



**Asia-Pacific  
Economic Cooperation**

---

**2015/SOM3/EC/WKSP4/005**

Session 4

## **Overview of the Hague Choice of Court Agreements Convention**

Submitted by: HCCH





**APEC**  
PHILIPPINES  
2 0 1 5

**Workshop on Effective Enforcement of Business  
Contracts and Efficient Resolution of Business  
Disputes Through the Hague Choice of Court  
Agreements Convention  
Cebu, Philippines  
1 September 2015**



**APEC**  
Asia-Pacific  
Economic Cooperation

 **United Nations**  
UNCITRAL  
Regional Centre for Asia and the Pacific



 **HCCH**  
HAGUE CONFERENCE ON  
PRIVATE INTERNATIONAL LAW  
CONFÉRENCE DE LA HAÏE  
DE DROIT INTERNATIONAL PRIVÉ

**Effective enforcement of business contracts and  
efficient resolution of business disputes through  
the Hague Choice of Court Agreements Convention**

APEC Workshop  
*Cebu, Philippines, 1 September 2015*

Christophe Bernasconi  
Secretary General



**The HCCH:  
Introduction**

## Why "HCCH" ...?

**H**ague **C**onference on Private International Law  
**C**onférence de La **H**aye de Droit International Privé

## Why "HCCH" ...?

**H**ague **C**onference on Private International Law  
**C**onférence de La **H**aye de Droit International Privé

## What is the HCCH?



An **intergovernmental organisation** working toward “progressive unification of the rules of private international law” (Art. 1, Statute)

### JURISDICTION

Which State’s authorities are competent to decide matters in a cross-border situation?

### APPLICABLE LAW

Which State’s laws apply to a cross-border situation?

### RECOGNITION & ENFORCEMENT

How may one State’s judgment or decision be recognised / enforced in another State?

