COMMENT

COMITY, TIPPING POINTS, AND COMMERCIAL SIGNIFICANCE: WHAT TO EXPECT OF THE HAGUE JUDGMENTS CONVENTION

OLIVIA STITZ*

CONTENTS

* J.D. Class of 2021, Sandra Day O'Connor College of Law at Arizona State University. I would like to thank Professor Victoria Sahani for her thoughtful editing and feedback. All the opinions expressed in this Comment should only be attributed to the author.

I. INTRO

"Truly fortunate is the nation, which sets itself the goal of finding the means to improve."[1] -- Tobias Asser, founder of the Hague Conference on Private International Law.

The above words of Tobias Asser guide the recently passed Hague Judgments Convention. Asser started initiatives for a convention that would improve global judicial cooperation in light of growing cross-border trade and international commerce.[2] Recognition and enforcement of foreign judgments is regulated by national law, domestic law, and "principles of comity, reciprocity and res judicata."[3]

In the US, enforcement of foreign judgments depends on the state in which enforcement is sought.[4] On the other side, enforcement of US court judgments in another country encounter criticism regarding "excessive" monetary damages.[5] Hence, approximately 90% of international commercial contracts[6] rely on arbitration clauses under the New York Convention to ensure enforceability across jurisdictions.[7]

Since its passage in 1958, the New York Convention has risen to the challenge of international business and dispute needs. However, while arbitration was historically the cheaper, quicker, and more efficient alternative to litigation,[8] the tides have turned. Modern practices are causing arbitral amounts-in-dispute to rise.[9] Discovery processes and motion practices extend the proceedings to last longer.[10] Arbitration's traditional hallmarks, "speedy, simple, and inexpensive"[11] are a fairly tale of the past.

Currently, foreign court judgments run the risk of unenforceability when parties are seeking recognition beyond their jurisdiction unless states are party to a specific judgment enforcement treaty or the 2005 Hague Convention on Choice of Court Agreement ("Choice of Court Convention"). Even then, it is hard to know when and how a judicial ruling will be recognized in another jurisdiction. Today, the US is a signatory only to the Choice of Court Convention.[12]

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[1] HAGUE CONVENTION ON PRIVATE INT'L. LAW [hereinafter HCCH], *22nd Diplomatic Session of the HCCH: The Adoption of the 2019 HCCH Judgments Convention*, YOUTUBE (Sep. 9, 2019), https://youtu.be/1SgcrsD9Iao [hereinafter *22nd Diplomatic Session*].

[2] *Id.*

[3] Bureau of Consular Affairs, *Enforcement of Judgments*, U.S. DEPT. OF STATE, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Enforcement-of-Judges.html.

[4] SCOTT A EDELMAN ET AL., ENFORCEMENT OF FOREIGN JUDGMENTS: IN 28 JURISDICTIONS WORLDWIDE 131, 131 (Patrick Doris ed., 2006), https://www.gibsondunn.com/wp-content/uploads/documents/publications/Edelman-Jura-Enforcement-of-Foreign-Judgments-US.pdf.

[5] Bureau of Consular Affairs, *supra* note 3.

[6] S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973, 1976 (2016).

[7] Pamela K. Bookman, *The Arbitration-Litigation Paradox*, 72 VAND. L. REV. 1119, 1141-42 n.137 (2019).

[8] Strong, *supra* note 6, at 1983.

[9] *See generally* 1982-83.

[10] *See id.* at 1983.

[11] Bookman, *supra* note 7, at 1125.

[12] Bureau of Consular Affairs, *supra* note 3; *see generally* HCCH, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98; Bureau of Consular

To deal with a growing international commercial community, resulting in a rising number of international commercial disputes, the HCCH sought to tackle the challenges of modern commerce. On July 2, 2019, the HCCH's 22nd Diplomatic Session met in The Hague and passed the Hague Judgments Convention.[13] The Hague Judgments Convention would expand dispute resolution options available to businesses. The Hague Judgments Convention promises enforceability of judicial rulings across borders among signatory states, seeking a solution to the international litigation question: Will my judgment be enforced outside of the jurisdiction of the court that rendered the judgment?

The Hague Judgments Convention's underlying goal is uniformity and predictability in international judicial proceedings.[14] To encourage recognition of foreign judgments and achieve this goal of uniformity and predictability, judges are encouraged to interpret contracts with an "international spirit."[15] This ethos requires judges to rise to the challenge and incorporate all applicable regulations, rules, and laws potentially relevant to international proceedings.[16] By fostering uniformity, attorneys should be better at predicting enforceability of judgments, assisting clients in selecting the most appropriate dispute resolution option, as well as choosing the appropriate forum and governing law during negotiations.[17] In essence, the new Hague Judgments Convention should foster faster court proceedings and resolutions on the international stage.[18] Additionally, the Hague Judgments Convention should increase convenience, offering a one-stop-shop for determining the question of enforceability[19] rather than requiring thorough research and analysis of existing, and sometimes non-existing, independent treaties.

On its face, the Hague Judgments Convention appears promising. What can be wrong with the advancement of cross-border cooperation? However, the devil lies in the details. This article will take a look at what those details are, what it will take for the Hague Judgments Convention to reach commercial significance, and once reached, what factors will push businesses in one direction or another when selecting the most appropriate dispute resolution option.

Part II of this article will introduce the Hague Judgments Convention, relevant Articles for commercial transactions and enforcement, and the Hague Judgments Convention's history. To put the Hague Judgments Convention in perspective, the Hague Judgments Convention will be compared to the New York Convention and the recently passed Singapore Mediation Convention, both introduced in Part II.

Affairs, *International Treaties & Agreements*, U.S. DEPT. OF STATE, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/intl-treaties.html.

[13] HCCH, *It's done: the 2019 HCCH Judgments Convention has been adopted!*, https://www.hcch.net/en/news-archive/details/?varevent=687 (last visited Sep. 11, 2020) [hereinafter *It's done*].

[14] HCCH, *Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, art. 20 (concluded July 2, 2019) https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf [hereinafter *Recognition and Enforcement*].

[15] HCCH, *Twenty-Second Session, Recognition and Enforcement of Foreign Judgments*, 86, art. 21 ¶ 3939, July 2, 2019 https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf [hereinafter *Twenty-Second Session*].

[16] *Id.*

[17] HCCH, *Recognition and Enforcement*, *supra* note 14.

[18] HCCH, *22nd Diplomatic Session*, *supra* note 1.

[19] *Id.*

Part III analyzes various factors that must be met in order for the Hague Judgments Convention to take on a significant role. Divided into three subsections, the first section considers factors influencing states when deciding to sign onto the Hague Judgments Convention and analyzes what hurdles states must overcome before wanting to join, including political concerns and biases. Part III will also consider the realities of commercial significance in light of signatories. The second section will analyze practical considerations such as the freedom to contract and costs associated with dispute resolution. The third and final section of Part III will assume commercial significance, analyzing the balancing process parties undertake when considering litigation over arbitration as a new dispute resolution option.

Part IV will conclude, demonstrating that the hurdles placed before state governments, contracting parties, and enforcing courts make court proceedings on the international stage less desirable than arbitration to date. Although a noble cause and a worthy objective to strive for in the future, as the world stands today, arbitration will carry the day.

II. BACKGROUND

When negotiating contracts, parties have significant flexibility in choosing the type of dispute resolution, forum, governing law, and other important factors necessary for a successful agreement. International contracts generally turn to the UNIDROIT Principles of International Commercial Contracts for basic principles that will easily translate to enforceability on the international stage.[20] As international trade has progressed, substantive law has evolved into a harmonious body of legal principles.[21] However, contracts are generally up to the parties and are thoroughly negotiated by highly sophisticated parties.[22] Hence, parties will choose their preferred dispute resolution option based on enforceability, confidentiality, efficiency, and much more. Unlike litigation or arbitration, mediation serves as a popular proceeding in resolving disputes early on. Because participation is voluntary and decisions are non-binding, proceedings tend to preserve the parties' relationships,[23] encouraging continued trading practices. With that in mind, the legal industry on a global scale is trying to facilitate interstate relations, foster commerce, and find forms of dispute resolutions that will satisfy everyone involved. Two of the more popular adjudicative dispute resolution options are litigation and arbitration. Currently, arbitration wins on the international playing field, because court rulings generally lack enforcement in foreign jurisdictions. Hence, the leaders of global commerce have tried to find ways to resolve this discrepancy with the Hague Judgments Convention.

Because arbitration comes in two flavors—ad hoc and institutional proceedings—it is worth noting that this article spends little time on ad hoc proceedings, as there is insufficient data available; however, its absence has no effect on the underlying analysis and conclusion.

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[20] Klaus P. Berger, *UNIDROIT Principles of International Commercial Contracts, An Article-by-Article Commentary*, 34 ARB. INT'L 469–71 (2018).
[21] Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 30 (2008).
[22] Bookman, *supra* note 7, at 1128.
[23] G.A. Res. 73/198, at 3 (Dec. 20, 2018) [hereinafter Singapore Convention].

A. Basics

Parties carefully negotiate commercial contracts. Hence, every contract will vary from other contracts, even though negotiations start off with each party referencing their basic content checklist - similar to form contracts. International contracts are inherently customized documents, capable of adapting to the participating parties, current economic settings, and relevant legal standards.

When businesses are negotiating regarding which form of dispute resolution to select, they are dealing with three options: arbitration, litigation, and mediation.[24] As this article will demonstrate, each option comes with its own advantages and disadvantages. The first option, arbitration, offers privacy and confidentiality but outcomes are case-specific and results are not reasonably predictable.[25] The second option, litigation, offers predictability and reliability, but is inherently public. The third option, mediation, offers privacy and confidentiality as well, but is an agreement as opposed to a third-party decision. Usually mediation is selected in addition to one of the other two options. Rarely will a contract select both arbitration and litigation. When negotiating the dispute resolution clause, businesses and their attorneys alike are well advised to consider the options available to them thoroughly analyzing advantages and disadvantages before setting their selection in stone.

Arbitration is much more flexible for the individual parties. Procedurally, litigation offers more regulated and generalized guidelines, whereas arbitration and arbitral institutions allow for personalized and tailored rules.[26] For example, parties to arbitration will purposely search for a neutral forum to hold their proceedings, whereas forum shopping in courts is frowned upon. Although judges will generally follow the parties' agreement and even apply the contract's governing law, judges are bound by procedural rules and public policy considerations. Furthermore, in arbitration the parties may designate a specific arbitrator responsible for the proceedings. Because arbitrators have no educational or skill requirements other than what the parties agree upon, considerations for selecting the appropriate arbitrator may include the arbitrator's knowledge in the industry, the chosen governing law, or a common language between the parties. In contrast, court proceedings will not allow parties to shop for judges.

Additionally, the right to appeal in arbitration is limited; in contrast, it is a constitutional right in judicial proceedings. Finality of arbitral awards is achieved upon receiving the award. Even if parties agree to judicial appeals, the arbitral award cannot be challenged on its merits. Parties can only appeal awards based on procedural flaws. If an arbitral appeal is successful, courts may either uphold the award or invalidate it. Nothing more. Finality in courts is only achieved upon exhausting all options of appeal, a long and arduous process.

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[24] Bookman, *supra* note 7, at 1125.
[25] Dammann & Hansmann, *supra* note 21, at 37; Strong, *supra* note 6, at 1982; Stephen L. Brodsky, *Cross-Border Arbitration: A Beneficial Alternative to Resolving International Commercial Disputes*, AMERICAN BAR ASS'N., (July 3, 2019), https://www.americanbar.org/groups/litigation/committees/commercial-business/articles/2019/spring2019-cross-border-arbitration-international-commercial-disputes/.
[26] Carolyn B. Lamm, Eckhard R. Hellback, & Nikolaos Tsolakidis, *Int'l Arbitration in a Globalized World*, 20 DISP. RESOL. MAG. 4, 5 (2013-14).

The standard of discoverable information differs as well. While parties in arbitration only need to produce information they will use for their case, courts require all information that could be relevant to the proceedings. However, should parties play hard ball in courts, hitting the breaks on providing relevant information, courts have the full power of a government entity to subpoena documents, witnesses, and third parties.[27] While arbitrators can subpoena participating parties, witnesses, and documents,[28] the power is limited,[29] and arbitrators rely on courts to assist with enforcing the subpoena.[30] To circumvent this inconvenience, arbitrators will often imply adverse inference against the non-producing party, penalizing hold-outs.

