

# PROF. RONALD BRAND'S PROPOSAL

## **Recognition and enforcement of judgments based on non-exclusive choice of court agreements**

The following page contains options that could be included in the Convention on Exclusive Choice of Court Agreements in order to adjust the Chapter III provisions so that judgments based on non-exclusive choice of court agreements could be recognised and enforced in limited circumstances.

Article 9, paragraph 1, currently contains the basic rule on recognition and enforcement. That rule provides 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.” The same paragraph then goes on to list the limited grounds on which recognition and enforcement may be denied.

The **general option** set forth below would create a second basic rule on recognition and enforcement in Article 9 by adding a new paragraph 2 and moving the grounds for denial of recognition and enforcement to a new paragraph 3. The new paragraph 2 would place a judgment that (1) was rendered by a court selected in a non-exclusive choice of court agreement that complies with the form requirements of Article 3, paragraph c, and (2) is the only judgment available regarding the dispute, on an equal status with judgments based on an exclusive choice of court agreement. This would change nothing in the jurisdiction provisions of Chapter II. It thus raises no questions of *lis pendens* or parallel litigation that would disrupt the existing jurisdictional rules. It would only come into effect *after* a judgment from a Contracting State is rendered based on an agreement of the parties that meets the form requirements of Article 3, paragraph c, but is not strictly exclusive. This would allow the recognition and enforcement benefits of the convention particularly to those industries that have noted the frequent use of non-exclusive and hybrid choice of court agreements for legitimate purposes. All of the grounds for non-recognition of a judgment based on an exclusive choice of court agreement would be available in order to challenge a judgment based on a non-exclusive choice of court agreement.

Should it be determined for some reason that a general obligation to recognize and enforce judgments based on non-exclusive choice of court agreements is not appropriate in the Convention, then the **declaration option** set forth below would allow those states that prefer such recognition and enforcement to declare that they will recognize and enforce such judgments from other Contracting States making the same declaration. This new article would provide an “opt-in” system that creates no obligation on any state, but allows those states that want the advantages of Convention recognition and enforcement of judgments based on non-exclusive choice of court agreements to have those benefits with other Contracting States taking the same position. In this sense, it is a provision that does no harm to any Contracting State, but offers an expansion of the Convention’s Chapter III benefits among states making the declaration.

## **Recognition and enforcement of judgments based on non-exclusive choice of court agreements**

### **General option:**

#### *Article 9 Recognition and enforcement*

1. A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter.
2. A judgment given by a court of a Contracting State designated in a non-exclusive choice of court agreement shall be recognised and enforced in accordance with this Chapter 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, 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. Recognition or enforcement may be refused only on the following grounds -  
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### **Declaration option:**

#### *Article X 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 recognize and enforce judgments from the courts of other Contracting States based on non-exclusive choice of court agreements.
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 recognised 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.