### LEGAL CO-OPERATION

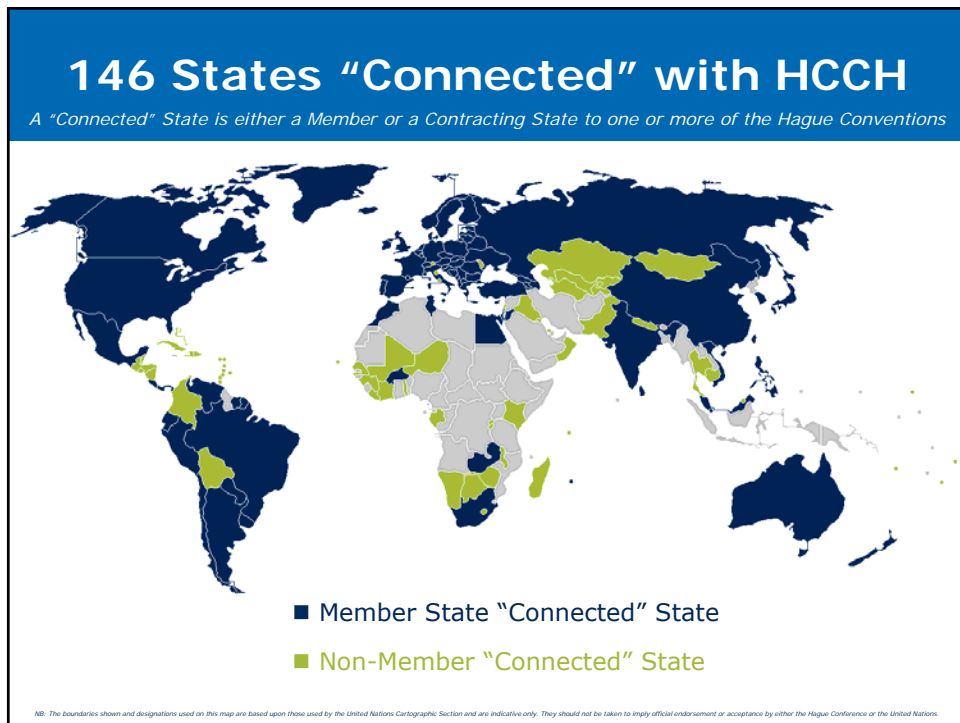
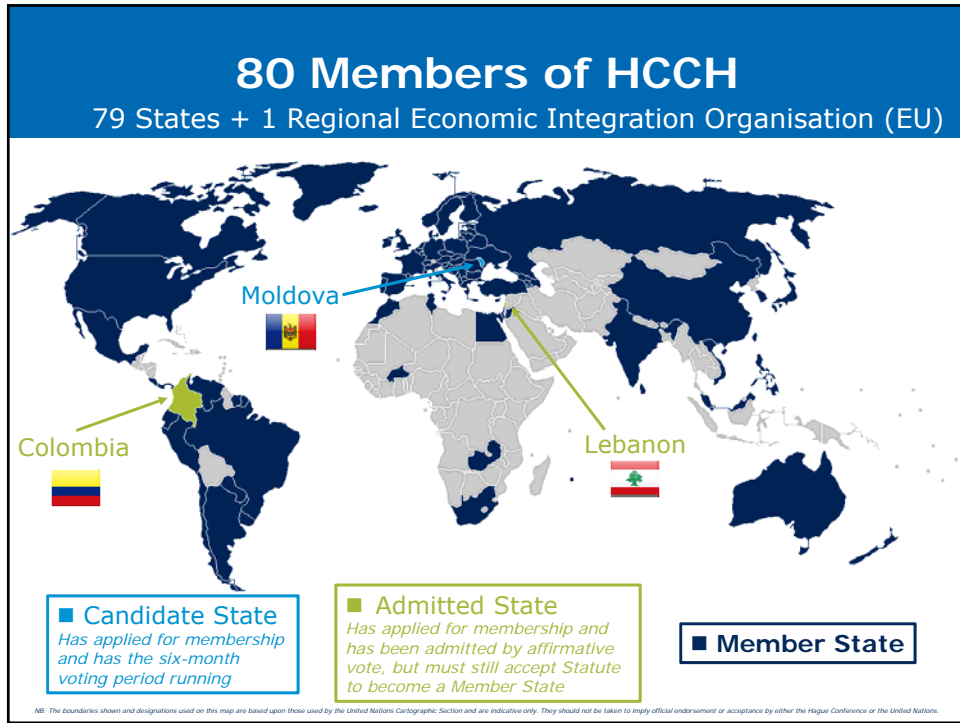
How can authorities work together to improve efficiency and overcome challenges in cross-border situations?