Another difference between litigation and arbitration is the judge's or arbitrator's duty to follow substantive law. While the arbitrator may or may not follow the selected governing law of the contract, deciding in equity if the parties agree to give the arbitrators that power, judges lack such freedoms.

Finally, and most significantly, litigation and arbitration differ in enforceability as previously mentioned. The 2019 Hague Judgments Convention seeks to overcome this barrier.

B. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

i. Intro

The first project considering a "global approach to jurisdiction and judgments recognition" was introduced by the United States in 1992.[31] In 2005, this idea resulted in the Choice of Court Agreement.[32] The Choice of Court Agreement allows contracts with an "exclusive choice of court" to receive enforcement of their agreement across fellow member states.[33] Judgments must be made on the merits,[34] and the agreement must designate at least one specific court to rule on the contractual disputes "to the exclusion of the jurisdiction of any other courts."[35] If the contract does not address the matter, as is frequently the case, the Choice of Court Agreement does not apply. The Choice of Court Agreement's progeny, the Hague Judgments Convention, shares the common goal of cooperation and uniformity across international borders.[36]

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[27] *See* 28 U.S.C. § 1782 (assuming proper jurisdiction).
[28] *See* 9 U.S.C. § 7.
[29]*See, e.g.*, CVS Health Corp. v. Vividus, LLC, 878 F.3d 703 (9th Cir. 2017).
[30] *See* 28 U.S.C. § 1782.
[31]Ronald A. Brand, *The Circulation of Judgments under the Draft Hague Judgments Convention* 4 (Legal Studies Research Paper Series, Pittsburgh Law, Working Paper No. 2019-02, 2019); *see generally* HCCH, *Twenty-Second Session*, *supra* note 15, at 4.
[32] HCCH, *Twenty-Second Session*, *supra* note 15, at 4.
[33] HCCH, *Convention on Choice of Court Agreements*, art. 8(1), 44 I.L.M. 1294 (concluded June 30, 2005). [hereinafter *Choice of Court Agreements*]
[34] *Id.* at art. 4(1).
[35] *Id.* at art. 3(a).
[36] *See generally* HCCH, *Choice of Court Agreements*, *supra* note 33. Current economically significant signatory states to the Choice of Court Agreement include the United States (2009), United Kingdom (2018), Singapore (2015), Germany (2015), France (2015), China (2017), and the European Union (2009). European member states dominate the agreement. HCCH, *22nd Diplomatic Session*, *supra* note 1; HCCH, *Recognition and Enforcement*, *supra* note 14, at art. 20.

In 2011, members of the HCCH decided to continue down the path of jurisdictional uniformity, creating a Working Group that would submit the "proposed draft Text for a Convention on the recognition and enforcement of judgments in civil and commercial matters" in 2015.[37] Currently, over 85 states are members of the HCCH.[38] Members include, *inter alia*, the United States, various European states, the European Union, and several states from the Americas, Middle East, and Asia.[39] When the members of the HCCH met for the 22nd Diplomatic Session, over 400 delegates attended the meeting in The Hague.[40] After numerous revisions, the Working Group's draft was ultimately passed at the 22nd Diplomatic Session in July 2019.[41] While the broad goal of uniformity remains a hallmark of the document, the Hague Judgments Convention also intends to improve practical effectiveness of court judgments, avoid duplicative proceedings, and reduce costs and lengths of proceedings while at the same time increasing predictability.[42]

ii. The Hague Judgments Convention

There are two ways in which states can become signatories to the Hague Judgments Convention: Signature or accession.[43] Once joined, the Hague Judgments Convention could apply to the member's territorial units as well.[44] Jurisdictions with multiple territorial units will have to turn to Articles 23 and 26 to help interpret and apply the Hague Judgments Convention to each unit.[45] Although the United States spearheaded the idea of a uniform method for judicial recognition across borders in the 1990's, it has yet to sign on to the Hague Judgments Convention. As of publication of this article, only two states have signed the document.[46]

There are numerous sources available for parties to turn to when seeking help with the articles' interpretation.[47] The Hague Judgments Convention is intended to complement existing conventions and overrides neither the Choice of Court Convention nor the New York

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[37] HCCH, *Twenty-Second Session*, *supra* note 15, at 4–5; *see also* HCCH, *Recognition and Enforcement*, *supra* note 14.

[38] Hague Conference on Private Int'l Law, *HCCH Members*, HCCH, https://www.hcch.net/en/states/hcch-members (last visited Sep. 11, 2020) (membership count based on Nov. 12, 2019 data).

[39] *Id.*

[40] HCCH, *22nd Diplomatic Session*, *supra* note 1.

[41] HCCH, *Twenty-Second Session*, *supra* note 15, at 1; *see also* HCCH, *It's done*, *supra* note 13.

[42] HCCH, *Twenty-Second Session*, *supra* note 15, at para. 8-12; *see also* HCCH, *Recognition and Enforcement*, *supra* note 14.

[43] HCCH, *Twenty-Second Session*, *supra* note 15 at para. 431.

[44] For example, the Convention would equally bind all U.S. judicial systems, federal and state. *Id.* at para. 434-37.

[45] HCCH, *Twenty-Second Session*, *supra* note 15 at para. 434-35 (HCCH, 2019); *see also* HCCH, *Recognition and Enforcement*, *supra* note 14 art. 23, 26.

[46] As of August 2020, only two states have ratified the document. HCCH, *Status Table: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=137 (last visited Sep. 11, 2020).

[47] *See generally* HCCH, *Twenty-Second Session*, *supra* note 15, at para. 14-15, 143-44; HCCH, "CIVIL OR COMMERCIAL MATTERS" / "ACTA IURE IMPERII," INFORMATION DOCUMENT NO 4 OF JUNE 2016 FOR THE ATTENTION OF THE SPECIAL COMMISSION OF JUNE 2016 ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 2 (2016); HCCH, *Glossary of Commonly Used Terms and References: Document for the attention of the Special Commission of June 2016 on the Recognition and Enforcement of Foreign Judgments*, 3-4 (2016) [hereinafter, *Glossary of Commonly Used Terms and References*]; HCCH, SUPPORTING DOCUMENTS FOR INFORMATION DOCUMENT NO 4: DOCUMENTS FOR THE ATTENTION OF THE SPECIAL COMMISSION OF JUNE 2016 ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 3-4 (2016).

Convention.[48] Commercial contract disputes regarding place of performance are specifically governed by Article 5(1)(g).[49]

When seeking enforcement of a judgment, the multifaceted aspects of jurisdiction present a mine field to parties. Firstly, place of performance will be key to recognition of the court of origin's judgment when seeking enforcement in the addressed court.[50] Place of performance is determined based on the parties' agreement or the contract's governing substantive law.[51] Where the agreement is silent on place of performance or the selected place of performance is invalid the "law of the requested State", the enforcing state's law,[52] will determine applicable law.[53] Secondly, jurisdiction can vary depending on who is filing the claim and what court is being addressed.[54]

Once jurisdiction is established, additional hurdles to enforcement must be overcome. Parties must anticipate judicial use of the Hague Judgments Convention's escape clauses, including public policy and specific "relations", which means a specific exception.[55] Both options create broad excuses for non-enforcement. Firstly, judges are ultimately granted broad discretion under public policy considerations, which include questions of sovereignty and security.[56] Although the Hague Judgments Convention expects judges to "interpret strictly," requiring non-enforcement to "constitute a manifest breach of a rule of law regarded as essential in the legal order of the [s]tate in which enforcement is sought," no specific guidelines are provided.[57] Because the Hague Judgments Convention offers little other guidance on these points, case law and jurisdictional practice will have to be established for parties to know how courts will approach the matter. Fortunately, although the court might refuse enforcement, refusal does not void the court of origin's ruling.[58] Secondly, specific relations on the state level can lead to unexpected recognitions because recognition of judgments may be excused for specific signatory states where the enforcing state decided to rely on reservations in compliance with international laws.[59]

Overall, even once jurisdiction can be established, the Convention allows broad discretion for enforcement, and parties are well-advised to thoroughly research public policies and state relations before committing to a court of origin or court of enforcement.

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[48] HCCH, *Twenty-Second Session*, *supra* note 15, at para. 66, 414, 420.
[49] *Id.* at para. 129.
[50] *Id.* at para. 189-90.
[51] *Id.* at para. 191-92.
[52] HCCH, *Glossary of Commonly Used Terms and References*, *supra* note 47, at 3-4.
[53] HCCH, *Twenty-Second Session*, *supra* note 15, at para. 193, 195 (additional examples available at para. 194).
[54] *Id.* For example, if the vendor files a claim for payment, jurisdiction is where the payment is due. But if the buyer files for delayed delivery, jurisdiction is proper at the place of delivery. *Id.* at para. 190.
[55] HCCH, *Recognition and Enforcement*, *supra* note 15, at art. 7, 17-19, 29(3).
[56] *See* HCCH, *Twenty-Second Session*, *supra* note 15, at para. 275, 294.
[57] *Id.* at para. 289. "Manifestly" includes violations of procedural requirements set under a state's Constitution but does not include violations of underlying substantive laws. *See generally Id.* at para. 290-93.
[58] HCCH, *Recognition and Enforcement*, *supra* note 14, at art. 7.
[59] *See* HCCH, *Twenty-Second Session*, *supra* note 16, at para. 447.

C. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

To encourage cross-border trading, sophisticated and influential movers of the world collaborated to pass the New York Convention on arbitration in June 1958.[60] The New York Convention propelled international dispute resolution into the current century, advancing international trade to a whole new level.[61] Due to the New York Convention's success and its reputation established over several years, arbitration awards are being recognized across several states, resulting in widespread enforcement of awards. The New York Convention's success is also partly due to parties' willingness to comply with arbitral findings.[62]

The New York Convention applies to "recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought."[63] Recognition extends to awards rendered by arbitrators and arbitral bodies as long as the original agreement to arbitrate amongst the parties was in writing.[64] States shall generally enforce awards made in compliance with the New York Convention,[65] but may refuse enforcement for one of six reasons: i) incapacity of a party, ii) insufficient notice, iii) awards reaching beyond the agreement, iv) the arbitrator or proceeding violating the agreement or governing law, v) the matter was not arbitrable, or vi) enforcement would violate public policy.[66]

The day the New York Convention was passed predicted the document's success. Ten members signed on-site, including Belgium, Costa Rica, El Salvador, Germany, India, Israel, Jordan, the Netherlands, the Philippines, and Poland.[67] After years of trying to convince the US government that independent treaties were no longer sufficient for international arbitration, the ABA finally won.[68] The US signed the New York Convention in 1970, preceded by, *inter alia*, Russia, and Japan.[69] The UK soon followed suit, signing on September 24, 1975.[70] Only at this point did the New York Convention truly take off. The signatories of the early 1970s propelled the New York Convention's significance into what it is today, garnering momentum for international

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[60] See N.Y. ARB. CONVENTION, *Contracting States*, http://www.newyorkconvention.org/countries (last visited Sep. 11, 2020) for a list of states participating in the Convention and their dates of signature, ratification, accession, or succession.

[61] *60 Years of the New York Convention: A Triumph of Trans-National Legal Co-Operation, or a Product of its Time and in Need of Revision?*, HERBERT SMITH FREEHILLS (July 27, 2018), https://www.herbertsmithfreehills.com/latest-thinking/60-years-of-the-new-york-convention-a-triumph-of-trans-national-legal-co-operation.

[62] *See, e.g.*, PRICEWATERHOUSECOOPERS LLP & LOUKAS MISTELLS, QUEEN MARY UNIV. OF LONDON, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES (2008), 2, 4 https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf.

[63] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38 art. I(1), 3.

[64] *Id.* at arts. I(2), II(1)-(2).

[65] *Id.* at art. III.

[66] *Id.* at art. V. (the six options are summaries of the articles' enforcement exceptions and do not reflect the explicit options available).

[67] N.Y. ARB. CONVENTION, *supra* note 60.

[68] Bookman, *supra* note 7, at 1136; HERBERT SMITH FREEHILLS, *supra* note 61.

[69] N.Y. ARB. CONVENTION, *supra* note 60 (showing China signed in 1987, Russia in 1958, and Japan in 1961).

