2025

The Case for a US Declaration Under Article 22 of the Choice of Court Convention

Ronald A. Brand
University of Pittsburgh School of Law, rbrand@pitt.edu

The Case for a US Declaration under Article 22 of the Choice of Court Convention

56 **GEORGETOWN JOURNAL OF INTERNATIONAL LAW**
(forthcoming 2025)

Ronald A. Brand

Abstract

In this article, written for the festschrift honoring Professor David P. Stewart at Georgetown Law Center, I recommend that the United States exercise the opportunity to take an Article 22 declaration when ratifying the 2005 Hague Choice of Court Convention. While both the jurisdiction rules in Chapter II and the recognition and enforcement rules in Chapter III of that Convention are otherwise limited to the narrowly-defined exclusive choice of court agreements, non-exclusive choice of court agreements play a significant role in international commercial relationships. Article 22 offers the opportunity to create a regime of states that will apply the judgments recognition rules of the Convention to judgments from courts in which jurisdiction was based on a non-exclusive choice of court agreement. This avoids having non-exclusive agreements considered in the court of origin under the Convention, thus preventing the need for rules dealing with parallel litigation but furthers the basic thrust of the Convention in increasing the recognition and enforcement of judgments under common rules. The recent Swiss Article 22 declaration makes a U.S. declaration particularly valuable. After reviewing the benefits of a declaration, and finding no real disadvantages, I conclude that the U.S. ratification of the Convention should include a declaration opting in to the Article 22 regime for recognition and enforcement of judgments resulting from non-exclusive choice of court agreements.

Key words

jurisdiction; private international law; choice of court; international litigation; international law' treaties; conflicts of law; Hague Conference on Private International Law; comparative law; Hague Convention; international economic law; international trade law

The Case for a US Declaration under Article 22 of the Choice of Court Convention

Ronald A. Brand*

I. Introduction

Professor David P. Stewart has played a role in both my professional life and in the "life" of the 2005 Hague Convention on Choice of Court Agreements. As a lawyer at the Office of the Legal Adviser of the U.S. Department of State he helped shape U.S. positions at the Hague Conference on Private International Law. Outside his day jobs, he led the American Branch of the International Law Association (ABILA) - first as President and then as Chair of the Board of Directors. Most importantly, throughout his career he has shaped the minds and careers of students as an Adjunct Professor and then as a Professor of Practice at Georgetown Law Center. I hope that my words which follow serve in some small way to honor the many contributions Professor Stewart has made to the law, legal education, and individual lives.

The Hague Convention on Choice of Court Agreements (COCA or the Convention),[1] completed under the auspices of the Hague Conference on Private International Law, was the first treaty concluded in a process that began in 1992 to consider international rules on jurisdiction and the recognition and enforcement of foreign

*Chancellor Mark A. Nordenberg University Professor and Academic Director, Center for International Legal Education, University of Pittsburgh School of Law.

[1]Convention of 30 June 2005 on Choice of Court Agreements ("Hague Convention" or "Convention"), available at https://www.hcch.net/en/instruments/specialised-sections/choice-of-court.

judgments.[2] Like other multilateral treaties, neither the process of negotiation nor the process of widespread ratification and accession is a simple or speedy matter. For the United States, COCA was signed on January 19, 2009,[3] creating a non-binding obligation to move from signature to ratification. In many ways, the process of internal negotiation of the method of ratification and implementation of COCA has been at least as difficult as the external negotiation of the Convention text. Nonetheless, there are reasons for optimism that the United States may soon ratify and implement COCA, becoming a part of a global regime both for honoring private party choice of court as a forum for dispute settlement and for honoring the judgments that result when parties choose a court.[4]

The Convention rules are designed to apply to cases in which jurisdiction is based on an exclusive choice of court agreement. This makes the Article 3 definition of an exclusive choice of court agreement particularly important. It also leaves out a significant set of choice of court agreements for which judgments may still result from jurisdiction consistent with the parties' agreement (non-exclusive choice of court agreements). Article 22 provides that Contracting States may declare into an optional regime for the recognition and enforcement of judgments resulting from the set of judgments not otherwise covered by the Convention. Switzerland has become the first Contracting State to declare its commitment to the Article 22 regime. The United States has an opportunity to enhance

---

[2]For a more extensive discussion of the Convention, its history, and its text, see RONALD A. BRAND AND PAUL HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS (Cambridge University Press 2008).

