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REFLECTION PAPER ON THE RELATIONSHIP BETWEEN THE FUTURE JUDGMENTS CONVENTION AND THE CONVENTION

drawn up by the Permanent Bureau

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DOCUMENT DE RÉFLEXION SUR L'ARTICULATION ENTRE LA FUTURE CONVENTION SUR LES JUGEMENTS ET LA CONVENTION SUR LES ACCORDS D'ÉLECTION DE FOR

établi par le Bureau Permanent

For the attention of the Working Group on the Judgments Project

À l'attention Groupe de travail relatif au projet sur les Jugements

Churchillplein 6b, 2517 JW The Hague - La Haye | The Netherlands - Pays-Bas
+31 (70) 363 3303 +31 (70) 360 4867 | secretariat@hcch.net | www.hcch.net

Asia Pacific Regional Office - Bureau régional Asie-Pacifique | S.A.R. of Hong Kong - R.A.S. de Hong Kong | +852 2858 9912
Latin American Regional Office - Bureau régional Amérique latine | Buenos Aires | Argentina – Argentine | +54 (11) 4310 8372

The development of the future Convention on the recognition and enforcement of foreign judgments in civil and commercial matters (future Judgments Convention) raises the issues of that future instrument's relationship with a number of other international instruments dealing with the same matters, wholly or in part.[1] These instruments include the *Hague Convention of 30 June 2005 on Choice of Court Agreements* ("Choice of Court Convention"). Accordingly, the purpose of this paper is to analyse the relationship between the Choice of Court Convention and the future Judgments Convention in the cases of an exclusive choice of court agreement (B), a non-exclusive choice of court agreement (C), and an exclusive choice of court agreement followed by implied consent to jurisdiction (D). These considerations are preceded by a few introductory observations relating to the scope of each of the two Conventions (A). The draft text developed by the Working Group in February 2015 was used as the basis for this paper (Prel. Doc. No 7B of February 2015; "Preliminary Draft Text"[2]).

A. Introduction

A. I. Scope of the Choice of Court Convention

The scope of the Choice of Court Convention is restricted in principle to exclusive choice of court agreements concluded, in international cases, in civil or commercial matters (Art. 1(1), Choice of Court Convention). That Convention applies to determine the jurisdiction of the courts of Contracting States, and to allow the recognition and enforcement of judgments delivered in one Contracting State in the other Contracting States.

As regards the recognition and enforcement of foreign decisions, Article 8(1) of the Choice of Court Convention lays down a principle that "[a] judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter [*i.e.,* Chapter III]. Recognition or enforcement may be refused only on the grounds specified in this Convention."

As regards the scope of that Convention, it should be noted that:

This reflection paper has been drafted with the assistance of Justin Monsenepwo (Legal Intern) and Florence Guillaume (Professor on secondment). The Permanent Bureau wishes to thank them for their excellent work.

[1] These issues were already analysed extensively at the time of drafting of the Choice of Court Convention. See SCHULZ A., Reflection Paper to assist in the preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Preliminary Document No 19 of August 2002, *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, para. 133 and 134, p. 32; SCHULZ A., The relationship between the Judgments Project and other International Instruments, *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 230-240; SCHULZ A., MURIA TUÑON A., VILLANUEVA MEZA R., The American instruments on private international law. A paper on their relation to a future Hague Convention on exclusive choice of court agreements, Preliminary Document No 31 of June 2005 for the attention of the Twentieth Session of June 2005, *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 318-347.

[2] The abbreviations of instruments and documents mentioned in this note are in line with the Glossary of commonly used terminology (Glossary of commonly used terms and references, prepared by the Permanent Bureau, July 2015).

- Several matters are expressly excluded from its scope (see Art. 2, Choice of Court Convention).
- The Convention relates in principle only to judgments given by a court of a Contracting State designated in an exclusive choice of court agreement. However, each Contracting State may make a Declaration (see Art. 32, Choice of Court Convention) that it will also apply the Convention for the recognition and enforcement of judgments given by a court of a Contracting State designated in a non-exclusive choice of court agreement. But this option to extend the scope of the Convention applies only to a situation clearly delimited by Article 22, that is a State may agree to recognise and enforce a judgment given by a court of another Contracting State chosen by the parties in a non-exclusive choice of court agreement, provided that the State of origin of the decision made the same Declaration for the purposes of Article 22. Accordingly, on the basis of the reciprocity principle, the Convention may not apply in the absence of such a Declaration by the State of origin of the decision and the requested State to recognise and enforce the decision if the jurisdiction of the court of origin is based on a non-exclusive choice of court agreement.
- The Choice of Court Convention applies only to international matters. As regards the recognition and enforcement of a decision, the situation is international "where recognition or enforcement of a foreign judgment is sought" (Art. 1(3), Choice of Court Convention). In addition, the Convention applies only if the judgment to be recognised originates in another Contracting State (Art. 8(1), Choice of Court Convention). However, each Contracting State may make a Declaration (see Art. 32, Choice of Court Convention) whereby its courts may refuse recognition or enforcement of a judgment given by a court of another Contracting State "if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State" (Art. 20, Choice of Court Convention). In other words, a State may refuse recognition or enforcement of a foreign decision that it regards as strictly domestic, if it has made that Declaration.

A. II. Scope of the future Judgments Convention

The scope of the future Judgments Convention has not yet been fully defined in terms of subject matter, but it is likely to match to a large extent that of the Choice of Court Convention. Article 4(1) of the Preliminary Draft Text lays down a principle that "[a] judgment of a court of a Contracting State (State of origin) to which this Convention applies shall be recognised and enforced in another Contracting State (State addressed) in accordance with the provisions of this Chapter [*i.e.,* Chapter II]. Recognition or enforcement may be refused only on the grounds specified in this Convention."

As regards the scope of the future Judgments Convention, it should be noted that in the current standing of the draft:

- Several matters are expressly excluded from the scope of the future Convention (see Art. 2 of the Preliminary Draft Text).
- The future Judgments Convention applies only to international matters, that is "recognition and enforcement in one Contracting State of a judgment

given in another Contracting State" (Art. 1(2) of the Preliminary Draft Text).
- The general provisions, and in particular the possible options for Declarations, have not yet been considered.

A. III. Relationship between the two instruments[3]

On the basis of the abovementioned, several comments may be made in connection with the two instruments' respective scopes, assuming that the State of origin of the decision and the State requested to recognise or enforce that decision have both ratified the Choice of Court Convention as well as the future Judgments Convention:

- First, if the parties have entered into an exclusive choice of court agreement for a matter within the scope of the Choice of Court Convention, the recognition or enforcement of a decision given in the chosen Contracting State should occur in accordance with that Convention in the other Contracting States: there seems to be no doubt that the Choice of Court Convention should prevail over the future Judgments Convention (principle of *lex specialis derogat lege generali*). It would be desirable, however, for this rule to be specified in an article dealing with the relationships with other international instruments. We shall return to this point below (B).

- Second, if it appears that a decision may not be recognised or enforced in accordance with the Choice of Court Convention, for instance, owing to the fact that the exclusive choice of court agreement is void (see Art. 9(a), Choice of Court Convention), might it be recognised or enforced in accordance with the Judgments Convention? This question also arises in other situations. For instance, if a State has made a Declaration – pursuant to the Choice of Court Convention – enabling it to refuse recognition or enforcement of a foreign judgment in a situation that it regards as strictly domestic (see Art. 20, Choice of Court Convention), will it nonetheless be required to apply the Judgments Convention in order to recognise or enforce the same decision? This issue is related to that of the relationships with other international instruments, and will need to be clarified in the course of drafting of the general provisions. We shall consider it in part below (B).

