The Hague Choice of Court Agreement Convention

Submitted by: HCCH
The Hague Choice of Court Agreement Convention

International Instruments for Dispute Resolution and Prevention
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Litigation

- *Transparency – publicity*
- *May damage business relations/business reputation*
- *Slower (?) but interim measures readily available*
- *Expensive (?) – legal fees*
- *Judgments normally enforceable within national boundary*
- *Certain judgments may bind non-parties (Validity of IPRs, ownership of land etc)*
- *Better deterrent effect*
- *Uncertainty of cross border enforcement*
Arbitration

• *Private – arbitral awards normally not published*
• *Help preserve business reputation*
• *Quicker (?), interim measures available but may require assistance by the court*
• *Less Expensive (?) arbitrator fees, institution fees, legal fees*
• *Arbitral awards enforceable in over 150 states under the New York Convention (note also ICSID arbitration under the Washington Convention)*
• *Normally binding on the parties only – less deterrent effect*
Mediation, conciliation

- **Private and consensual – settlement agreements not published**
- **Help preserve business relations/business reputation**
- **Court-ordered interim measures not available**
- **Less Expensive – mediator fees, institution fees, legal fees**
- **Settlement agreements – Effect determined by national legislation, lack of cross border enforcement (but note development at UNCITRAL)**
- **Binding on the parties only – less deterrent effect**
The clear, simple and predictable regime established by the Convention contributes to a strong and effective legal framework for cross-border trade and investment (judicial equivalent to 1958 NY Arbitration Convention)

3 Key Obligations

**Article 5**
The chosen court **must** hear the dispute

**Article 6**
Any non-chosen court **must** suspend / dismiss proceedings

**Article 8**
Judgment given by the chosen court **must** be recognised and enforced
Address the issue of cross border recognition and enforcement of judgments in civil and commercial cases where there is a valid exclusive choice of court agreement between the parties

- which court should be entitled to determine the dispute
- ensure cross-border enforcement of the resulting judgment
**Scope**

1. **International cases**
   - **Internationality**

2. **Civil and commercial matters**
   - **Excluding:** consumer and employment contracts; and certain other matters

3. **Exclusive choice of court agreement**
   - **Designates the court(s) of a Contracting State**

4. **Interim measures of protection**
   - **Not governed by the Convention**
Copyright and related rights

• **completely covered** – applies even to questions of **validity**, but only as between the parties, not **in rem**

Other IP rights *(e.g. patents, trade marks and designs)*

• **validity** as object of proceedings is **excluded** from scope – but **not** if issue arises as **preliminary question**

• **infringement** actions for other IP rights (e.g. license agreement) **also excluded, except** when brought (or could have been brought) pursuant to **a contract**
First Obligation

1. The chosen court must hear the dispute
   
   Article 5

   • Chosen court cannot refuse to hear case because of:
     • *forum non conveniens*;
     • *lis pendens*
     • Does not affect rules on subject matter jurisdiction or venue

   PREDICTABILITY
   of forum, as chosen by the parties
Second Obligation

2

Any non-chosen court **must** suspend/dismiss proceedings

*Article 6*

**unless:**

- Agreement is null and void under law of chosen court
- Incapacity under law of court seised
- Manifest injustice or public policy
- Incapable performance
- Case not heard

**PREVENTION**

of parallel proceedings
Third Obligation

3

Judgment given by the chosen court must be recognised and enforced

Article 8

unless (Art. 9):

• null and void under law of chosen court
• Incapacity under law of requested State
• no proper notification
• fraud
• public policy
• Inconsistent with earlier judgment

ENFORCEMENT of judgments rendered by the chosen court (see also Art. 11 on damages)
Operation
(Assuming all economies below are parties to the 2005 Convention)

- **Company in Australia**
  - Party brings proceedings in the court of Australia or a court in a third economy
  - The Australian court **MUST** decline to hear case

- **Choice of Court Agreement in the contract designating a court in PNG**
  - If proceedings are brought in the court of PNG then:
    - The court of PNG **MUST** hear the case
    - The judgment of the court of PNG **MUST** be recognised and enforced in other Contracting States of the 2005 Convention
Model for Regional Trade Agreements
(EIA, FTA, Customs Union etc)

- Enhance “circulation” of civil and commercial judgments within e.g. members of an FTA or economies in a regional organisation such as APEC and ASEAN
- Enhance and promote economic and legal cooperation among member economies
- Enhance and promote certainty and predictability on dispute management and resolution
- Work as an alternative to arbitration and side by side with mediation
Came into effective internationally on 1 October 2015

Applied in 30 states and REIO (EU states, Mexico, Singapore and EU)

Hague Conventions are open to all states, not limited to member states of the HCCH

Among APEC economies:
- it is in force in Mexico and Singapore
- US and China signed the convention, others are considering joining including Canada, Russia, Australia and NZ
International Support

The Council of Bars and Law Societies of Europe (CCBE) recommendation in 2014

The German Bar Association (DAV) encouragement in 2103

The Inter-American Bar Association (IABA) recommendation in 2013

International Chamber of Commerce (ICC) endorsement in 2007, 2012
Means of co-operation

- Dedicated webpage
- Explanatory Report to the Convention
- Implementation Checklist
- Informal Dialogue
Current Judgment Project

- Continuation of the project on recognition and enforcement of judgments in civil and commercial matters

- the Convention should address judgments outside the 2005 Convention
• the scope and repercussions of the draft Convention should be more far-reaching than the 2005 Choice of Court Agreement Convention

• A further round of negotiation will be held in the Hague in May 2018.

• A diplomatic conference may be convened in 2019 to wrap up the negotiations, depending on the outcome of the May 2018 meeting.
Formally approved on 19 March 2015

First HCCH soft law normative instrument

Affirm party autonomy in international commercial contracts, giving the parties’ chosen law the widest scope of application, but subject to balanced boundaries

Strengthen legal certainty and predictability

May be considered an international code of current best practice in relation to party autonomy in international commercial contracts

Provide a comprehensive blueprint to guide users in the creation, reform, or interpretation of choice of law regimes at the national, regional, or international level

Endorsed by UNCITRAL and ICC (Paris), implemented by Paraguay
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