



UNIVERSITY  
OF  
JOHANNESBURG



**HCCH**  
HAGUE CONFERENCE ON  
PRIVATE INTERNATIONAL LAW  
CONFÉRENCE DE LA HAYE  
DE DROIT INTERNATIONAL PRIVÉ

# Party Autonomy in Recent Work of the HCCH and its Relevance for East and Southern Africa

Commercial Private International Law in East and Southern Africa  
*Johannesburg, South Africa, 14 September 2015*

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# 1. The HCCH



**HCCH**

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# What is the HCCH?



An **intergovernmental organisation** working toward “progressive unification of the rules of private international law” (Art. 1, Statute)

Which State’s authorities are competent to decide matters in a cross-border situation?

## JURISDICTION

Which State’s laws apply to a cross-border situation?

## APPLICABLE LAW

How may one State’s judgment or decision be recognised / enforced in another State?

## RECOGNITION & ENFORCEMENT

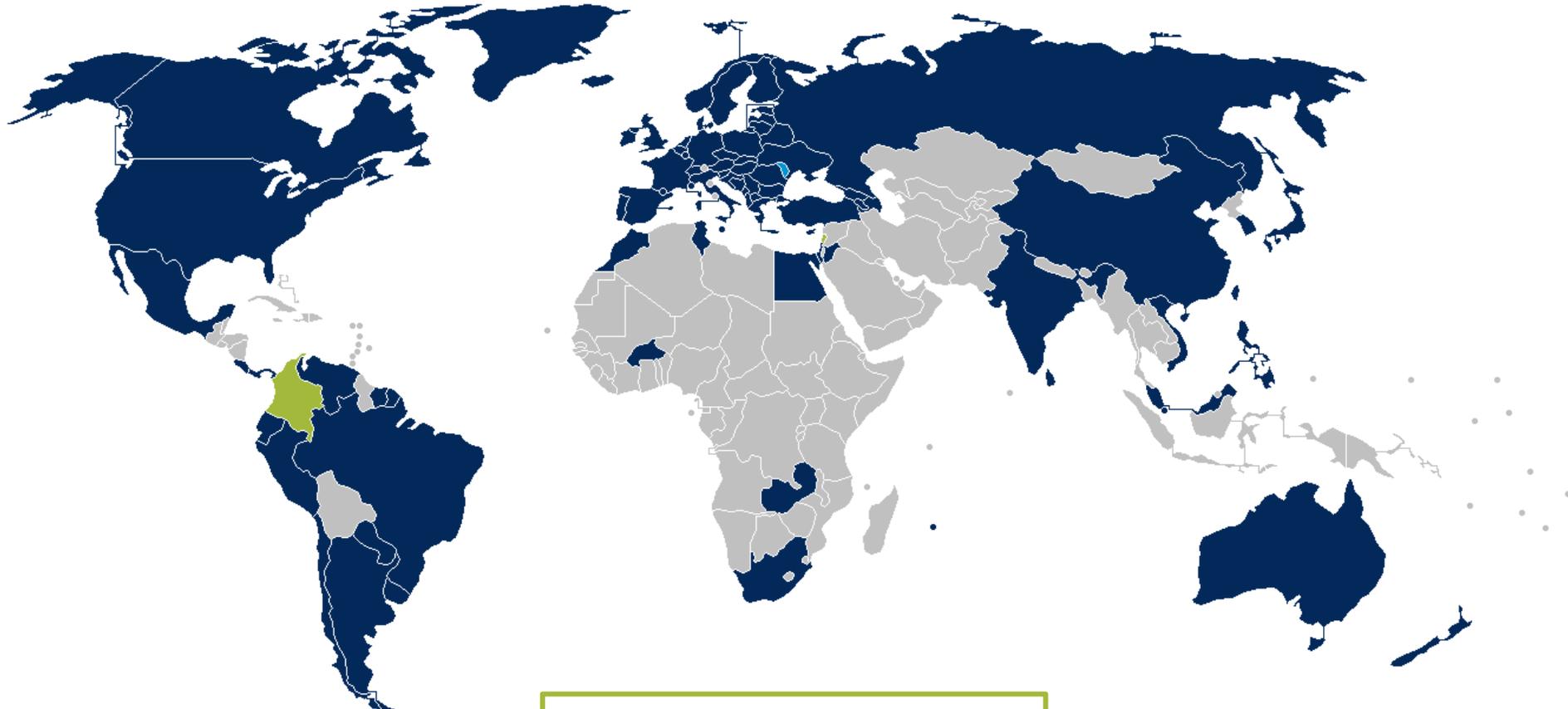
How can authorities work together to improve efficiency and overcome challenges in cross-border situations?