[70] *Id.*

arbitration's popularity.[71] As of the beginning of 2020, over 160 nations had signed on to the New York Convention.[72]

Arbitration proceedings continue to increase to date. For example, the International Chamber of Commerce ("ICC") recorded a staggering 77% increase of arbitration cases between 1992 and 2007.[73] The New York Convention's momentum from the 1970s has carried over into the 21st century.

D. United Nations Convention on International Settlement Agreements Resulting from Mediation

As one of the newest conventions on the international dispute market, the Singapore Convention fills the gap where existing conventions do not incorporate various alternative dispute resolution options and disregard "consistent standards on the cross-border enforcement" of mediation settlements.[74] By passing the Singapore Convention in August 2019, the need for cross-border recognition of mediations was met.[75] By the end of 2019, over 50 states had already signed on, including China, the United States, Saudi Arabia, and Singapore.[76]

Generally, mediation attempts to amicably resolve disputes with a third-party neutral.[77] A mediator seeks to find common ground between the parties, guiding them along a path of consensus to finding a solution. The Singapore Convention only applies to mediation, and cannot be used to enforce court rulings or arbitral awards.[78] Recognition requires proceedings to result in a written settlement agreement.[79] The Singapore Convention is only applicable in diversity cases of international commercial disputes.[80] Diversity under the Singapore Convention can have two meanings: i) Either minimal party diversity - at least two parties have their place of business in another state;[81] or ii) performance under the settlement agreement is in another state or the underlying issue is closely connected to another state.[82] The Singapore Convention's diversity requirements parallel those of US court diversity jurisdiction requirements. While reciprocal enforcement is expected amongst fellow signatory states, enforcement can be refused for similar reasons as listed under the New York Convention.[83]

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[71] *See* Yves Derains, *New Trends in the Practical Application of ICC Rules of Arbitration*, 3 NW. J. INT'L L. & BUS. 39, 39 (1981).
[72] N.Y. ARB. CONVENTION, *supra* note 60 (showing the most recently joined state being the Maldives in September 2019).
[73] Lucy Greenwood, *The Rise, Fall and Rise of International Arbitration: A View from 2030*, 77 ARB. 435, 436 (2011).
[74] Singapore Convention, *supra* note 23, at 2.
[75] *Id.* at 1.
[76] UniteasjDSD sssUUnited Nation Treaty Collection, United Nation Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en.
[77] Singapore Convention, *supra* note 23, at 4.
[78] *Id.* at art. 1.
[79] *Id.* at art. 1, art. 2(2), art. 4(1)(b).
[80] *Id.* at art. 1.
[81] *Id.* at art. 1(a).
[82] *Id.* at art. 1(b).
[83] *Compare* Singapore Convention, *supra* note 23, at art. 5, *with* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 63, art. 5.

While the Singapore Convention fills an important gap in the international dispute resolution arena, it will take a smaller role in this article. Contracts typically consider mediation as the first line-of-defense. While parties might seek to resolve disputes using mediation and arbitration or litigation, parties will rarely choose arbitration *and* litigation as a dispute resolution option. Hence, mediation's interplay with either is complementary. Its significance should not be impacted by the new Hague Judgments Convention.

III. ANALYSIS

A. Tipping Points - A Question of Commercial Significance

i. Intro

Before US businesses and attorneys can begin transitioning dispute resolution terms from arbitration to judicial proceedings, the Hague Judgments Convention needs member states. While attorneys and professionals are eager to jump on the international Hague Judgments Convention train,[84] predicting sunny prospects for international trade agreements is premature,[85] especially considering that as of publication of this article, only the Ukraine and Uruguay had signed.[86]

Bearing in mind how many delegates attended the 22nd Diplomatic session in July[87] and the profession's enthusiasm, it seems enticing and plausible to conclude that quick and numerous accession by various states is to be expected.[88] Additionally, the business and legal benefits of having a judicial resolution option seem desirable.[89] Realistically, however, accession and acceptance will face numerous hurdles, some higher than others.

ii. Political Concerns and Biases

While this article focuses on the Hague Judgments Convention's effects on international commercial contracts, states are nonetheless making a political decision.[90] Hence, political decisions still impact international commercial relations.[91] One consideration is the question of

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[84] *E.g.*, David P. Stewart, *Current Developments, The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, 113 AM. J. OF INT'L L. 772, 782 (2019); Michiel Coenraads & Jorian Hamster, A Gamechanger in International Dispute Resolution: The 2019 Convention on Enforcement of Foreign Judgments, DLA PIPER (July 8, 2019), https://www.dlapiper.com/en/uk/insights/publications/2019/07/the-hague-enforcement-convention/; Robert Price & Isuru Deveendra, *A New Global Regime for Cross-Border Enforcement of Civil and Commercial Judgments*, LATHAM & WATKINS: LATHAM.LONDON (Aug. 21, 2019), https://www.latham.london/2019/08/a-new-global-regime-for-cross-border-enforcement-of-civil-and-commercial-judgments/.

[85] Stewart, *supra* note 84; HCCH, *Status Table: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, *supra* note 46.

[86] HCCH, *Status Table: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, *supra* note 46.

[87] HCCH, *It's done*, *supra* note 13.

[88] Stewart, *supra* note 84.

[89] *Id.* at 782.

[90] Dammann & Hansmann, *supra* note 21, at 24.

[91] *See* E. Norman Veasey, The Conundrum of the Arbitration vs. Litigation Decision, AMERICAN BAR ASS'N (Sept. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2015/12/07_veasey/.

sovereignty and concerns for recognizing another government's actions. The answer is invariably tied to states' political administration and philosophies.[92] Currently, scholars recognize that, across the board, the U.S. is not quite ready to jump on the bandwagon of general recognition.[93] Furthermore, this is reflected in the United States' foreign policy and the fact that U.S. treaty ratification is generally slow and cumbersome.[94] For example, because every country's governmental values differ, U.S. constitutional questions will heavily influence the decision of signing the Hague Judgments Convention one way or another.[95] Because enforcement would apply to all judicial holdings of member states, signing on to the Hague Judgments Convention removes a state's ability to choose whose rulings to recognize. Only if states "notify the depository" that they will not accept judgments of a new signatory state can enforcement be excused under the new Hague Judgments Convention.[96]

Another indication of states' hesitancy to recognize cross-border court rulings is the Choice of Court Convention; the Convention has abysmal popularity thus far. Although passed in 2005 with great enthusiasm, as of 2019, only 36 states have signed on to the Choice of Court Convention.[97] In contrast, the New York Convention reached 36 states only four years after being passed in 1958.[98] Even then, it still took several years and major players before international arbitration took off. As of today, the Choice of Court Convention is an example that indicates continued governmental concerns and reluctance. Although recently significant players signed on to the Choice of Court Convention, the effects are yet to be seen.

A second consideration of how states approach the matter is one of political pride and a concern for the message parties send when choosing courts other than their own.[99] Pride has gotten in the way of lesser things than global cooperation. Arbitration, on the other hand, has little to no political nuances because the proceedings are fully removed from any governmental decision-maker.[100] However, as elaborated further below, a pattern emerges even in arbitration, and popular

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[92] *See* Jean Galbraith, *Contemporary Practice of the United States Relating to International Law*, 113 AM. J. of INT'L L. 131 (2019).
[93] Stewart, *supra* note 84, at 782.
[94] *Id.*
[95] *See China, People's Republic of - Government*, FOREIGN LAW GUIDE (Marci Hoffman ed.) (discussing China, France, and UK), http://dx.doi.org.ezproxy1.lib.asu.edu/10.1163/2213-2996_flg_COM_323948 (last visited Nov. 16, 2019); *France - Legal System*, FOREIGN LAW GUIDE (Marci Hoffman ed.), http://dx.doi.org.ezproxy1.lib.asu.edu/10.1163/2213-2996_flg_COM_323135 (last visited Nov. 16, 2019); *Iran - Legislation and the Judicial System*, FOREIGN LAW GUIDE (Marci Hoffman ed.), http://dx.doi.org.ezproxy1.lib.asu.edu/10.1163/2213-2996_flg_COM_099302 (last visited Nov. 16, 2019); *Queen and Church of England*, ROYAL INSIGHT, https://web.archive.org/web/20080307003413/http://www.royalinsight.gov.uk/output/Page4708.asp (last visited Nov. 16, 2019); *United Kingdom of Great Britain and Northern Ireland - Legal System*, FOREIGN LAW GUIDE (Marci Hoffman ed.), http://dx.doi.org.ezproxy1.lib.asu.edu/10.1163/2213-2996_flg_COM_323001 (last visited Nov. 16, 2019).
[96] HCCH, *It's done*, *supra* note 13; HCCH; *see also Recognition and Enforcement*, *supra* note 14, art. 29(3); *see, e.g.*, HCCH, *Twenty-Second Session*, *supra* note 15, at para. 447.
[97] HCCH, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, supra note 12.
[98] N.Y. ARB. CONVENTION, *supra* note 60.
[99] Dammann & Hansmann, *supra* note 21, at 24.
[100] This will not apply if at least one of the contracting parties is a state or governmental entity.

fora and governing laws are discernable. Is arbitration already sending a message to the international community about which seats of arbitration are better than others?[101]

A third consideration requires a review of how states weigh and value contractual relationships. While the US gives great deference to contractual agreements, other countries do not. US parties will be hard-pressed to give up contractual freedoms generously granted by US courts.[102] With this freedom in mind, it is more than reasonable that businesses and the legal profession will want to participate in the US' decision of signing on to the Hague Judgments Convention. Ultimately, whichever lobbying group influences the decision most will be a driving factor in how the Hague Judgments Convention is not only implemented but used and applied.

A fourth consideration includes cultural considerations at large. Due to "pioneering scientists, programmers and engineers," the Internet offers a phenomenal platform for information exchange.[103] With modern technology, our cultural differences seem to disappear as they slowly melt into one multicultural pot. However, it takes generations to overcome some cultural traditions. We must ask ourselves every day whether societies are ready to put aside their differences. The populist rage against globalism is fiercely trying to move away from the melting pot. These popular movements are everchanging. While during the post-war period states were encouraged to work together (another reason why the New York Convention garnered strong support and popularity in the 1970's), before (during the 1920's) and again today, strong hostility towards international cooperation is discouraging even international arbitration. Depending on the state's government and populist stance, citizens and domestic politics drive the decision to sign on to the Hague Judgments Convention. Hence, current views on globalism are another driving factor impacting state's decisions on whether or not to sign on to the Hague Judgments Convention.

Internally, with its dual system of government, the US faces a fifth hurdle of enforceability.[104] The Hague Judgments Convention's goal of uniformity, must apply on both federal and state level.[105] However, US contract law is state law[106] and lacks uniformity even within the US borders.[107] Although Delaware is US business law's central hub, other US states are not bound to copy its rules. Additionally, international arbitral contracts using US law appear to prefer New York law instead.[108] Political concerns, biases, and pride are high hurdles that must be overcome. They are also hurdles that are less prevalent in arbitration, only holding back international litigation.

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[101] *See infra* Part III Section B2.
[102] *See* Dammann & Hansmann, *supra* note 21, at 24.
[103] Evan Andrews, *Who Invented the Internet*, HISTORY (Dec. 18, 2013), https://www.history.com/news/who-invented-the-internet.
[104] Stewart, *supra* note 84, at 782.
[105] *See* HCCH, *Recognition and Enforcement*, *supra* note 14, at art. 20, art. 22(3).
[106] *See* Stewart, *supra* note 84, at 782.
[107] *Id*.
[108] Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455, 510 (2014).

iii. Current Alternatives

Aside from the Hague Judgments Convention, there are two possible alternatives to the political question. The first alternative is comity; the second alternative is treaties. However, the first alternative, comity, faces two significant barriers. The first barrier is that reciprocity is currently unsuccessful because of foreign perceptions of US monetary damages.[109] Additional bad news is that the Supreme Court recognized in *Hilton v. Guyot* that "the decisions of this court have clearly recognized that judgments of a foreign state are prima facie evidence only."[110] While the progenies of *Hilton* have indicated a willingness to recognize other judgments under a comity argument,[111] foreign courts' distaste for exorbitant US damages awards has halted any significant development of precedent on this theory. Although US courts are willing to consider foreign court judgments and enforceability of those judgments,[112] this does not resolve foreign states' unwillingness to honor US judgments.[113] The second barrier is that reciprocity is unreliable because it lacks predictability and receives a case-by-case review. Yet predictability is a significant factor considered when choosing the appropriate dispute resolution form.

