THE CASE FOR A U.S. DECLARATION UNDER ARTICLE 22 OF THE CHOICE OF COURT CONVENTION

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ABSTRACT

In this Article, written for the Festschrift honoring Professor David P. Stewart at Georgetown University 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.

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I. INTRODUCTION

Professor David P. Stewart has played a role in both my professional life and 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, he has shaped the minds and careers of students as an Adjunct Professor and then as a Professor from Practice at Georgetown University Law Center throughout his career. I hope that my words below serve in some small way to honor the many contributions Professor Stewart has made to the law, legal education, and individual lives.

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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 judgments.[2] Like other multilateral treaties, neither the process of COCA's negotiation nor that of its widespread ratification and accession is a simple or speedy matter. For the United States, COCA was signed on January 19, 2009, creating a nonbinding obligation to move from signature to ratification.[3] 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

1. Convention on Choice of Court Agreements, June 30, 2005, 3110 U.N.T.S. 313, https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf [hereinafter *Hague Convention*].

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

3. *Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONF. ON PRIV. INT'L L. (Mar. 13, 2025), https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

negotiation of the Convention's text.[4] Nonetheless, there are reasons for optimism that the United States may soon ratify and implement COCA,[5] becoming part of a global regime both for honoring private party choice of court for dispute settlement, and for honoring the resulting judgment given by a chosen court.

The Convention rules are designed to apply to cases where 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. However, this framework excludes a significant category of agreements—non-exclusive choice of court agreements—for which judgments may still result from jurisdiction consistent with the parties' agreement. As a supplemental measure, Article 22 provides that Contracting States may declare into an optional regime for the recognition and enforcement of judgments resulting from judgments not otherwise covered by the Convention.[6] Switzerland has become the first Contracting State to file an Article 22 declaration accepting the optional regime.[7] The United States now has the opportunity to enhance the effect of the Convention by joining Switzerland and perhaps leading others to do the same.

In this Article, I begin Part II with a brief introduction to the Choice of Court Convention, its history, and its rules. In Part III, I focus on Article 22 and the possible declaration into a secondary regime for

4. *See* Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 COLUM. J. TRANSNAT'L L. 277, 331-341 (2017) for a discussion of the internal process of COCA ratification and implementation; Ronald A. Brand, *Implementing the 2005 Hague Convention: The EU Magnet and the US Centrifuge*, LIBER AMICORUM ALEGRIA BORRÁS 267 (Joaquim Forner Delaygua, Cristina Gonzalez Beilfuss & Ramon Vinas Farre, eds., Marcial Pons 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2288708 (discussing the author's involvement in the process of negotiating with the European Union on behalf of the United States – the external process).

5. 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. U.S. Department of State Advisory Committee on Private International Law: Public meeting on the Convention on Choice of Courts Agreement, the Judgments Convention and the Singapore Convention, 89 Fed. Reg. 72919 (Sep. 6, 2024). The Office of Private International Law of the Office of the Legal Adviser of the U.S. Department of State prepared draft implementing legislation and a draft report to the Senate Foreign Relations Committee in early 2025.

6. *Hague Convention*, *supra* note 1, art. 22.

7. *Declarations Articles: 22*, HAGUE CONF. ON PRIV. INT'L L. (Sept. 18, 2024) [hereinafter *The Swiss Declaration*] https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1537&disp=resdn. ("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.") (translation by Hague Conference).

judgments recognition and enforcement. I follow with discussion in Part IV 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 these benefits, including an enhanced judgments recognition regime with countries particularly important to the financial industry—a regime that would not be reliant on the 2019 Judgments Convention, which states like Switzerland have chosen not to ratify. In Part V, 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[8]

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.[9] The process leading to the conclusion of the Convention began in 1992, when the United States proposed that the Hague Conference initiate negotiation of a multilateral convention on the recognition and enforcement of judgments.[10] Negotiations throughout the 1990s demonstrated that such an expansive project was far too ambitious on a

8. This section builds on (and borrows from) the author's prior publications, including BRAND & 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. REV. 847 (2021); Ronald A. Brand, *The 2005 Choice of Court Convention – the triumph of party autonomy*, *in* THE ELGAR COMPANION TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 298 (Thomas John et al. eds., 2020); Ronald A. Brand, *Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead*, 67 NETH. INT'L. L. REV. 3 (2020); Brand, *Continuing Evolution of U.S. Judgments Recognition*, *supra* note 4; Ronald A. Brand, *Understanding Judgments Recognition*, 40 N. CAROLINA J. INT'L 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. REV. 491 (2013); Ronald A. Brand, *Introductory Note to the 2005 Hague Convention on Choice of Court Agreements*, 44 I.L.M. 1291 (2005).