## LEGAL CO-OPERATION

**NB:** The Conference does not deal with substantive law, but provides “road signs” and “bridges” needed in cross-border situations

# 80 Members of HCCH

79 States + 1 Regional Economic Integration Organisation (EU)



**■ Candidate State**  
*Has applied for membership and has the six-month voting period running*

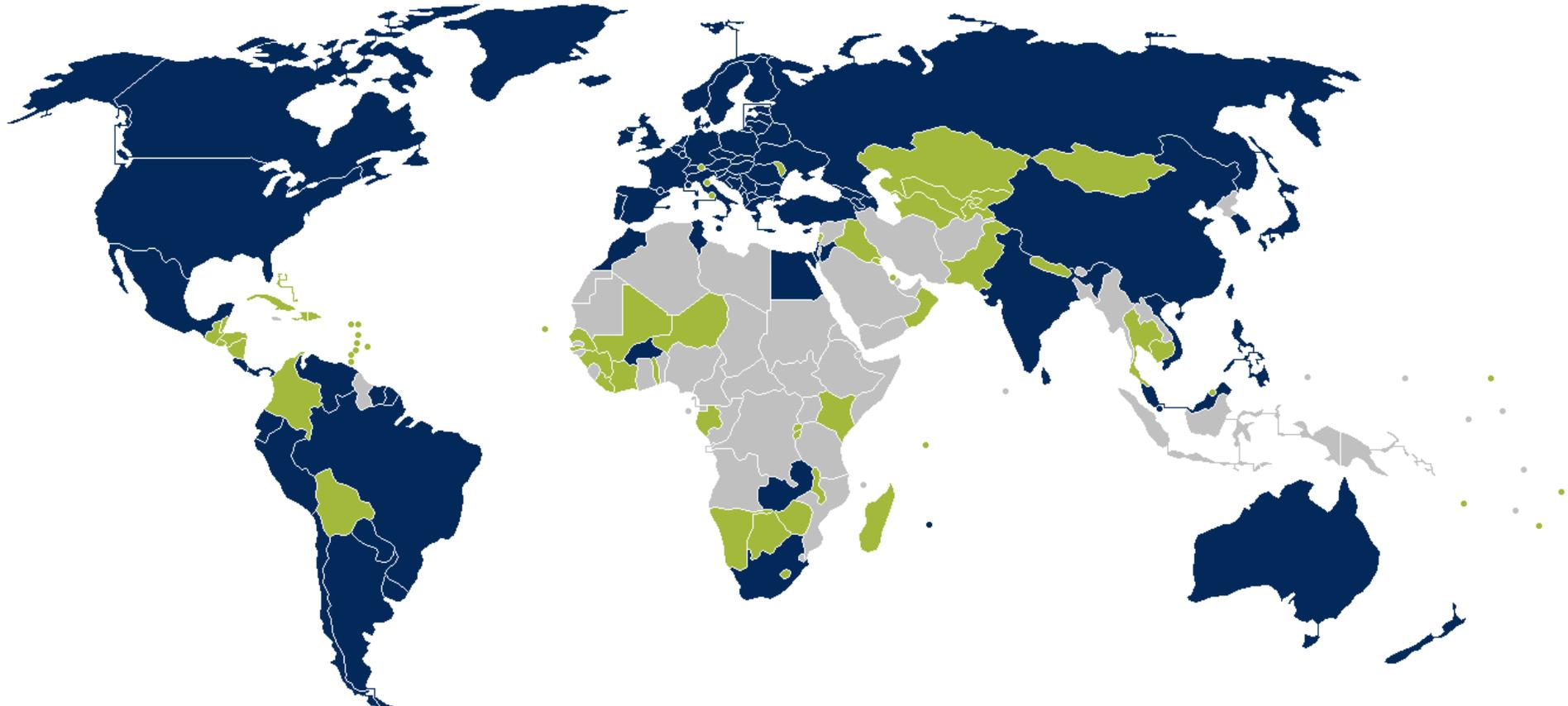
**■ Admitted State**  
*Has applied for membership and has been admitted by affirmative vote, but must still accept Statute to become a Member State*

**■ Member State**

NB: The boundaries shown and designations used on this map are based upon those used by the United Nations Cartographic Section and are indicative only. They should not be taken to imply official endorsement or acceptance by either the Hague Conference or the United Nations.

# 146 States “Connected” with HCCH

*A “Connected” State is either a Member or a Contracting State to one or more of the Hague Conventions*



■ Member State “Connected” State

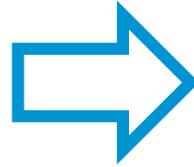
■ Non-Member “Connected” State

## 2. Party Autonomy



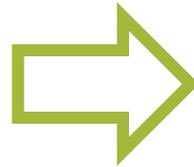
# Party Autonomy

What is party autonomy?



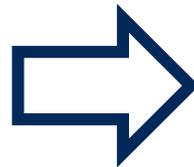
Empowerment of private parties to choose the governing law and competent forum for dispute resolution

What is the status of party autonomy in international trade?



Widely, but not universally accepted

How important to accept party autonomy in international trade?