[3]https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

[4]The Secretary of State's Advisory Committee on Private International law met on October 24-25, 2024, to consider draft text of implementing legislation for the Convention. Fed. Reg. Doc. 2024-20151, Filed 9-5-24.

the effect of the Convention by joining Switzerland and perhaps leading others to do the same.

In this article, I begin with a brief introduction to the Choice of Court Convention, its history, and its rules. I then focus in particular on Article 22, and the possible declaration into a secondary regime for judgments recognition and enforcement. I follow with discussion of the potential benefits to the United States of filing an Article 22 declaration with its instrument of ratification of the Convention. The Swiss Article 22 declaration, filed in September 2024, highlights some of the benefits that might result from a U.S. Article 22 declaration. I conclude that the U.S. ratification of COCA should include a declaration opting in to the Article 22 regime for recognition and enforcement of judgments resulting from non-exclusive choice of court agreements.

II. The History, Structure, and Rules of the Choice of Court Convention[5]

[5]This section builds on (and borrows from) the author's prior publications, including BRAND AND HERRUP, *supra* note 2; Ronald A. Brand, *The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?* 82 U. PITT. L.R. 847 (2021); Ronald A. Brand, *The 2005 Choice of Court Convention – the triumph of party autonomy*, THE ELGAR COMPANION TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 296 (Thomas John, Rishi Gulati, and Ben Kohler, eds. 2020); Ronald A. Brand, *Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead*, 67 NETH. INTL L.R. 3 (2020); Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 COL. J. TRANSNATL L. 276 (2017); Ronald A. Brand, Understanding Judgments Recognition, 40 N. CAROLINA J. INTERNATL L. AND COM. REG. 877 (2015); Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L.R. 491 (2013); and Ronald A. Brand, *Introductory Note to the 2005 Hague Convention on Choice of Court Agreements*, 44 I.L.M. 1291 (2005).

The 2005 Hague Convention on Choice of Court Agreements was concluded as part of the Final Act of the Twentieth Session of the Hague Conference on Private International Law on June 30, 2005.[6] The process leading to the conclusion of the Convention began in 1992 when the United States proposed that the Hague Conference take up the negotiation of a multilateral convention on the recognition and enforcement of judgments.[7] Negotiations throughout the 1990's proved that such an expansive project was far too ambitious on a global basis, leading to a more focused look at the single jurisdictional basis of consent expressed in a choice of court agreement.[8] Such a convention would also serve to provide a counterpart to the successful New York Arbitration Convention,[9] the rules of which provide for honoring both an agreement to arbitrate in international contracts and for honoring the resulting arbitral award.[10]

---

[6]The Final Act also contained amendments to the Hague Conference Statute that allows the European Union, and similar Regional Economic Integration Organizations, to become members of the Hague Conference and parties to its conventions.

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

[8]Hague Conference on Private International Law, Commission II, Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6--20 June 2001, Interim Text, available at https://www.hcch.net/en/publications-and-studies/details4/?pid=3499&dtid=35.

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

[10]*Id*. arts. II and III.

Through the normal Hague Conference process of a Working Group with a limited number of participants, followed by Special Commission meetings of the Hague Conference membership, the Convention on Choice of Court Agreements was completed at a Diplomatic Conference in June of 2005.[11]

With a stated goal to "promote international trade and investment through enhanced judicial co-operation,"[12] the Choice of Court Convention provides rules for agreements that designate a single court, or the courts of a single country, for resolution of disputes ("exclusive choice of court agreements").[13] It does not apply to agreements that include a consumer as a party,[14] nor does it apply to purely domestic agreements.[15]

Articles 5, 6, and 8 of the Convention set out three basic rules. Article 5 provides that the court chosen by the parties in an exclusive choice of court agreement has exclusive jurisdiction to hear matters within the scope of the choice of court agreement. Article 6 provides that, when an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and must decline to hear the case. Article 8 provides that a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement must be recognized and enforced in the courts of other Contracting States. Article 9 then provides the limited set of bases that can justify non-recognition of a judgment.

Most important for this discussion, through a declaration process, the Convention offers an optional fourth rule. Article 22

---

[11]https://www.hcch.net/en/publications-and-studies/details4/?pid=4968.

[12]Hague Convention, *supra* note 1, preamble.

[13]*Id.*, art. 3.

[14]*Id.* art. 2(1)(a).