- Third, if the parties have entered into a non-exclusive choice of court agreement for a matter within the scope of the Choice of Court Convention, the recognition or enforcement of a decision given in one of the chosen Contracting States should occur in accordance with that Convention only if both States concerned have made Declarations whereby they also apply the Choice of Court Convention for the recognition and enforcement of non-exclusive choice of court agreements (Art. 22, Choice of Court Convention). We shall return to this issue below (C).

- Fourth, when no such Declarations have been made according to Article 22 of the Choice of Court Convention, this Convention should not apply for the recognition or enforcement of a decision given in one of the Contracting States chosen in a non-exclusive choice of court agreements. In such case, the future Judgments Convention should apply in principle. We shall return

[3] For a schematic presentation of the issues addressed in this paper, see Annex I.

to this point below (D).

- Fifth, if the parties have entered into an exclusive choice of court agreement for a matter within the scope of the Choice of Court Convention, but the plaintiff does not comply with that agreement and seises a court in another Contracting State, the jurisdiction of which is not challenged by the defendant, the recognition or enforcement of that decision may not occur in accordance with that Convention. In this situation of implied consent to jurisdiction, can the future Judgments Convention be applied? We shall return to this issue below (D).

- Sixth, if the parties have entered into an exclusive choice of court agreement for a matter that is not within the scope of the Choice of Court Convention, but within the scope of the future Judgments Convention (which may occur, in particular, if the scopes are not identical in terms of subject-matter),[4] the future Judgments Convention should apply to the recognition or *exequatur* in the other Contracting States of a decision given in the chosen Contracting State. This rule seems to be self-evident, and we shall not elaborate further upon it in this paper.

B. Relationship between the two instruments in the case of an exclusive choice of court agreement

In the case where the parties have designated on an exclusive basis, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of a State X in accordance with the Choice of Court Convention, it should be considered whether recognition and enforcement of a judgment will be granted on the basis of the Choice of Court Convention (Art. 8(1)) or of the future Judgments Convention (Art. 4(1) of the Preliminary Draft Text).

The issue arises, naturally, only if the State of origin of the decision (State X) and the State addressed (State Y) are both parties to both Conventions, and both Conventions are also applicable in terms of scope. If the State of origin is not a party to the Choice of Court Convention, a State party to that Convention may not apply it to recognise or enforce a judgment given by one of its courts (see Art. 8(1), Choice of Court Convention).

Two situations should be distinguished:

B. I. The chosen court is the one having given judgment

If the court of State X, chosen by the exclusive choice of court agreement, has given judgment, the issue arises whether recognition or enforcement of that decision in State Y is to occur on the basis of the Choice of Court Convention or of the future Judgments Convention.

According to Article 4(1) of the Preliminary Draft Text:

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[4] As an illustration, anti-trust (competition) matters are excluded from the scope of the Choice of Court Convention (Art. 2(2) h), whereas they are covered by the future Judgments Convention (Art. 2 of the Preliminary Draft Text).

"*A judgment of a court of a Contracting State (State of origin) to which this Convention applies shall be recognised and enforced in another Contracting State (State addressed) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.*"

Under Article 8(1) of the Choice of Court Convention:

"*A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.*"

Either of these provisions may apply to the recognition or enforcement of a decision given by the court chosen by the parties in their choice of court agreement. Article 4(1) of the Preliminary Draft Text is more general, since it covers a far broader scope. Article 8(1) of the Choice of Court Convention is more specific, since its scope is restricted to choice of court agreements.

The issue accordingly arises of which Convention State Y will be required to apply when the court having given judgment is that designated by the parties in the choice of court agreement.

B. II. The chosen court is not the court having given judgment

Article 5(2) of the Preliminary Draft Text specifies that:

"*Recognition or enforcement may also be refused if the proceeding in the court of origin was contrary to an agreement [valid under the laws of the State addressed] or a designation in a trust instrument under which the dispute in question was to be determined [other than by proceedings in] [in a court other than] the court of origin.*"

This provision may apply if the court having given judgment is not the court that was chosen by the parties in their choice of court agreement. In such a case, the decision will not, in principle, be recognised and enforced in the other Contracting States.

Article 8(1) of the Choice of Court Convention may also apply to this situation. It also leads to the answer that the decision will not, in principle, be recognised and enforced in the other Contracting States.

The issue accordingly arises of which Convention State Y will be required to apply when the court having given judgment is not the court designated by the parties in the choice of court agreement.

B. III. Application of Article 26(4) of the Choice of Court Convention

In order to determine the issue of the relationship between the Choice of Court Convention and the other international instruments, Article 26 of the Choice of Court Convention provides for four "*give-way*" rules. Article 26(4) of the Convention deals specifically with the relationship between the Convention and other treaties allowing the recognition or enforcement of judgments, regardless of

whether the treaty concerned was made before or after the Choice of Court Convention. This rule is relevant only if both the States concerned are parties to the two conventions under consideration.

The principle laid down by Article 26(4) of the Choice of Court Convention is that this Convention does not prevent a State also party to another treaty from applying that treaty in matters of recognition or enforcement. This rule is a statement of the principle of *favor recognitionis*: it is intended to promote the recognition and enforcement of judgments.[5] This means that a State party to both the Choice of Court Convention and the future Judgments Convention may apply either Convention in order to recognise or enforce a decision originating in another State which, *ex hypothesi*, is also a party to both Conventions.

However, the second sentence of Article 26(4) of the Choice of Court Convention specifies that "the judgment shall not be recognised or enforced to a lesser extent than under this Convention [*i.e.,* the Choice of Court Convention]". In other words, the application of another Convention is to be preferred if it allows more effective or more extensive recognition or enforcement.[6]

Article 26 of the Choice of Court Convention accordingly results in leaving the judgment creditor an option to apply either the Choice of Court Convention or the Judgments Convention. Should it be accepted that this option exists where the judgment might not be recognised under the Choice of Court Convention, but might be under the future Judgments Convention? If any of the requirements for recognition under the Choice of Court Convention is not satisfied, may the judgment creditor fall back on the Judgments Convention to apply for recognition and enforcement of that decision? One may consider, for instance, the situation where the addressed State refuses recognition or enforcement on the grounds that the choice of court agreement is void (see Art. 9(a), Choice of Court Convention), or that it regards the situation as being strictly domestic (see Art. 20, Choice of Court Convention). This solution is not desirable, since it would seem preferable to grant primacy to the Choice of Court Convention as it is more specific than the future Judgments Convention (principle of *lex specialis derogat lege generali*): the Choice of Court Convention focusses on a specific procedural situation, namely the choice of court, whereas the future Judgments Convention deals with the recognition and enforcement of judgments in general fashion. Hence, it might be desirable to include a disconnection clause in the future Judgments Convention, allowing a grant of primacy to the Choice of Court Convention if the two Conventions overlap.

B. IV. Inclusion of a disconnection clause in the future Judgments Convention

A "*give-way*" rule might be included in the future Judgments Convention, and have as its purpose:

- to formalise expressly the primacy of the Choice of Court Convention in

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[5] HARTLEY T., DOGAUCHI M., Explanatory Report on the Choice of Court Convention, *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, para. 287, p. 853.
[6] HARTLEY T., DOGAUCHI M, *supra* note 5, para. 287, p. 853.

clearly determined cases, so that the future Judgments Convention would not affect the application of the Choice of Court Convention by a State party to both Conventions; and
- to confirm that the future Judgments Convention applies only in cases outside the scope of the Choice of Court Convention.

Thus, the following wording might be contemplated:

"*The* Hague Convention of 30 June 2005 on Choice of Court Agreements *prevails over this Convention in the relations between Contracting States to both Conventions.*"

This provision could be included in the future article dealing with the Relationship with other international instruments.

The Working Group should further consider whether Article 26(4) of the Choice of Court Convention ought to lead to the application of the future Judgments Convention as a last resort so that a decision that could not have been recognised or enforced in accordance with the requirements of the Choice of Court Convention could still be considered for recognition and enforcement under the future Judgments Convention.

