

**SUIVI DES ACTIVITÉS DE LA CONFÉRENCE RELATIVES À LA
CONVENTION SUR LES ACCORDS D'ÉLECTION DE FOR**

établi par le Bureau Permanent

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**REVIEW OF THE ACTIVITIES OF THE CONFERENCE IN REGARD TO THE
CONVENTION ON CHOICE OF COURT AGREEMENTS**

drawn up by the Permanent Bureau

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Summary

This Preliminary Document informs the Council on General Affairs and Policy about activities undertaken in the past year to promote the *Hague Convention of 30 June 2005 on Choice of Court Agreements* ("the Choice of Court Convention"). In addition, it is designed to:

- prompt consideration by the Council of the future work of the Permanent Bureau in relation to the Choice of Court Convention;
- keep the Council informed of important developments in the broader context of international litigation in civil and commercial matters, should the Council wish to revisit its discussions on the continuation of the Judgments Project.

Introduction

In its Note addressed to the Council on General Affairs and Policy in April 2010¹ ("the 2010 Note"), the Permanent Bureau raised the possibility of continuing the work on judgments in civil and commercial matters (known as the "Judgments Project"). In particular, the Permanent Bureau proposed the following plan of action:

As a first step, consideration might be given to convening a group of experts, possibly after the entry into force of the Choice of Court Convention at the international plane, to advise on the areas where it might be feasible to resume work on judgments, and where consensus might be possible. In the light of the analysis and recommendations of the group, the Council might then, at its next or one of its next meetings, take a decision on the ongoing construction of a global framework to deal with litigation on civil and commercial matters.

At its meeting from 7 to 9 April 2010, the Council took note of this proposal and concluded that "such exploratory work, including the appointment of an expert group, will be further considered only following the entry into force of the 2005 Choice of Court Convention".²

In line with this conclusion, the Permanent Bureau has intensified its efforts to promote the Choice of Court Convention (which has not yet entered into force³), and continued monitoring national and regional developments in the area of judgments. The objectives of these activities are to expedite the entry into force of the Convention, and to ensure that the Hague Conference stays abreast of developments that could impact any future work on the need and feasibility of a multilateral instrument on judgments.

I. Ongoing work to promote the ratification of the Choice of Court Convention

1. *Implementation dialogue*

On 8 September 2010, in response to requests made by States considering the Choice of Court Convention,⁴ the Permanent Bureau launched an informal "dialogue" between representatives of interested Members on implementing the Choice of Court Convention.

¹ "Continuation of the Judgments Project", Prel. Doc. No 14 of February 2010 for the attention of the Council of April 2010 on General Affairs and Policy of the Conference (hereinafter "the 2010 note") available on the website of the Hague Conference at < www.hcch.net > under "Work in Progress" then "General Affairs".

² See Conclusions and Recommendations adopted by the Council in "Report of the Council on General Affairs and Policy of the Conference of 7 to 9 April 2010", Prel. Doc. No 1 of September 2010 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, p. 17, available on the website of the Hague Conference at < www.hcch.net > under "Work in Progress" then "General Affairs".

³ Pursuant to Art. 31(1), 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, acceptance, approval or accession. To date, only one such instrument has been deposited with the depositary.

⁴ See para. 7 of the 2010 note, *supra* note No 1.

The objectives of the dialogue are to:

- enhance interaction between interested States, and with the Permanent Bureau, on implementation issues;
- encourage the entry into force of the Convention; and
- promote a more focused preparation of implementation tools, for example an implementation checklist, seminars and other promotional materials.

The dialogue, which is facilitated through an e-mail distribution list maintained by the Permanent Bureau, currently involves participants from Argentina, Australia, Canada, the European Union, Mexico, New Zealand, and the United States of America. Participation is open to all States and Regional Economic Integration Organisations (“REIOs”). The Permanent Bureau encourages any other State which is actively examining the Choice of Court Convention with a view to its accession or ratification to nominate one or more representatives to participate in the dialogue.

To date, participants have shared a range of views and experiences on national developments relating to the Convention, including steps taken internally towards possible ratification or accession. In addition, participants have provided updates on bilateral and regional initiatives relating more broadly to the recognition and enforcement of judgments in civil and commercial matters.

2. *Brazil seminars*

In November 2010, the Permanent Bureau co-organised two seminars in Brazil on the Choice of Court Convention. The goal of these seminars was to bring together judges, lawyers and other legal professionals to provide information and exchange experiences on the operation of the Convention and its regional counterparts,⁵ and to discuss the benefits of these instruments in giving effect to choice of court agreements in cross-border litigation.