[15]*Id.* art. 1(2). Other exclusions from scope are included in Article 2.

provides that Contracting States may declare reciprocally that their courts will recognize and enforce judgments given by courts of other declaring Contracting States designated in a non-exclusive choice of court agreement.

While the Convention may be seen as providing a basic rule of jurisdiction (courts will honor exclusive choice of court agreements) and a basic rule of judgments recognition (courts will honor judgments resulting from jurisdiction based on an exclusive choice of court agreement), setting out specific jurisdictional rules when the choice of court agreement involved was not exclusive came to be a difficult process. Such a clause–precisely because it is not exclusive to a single court–can allow the same case to be brought in the courts of multiple States, thus necessitating rules dealing with the possibility of parallel proceedings (or at least related actions or claims even if all aspects of the cases are not fully "parallel"). Thus, Article 22 was created in response to discussions during the negotiations indicating that a significant number of industries rely on non-exclusive choice of court agreements. The inclusion of Article 22 provides Contracting States with the opportunity, through the exercise of a declaration, to opt in to an additional regime for judgments recognition that has effect after a judgment is rendered by a court that has exercised jurisdiction based on a non-exclusive choice of court agreement.

While the New York Arbitration Convention now results in obligations to recognize and enforce both arbitration agreements and arbitral awards in over 170 countries,[16] no such arrangement currently provides similar benefits for U.S. parties to international transactions. Ratification of the Choice of Court Convention by the United States will provide parties entering into international trade contracts with a more balanced choice between arbitration and litigation.

---

[16]https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

III. The Role of Article 22 in the Convention

Article 1(1) of the Convention provides that the Convention "shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters."[17] Thus, by its terms, it is limited in both Chapter II (the jurisdictional provisions) and Chapter III (the recognition and enforcement provisions) to cases involving exclusive choice of court agreements. This makes the definition of an exclusive choice of court agreement key to application of the Convention.

Article 3(a) defines an exclusive choice of court agreement as

> an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.[18]

Paragraph (c) provides form requirements, stating that an exclusive choice of court agreement must be "concluded and documented (i) in writing; or (ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference."[19]

The definition of an exclusive choice of court agreement leaves out any choice of court agreement that does not provide for dispute settlement limited to a single court or the courts of a single Contracting State. Thus, asymmetrical agreements that allow party A

---

[17] *Id*. art. 1(1).

[18] *Id*. art. 3(a).

[19] *Id.* art. 3(c). Article 3(b) creates a "deeming" rule, providing that "a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise."

to bring suit in the courts of party B's home state and party B to bring suit in the courts of party A's home state are not covered by the Convention. Nor are many other types of choice of court agreements that may provide options based on which party is bringing suit and the subject matter of the claim.[20]

There is a good reason for the narrow definition of an exclusive choice of court agreement in the Convention. From the early negotiations for a more comprehensive convention on jurisdiction and the recognition and enforcement of judgments, one of the most difficult issues was reconciling the divergent rules that apply to proceedings on the same matter brought in multiple courts, or for which jurisdiction exists in multiple judicial systems. The

---

[20]An example of an asymmetrical choice of court clause can be found in *Etihad Airways PJSC v Flöther*, [2020] EWCA Civ 1707, where the UK Court of Appeal upheld a lower court decision that the clause involved was exclusive for purposes of Article 31(2) of the Brussels I Recast Regulation ( ), but suggested (without deciding) that it would not be exclusive under the Choice of Court Convention. That clause read as follows:

> 33.1 Jurisdiction
>
> 33.1.1 The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to non-contractual obligations arising from or in connection with this Agreement, or a dispute regarding the existence, validity or termination of this Agreement) (a "Dispute").
>
> 33.1.2 The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.
>
> 33.1.3 This Clause 33 is for the benefit of the Lender only. As a result, the Lender shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Lender may take concurrent proceedings in any number of jurisdictions.

traditional civil law approach to such matters provides for a strict *lis pendens* rule that requires all courts other than the court first seised to dismiss or suspend proceedings in favor of the court first seised. That rule has obvious problems in creating a race to the courthouse, thus favoring the party most able to have legal counsel move quickly when a dispute arises. The traditional common law approach to parallel proceedings is to allow the proceedings to move forward in tandem but give effect to the first to reach judgment. A common law court may, however, exercise discretion under the doctrine of *forum non conveniens* to stay or dismiss proceedings in favor of proceedings in a more appropriate court. Such an approach also has obvious problems of inefficiency and unpredictability. Neither the traditional civil law *lis pendens* rule nor the traditional common law *forum non conveniens* doctrine provides good results in all circumstances and the negotiations failed to find a fully satisfactory solution to those differences.[21]