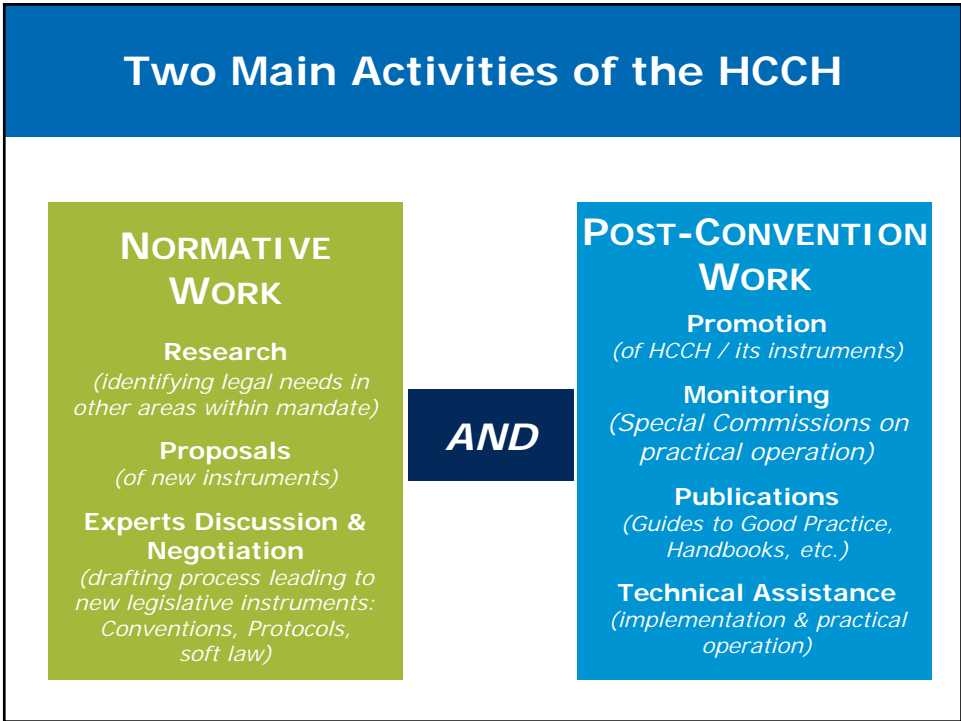
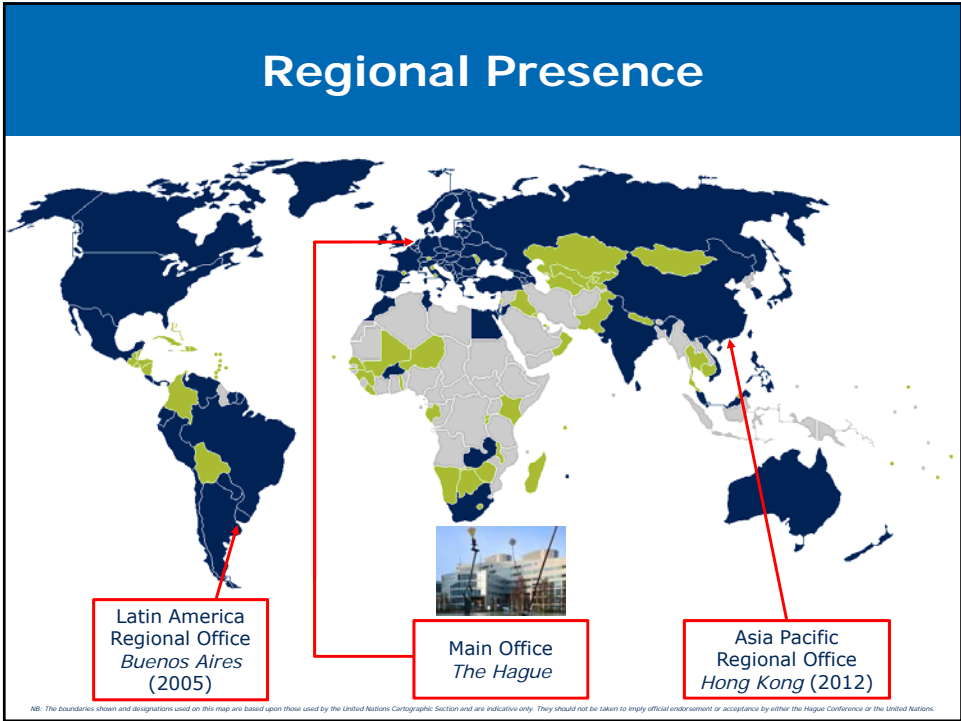
*NB: The Conference does not deal with substantive law, but provides “road signs” and “bridges” needed in cross-border situations*

## What is the HCCH?



- The **oldest** international organisation in The Hague, with its origin dating back to **1893**
- The **only** international organisation in The Hague with a **legislative function** (*i.e.* not a court or tribunal)
- Fulfils its mandate by developing and adopting **Hague Conventions** (as well as Protocols and *soft law* instruments) – “**World laws**” (Prof. Schermers, 1972)
- There are currently **38 Conventions** and Protocols, and 1 **soft law** instrument





