



**Asia-Pacific
Economic Cooperation**

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Session 6

Enhancing Trade in APEC Hague Choice of Court Convention and Other Tools for Resolving Disputes

Submitted by: United States



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**

ENHANCING TRADE IN APEC

Hague Choice of Court Convention & Other Tools for Resolving Disputes

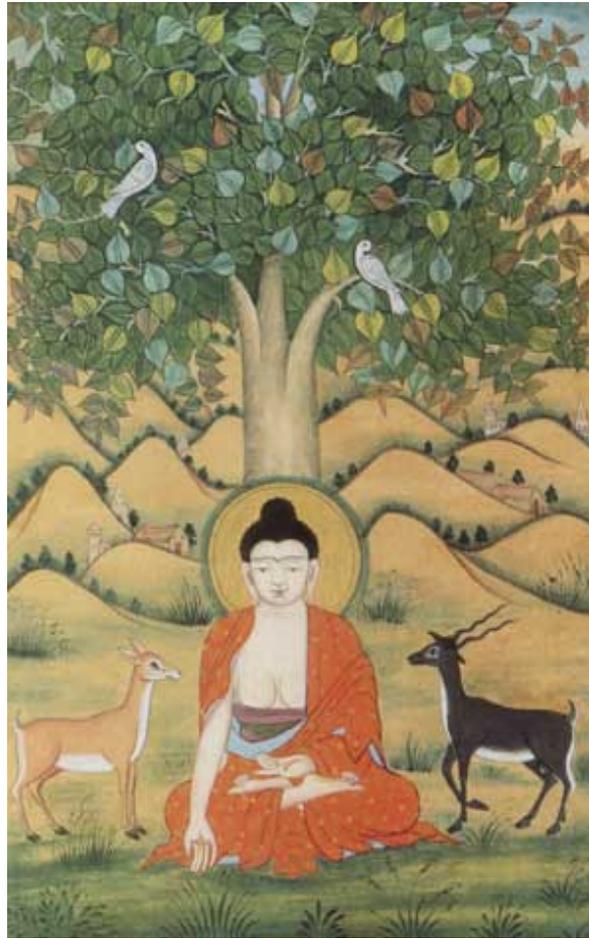
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SOM III Cebu, Philippines
September 1, 2015



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CASE STUDY: THE ORIGINAL BODHI TREE



ENHANCING TRADE IN APEC

Hague Choice of Court Convention and Other Tools for Resolving Disputes

1. Impact of Dispute Resolution on Law Development and Trade
2. Dispute Resolution in APEC
3. Tools for Improvement (Cross-Border Trade)
 - Hague Choice of Court Convention
 - UNCITRAL Arbitration Instruments
 - Online Dispute Resolution