By providing certainty and predictability enhancing effectiveness of the transactions, reducing costs

# Party Autonomy

(cont'd)

Widely accepted in international conventions, regional instruments, national codifications, and national case law, e.g.:

- European Union: Rome I Regulation
- South Africa: *Creutzburg v. Commercial Bank of Namibia Ltd* (2006) 4 All SA 327
- Kenya: *Friendship Container Manufacturers Ltd. v. Mitchell Cotts (K) Ltd* [2001] 2 E.A. 338
- Uganda: *Bank of Uganda v. Banco Arabe Español*. Civil Appeal No. 23 of 2000 (Court of Appeal, Uganda, 2000)
- ILA Resolution No 6/2008

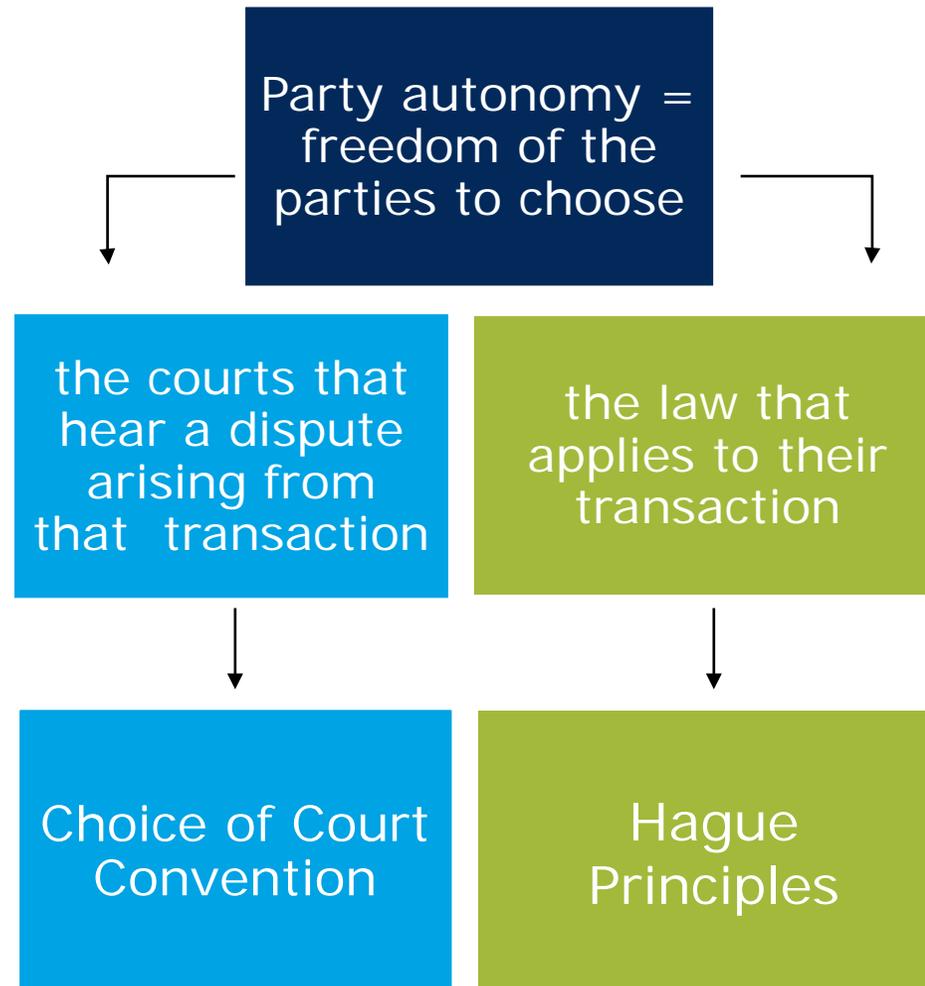
# Party Autonomy

(limitations)

- **South Africa:** The court in which an action is brought in breach of a jurisdiction clause has the discretion to hear the matter itself and not to refer it to the chosen foreign court:
  - *Foize Africa (Pty) Ltd v. Foize Beheer BV* (2012) 4 All SA 387;
  - *Butler v. Banimar Shipping Co.* SA 1978 (4) SA 753 at 761;
  - *Ind-Lex Investment CC v. Aqua-Terra (Pty) Ltd* (1991-2) 7 BSC 221.
- **Swaziland & Namibia : discretion in upholding a jurisdiction agreement**
  - *Barlows Central Finance Corp. (Pty) Ltd v. MV Dien Danielsen* 1982 (3) SA 534;
  - *Olympic Fruit v. Nagrapex Holdings*, Case No. A 278/2011 (High Court, Namibia, 2011).