## Three Main Fields of Normative Work

### International Protection of Children

1980 Child Abduction Convention (93)  
 1993 Intercountry Adoption Convention (95)  
 1996 Child Protection Convention (41)  
 2007 Child Support Convention [5(32)]  
 and Protocol [2(28)]

### International Civil Procedure & Legal Co-operation

1961 Apostille Convention (108)  
 1965 Service Convention (68)  
 1970 Evidence Convention (58)  
 1980 Access to Justice Convention (27)  
 2005 Choice of Court Convention [2(29)]

### International Commercial & Finance law

1985 Trusts Convention (12)  
 2006 Securities Convention (2)  
 2015 Principles on Choice of Law in  
 International Commercial Contracts

## Resulting Benefits of Hague Conventions

### *Facilitating international trade, commerce and foreign direct investment*

Through the *Apostille, Service, Evidence, Access to Justice, Choice of Court, and Securities* Conventions and the *Contracts Principles*

These instruments create a clear (but non-intrusive) framework that:

- *sets uniform global standards*
- *provides legal certainty and predictability for parties*
- *enhances co-operation between States, saving consular/legal resources*
- *reduces costs and delays*
- *improves the rule of law*

## Resulting Benefits of Hague Conventions

### Facilitating international trade, commerce and foreign direct investment

In addition, many international organisations have lent their support to Hague Conventions for these reasons. For example:



WORLD BANK GROUP

- the **World Bank Group (IFC)** in the *Investing Across Borders Report (2010)*, found that the *Apostille Convention* simplifies the establishment a business in a foreign State and facilitates foreign direct investment



INTERNATIONAL CHAMBER OF COMMERCE

- the **International Chamber of Commerce** has encouraged States to join both the *Apostille* and *Choice of Court Convention*



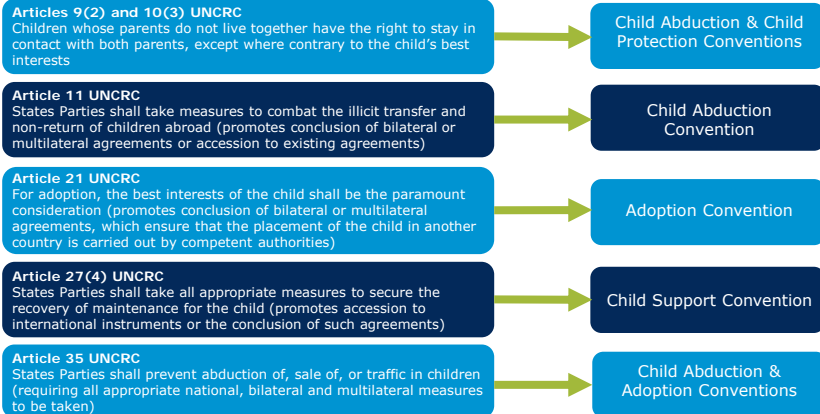
GROUP OF THIRTY  
Consultative Group on International Economic and Monetary Affairs, Inc.

- the **Group of Thirty** has recommended that States ratify the *Securities Convention*

## Resulting Benefits of Hague Conventions

### Giving effect to human rights

The *Child Abduction, Child Protection, Intercountry Adoption, and Child Support Conventions* give effect to fundamental principles expounded in the **1989 UN Convention on the Rights of the Child:**





## Work in the Pipeline

Work relating to possible new instruments:

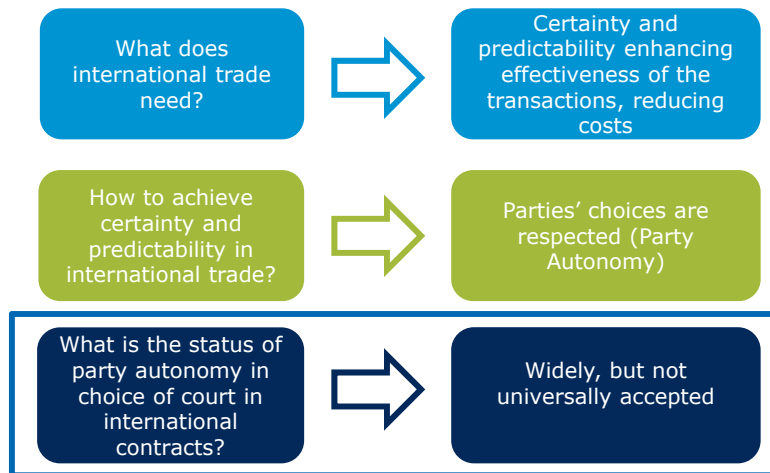
- **Judgments** Project
- Private international law issues surrounding the **status of children**, including issues arising from **international surrogacy** arrangements
- Recognition and enforcement of foreign **civil protection orders**
- Recognition and enforcement of **voluntary cross-border agreements**
- Co-operation in respect of **protection of tourists** and visitors abroad
- Use of **video-link** and other modern technologies in the taking of evidence abroad



**The Choice of Court  
Convention**

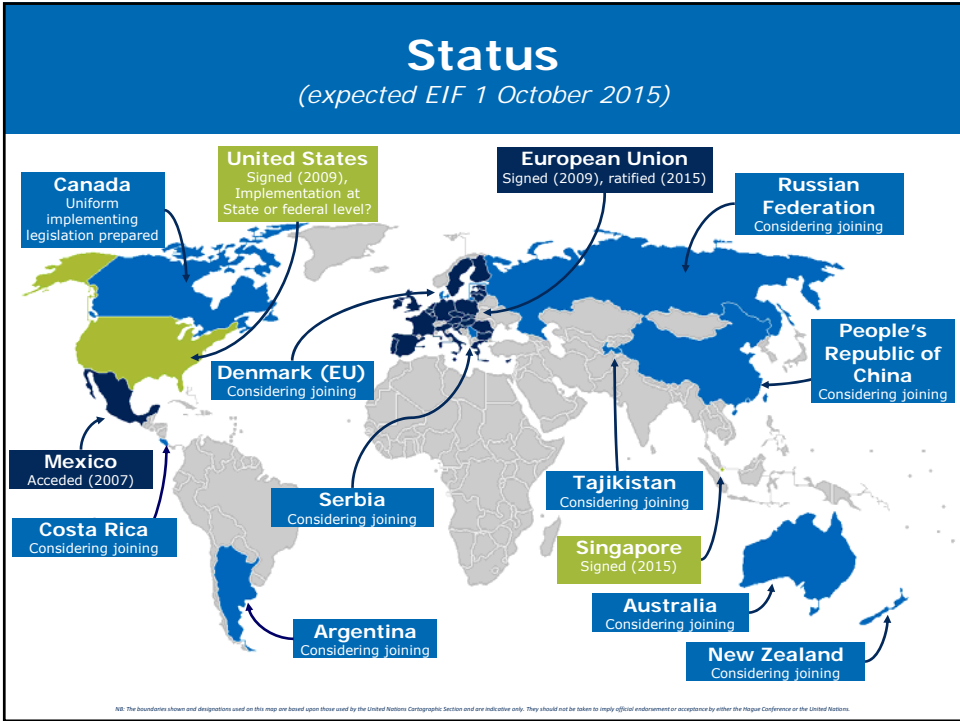
*(Hague Convention of 30 June 2005 on  
Choice of Court Agreements)*

## Party Autonomy in International Trade



## Purpose

- **Legal certainty and predictability** with respect to choice of court agreements
  - *Encourages the **promotion of trade and investment***
- Ensuring that the **parties' choice** of forum (court) to resolve disputes **is being upheld** in international cases
- Resulting in the **promotion of party autonomy** in international trade and commerce
  - *Will hopefully become the **litigation equivalent of the 1958 New York Convention***



### 3 Key Obligations

- 1** The chosen court **must** hear the dispute  
*Article 5*
- 2** Any non-chosen court **must** suspend/dismiss proceedings  
*Article 6*
- 3** Judgment given by the chosen court **must** be recognised and enforced  
*Article 8*

