

ONGOING WORK IN THE AREA OF JUDGMENTS

drawn up by the Permanent Bureau

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TRAVAIL EN COURS EN MATIÈRE DE JUGEMENTS

établi par le Bureau Permanent

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1. Introduction

1. This document concisely reports the most important developments in the area of Judgments, comprising rules on international jurisdiction and on recognition and enforcement of foreign judgments, since the last meeting of the Council on General Affairs and Policy (the Council) until December 2015,¹ including:

- the entry into force of the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (Choice of Court Convention); and
- the progress made on the mandate conferred by the Council to the Working Group on the Judgments Project “to prepare proposals for consideration by a Special Commission in relation to provisions for inclusion in a future instrument relating to recognition and enforcement of judgments”² and the recommendations made by the Working Group for the subsequent steps.³

2. The entry into force of the Choice of Court Convention

2. On 1 October 2015, further to the deposit of the instrument of approval by the European Union (EU), the Choice of Court Convention, which applies to choice of court agreements concluded on or after 1 October 2015,⁴ entered into force. At present, 28 States (all the EU Member States with the exception of Denmark, as well as Mexico, which was the first State to accede to the Convention on 26 September 2007) are bound by the Convention.

3. In 2009 the United States of America was the first country to sign the Choice of Court Convention (although Mexico had acceded to it earlier). It, however, has not yet ratified the Convention. The United States of America is still considering the best means of domestic implementation of the Convention, which raises issues regarding the balance of federal and state laws in implementing party obligations under the Convention. Singapore became the second signatory to it on 25 March 2015, and expressed its intention to ratify the Convention in the course of 2016.

4. The entry into force of the Choice of Court Convention has been an important catalyst for the ratification process in other interested States. Currently, about a dozen States have expressed their interest in the Convention.

5. In the Asia Pacific region, Australia is continuing to work towards the implementation of the Choice of Court Convention. Also, the People’s Republic of China is actively studying the Choice of Court Convention. In this respect, in 2015 China joined the Implementation Dialogue, which is an informal forum established for the purposes of exchanging information and sharing experiences with regard to the implementation of the Choice of Court Convention. In line with the priority given to the Convention, China organised workshops and commissioned research projects on the Convention. In addition, other Asian States are continuing their study of the Convention and are in contact with the Permanent Bureau with regard to specific implementation matters.

6. In the European region, Denmark is currently considering the possibility of ratifying the Choice of Court Convention. Its future ratification of the Convention will bring Denmark in line with other EU Member States. Some other States, such as Macedonia, Serbia, and Ukraine have also further progressed in joining the Convention.

7. Several Latin American States, such as Costa Rica and Argentina, are also considering the Convention.

¹ This document was finalised in early January 2016.

² Conclusions and Recommendations adopted by the Council of 17 to 20 April 2012, para. 17.

³ “Report of the fifth meeting of the Working Group on the Judgments Project (26-31 October 2015) and Proposed Draft Text resulting from the meeting”, Prel. Doc. No 7A of November 2015.

⁴ See Art. 16 and the Hartley-Dogauchi Explanatory Report, paras 218 *et seq* for some illustrative examples.

8. The Permanent Bureau continues to support and facilitate the ratification process of the Choice of Court Convention via the Implementation Dialogue.⁵ It also responds to queries or comments made by States on how to become a party to the Convention. In this regard, it is to be noted that the entry into force of the Convention does not affect the methods a State has at its disposal to join the Convention. According to the Convention, a State can become a party to the Convention either by signature followed by ratification, acceptance or approval (Art. 27(1) and (2) of the Convention) or by accession (Art. 27(3) of the Convention).

