

DEUTSCHE STIFTUNG FÜR
INTERNATIONALE RECHTLICHE
ZUSAMMENARBEIT E.V.



**Choice of Court Convention,
International Recognition and
Enforcement of Judgments,
and the Draft Hague Principles
on Choice of Law**

*TBILISI, GEORGIA
26-28 February 2013*

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Choice of Court Convention

The Judgments Project

Hague Principles on
Choice of Law in International
Contracts

Context

- The Hague Conference has a long history of promoting the principle of **party autonomy** in the area of international trade
 - 'Party autonomy' includes the ability of parties to choose the court (forum) to resolve disputes in international cases, and for that choice to be respected by law
- The parties' choice of court will generally be expressed in a term of their contract – this term is known as a "choice of court agreement" or "forum selection clause"

Context

- The ability of parties to choose a court is recognised in several regional instruments, *e.g.*:



Brussels I Regulation (within European Union)



Buenos Aires Protocol on International Jurisdiction in Contractual Matters (between MERCOSUR States)



Minsk and Kishinev Conventions on legal assistance and legal relations in civil, family, and criminal matters (between Members of the Commonwealth of Independent States)

- Under national law, some States still do not recognise the ability of parties to:
 - choose the courts of that State;
 - choose the courts of another State

The Choice of Court Convention

- Concluded in 2005 at the 20th Session of the Hague Conference
- Its basic objectives are to:
 - provide legal certainty and predictability with respect to choice of court agreements; and
 - become the litigation equivalent of the 1958 New York Convention
- In a 2012 statement, the International Chamber of Commerce confirmed that by promoting greater certainty for cross-border business, the Convention should create a climate more favourable for international trade and investment

Scope

- Applies in **international cases**:
 - For the purposes of *jurisdiction*, a case is international unless the parties are resident in the same Contracting State and their relationship and all other elements relevant to the dispute are connected only with that State;
 - For the purposes of *recognition/enforcement*, a case is international where the judgment was given in another Contracting State

Scope

- Applies in **civil or commercial matters**:
 - Consumer and employment contracts are expressly excluded
→ Article 2(1)
 - Other “excluded matters” include: family law and succession; insolvency; carriage of goods and persons; anti-trust (competition) matters; and validity of intellectual property rights other than copyright and related rights
→ Article 2(2)

Scope

- Applies to **exclusive choice of court agreements**:
 - a choice of court agreement designating a single court (or the courts of a single State) is deemed exclusive unless the parties expressly provide otherwise
→ Article 3(b)
 - However, States may agree (by declaration) to recognise and enforce judgments rendered pursuant to a *non-exclusive* choice of court agreement
→ Article 22

The key obligations

1. The chosen court **must** hear the dispute

➔ Article 5

2. Any non-chosen court **must** suspend/dismiss proceedings

➔ Article 6

3. A judgment given by the chosen court **must** be recognised and enforced

➔ Article 8

1. Chosen court must hear the dispute

- Chosen court cannot refuse to hear the dispute because:
 - it considers that a court of another State is more appropriate (*forum non conveniens*);
 - a court of another State was seised first (*lis pendens*)
- Chosen court may refuse to hear dispute where the choice of court agreement is null and void under the law of that State (including conflict rules) → Article 5
- No effect on internal rules on subject matter jurisdiction or venue

2. Non-chosen court must suspend/dismiss

- Court not chosen may only hear the dispute if:
 - the choice of court agreement is null and void under law of State of chosen court (includes conflict rules);
 - a party lacked capacity to conclude agreement under law of State of court seised (includes conflict rules);
 - giving effect to agreement would lead to manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;
 - for exceptional reasons beyond control of parties, the agreement cannot reasonably be performed; or
 - chosen court has decided not to hear the case

➡ Article 6

3. Court addressed must recognise/enforce

- The court addressed may refuse to recognise/enforce a judgment by the chosen court if:
 - the choice of court agreement was null and void under law of State of chosen court (unless otherwise determined by the chosen court);
 - a party lacked capacity to conclude agreement under the law of requested State;
 - the defendant was not properly notified; or
 - the judgment was obtained by fraud in connection with a matter of procedure

3. Court addressed must recognise/enforce

- The court addressed may refuse to recognise/enforce a judgment by the chosen court if:
 - recognition/enforcement would be manifestly incompatible with public policy of requested State;
 - the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
 - the judgment is inconsistent with an earlier judgment given in another State between the same parties and involving same cause of action (provided that the earlier judgment is recognisable in requested State)