The second alternative would be bilateral or multilateral treaties. Although states to the Hague Judgments Convention can implement reservations of enforcement under Article 29, the need to monitor signatories only to implement such an exception seems cumbersome. Relying on bilateral or multilateral treaties instead sounds more efficient. However, currently there are only few such treaties in place. Lack of treaties further demonstrates the political struggle that states are experiencing on this matter. The young associate, tasked with finding the Holy Grail of a judgment recognition treaty, will, despite diligent efforts, be hard pressed to find a treaty in the first place.[114] While there are several concerns governments must overcome before signing the Hague Judgments Convention, the alternatives seem equally unsatisfying.

iv. Brexit

There is clearly some hesitancy amongst the states when starting to recognize each other's court rulings. Perhaps the primary question that should be asked is whether foreign court judgment recognition could ever work at all? Fortunately, the answer to this question is: Yes. As a trailblazer in inter-state cooperation, the European Union's practices shed light on the remote possibility of cross-border court recognitions and potential success.[115] Although initially intended for economic progression, the EU quickly realized it had to assimilate some of the individual states' governmental functions, or at least find a way to encourage and effectively facilitate trade. That

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[109] Bureau of Consular Affairs, *supra* note 3.
[110] Hilton v. Guyot, 159 U.S. 113, 182 (1895).
[111] *See* Christina Weston, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'l L. Rev. 731 (2011).
[112] *Id.*
[113] Bureau of Consular Affairs, *supra* note 3.
[114] *See* Bureau of Consular Affairs, *International Treaties & Agreements*, *supra* note 12.
[115] *Enforcement of Judgments*, E-JUSTICE EUROPA, https://e-justice.europa.eu/content_enforcement_of_judgments-51-en.do (last visited Sep. 11 2020).

meant finding a way to deal with international commercial contracts, judgments, and judgment enforcement. The solution: the Brussels I Regulation.[116]

The regulation requires EU members to recognize foreign court monetary and specific performance judgments, with the caveat that procedural requirements must be met.[117] Enforcement itself follows national rules of the enforcing state.[118] Hence, the answer to the question whether enforcement of foreign court judgments is possible can be answered in the affirmative. But is it probable on a bigger scale?

Looking to current events, the UK threw a huge curve ball into the EU after passing Brexit.[119] As a consequence of the anticipated severance, the UK must determine how to maintain judicial relevance in the EU market.[120] The Brussels I Regulation only applies to EU members, which, post Brexit, the UK no longer is. Additionally, by exiting the Union, the UK is no longer part of the Rome I and II Conventions.[121] Hence, a new solution must be found. Unfortunately, common ground has not been found - yet. The EU is recommending the European Court of Justice as a common venue with common rules.[122] The UK disagrees.[123] Despite the UK's lack of alternatives, the UK brings up a worthy argument when noting that "there is no point in countries lining up their rules if they cannot agree on what those rules mean."[124] Regardless of how good the UK's counterarguments are to the EU's solutions, it does not look as though the UK has come up with any other feasible solutions other than successfully boasting about their willingness to entertain various suggestions.[125] To add insult to injury, and despite the UK's express aversion for the European Court of Justice,[126] the EU has graciously offered to let that very same court rule on the matter if no common ground can be found.[127] As of 2020, ideas continue to diverge, and in the draft withdrawal agreement Articles 162 - 165 remain opaque.[128] The future of these two "'closest friend[s] and neighbour[s]'" appears grim.[129]

Although the EU is, and remains, an incredible feat of multi-cultural and ethical cooperation, in the big scheme of the universe, European countries are very similar. They share a common ancestry and even have reasonably similar cultural values and religion. One could go so

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[116] 2012 O.J. (L 351) 1, para. 3.
[117] *Id.*
[118] *Id.*
[119] Curtis, *The Brexit Agreement—what it means for enforcing judgments across the European Union*, (Jan.16, 2019), https://d20qsj1r5k97qe.cloudfront.net/news-attachments/Brexit-Enforcement-of-Judicial-Decisions-pdf.pdf?mtime=20191009160112.
[120] The question of recognition and enforcement only pertains to relations between the UK and the EU but does not extend to relations between the UK and non-EU members. *Id.* at 1.
[121] These instruments set rules on "deciding which law applies in both contractual and non-contractual disputes where there is no written agreement specifying the governing law." *Id.* at 1–2.
[122] Raphael Hogarth, *Dispute Resolution After Brexit*, INST. FOR GOV'T 2 (2017), https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_dispute_resolution_WEB.pdf.
[123] *Id.*
[124] *Id.* Fortunately, lining up each other's rules is not what the Hague Judgments Convention proposes.
[125] *Id.* at 5.
[126] *See Id.* at 22.
[127] Charlie Cooper & David M. Herszenhorn, *The Other Dispute Holding up Brexit Talks*, POLITICO (May 12, 2018), https://www.politico.eu/article/brexit-governance-withdrawal-treaty-dispute-negotiations/.
[128] *Id.*
[129] Hogarth, *supra* note 122, at 6.

far as to venture that even Americans share this common ideology. But if the European Union, its continuing members, and the UK cannot find common ground what hope is there for the global community? International commercial contracts do not merely exist among similar cultures. The international community is forced to deal with much greater disparities, having to overcome cultural differences between Western and Asian cultures, Middle Eastern and African parties, as well as South American nations. The multi-faceted parties partaking on the global scale is remarkable, and perhaps exactly what appears intimidating to governments. Additionally, Brexit addresses a more substantive question applicable to international proceedings. English Law, and the UK as a territory, have been popular options in arbitration agreements. "Hurricane Brexit"[130] will have some effect on how parties view their dispute resolution options with enforcement as a fundamental goal.

Ultimately, how Brexit will solve this predicament can be exceptionally insightful into the effects on the Hague Judgments Convention by illuminating hurdles faced and introducing alternatives not yet considered. However, at least today, the question as to whether recognition and enforcement of foreign court judgments is probable is answered in the negative. Many kinks must be ironed out on the individual state level, something the Hague Judgments Convention and 22nd Diplomatic Session could not possibly have done or prepared for on their own. The old saying "only time will tell" must carry the day.

v. Quantity and Quality of Signatories

Governments overcoming political concerns and biases will not alone create commercial significance. Commentators agree that a "significant number" of signatories is necessary.[131] However, what is this number? The author of this article postulates that commercial significance requires either a lot of "fish" (quantity) or specific big "fish" (quality) in the Hague Judgments Convention "sea." Both the New York Convention and Choice of Court Convention can offer insight and shed light on this theory.

Turning to quantity first: by the end of the 1970's, when the New York Convention's impact was truly noticeable for the first time, 61 states had signed onto the New York Convention.[132] Translated into the Hague Judgments Convention: Over 50 states would have to be convinced that recognizing each other's court rulings is a great idea. These numbers do not bode well considering that, for a similar time frame, a period of fourteen years, the Choice of Court Convention had only achieved about half of those numbers.[133] Putting the Choice of Court Convention's quantities into perspective: It only took the New York Convention four years to achieve the same amount of approval the Choice of Court Convention holds today.[134]

Turning to quality: Both the US and the UK joined the New York Convention in the 1970's - the beginning of arbitration's modern significance. Considering the UK's arbitral popularity for seat and governing law today, the UK plays an important role in determining an arbitration

[130] Term invented by the author.
[131] HCCH, *22nd Diplomatic Session*, *supra* note 1.
[132] N.Y. ARB. CONVENTION, *supra* note 60.
[133] HCCH, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, *supra* note 12.
[134] *See* N.Y. ARB. CONVENTION, *supra* note 60.

convention's popularity.[135] However, it took the UK over ten years to sign on to each the New York and the Choice of Court Convention.[136] The US is not much better when considering timeframe.[137] At best, key players such as the UK and the US join a convention approximately ten years later. For the Hague Judgments Convention that means 2029. However, unlike the New York Convention and Choice of Court Convention, the Hague Judgments Convention faces additional hurdles. Compared to the New York Convention, which walked away with 10 signatories the day of being passed,[138] the Hague Judgments Convention received only one signature from Uruguay in July and no additional members since. On the other hand, one signatory is 100% better than the signatures the Choice of Court Convention received in all of 2005.[139] The Choice of Court Convention received its first signature in 2007, and only received a significant boost when the EU signed as the second sovereign in 2009.[140] Hence, before it can meet quantity or quality, the Hague Judgments Convention must survive its two-signatory requirement or else all efforts will be null and void.[141]

Summarily, this article predicts that key players will be the turning point for the Hague Judgments Convention, rather than numerosity. The New York Convention had a great deal of signatory states from the beginning, yet the decade that saw both the US and the UK join was a decade in which the New York Convention experienced such a boost that it must be more than mere coincidence. Perhaps this bodes well for the Hague Judgments Convention and US parties in particular. From an enforcement and practicality perspective, US and UK law, courts, and proceedings are more similar to each other than any other judicial systems on the global market. This is because the US legal system was created with the UK as a backdrop. Additionally, a Choice of Court Convention's success would help the new Hague Judgments Convention's standing as well.

vi. In Light of Mediation

Compared to the above conventions, it is quite exciting to see the Singapore Convention setting a signatory record, currently showcasing over 50 signatories.[142] Even the New York Convention received only a total of 24 new signatures within the same year it was passed.[143] The Singapore Convention's popularity further demonstrates states' hesitancy regarding court related proceedings. The Singapore Convention's popularity is further reflected in the amount of disparate member states, spanning from the Americas (Chile, US, Venezuela), to Europe (Georgia, Turkey,

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[135] Unfortunately, because the Choice of Court Convention only recently calls the UK a fellow signatory (2018), little can be said about UK's litigation popularity.
[136] HCCH, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, *supra* note 12; N.Y. ARB. CONVENTION, *supra* note 60.
[137] HCCH, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, *supra* note 12; N.Y. ARB. CONVENTION, *supra* note 60.
[138] N.Y. ARB. CONVENTION, *supra* note 60.
[139] HCCH, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, *supra* note 12.
[140] *Id.*
[141] HCCH, *Recognition and Enforcement*, *supra* note 14, at art. 28.
[142] HCCH, Singapore Convention, *supra* note 76.
[143] N.Y. ARB. CONVENTION, *supra* note 60.

Ukraine), Africa (Nigeria, Uganda, Uruguay), the Middle East (Afghanistan, Iran, Israel, Qatar, Saudi Arabia), and Asia (China, Fiji, India, Singapore).

The nature of mediation leaves all concerns of comity to the wayside, allowing for simple cross-border cooperation between business parties. Globally recognized mediation awards are even more preferable to the business owner who seeks amicable resolutions of disputes, preserving business relations that were so hard fought for in the first place.[144] Although widespread acceptance only requires "effectiveness of the procedure" as well as cost efficiencies,[145] the Singapore Convention does not resolve the question of accountability where parties are unable to cooperate.[146] Hence, parties will continue to select a binding dispute resolution option to incorporate a neutral fact finder. However, that means attorneys are back to square one when weighing litigation versus arbitration.

vii. Expectations

With these concerns in mind, the Hague Judgments Convention is unlikely to receive widespread recognition in the near future. To even consider signing onto the Hague Judgments Convention, states must overcome hurdles that include questions of comity and populist movements. Even once those stars align, the "fish" in the "sea" must ultimately be significant. While many little "fish" will play a factor, realistically, the bigger ones truly drive a convention forward. The reality is that, the longer it takes for global recognition of court rulings to take over, the more developed arbitral practices become. At some point, the cost-balance of switching from arbitration to litigation will be outweighed by well-established, veteran arbitral practices.

B. Practical Considerations

i. Intro

Generally, the question of enforceability of judgments, judicial or arbitral, is becoming more relevant every day. The number of newly filed arbitrations rises from year to year with increased party disparity. Obtaining jurisdiction in an arbitration case is reasonably simple and based in the contract. Obtaining personal and subject matter jurisdiction as well as establishing proper venue in courts is more difficult. By setting out basic arbitration parameters, parties create their own jurisdiction. For example, in arbitration, similar to a choice of venue clause, parties can select a specific arbitral institution to administer proceedings. Globally prominent international arbitral institutions include the ICC, International Centre for Dispute Resolution ("ICDR"), London Court of International Arbitration ("LCIA"), Hong Kong International Arbitration Centre ("HKIAC"), Singapore International Arbitration Centre ("SIAC"), and Stockholm Chamber of Commerce ("SCC"). Generally, institutions are selected for their neutrality. However, finding a neutral court that also has jurisdiction will prove difficult.