---

[21]The Interim Text of a comprehensive jurisdiction and judgments convention, denoting the status of negotiations after a Diplomatic Conference in June 2001, included an article that incorporated an attempted compromise between the *lis pendens* and *forum non conveniens* approaches:

> Article 21 Lis pendens
>
> 1. When the same parties are engaged in proceedings in courts of different ContractingStates and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under Articles [white list]128 [or under a rule of national law which is consistent with these articles]129 and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 [, 11]130 or 12.
>
> 2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court

first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised –

a) when the document instituting the proceedings or an equivalent document is lodged with the court; or

b) if such document has to be served before being lodged with the court, when it is

received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised –

a) the provisions of paragraphs 1 to 5 above shall not apply to the court second

seised; and

b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised

Without a workable rule on parallel proceedings, it is possible that a non-exclusive choice of court agreement can result in proceedings in the courts of more than one state authorized by the agreement. Thus, including such agreements within the scope of the Convention would have required more complex jurisdictional rules; meaning either a more complicated Convention or an inability to reach agreement on any jurisdictional framework.[22] Thus, the narrower focus on exclusive choice of court agreements was selected. That is not a bad result; it goes a long way to bringing choice of court agreement law in line with arbitration agreement law under the New York Convention, thus presenting contract drafters with a more balanced choice between judicial dispute settlement and arbitration.

While it was not possible for the Choice of Court Convention to deal with broader types of choice of court agreements in its jurisdictional rules, it was possible to provide opportunities for recognition and enforcement of judgments after they are issued–if those judgments resulted from proper exercise of jurisdiction based on party consent demonstrated in a non-exclusive choice of court agreement. Article 22 provides that opportunity. It offers a secondary judgments recognition regime based on the basic Convention acknowledgment of party autonomy in choice of forum, while at the

---

> is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001, Interim Text, art. 21, *available at* https://assets.hcch.net/docs/e172ab52-e2de-4e40-9051-11aee7c7be67.pdf. The text of this provision demonstrates the complexity of the problem, a matter now being given further consideration in a Working Group focused on preparation of a possible text for a convention on parallel proceedings and on related actions and claims. *See* https://www.hcch.net/en/projects/legislative-projects/jurisdiction.

[22]*See, e.g.*, BRAND AND HERRUP, *supra* note 2 at 154 ("[t]here was a concern on the part of some that extension of the Convention to non-exclusive choice of court agreements would produce an increase in parallel proceedings and inconsistent results").

same time avoiding the complexities of addressing non-exclusive choice of court agreements at the point where the jurisdiction of the court of origin must be considered.

IV. Considering an Article 22 Declaration

A. The Basics of Article 22

Article 22 reads as follows:

> Article 22 Reciprocal declarations on non-exclusive choice of court agreements
>
> 1. A Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts in one or more Contracting States (a non-exclusive choice of court agreement).
>
> 2. Where recognition or enforcement of a judgment given in a Contracting State that has made such a declaration is sought in another Contracting State that has made such a declaration, the judgment shall be recognised and enforced under this Convention, if -
>
> a) the court of origin was designated in a non-exclusive choice of court agreement;
>
> b) there exists neither a judgment given by any other court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, nor a proceeding pending between the same parties in any other such court on the same cause of action; and
>
> c) the court of origin was the court first seised.

During the negotiation of the Choice of Court Convention, discussions with various constituencies from a number of States

indicated that "choice of court agreements which do not meet the Convention definition under Article 3 are useful–and are used–in a wide variety of contexts,"[23] and that "restriction of the recognition and enforcement provisions of the Convention to exclusive choice of court agreements led to overly narrow results."[24] These factors led to the inclusion of Article 22 as an optional rule dealing only with the recognition and enforcement of judgments, and not with the complexities that would have resulted by including non-exclusive choice of court agreements in the scope of the jurisdiction chapter.

Article 22(1) binds the declaring state to recognize and enforce a judgment

> given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that . . . designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts in one or more Contracting States (a non-exclusive choice of court agreement).

Thus, while the language of Article 3(a) defining an exclusive choice of court agreement limits that category to the courts of one Contracting State, Article 22(1) provides for designation of "a court or courts" but allows the designation to be of courts in more than one State so long as each is a Contracting State.