C. Relationship between the two instruments in the case of a non-exclusive choice of court agreement

In the event that the parties have designated, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one or more Contracting States by means of a non-exclusive choice of court agreement, one should consider whether the recognition and enforcement of a judgment originating in a State designated by the non-exclusive agreement will occur on the basis of the Choice of Court Convention (Art. 8(1)) or of the future Judgments Convention (Art. 4(1) of the Preliminary Draft Text).

The issue arises, naturally, only if the State of origin of the decision (State X) and the State addressed (State Y) are both parties to both Conventions, and both Conventions are also applicable in terms of scope. If the State of origin is not a party to the Choice of Court Convention, a State party to that Convention may not apply it to recognise or enforce a judgment originating in that State (see Art. 8(1), Choice of Court Convention).

The Choice of Court Convention applies in principle only if the parties have entered into an *exclusive* choice of court agreement (see Art. 1(1), Choice of Court Convention). However, Article 22(1) of the Choice of Court Convention allows Contracting States to extend the scope of the Convention to non-exclusive choice of court agreements by means of a Declaration:

"*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 of one or more Contracting States (a non-exclusive choice of court agreement)."

Application of the Choice of Court Convention in order to recognise or enforce a decision given by a court of a Contracting State that has been designated by the parties in a non-exclusive choice of court agreement is subject to particular requirements (Art. 22(2), Choice of Court Convention):

"*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."

Since Art. 22 of the Choice of Court Convention may apply only if both States concerned made the Declaration (requirement of reciprocity), two situations should be distinguished:

C. I. Reciprocal Declarations under Article 22 of the Choice of Court Convention

In this situation the State addressed may apply this Convention in order to recognise the decision.

The future Judgments Convention makes no distinction between an exclusive choice of court agreement and a non-exclusive choice of court agreement. In particular, Article 5(2) of the Preliminary Draft Text generally refers to “agreement”:

"*Recognition or enforcement may also be refused if the proceeding in the court of origin was contrary to an agreement [valid under the laws of the State addressed] [...].*"

This provision also covers the recognition and enforcement of a judgment given by a court on the basis of a non-exclusive choice of court agreement: it refers to an "agreement" (*accord d'élection de for* in the French version), regardless of its exclusive or non-exclusive character.

Accordingly, recognition or enforcement in such a case may occur under either the Choice of Court Convention or the future Judgments Convention. If the court having given judgment is that of a State chosen by the parties, the judgment may be recognised. If the court having given judgment is not that of a State chosen by the parties, the judgment will probably not be recognised, whether under one Convention or the other. The issue accordingly arises of which Convention the State addressed is required to apply. Solutions will be suggested below (see *infra*, C. IV).

However, the issue of the relationship between the two Conventions in this

very specific case is likely to arise in practice less frequently than the situations considered previously (see *supra*, B): the requirement of reciprocity considerably restricts the scope of Article 22 of the Choice of Court Convention.

C. II. No reciprocal Declarations under Article 22 of the Choice of Court Convention

If the State of origin of the decision or the State addressed for recognition or enforcement of the decision has not made a Declaration in accordance with Article 22 of the Choice of Court Convention, the State addressed may not apply that Convention in order to recognise the decision. In particular, if the State addressed has made that Declaration but the State of origin has not made that Declaration, the State addressed may not apply the Choice of Court Convention in order to recognise or enforce the decision.

In such case, the State addressed might apply the future Judgments Convention, which – in the current standing of the draft – makes no distinction between exclusive and non-exclusive choice of court agreements. The future Judgments Convention would accordingly supplement the Choice of Court Convention by allowing the recognition or enforcement of a decision given by the courts of another Contracting State designated in a non-exclusive choice of court agreement. In this situation, the relationship between the two Conventions raises no particular difficulty. But it would probably be necessary to contemplate particular requirements for the recognition of such judgments.

Before setting out possible solutions in this respect (see *infra*, C. IV), the evolution of the treatment of non-exclusive choice of court agreements during the recent work of the Conference and the reasons that led to inclusion of the requirement of reciprocity in Article 22 of the Choice of Court Convention, should be briefly recounted.

C. III. Treatment of non-exclusive choice of court agreements during the work of the Conference

1. Treatment of non-exclusive choice of court agreements during the first phase of the Judgments Project

Article 22(1) of the 2001 Interim Text already provided that the court chosen by a non-exclusive choice of court agreement would be given discretion to accept or refuse to exercise its jurisdiction.[7]

The inclusion of non-exclusive agreements in the 2001 Interim Text raised the following issues:

- Issues relating to the obligation for any court seised in a Contracting State to dismiss the case on grounds of lack of jurisdiction or to stay proceedings if the parties had chosen the courts of another State.
- Issues relating to *lis pendens* (parallel proceedings): it was not yet decided on a general basis whether the autonomous solution in Article 21 of the

[7] SCHULZ A., Reflection Paper to assist in the preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Preliminary Document No 19 of August 2002, *supra* note 1, para. 64 and 67, p. 23.

2001 Interim Text would compel the court chosen on a non-exclusive basis and seised second to stay judgment in favour of the court seised first and having only so-called "grey" jurisdiction;[8] thus, in the event that the court seised second and designated by a non-exclusive choice of court agreement considered that it was the more appropriate forum and did not wish to decline jurisdiction, there would have been parallel proceedings conducted in two States without the Convention providing a solution.[9]

2. Treatment of non-exclusive choice of court agreements during the preparation of the Choice of Court Convention

It was during the second meeting of the Informal Working Group on the Judgments Project, held from 6 to 9 January 2003, that the exclusion of non-exclusive choice of court agreements was mentioned. That issue was raised in connection with provisional measures:[10] at its First Meeting, the group had listed a number of principles in connection with provisional measures when dealing, on the one hand, with an exclusive choice of court agreement, and on the other hand, with a non-exclusive choice of court agreement. As regards the non-exclusive choice of court agreements, the opinion on the informal group was divided as to the desirability and means of resolving a situation in which, for instance, the courts of a Contracting State issue an anti-suit injunction against a party having brought proceedings abroad before the court chosen in another Contracting State. It was eventually decided to suggest "*to limit the Convention to exclusive choice of court clauses (in that case, no rule on anti-suit injunctions would be required)*".[11]

However, several delegations[12] subsequently requested the inclusion of non-exclusive choice of courts agreements in the Convention at the meetings of the Special Commission. In Working Document No 28, circulated on Monday 20 June 2005,[13] a proposal was made, as a compromise, for the option of reciprocal declarations regarding non-exclusive choice of court agreements as part of *"Article Q"* entitled "*Reciprocal declarations on recognition and enforcement of judgments based on non-exclusive choice of court agreements*":

> " *1. A contracting State may declare that its courts will recognise and enforce judgments from the courts of other Contracting States based on choice of court agreements other than exclusive choice of court agreements.*

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[8] *I.e.,* on the basis of the jurisdiction rules under domestic law remaining applicable to each State: SCHULZ A., Preliminary Document No 19 of August 2002, *supra*, note 1, para. 56 and 57, p. 20. It was already pointed out that such an issue would not arise in a convention containing only a "white list" (see SCHULZ A., *ibid*, para. 87, note 44, p. 27).

[9] SCHULZ A., Preliminary Document No 19 of August 2002, *supra* note 1, para. 91, p. 27.

[10] SCHULZ A., Report on the Second Meeting of the Informal Working Group on the Judgments Project, Prel. Doc. No 21 of January 2003, *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, para. 15 and 16, p. 57.

[11] SCHULZ A., *supra* note 10, para. 16, p. 57.

[12] During the session on Friday 24 June 2005 of the Second Commission on the Choice of Court Convention, the Swiss delegation (Mr. Markus) and the Chinese delegation (Mr. Poon), in particular, not only supported the proposal in Working Document No 28 of the Australian and American delegations having led to Article 22 of the Convention, but also clearly indicated the importance of including non-exclusive choice of court agreements in the Convention (see Minutes No 17, session of Friday 24 June 2005 (morning), *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 684-685).