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[144] Singapore Convention, *supra* note 23.
[145] Strong, *supra* note 6, at 2039-40.
[146] *Id.* at 2014, 2058.

Establishing personal jurisdiction specifically will also prove difficult, whereas arbitration does not face such hurdles. International arbitral proceedings are multicultural in nature. The ICC alone processed over 800 cases in 2018, proceedings representing over 130 different countries.[147] Of those proceedings, a majority of cases included US parties.[148] Although Western cultures make up a majority of the parties in the ICC, more and more cases are seeing an increase of parties from the Middle East, including the United Arab Emirates and Turkey.[149] Just as the ICC appears to primarily attract Western cultures, the LCIA reports comparable cultural representations.[150] Similarly, the HKIAC, an Asian based institution, reports that most of its parties come from Asia.[151] While the reasons for institutional party disparity might differ, and parties also select institutions based on geographic advantages, trading benefits and barriers, or even cultural reasons, the result is the same across the board: Each institution deals with diverse parties. The melting pot is colorful. This will undoubtedly translate into any judicial proceeding as well and most likely will cause some tensions.

Establishing judicial jurisdiction will depend on the court selected and its powers over the parties, which presently is a fairly inflexible system on the international stage. One reason for the New York Convention's success lies in its flexibility to accommodate these variations. Whether the Hague Judgments Convention can offer the necessary flexibility and ability to accommodate such multi-cultural proceedings is unlikely.

ii. The Freedom to Contract

As previously mentioned, parties to contracts have great autonomy when negotiating their agreements. Because international contracts involve sophisticated participants, the terms of such agreements, including dispute resolution clauses, are highly negotiated.[152] Due to enforceability concerns of judicial rulings, 97% of international commercial contracts turn to arbitration as their number one choice for dispute resolution.[153]

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[147] Int'l Chamber of Commerce, *ICC Arbitration Figures Reveal New Record for Awards in 2018*, https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/ (last visited Sep. 11, 2020).

[148] US parties were followed by French, Spanish, and German parties in amount of representation. *Id.*

[149] The ICC reported 31% of cases including European parties, while only 12% represented West and Central Asia. *Id*.

[150] LONDON COURT OF INT'L ARBITRATION, 2018 ANNUAL CASEWORK REPORT 5 (LCIA, 2018), (download full report by clicking "Click here to access the full LCIA 2018 Annual Casework Report" at https://www.lcia.org/News/2018-annual-casework-report.aspx) (reporting 20% parties from the UK, 14% from Asia, and 13% from the Middle East).

[151] The institution's top ten represented nations include China, British Virgin Islands, the United States, Cayman Islands, Singapore, South Korea, Macau, Vietnam, and Malaysia. *2018 Statistics*, HONG KONG INT'L ARBITRATION CENTRE, https://www.hkiac.org/about-us/statistics.

[152] *See* Bookman, *supra* note 7, at 1128.

[153] SCHOOL OF INT'L ARBITRATION, QUEEN MARY UNIVERSITY OF LONDON, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 5 (2018), https://www.whitecase.com/sites/whitecase/files/files/download/publications/2018-international-arbitration-survey.pdf. All data relied upon here does not fully encompass the current landscape of international commercial contracts because, for example, ad hoc proceedings are fully confidential and private. However, the data does offer insight into trends and preferences, providing a guideline in our analysis of the situation.

Parties can choose the seat of arbitration and governing law independently of each other. When deciding the location of arbitration, parties consider the reputation and legal procedures available as well as neutrality of the location.[154] Over the years, preferences have developed, and the majority of parties prefer London as their seat of arbitration, closely followed by Paris.[155] London is only rivaled by Hong Kong for parties arbitrating through the HKIAC in Asia.[156] Assuming the reasons parties choose a seat of arbitration are transferable into the litigation world, the fact that England is a popular choice bodes well for American parties who will benefit from a common language and familiar judicial system. This seems to lean in favor of judicial proceedings under the new Hague Judgments Convention. However, with Brexit alive and well, the UK's future remains in the dark.

When deciding governing law, parties must select procedural rules as well as underlying substantive laws while negotiating their agreements. Procedural rules are only as flexible as the arbitral institution allows. Each institution has its own, fully developed procedural rules.[157] Procedural requirements in courts will similarly vary. Even within the US, procedural rules diverge across the states and between the various court levels. Hence, it is only to be expected that other foreign courts will differ also.[158] Procedures are greatly influenced by underlying cultural values and beliefs, and those differences will be reflected in court proceedings.[159] The greatest hurdle to overcome will be finding a court with power over both parties. If the court lacks personal jurisdiction over one party, proceedings will come to a halt. Furthermore, the need for the court's power over parties goes as far as enforcement. Judicial power is territorial and enforcement beyond those borders would rely on foreign courts to assist - an issue the Hague Judgments Conventions seeks to remedy.

Substantively, it looks as though English Law is the winner in arbitral proceedings, followed by Swiss, US, French, and German law.[160] The LCIA similarly recorded that a majority of their cases, over 200, selected English Law as governing law, distantly followed by Cyprus with only 10 cases.[161] English law carries the day even across the institutions and into Asia.[162] Again,

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[154] *Id.* at 10–11.

[155] *Id.* 64% choose London, 53% Paris, followed by Singapore (39%), Hong Kong (28%), Geneva (26%), and New York (22%). *Annual Report 2018*, SINGAPORE INT'L ARBITRATION CENTRE 5 (2018), http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_AR2018-Complete-Web.pdf. The trend to choose England as a seat of arbitration appears to apply across the board, and the LCIA reports 238 cases with England as seat of arbitration. LONDON COURT OF INT'L ARBITRATION, *supra* note 150, at 11.

[156] HONG KONG INT'L ARBITRATION CENTRE, *supra* note 151.

[157] The greatest flexibility in customizing procedures is for ad hoc arbitrations. Lamm, Hellback & Tsolakidis, *supra* note 26.

[158] *E.g., Hong Kong - Government*, FOREIGN LAW GUIDE, https://referenceworks-brillonline-com.ezproxy1.lib.asu.edu/entries/foreign-law-guide/hong-kong-government-COM_323519# (last visited Sep. 21, 2020).

[159] *See* RADU D. POPA & MIRELA ROZNOVSCHI, *Comparative Civil Procedure: A Guide to Primary and Secondary Sources*, HAUSER GLOBAL LAW SCHOOL PROGRAM, https://www.nyulawglobal.org/globalex/Comparative_Civil_Procedure.html (last visisted Sep. 11, 2020).

[160] Cuniberti, *supra* note 108 at 459.

[161] LONDON COURT OF INT'L ARBITRATION, *supra* note 150, at 11.

[162] The HKIAC reports English law as the second most popular choice of law after Hong Kong law. HONG KONG INT'L ARBITRATION CENTRE, *supra* note 151. The SIAC reported that 18% of their arbitrations are governed by

assuming the reasons for selecting governing law in arbitration are translatable into the litigation world, US parties are fairly likely to be comfortable with the applicable laws in the UK court system should they choose litigation as their dispute resolution option under the Hague Judgments Convention.[163] Additionally, since the UK judicial system is reasonably well respected across the board and one of the better known systems of law, application of its substantive rules in other courts is less likely to be met with disdain.

Because this article focuses on international contracts that have at least one US contracting party involved, it is worth noting that in the world of US based international arbitration, New York is the clear winner for both forum and substantive law.[164] However, because foreign parties despise US damages awards, most non-US parties will not want to choose a US court for that reason alone.[165]

iii. Costs of International Dispute Resolution

The traditional benefits of arbitration may no longer justify its choice over litigation. While arbitration has seen a boom over the last several decades, its traditional hallmarks are slowly dissipating. Growing amounts in controversy and litigators' flair for motion practice result in longer proceedings and greater expenses. Fees differ significantly depending on what arbitral institution the parties choose but generally range from $1,000 to $200,000.[166] Additionally, while arbitral proceedings, on average, last up to two years,[167] recent tendencies for more elaborate discovery proceedings and fanciful motion practices escalate costs and delay cases by approximately 40%.[168]

English law. SINGAPORE INT'L ARBITRATION CENTRE, *supra* note 155, at 21. *See also SCC Statistics 2018*, ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, https://sccinstitute.com/statistics/.

[163] England's popularity for seat of arbitration and governing law can only be translatable into the litigation world if they sign onto the Convention. As discussed in Section A above, this is unlikely to happen soon and the question arises: Who will take their place instead?

[164] Surprisingly, Delaware business law does not carry the day on the international playing field, contrary to its local popularity. Dammann & Hansmann, *supra* note 21, at 49. Although the article focuses on commercial relations that include a US party, the data available does not distinguish on those grounds, limiting the significance of the information to a degree.

[165] Bureau of Consular Affairs, *supra* note 3.

[166] *Costs & Duration*, HONG KONG INT'L ARBITRATION CENTRE, https://www.hkiac.org/content/costs-duration (last visited Nov. 12, 2019). The ICC requires an advance, non-refundable administrative fee of $5,000, which does not include other expenses such as arbitrator fees, expert expenses, and legal costs. *Costs and payments*, INT'L CHAMBER OF COMMERCE, https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/ (last visited Nov. 12, 2019). The ICDR calculates fees somewhat differently, and basic filing fees can range from $1,000 to $16,100 alone. *International Arbitration Fee Schedule: Amended and Effective October 1, 2017*, INT'L CTR FOR DISPUTE RESOLUTION (2017), https://www.icdr.org/sites/default/files/document_repository/International_Dispute_Resolution_Procedures_Fee_Schedule.pdf.

[167] INT'L CHAMBER OF COMMERCE (ICC), 2018 DISPUTE RESOLUTION STATISTICS 15 (ICC Publication No.: 898E, 2019), https://nyiac.org/wp-content/uploads/2019/08/icc_disputeresolution2018statistics.pdf.

[168] *Arbitrator Survey Finds How Parties and Counsel Increase Costs and Lower Efficiency of Their Cases*, INT'L CENTRE FOR DISPUTE RESOLUTION, AMERICAN ARBITRATION ASSOCIATION 2 (downloaded Nov. 12, 2019 (fill out Download Now! form from https://go.adr.org/arbitrator-survey.html). The LCIA reports average costs of $97,000 for cases lasting around sixteen months, noting that some matters with small amounts in controversy can be resolved in under one year. *Costs and Duration: 2013-2016*, LONDON COURT OF INT'L ARBITRATION 2 (download report from

Court proceedings' traditional hallmarks, "slow [and] inefficient,"[169] are alive and well. Curiously, in comparison, court-related costs appear deceivingly lower than the above reported arbitration expenses.[170] However, assuming that New York's arbitration popularity prevails over litigation proceedings, New York's fees ultimately add up to the same, although expenses are allocated differently.[171] The statistics are deceiving as they do not reflect any other filing fees, expert witness expenses, or court reporter costs. Some of these expenses are present in arbitration, while others are not, depending on the proceedings and the parties. Due to litigators' aggressive motion practice, expenses for court proceedings will rise high and fast. Some businesses can spend over $200 billion on litigation.[172] On the global scale, the US is estimated to be the costliest litigation forum when compared to Canada, Europe, and Japan.[173] However, within Europe, the UK appears to be the most expensive litigation forum.[174] Expenses will be a driving factor for businesses in the negotiation process. If, for example, motion practice remains lower in arbitration, and length of proceedings are shorter, arbitration should carry the day.

Mediation expenses will vary depending on how the parties choose to proceed, but costs of proceedings are generally lower compared to either litigation or arbitration.[175] The primary reason for lower costs is that mediation experiences significantly shorten resolution periods.[176] As such, from a cost perspective, mediation is generally preferred.

iv. Dockets

Although the difference in applicable fees is difficult to capture, docket load information is much more straightforward. Most international arbitral institutions receive under 1,000 new filings per year.[177] Of those filed cases, contractual disputes were either financial, service contracts,

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https://www.lcia.org/lcia/reports.aspx). The HKIAC reports a similar durational average but lists much higher registration and administrative expenses, reporting an expense mean of $119,078. HONG KONG INT'L ARBITRATION CENTRE, *supra* note 166.