# Party Autonomy in the Work of the HCCH

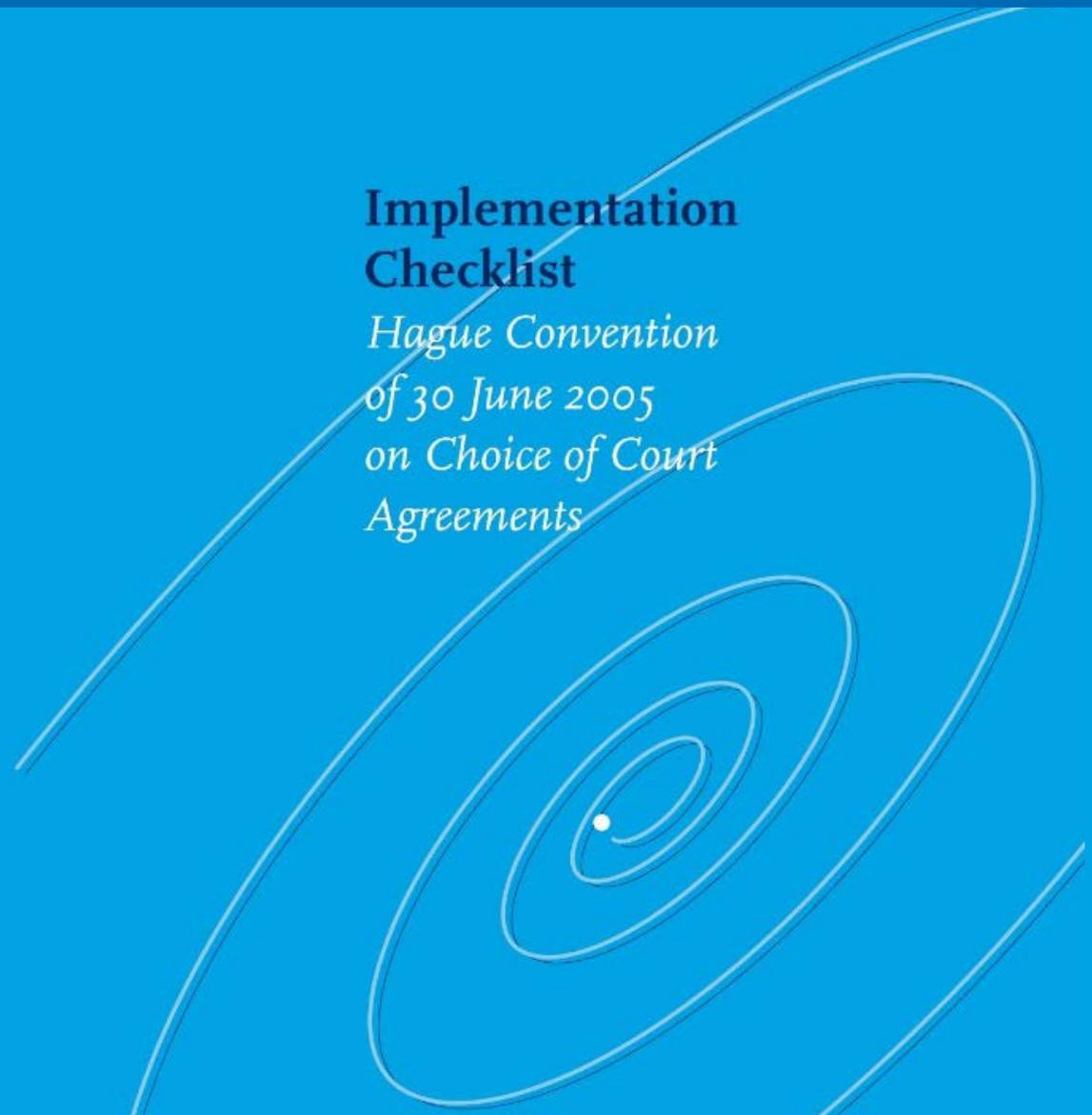
With regard to commercial transactions:



# 3. The Choice of Court Convention

## **Implementation Checklist**

*Hague Convention  
of 30 June 2005  
on Choice of Court  
Agreements*



# Scope

## 1) International cases

- for the purpose of jurisdiction:  
“International” **unless** 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  
*(subject to Art. 19 declaration)*
- for the purpose of recognition and enforcement:  
A case is “international” where the judgment was given in another Contracting State  
*(subject to Art. 20 declaration)*

## 2) “Civil and commercial matters”

- Excluding consumer and employment contracts (*Art. 2(1)*) and other “excluded matters” (*Art. 2(2)*)
- A State may refuse to apply the Convention to a specific matter in which it has a strong interest in not applying the Convention  
*(Art. 21 declaration – EU Declaration on insurance)*

# Scope

(cont'd)