[13] Proposal of the Delegation of Australia and the United States of America, *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 517.

2. When a judgment from one Contracting State that has made such a declaration is presented for recognition or enforcement in the courts of another Contracting State that has made such a declaration, such judgment shall be recognized and enforced in accordance with Chapter III, if

a) The jurisdiction of the court rendering the judgment was based on a choice of court agreement that meets the requirements of paragraph c) of Article 3, but is not an exclusive choice of court agreement as defined in paragraph a) of Article 3, and
b) There exists neither a judgment from any other court nor a proceeding pending in any other court on the same subject matter between the same parties.

3. Such a declaration may be made upon ratification, acceptance, approval or accession or at any time thereafter, and it may be modified or withdrawn at any time. It shall be communicated to the Depositary and shall take effect 90 days after such communication is received."

The Working Group on various Matters[14] suggested inserting Article Q after Article 20, with the following contents:

"*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 and enforcement of a judgment given in a Contracting State that has made 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 another 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."

As specified in minutes No 17 of the session on 24 June 2005, Article Q (the location of which in the final text of the Convention was not specified yet) was precisely in line with the text of March 2003.[15] Its purpose was to allow the recognition and enforcement of judgments based on non-exclusive choice of court agreements. That matter was initially provided for in the chapter dealing with jurisdiction.[16] However, it was difficult, in Chapter II of the Convention, to deal at the same time with exclusive and non-exclusive choice of court agreements. Owing to the many problems raised by the inclusion of non-exclusive agreements

[14] Working document No 71, Working Group on various Matters, *in* Proceedings of the Twentieth Session, Tome III, Choice of Court, p. 530 and 532. See also Working Document No 88, Proposal of the Drafting Committee, *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 554.
[15] Minutes No 17, session of Friday 24 June 2005 (morning), *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 684.
[16] In the proposal of the Drafting Committee – as indeed in the current version of the Convention –, this was Chapter II (see Working Document No 88, Proposal of the Drafting Committee, *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 554).

in the chapter dealing with jurisdiction, that part was withdrawn from the text of the draft Convention.

The aforementioned Working Document No 28 – discussed at the working session of the Second Commission on Friday 24 June 2005 – stresses, for instance, the importance of non-exclusive choice of court agreements in financial agreements and settlements.[17] This is why the principle of including non-exclusive choice of court agreements in the Convention was accepted.[18]

However, again according to the Schulz Report, recognition and enforcement of judgments given on the basis of non-exclusive choice of court agreements were accompanied by safeguards provided for under Article 9, on the one hand, and consisting in the requirement of reciprocal declarations by the States, on the other hand. The latter option was a compromise solution between those Contracting States wishing to enjoy the benefits of the circulation of judgments (including on the basis of a non-exclusive choice of court agreement) and those displaying greater reluctance as to the desirability of including non-exclusive choice of court agreements in the Convention.[19] The optional character of the recognition and enforcement of judgments given on the basis of non-exclusive choice of court agreements constituted, in addition to the safeguards under Article 9, a further protective device, because it would enable a State to wait and see how the implementation of the Convention regarding that provision might evolve. Thus, most of the Convention would deal with exclusive choice of court agreements, next to a possible opt-in relating to non-exclusive agreements.[20] Finally, a decision was made that Article Q on non-exclusive choice of court agreements would be adopted as entered in Working Document No 71, but that it would be reworked to make it consistent with Article 9 of the Convention.

C. IV. Inclusion of disconnection clauses in the future Judgments Convention

The relationship between the two Conventions, in cases where both States have made the Declaration under Article 22 of the Choice of Court Convention, may be organised by means of the same priority rule as contemplated above (see *supra*, B. IV):

> "*The* Hague Convention of 30 June 2005 on Choice of Court Agreements *prevails over this Convention in the relations between the Contracting States to both Conventions.*"

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[17] See Minutes No 17, session of Friday 24 June 2005 (morning), *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 683 *et seq*., esp. 685 and 686.

[18] Minutes No 17, session of Friday 24 June 2005 (morning), *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 688.

[19] Minutes No 17, session of Friday 24 June 2005 (morning), *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 687: "*The proposal in Working Document No 28 was a compromise to satisfy the States that wanted to recognise judgments based on a non-exclusive choice of courts agreements, without imposing it on the other States. If a State did not want to recognize such judgment, it should not prevent the others from doing so*" (Mr. Bucher, Switzerland).

[20] The discussion shows that this was the position of many delegations, and in particular those of Switzerland (Mr. Markus), New Zealand (Mr. Goddard), China (Mr. Poon), Japan, etc. This position was also supported by the Chairman of the session, Mr. Bucher (Switzerland). See Minutes No 17, session of Friday 24 June 2005 (morning), *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 684-688.

That rule clearly provides for precedence of the Choice of Court Convention over the future Judgments Convention, in the event that the issue is within the scope of the Choice of Court Convention. That is so, with respect to a non-exclusive choice of court agreement, only if both States concerned have made the Declaration under Article 22 of the Choice of Court Convention.

On the other hand, in the following three situations, the Choice of Court Convention may not apply in the presence of a judgment delivered on the basis of a non-exclusive choice of court agreement:

1. recognition and enforcement of a judgment are requested of a State that has not made the Declaration under Article 22 of the Choice of Court Convention;
2. the addressed State has made the Declaration under Article 22 of the Choice of Court Convention, but not the State of origin of the decision;
3. neither the State of origin of the decision nor the addressed State has made the Declaration under Article 22 of the Choice of Court Convention.

In these three situations, the issue of the application of the future Judgments Convention will arise. Having regard to the fact that recognition and enforcement of judgments delivered on the basis of non-exclusive choice of court agreements raise difficulties with respect to parallel proceedings, supplementing the provisions of the future Judgments Convention by providing related grounds for refusal of recognition or enforcement (Art. 5(1)) of the Preliminary Draft Text might be contemplated. If one wishes to keep the two instruments consistent, Article 22(2) of the Choice of Court Convention could serve as a model for the drafting of that provision, for instance in the following wording:

"*1. Recognition or enforcement may be refused if:*
[...]
f) the court of origin was designated in a non-exclusive choice of court agreement, and
- there exists a judgment given by another court before which proceedings could be brought in accordance with the non-exclusive choice of court agreement, or a proceeding is pending between the same parties before another such court on the same cause of action, and
- the court of origin was not the court first seised."

Such a rule would require the future Judgments Convention to retain the same system of primacy as provided for under the Choice of Court Convention. In this respect, it shall be pointed out that Article 22(2) of the Choice of Court Convention does not deal with the issue of a proceeding pending in the requested State (unless that State is one of those chosen in the non-exclusive choice of court agreement), an issue that might usefully be dealt with in the future Judgments Convention.[21]

[21] See in this respect the Reflection paper on *lis pendens* within the context of recognition and enforcement (currently being prepared by the Permanent Bureau).

D. Relationship between the two instruments in the case of an exclusive choice of court agreement followed by implied consent to jurisdiction

Where the parties have designated the courts of a State X, on an exclusive basis, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, it may be that one of them would seise a court of a State Y. If the defendant enters an appearance before that court and argues the merits without challenging jurisdiction, one may wonder whether recognition and enforcement of the judgment given by that court of State Y will be based on the Choice of Court Convention or on the future Judgments Convention.

After a brief reminder of work conducted so far by the Hague Conference relating to implied consent to jurisdiction (D. I), we shall analyse the issue particularly in the light of the Choice of Court Convention (D. II) and of the future Judgments Convention (D. III).