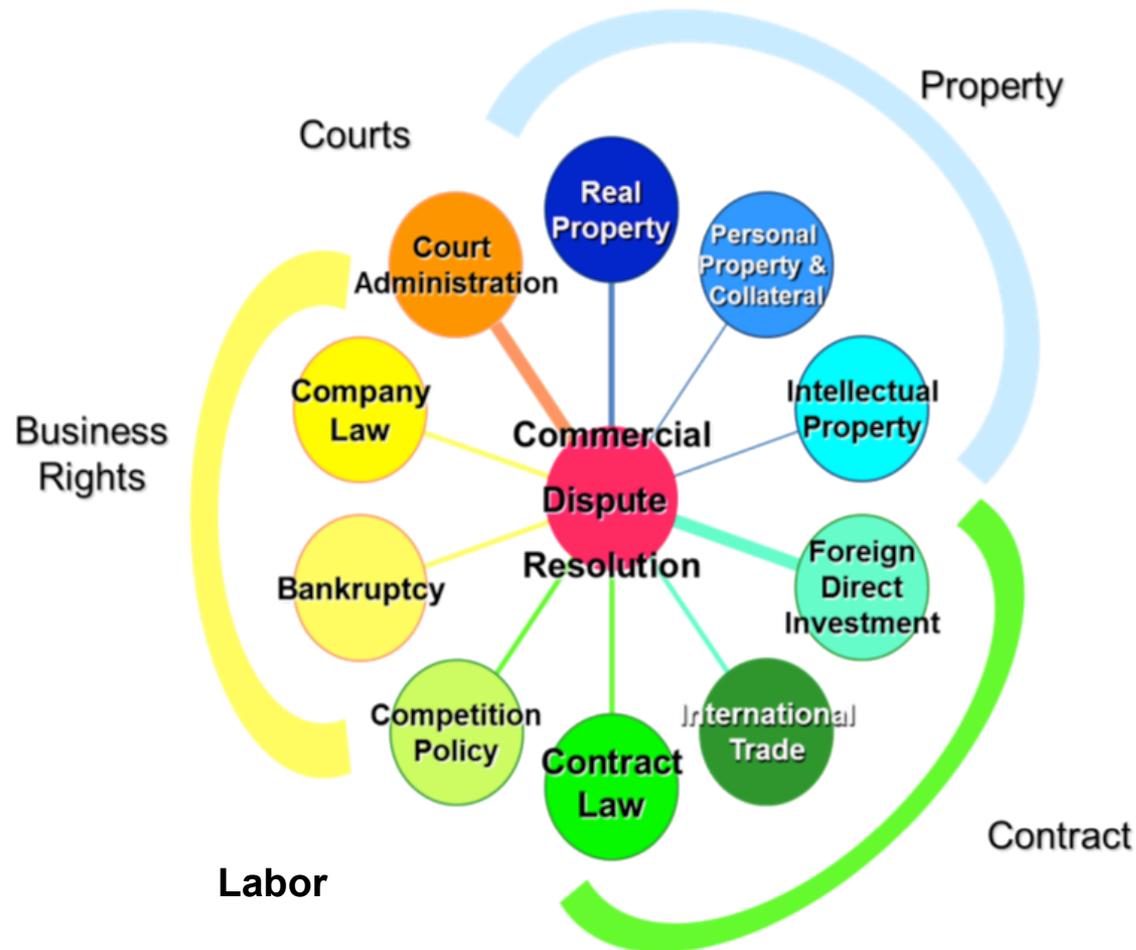
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IMPACT OF DISPUTE RESOLUTION ON LAW DEVELOPMENT AND TRADE



IMPACT OF DISPUTE RESOLUTION ON LAW DEVELOPMENT AND TRADE

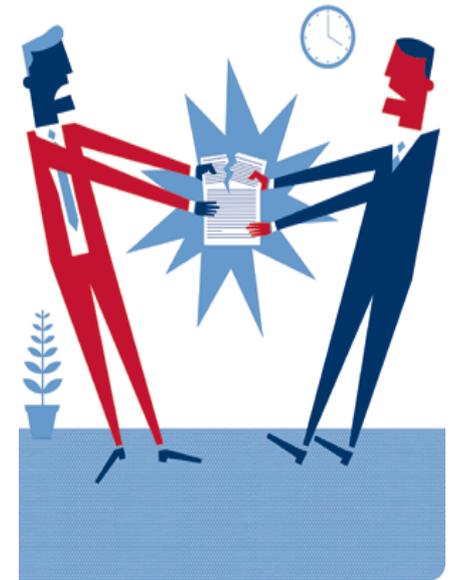
- Courts interpret market rules and protect economic rights.
- World Bank studies:
 - In economies with slow courts, firms receive less bank financing.
 - Reforms, such as creditors' rights, increase bank financing only if contracts can be enforced in courts.
 - Safavian, Mehnaz, and Siddharth Sharma. 2007. "When Do Creditor Rights Work?" *Journal of Comparative Economics* 35 (3): 484–508.
 - In economies with good contract enforcement in debt collection, firms produce and export more customized products.
 - Nunn, Nathan. 2007. "Relationship-Specificity, Incomplete Contracts, and the Pattern of Trade." *Quarterly Journal of Economics* 122 (2): 569–600.
- Other research shows foreign direct investment is greater where the cost of contract enforcement in debt collection and property eviction cases is lower, particularly in indebted economies.
 - Ahlquist, John S., and Aseem Prakash. 2010. "FDI and the Costs of Contract Enforcement in Developing Countries." *Policy Sciences* 43 (2): 181–200.



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DISPUTE RESOLUTION IN APEC

Enforcing Contracts - Where do things stand?

- APEC EoDB for Enforcing Contracts measures time, cost and procedural complexity of resolving a commercial lawsuit in member economies.
- APEC 2014 Interim Assessment found in the Enforcing Contracts area that:
 - “[a]ny improvements were marginal”
 - “[I]t still took on average more than 14 months to enforce a contract [421 days]”
 - “In terms of cost to enforce a contract, measured by a percentage of the claim taken by administrative fees . . . , the APEC region [had] an average score of 33.4 per cent of the claim, slightly higher than in 2009.
- The Assessment concludes that “APEC Economies could make significant gains by ensuring efficient, consistent and quick dispute settlement procedures.” APEC’s EoDB 2014 Interim Assessment at 42-43.