[169] Bookman, *supra* note 7, at 1141.

[170] *Measuring the Costs of Delays in Dispute Resolution*, AMERICAN ARBITRATION ASSOCIATION, https://go.adr.org/impactsofdelay.html. Filing a civil case in the Arizona District Court costs $400 and registering another district's judgment only costs $47. UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA FEE SCHEDULE 1 (U.S. Courts, Effective Oct. 1, 2018), http://www.azd.uscourts.gov/sites/default/files/documents/fee%20schedule.pdf.

[171] *Filing Fees*, N.Y. COURTS, https://www.nycourts.gov/forms/filingfees.shtml (listing $210 to receive an index number and $45 per motion).

[172] JOHN B. HENRY, *Fortune 500: The Total Cost of Litigation Estimated At One-Third Profits*, CORP. COUNS. BUS. J., ELAW FORUM (Feb. 1, 2008).

[173] U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, INT'L COMPARISONS OF LITIGATION COSTS: CANADA, EUROPE, JAPAN AND THE UNITED STATES (UPDATED 2013), https://www.instituteforlegalreform.com/uploads/sites/1/ILR_NERA_Study_International_Liability_Costs-update.pdf.

[174] *Id.* Because France's judges apparently work for free, overall court costs can be lowered. Maria Dakolias, *Court Performance Around the World: A Comparative Perspective*, 2 YALE HUM. RTS. & DEV. J. 87, 106 (1999).

[175] Average mediation expenses in 2017, hovered around $23,000. *Costs & payment*, INT'L CHAMBER OF COMMERCE, https://iccwbo.org/dispute-resolution-services/mediation/costs-payment/ (last visited Sep. 11, 2020).

[176] *Mediation*, LONDON COURT OF INT'L ARBITRATION, https://www.lcia.org/Dispute_Resolution_Services/Mediation.aspx (last visited Sep. 11, 2020).

[177] INT'L CHAMBER OF COMMERCE, *ICC Arbitration Figures Reveal New Record for Awards in 2018*, *supra* note 147 (reporting a total of 842 administered cases with an aggregate amount of $36 billion in amount in controversy and

sale of goods,[178] or commercial and corporate agreements.[179] The cases submitted to arbitration are limited in subject matter, especially considering arbitrability. While the number of arbitral filings has increased, it comes no where near newly filed US civil cases. US federal courts, on the other hand, recorded over 277,000 civil cases filed in 2018, of which 85,316 (8%) were state law cases in federal court on diversity jurisdiction.[180] New York alone reported over 1 million new civil cases filed in 2018.[181] Of all the cases pending, over 900 civil cases had been pending for at least three years.[182] Thirty-five percent of all civil cases lasted over one year, some even taking over ten years before a final agreement or judgment was reached.[183]

Economic efficiencies are a key concern for parties when they consider docket load. A greater workload means it could take longer for issues to be resolved which, in turn, raises costs. Judges are assigned cases which they cannot decline. Arbitrators can turn down cases for any reason and frequently parties will consider an arbitrator's caseload when selecting their tribunal. On the other hand, arbitrators generally work alone,[184] whereas judges have an entire staff helping them with research, writing, and administration. Arbitrability is another reason why economic efficiency favors arbitration. Not everything is arbitrable. However, anything can be litigated regardless of subject matter or consent. Hence, while parties do not consider the number of cases a judge or arbitrator is working on per se, they consider the economies of scale in relation to workload, time, and money.

Additionally, with the freedom to forum shop, parties should keep the realities of each system in mind. The complexities of international disputes make court proceedings less desirable. The contractual autonomy will always be limited in the litigation realm, because existing rules and regulations must be followed, whereas rules and regulations can be created to suit the parties in arbitration. Even with the Hague Judgments Convention in force, the ability to enforce foreign court rulings could still be limited depending on how states adopt the Convention.[185] Parties might

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599 approved draft awards. *See also* 2018 ICDR CASE DATA INFOGRAPHIC 1 (Int'l Ctr for Dispute Resolution, American Arbitration Association, 2018), https://www.icdr.org/sites/default/files/document_repository/2018_ICDR_Case_Data.pdf; HONG KONG INT'L ARBITRATION CENTRE, *supra* note 151; SINGAPORE INT'L ARBITRATION CENTRE *supra* note 155, at 14; LONDON COURT OF INT'L ARBITRATION, *supra* note 150, at 3.

[178] LONDON COURT OF INT'L ARBITRATION, *supra* note 150.

[179] *See* SINGAPORE INT'L ARBITRATION CENTRE, *supra* note 155, at 16-17; ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, *supra* note 162.

[180] *Federal Judicial Caseload Statistics 2018*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 (last visited Nov. 12, 2019); *see also* U.S.COURTS, CIVIL JUSTICE REFORM ACT (CJRA) 2-3, 6 (U.S. Courts, 2018), https://www.uscourts.gov/sites/default/files/cjra_na_0930.2018_1.pdf (reporting 50,000 filed at the trial level with over 700 pending motions on the dockets and a majority of pending bench trial for contract disputes).

[181] N.Y. UNIFIED COURT SYSTEM, 2018 ANNUAL REPORT 39 (2018), https://www.nycourts.gov/legacypdfs/18_UCS-Annual_Report.pdf

[182] *Id.* at 6.

[183] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 4 (2009), https://www.uscourts.gov/sites/default/files/iaals_civil_case_processing_in_the_federal_district_courts_0.pdf.

[184] Some arbitrators use tribunal secretaries to assist in cases. However, tribunal secretaries are limited in what they can do and their participation in the proceedings is still highly controversial as they are not selected by the parties through agreement but by the arbitrator independently.

[185] *See generally* HCCH, *Recognition and Enforcement*, *supra* note 14, at art. 29.

still have to expend substantial efforts and money to have a foreign court judgment enforced in another country. The New York Convention, however, has made enforcement of arbitral awards fairly straightforward. Although arbitration is becoming costlier and lengthier, time and effort spent on arbitration could keep bottom-line expenses lower.

C. Incorporation

i. Overcoming the Status Quo

Humans are creatures of habit. Due to the current legal opportunities, arbitration is the frontrunner in international contracts. If parties are supposed to shift from arbitration to litigation, parties, many of which are businesses, will want to take their own risk tolerance into account, justifying change. Hence, with transition comes some hurdles.

The first two hurdles are purely political. The first hurdle to overcome is one of current business practices. To achieve a successful contract, most law firms and in-house counsels have some form of checklist to reference.[186] These checklists help avoid pitfalls and prevent mistakes whose lessons have already been learned.[187] Due to well established checklists, attorneys and businesspeople may be hesitant to venture into the international contracts' arena without well-defined and established guidelines. Without industry support, governments have little incentive to join the Convention. On the other hand, if there is no push from the industry yet governments sign on to the Hague Judgments Convention *sua sponte*, those countries could still feel the need to promote their efforts to the business community, garnering industry support for their decision in retrospect.

Should a country decide to gather support for their decision to join the Hague Judgments Convention, the second hurdle would require the government to overcome the business golden rule: Good friends are hard to come by.[188] Because of this rule, mediation has taken on popularity, and fosters continued relations and amicable solutions. Businesses want to maintain relationships that they have worked so hard to establish. If an issue can be fixed amicably, why not try?[189] While mediation can be used before turning to more aggressive dispute resolution options such as arbitration or litigation, arbitration and litigation cannot. These two last forms of dispute resolution act as alternatives; contracts can choose only one or the other. Choosing between arbitration and litigation will be driven by questions of expenses, confidentiality, and predictability.

It is unlikely that the US will decide to join the Hague Judgments Convention on its own. In the US, it is more likely that businesses would have to push for the government to sign on to

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[186] *Int'l Business Contracts Checklists*, CANTWELL & GOLDMAN PA, https://www.hmtlaw.com/International-Business/Checklist-For-International-Business-Contracts.shtml (last visited Sep. 11, 2020).

[187] Several arbitral institutions offer model contracts, terms, and clauses for both arbitration and mediation. *Model Contracts & Clauses*, INT'L CHAMBER OF COMMERCE https://iccwbo.org/resources-for-business/model-contracts-clauses/ (last visited Sep. 11, 2020).

[188] Strong, *supra* note 6, at 2031.

[189] Because a written and signed mediation agreement is enforceable under traditional US contract law, the Singapore Convention has added little in those regards.

the Hague Judgments Convention, similar to the New York Convention, if the US government is to be persuaded to sign the Convention.[190]

Once businesses have determined their risk tolerance, checklists and practices will be updated to match their findings. At that point, if they transition to litigation, the change will be immediate. With risk tolerance in mind, transitions from arbitration to litigation are likely to be an industry related decision. For example, highly complex technical subject matters lend themselves best to arbitration where the need for decisionmakers with expertise can be met.

ii. Effects of the Advantages and Disadvantages

After introducing the idea of risk tolerance, it seems only fair to take a look at what that consideration might entail. Advantages and disadvantages of dispute resolution forms have been discussed *ad infinitum* over the years. As addressed in more detail in the article's introduction portion,[191] these alternatives can be part of a steppingstone toward more aggressive dispute resolution options[192]

Factors such as predictability, homogeneity of the law,[193] decision makers, subpoena powers, and docket load all influence the outcome. Furthermore, jurisdictional requirements in the US are hard to come by when bringing a suit[194] and when seeking enforcement.[195] Even if jurisdictional requirements are met, one party is going to be concerned with biases and other intangible disadvantages.

a. Confidentiality and Privacy

The most significant factor for business parties to consider is confidentiality.[196] Privacy only prevents non-parties from attending the proceedings, whereas confidentiality offers true protection of the information discussed, and prevents parties from discussing the proceedings.[197] Arbitration can offer both.[198] Courts generally offer neither.[199]

The concern for confidentiality favors arbitration. Because strategic advantages take on a heightened role on the international playing field, the protection of vital information takes on a central role.[200] Arbitration's policy towards confidentiality is much more generous and amicable

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[190] Bookman, *supra* note 7, at 1136.
[191] *Id.* at 1125.
[192] Singapore Conventionna, *supra* note 23, at 19.
[193] Dammann & Hansmann, *supra* note 21, at 29-30.
[194] Bookman, *supra* note 7, at 1144.
[195] Steven C. Nelson, *Alternatives to Litigation of International Disputes*, 23 INT'L LAW. 187, 190-91 (1989).
[196] Veasey, *supra* note 91.
[197] Mayank Samuel, *Confidentiality in International Commercial Arbitration: Bedrock or Window-Dressing?*, Kluwer Arbitration Blog (Feb. 21, 2017), http://arbitrationblog.kluwerarbitration.com/2017/02/21/confidentiality-international-commercial-arbitration-bedrock-window-dressing/?doing_wp_cron=1597606717.5020339488983154296875.
[198] *Id.*
[199] The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases March 2007 Post-Public Comment Version*, 8 SEDONA CONF. J. 141, 143 (2007).
[200] Samuel, *supra* note 197.

for international business affairs.[201] Although there is a jurisdictional split regarding whether confidentiality is presumed versus requiring an explicit agreement pertaining to confidentiality, the protection of any information is easily obtained.[202] Confidentiality for arbitral proceedings follows a two-pronged approach: i) The obligation of confidentiality amongst the parties involved in the arbitration, including third-party witnesses, and ii) confidentiality of the substance of the current arbitration against future proceedings, including exchanged documents and evidence.[203] However, achieving either or both is purely based on party assent and can cover the fact that the proceedings are happening at all, the content of the proceedings, as well as the award.

The US judiciary, on the other hand, is no fan of confidentiality and will generally require production and exchange of all relevant information.[204] Although parties may seek a protective order for the information they are producing, they must show they have "in good faith conferred or attempted to confer" with opposing party to resolve the issue before petitioning the court for protection.[205] The court, in turn, has wide discretion in such rulings, allowing decisions to range from a seal, partial seal, or any other form the judge deems appropriate or necessary to protect the information.[206] Judges may consider the public's interest in the information and its relevance to the public nature of the proceedings.[207] This can take on different forms and include review of historical practices or even the public's interest in the information.[208] In practice, "good cause" only applies to non-dispositive motions.[209] In any other situation, if the information is material to the substance of the case, protection must overcome a "compelling need" standard.[210] Not only does this raise the burden to be met by the requesting party, documents previously designated confidential will lose that status if "introduced at trial or filed in connection with a motion for summary judgment."[211] For reasons of confidentiality, arbitration will win every time.

