Implementation Checklist

Hague Convention of 30 June 2005 on Choice of Court Agreements

HccH
HAGUE CONFERENCE ON
PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE
DE DROIT INTERNATIONAL PRIVÉ

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Introduction

This document is addressed to States that are interested in becoming a Party to the *Hague Convention of 30 June 2005 on Choice of Court Agreements* ('Convention').

The purpose of the Checklist is to highlight issues which may need to be considered by a State when implementing the Convention. Some of these issues are common to all Hague Conventions and may therefore be familiar to States that have already implemented other Hague Conventions. Furthermore, the Checklist does not seek to prescribe the method by which the Convention is implemented internally, as this will differ for each State that becomes a Party. The issues highlighted in this Checklist are not exhaustive and there will undoubtedly be other issues particular to each State that require consideration.

As the Convention is also open to Regional Economic Integration Organisations ('REIOs'), the Checklist may also be useful to REIOs that are interested in becoming a Party to the Convention. Specific information on the ratification or accession of REIOs is set out at **Annex II**.

For further information on the Convention, including the Explanatory Report and a current list of Contracting States, visit the 'Choice of Court Section' of the Hague Conference website < www.hcch.net >.

>I

Preliminary steps

☐ **Consult** with the Permanent Bureau of the Hague Conference on Private International Law and other Contracting States on implementation matters.

The full text of the Convention and related materials are available on the Hague Conference website < www.hcch.net >.

☐ **Consult** with key stakeholders (*e.g.*, government departments, courts, legal practitioners, and the business community) and other subject matter experts (such as professional and academic institutions) to:

- determine the method and implications of becoming a Party;
- identify the best methods of implementing the Convention; and
- develop a plan for the implementation and operation of the Convention.

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Bringing the Convention into force within the internal legal system

☐ **Consider** how the Convention will be given force of law within the internal legal order of the State.

For some States, the Convention will automatically become part of internal law once it enters into force.

For other States, the Convention will need to be incorporated into internal law by legislative act. A list of key provisions that may require specific legislative enactment is set out in Annex 1.

Regardless of how the Convention is given force of law, some implementing measures will be needed to assist the effective implementation and operation of the Convention within the internal legal system (for example, procedural rules). In particular, the State may consider adopting the form recommended by the Hague Conference for parties to use in seeking recognition, or applying for enforcement, of judgments given by the chosen court. This form is available on the 'Choice of Court Section' of the Hague Conference website < www.hcch.net >.

☐ **Review** internal laws and practices to ensure that existing provisions are not inconsistent with the Convention or otherwise create obstacles for the effective implementation and operation of the Convention.

Although this issue might not be so imperative for States in which treaties override inconsistent internal law, existing provisions may still need to be amended or repealed.

A State may wish to examine existing legislation, case law and / or court practices in relation to choice of court agreements to determine whether any additional measures should be taken to ensure practices that conform to the Convention.

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Becoming a Party – signature / ratification or accession

☐ **Determine** the method for becoming a Party.

Article 27 provides that a State may become a Party to the Convention by *either* of the following methods:

- **signature followed by ratification** – by signing the Convention, a State expresses, in principle, its intention to become a Party to the Convention. The State will then need to *ratify* the Convention for it to enter into force;

- **accession.**

The legal effect of each of these methods is the same: *i.e.*, the State expressing its consent to be bound by the Convention.

Unlike certain other Hague Conventions, *each* of these methods of becoming a Party is available to *all* States, whether or not they were a Member of the Hague Conference when the Convention was concluded. Additionally, a State that accedes to the Convention is on an *equal footing* to those that sign and ratify it, insofar as the entry into force of the Convention for the State is not subject to the agreement of other Contracting States.

Each State is free to decide which method it will employ to become a Party. For example, Mexico became the first Contracting State to the Convention by accession.

>3 *cont.*

Becoming a Party – signature / ratification or accession

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☐ **Take** the required steps to become a Party.

For States wishing to become a Party by **signature followed by ratification:**

- the signature will need to be arranged with the Treaties Division of the Ministry of Foreign Affairs of the Netherlands (the depositary of the Convention), which is generally done through the State's local diplomatic representation; and
- the instrument of ratification must be deposited with the depositary.

For States wishing to become a Party by **accession**, the instrument of accession must be deposited with the depositary.

The contact details for the Treaties Division are as follows:

Treaties Division, Ministry of Foreign Affairs
Office address: DJZ/VE, Bezuidenhoutseweg 67
2594 AC The Hague
The Netherlands
Postal address: PO Box 20061
2500 EB The Hague
The Netherlands
Telephone: +31 70 348 49 22
E-mail: djz-ve@minbuza.nl
Website: www.minbuza.nl/treaties

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Territorial extension of the Convention

This section is only relevant to States that have two or more territorial units in which different systems of law apply (e.g., federal States, States with overseas territories and / or autonomous regions).