9. The Permanent Bureau constantly updates the "Choice of Court" section on the Hague Conference website, including the Convention's bibliography. With respect to the promotional activities in relation to the Convention, special mention should be given to an Asia Pacific Economic Co-operation (APEC) workshop titled "Effective enforcement of business contracts and efficient resolution of business disputes through the Hague Choice of Court Agreements Convention" held in Cebu, Philippines, on 1 September 2015. The Workshop was organised by the Department of Justice of Hong Kong, People's Republic of China, in collaboration with the Asia Pacific Regional Office of the Hague Conference and the Regional Centre for Asia and the Pacific of the United Nations Commission on International Trade Law, under the auspices of the APEC Economic Committee and its Friends of the Chair on Strengthening Economic and Legal Infrastructure. In the report of the Workshop, which contains conclusions and recommendations, the participants observed that "the harmonized rules under the Choice of Court Convention provide litigants and courts with a simple, predictable and effective legal framework, which will greatly benefit the international business community and foster international trade and investment", and welcomed that "some APEC member economies are actively considering the Choice of Court Convention and encouraged the competent authorities of all other member economies to do the same".⁶

10. Interestingly, the Choice of Court Convention continues to influence the reform of domestic and regional laws with regard to forum selection. At the regional level, the Convention has served as a source of inspiration in the development process of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast),⁷ which entered into force on 10 January 2015. By providing that priority be given to the court chosen by the parties even if such court is the second seized, the two instruments regulate parallel proceedings in a complementary and compatible way, to the benefit of predictability and access to justice.

11. At the national level, the Choice of Court Convention has served as a model for legislative changes. For example, Brazil has introduced Article 25 on choice of court agreements in its new Code of Civil Procedure. This novelty will change the current practice in Brazil, whereby clauses in favour of foreign courts would be considered unenforceable by courts in Brazil if the underlying dispute had a close connection with the Brazilian territory. Once the new Code enters into force in March 2016, Brazilian domestic law will consolidate the notion of party autonomy in forum selection, which may also pave the way for Brazil's adoption of the Convention. Similarly, in Argentina, the new Civil and Commercial Code, which entered into force on 1 August 2015, codifies parties' freedom to conclude a choice of court agreement (Art. 2605) and confirms the exclusive nature of the parties' choice of forum (Art. 2606). These new provisions are in line with those of the Choice of Court Convention, and it is hoped that the adoption of the new Code will further facilitate the ratification process of the Convention in Argentina.

⁵ Representatives from Argentina, Australia, Canada, China (People's Republic of), Costa Rica, European Union, Germany, Mexico, New Zealand, Serbia, Ukraine and United States of America participate in the Implementation Dialogue. For further information on implementation tools serviced by the Permanent Bureau, see the Hague Conference website at < www.hcch.net > under "Choice of Court".

⁶ See paras 2 and 3 of the Report on the Workshop, which is available [here](#) (in English).

⁷ OJ L351/1, 20.12.2012.

3. Progress made in the Judgments Project and recommendations for the subsequent steps

12. The Working Group on the Judgments Project (“the Working Group”) has met five times since it was set up by the Council in 2012 and, further to its fifth meeting, submitted to the Council a Report together with a Proposed Draft Text on the recognition and enforcement of foreign judgments in civil and commercial matters, which was circulated as Preliminary Document No 7A on 17 November 2015.

13. The Report also contains two specific recommendations to the Council.⁸ First, the Working Group recommended that the Proposed Draft Text be submitted for consideration to a Special Commission to be convened, if possible, in June 2016. If Council approves this recommendation, the Permanent Bureau will work further on the preparations of the meeting of the Special Commission. In that regard, the Working group suggested that the Permanent Bureau should draw up a paper to assist in the preparation of a future Convention. The purpose of this paper is to outline the issues identified by the Working Group as matters to be addressed by the Special Commission, with a view to providing context and background, and thus enabling all the participants of the Special Commission to adequately prepare for and address such issues.

14. Secondly, the Working Group also recommended that matters relating to direct jurisdiction, (including exorbitant grounds and *lis pendens*/declining jurisdiction), be considered by the Experts’ Group with a view to preparing an additional instrument. It was recommended that the Experts’ Group meets soon after the Special Commission has drawn up a draft Convention.

