

Council on General Affairs and Policy of the Conference – March 2017

Document	Preliminary Document <input checked="" type="checkbox"/> Procedural Document <input type="checkbox"/> Information Document <input type="checkbox"/>	No 5 of January 2017
Title	Suggested Further Work in Support of Forum and Law Selection in International Commercial Contracts	
Author	Permanent Bureau	
Agenda item	Items V.2.b. and V.3.a.	
Mandate(s)	C&R Nos 37, 38 and 39 of the 2016 Council on General Affairs and Policy	
Objective	To report on the development of the implementation of the Choice of Court Convention and the Hague Principles since the March 2016 Council meeting; To propose further work in support of choice of court and choice of law in international commercial contracts.	
Action to be taken	For Approval <input type="checkbox"/> For Decision <input checked="" type="checkbox"/> For Information <input type="checkbox"/>	
Annexes	n.a.	
Related documents	n.a.	

A. Introduction

1. Both the *Hague Convention of 30 June 2005 on Choice of Court Agreements* (Convention) and the *Principles on Choice of Law in International Commercial Contracts* (Hague Principles) endorse party autonomy, giving effect to agreements made by the parties on choice of court and choice of law.

2. This document will first outline the development of the Convention and the Hague Principles since the March 2016 Council meeting and suggest some possible actions in support of the Convention and the Hague Principles. The Council is invited to consider the proposed conclusions presented at the end of the document.

B. An increased interest in the Choice of Court Convention and the Hague Principles

1. The Choice of Court Convention

3. The Convention continues to gain momentum since its entry into force on 1 October 2015. Singapore, having signed the Convention on 25 March 2015, ratified it on 2 June 2016, becoming the first Asian State bound by it. The Convention is now applicable in 30 jurisdictions (Mexico, the EU, all EU Member States (except for Denmark) and Singapore). The United States of America and Ukraine are signatory States to the Convention.

4. Other States are working towards accession or ratification. As foreshadowed by the Australian delegation at the 2016 Council meeting, Australia's accession to the Convention (and the implementation of the Hague Principles) is underway. The Council of Chief Justices of Australia's Harmonisation of Rules Committee is tasked with the drafting of court rules implementing the Convention and Australia's accession to the Convention is being considered by the Australian Parliament.¹ It is hoped that Australia will be in a position to accede to the Convention in 2017.²

5. In Canada, the implementation of the Convention is considered as one of the top priorities by the Department of Justice in International Private Law.³ Ontario is expected to be the first Canadian jurisdiction to pass legislation implementing the Convention (Bill 218, Burden Reduction Act, 2016), further to the Uniform Choice of Court Agreements Convention Act adopted by the Uniform Law Conference of Canada in 2010.⁴

6. The Ministry of Justice of Denmark submitted a bill on the implementation of the Convention to the Parliament of Denmark. Its future accession to the Convention will bring Denmark in line with other European Union Member States.

7. Tunisia is actively considering four Hague Conventions, notably the Apostille Convention, Service Convention, Child Abduction Convention and Choice of Court Convention. Ratification draft bills are currently pending before the Tunisian Council of Ministers. In Brazil, the Ministry of Justice and Citizenship finalised a study on the Convention, recommending its ratification.

8. The Permanent Bureau has received queries from other States in regard to implementation issues. The *Implementation Dialogue* supports and facilitates the ratification process of the Convention for interested States and currently includes 13 jurisdictions.⁵

¹ See, < http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/ChoiceofCourts/Report_166/section?id=committees%2freportjnt%2f024013%2f24043 >.

² Speaking note of the Commonwealth Attorney-General, Senator the Hon. George Brandis QC, at a lecture on the Hague Conference on Private International Law on 30 September 2016.

³ Activities and Priorities of the Department of Justice in International Private Law, Report of the Department of Justice Canada 2016, paras 119-124.

⁴ The Act is available at < http://www.ulcc.ca/images/stories/Uniform_Acts_EN/Uniform%20Choice%20of%20Court%20Agreements%20Convention%20Act.pdf >.

⁵ Representatives from Argentina, Australia, Canada, China (People's Republic of), Costa Rica, European Union, Germany, Mexico, New Zealand, Serbia, Singapore, Ukraine and United States of America participate in the Permanent Bureau's 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".

9. At present, the text of the Convention is available in 25 languages.⁶ The Hartley / Dogauchi Explanatory Report can be accessed in 23 languages.⁷

10. In short, the conditions for the Convention to make a significant contribution to cross-border litigation practice are in place.⁸ As for its practical operation, the Permanent Bureau is of the opinion that there is currently no need to envisage a meeting of the Special Commission to review the operation of the Convention. Instead, efforts should be made to continuously ensure the further expansion and successful operation of the Convention. Section C of this document proposes some specific projects in this regard.

