

# **SETTING A FRAMEWORK FOR LITIGATION IN ASIA**

— THE HAGUE CHOICE OF COURT  
CONVENTION AND BEYOND —

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# I. INTRODUCTION

## ◆ Globalization & Regionalisation

Europe (EU), North & South America, Africa and Asia

## ◆ Cross-border Transactions in Asia → Dispute Resolution

- **Arbitration** = often used; 1958 New York Convention (159 Member States)
- **Litigation?** (Jurisdiction + Recognition & Enforcement [R&E] of Judgments)



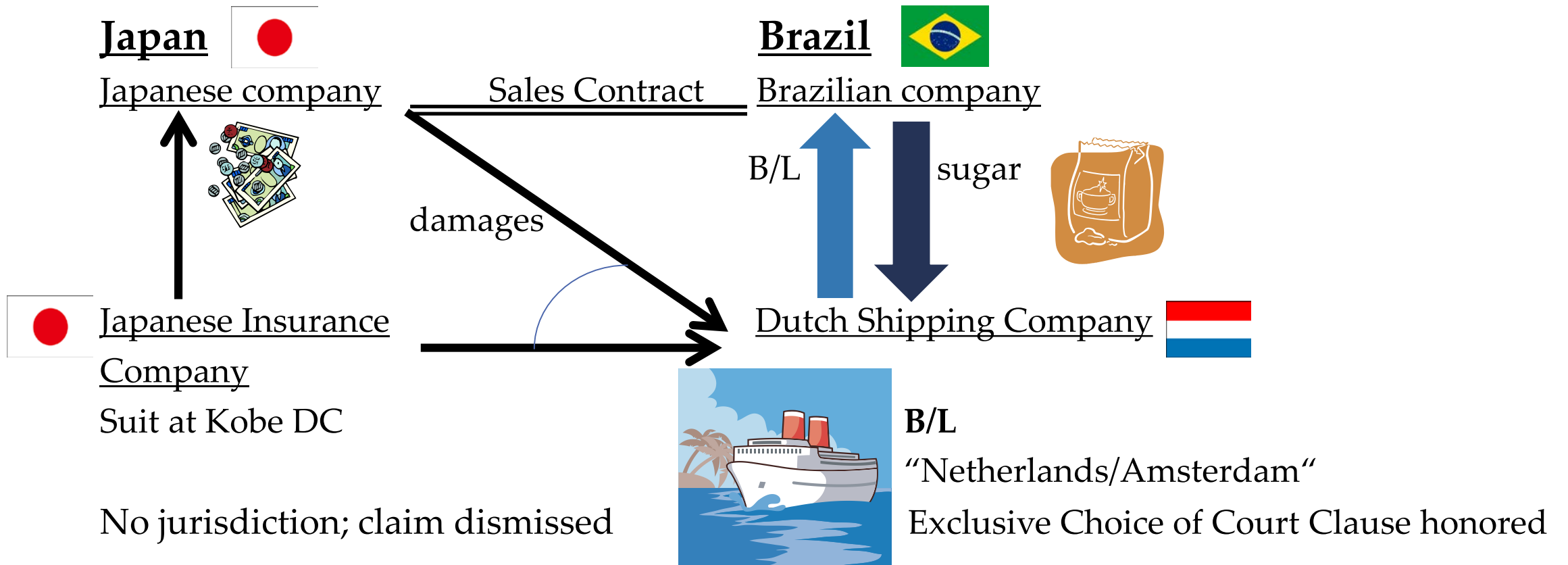
2005 Hague Choice of Court Convention

Hague Judgments Project

----- from an Asian Perspective

# II. CHOICE OF COURT AGREEMENTS IN JAPAN

Supreme Court of Japan, 28 Nov. 1975 (Chisadane case)



# Ruling of the Supreme Court

## 1. Choice of Court Agreement

Valid agreement; “in writing”

## 2. Exclusive Choice of Foreign Courts

Make sure: Foreign courts exercise jurisdiction (*no “denial of justice”*)

## 3. “Reasonableness” Test

Shipping Company’s risk hedge & main seat

→ 2011 Reform: Art. 3-7 CCP



**Clear Criteria?**

**R&E of the Dutch Judgment?** (Lack of „Reciprocity“)

## ◆ Validity of Choice of Court Agreements

## ◆ R&E of Judgments

➤ Europe = „Brussels & Lugano“ System (EU Regulations & Lugano Convention)

↔ No guarantee for Third States

National Law of the Member States applies  
Different Rules; „Reciprocity“?