9. 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. *See* Statute of the Hague Conference on Private International Law, art. 1, July 15, 1955, 2997 U.N.T.S. 220, *available at* https://www.hcch.net/en/instruments/conventions/full-text#_ftn2.

10. Letter from Edwin D. Williamson, Legal Advisor, U.S. Dep't of State, to Georges Droz, Sec'y Gen., The Hague Conference on Priv. Int'l Law (May 5, 1992) (distributed with Hague Conference document L.c. ON No 15 (92)). The letter was accompanied by a study by Professor Arthur T. von Mehren of Harvard University, outlining his thoughts on the possibilities for such a convention (on file with author).

global scale, leading to a narrower focus on the single jurisdictional basis of consent expressed in a choice of court agreement.[11] Such a convention would also provide a counterpart to the successful New York Arbitration Convention, which provides rules for honoring both an agreement to arbitrate in international contracts and the resulting arbitral award.[12] Following the standard Hague Conference procedure—starting with a Working Group with a limited number of participants and expanding to Special Commission meetings of the full Conference membership—the Convention on Choice of Court Agreements was completed at a Diplomatic Conference in June of 2005.[13]

With a stated goal to "promote international trade and investment through enhanced judicial co-operation,"[14] 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 (*i.e.*, exclusive choice of court agreements).[15] It does not apply to agreements that include a consumer as a party,[16] nor does it apply to purely domestic agreements.[17]

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 that agreement.[18] 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.[19] 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.[20]

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11. *See* 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 (Interim Text)*, (June 6-20, 2001), https://www.hcch.net/en/publications-and-studies/details4/?pid=3499&dtid=35.

12. *See generally* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter *New York Convention*]; *see id.* art. II (providing rules for honoring an agreement to arbitrate in international contracts); *see also id.* art. III (specifying rules for honoring arbitral awards).

13. Hague Conference on Private International Law [HCCH], *Proceedings of the Twentieth Session (2005), Tome III, Choice of Court*, 5 (2005), https://www.hcch.net/en/publications-and-studies/details4/?pid=4968.

14. Hague Convention, *supra* note 1, pmbl.

15. *Id.* art. 3.

16. *Id.* art. 2(1)(a).

17. *Id.* art. 1(2). *See also id.* art 2 (listing other exclusions from scope).

18. *Id.* arts. 3, 5.

19. *Id.* art. 6.

20. *Id.* art. 8.

Article 9 then provides the limited set of bases that can justify the non-recognition of a judgment.[21]

Most important for this discussion is the optional fourth rule offered by the Convention in Article 22. Article 22 provides that Contracting States may declare reciprocally that their courts will recognize and enforce judgments given by the courts of other declaring states designated in a non-exclusive choice of court agreement.[22]

While the Convention may be seen as providing a basic rule of jurisdiction (that courts will honor exclusive choice of court agreements) and a basic rule of judgments recognition (that courts will honor judgments resulting from jurisdiction based on an exclusive choice of court agreement), setting out specific jurisdictional rules for non-exclusive choice of court agreements proved difficult. 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.[23] 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 judgment recognition that is effective 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 results in obligations to recognize and enforce both arbitration agreements and arbitral awards in over 170 countries,[24] no such arrangement currently provides similar benefits for U.S. parties to international transactions. Hence, U.S. ratification of the Convention would provide parties entering into international trade contracts with a more balanced choice between arbitration and litigation.

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21. *Id.* art. 9.

22. *Id.* art. 22.

23. *See,* Hague Conference on Private International Law, Proceedings of the Twentieth Session, 14 to 30 June 2025, Tome III, Minutes No 15, 686, *available at* https://assets.hcch.net/docs/8e05df5e-e9fd-4097-a1ab-9b086038db30.pdf.

24. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, UNCITRAL, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited Oct. 17, 2025).

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."[25] Thus, by its terms, Chapter II (the jurisdictional provisions) and Chapter III (the recognition and enforcement provisions) of the Convention are both limited to cases involving exclusive choice of court agreements. This limitation 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.[26]

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."[27]

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. As such, the Convention covers neither asymmetrical agreements that allow party *A* 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, nor other types of agreements that may provide varying options based on which party is bringing suit, or the subject matter of the claim.[28]

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

26. *Id.* art. 3(a).