The first seminar was held in Rio de Janeiro on 5 November 2010 on the settlement of international disputes. The seminar was co-organised with the Pontifícia Universidade Católica do Rio de Janeiro (PUC-Rio) and was attended by around 70 participants, including judges, arbitrators, scholars and students. This event focused on the Convention’s potential in offering the international business community a much needed instrument for court judgments to parallel that which the *United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* accomplishes for arbitral awards. The Permanent Bureau would like to express its gratitude to PUC-Rio for its excellent collaboration and support.

The second seminar was held in Brasilia on 8 November 2010 on choice of court in international litigation. The seminar was co-organised with the Brazilian Ministry of Justice (as President *pro tempore* of MERCOSUR) and was attended by more than 40 government officials, judges, and other experts from all MERCOSUR Contracting States (Brazil, Argentina, Uruguay, Paraguay) and Associated States (Bolivia, Chile, Colombia, Ecuador and Peru), as well as Mexico (as the first State having acceded to the

⁵ I.e., *Protocol of Las Leñas on Jurisdictional Co-operation and Assistance in Civil, Commercial, Labour and Administrative Matters*, Decision No 5/92, Valle de Las Leñas, 27 June 1992 and the *Protocol of Buenos Aires on International Jurisdiction in Contractual Matters*, Decision No 1/94, Buenos Aires, 5 August 1994.

Convention) and the American Association of Private International Law (ASADIP).⁶ The Permanent Bureau would like to renew its appreciation for the excellent co-operation and support provided by the Ministry of Justice of Brazil, as well as the financial support of the Hague Forum for Judicial Expertise and the Government of the Netherlands.

Participants at both seminars encouraged efforts by States to join the Choice of Court Convention, noting its relevance in international dispute settlement and its consistencies with regional instruments in this area. A more detailed report on each seminar is available on the website of the Hague Conference < www.hcch.net >, under Convention No 37 and then "Seminars".

3. *Other seminars*

In addition to the Brazil seminars, the Permanent Bureau has organised the following events since the last Council meeting at which the Choice of Court Convention was discussed:

- Seminar during the World Expo 2010 in Shanghai on recent developments in international dispute resolution – co-organised with the Permanent Court of Arbitration, the East China University of Political Science and Law (Shanghai) and the Municipality of The Hague;
- International conference on co-operation through Hague Conventions (Bonn, 14-16 October 2010) – co-organised with the German Foundation for International Legal Co-operation (*IRZ-Stiftung*); and
- Study visit of Vietnamese government officials to the Permanent Bureau – The Hague, 8-10 December 2010 – co-organised with the Ministry of Justice of Vietnam.⁷

Furthermore, the Permanent Bureau is very appreciative of the invitations extended to it to discuss the Convention at numerous colloquia and seminars, and thanks the organisers, participants and other speakers for their comments and feedback on the Convention and its implementation in the jurisdictions concerned.

4. *Implementation Checklist*

The Permanent Bureau has prepared an Implementation Checklist addressed to States and the REIO interested in joining the Choice of Court Convention. The purpose of the Checklist is to highlight issues which the target audience may need to consider when implementing the Convention. The Checklist is modelled on a similar document prepared by the Permanent Bureau in respect of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.⁸

The Permanent Bureau has circulated an exposure draft of the Checklist to participants of the above-mentioned implementation dialogue for their feedback. Subject to this consultation process, and further circulation to all Members of the Hague Conference, the

⁶ A concluding statement adopted by participants at the seminar is available on the website of the Hague Conference at < www.hcch.net > under "News & Events" then "2010".

⁷ A report of the study visit is available on the website of the Hague Conference at < www.hcch.net > under "News & Events" then "2010".

⁸ This document is available on the website of the Hague Conference at < www.hcch.net > under "Conventions" then "34" and "Practical operation documents".

Permanent Bureau intends to upload the Checklist to the website of the Hague Conference.

II. Update on related developments

The current status of the Choice of Court Convention should be examined taking into account recent national and regional developments in the area of international litigation. The Permanent Bureau has been following these developments as much as possible, with assistance from participants of the above-mentioned implementation dialogue, to ascertain the Convention's expected entry into force (among States and REIOs that have already expressed interest in joining it) and its acceptability among other States.