While a non-exclusive choice of court agreement may offer choice between or among courts of other Contracting States, the obligation to recognize and enforce a resulting judgment under Article 22 extends only to judgments from other Contracting States that have made an Article 22 declaration.[25] When that requirement is met, four specific conditions must be met:

---

[23]BRAND AND HERRUP, *supra* note 2 at 153 (2008). *See also* the discussion of *Etihad Airways PJSC v Flöther*, [2020] EWCA Civ 1707, *supra* note 20.

[24]*Id*. at 154.

[25]Choice of Court Convention, art. 22(2).

1) the court of origin was designated in a non-exclusive choice of court agreement; and

2) there exists no other judgment given by a court before which proceedings could be brought under the non-exclusive choice of court agreement; and

3) there are no proceedings pending between the same parties on the same causes of action in a court before which proceedings could be brought under the non-exclusive choice of court agreement; and

4) the court of origin was the court first seised (in the event either of existence of another judgment or pending proceedings, above).[26]

These conditions do not prohibit recognition and enforcement under national law of judgments not meeting all of the Article 22 conditions, but when met they create the obligation for recognition and enforcement of the judgment under the Convention.

B. Advantages of a U.S. Article 22 Declaration

Once the Article 22 requirements are met, the requisite judgment "shall be recognised and enforced under [the] Convention."[27] Thus, the special regime created for recognition and enforcement of judgments resulting from cases brought on the basis of a non-exclusive choice of court agreement brings with it the other rules of Chapter III of the Convention on the recognition and enforcement of judgments. Under Article 8(2), there can be no review on the merits. The Article 9 discretionary grounds for non-recognition all apply the same as to a judgment given on the basis of an exclusive choice of court agreement. And the Article 10 rules on preliminary questions, the Article 11 rules on damages, the Article 12 rules on judicial settlements, the Article 13 rules on documents to be produced, the Article 14 rules on procedure, and the Article 15 rule of severability, all apply.

---

[26]Brand and Herrup, *supra* note 2, at 156.

[27]Convention on Choice of Court Agreements, art. 22(2).

Other provisions of the Convention allow specific declarations. Article 19 allows a declaration that a State will not open its courts through party agreement to cases having no connection with that State. Article 20 allows a declaration that a State will not recognize and enforce a judgment if the parties and all elements of the case were domestic to the recognizing State. Article 21 allows a declaration that a State will exclude certain subject matter cases from the Convention for the courts of that State (on a reciprocal basis).

Unlike the declarations in Articles 19 through 21 that are limited, unilateral "opt out" provisions that are available to individual States, Article 22 is an "opt in" provision allowing a declaration that then connects the declaring State with the group of other declaring States for additional judgments recognition benefits.

1. Timing Issues and Article 16: Planning Now for Judgment Recognition Later

One rule that applies to the recognition and enforcement of judgments in cases involving exclusive choice of court agreements does not apply to the recognition and enforcement of judgments involving non-exclusive choice of court agreements. Article 16(1) provides a timing rule, stating that "[t]his Convention shall apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court." By its terms, this provision is limited to exclusive choice of court agreements. Thus, those who draft contracts with exclusive choice of court agreements prior to the entry into force of the Convention in the relevant States generally need not be concerned with–and may not obtain the benefits of–the Convention rules. But, those who draft non-exclusive choice of court agreements may plan for the possibility of Convention application if an Article 22 regime for the circulation of judgments materializes.

Because the timing rule of Article 16(1) applies only to exclusive choice of court agreements, and provides that such agreements are governed by the Convention only if concluded after the date of entry into force of the Convention in the State of the chosen court, if an action is brought in the court chosen in a non-exclusive choice of court agreement, that proceeding is not subject to the Article 16(1) timing limitation. It is, however, subject to the

article 16(2) limitation that prevents the application of the Convention "to proceedings instituted before its entry into force for the State of the court seised." Thus, Article 22 will apply to proceedings brought to recognize and enforce the resulting judgment if those proceedings are brought after the Convention has entered into force in both the Contracting State from which the judgment originates and the Contracting State in which recognition and enforcement is sought, so long as both of these Contracting States have filed an Article 22 declaration. The application of the recognition and enforcement provisions in that circumstance will not hinge on whether the Convention was in effect when the non-exclusive choice of court agreement was concluded.