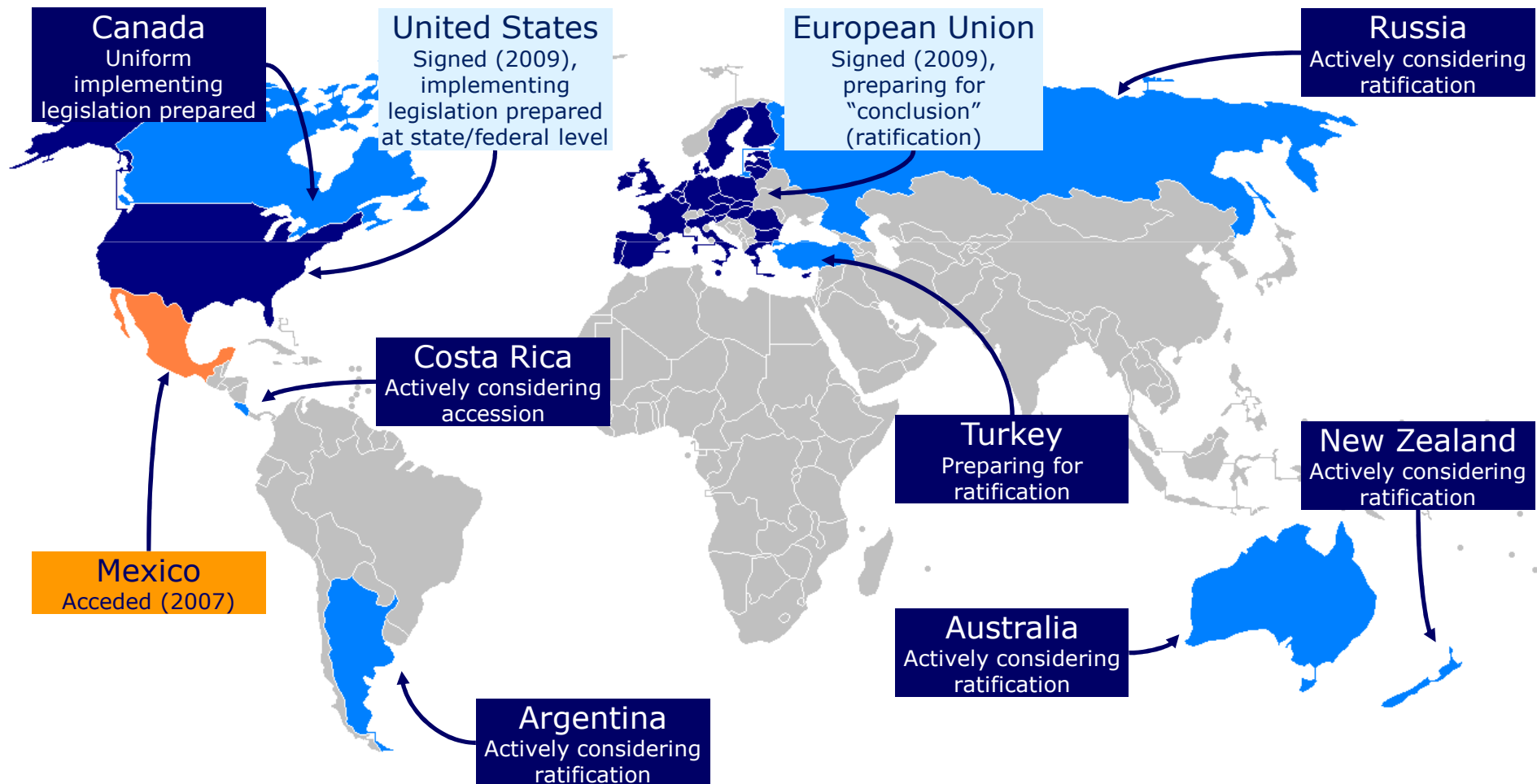
➔ Article 9

Status

- The Convention is not yet in force
- Mexico acceded in 2007
- The EU and USA signed in 2009 and ratification is on the way
- The Convention will enter into force after two ratifications/accessions

➡ Article 31

Status



Choice of Court Section

More information
available on the
**Choice of Court
section** of the Hague
Conference website





The Judgments Project

Background

- Since 1993, the Hague Conference has been working towards a global instrument on foreign judgments in civil and commercial matters
- This work is known as the 'Judgments Project'
- The Judgments Project has so far produced the Choice of Court Convention
- A broader draft instrument on jurisdiction and recognition/enforcement was unable to achieve consensus at the 2001 Session of the Hague Conference

Background

- In 2010, the Permanent Bureau provided a document to Members of the Hague Conference inviting consideration of the possible continuation of the Judgments Project
- The document highlighted the following factors to guide consideration:
 - what is needed by international litigants and judicial actors dealing with international cases?
 - what could be the basis for future work?
 - what is feasible for future negotiations?