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TOOLS FOR IMPROVEMENT

Importance

2014 APEC Ministerial Statement:

- "We welcome the joint efforts of the EC . . . the Hague Conference on Private International Law (HCCH), as well as . . . the UN Commission on International Trade Law (UNCITRAL) to build awareness of private international law instruments to facilitate cross-border trade and investment, enhance ease of doing business, and foster effective enforcement of contracts and efficient settlement of business disputes."

2014 APEC Leaders' Declaration

- ". . . . We encourage wider use of these instruments which would contribute to APEC's regional integration, connectivity and structural reform agenda."



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TOOLS FOR IMPROVEMENT

Hague Conference

- Hague Choice of Court Agreements Convention
 - Cross Border Judicial Enforcement
 - Finalized in 2005
 - Enters into force
Oct 1, 2015
 - 29 Contracting Parties



HAGUE CHOICE OF COURT CONVENTION

A Potential Game Changer?

- Arbitration predominant form of dispute resolution in international trade.
- Traditional judicial relief seen slow and raises competing jurisdictional claims by different courts, as well as jurisdictional, choice of law, and enforcement difficulties in cross-border disputes.
- Hague Convention has potential to reduce disparity when it enters into force this year.
- The Convention would supplement arbitration-recognition regime with a parallel regime of judgment recognition when parties exclusively agree on a particular court for resolution of their disputes.



HAGUE CHOICE OF COURT CONVENTION

History and Status in the U.S.

- U.S. signed treaty in 2009
- U.S. has not ratified the treaty
- Convention largely consistent with existing U.S. law where U.S. courts commonly enforce choice of court agreements
 - Usually referred to as “forum selection clauses”



HAGUE CHOICE OF COURT CONVENTION

Consistent with U.S. law

- Hague Convention deals with recognition and enforcement of judgments – governed by state law in U.S.
- Judgments enforcement in U.S. largely a matter of state common law, supplemented by 2 uniform acts adopted in half of the states.
- U.S. courts traditionally among most receptive in the world to recognition and enforcement of foreign judgments.



HAGUE CHOICE OF COURT CONVENTION

Benefits

- Convention widely seen in U.S. as providing value added.
- Grounds for recognition and enforcement of foreign judgments nearly uniform throughout the U.S., however standards vary globally.
- U.S. not party to any treaty dealing with recognition and enforcement of judgments. No federal statute deals with these issues on a general basis.



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UNCITRAL ARBITRATION INSTRUMENTS

Other Tools for Resolving Disputes

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards: **the New York Convention** (1958)
- **Model Law** on International Commercial Arbitration (rev. 2006)