➤ U.S. & Canada = Generous Approach, but uncertainty; State/Provincial law



➤ **Asia**

- **Mainland China**: 33 Bilateral Treaties

Recently: „Reciprocity“ with Germany (2013), Singapore (2017), the U.S. (2017)  
 (“Follow-Suit” Model)

But: Not with **Japan** or **South Korea**

**China**: „Gomi Akira“ case (1994); „Awabiya“ case (2001)

= No Reciprocity with Japan

**Japan**: Osaka High Court 9 April 2003; Tokyo High Court 25 Nov. 2015

= No Reciprocity with China (except for Divorce Judgments)



**International Instruments are desirable**

# III. 2005 HAGUE CHOICE OF COURT CONVENTION

## 1. General Framework

### ➤ 31 Contracting Parties

EU & Member States, Denmark, Mexico, Singapore (2016)

### ➤ 4 Signatories

U.S., Ukraine, Montenegro, China (2017)  
+ Australia? (Japan? South Korea?)



# 2005 Hague Choice of Court Convention

## ◆ Purpose

Clarity & Certainty  
Parallel to the 1958 NY Convention

## ◆ Exclusive Choice of Court Agreements

Presumption of Exclusivity

## ◆ Limited Scope of Application

Excluded matters: (i) Consumer & Employment Contracts  
(ii) Particular matters

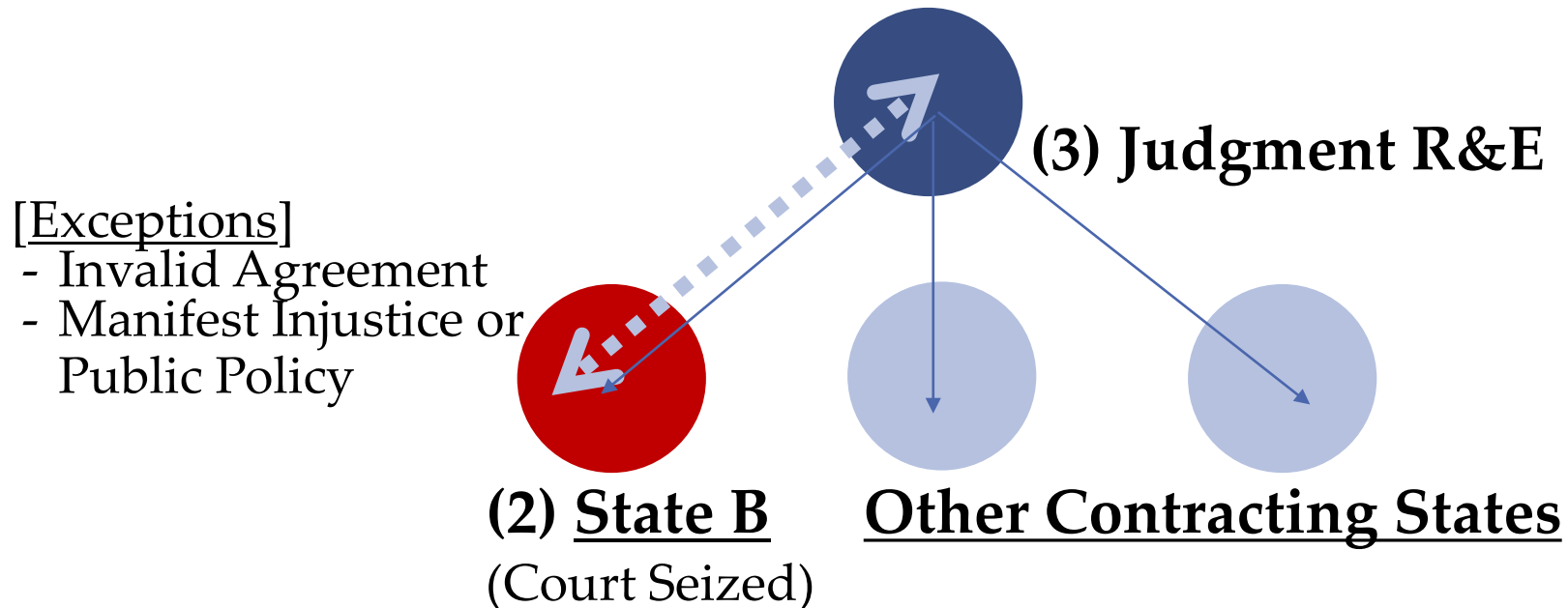
- Status and capacity; family & succession matters
- Carriage of passengers
- Maritime issues
- Anti-trust matters
- Tort
- Rights in rem in immovables
- Validity & dissolution of companies
- Validity & Infringement of IP except for copyrights  
etc.