The *clear, simple* and *predictable* regime established by the Convention contributes to a *strong* and *effective legal basis* for *cross-border trade and investment*

## International Endorsement

2007: International Chamber of Commerce Endorsement

2012: International Chamber of Commerce re-Endorsement

2013: Inter-American Bar Association Recommendation

2013: German Bar Association Encouragement

2014: CCBE Recommendation

## Scope

### 1) International cases

- for the purpose of ***jurisdiction***:  
 “International” **unless** parties are resident in the same Contracting State and their relationship and all other elements relevant to the dispute are connected only with that State  
*(subject to Art. 19 declaration)*
- for the purpose of ***recognition and enforcement***:  
 A case is “international” where the judgment was given in another Contracting State  
*(subject to Art. 20 declaration)*

### 2) “Civil and commercial matters”

- **Excluding consumer and employment contracts** (Art. 2(1)) and other “excluded matters” (Art. 2(2))
- A State may refuse to apply the Convention to a specific matter in which it has a strong interest in not applying it  
*(Art. 21 declaration – “asbestos clause”)*

## Scope (cont'd)

### 3) Exclusive choice of court agreements

- that designate the **court(s)** of a **Contracting State**
- **presumption** is in favour of **exclusivity**
- must be **concluded or documented in writing, or by other means** of communication which render information accessible for subsequent reference (**e-agreement**)
- **concluded after EIF for the State** of the designated court

### 4) Interim measures of protection

- **outside the scope** of the Convention
- a court – whether the chosen court or otherwise – **may grant such measures or not grant them** as it sees fit
- however, such measures are **not recognisable or enforceable** under the Convention

## 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:*

- null and void
- incapacity
- 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*

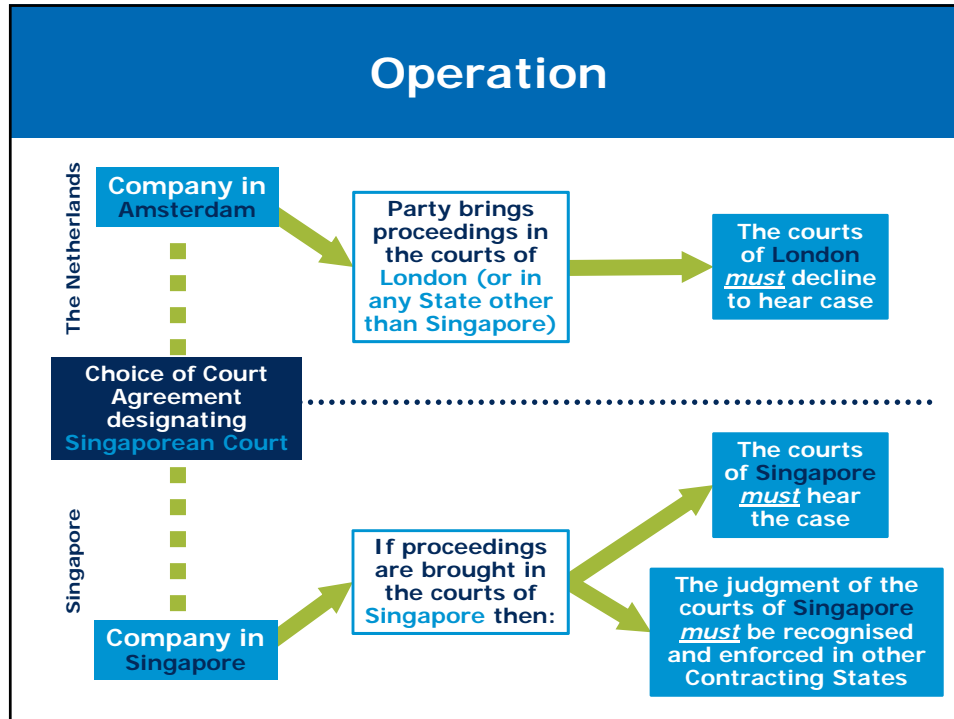


*unless (Art. 9) :*

- null and void
- incapacity
- notification
- fraud
- public policy
- inconsistent judgment