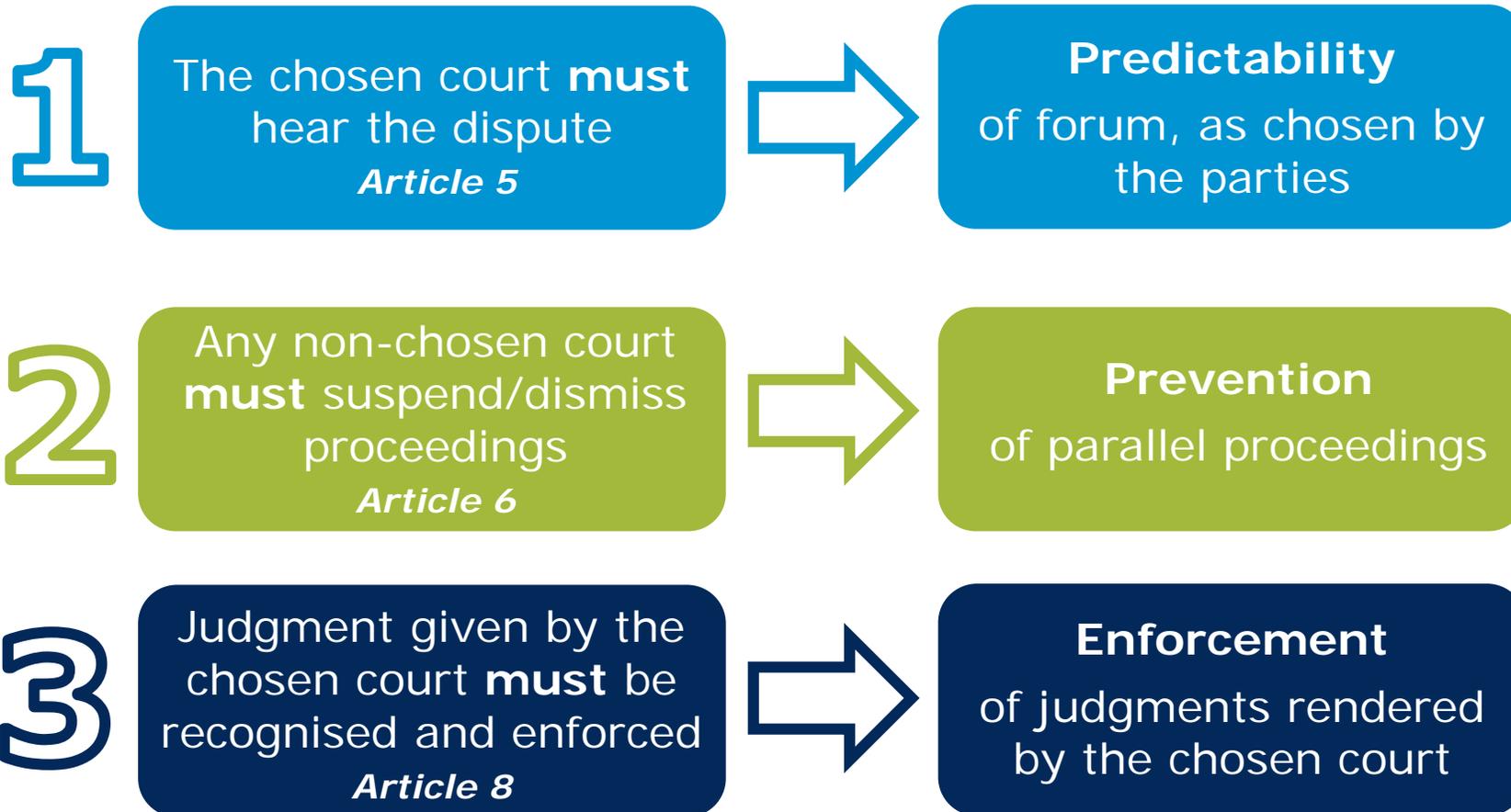
## 3) Exclusive choice of court agreements

- that designate the court(s) of a Contracting State
- concluded after entry into force for the State of the designated court
- may refer to the courts of a Contracting State generally, or to a specific court(s) of that State
- must be concluded or documented in writing, or by other means of communication which render information accessible for subsequent reference (e-agreement)