☐ **Ascertain** the competence of any territorial units in which different systems of law apply over matters governed by the Convention.

☐ **Determine** whether to make a declaration concerning the territorial extension of the Convention.

Article 28 allows a State to declare that the Convention extends to all its territorial units or only to one or more of them. If no such declaration is made, the Convention applies to all territorial units of the State.

☐ **Notify** the depositary of any declaration made.

The declaration may be made upon signature, ratification or accession (as the case may be). The declaration may be modified by submitting another declaration.

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Developing a timetable

☐ **Determine** the date on which the Convention will enter into force for the relevant State ('EIF date').

The Convention enters into force following the second instrument of ratification or accession.

- For the *first two Contracting States*, the Convention enters into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification or accession, as the case may be (Art. 31(1)).
- For *each subsequent Contracting State*, the Convention enters into force on the first day of the month following the expiration of three months after the deposit of that State's instrument of ratification or accession, as the case may be (Art. 31(2)).

☐ **Ensure** that by the EIF date:
- appropriate implementing measures are put in place, or enacted and in force; and
- no existing internal law or practice creates an obstacle for the effective implementation and operation of the Convention (see section 2).

☐ **Factor in** timing for communication with relevant stakeholders regarding the Convention entering into force (see section 6).

>6

Communication

IMPLEMENTATION CHECKLIST

☐ **Make certain** that all key stakeholders (including those listed in section 1) are informed sufficiently in advance of:

- the EIF date;
- any resulting changes to relevant internal laws and practices; and
- in the case of government departments and courts, any resulting changes to their respective roles under the Convention.

Information may include publication and distribution of written material, reference to online resources, and the organisation or promotion of seminars. It might be convenient to disseminate information through local chambers of commerce as well as the local branches of international organisations such as the International Bar Association and the International Chamber of Commerce.

☐ **Ensure** that adequate training is provided to individuals involved in the domestic application of the Convention (*e.g.*, judges, court officials, and legal practitioners).

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Declarations

IMPLEMENTATION CHECKLIST

☐ **Consider** the need to make any of the optional declarations provided for under the Convention.

The Convention provides that a State may make any of the following optional declarations:

- **Article 19** declaration limiting jurisdiction where a case is wholly *foreign* to the State concerned – this declaration gives the courts of the State discretion to refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

- **Article 20** declaration limiting recognition and enforcement of foreign judgments where a case is wholly *domestic* to the State concerned – this declaration gives the courts of the State discretion to refuse to recognise or enforce a judgment given by a court of another Contracting State if the parties were resident in the 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 that State.

- **Article 21** declaration with respect to specific matters – this declaration allows the State to exclude specific matters from the application of the Convention where it has a strong interest in doing so. This effectively extends the matters already excluded from the scope under Article 2(2). Any such declaration should be made only in respect of discrete areas of law of the kind mentioned in Article 2(2). In addition, the declaration cannot use any criterion other than subject matter (for instance, 'contracts of marine insurance' is possible, but not 'contracts of marine insurance where the chosen court is situated in another State').

>7 *cont.*

Declarations

- **Article 22** declaration on non-exclusive choice of court agreements – this declaration allows the State to extend the scope of the Convention, in particular the provisions on recognition and enforcement of judgments, to *non-exclusive* choice of court agreements.

- **Article 26(5)** declaration on priority of treaties in relation to a specific matter – this declaration allows the State to give priority to a treaty which, in relation to a specific matter, governs the same issues as the Convention.

☐ **Notify** the depositary of any declaration made.

Declarations may be made upon signature, ratification or accession (as the case may be) or at any time thereafter. Declarations may be modified or withdrawn at any time by notification to the depositary.

>8

Ongoing review processes

☐ **Develop** and **implement** mechanisms to monitor and evaluate the application and functioning of the Convention.

Ongoing monitoring and evaluation assists in identifying and responding to any implementation issues that may arise.

At the domestic level, this may include continuing dialogue and consultation with individuals and entities involved in the domestic application of the Convention (*e.g.*, judges, court officials, and legal practitioners).

At the international level, Article 24 of the Convention provides for the Secretary General of the Hague Conference to make arrangements for the regular review of the operation of the Convention, which will primarily take the form of meetings of Contracting States and other interested States.

> Annex 1

Key provisions that may require specific legislative enactment

The table below sets out a list of key provisions that may require specific legislative enactment into internal law. As acknowledged at section 2 of the Checklist, not all States require a legislative act to incorporate the Convention into internal law.