27. *Id.* art. 3(c). *See also id.* art. 3(b) (creating 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.").

28. An example of an asymmetrical choice of court clause can be found in Etihad Airways PJSC v. Flöther [2020] EWCA (Civ) 1707 (upholding a lower court decision that the clause involved was exclusive for purposes of Article 31(2) of the *Brussels I (Recast) Regulation*, Regulation 1215/2012, 2012 O.J. (L 351) 1 (EU), but suggesting (without deciding) that it would not be exclusive under the Choice of Court Convention which reads:

The Convention's narrow definition of an exclusive choice of court agreement exists for a good reason. From the beginning of negotiations for a more comprehensive convention on jurisdiction and judgments recognition and enforcement, one of the most difficult issues had been 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 traditional civil law approach to such matters is a strict *lis pendens* rule that requires all courts other than the court first seized to dismiss or suspend proceedings in favor of the first court.[29] 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.[30] A common law court may, however, exercise discretion under the doctrine of *forum non conveniens* to stay or dismiss proceedings in favor of a more appropriate court. Such an approach also has obvious problems of inefficiency and unpredictability.[31] 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 dealing with parallel proceedings in the jurisdictional provisions of Chapter II of the Convention.[32]

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.)

29. *See, e.g.*, *Brussels I (Recast) Regulation*, *supra* note 27, art. 29(1) ("Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised [sic] shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised [sic] is established.").

30. For a discussion of the problems of the existing regimes for parallel proceedings in both common law and civil law jurisdictions, see Ronald A. Brand & Paul Herrup, *A Hague Parallel Proceedings Convention: Architecture and Features*, 2 U. CHI. J. INT'L L. ONLINE 1, 5 (2023).

31. *Id.*

32. 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

The Convention's narrower focus on exclusive choice of court agreements was selected given the lack of a workable rule on parallel

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incorporated an attempted compromise between the *lis pendens* and *forum non conveniens* approaches:

> Article 21 Lis pendens
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> 1. When the same parties are engaged in proceedings in courts of different Contracting States 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] [or under a rule of national law which is consistent with these articles] 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] 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 is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

See 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 (Interim Text)*, art. 21 (June 6–20, 2001), https://www.hcch.net/en/publications-and-studies/details4/?pid=3499&dtid=35; The text of the interim 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 Jurisdiction Project*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/projects/legislative-projects/jurisdiction (last visited Oct. 10, 2025).

proceedings. Without such a rule, non-exclusive choice of court agreements can give rise to proceedings in the courts of more than one state authorized by the agreement. Including such non-exclusive agreements in the Convention would have required more complex jurisdictional rules, resulting in either a more complicated Convention, or an inability to reach agreements on any jurisdictional framework.[33] The Convention's narrower focus on exclusive agreements offers a significant benefit by bringing the law of choice of court agreements in line with the law of arbitration agreements under the New York Convention. This presents contract drafters with a more balanced choice between judicial dispute settlement and arbitration. While it was not possible for the 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, provided that these judgments resulted from proper exercise of jurisdiction based on party consent demonstrated in a non-exclusive choice of court agreement. Article 22 provides such an opportunity. It offers a secondary judgments recognition regime based on the basic Convention acknowledgment of party autonomy in choice of forum, while at the same time avoiding the complexities of addressing non-exclusive choice of court agreements when 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).

33. *See, e.g.*, Brand & Herrup, *supra* note 2, at 154 ("There was, however, 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.").

> (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.[34]

During the negotiation of the Convention, consultation with various constituencies 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,"[35] and that "restriction of the recognition and enforcement provisions of the Convention to exclusive choice of court agreements led to overly narrow results."[36] These factors led to the inclusion of Article 22 as an optional rule limited to the recognition and enforcement of judgments, thereby avoiding 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

34. *Hague Convention*, *supra* note 1, art. 22.

35. BRAND & HERRUP, *supra* note 2, at 153; *see also* the discussion of Etihad Airways PJSC v. Flöther [2020] EWCA Civ 1707 (Eng.), *supra* note 28.