1. *Review of the Brussels I Regulation within the European Union*

The European Union (then the European Community) signed the Choice of Court Convention on 1 April 2009. Ratification of the Convention is currently linked to the European Union's ongoing revision of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I Regulation"). Further to extensive consultations, the European Commission published a proposal on a revised Brussels I Regulation in December 2010 ("the EC proposal").⁹ This proposal officially launches a legislative process which will eventually lead to a Regulation to be adopted by the European Parliament and the Council in the future.¹⁰

It is important to note that the EC proposal includes a revised section on choice of court agreements which seeks to align the Brussels I Regulation with the mechanism established in the Convention.¹¹ First, the European Commission proposes to give priority to the chosen court of a European Union Member State to decide on its jurisdiction, regardless of whether it is first or second seised. Accordingly, "the courts of other Member States shall have no jurisdiction over the dispute until such time as the court or courts designated in the agreement decline their jurisdiction". The EC proposal does not specify, however, how a court not chosen should proceed while the chosen court decides on its jurisdiction. Second, the proposed text introduces a harmonised conflict of law rule to determine whether the agreement is "null and void as to its substance", referring to the law of the chosen court.

Most importantly, the EC proposal does not extend the scope of application of the section on choice of court agreements to cases where the chosen court is outside the European Union, thereby making way for possible ratification of the Convention by the European Union.¹² In this regard, the Council of the European Union stressed the importance of ratification of the Convention by the (then) European Community in 2009. It was then noted, however, that some Member States preferred postponing any ratification until after the conclusion of the Brussels I review.¹³ Last but certainly not least, the European

⁹ See Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, issued by the European Commission on 14 December 2010, COM(2010) 0748 final, not yet published in the Official Journal but available at < http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf > (last consulted 1 March 2011).

¹⁰ In accordance with the "ordinary legislative procedure", set out in Art. 294 of the Treaty on the Functioning of the European Union. Under this procedure, the European Parliament's position is key to the outcome of this ongoing review.

¹¹ See EC Proposal, *supra* note No 9, p. 6. This is in line with the Permanent Bureau's submissions in its Response to the Green Paper on the Review of the Brussels I Regulation, of 13 July 2009, available at http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/hague_conference_on_private_international_law_en.pdf (last consulted 1 March 2011).

¹² Action Plan Implementing the Stockholm Programme (COM/2010/171), available at < http://ec.europa.eu/commission_2010-2014/malmstrom/archive/COM%202010%20171%20EN.pdf > (last consulted 1 March 2011)

¹³ Council Report on the discussions concerning the report from the Commission on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and

Parliament has acknowledged the relevance of the European Union's signature of the Choice of Court Convention and has advocated, beyond its ratification, "the resumption of negotiations on an international judgments convention" by the Hague Conference.¹⁴

2. *United States of America*

The United States of America signed the Choice of Court Convention on 19 January 2009. The ratification process has featured a debate about implementation methods in this country and, in particular, the issue of whether implementation legislation was needed at the federal level only, or at both the federal and state levels. Whichever internal procedures are eventually followed, it is essential to note that the very intense review undertaken so far and the participation of many interested stakeholders should pave the way for successful domestic implementation of the Convention in the future.

3. *Trans-Tasman regime (Australia and New Zealand)*

In the 2010 Note, the Permanent Bureau referred to draft legislation being considered by the parliaments of Australia and New Zealand, which contained provisions based on the Choice of Court Convention giving effect to exclusive choice of court agreements in cross-border proceedings involving parties in Australia and New Zealand.¹⁵ Legislation implementing the 2008 *Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman court proceedings and regulatory enforcement* ("Trans-Tasman Agreement")¹⁶ has now been passed¹⁷ in both States and is awaiting final entry into force of the Agreement.¹⁸ This is expected to occur at the earliest by the end of 2011.

As for the Choice of Court Convention itself, the Commonwealth Attorney-General's Department in Australia conducted a consultation process in 2008, which indicated broad support for accession to the Convention. Both the Department and the New Zealand Ministry of Justice have indicated an intention to focus resources on the implementation of the Convention once the Trans-Tasman Agreement has entered into force.

4. *Canada*

At its annual meeting in August 2010, the Uniform Law Conference of Canada adopted a model law to implement the Choice of Court Convention in the various provinces and territories of Canada.¹⁹ The model law has been recommended to each jurisdiction for enactment. Acceptance of the model law by the provinces and territories should eventually lead to Canada's ratification of / accession to the Convention.

commercial matters, Document No 14159/09, available at < <http://register.consilium.europa.eu> > (last consulted 1 March 2011).

¹⁴ Resolution of the European Parliament on the implementation and review of the Brussels I Regulation, adopted on 7 September 2010, No A7-0219/2010, para. 15, available at < <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0304+0+DOC+XML+V0//EN&language=EN> > (last consulted 1 March 2011).