## 4) Interim measures of protection

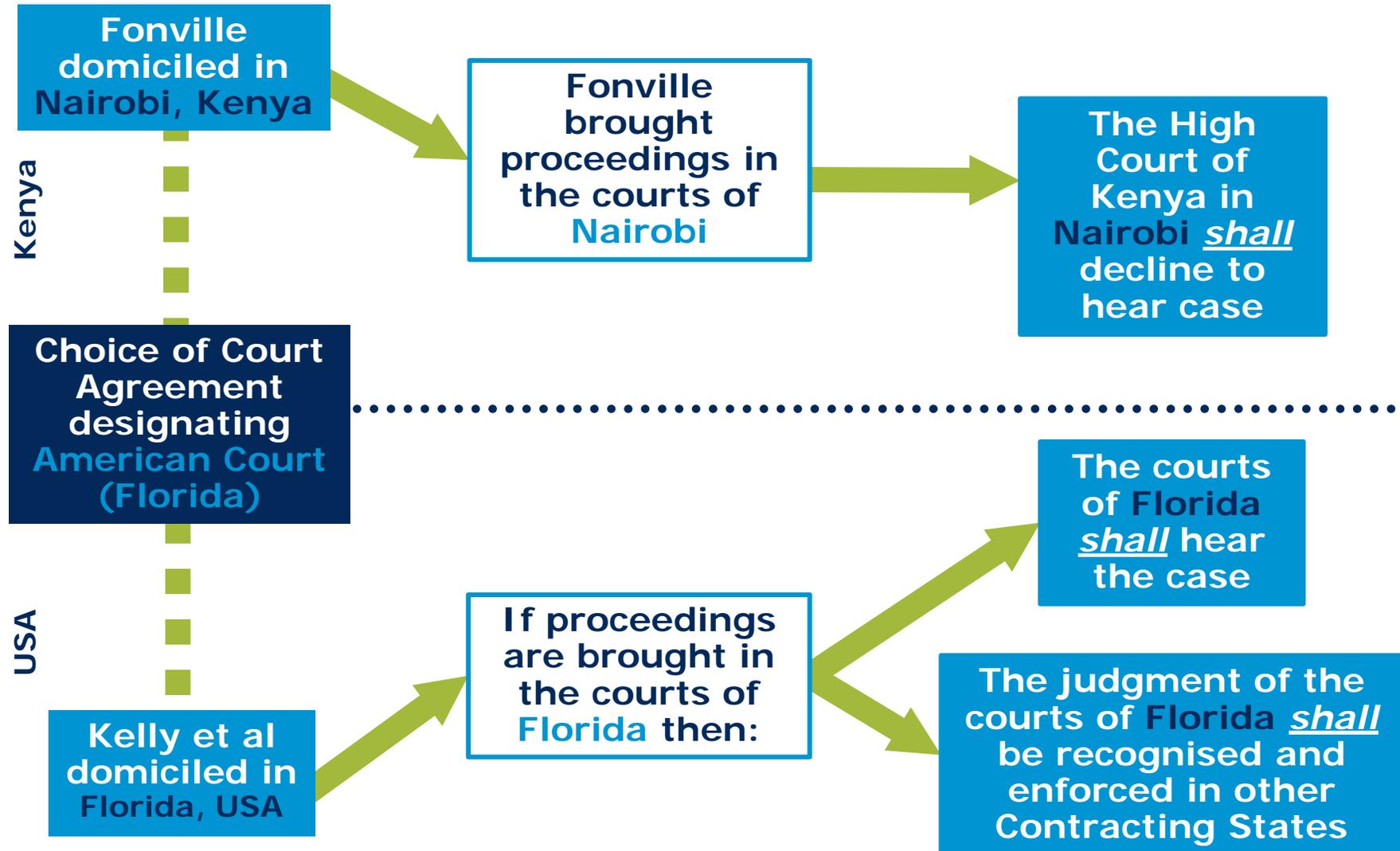
- Outside the scope of the Convention
- a court – whether the chosen court or otherwise – may grant such measures or not grant them as it sees fit
- such measures are not, however, recognisable or enforceable under the Convention