2. The Hague Principles

11. At its 2016 meeting, the Council welcomed the work accomplished by the Permanent Bureau in relation to the promotion of the Hague Principles, and expressed its support for the continuation of promotional work.⁹

12. In line with the Council's mandate, the Permanent Bureau has been committed to raising awareness about the Hague Principles. The Hague Principles are now available in three languages,¹⁰ and the 12 Articles of the Hague Principles can be accessed in four additional languages.¹¹ References to scholarly writings on the Hague Principles have been constantly added onto the Hague Conference website.¹²

13. The Permanent Bureau monitors the ongoing implementation of the Hague Principles in Australia¹³ and follows with interest the current work of the Organization of American States on

⁶ The Convention is available in [English](#) and [French](#), which are the official languages of the Hague Conference, [Chinese](#), (kindly provided by the Ministry of Foreign Affairs of the People's Republic of China), [Russian](#) (kindly provided by the Ministry of Justice of the Russian Federation), [Arabic](#) (kindly provided by the National Organ of Tunisia), and 20 other languages of the European Union ([Bulgarian*](#), [Czech*](#), [Danish*](#), [Dutch](#) (extracted from *Tractatenblad van het Koninkrijk der Nederlanden, 2009 nr. 31*), [Estonian*](#), [Finnish*](#), [German](#) (kindly provided by the Austrian, German and Swiss authorities), [Greek*](#), [Hungarian*](#), [Italian*](#), [Latvian*](#), [Lithuanian*](#), [Maltese*](#), [Polish*](#), [Portuguese*](#), [Romanian*](#), [Slovak*](#), [Slovene*](#), [Spanish](#) (kindly prepared by Professors Borrás and González Campos and revised in collaboration with the Permanent Bureau), and [Swedish*](#) (the translations marked with an asterisk were kindly prepared by the European Union translation services). All translations are available on the Hague Conference website at < www.hcch.net > under "Choice of Court".

⁷ T. Hartley and M. Dogauchi, "Explanatory Report on the 2005 Hague Choice of Court Convention", in *Proceedings of the Twentieth Session (2005)*, Tome III, *Choice of Court*, Antwerp-Oxford-Portland, Intersentia, 2010. The Explanatory Report is available in [English](#) and [French](#), [Spanish](#) (kindly provided by the Ministry of Foreign Affairs of Spain and revised by the Permanent Bureau), [German](#) (kindly prepared by the Austrian, German and Swiss authorities), and in other 19 languages of the European Union: [Bulgarian](#), [Croatian](#), [Czech](#), [Danish](#), [Dutch](#), [Estonian](#), [Finnish](#), [Greek](#), [Hungarian](#), [Italian](#), [Latvian](#), [Lithuanian](#), [Maltese](#), [Polish](#), [Portuguese](#), [Romanian](#), [Slovak](#), [Slovene](#), [Swedish](#) (kindly provided by the European Commission Directorate-General for Justice and Consumers). All translations are available on the Hague Conference website at < www.hcch.net > under "Choice of Court".

⁸ This has been recognised at different events, e.g., the Trade Law Forum Incheon 2016, held in Incheon, Republic of Korea, 16-18 May 2016, where presentations on the Convention, the Hague Principles and other Hague Conference instruments were made; a workshop on Supply Chain Finance and Implementation of Secured Transaction Reform in a Cross-Border Context, organised under the auspices of the Asia Pacific Economic Co-operation (APEC) Economic Committee meetings, held in Lima, Peru, in August 2016; an International Association of Young Lawyers Seminar "Cross Border Litigation" held in Lille, France, 14-15 October 2016; an IBA Conference "The 2005 Hague Convention on Choice of Court Agreements: New Perspectives in International Commercial Dispute Resolution" held in Milan, Italy, 17-18 November 2016. As for scholarly writings, see the Hague Conference website at < www.hcch.net > under "Bibliography" in the "Choice of Court".

⁹ See "Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (15-17 March 2016)", C&R No 39.

¹⁰ The Hague Principles are available in [English](#), [French](#) and [Spanish](#) (kindly provided by the Ministry of Foreign Affairs of Spain and revised by the Permanent Bureau).

¹¹ The 12 Articles of the Hague Principles are available in English, French and [Greek](#) (generously provided by Professor Ioannis Voulgaris, retired from the *Université «Démokritos» de Thrace*). The translation services of the United Nations has kindly provided [Arabic](#), [Chinese](#), [Russian](#) and Spanish translations.