**Enforcement**  
of judgments rendered by the chosen court  
(see also Art. 11 on damages)



## Intellectual Property under 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 also **excluded**, except when brought (or could have been brought) pursuant to a **contract**

## Choice of court in favour of a Korean court

**LG v. Obayashi Co. and Tanaka** (Seoul High Court of Appeal (No 2007NA96470))

- contract for the transfer of a series of patent rights;
- containing choice of court (Seoul District Court) and applicable law clauses;

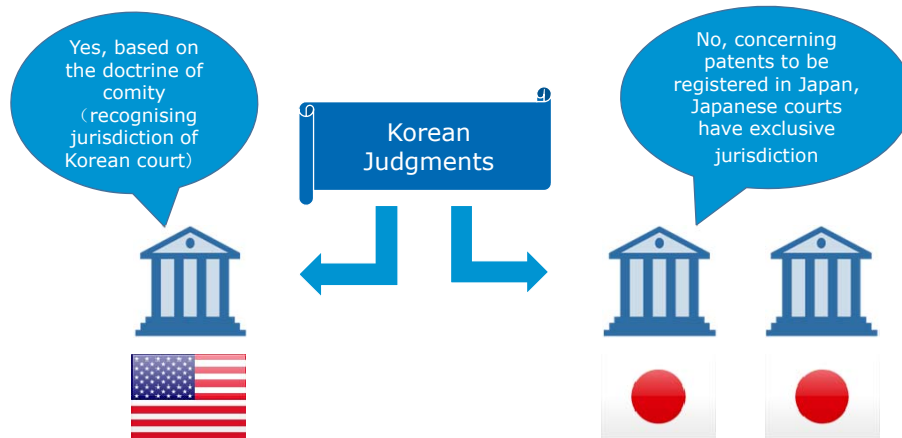
*Seoul District Court:* dismissed (exclusive jurisdiction of the country of registration) **1999 Draft Hague Convention** was referred to (Art. 12(4) – exclusive jurisdiction for registered IP rights)

*Seoul High Court of Appeal:* reversed the District Court decision (respecting the parties' choice of court because the *subject matter* of the dispute is about validity and interpretation of the patent transfer contract) **Choice of Court Convention** was referred to (Art. 2 (o))

*Supreme Court of Korea:* upheld the High Court decision

## Choice of court in favour of a Korean court (cont'd)

### LG's enforcement of the judgments

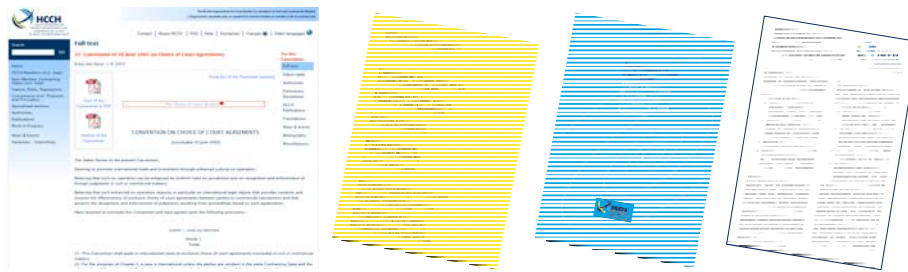




## Additional Information

Several useful resources available on the Choice of Court Section of the HCCH website <[hcch.net](http://hcch.net)>

- **Full Text of the Convention**
- **Explanatory Report to the Convention**
- **Implementation Checklist**
- **Implementation Dialogue**



Christophe Bernasconi

[cb@hcch.nl](mailto:cb@hcch.nl)



[www.hcch.net](http://www.hcch.net)