# 3 Key Obligations



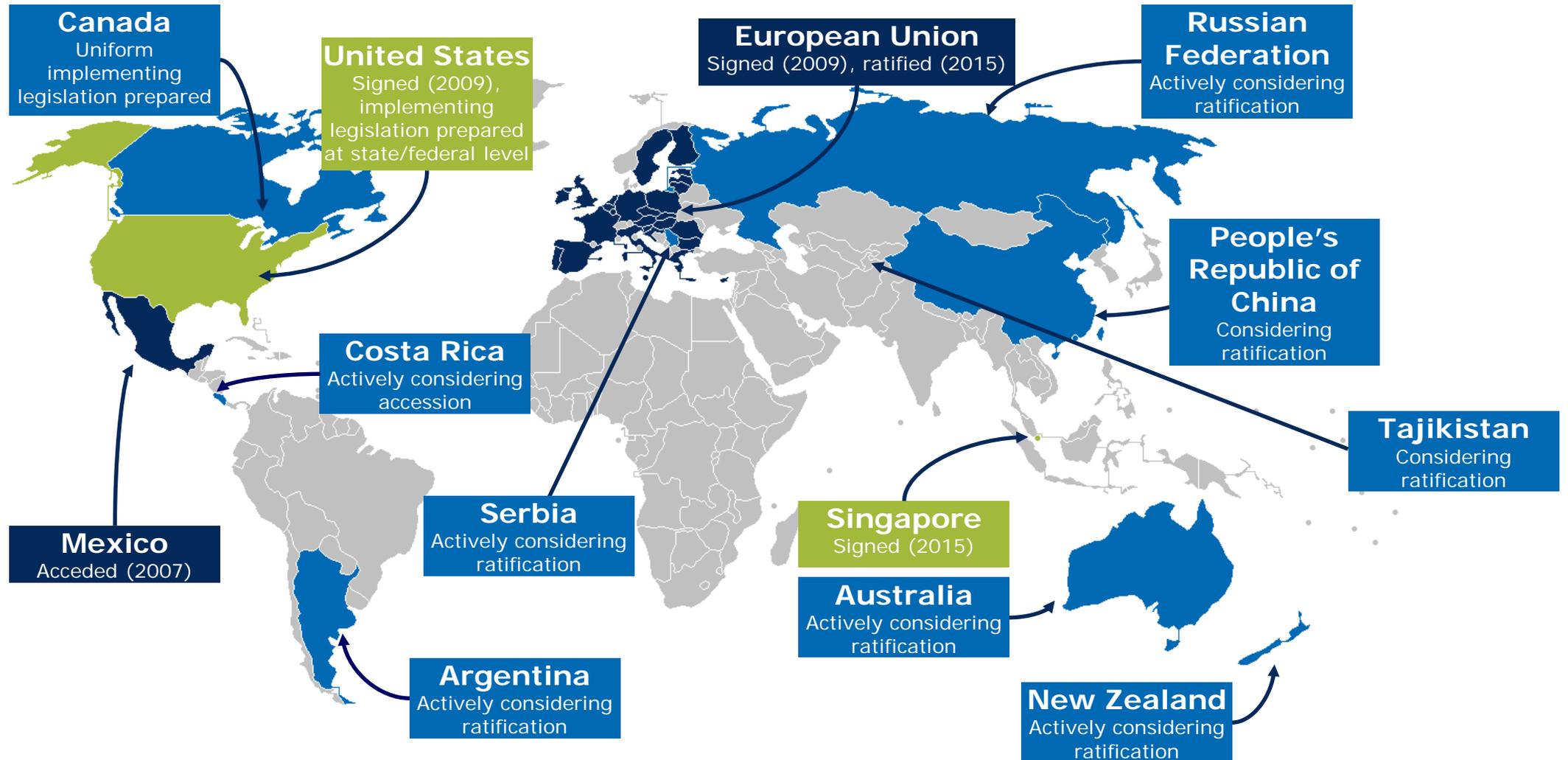
# Operation of the Key Obligations in Practice

*Fonville v. Kelly III (2002) EA 71, 1995 LLR 2636*



# Status

(as of 1 October 2015)