This absence of a normal Convention limitation on the working of Article 22 has a clear logic. As already noted, unlike other authorized declarations, such as those found in Articles 19, 20, and 21, all of which serve to allow a state to limit the application of the Convention, an Article 22 declaration serves to allow a group of states to expand the application of the Convention in their courts by expanding the scope of Chapter III of the Convention. In the same way, the Article 32(5) rules that place timing limitations on declarations that limit the application of the Convention do not place timing limitations on declarations that expand the application of the Convention. Moreover, Articles 19, 20, and 21 provide for declarations that affect the application of the rules found in both Chapter II (jurisdiction) and Chapter III (recognition and enforcement). Article 22 declarations affect only rules found in Chapter III. Nothing in the Chapter III rules is dependent on the date of conclusion of the choice of court agreement under Article 16(1).

2. Providing for Future Evolution of International Trade

During the negotiation of the Choice of Court Convention, consultation with various constituencies indicated that non-exclusive choice of court agreements are an important part of some trade groups, and that the circulation of judgments from cases brought on the basis of those agreements can be valuable. In particular, the banking industry indicated a rather common use of asymmetrical

choice of court agreements that allow each party to sue the other in the defendant's home jurisdiction.[28] There are obvious advantages to such agreements, and no good reason not to provide for the recognition and enforcement of the judgments that result when the case has been decided by a single court after party agreement to jurisdiction in that court.

As global commerce becomes more complex, and as that commerce is done in new ways that may not yet be imagined, the exercise of party autonomy to choose a court for dispute settlement can become more complex as well. An Article 22 declaration serves to recognize that not all such complexities can be predicted, but that they can be provided for through a reasonable level of flexibility and extension of Convention rules.

The existence of practice using non-exclusive choice of court agreements demonstrates that trade is neither done in a singular box of legal relationships nor locked-in to a manner in which it will necessarily always be done in the future. The expansion of the Chapter III judgments recognition provisions of the Choice of Court Convention to application in a broader set of consensual selections of a court for the settlement of disputes seems only to be a positive development that allows a treaty to serve not just the present but the future as well. The use of the Article 22 declaration is a path to that positive development.

3. The September 2024 Swiss Declaration

On September 18, 2024, Switzerland filed its instrument of accession to the Choice of Court Convention.[29] Under Article 31, the

---

[28]For an example of such use in the banking industry, see the discussion of *Etihad Airways PJSC v Flöther*, [2020] EWCA Civ 1707, *supra* note 20.

[29]Hague Conference on Private International Law, 37: Convention of 30 June 2005 on Choice of Court Agreements, Status Table, *available at* https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

Convention entered into force for Switzerland on January 1, 2025. While 34 other States and one Regional Economic International Organization (the European Union) had become parties to the Convention prior to the Swiss accession, Switzerland was the first to file an Article 22 declaration.[30]

The Swiss declaration opens the door for Article 22 relationships that can be valuable to U.S. parties to international commercial relationships. As already noted, the banking industry is one that does make use of non-exclusive choice of court agreements on a significant level. Switzerland is a State with an important banking industry.[31] Even if the Article 22 regime would include only the United States and Switzerland, such a bilateral arrangement on recognition and enforcement of judgments could have significant value to U.S. parties to transnational commerce. Moreover, if the United States joins Switzerland in the Article 22 judgments recognition regime, that may make future (and maybe even some present) Contracting States likely to follow their lead.

---

[30]The Swiss declaration (translated on the Hague Conference website to English) states:

> In accordance with Article 22, paragraph 1, Switzerland declares that its courts will recognise and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph c), and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement).

https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1537&disp=resdn.

[31]*Supra* note 20.

4. The Uncertainty of Parallel Effect of the 2019 Judgments Convention: Avoiding Unnecessary Litigation Frustration

The Choice of Court Convention was completed when no other Hague Conventions were effectively available for the recognition and enforcement of foreign judgments.[32] That has changed with the completion of the 2019 Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters.[33] The Judgments Convention specifically covers the possibility of recognition and enforcement of judgments based on non-exclusive choice of court agreements.[34] Thus, a global regime in which many States are party to both the Choice of Court Convention and the Judgments Convention would seem to make any system under Article 22 of the Choice of Court Convention redundant and unnecessary.

---

[32]The Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, an earlier Hague Conference product, had only Albania, Cyprus, Kuwait, The Netherlands, and Portugal as Contracting States, and required separate bilateral agreements that prevented it from having any practical effect. https://www.hcch.net/en/instruments/conventions/status-table/?cid=78.