United Nations
UNCITRAL

UNCITRAL ARBITRATION INSTRUMENTS

The New York Convention

New York Arbitration Convention Status: 2011



156 Parties

UNCITRAL ARBITRATION INSTRUMENTS

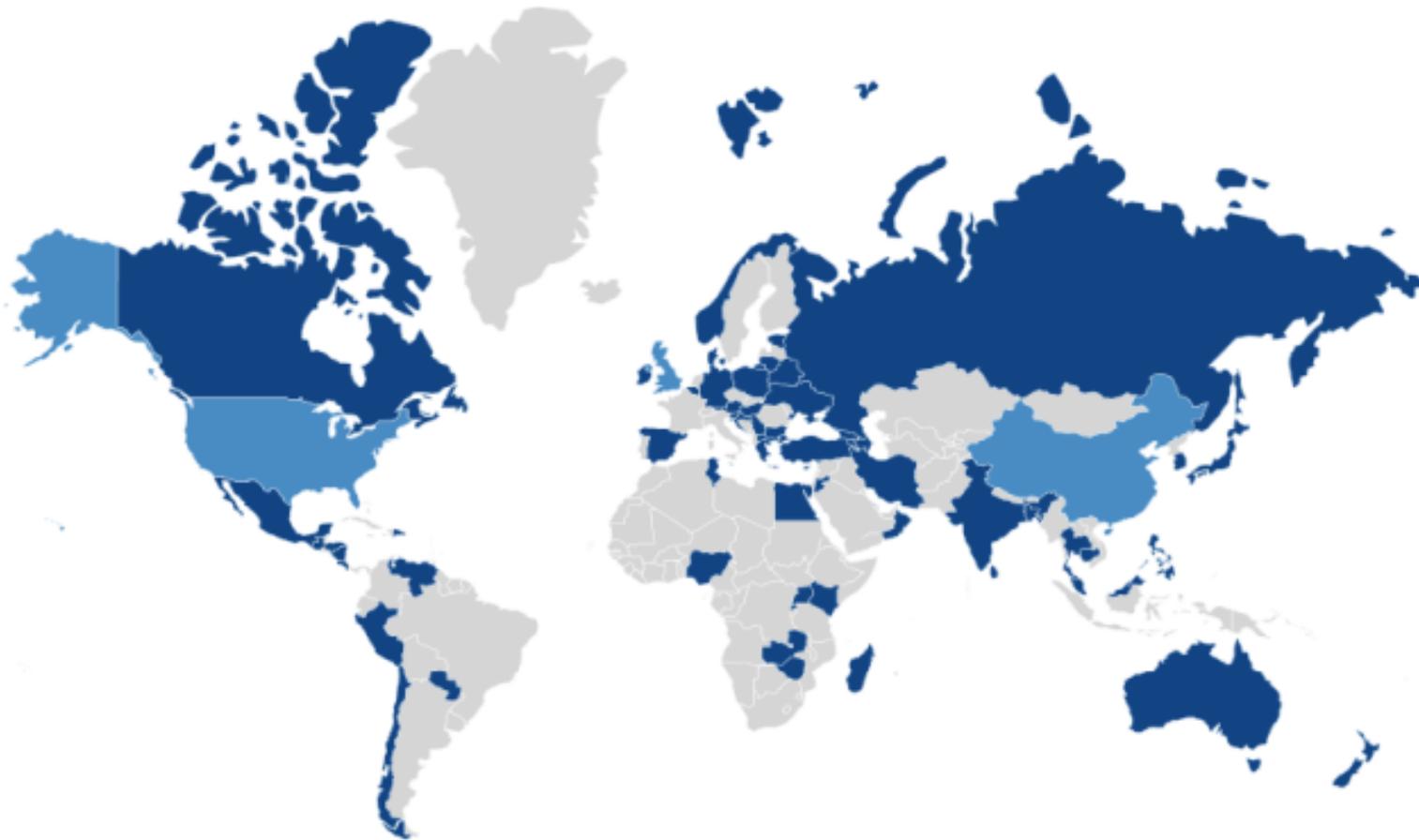
The New York Convention



- Requires courts to recognize arbitration clause
- Arbitration award in one Convention country to be recognized and enforced in another
- Limited grounds for denial of enforcement of arbitration award (Article V)

UNCITRAL ARBITRATION INSTRUMENTS

The Model Law



UNCITRAL ARBITRATION INSTRUMENTS

The Model Law

- UNCITRAL Model Law helps member economies modernize their laws on arbitral procedure and take into account the needs of international commercial arbitration.
- It covers all stages of the arbitral process.
- It reflects worldwide consensus on key aspects of international arbitration practice.



UNCITRAL ARBITRATION INSTRUMENTS

Litigation or Arbitration?

- Hague Convention reduces the advantages of arbitration.
- Establishes framework for enforcing court judgments if parties agreed to go to court.
- Similar to the New York Convention and UNCITRAL Model Law except
 - Has narrower scope of application
 - Provides more leeway in refusing to enforce a judgment.
- Whether it is as impactful as the New York Convention will depend on widespread ratification.

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HAGUE CONVENTION EXCLUDES CONSUMERS

'On the Internet, nobody knows you are a consumer'



ONLINE DISPUTE RESOLUTION

Hague Convention Excludes Consumers

- Draft Hague Convention carved out B2C transactions over concerns about which court (of the consumer or vendor) should have jurisdiction.
- Permanent Bureau of the Hague Conference explains concern of vendor:
 - “[B]usiness interests and other Internet users ... [may] be forced to defend themselves against actions in a multitude of jurisdictions.... **[I]t is virtually impossible to determine where a consumer is located with certainty** ...[E]ach jurisdiction will apply its own uncoordinated choice of law rules ... subjecting e-commerce businesses to...potentially conflicting legal frameworks.”
 - “[C]ountries are still deciding which approach is preferable [consumer or vendor court]....**[D]eliberations are contingent upon the growth of ... [ODR] techniques, which may provide a valid alternative by which a consumer can obtain an effective remedy.**”

- Permanent Bureau of the Hague Conference, *The Impact of the Internet on the Judgment Project: Thoughts for the Future*, Preliminary Document No. 17 of February 2002 at 8-11, available at http://www.hcch.net/upload/wop/gen_pd17e.pdf (footnotes omitted) (emphasis added).