D. I. Implied consent to jurisdiction

It should be pointed out that in connection with the work for preparation of the *Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (Enforcement Convention), implied consent to jurisdiction was not included among the grounds for refusal of recognition and enforcement, but instead among the "jurisdiction catalogue": the preliminary draft Convention of 8 March 1963[22] contained a rule relating to implied extension of jurisdiction. It was included in Article 9, point 4 (after point 3, dealing with the contractual express forum in writing) and provided that:

> "*The court having given the foreign decision shall be considered to have jurisdiction for the purposes of this Convention: […]*
> *4. Where the defendant proceeds on the merits, without contesting the jurisdiction of the court of origin or making reservations thereon.*"

The Special Commission[23] had expressed unanimous agreement that such an appearance should be regarded as expressing a wish to extend the forum, provided, naturally, that the appearing party entered a defence on the merits without stating reservations.[24]

However, in the preliminary draft Convention relating to jurisdiction, the enforcement and recognition of decisions in civil and commercial matters and enforcement of *actes authentiques* of 13 April 1966,[25] the rules for extension of jurisdiction are the subject-matter of a separate section (section 6) included in

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[22] Prel. Doc No 4, *in* Hague Conference (ed.), Proceedings of the Extraordinary Session from 13 to 26 April 1966, p. 48-50.
[23] This Commission held its session in The Hague from 12 to 22 June 1962 and from 26 February to 7 March 1963; it was chaired by Mr. A. Huss, Vice President of the Superior Court of Justice of Luxembourg.
[24] Regarding the criticism by the various delegations, see Prel. Doc. No 5, *in* Hague Conference (ed.), Proceedings of the Twentieth Session, Tome III, p. 51-65, esp. p. 57 and 62.
[25] See Working Document No 29, *in* Hague Conference (ed.), Proceedings of the Extraordinary Session of 13 to 16 April 1966, p. 167-171.

Title II on jurisdiction. It comprises two Articles, relating respectively to express agreement (in writing or oral) on choice of court (Art. 17) and to implied extension of jurisdiction through the defendant's voluntary appearance (Art. 18). Article 18 provided that:

> "*In addition to the cases where its jurisdiction is based on other provisions of this Convention, a court of a Contracting State before which the defendant enters an appearance shall have jurisdiction. This rule shall not apply if the sole purpose of such appearance is to challenge jurisdiction, or if there is another court having exclusive jurisdiction under Article 16.*"

In the draft Convention accompanying the Final Act of the Extraordinary Session of 26 April 1966,[26] the rules relating to implied extension of jurisdiction are provided for under Article 10 point 6 of Chapter II on the requirements for the recognition and enforcement of judgments:

> "*[The court of the requested State shall be considered to have jurisdiction for the purposes of this Convention] where the defendant has argued the merits without challenging the jurisdiction of the court or making reservations thereon; nevertheless, such jurisdiction shall not be recognized if the defendant has argued the merits in order to resist the seizure of property or to obtain its release, or if the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject-matter of the dispute*."

The explanatory report by Mr. Ch. N. Fragistas[27] explains that doubts were raised as to whether this jurisdiction was justified or not. It was claimed in particular that the fact that the defendant had not raised before the court of one State, claiming international jurisdiction, a plea of lack of jurisdiction is not always proof of that party's intent to submit to that State's international jurisdiction. Challenging the international jurisdiction of a court which according to its own law considers that it has jurisdiction is not always devoid of unwelcome consequences and may lead the defendant "into dire straits". But despite these doubts, jurisdiction based on implied consent to jurisdiction was accepted, subject to two exceptions mitigating its scope.

Thus Article 10 of the Enforcement Convention provides that:

> "*The court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention: [...] (6) if the defendant has argued the merits without challenging the jurisdiction of the court or making reservations thereon; nevertheless, such jurisdiction shall not be recognized if the defendant has argued the merits in order to resist the seizure of property or to obtain its release, or if the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject-matter of the dispute.*"

In addition, in connection with the Judgments Project, the preliminary draft Convention of 1999 included the following direct jurisdiction rule concerning

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[26] See Final Act of the Extraordinary Session, *in* Hague Conference (ed.), Proceedings of the Extraordinary Session of 13 to 26 April 1966, p. 348-358.

[27] FRAGISTAS Ch. N., Explanatory Report on the Convention on recognition and enforcement of foreign judgments in civil and commercial matters, *in* Hague Conference (ed.), Proceedings of the Extraordinary Session of 13 to 26 April 1966, p. 377-378.

implied consent to jurisdiction:[28]

> "*1. Subject to Article 12, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.*
> *2. The defendant has the right to contest jurisdiction no later than the time of the first defence on the merits.*"

However, concerns were raised that, in a mixed Convention, such a provision would lead to increased litigation. This resulted in the removal of the draft Article 5 and the introduction of Article 4(3) in the 2001 text:

> "*Article 4*
> *[…]*
> *(3) Where a defendant expressly accepts jurisdiction before a court of a Contracting State, and that acceptance is (in writing or evidenced in writing), that court shall have jurisdiction.*"

It shall be noted that this was a direct jurisdiction rule designed in particular to protect party autonomy in the case of a choice of court agreement made during the course of proceedings.[29]

D. II. Implied consent to jurisdiction in the Choice of Court Convention

Analysis of the Choice of Court Convention shows that the situation of recognition and enforcement of a judgment given by a court not chosen by agreement between the parties, where the defendant nonetheless entered an appearance and argued the merits without challenging jurisdiction, is not covered by the Convention: Article 8, governing the recognition and enforcement of judgments for the purposes of the Choice of Court Convention, applies only to judgments originating in the courts designated in an exclusive choice of court agreement within the meaning of Article 3 of the Convention.

Under Article 3(c) of the Choice of Court Convention, an exclusive choice of court agreement must be concluded or documented "i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference". An implied agreement based on the defendant's voluntary appearance is accordingly not within the scope of the Choice of Court Convention.

D. III. Implied consent to jurisdiction in the future Judgments Convention

1. Possible amendment to take implied consent to jurisdiction into account

In the current version of the future Judgments Convention, Article 5 of the Preliminary Draft Text provides for the grounds for refusal of recognition and enforcement of judgments. This Article does not provide for the case where the court seised has no jurisdiction but the defendant nonetheless argued the merits

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[28] For further elaboration on the issue, see SCHULZ A., *supra* note 10, para. 38-39, p. 63.
[29] SCHULZ A., *supra* note 10, para. 40, p. 63-64.

without challenging jurisdiction or entering reservations on the issue.

Article 5(2) of the Preliminary Draft Text provides that "Recognition or enforcement may also be refused if the proceeding in the court of origin was contrary to an agreement [valid under the laws of the State addressed] [...]". Can this provision apply to the situation of implied consent to jurisdiction? The issue arises since Article 5(2) of the Preliminary Draft Text refers to an "agreement" (*accord d'élection de for* in the French version), without any distinction being drawn between express or implied. This could accordingly refer also to recognition or enforcement of a judgment given on the basis of an implied consent to jurisdiction. However, as drafted, this provision refers in fact to the opposite situation, that is, where the court having given judgment is not that chosen by agreement between the parties. Article 5(2) of the Preliminary Draft Text is accordingly intended to enable a refusal of recognition or enforcement when the court of origin is not the court that was chosen by the parties. This provision is not applicable, therefore, when the court of origin is the one that was chosen by the parties by means of an implied agreement.

In addition, Article 5(3)(d) of the Preliminary Draft Text provides that:

> "*3. Recognition or enforcement of a judgment may also be refused if it does not comply with the requirements of any of the following provisions: [...] d) the [defendant] [person against whom the judgment was rendered] expressly consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given.*"

That provision also does not refer to the situation of implied consent to jurisdiction, since the defendant is required to have *expressly* consented to the jurisdiction of the court of origin.