[33]https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments.

[34]Article 5(1)(m) of the Judgments Convention provides for the circulation of judgments under the Convention when "the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement." For a discussion of the complexity added to the Judgments Convention by Article 5(1), see RONALD A. BRAND, MICHAEL S. COFFEE, AND PAUL HERRUP, THE 2019 HAGUE JUDGMENTS CONVENTION, 105 *et. seq.* (Oxford University Press, 2023).

There are three problems with the assumption that States will make the two Conventions a sort of seamless web for purposes of judgments recognition in cases involving all types of choice of court agreements. The first is that, while some see the two Conventions as part of a package that all States should join, they remain free-standing Conventions without any requirement that joining one necessitates joining the other. Switzerland has demonstrated this by joining only the Choice of Court Convention while showing no intention to join the Judgments Convention any time soon.[35] Thus, practice already demonstrates that an assumption of a common package of Conventions is not well-founded.

The second problem requires an understanding of how a judgment based on a non-exclusive choice of court agreement would be recognized and enforced under each of the two Conventions. The Judgments Convention rules begin with Article 4 which states that a "judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter [I]." Article 5(1) then provides a list of thirteen specific connecting factors. If one of those connections is present, the resulting judgment is eligible for circulation under the Convention, subject to the Article 7 grounds for non-recognition. This seems to provide a workable path, but, while the Judgments Convention has a similar scope to the Choice of Court Convention, not all coverage is the same. For example, the Judgments Convention does not exclude consumer matters from scope.

Most important in considering how the two Conventions might work in tandem is the Judgments Convention gateway provision listing connecting factors for purposes of circulation of judgments based on non-exclusive choice of court agreements. Article 5(1)(m), the last of the list of connecting factor tests, appears on its face to dove-tail with the Choice of Court Convention. It provides:

---

[35] *See supra* note 29 and accompanying text.

> 1. A judgment is eligible for recognition and enforcement if one of the following requirements is met – . . .
>
> (m) the judgment was given by a court designated in an agreement concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference, other than an exclusive choice of court agreement.

For the purposes of this sub-paragraph, an "exclusive choice of court agreement" means an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one State or one or more specific courts of one State to the exclusion of the jurisdiction.

This provision is designed to provide for the recognition and enforcement of agreements other than exclusive choice of court agreements (*i.e.,* non-exclusive choice of court agreements), but does so by negative definition. This suggests an assumption that any State joining the Judgments Convention will also be a party to the Choice of Court Convention. Without that, the judgments most easily accepted from another State's courts–those in which exclusive jurisdiction was based on binding, pre-dispute agreement of the parties–are left in the least favorable position. While the Swiss decision to join the Choice of Court Convention but not the Judgments Convention does not create this problem, it demonstrates that a State may well *not* join both and sets up the possibility of a reverse decision for other States in the future.

The third problem of Convention relationships is the one that could prove to have the most practical importance. It is the problem of definitions. The use of the Choice of Court Convention Article 3 definition of exclusive choice of court agreement in reverse in Article 5(1)(m) of the Judgments Convention would seem to create a perfect fit between the two Conventions. As already noted, however, by omitting exclusive choice of court agreements as a gateway connecting factor in Article 5(1), there is no Judgments Convention path for recognition and enforcement of a judgment based on an

exclusive choice of court agreement. Thus, even if a State is a party to both Conventions, the definition still matters.

Only a judgment based on a non-exclusive choice of court agreement is subject to recognition and enforcement under the Judgments Convention, and–without an Article 22 declaration–only a judgment based on an exclusive choice of court agreement is subject to recognition and enforcement under the Choice of Court Convention. This means that the initial question for either Convention is "what type of choice of court agreement do we have in the case in question?" This sets up the possibility of unnecessary litigation of definitional issues and the opportunity for a party to cause delay, added expense, and frustration of the purpose of both Conventions.

With an Article 22 declaration, and with enough other states also declaring into the Article 22 regime, the opportunity for definitional frustration is avoided. Judgments based on either exclusive or non-exclusive choice of court agreements would be subject to recognition and enforcement under the Choice of Court Convention in the Contracting States opting in to the Article 22 regime. This would avoid the complexity of the Article 5(1) gateway function in the Judgments Convention, and result in a streamlined approach to the entire group of judgments based on choice of court agreements of any type. It would also establish a clear distinction between a Convention focused on jurisdiction based on consent of the parties and a Convention focused on other connections to the court of origin. Moreover, the result would establish more clearly that the Choice of Court Convention is the litigation counterpart to the New York Convention for arbitral awards. Opportunities for confusion, frustration of purpose, and facetious litigation tactics would be reduced.