¹² For more information, see the Hague Conference website at < www.hcch.net > under "Bibliography" in the "Choice of Law in Contracts".

¹³ See *supra*, para. 4.

the “law applicable to international contracts”, which is hoped to contribute to the implementation of the Hague Principles in the Americas.¹⁴

14. Among the promotional activities that took place throughout the year,¹⁵ the conference co-organised with the University of Lucerne on 8 and 9 September 2016, at the University of Lucerne, Lucerne, Switzerland deserves particular attention (Lucerne conference). The Lucerne conference, titled *Towards a Global Framework for International Commercial Transactions: Implementing the Hague Principles on Choice of Law in International Commercial Contracts*, focused on the implementation of the Hague Principles and their practical relevance for legislators, judges, arbitrators or counsel. It also contributed greatly to the ongoing debate on party autonomy in international commercial contracts and the role that the Hague Principles are set to have in that regard.

C. Suggested further work – access to the law on the validity of a choice of court agreement

15. Under the Convention, the substantive validity of choice of court agreements is governed by the law of the State of the chosen court.¹⁶ The Hartley / Dogauchi Explanatory Report states that “the law of the State of the chosen court” includes the choice of law rules of that State.¹⁷ When determining the validity, under Article 5(1), the chosen court will apply its own law, whereas under Article 6(a), the court seised (*i.e.*, a different court than the chosen court) will need to apply the law of the chosen court, *i.e.*, a foreign law. Commentators have praised the advantages of referring to the same law – the law of the State of the chosen court – so that the result is the same irrespective of which court hears the claim, but have also expressed concerns as to the difficulties of accessing and properly applying the relevant rules of the law of the State of the chosen court.¹⁸

16. At the international level, there are no uniform (choice of law or substantive) rules on the substantive validity of choice of court agreements. The Hague Principles expressly exclude the validity of choice of court agreements from their scope because of the split in treatment (as a substantive or procedural matter) under national laws.¹⁹

17. Indeed, national laws and practices differ when determining the validity of choice of court agreements.²⁰ The court seised may also need to apply the choice of law rules of the State of

¹⁴ A draft guide is being prepared by the Inter-American Juridical Committee and will be further discussed at the Committee’s 90th Regular Session in March 2017, see < <http://www.oas.org/en/sla/iajc/agenda.asp> >.

¹⁵ Such as presentations on the Hague Principles at the Incheon Trade Law Forum 2016, held in Incheon, Republic of Korea, 16-18 May 2016; a presentation and forthcoming publication at La Sapienza Università di Roma, 14 October 2016; the tenth ASADIP Meeting, held at Buenos Aires, Argentina, 10-11 November 2016.

¹⁶ This is expressed in exception rules: the chosen court does not need not hear the case where the choice of court agreement is null and void under its law (Art. 5(1)); a court of a Contracting State other than that of the chosen court does not need to suspend or dismiss proceedings to which an exclusive choice of court agreement applies if the agreement is null and void under the law of the State of the chosen court (Art. 6(a)); and recognition or enforcement of a judgment granted under a choice of court agreement may be refused if the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid (Art. 9(a)). See the Hartley / Dogauchi Explanatory Report, paras 125-126, 149, 183.

¹⁷ See the Hartley / Dogauchi Explanatory Report, para. 125.

¹⁸ See A. Schulz, “The Hague Convention of 30 June 2005 on Choice of Court Agreements”, *Journal of Private International Law*, No 2, 2006, p. 256; Th. Kruger, “The 20th Session of the Hague Conference: A New Choice of Court Convention, and the Issue of EC Membership”, *ICLQ*, Vol. 55, 2006, p. 451; R. A. Brand and P. M. Herrup, *The 2005 Hague Convention on Choice of Court Agreements, Commentary and Documents*, Cambridge University Press, Cambridge, 2008, pp. 81-82; S. Vrellis, “The Validity of a Choice of Court Agreement under the Hague Convention of 2005”, in *Convergence and Divergence in Private International Law*, Liber Amicorum Kurt Siehr, Eleven International Publishing & Schulthess, 2010, pp. 770-776; T. Hartley, *Choice of Court Agreements under the European and International Instruments*, Oxford University Press, 2013, pp. 165-171; M. Weller, “Choice of Forum Agreements under the Brussels I Recast and under the Hague Convention: Coherences and Clashes”, *Journal of Private International Law*, No 3, 2016 (forthcoming); Ulrich Magnus, “Onderkollisionsnorm fur das Statut von Gerichtsstands- und Schiedsgerichtsvereinbarungen?” *IPRax*, No 6, 2016, pp. 521-531, and comments made during the Lucerne conference and the Milan IBA conference, *supra*, notes 8 and 15.