## 2. „Three Pillars“ of the Hague Convention

- (1) **The Designated Court** = Obligation to hear the case (Art. 5)
- (2) **Any Court not Chosen** = Decline to hear the case (Art. 6)
- (3) **Judgments of the Chosen Court** = R&E (Art. 8 & 9)

(1) State A (Chosen Court)



# 3. Validity of Choice of Court Agreements

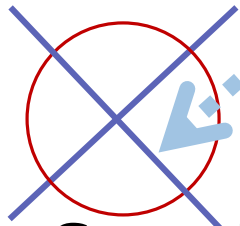
## State A (Chosen Court)



- Exclusive Choice of Court Agreements (Art. 4 a)
- In Writing (Art. 4 c)
- Valid Agreement (Art. 5 & 6 a)

Validity of the Choice of Court Agreement

Law of State A (incl. Private International Law): Uniformity



## State B

(Court Seized)

State B: „Agreement is Null & Void“ → ~~Judgment~~

State A: „Valid Agreement“ → Judgment

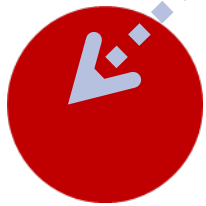


**State A's Judgment: R&E in other States**

# 4. Public Policy Considerations

## Safeguard of State Policies

State A (Chosen Court)



State B

(Court Seized)

“Manifest Injustice” or “Public Policy”

**State B:** .....▶ **Retain the Case**

- Anti-trust Law?

- Protection of Investors or Commercial Agents?

(„Overriding Mandatory Rules“)



# IV. IMPACT OF THE 2005 CHOICE OF COURT CONVENTION

## 1. Significance

### ➤ Advantages of Litigation

- Transparency
- Reliability
- Neutrality
- Less expensive (for small & medium businesses)
- Interim Measures available

### ➤ Use of Particular Courts

- Singapore Int'l Commercial Court (SICC)
- Other Commercial Courts (Frankfurt, Paris, Amsterdam etc.)

### ➤ Competition: Venue for Litigation → “Race to the Top”

- Singapore vs. Hong Kong
- Other jurisdictions?

## 2. Adjustments of Domestic Law



State A = Chosen Court



State B = Japan

### 1. Validity of Choice of Court Agreements (Art. 5 & 6)

- The Law of State A applies (no longer Japanese law [*lex fori*])
- Presumption of Exclusivity

Cf. 2018 IACL Session: “Optional Choice of Court Agreements”

## 2. Safeguard of State Policies (Art. 6)

### (1) “Manifest Injustice”

- No longer “Reasonableness” Test in Japan?

**Balancing of Interests; Protection of the Weaker Party; No Real Connection etc.**

Tokyo High Court, 17 Nov. 2014 (*Nevada*); Osaka High Court, 20 Feb. 2014 (*Bangkok*); Tokyo High Court, 28 June 2012 (*Liechtenstein*); also Tokyo District Court, 14 Nov. 2012 (*Isle of Man*)

→ **Hartley & Dogauchi Report: “Exceptional Cases”**

No Fair Trial at the Chosen Court (*bias or corruption*); No Bringing or Defending the case; Circumstances of the Agreement (*fraud*)

## (2) “Public Policy”

- “Overriding Mandatory Rules”?
- Anti-trust Law?