36. BRAND & HERRUP, *supra* note 2, at 154.

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 Contracting States that have made a reciprocal Article 22 declaration.[37] When this requirement is satisfied, four specific conditions must be met:

> (1) the court of origin was designated in a non-exclusive choice of court agreement; and
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> (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).[38]

If a judgement does not meet all of these conditions, recognition and enforcement of the judgment under national law is not prohibited in an Article 22 regime. However, when these conditions are met, they create the obligation for recognition and enforcement of the judgment under the Convention among States making an Article 22 declaration.

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."[39] Thus, the special regime created for recognition and enforcement of judgments, resulting from cases brought based on 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

37. *Hague Convention*, *supra* note 1, arts. 3(a), 22(1), 22(2).

38. BRAND & HERRUP, *supra* note 2, at 156.

39. *Hague Convention*, *supra* note 1, art. 22(2).

Article 8(2), there can be no review on the merits.[40] Similarly, 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.[41] And the Article 10 rules on preliminary questions,[42] the Article 11 rules on damages,[43] the Article 12 rules on judicial settlements,[44] the Article 13 rules on documents to be produced,[45] the Article 14 rules on procedure,[46] and the Article 15 rule of severability,[47] all apply.

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.[48] 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.[49] 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.[50]

Unlike the limited, unilateral "opt out" provisions available to individual states in the declarations in Articles 19 through 21, Article 22 is an "opt in" provision that allows a declaring state to connect with other such states for additional judgment recognition benefits. Article 22 offers at least five specific advantages worth consideration as the United States considers ratification and implementation of the Convention.

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

One rule governing recognition and enforcement in cases involving exclusive choice of court agreements does not extend to those involving non-exclusive agreements. Article 16(1) provides a timing rule, which states 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."[51] By its terms, this provision is limited to exclusive

40. *Id.* art. 8(2).
41. *Id.* art. 9.
42. *Id.* art. 10.
43. *Id.* art. 11.
44. *Id.* art. 12.
45. *Id.* art. 13.
46. *Id.* art. 14.
47. *Id.* art. 15.
48. *Id.* art. 19.
49. *Id.* art. 20.
50. *Id.* art. 21.
51. *Id.* art. 16(1).

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 benefit from—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, a proceeding brought in the court chosen named in a non-exclusive choice of court agreement 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."[52] Thus, Article 22 will apply to proceedings 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 Article 22's application has a clear logic. As already noted, unlike other authorized declarations—such as those found in Articles 19, 20, and 21—that serve to allow a state to limit the application of the Convention, an Article 22 declaration allows states to expand the application of the Convention in their courts by expanding the scope of Chapter III of the Convention. Similarly, while the Article 32(5) rules place timing limitations on declarations, such limitations do not apply to declarations that expand the Convention's scope. Moreover, while Articles 19, 20, and 21 allow 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 Convention under Article 16(1). This allows the possibility of inclusion of non-exclusive choice of court agreements entered before the entry into force of the Convention in the relevant Contracting States.

52. *Id.* art. 16(2).

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.[53] 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.[54] 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 the parties have agreed to its jurisdiction.

As global commerce becomes more complex, and as that commerce is done in novel ways yet to be imagined, the exercise of party autonomy in selecting a court for dispute settlement can become more complex. An Article 22 declaration serves to recognize that not all such complexities can be predicted, but 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 into a manner in which it will necessarily always be done in the future. Expanding the Choice of Court Convention's Chapter III judgments recognition provisions to be applied to 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 Article 22 declaration mechanism provides the means to achieve this positive development.

3. The September 2024 Swiss Declaration

On September 18, 2024, Switzerland filed its instrument of accession to the Choice of Court Convention.[55] Under Article 31, the Convention entered into force for Switzerland on January 1, 2025. While 34 other states and one Regional Economic International Organization (the European

53. *See, supra* not 16 regarding asymmetrical non-exclusive choice of court agreements. *See,* Hague Conference on Private International Law, Proceedings of the Twentieth Session, 14 to 30 June 2025, Tome III, Minutes No 15, 686, *available at* https://assets.hcch.net/docs/8e05df5e-e9fd-4097-a1ab-9b086038db30.pdf.

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

55. *Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements*, *supra* note 3.

Union) had become parties to the Convention prior to the Swiss accession, Switzerland was the first to file an Article 22 declaration.[56]

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 and finance industry is one that does make use of non-exclusive choice of court agreements.[57] Switzerland is a state with an important banking industry. 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 for U.S. parties to transnational commerce. Moreover, if the United States joins Switzerland in the Article 22 judgments recognition regime, this move will provide further motivation for future (and maybe even some present) Contracting States to follow the U.S. lead. The existence of a bilateral regime under Article 22 can provide incentive for others to make it a multilateral regime.