Privacy also favors arbitration. Privacy matters because it can protect parties from the stigma associated with dispute resolutions, shielding business reputation and market value. Arbitration is inherently and automatically private. That means, unless the parties tell someone they are in dispute resolution proceedings, only the participants in the arbitration will know. The inherent public nature of court proceedings makes it impossible for parties to keep their legal issues on the down-low, hoping the press will not tear them apart. The fact that a legal process is ongoing cannot be hidden. If the business' name is in the case heading, even a not-so-diligent reporter will soon know more. While the institution could neither confirm nor deny the existence of such a case,

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[201] Donggen Xu & Huiyuan Shi, *Dilemma of Confidentiality in International Commercial Arbitration*, 6 FRONTIERS LAW CHINA 403, 405 (2011).
[202] Samuel, *supra* note 197 (The US rejects a presumption of confidentiality); *see also* HONG KONG INT'L ARBITRATION CENTRE, 2018 ADMINISTERED ARBITRATION RULES 50 (HKIAC, Nov. 1, 2018); INT'L CENTRE FOR DISPUTE RESOLUTION, INT'L DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) art. 21 (ICDR, Rules Amended and Effective Jun 1, 2014).
[203] Xu & Shi, *supra* note 201, at 405-06.
[204] *See* FED. R. CIV. P. 26(c)(1)(A) – (H) (requiring parties to justify a protective order).
[205] *Id.*
[206] *Id.*
[207] The Sedona Conference, *supra* note 199.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.* at 143-44.

the judge's Judicial Assistant would be much more forthcoming. Privacy leans in favor of arbitration on the international commercial playing field. Overall, if a party seeks full protection of their information and brand proliferation, arbitration is the correct choice.

b. Predictability

A strong factor favoring litigation is predictability. While courts can offer predictability of the law, arbitration takes place in the wild west. Arbitration does not seek predictability in the way courts do. Because arbitral proceedings are private, tailored to the parties, and determined based on the parties in the specific dispute, no one arbitral award will be the same. Depending on the court venue, precedent can offer some amount of certainty to trained legal experts, allowing for their clients to make proper risk tolerance decisions. However, not being versed in a forum court's proceedings and governing laws disadvantages the foreign attorney, forcing businesses to hire local counsel. This in turn increases costs.

Language is another factor to consider. This issue takes on two forms: i) The ability to speak the language and ii) the underlying values associated with words and phrases. Firstly, not being versed in the forum court's language will disadvantage parties and limit predictability in that regard. While in parties to an arbitration can select an arbitrator based on language skills, courts will not be as accommodating since parties cannot select the judge.[212] Language barriers are inevitable. Secondly, while the Hague Judgments Convention seeks uniformity in its application, this would require that words and situations be interpreted similarly. Yet, culturally, this is impossible. While capable of speaking each other's languages, a person's understanding of the world around them and how locals use certain words and phrases to express themselves remains unbridgeable. If something as simple as "walking distance" can mean a mere few blocks to an American but can mean a 20-minute walk to a European, there is little hope to find common ground in the legal process, a system built on the delicate balance of words and their meanings. Even where judges attempt to interpret broadly, as recommended under the Hague Judgments Convention,[213] cultural differences will nonetheless limit interpretation. Furthermore, interpreting the Hague Judgments Convention itself may affect predictability as the language used does not fit squarely within the current international framework.[214] Because underlying cultural values influence what meanings words receive, and the same word in one place will have completely different underlying values in another, global uniformity will be difficult to achieve.

The goal of predictability has several angles to it on the international scale and goes beyond currently unestablished international litigation precedent. However, it is up to contracting parties to create the predictability they seek by participating in the process and creating a history that will ultimately feed into this need for predictability.

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[212] Dammann & Henry Hansmann, *supra* note 21, at 28.

[213] *See* HCCH, *Twenty-Second Session supra* note 15, at para. 393.

[214] For example: The Hague Judgments Convention's Article 29 allows for states to limit enforceability by country, referencing the option as "relations." HCCH, *It's done*, *supra* note 13, at art. 29. The New York Convention, on the other hand, has a similar and more common clause referring to "reservations". United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 63, at art. 1(3). However, the limitations that countries may establish under either are significantly different.

c. Efficiency

When turning to cost-balance considerations, efficiency is the number one factor parties consider when choosing between dispute resolution options.[215] As indicated above, if efficiency means low costs, then currently, no dispute resolution proceeding truly achieves this goal.[216] Because up to 90% of international commercial contracts currently use arbitration clauses,[217] the expectation of a "speedy, simple, and inexpensive" arbitration are goals of the past.[218] High stakes and procedural requirements in the international arbitration proceedings increase expenses significantly,[219] running tallies up to $1 million.[220] Although any dispute resolution runs high -cost tallies, businesses will nevertheless seek out the cheapest option available. When selecting an arbitral institution, expenses can range from $1,000[221] to $119,000.[222] However, as addressed in more detail in Section B above, arbitral proceedings are shorter[223] and fewer.[224] US and UK court dockets see thousands upon thousands of newly filed civil cases every year,[225] sometimes continuing for over ten years.[226] Because of the realities of court dockets, parties in litigation proceedings ultimately turn to settlement agreements within three years.[227] Even when compared to the timeframe from filing to settlement, litigation proceedings are still twice as long as reported average arbitral proceedings.[228]

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[215] GLOBAL POUND CONFERENCE SERIES: GLOBAL DATA TRENDS and REGIONAL DIFFERENCES 3, 9 (Global Pound Conference Series, et al. eds., 2018) (scroll to bottom and download report by clicking "Global Data Trends and Regional Differences" Preview on https://www.imimediation.org/research/gpc/series-data-and-reports/).
[216] *Id.* at 10.
[217] Strong, *supra* note 6.
[218] Bookman, *supra* note 7, at 1125; Dammann & Hansmann, *supra* note 21, at 37.
[219] Bookman, *supra* note 7, at 1165-66.
[220] Strong, *supra* note 6, at 1982.
[221] *International Arbitration Fee Schedule: Amended and Effective October 1, 2017*, *supra* note 166.
[222] HONG KONG INT'L ARBITRATION CENTRE, *supra* note 166; *see generally Arbitrator Survey Finds How Parties and Counsel Increase Costs and Lower Efficiency of Their Cases*, *supra* note 168 (showing that increased motion practice will add to the bottom-line costs).
[223] *Compare* HONG KONG INT'L ARBITRATION CENTRE, *supra* note 151, *and* LONDON COURT OF INT'L ARBITRATION, *supra* note 168, *with* ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, *supra* note 162.
[224] Int'l Ctr for Dispute Resolution, *supra* note 177; Int'l Chamber of Commerce, *supra* note 147; LONDON COURT OF INT'L ARBITRATION, *supra* note 150, at 3.
[225] JUDICIARY OF ENGLAND AND WALES, BUSINESS AND PROPERTY COURTS: THE COMMERCIAL COURT REPORT 2017-2018 (INCLUDING THE ADMIRALTY COURT REPORT) 10 (2019), https://www.judiciary.uk/wp-content/uploads/2019/02/6.5310_Commercial-Courts-Annual-Report_v3.pdf; MINISTRY OF JUSTICE, CIVIL JUSTICE STATISTICS QUARTERLY, ENGLAND AND WALES, JANUARY TO MARCH 2019 (PROVISIONAL) (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806896/civil-justice-statistics-quarterly-Jan-Mar-2019.pdf; U.S.COURTS, *supra* note 180, at 2, 6.
[226] Giuliana Palumbo et al., JUDICIAL PERFORMANCE AND ITS DETERMINANTS: A CROSS-COUNTRY PERSPECTIVE: A GOING FOR GROWTH REPORT 13 (Organization for Economic Co-operation and Development Economic Policy Papers No. 05, 2013), http://www.oecd.org/economy/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf; INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, *supra* note 183, at 4.
[227] HENRY, *supra* note 172.
[228] *Compare* HONG KONG INT'L ARBITRATION CENTRE, *supra* note 151, *and* LONDON COURT OF INT'L ARBITRATION, *supra* note 168, *with* ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, *supra* note 162 (showing that arbitration disputes are resolved between 1 and 1.5 years).

Efficiencies also consider the length of proceedings impacting the finality of awards.[229] Depending on the agreement, parties can agree that the arbitral award is final, binding, and non-appealable.[230] Arbitral appeals are possible but must be included in the parties' agreement.[231] The arbiter will alter his ruling in only a few instances.[232] Appeals of arbitral awards to the courts are rare and judicial review is limited.[233] On the other hand, court proceedings are tied to the right of appeal and will reach finality only when all options for appeal have been exhausted. From a cost perspective, arbitration should win hands-down.[234]

Length of proceedings effects costs in another way: Use of intellectual brain power. Intellectual resources include attorneys, executives, and in-house staff necessary for the proceedings. The more brain power that is needed, the more intellectual resources are diverted from day-to-day business procedures. The more resources are diverted from day-to-day business procedures, the more money flows into dispute resolution proceedings because it is flowing away from the business' actual operations. While this ties into the idea of lag time mentioned above, resource allocation for the actual proceedings will be the same for both arbitration and litigation. However, arbitration has some options on how to address these expenses. One way to efficiently use these resources is to negotiate well defined procedural requirements in arbitration proceedings.[235] For example: The use of modern technology to host proceedings such as videoconferences reduces travel time, which in turn reduces expenses while increasing efficiencies.[236] While US courts are trying to move into the 21st century and incorporate technology into proceedings,[237] these options are limited and still in their test stages, bound by an ancient system unwilling to change. Another option is for arbitration parties to select an optimal geographic location for both sides, regardless of jurisdictional requirements. To a certain degree, this option is also available in court proceedings within the US since courts will recognize selected venues.[238]

Efficiencies also include lag time in behavioral changes. It takes time, money, and energy for staff and paperwork to adjust to a new system. As mentioned above, parties will have contractual checklists that set the tone for negotiations. The longer a current system is in place, the more difficult it will be to change. This means that the longer it takes for the Hague Judgments Convention to reach commercial significance, the longer arbitral proceedings will have been in

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[229] GLOBAL POUND CONFERENCE SERIES, *supra* note 215.
[230] *What Happens After the Arbitrator Issues an Award, A.B.A.* 1, https://www.adr.org/sites/default/files/document_repository/AAA229_After_Award_Issued.pdf.
[231] *Id*. at 2.
[232] *Id*. at 1.
[233] 9 U.S.C. §§ 9-11; *see generally* Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).
[234] AMERICAN ARBITRATION ASS'N, *supra* note 170.
[235] GLOBAL POUND CONFERENCE SERIES, *supra* note 215, at 9.
[236] INT'L CENTRE FOR DISPUTE RESOLUTION, ICD MANUFACTURER/SUPPLIER ONLINE DISPUTE RESOLUTION PROGRAM, https://www.icdr.org/sites/default/files/document_repository/ICDR_FAQs_OnlineDR_Manufacturer_Supplier_English.pdf.
[237] *E-Courtrooms*, THE JUDICIAL BRANCH OF ARIZ. MARICOPA CNTY., https://superiorcourt.maricopa.gov/e-courtrooms/ (last visited Sep. 11, 2020).
[238] *See* 28 U.S.C. §§ 1404, 1406; Atl. Marine Const. Co., Inc. v. U.S. Dist. Court of Western Dist. of Texas, 571 U.S. 49 (2013); Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (and its progenies).

place and the longer it will take to transition. Even if transition were to occur today, arbitration has a long standing tradition considering the New York Convention has already been in place for over 60 years.

Overall, when considering efficiencies, Western businesses are more likely to continue to rely on international arbitration proceedings. Although costs appear deceivingly similar, arbitral proceedings remain more cost-efficient due to finality, flexibilities, and technological advances . Interestingly, efficiencies are not as important when dealing with Asian parties. According to statistics, Asian parties value certainty and enforceability over efficiency.[239] While enforceability is no longer a problem for arbitration, certainty is. Certainty and predictability are a benefit the Hague Judgments Convention specifically offers.[240] In addition, considering that the Chinese dragon is slowly awakening, making the country and its citizens significant players on the international commercial playing field, Chinese parties are likely to push for judicial proceedings that can give them the certainty they seek.

d. Public Policy Considerations

Perhaps a lesser yet relevant factor for choosing arbitration or litigation is the effects of public policy on the decision-making process. Public policy plays no role in arbitration, except possibly in denying enforcement of an arbitral award under the New York Convention. However, at common law, US courts may decline to enforce judgments that violate US public policies.[241] Additionally, the Hague Judgments Convention offers various escapes to enforcement under its Articles.