ONLINE DISPUTE RESOLUTION

E-commerce Needs Harmonized ODR

- The main conclusion of UNCITRAL in establishing the ODR Working Group is that there are currently no practical ways to resolve low-value cross-border e-commerce disputes.
- *The barriers to obtaining a judicial remedy are magnified in high-volume, low value cross-border e-commerce transitions where a foreign supplier is involved.*
- “[T]he solution — providing a quick resolution and enforcement of disputes across borders — might reside in a global online dispute resolution system for small-value, high-volume business-to-business and business-to-consumer disputes.”

• [Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17, A/65/17, para. 254 \(2010\).](#)



ONLINE DISPUTE RESOLUTION

Justice in a Digital World

- B2C e-commerce sales expected to reach \$1.7 trillion in 2015. eMarketer, July 2014.
- Worldwide e-commerce retail sales have grown over the last decade by 20% annually.
- A key component in establishing buyer and vendor confidence, and in growing cross-border e-commerce is access to justice through online dispute resolution.
- UNCITRAL working group on online dispute resolution providing framework for rapid, fair, transparent and cost-effective resolution of cross-border disputes that can keep pace with the rapid growth of e-commerce.



Digital highway provides MSMEs unprecedented access to international markets

ONLINE DISPUTE RESOLUTION

Government Models



- In Mexico, *Concilianet* provides government-run online dispute resolution platform for B2C. Participation is mandatory for domestic vendors.

Available at: http://www.profeco.gob.mx/Folletos/Queja_ing.pdf



- In Republic of Korea e-commerce dispute resolution committee mediates disputes stemming from e-commerce transactions involving B2C.

Available at <http://www.ecmc.or.kr/home.it>



- In Colombia government is promoting ODR for disputes including those involving e-commerce, chargebacks, simplified insolvency, and shareholder disputes.

- In Ontario government is considering using ODR as an alternative to an in-court prosecution of minor criminal offenses such as traffic tickets. The process would minimize the significant public resources involved with public trials and at the same time ensure a fair, effective process, including the right to be heard (online) before an unbiased decision maker.

Ministry of the Attorney General, Exploring an online Administrative Monetary Penalty System for infractions of provincial statutes and municipal by-laws in Ontario, available at

http://www.attorneygeneral.jus.gov.on.ca/english/POA%20ConsultationPaper%20Final_ENG.pdf.



ONLINE DISPUTE RESOLUTION

Regional Platforms

- The Proposed OAS ODR regional platform would establish model law/cooperative framework and procedural rules to govern ODR proceedings including arbitration of disputes.



- Available at http://www.oas.org/dil/esp/CIDIPVII_proteccion_al_consumidor_united_states_guia_legislativa_anexo_A.pdf

- The EC ODR regional platform provides for submission of B2C complaints within EU via online form.
 - ◻ EC refers complaint to competent national ADR entity, which provides online mediation/arbitration.



- Regulation No. 524/2013 on online dispute resolution for consumer disputes, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>.
- See also Directive 2013/11 on alternate dispute resolution for consumer disputes, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0063:0079:EN:PDF>

CONCLUSION

- The Hague Choice of Court Convention, UNCITRAL arbitration instruments and ODR are crucial tools for resolving of cross-border disputes in APEC.
- The Hague Choice of Court Convention provides a streamlined framework for recognition and enforcement of judicial awards in cross-border transactions.
- The UNCITRAL arbitration instruments provide a universally accepted means for resolving cross-border disputes. They complement and relieve the judiciary.
- ODR provides a vital basis for resolving low-value disputes in cross-border transactions.
- Creating an enabling legal environment through these tools has the potential to make access to affordable justice a reality across APEC. They:
 - Provide MSMEs with an opportunity to compete and flourish
 - Empower consumers and protect them against unfair practices
 - Build capacity for economic growth and improve trade
- The time is now to build a legal framework in APEC that extends justice to all.

Thank You

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