Hence, the future Judgments Convention does not – at this stage of the project – govern the recognition and enforcement of judgments delivered in the case of implied consent to jurisdiction. Recognition and enforcement of such judgments remain possible, however, on the basis of the domestic indirect international jurisdiction rules of the State addressed (Art. 5(3)(b) of the February 2015 Preliminary Draft Text).

For the recognition and enforcement of such judgments to be governed by the future Judgments Convention, it would be sufficient to amend Article 5(3)(d) of the Preliminary Draft Text by deleting the work "expressly" (*expressément* in the French version), and possibly to supplement the text with a reference to the defendant's appearance (in a second sentence):

> "*3. Recognition or enforcement of a judgment may also be refused if it does not comply with the requirements of any of the following provisions: [...] d) the [defendant] [person against whom the judgment was rendered] consented to the jurisdiction of the court of origin in the course of the proceedings in which the judgment was given. The defendant's appearance shall constitute consent to jurisdiction, unless the purpose of the appearance is solely to challenge jurisdiction.*"[30]

[30] For other possible wordings, see the Annex II.

2. Relationship of the proposed rule with Article 5(2) of the Preliminary Draft Text

Including the amendment of Article 5(3)(d) set forth above so as to include implied consent to jurisdiction raises the issue of the relationship between that rule and Article 5(2) of the Preliminary Draft Text: a judgment given on the basis of an implied consent to jurisdiction could be in breach of a choice of court agreement previously made between the parties. Yet the Article 5(2) of the Preliminary Draft Text provides that breach of a choice of court agreement is grounds for refusal of recognition and enforcement of judgments. Accordingly, should primacy be granted to the choice of court agreement or to the implied consent to jurisdiction (which *ex hypothesi* is later)?

One solution that might be contemplated would be to accept the primacy of the implied consent to jurisdiction over the choice of court agreement. This might be justified by the principle of party autonomy: on the basis of that principle, the fact that the parties entered into a choice of court agreement does not prevent them from subsequently submitting to the jurisdiction of a court other than that referred to in the choice of court agreement. By entering an appearance before a court other than the chosen court without challenging jurisdiction, the defendant has consented to that court's jurisdiction. Accordingly, there is a new agreement between the parties as to that court's jurisdiction, superseding the previous one.

This position is that taken by the European Court of Justice in the case of *Elefanten Schuh v. Jacqmain* of 24 June 1981[31] (this related to Art. 18 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968). In that judgment, the Court granted primacy to the implied consent to jurisdiction over an earlier choice of court agreement on the basis of the principle of party autonomy. The primacy of implied consent has been maintained in subsequent EU rules, now Article 26 of Regulation Brussels I *bis*.

The same principle is also recognised on other continents, for instance in the laws of Australia,[32] Ghana,[33] South Africa,[34] India,[35] and China.[36] This solution

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[31] Case 150/80 (1981) ECR 1671, 1700. See also *Hannelore Spitzley v. Sommer Exploitation SA*, Case 48/84 (1985) ECR 787, 800.

[32] *Boyle v. Sacker* (1888) 39 Ch D 249 : "(…) s*teps taken with knowledge of an irregularity, with a view to defending the case on the merits will waive irregularities in the institution or service of proceedings, since they could only usefully be taken on the basis that the proceedings were valid (…)*". See DAVIES M., BELL A. S., BRERETON LE GAY P., Nygh's conflict of laws in Australia, Sydney 2010, p. 63.

[33] *Polimex v. BBC Builders and Engineers Co. Ltd* (1968) GLR 168; *Moubarak v. Holland West Afrika Lijn* (1953) 14 WACA 262, cited *in* FRIMPONG OPPONG R., Private international law in commonwealth Africa, New York 2013, p. 49.

[34] *Hay Management Consultants (Pty) Ltd v. P3 Management Consultants (Pty) Ltd* 2005 (2) South Africa Law Reports 522; *Van der Walt Business Brokers (Pty) Ltd v. Budget Kilometers* 1999 (3) South Africa Law Reports 1149; *Du Preez* v. *Philip-King* 1963 (1) South Africa Law Reports 801; *Blue Continent Products (Pty) Ltd* v. *Foroya Banki PF* 1993 (4) South Africa Law Reports 563, cited *in* FRIMPONG OPPONG R*., supra* 33, p. 79-80.

[35] *Rama Iyer (died) Lakshmana Iyer* v. *Krishna Pattar*, 1915, MLJ 148, cited *in* GOVINDARAJ V. C*.,* The conflict of laws in India, inter-territorial and inter-personal conflict, New Delhi 2011, p. 26-27.

[36] Art. 127(2) of the Code of Civil Procedure of the People's Republic of China: "*If the parties fail to put in any objection to the jurisdiction and submit defense, the people's court shall be deemed to have jurisdiction over the case unless the case falls under the jurisdiction of another level or to exclusive jurisdiction* ". That article also applies to situations of private international law for the purposes of Art. 259 of the same Act, which provides that: "*(…) Where it is not covered by the*

appears to be in line with case law in the United States of America, where it is accepted that the defendant's appearance, either in person or by an attorney,[37] is grounds for jurisdiction of the seised court.[38] There is an exception, however, when the defendant enters an appearance for the purpose of challenging the court's jurisdiction: such appearance is not construed as implied consent to jurisdiction,[39] especially in the case of a special appearance (appearance of the defendant solely for the purpose of challenging the court's jurisdiction).

On the basis of the preceding, the issue arises as to whether it would be desirable or not to include in the future Judgments Convention a specific provision whereby implied consent to jurisdiction supersedes an earlier choice of court agreement. Such a provision would be useful in particular to determine the situation where the judgment to be recognised comes from a court other than that chosen by the parties in a choice of court agreement, exclusive or not. For the purpose, the inclusion in Article 5(2) of the Preliminary Draft Text of a reservation relating to application of sub-section (3)(d) could be contemplated, for instance.

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provisions of this Part [ie. Part IV. Special Provisions for Civil Procedures of cases involving foreign element], other relevant provisions of this Law shall apply".

[37] *Oswalt Ind., Inc. v. Gilmore*, 297 F. Supp. 307 (D.Kan.1969).

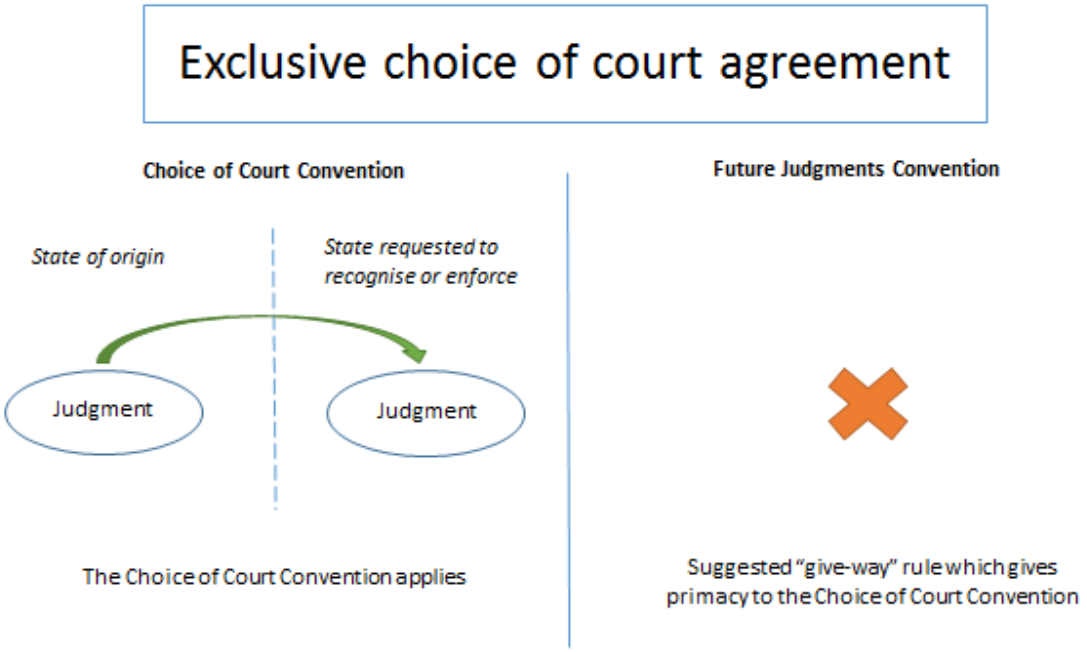
[38] *Vilas v. Plattsburg and M. R. R.*, 123 N.Y. 4440, 25 N.E. 941 (1890).