### Tokyo High Court, 25 Oct. 2017: Depends on the “Result”

- “Abuse of a Dominant Position” under the Japanese Anti-Trust Law
- Contractual Clauses Null & Void as a matter of Contract Law in the U.S./Michigan

→ Hartley & Dogauchi Report: “Basic Norms or Principles of that State”

(The Convention) “does not permit the court seised (\*State B) to hear the case simply because the chosen court (\*State A) might violate, in some technical way, a mandatory rule of the State of the court seised.”



Restrictive Interpretation required

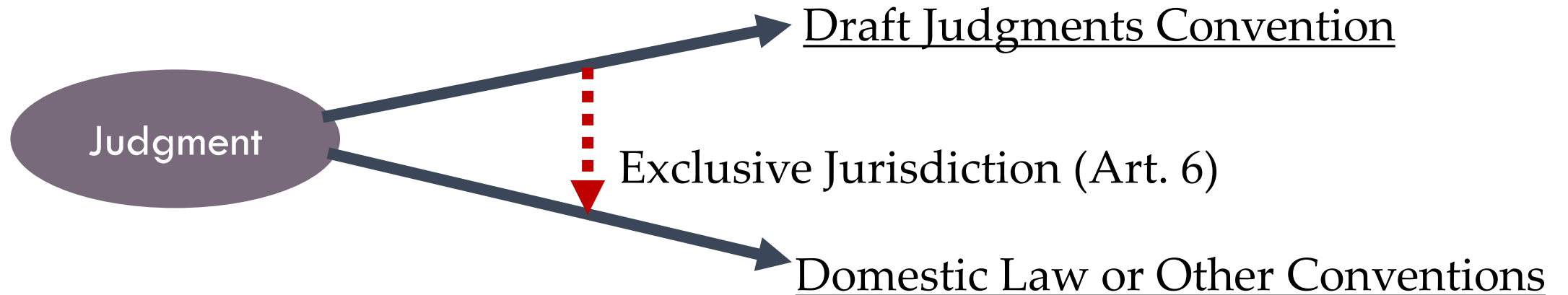
# V. HAGUE JUDGMENTS PROJECT

## 1. Objective & Framework

- ◆ Enhance the Circulation of Judgments = only Judgments R&E
- ◆ Preservation of National Law (except for Exclusive Jurisdiction: Art. 16)

State of Origin A

Requested State B





## ◆ Coordination with the Choice of Court Convention

- „Two-Tire System“
- Absent an Exclusive Choice of Court Agreement  
→ Draft Judgments Convention applies
- Unless Necessary, Not Deviate from the Choice of Court Convention



## 2. Policy Issues & Fitting Rules

### ◆ Scope of Application (↔ Deviations from the Choice of Court Convention)

#### ➤ Excluded Matter

- Defamation (Art. 2 (1)(k)) + Privacy? (Art. 2 (1)(l))  
Constitutional Freedom of Speech  
(U.S. First Amendment & 2010 Speech Act [28 U.S.C. §§ 4101 ff.]; EU Rome II)

#### ➤ Included Matters

- Immovable Property and its Tenancy (Art. 6 (b)(c) & Art. 5 (1)(h))
- Consumer & Employment Contracts (Art. 5 (2))

Cf. Validity & Infringement of Registered IP Rights? (e.g. patent)  
Practical Need ↔ Concern (Policy & Trade Issues)

# 3. Assessments

## ◆ Extension of the Choice of Court Convention

## ◆ Enhance Legal Certainty

- Uniform Rules (*also in relation to EU Member States, the U.S. etc.*)
- Clear Grounds for Refusal
- New Settings for Japan & Other Asian countries
  - Reciprocity by the Convention
  - Art. 7 (2) “*Lis pendens*” rule (cross-border parallel proceedings)

### Foreign Judgments vs. Pending Proceedings in Japan

- Priority only if the Japanese court was first seized
- Close connection with Japan required

# VI. CONCLUSION

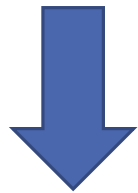
## Hague Choice of Court Convention & Judgments Project

### ◆ Realistic & Feasible

- Reasonably Limited Scope
- Preservation of National Law (in favor of Recognition)

### ◆ Uniform Rules

- “Reciprocity”
- Advantages of the Conventions



**Impact on Future Developments in Asia**