The first excuse for non-enforcement lies with Article 7(1)(c) which allows courts to deny enforcement for public policy concerns. But what does that mean? Neither US precedent, the Hague Judgments Convention's definitions,[242] nor its glossary[243] provide insight into how this might play out. Generally, questions of public policy will have little impact on the commercial law context. However, such a question can arise where one of the parties is a government entity. For example, the Chinese government currently owns some of the world's largest public companies.[244] Contracts with the Chinese government are going to increase. Contracts involving foreign governments bring with them issues of enforceability even in arbitration. In 2018, the D.C. District Court reviewed factors for non-enforcement of arbitral awards from *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*[245] as it denied a request to stay, later recognizing that specific performance of arbitral awards against a foreign government requires a balance between sovereignty and contract rules.[246] "Given that the United States has not waived its sovereign immunity in its own

[239] GLOBAL POUND CONFERENCE SERIES, *supra* note 215, at 21.
[240] HCCH, *It's done*, *supra* note 13.
[241] *See generally* Victoria Shannon Sahani, *A Hardy Case Makes Bad Law*, 43 FORDHAM L.J. 363, 391 (2019).
[242] HCCH, *Recognition and Enforcement*, *supra* note 14; HAGUE CONFERENCE ON PRIVATE INT'L LAW, "CIVIL OR COMMERCIAL MATTERS" / "ACTA IURE IMPERII," *supra* note 47.
[243] HCCH, *Glossary of Commonly Used Terms and References*, *supra* note 47.
[244] Andrea Murphy et al., *Global 2000, The World's Largest Public Companies*, FORBES MEDIA LLC (May 15, 2019), https://www.forbes.com/global2000/#53c5dcd0335d.
[245] Europcar Italia, S.P.A. v. Maiellano Tours, Inc., 156 F.3d 310, 317 (2d Cir. 1998).
[246] Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas, 314 F. Supp. 3d 95, 105, 109 (D.D.C. 2018).

courts against specific performance in contract cases," enforcement against the foreign government would "defy comprehension" of compliance.[247] On the litigation side, China will not want to subject itself to a US court, and certainly not under the current political climate. In contrast, a contracting party will not want to end up in Chinese court, presuming bias against it. Arbitration seems like a fair and safe middle ground in comparison.

To tackle its greater involvement in international commerce, China created a new court in 2018 "[u]nder the backdrop of the deepening development of the Belt and Road Initiative": The International Commercial Court.[248] The court is intended to process international commercial cases specifically.[249] The venue is now a "one-stop platform for resolving international commercial disputes."[250] Not knowing the effect of China's new court, issues of enforcement place arbitration and litigation on the same footing.

A second "escape" under public policy excuses presents itself in Article 19 of the Hague Judgments Convention. Article 19 allows courts to refuse enforcement where a state or one of its agencies is party to the agreement. This appears to be in line with current US policies. After the Tate Letter[251] retracted any and all immunities for foreign states in commercial actions and *Weilamann v. Chase Manhattan Bank*[252] caused a panicked US Executive Branch to instruct courts not to enforce judgments against foreign governments within the US, non-enforcement against foreign governments is likely. Unlike judicial proceedings, arbitration is free of such political considerations, which once again places arbitration as the winner.

A third concern under public policy addresses the question of due process of law.[253] The Full Faith and Credit Clause of the US Constitution applies to the US and the US alone. Hence, while comity amongst US States works, it does not in the international arena.[254] For example, after obtaining a default judgment against a US citizen, two Iranian banks sought enforcement of that judgment in the US.[255] However, the Ninth Circuit denied enforcement, reasoning that Iran's lack of public trials, politically weighted proceedings, and joint governmental branches violated US public policies.[256] Another instance arose when the D.C. District Court denied enforcement of a British judgment because the underlying public policies were "repugnant" to Maryland's public policy.[257] Although decided under a different political climate, these cases remain good law making it very clear that constitutional violations will receive zero deference by American courts when considering enforcement of foreign court rulings.[258]

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[247] *Id.* at 114.
[248] LIU TINGMEI, THE CHINA INTERNATIONAL COMMERCIAL COURT (CICC) IN 2018, http://cicc.court.gov.cn/html/1/219/208/209/1316.html (last updated Sep. 11, 2020).
[249] *Id.*
[250] *Id.*
[251] Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Department of State Bulletin 984-85 (June 23, 1952) ("Tate Letter").
[252] Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469 (Sup. Ct. 1959).
[253] Weston, *supra* note 111, at 741.
[254] *See generally Id.*
[255] Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1408 (9th Cir. 1995).
[256] *Id.* at 1412.
[257] Matusevitch v. Telnikoff, No. 97-7138, 1998 WL 388800, at 1 (D.C. Cir. May. 5, 1998).
[258] WILLIAM E. THOMSON & PERLETTE MICHELE JURA, CONFRONTING THE NEW BREED OF TRANSNATIONAL LITIGATION: ABUSIVE FOREIGN JUDGMENTS (2011). Note that the issue of comity goes both ways.

As indicated by the D.C. District Court and noted above, a fourth and somewhat smaller public policy concern in the commercial world is public policy considerations in the constitutional sense.[259] Generally, US courts give "meaning to our constitutional values."[260] Constitutional values will more likely come into play when considering proper procedures or lack thereof. While US courts have already decided on some arbitration-related public policy considerations, these concerns will only be magnified in the judicial proceeding. For example, arbitral awards from proceedings where arbitrators ruled on a contract removing antitrust violation remedies will receive no deference from US courts but could theoretically still be arbitrated.[261] Where a country's statutory rights are implicated, public policy is implicated.

Public policy excuses for non-enforcement do not end here. A fifth excuse includes "[i]nternational comity abstention and the presumption against extraterritoriality."[262] Extraterritoriality allows courts to presume that statutes apply domestically only.[263] By comparing international comity abstention justifications with *forum non-conveniens*, Bookman sheds light on the argument's malleability and the term's vagueness. *Forum non-conveniens* allows courts to decline jurisdiction where another forum would be better suited.[264] However, the doctrine is not very well-defined and gives courts the leeway to avoid "uncomfortable" situations.[265] Having to decide whether to enforce a foreign court's judgment will undoubtedly become uncomfortable.[266] Given the lay of the land now, there is no reason why US courts could not expand this doctrine liberally to foreign court rulings.

Lastly, although both litigation and arbitration might face public policy scrutiny, complete disregard of public policy in court proceedings can actually result in court holdings being overturned. Disregard of public policy in arbitration will have no such effect on the award. In conclusion, while public policy remains a grey area of enforcement for arbitral awards to-date, it will receive greater deference in cases fully litigated. Hence, from a public policy point of view, arbitration is preferable.

e. Additional Factors

In addition to expenses, time, resources, confidentiality, and public policy concerns, parties need to consider various other factors. First, parties should consider the underlying subject matter's complexity and uniqueness. While a judge is a trained legal professional, skilled in dispute resolution, he or she and the jury (if applicable) may not understand the subject matter well enough to make an educated decision. Although this should not be a showstopper, as it is up to the attorneys

[259] Weston, *supra* note 111, at 743.
[260] Fiss, *supra* note 258, at 14.
[261] Bookman, *supra* note 7, at 1150. While the Hague Judgments Convention does not cover Antitrust matters, contract validity still depends on compliance with national laws.
[262] *Id.* at 1178.
[263] *Id.* at 1178–79; *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010).
[264] Bookman, *supra note 7*, at 1178.
[265] *Id.*
[266] *See* Corporacion Mexicana De Mantenimiento Integral, S.De R.L. De C.V. v. Pemex-Exploracion Y Produccion, 832 F.3d 92, 106 (2nd Cir. 2016).

to educate their audience, parties that are able to select the arbitrator can avoid the effects of bad lawyering.

Second, although universally prohibited, judicial biases are real and can disadvantage one party over the other. The realistic concern about bias is not about impartiality but about neutrality.[267] While a judge will certainly seek to overcome cultural biases and language barriers, everyone grows up around certain legal concepts, has a specific approach to legal problems,[268] and develops a culturally specific mindset—generally known as "unconscious biases."[269] The crux of these biases is that they occur in the decision maker's subconscious, influencing rulings on a deeply fundamental level of which even the decision maker is unaware.[270] To add insult to injury, scholars have found that decisions are frequently made intuitively, giving these unconscious biases full reign over delicate situations.[271] In *Bridgeway Corp. v. Citibank*,[272] by upholding the district court's "judicial notice" of historic facts and background, the Second Circuit demonstrates the social issues that will be part and parcel to any court proceedings.[273] In its opinion, the district court dedicates an entire section to "Liberia's government, its recent civil war, and its judiciary."[274] The case demonstrates not only US court biases, but also foreign court influences. One way to balance such bias is by selecting a neutral venue, a court that does not advantage one party over the other due to cultural differences. However, this will most likely result in courts lacking jurisdiction. The concern of unconscious biases will equally apply to arbitrators. Unlike court proceedings, parties to arbitration have the flexibility to designate a specific arbitrator, incorporating the risk of bias in their decision-making process.

Third, parties will want to consider the powers available to the fact finder and decision maker. Arbitrators are limited in their subpoena powers and rely on local courts to enforce unanswered requests, while courts have the government's full enforcement powers and do not need to rely on another entity to punish.[275] However, the courts' powers are territorial and will not reach evidence or witnesses beyond their borders. This limitation strips away any advantage gained if relevant evidence is spread out across the world, rather than focused in one location.

For the above reasons, enforceability of foreign court rulings will remain unpredictable—at least at the beginning of the Hague Judgments Convention's life. Even if enough states join, parties must conduct a thorough cost and risk analysis before abandoning their current system. These analyses will most likely turn in favor of arbitration. However, as businesses transition from arbitration to litigation and begin resolving disputes through the judiciary, the transition is likely to occur along industry lines.

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[267] Derains, *supra* note 71, at 40.
[268] *Id.*
[269] Lauren Stiller Rikleen, *When it Comes to Unconscious Bias, are Judges at Risk*, ABAJOURNAL (Oct. 31, 2019 7:00 AM CDT), http://www.abajournal.com/voice/article/are-judges-at-risk-for-unconscious-bias.
[270] *Id.*
[271] *Id.*
[272] Bridgeway Corp. v. Citibank, 201 F.3d 134, 144 (2d Cir. 2000).
[273] Weston, *supra* note 111, at 742-43.
[274] Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 278 (S.N.D.Y. 1999).
[275] *See* 9 U.S.C. § 7; Fed. R. Civ. P. 45.

IV. CONCLUSION

The Hague Judgments Convention is no panacea to the enforcement of foreign court judgments. Existing concerns will remain across the board. Considering how long it took for the Hague Judgments Convention to finally be passed, and the lack of immediate enthusiasm in comparison to other similar conventions intertwined with political concerns demonstrate wide-spread doubt. Even if enough states signed onto the Hague Judgments Convention, a certain amount of lag time and educational gap regarding the Hague Judgments Convention will further delay any commercial relevance the Hague Judgments Convention might have. At that point, arbitration will have been the primary choice of dispute resolution for international commercial contracts for many decades. Unlike domestic contractual disputes, litigation of international contractual disputes will have to experience a new set of precedents that incorporates the international nature of the relationship. Arbitration would offer a better-oiled machine than its new alternative.

However, while it is difficult to change the current status quo, once change takes place, it will change quickly. Businesses will not keep one foot in arbitration and dip their toes into litigation. Businesses and industries will choose one or the other. Relevant to that transition will be key considerations such as expenses and biases.

While the future of international litigation remains in limbo, international mediation's fate bodes well. Its non-binding and voluntary nature protects business relations and has little to no drawbacks and encourages cross-border relations.

In conclusion, although a noble solution on its face, the Hague Judgments Convention brings with it many headaches. It is in humanity's nature to reach for the stars even if to land on the moon. As of today, the Hague Judgments Convention will not take the world by storm. In the foreseeable future, it looks as though international commercial contracts are stuck with current options, expanded only by the force of the Singapore Mediation Convention.