Background

- The document presented three options for possible future work:
 - **Option 1:** A binding instrument on specific common grounds of jurisdiction *and* recognition/enforcement
 - **Option 2:** A binding instrument focusing on recognition/enforcement alone
 - **Option 3:** A non-binding instrument on jurisdiction and recognition/enforcement (on the latter alone)
- The document suggested convening an expert group to advise on areas where it might be feasible to resume work, and where consensus might be possible

Background

- In 2011, the Council agreed that a **small expert group** should be set up to explore the background of the Judgments Project and recent developments with the aim to assess the possible merits of resuming the Judgments Project
- In 2012, the expert group met for the first time and found that further work on cross-border litigation was desirable and recommended that:
 - work be undertaken by a Working Group towards a future binding instrument making provision for the recognition and enforcement of judgments
 - the expert group reconvene to consider matters of direct jurisdiction (including parallel proceedings).

Background

- After considering the findings of the expert group, the Council agreed for work to proceed towards a new instrument on cross-border litigation and agreed to the following two-track working method proposed by the expert group:
 - a working group prepares proposals on provisions relating to recognition and enforcement of judgments
 - the expert group reconvenes to consider and make recommendations on the desirability and feasibility of making provisions relating to matters of jurisdiction (including parallel proceedings)

Tentative timeline for future work

April 2012

Council gives
mandate to
re-launch
work on
Judgments
Project

Feb 2013

Back-to-back
meetings of
Working Group
and Expert Group

April 2013

Council refines
mandate of Working
Group

2013 – early 2014

Further
meetings of
Working
Group

2014 – 2015

Special
Commission
to consider
proposals
submitted by
Working
Group

Judgments Project Section

More information
available on the
**Judgments Project
section** of the Hague
Conference website





Hague Principles on Choice of Law in International Contracts

Objectives

- Freedom to choose the applicable law in international contractual disputes is widely accepted in international conventions, regional instruments, national codifications, and national case law
- However, party autonomy is not always respected and parties might not always get what they bargained for

Background

2006

Feasibility study conducted by the Permanent Bureau

2010 – 2011

Working Group meets on three occasions to prepare draft articles

Participation of several international organisations



2012

Special Commission approves the draft "Hague Principles"



Status

- The “Hague Principles” as approved by the Special Commission will be submitted to Council for endorsement in April 2013
- Council will be asked to give a mandate to the Working Group to prepare a Commentary on the Draft Principles

The draft Hague Principles in a nutshell

Issues	In court proceedings	In arbitration proceedings
Set of rules	A non-binding single set of rules applicable to both court and arbitral proceedings	
Scope	<ul style="list-style-type: none"> i. Applies to international contracts in commercial matters ii. The Hague Principles will not contain unified conflict rules for applicable law in the absence of choice iii. The Hague Principles will cover all aspects of choice of law related to international contracts (e.g., applicable law to consent, formal validity, substantive validity) 	
Basic principle and its formulation	<ul style="list-style-type: none"> Party autonomy Consent Change of law and severability Formal validity Battle of forms 	
Choice of law	Express and tacit	
Chosen law	Law and rules of law (subject to certain qualifications)	
Limitations	<ul style="list-style-type: none"> Mandatory rules Public policy exception (different rules for court and arbitration proceedings) 	

Additional information

- More information on the project on the Hague Conference website



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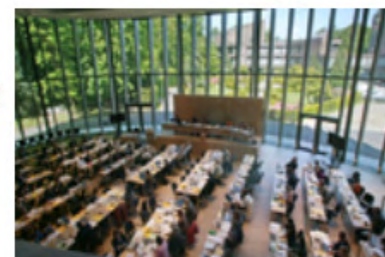
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Since 1893, the Hague Conference on Private International Law, a melting pot of different legal traditions, has developed and serviced Conventions which respond to global needs in the following areas:



International protection of children, family and property relations:

- International protection of children
 - [Child Abduction Section](#)
 - [INCADAT](#)
 - [Intercountry Adoption Section](#)
- International child support and other forms of family maintenance
- International protection of adults
- Relations between (former) spouses
- Wills, trusts, estates

International legal co-operation and litigation:

- International legal and administrative co-operation
 - [Apostille Section](#) (incl. e-APP)
 - [Service Section](#)
 - [Evidence Section](#)
- Jurisdiction and enforcement of judgments
 - [Choice of Court Section](#)
 - [The "Judgments Project"](#)

International commercial and finance law:

- [Contracts](#)
 - [Choice of law in international contracts](#)
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- [Banking](#)
- [Recognition of companies](#)



Latest developments



Dakar Workshop on the Hague Intercountry Adoption Convention and its implementation in Francophone



The Republic of Korea accedes to the 1980 Hague Child Abduction Convention [\[more\]](#)



Official opening of the Hague Conference on Private International Law Asia Pacific Regional Office in Hong Kong



Former Deputy Secretary General William Duncan recognised by Queen Elizabeth II for his work with

Questions ?

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First Secretary

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