



**Asia-Pacific
Economic Cooperation**

2018/SOM1/EC/WKSP2/009

The Hague Choice of Court Agreement Convention

Submitted by: HCCH



**Workshop on the Use of Modern
Technology for Dispute Resolution and
Electronic Agreement Management
Particularly Online Dispute Resolution
Port Moresby, Papua New Guinea
3-4 March 2018**



The Hague Choice of Court Agreement Convention

International Instruments for Dispute Resolution and Prevention
3 March 2018

Frank Poon
Representative, HCCH Regional Office for Asia and the Pacific

Options for Dispute Resolution

B2B, B2G, B2P



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***

Options for Dispute Resolution

ADRs



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***

Options for Dispute Resolution

ADRs



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***



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*

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)

Hague Convention on Choice of Court Agreements 2005



- **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

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 (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

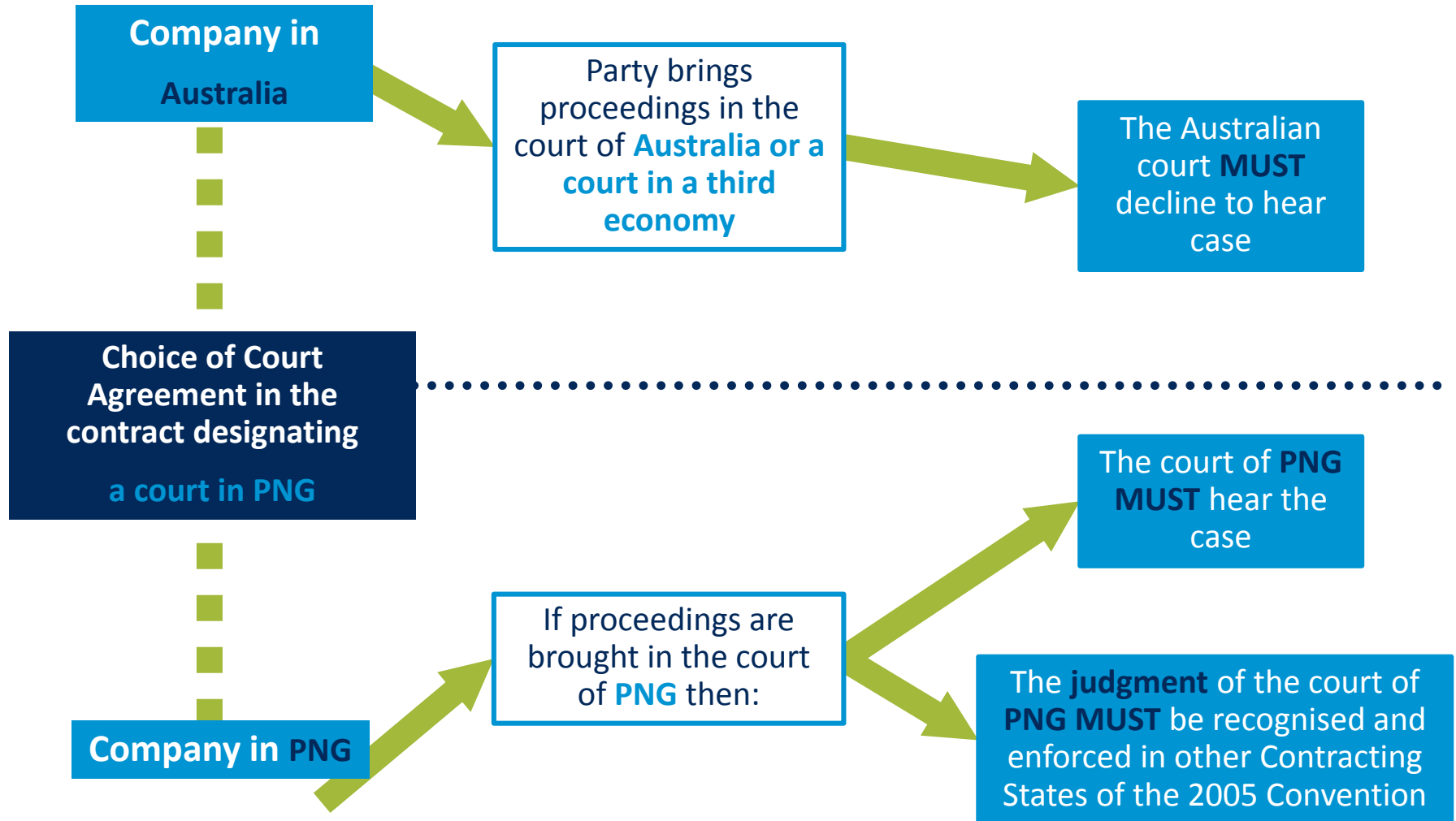


ENFORCEMENT
of judgments rendered by the chosen court
(see also Art. 11 on damages)



Operation

(Assuming all economies below are parties to the 2005 Convention)



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**

Application of the 2005 Convention



- **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

Deutscher **Anwalt** Verein



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

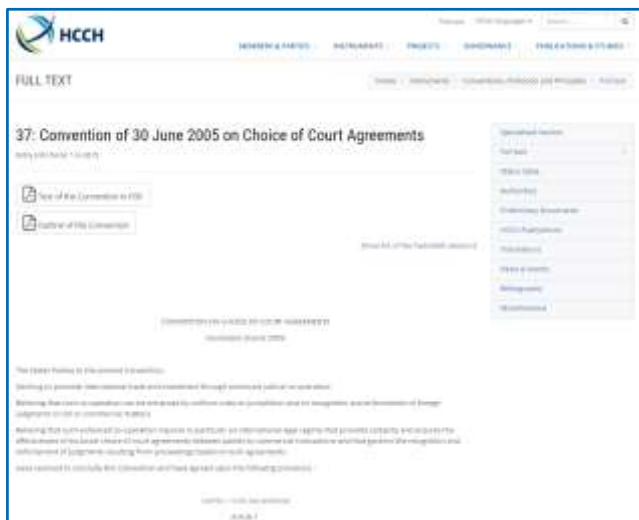
International Chamber of Commerce (ICC) endorsement in 2007, 2012





Means of co-operation

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





- **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.**

2015 Hague Choice of Law Principles

Hague Principles on Choice of Law in International Commercial Contracts

- 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



**Frank Poon, Representative
Regional Office for Asia and the Pacific**

fp@hcch.nl



www.hcch.net