Without the Article 22 declaration, it is possible that a case proceeds in the court of origin without a party challenging jurisdiction simply because there is a choice of court agreement that leads to that court and any contest would be unsuccessful. Even so, when recognition of a resulting judgment is sought in another requested State court the losing party could claim that the judgment does not fall under the Choice of Court Convention when no Article 22 declaration regime exists. At the minimum, a court would have to

determine the type of choice of court agreement in order to decide whether the matter falls under the Choice of Court Convention or the Judgments Convention. That effort would be unnecessary with an Article 22 declaration regime in place so long as the judgment is from a court in a Contracting State that has declared into that regime.

The Judgments Convention does provide acknowledgment of the role of choice of court agreements generally in the list of grounds for non-recognition of judgments. Article 7(1)(d) authorizes refusal of recognition or enforcement if "the proceedings in the court of origin were contrary to an agreement . . . under which the dispute in question was to be determined in a court of a State other than the State of origin." Thus, it provides a path to *non-recognition* of a judgment rendered *in breach of* a choice of court agreement; it just does not provide for *recognition* in all cases in which a judgment was rendered *in compliance with* a choice of court agreement.

5. Questions of Business and Attorney Confusion

One might suggest that a U.S. declaration in to an Article 22 recognition and enforcement regime would add complexity, especially when the United States ratifies the Judgments Convention at the same time as it ratifies the Choice of Court Convention. But the better assumption is that it would reduce complexity and confusion.

As already noted, the ability to recognize and enforcement a judgment resulting from any choice of court agreement (exclusive or non-exclusive) under COCA removes the complexity of definitional confusion. Moreover, COCA and Judgments really have different purposes and fill different roles. The Choice of Court Convention is, at base, a transaction planning convention. It applies *only* if there is planning through mutual consent to dispute settlement in a particular court or courts. The main focus of the Judgments Convention is at the litigation stage. It applies *only if* a judgment already exists. While the Judgments Convention may be important to *litigation planning* (and may affect the choice of court once a dispute has already arisen), it does not play the same role as COCA in transaction planning/contract drafting.

As already noted, an Article 22 declaration actually adds to transaction planning possibilities, allowing parties to an international

contract to position themselves even before the Convention is in effect in the State of a chosen court for the possibility that greater recognition and enforcement effect may come through future ratifications with Article 22 declarations.

The mere existence of an additional path to recognition and enforcement of a judgment does not add complexity so much as opportunity–opportunity for the result (the cross-border recognition and enforcement of judgments) that is the fundamental purpose of both the Choice of Court and Judgments Conventions. While both Conventions have rules for the recognition and enforcement of judgments resulting from jurisdiction based on a non-exclusive choice of court agreement, Article 23(1) of the Judgments Convention makes clear that the Judgments Convention "shall not affect the application" of the rules of the Choice of Court Convention, including the recognition and enforcement regime that results from multiple declarations by Contracting States under Article 22. That provision on "Relationship with other international instruments" helps avoid both complexity and confusion.

Vl. Conclusion

For those of us who were involved in negotiating the Hague Choice of Court and Judgments Conventions, it is a relief to see the real possibility of U.S. ratification and implementation of each of those Conventions. These Conventions have the potential to provide great benefit to U.S. parties engaging in international commerce at both the transaction planning and dispute resolution stages of a relationship life cycle. The Choice of Court Convention will provide transaction planning opportunities that place litigation on a more balanced playing field with arbitration. This will allow for more reasoned consideration of the forum chosen, whether through choice of court or an arbitration agreement through the balanced consideration of the real benefits and limitations of each type of choice of forum.

The United States, in ratifying the Choice of Court Convention, should exercise the opportunity to opt in by declaration to the Article 22 regime for recognition and enforcement of judgments based on non-exclusive choice of court agreements. Such

a declaration offers a number of advantages, with no apparent disadvantages. Switzerland has led the way through its Article 22 declaration, and the United States has the opportunity to demonstrate the benefits of such a declaration to others as it joins these two important Hague Conventions.