4. Resources allocated to the area of Judgments and future prospects

15. The Permanent Bureau continues to maximise both human and financial resources allocated to the work in the area of Judgments in order to ensure steady progress. In this regard, the Permanent Bureau acknowledges with gratitude the generous voluntary contribution made to the Judgments Project by the Australian Government, which has funded one full-time position specifically allocated to the Judgments Project from January 2013 until August 2016. In the event that the Council approves the continuation of the Judgments Project at the Special Commission level, the allocated resources to this “priority topic”⁹ should remain stable. To this end, the Permanent Bureau hopes that interested States will contribute to guaranteeing the funding of a full-time position for the period beyond August 2016. This should enable the Permanent Bureau to respond adequately to the demands of facilitating and supporting the work of the Special Commission in the coming 12 to 18 months. Maintaining the current resources would also enable the Permanent Bureau to respond to the increasing “post-Convention work” in relation to the Choice of Court Convention which is now in force (in fact, throughout 2015, the Permanent Bureau and other Hague Conference experts have recorded a surge of requests relating to the entry into force of the Choice of Court Convention and other recent developments in the area of Judgments).¹⁰

⁸ See Prel. Doc. No 7A of November 2015, *supra*, note 3, *in fine*.

⁹ Conclusions and Recommendations adopted by the Council of 24 to 26 March 2015, para. 4.

¹⁰ Some specific events include: a presentation on the Choice of Court Convention and the Judgments Project made at a seminar on “Intellectual Property and Private International Law” held in Geneva, Switzerland on 16 January 2015; a series of events promoting the Choice of Court Convention held in Madrid and Barcelona, Spain from 21 to 27 May 2015; a presentation on the Choice of Court Convention and the Judgments Project given at Round Table “Harmonising Legislation – The Need for Fair Principles for Enforcement: the Global Code of Enforcement” during the 22nd International Congress of Judicial Officer organised by the Union internationale des huissiers de justice from 2 to 5 June 2015 in Madrid, Spain; a presentation on the Choice of Court Convention and the Hague Principles “Party Autonomy in Recent Work of the HCCH and its Relevance for East and Southern Africa” given at a conference “Commercial Private International Law in East and Southern Africa” organised in Johannesburg, South Africa, on 14 September 2015; a presentation on the Choice of Court Convention and the Judgments Project given at the International Trademark Association (INTA) Government Relations Program held in Geneva, Switzerland on 16 September 2015; a presentation “Impact of the entry into force of the Choice of Court Convention” given at the Law Society on 13 November 2015 in London, the United Kingdom; a speech delivered at the British Institute of International and Comparative Law on the progress of the Judgments Project on 16 November 2015 in London, the United Kingdom; a presentation by former Secretary General van Loon on the Choice of Court Convention at the 12th Regional PIL Conference: “Private International Law on Stage – National, European and International Perspectives” held in Zenica, Bosnia and Herzegovina from 23 to 24 October 2015; Presentations on the Choice of Court Convention, the Hague Principles and the Judgments Project given at Doshisha University on 19 December 2015 in Kyoto, Japan. For further information, see the Hague Conference website at < www.hcch.net > under “News and Events” both in the “Choice of Court” and in the “Judgments” sections.

16. In light of the above, the Permanent Bureau invites the Council to:

- a) welcome the entry into force of the Choice of Court Convention, and to underscore that the Permanent Bureau should continue to promote the Choice of Court Convention, as one of the Hague Conference's key instruments, in order to consolidate its global relevance;

If the recommendations submitted by the Working Group in Preliminary Document No 7A of November 2015 are endorsed and a Special Commission to consider the Proposed Draft Text prepared by the Working Group is indeed convened for June 2016, the Council may wish to

- b) task the Permanent Bureau with preparing a paper for the attention of the Special Commission to assist in the preparation of a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.