¹⁵ See para. 7 of the 2010 note.

¹⁶ Text of agreement available at < <http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2008/12.html> > (last consulted 1 March 2011).

¹⁷ For the Australian legislation, see < <http://www.comlaw.gov.au/Details/C2011C00084> > (last consulted 1 March 2011); for the New Zealand legislation, see < <http://www.legislation.govt.nz/act/public/2010/0108/latest/DLM2576223.html> > (last consulted 1 March 2011).

¹⁸ According to Art. 16(2) of the Agreement, the Agreement will enter into force 30 days after each Party has notified the other, through diplomatic channels, of the completion of their respective domestic procedures for the entry into force of this Agreement. Australia and New Zealand are currently putting in place regulations and revising court rules to complete the domestic implementation process.

¹⁹ The text of the resolution and model law are available on the ULCC website at < <http://www.ulcc.ca/en/poam2/> > (last consulted 1 March 2011).

III. Continuing work on promoting the Choice of Court Convention and in related areas

The Permanent Bureau seeks direction from the Council as to the continuation of the Hague Conference's work in relation to the Choice of Court Convention.

1. *Promotional activities*

The Council may direct the Permanent Bureau to continue organising seminars – similar to those described in Part I of this Note – which aim to promote the Choice of Court Convention, and analyse its practical operation within the context of cross-border litigation (notably its interaction with existing national and regional regimes). It must be noted in this regard that promotional post-Convention activities are mainly sourced from the supplementary budget and are therefore dependent on available financial resources.

The Council may also express a preference for the development of other implementation tools, such as the above-mentioned Implementation Checklist, and similar materials designed to facilitate the acceptance and implementation of the Convention.

2. *Monitoring relevant developments*

Monitoring national and regional developments relevant to the Choice of Court Convention also should be continued. In addition to the developments described in Part II of this Note, the Permanent Bureau proposes to monitor developments such as:

- the work of the Commonwealth Secretariat towards model legislation on the recognition and enforcement of foreign judgments. Cross-fertilisation between recognition schemes contained in recent Hague Conventions – in particular, the Choice of Court Convention and the *Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* – and a future Commonwealth scheme should be encouraged;
- measures taken within the League of Arab States to improve the implementation of the 1983 Riyadh Arab Agreement for Judicial Co-operation.²⁰ This Agreement, which deals with international legal co-operation, including the recognition and enforcement of judgments rendered in accordance with a choice of court agreement, is relevant to all 22 Members of the League of Arab States (which comprises three Members of the Hague Conference) and should certainly be considered in promotion efforts of the Choice of Court Convention in the Arab world; and
- the interest of States, particularly those outside the European Economic Area, in the revised Lugano Convention (which contains a section on choice of court

²⁰ Endorsed by the Council of Arab Ministers of Justice on 6 April 1983 and signed by all Member States of the League of Arab States; entry into force on 30 October 1985. The Agreement has been ratified by Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Libya, Mauritania, Morocco, Oman, Palestine, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE and Yemen. The text of the Agreement in Arabic is available on the website of the League of Arab States at < http://www.arableagueonline.org/las/arabic/details_ar.jsp?art_id=328&level_id=199 > (last consulted 1 March 2011) and an English translation is available at < <http://www.unhcr.org/refworld/docid/3ae6b38d8.html> > (last consulted 1 March 2011).

agreements, as well as other rules on international jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).²¹

Given that the enforcement of choice of court agreements is seldom addressed in isolation at the national or transnational level, it is highly likely that these and other related developments will be relevant to future work conducted by the Hague Conference in respect of the Judgments Project (as proposed in the 2010 Note), particularly by helping to identify areas where international consensus might be possible for a new multilateral agreement on international litigation.

3. Further steps towards the Judgments Project?

The intensified activities of the Permanent Bureau to promote the entry into force of the Choice of Court Convention (described in Part I of this Note) will hopefully attract States into this Convention. In the circumstances, the Council may wish to continue its discussions on the Judgments Project on its own merits. In particular, it may wish to reconsider convening a group of experts to examine current developments in the area of international litigation and the feasibility of a new global instrument.

²¹ *Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, available at < <http://www.dfae.admin.ch/eda/fr/home/topics/intla/intrea/chdep/miscel/cvlug2.html> > (last consulted 1 March 2011) and currently in force between the European Union (including Denmark), Norway and Switzerland. For choice of court agreements, see section 7.