¹⁹ Art. 1(3)(b) of the Hague Principles. For details, see para. 1.26 of the Commentary on the Hague Principles.

²⁰ For discussions, see A. Schulz, “Report on the First Meeting of the Informal Working Group on the Judgments Project 22-25 October 2002”, Prel. Doc. No 20 of November 2002 drawn up for the attention of the Special

the chosen court to find the law governing the substantive validity of a choice of court agreement.²¹ In terms of substantive grounds of nullity, the Hartley / Dogauchi Explanatory Report only provides a general description, referring primarily to generally recognised grounds like fraud, mistake, misrepresentation, duress and the lack of capacity.²²

18. Commentators have thus suggested that assessing the validity of a choice of court agreement under the Convention might be facilitated by a repository on the laws governing this validity issue in each jurisdiction bound by the Convention.²³

19. Based on these considerations, the Permanent Bureau submits that, at this early stage of the application of the Convention, a questionnaire could be drawn up and completed with the assistance of the jurisdictions bound by the Convention. The limited number of Contracting States so far increases the feasibility of the proposed project. Subject to the views of the Council, the Permanent Bureau would prepare a questionnaire for the attention of Contracting States and would compile the received information and upload it onto the Convention webpage. Whenever a new State joins the Convention, it would be asked to complete the questionnaire.

20. The questionnaire would contain questions on how the laws of each Contracting State determine the validity of choice of court agreements and how this issue is dealt with in practice in these jurisdictions. The Permanent Bureau is aware of the challenges that are associated with maintaining the information up to date and would therefore invite Contracting States at regular intervals to keep the Permanent Bureau informed of any updates on this issue.

21. The Permanent Bureau is of the view that some related initiatives could be contemplated in order to enhance the effective operation of the Convention. Inspired by the successful experience of the International Hague Network of Judges in child abduction and child protection matters, a meeting of judges would be envisaged so as to enable them to exchange experiences and information with regard to the application of the Convention. It is important to note that there is no Central Authority structure available to ensure some form of administrative co-operation under the Convention but perhaps a form of international judicial co-operation could be developed over time.

D. Proposed conclusions

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

- encourage further work of the Permanent Bureau with regard to the implementation of the Convention and the Hague Principles;
- task the Permanent Bureau with preparing a questionnaire on the law governing the validity of choice of court agreements and circulate it among the Convention's Contracting States for its completion;
- direct the Permanent Bureau to, resources permitting and when there is sufficient experience under the Convention, explore the possibility of organising, if possible, in co-operation with an interested Member, a first Judicial Meeting on the operation of the

Commission of December 2003 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, see *Proceedings of the Twentieth Session (2005)* (*op. cit.* note 7), pp. 39-41, paras 19-21; A. Schulz, "Report on the Second Meeting of the Informal Working Group on the Judgments Project, 6-9 January 2003", Prel. Doc. No 21 of January 2003 drawn up for the attention of the Special Commission of December 2003 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, see *Proceedings of the Twentieth Session (2005)* (*op. cit.* note 7), pp. 61-63, paras 27-34.

²¹ See R.A. Brand and P.M. Herrup, *supra*, note 18, pp. 81-82; A. Schulz (*op. cit.* note 18), p. 256.

²² Para. 126 of the Hartley / Dogauchi Explanatory Report. It should be pointed out that the Convention contains a special rule on "capacity", and according to this rule, a choice of court agreement is invalid if either parties to it lacked capacity to conclude the agreement by either the law of the chosen court or by the *lex fori*. (Arts 6(b) and 9(b)).

²³ See, for instance, A. Schulz (*op. cit.* note 18), p. 256; R.A. Brand and P.M. Herrup (*op. cit.* note 18), p. 82; S. Vrellis (*op. cit.* note 18), pp. 770-776; M. Weller (*op. cit.* note 18). This idea was also discussed at recent conferences on the Hague Principles or the Convention, such as the Lucerne conference and the Milan IBA conference referred to *supra*, in notes 8 and 15.

Convention where the desirability and feasibility of a specialised judicial network would be examined, and report to the Council;

- invite Members to keep the Permanent Bureau closely updated regarding developments in their States in relation to choice of court and choice of law agreements (*e.g.*, new case law and legislation) wherever possible.