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 available for the recognition and enforcement of foreign judgments.[58] That has changed with the completion of the 2019 Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters (Judgments Convention).[59] The Judgments Convention specifically covers the possibility of recognition and enforcement of judgments based on non-exclusive choice of court agreements.[60] Thus, a global regime in which many states are

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56. *The Swiss Declaration*, *supra* note 7.

57. *See* Hague Conference on Private International Law [HCCH], *Proceedings of the Twentieth Session (2005), Tome III, Choice of Court*, 5 (2005), https://www.hcch.net/en/publications-and-studies/details4/?pid=4968.

58. *See Status Table 16: Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Sept. 22, 2022), https://www.hcch.net/en/instruments/conventions/status-table/?cid=78 (showing an earlier Hague Conference product with only Albania, Cyprus, Kuwait, The Netherlands, and Portugal as Contracting States, requiring separate bilateral agreements that prevented it from having any practical effect).

59. *See generally* Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (July 2, 2019), https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf. [hereinafter *The Judgments Convention*].

60. *Id.* art. 5(1)(m) (providing 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

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.

The redundancy of systems under the combination of the two Conventions rests on the assumption that States will make the Conventions a seamless web through common ratification of both Conventions. There are at least three problems with this assumption. The first is that, while those who engage in this assumption see the two Conventions as part of a package that all states should join, the Conventions remain free-standing 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.[61] Thus, practice already demonstrates that an assumption of a common package of Conventions is not well-founded.

The second problem postulates the reverse of the Swiss approach, with a State joining the Judgments Convention but not the Choice of Court Convention. Understanding this 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]."[62] Article 5(1) then provides a list of thirteen specific connecting factors.[63] 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.[64] 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 its scope.

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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 & PAUL HERRUP, THE 2019 HAGUE JUDGMENTS CONVENTION, 105 *et. seq.* (2023).

61. *See Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONF. ON PRIV. INT'L L. (Mar. 13, 2025), https://www.hcch.net/en/instruments/conventions/status-table/?cid=98; *see also Status Table 41: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, HAGUE CONF. ON PRIV. INT'L L., (May 13, 2025), https://www.hcch.net/en/instruments/conventions/status-table/?cid=137.

62. *Judgments Convention, supra* note 59, art. 4.

63. *Id.* art. 5(1).

64. *Id.* art. 7.

Most important in considering how the two Conventions might work in tandem is the Judgments Convention gateway provision, which lists 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:

> 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.[65]

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, predispute 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, the problem of definitions, is one that could produce the most practical importance. Article 5(1)(m) of the Judgments Convention uses language that excludes what is included in the definition of an exclusive choice of

65. *Id.* art. 5(1)(m).

court agreement in Article 3 of the Choice of Court Convention. This would seem to create a perfect fit between the two conventions. However, by omitting exclusive choice of court agreements as a gateway connecting factor in Article 5(1), no Judgments Convention path is left for the recognition and enforcement of judgments 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, a case might proceed in the court of origin with unchallenged jurisdiction, as parties may refrain from contesting jurisdiction due to the choice of court agreement designating that court. 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 if 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 acknowledge 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."[66] 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 into an Article 22 recognition and enforcement regime would add complexity, especially if, as expected, the United States ratifies the Judgments Convention at the same time as it ratifies the Choice of Court Convention. A better assumption is that it would reduce complexity and confusion.

As already noted, the ability to recognize and enforce a judgment resulting from any choice of court agreement (exclusive or non-exclusive) under COCA removes the complexity of definitional confusion. Moreover, COCA and the Judgments Convention essentially serve different purposes and fill distinct 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. By contrast, 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 and contract drafting.

An Article 22 declaration actually expands transaction planning possibilities. The declaration enables parties to an international contract to position themselves—even before the Convention is in effect—in the state of a chosen court, in anticipation of the possibility that greater recognition and enforcement effect may come through future ratifications with Article 22 declarations.

66. *Id.* art. 7(1)(d).

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 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,[67] including the recognition and enforcement regime that results from multiple declarations by Contracting States under Article 22. That provision on "[r]elationship with other international instruments" helps avoid both complexity and confusion.[68]

V. 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 numerous 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.

67. *Id.* art. 23(2).

68. *Hague Convention*, *supra* note 1, art. 26.