[39] *Michigan Cent. R. R. v. Mix*, 278 U.S. 492, 49 S.Ct. 207, 73 L.Ed. 470 (1929); *Cain v. Commercial Publishing Co.*, 232 U.S. 124, 34 S. Ct. 284, 58 L.Ed. 534 (1914); *Goldey v. Morning News*, 156 U.S. 518, 15 S.Ct. 559, 39 L.Ed. 517 (1895). See also, in a case where voluntary appearance was construed as a waiver of an arbitration agreement: *Anna Dockeray v. Carnival Corporation*, U.S. District Court, Southern District of Florida Miami Division, 2010, 10-20799: "*[a] party that substantially invokes the litigation machinery prior to demanding arbitration may waive its right to arbitrate. Waiver occurs where a party substantially participates in litigation to a point inconsistent with an intent to arbitrate and this participation results in prejudice to the opposing party"* (citing *Hodgson v. Royal Caribbean Cruises, Ltd.*, 990 So. 2d 1074, Fla. Dist. Ct. App. 2008).

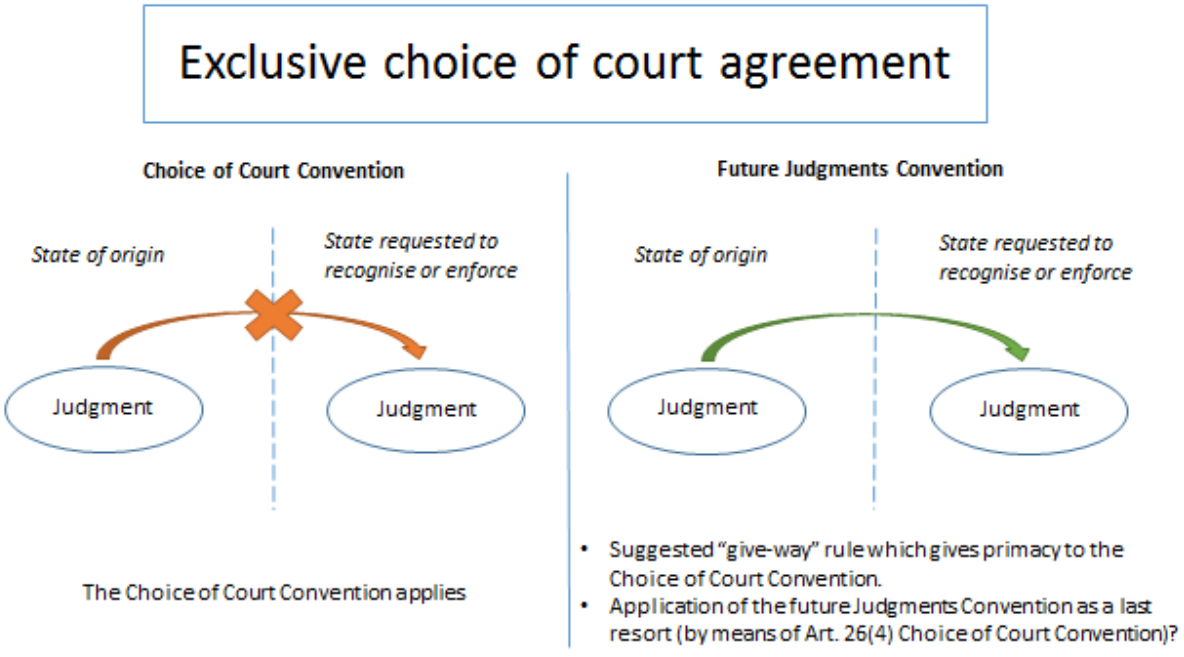
ANNEX I

RELATIONSHIP BETWEEN THE FUTURE JUDGMENTS CONVENTION AND THE CHOICE OF COURT CONVENTION (SCHEME)

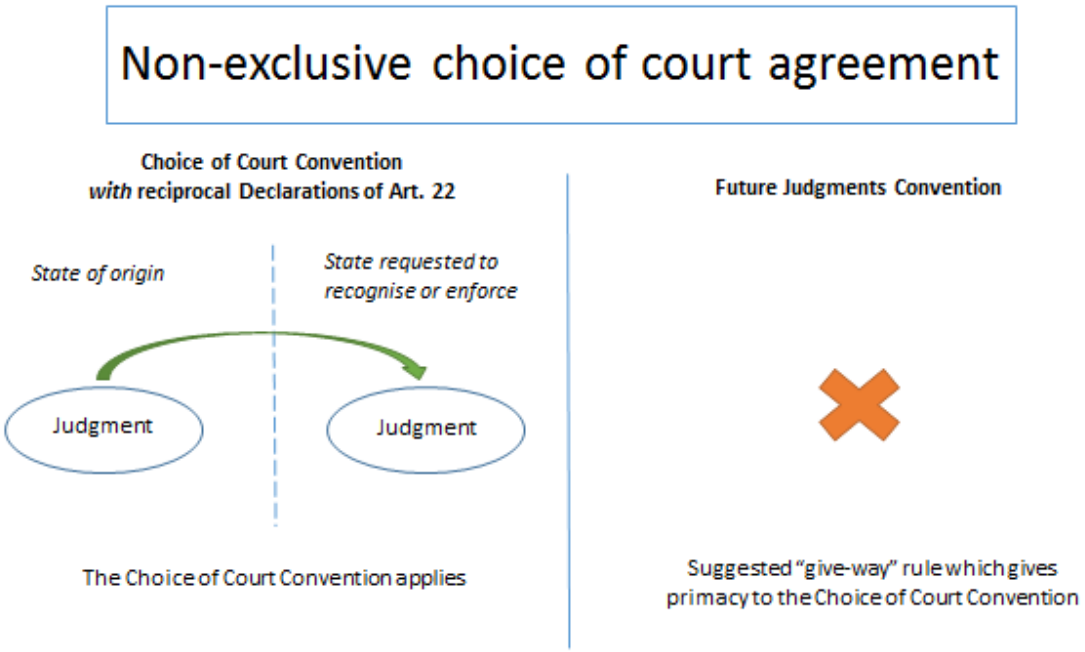
Hypothesis 1:



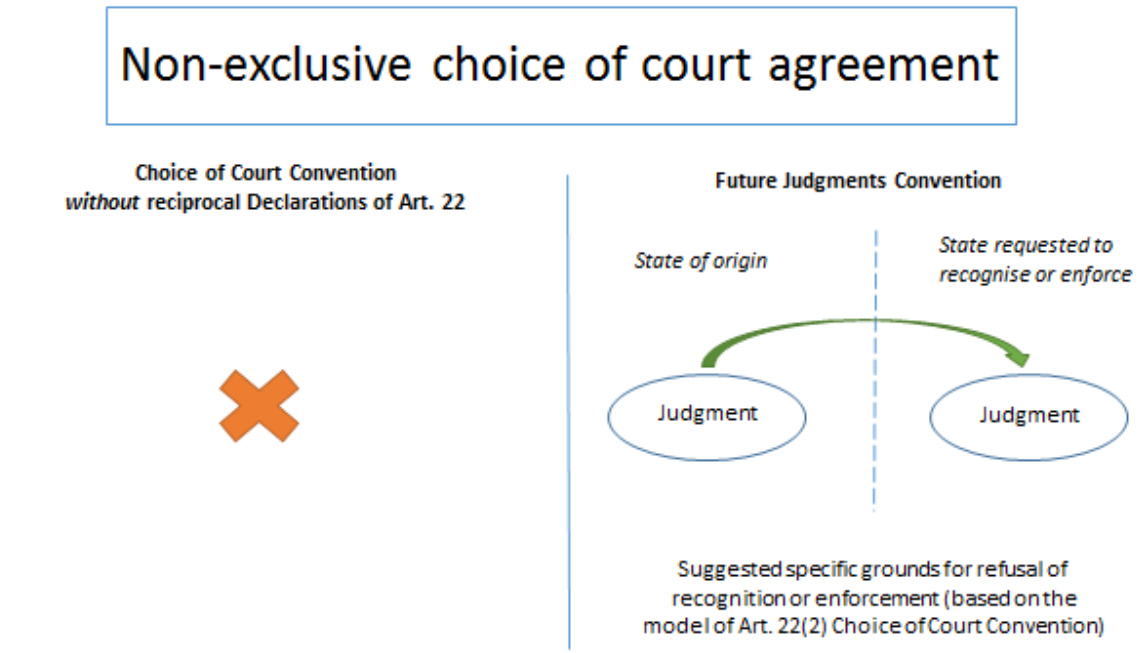
Hypothesis 2:



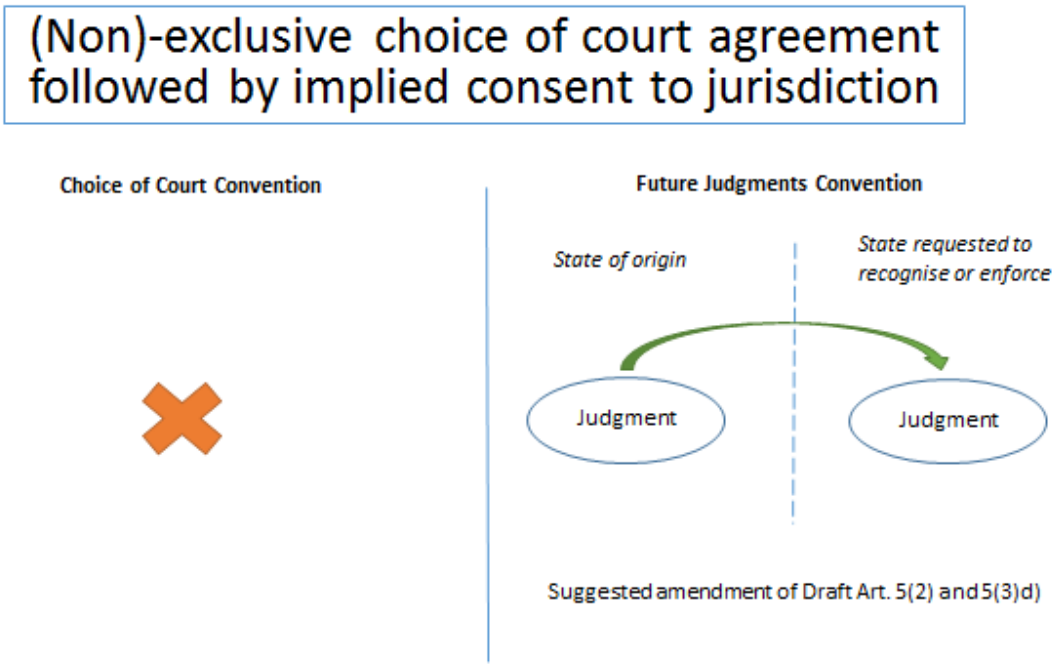
Hypothesis 3:



Hypothesis 4:



Hypothesis 5:



ANNEX II

RULES ON IMPLIED CONSENT TO JURISDICTION IN DIFFERENT INSTRUMENTS ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

I. Hague Conference instruments	
Documents/Convention	**Provisions**
Draft Convention of 8 March 1963 on the recognition and the enforcement of foreign judgments in civil and commercial matters (adopted by the Special Commission on recognition and enforcement of foreign judgments)	Article 9 The jurisdiction from which the foreign decision has come shall be considered as having jurisdiction in the sense of this Convention- […] 4. If the defendant has argued the merits without challenging the jurisdiction of the authority of origin or making reservations on this point.
Draft Convention of 26 April 1966 on the recognition and the enforcement of foreign judgments in civil and commercial matters	Article 10 The court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention - […] 6. if the defendant has argued the merits without challenging the jurisdiction of the court or making reservations thereon; nevertheless such jurisdiction shall not be recognized if the defendant has argued the merits in order to resist the seizure of property or to obtain its release, or if the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject-matter of the dispute.
Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters	Article 10 The court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention – […] (5) if, by a written agreement or by an oral agreement confirmed in writing within a reasonable time, the parties agreed to submit to the jurisdiction of the

	court of origin disputes which have arisen or which may arise in respect of a specific legal relationship, unless the law of the State addressed would not permit such an agreement because of the subject-matter of the dispute; (6) if the defendant has argued the merits without challenging the jurisdiction of the court or making reservations thereon; nevertheless such jurisdiction shall not be recognised if the defendant has argued the merits in order to resist the seisure of property or to obtain its release, or if the recognition of this jurisdiction would be contrary to the law of the State addressed because of the subject-matter of the dispute.
Preliminary draft Convention of 30 October 1999 on jurisdiction and foreign judgments in civil and commercial matters	Article 5 – Appearance by the defendant 11. Subject to Article 12, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction. 22. The defendant has the right to contest jurisdiction no later than at the time of the first defense on the merits.
II. Other instruments and legislations	
Instruments	**Provisions**
Council regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters	Article 24 Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.
Council regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)	Article 26 1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

	2. In matters referred to in Sections 3, 4 or 5 where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee is the defendant, the court shall, before assuming jurisdiction under paragraph 1, ensure that the defendant is informed of his right to contest the jurisdiction of the court and of the consequences of entering or not entering an appearance.
Lugano Convention of 21 December 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters	Article 24 Apart from jurisdiction derived from other provisions of this Convention, a court of a State bound by this Convention before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.
Riyadh Arab Agreement for Judicial Cooperation of 6 April 1983	Article 28 Jurisdiction of the courts of the contracting party where the judgement is made. Except in the cases provided for in Articles 16 and 27 of this Agreement, the courts of the contracting party where the judgement was made shall be considered to have jurisdiction in the following cases: [...](f) If the defendant made a defence in the substance of the case without raising a plea of non-jurisdiction of the court before which the dispute was brought.
International Law Association: *Leuven / London Principles on declining and referring jurisdiction of July 2000*	Referral Procedure in the Originating Court 5.3 The parties and the originating court are encouraged to consider appropriate terms of referral. These may deal in particular with: (a) the applicant's submission to the jurisdiction of the alternative court; (b) the terms on which the applicant may assert a defence of limitation or prescription of action in the alternative court.
American Law Institute:	§4. Claim and Issue Preclusion; Effect of Challenge to Jurisdiction in the Court of Origin

2005 Recognition and enforcement of foreign judgments: Analysis and proposed federal statute	(c) If the judgment debtor has appeared in the foreign action without challenging the jurisdiction of the rendering court, the judgment debtor or other party resisting recognition or enforcement may not challenge the jurisdiction of the rendering court under the law of the state of origin in the proceeding in the United States, but may show that such jurisdiction is unacceptable under § 6.
Canada: 2003 Uniform Enforcement of Foreign Judgments Act (consolidated)	Jurisdiction 8. A court in the State of origin has jurisdiction in a civil proceeding that is brought against a person if […] (b) as defendant, the person submitted to the jurisdiction of the court by appearing voluntarily.