In drafting any implementing legislation, the following issues should be considered:

- the relationship with any existing internal laws that govern choice of court in consumer and employment contracting which are excluded from the scope of the Convention (including whether the definitions of 'consumer' and 'employment' under Art. 2(1) of the Convention are compatible with those existing at internal law);
- the relationship with any existing internal laws that govern other matters which are excluded from the scope of the Convention (either pursuant to Art. 2 or to an Art. 21 declaration);
- whether the temporal scope of the legislation coincides with the transitional application of the Convention as provided under Article 16;
- the requirement for the provisions of the Convention to be interpreted with regard to the international character of the Convention and the need to promote uniformity in its application (as provided under Art. 23); and
- the relationship between the Convention and other international instruments in force to which the State is a Party (as provided under Art. 26).

> Annex I *cont.*

Key provisions that may require specific legislative enactment

Article	Disposition	Question
Article 3 Exclusive choice of court agreements	Meaning of 'exclusive choice of court agreement' for the purposes of the Convention.	The existing definition of 'exclusive choice of court agreement' under internal law may not be consistent with that provided under the Convention. In particular, the Convention: • deems a choice of court agreement designating one or more specific courts of one Contracting State to be exclusive unless the parties have expressly provided otherwise; and • allows a choice of court agreement to be concluded or documented by electronic means.
Article 4 Other definitions	Meaning of: • 'judgment'; and • resident' (for an entity or person other than a natural person).	In some States, the factors listed in Article 4 *a*) to *d*) might not be recognised as determining residence.
Article 5 Jurisdiction of the chosen court	Obligation of a chosen court to hear the case unless the relevant choice of court agreement is null and void under the law of that State. However, if the State makes an Article 19 declaration (see section 7 of the Checklist), the court may refuse to determine the dispute if, except for the location of the court, there is no connection between the State and the parties or the dispute.	In some States, this may require modification to existing laws giving courts discretion to decline jurisdiction on the grounds of *forum non conveniens* or *lis pendens*. Other implementing measures may be required to facilitate a case being brought before the chosen court (*e.g.*, procedural rules, court forms).

> Annex I *cont.*

Key provisions that may require specific legislative enactment

Article	Disposition	Question
Article 6 Obligations of a court not chosen	Obligation of a court not chosen to suspend or dismiss proceedings to which the agreement applies. However, this obligation is subject to the exceptions listed in Article 6 *a*) to *e*).	In some States, this may require modification to existing laws giving courts exclusive jurisdiction over matters covered by the Convention, or discretion to hear the case (*e.g.*, where the chosen court is considered not to be the appropriate forum).
Article 8 Recognition and enforcement	Obligation to recognise and enforce a judgment given by a chosen court. However, recognition or enforcement may be refused: • on the grounds listed in Articles 9 to 11; and / or • if the State makes an Article 20 declaration (see section 7 of the Checklist).	Are internal laws consistent with provisions on recognition and enforcement? Other implementing measures may be required to facilitate recognition and enforcement proceedings (*e.g.*, procedural rules for the production of documents listed in Art. 13 or registration of foreign judgments, if required in the State).

> Annex II

Additional information for REIOs

Under Article 29(1) of the Convention, an REIO may become a Party to the Convention. An REIO is defined as an organisation that:

- is constituted by sovereign States; and
- has competence over some or all of the matters governed by the Convention.

As a result, references in the Checklist to 'Contracting State' or 'State' may equally apply, where appropriate, to an REIO that is interested in becoming a Party to the Convention.

In addition to the issues highlighted in the Checklist, an interested REIO will need to ascertain the division of competence between the REIO and its Member States. The reason for this is that the Convention provides for an REIO to become a Party either:

- together with its Member States – this might occur where the REIO and its Member States enjoy concurrent external competence over the matters governed by the Convention, or if some matters fall within the external competence of the REIO and others within that of the Member States; or
- instead of its Member States – this might occur where the REIO has exclusive external competence over the matters governed by the Convention.

If an REIO wishes to be Party to the Convention *instead of its Member States*, it is required to make a declaration to that effect under Article 30(1).[1] The declaration may only be made upon signature, acceptance, approval or accession (as the case may be) and must be notified to the depositary (see details at section 3).

1 For example, when the European Union (then the European Community) signed the Convention on 1 April 2009, it made the following declaration: 'The European Community declares, in accordance with Article 30 of the Convention on Choice of Court Agreements, that it exercises competence over all the matters governed by this Convention. Its Member States will not sign, ratify, accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community'.