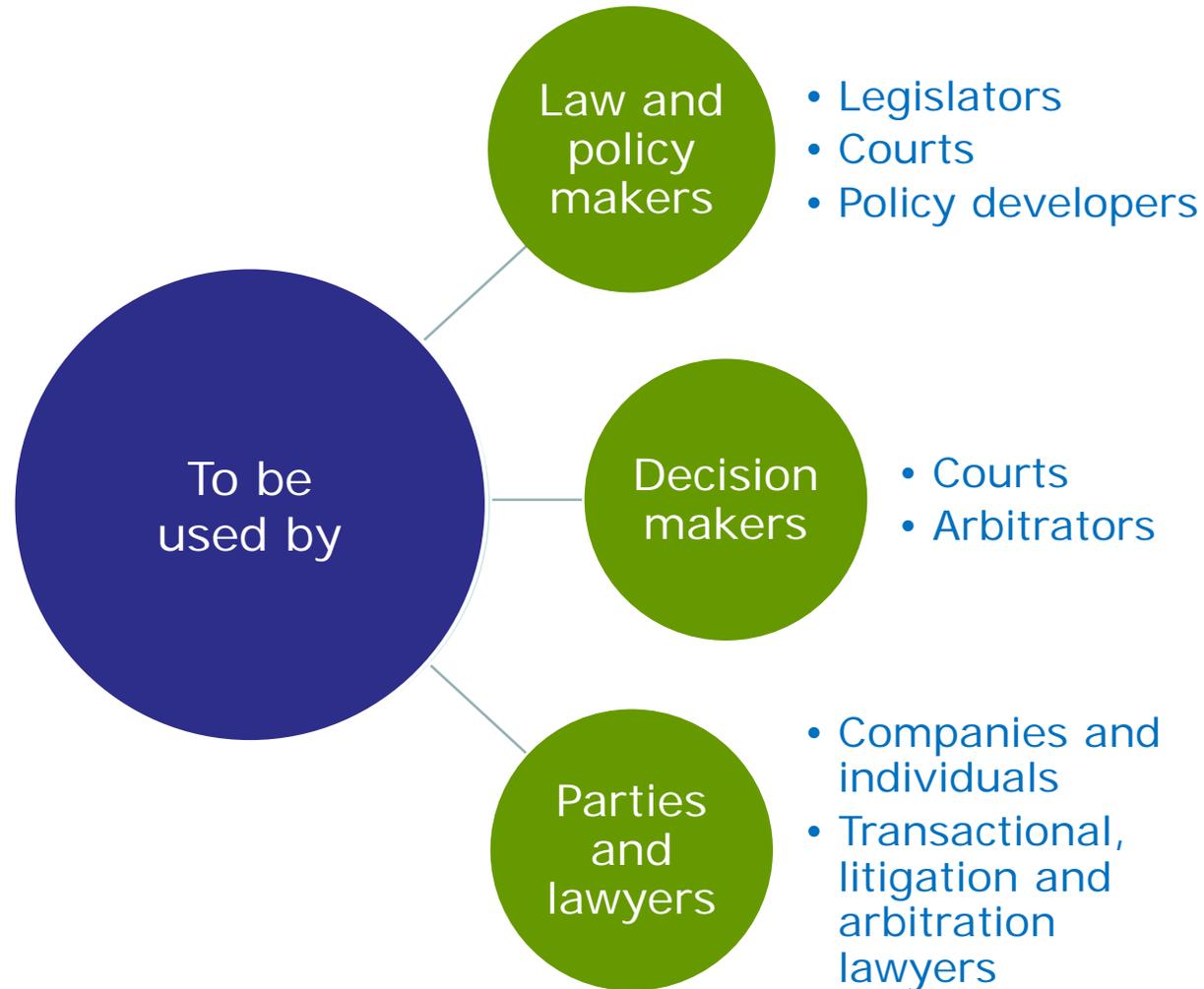
# 4. Hague Principles



# The Hague Principles in a Nutshell

- First normative ***soft-law*** instrument developed by HCCH (not Convention; not model law); first drawn up by Working Group, then approved by HCCH Members on **19 March 2015**
- A “package” consisting of Preamble and **12 Articles**, with an Introduction and a **Commentary**
  - In essence, the Hague Principles may be considered an **international code of current best practice** in relation to party autonomy in international commercial contracts
  - They provide a **comprehensive blueprint** to guide users in the creation, reform, or interpretation of choice of law regimes at the national, regional, or international level

# The Hague Principles



# Scope

**International contracts:** Presumed international unless parties, relationship and all relevant elements are within only one State

Covers all aspects of choice of law related to international contracts (e.g., applicable law to consent, formal validity, substantive validity)

**Commercial contracts:** Applies to a contract where each party is acting in the exercise of its trade or profession

Exclusions from scope: i.a. consumer or employment contracts

Provides rules only for situations where the parties have made a choice of law (express or tacit) by agreement

Does not contain unified conflicts rules for applicable law in the absence of a choice

# Main Provisions

Freedom to choose the applicable law (*Art. 2(1)*)

Different laws governing different parts of the contract (*Art. 2(2)*)

Modification of the applicable law at any time (*Art. 2(3)*)

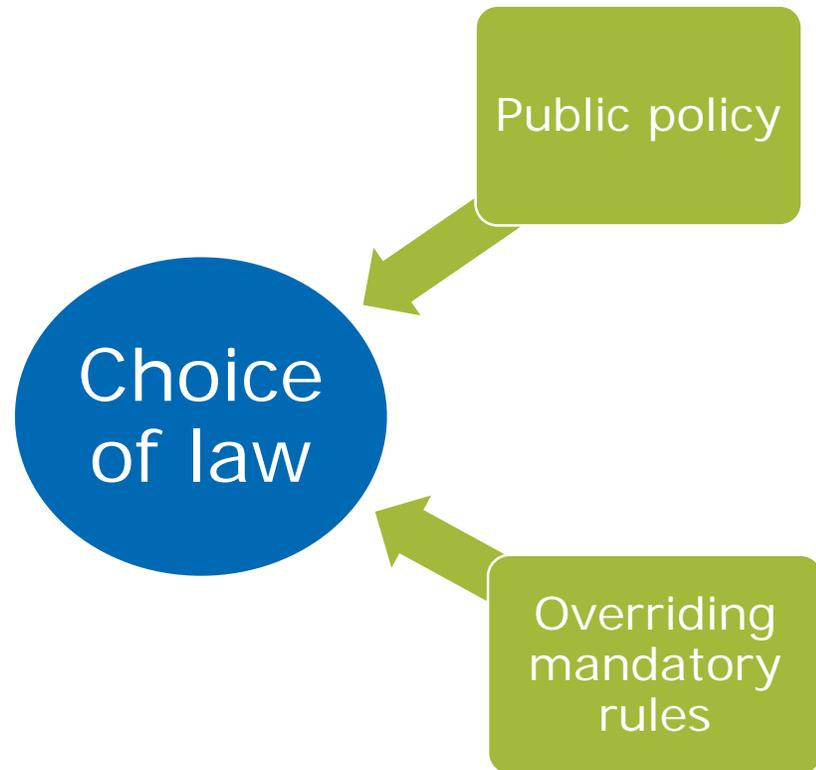
No connection to the transaction or the parties needed (*Art. 2(4)*)

Expressly or tacitly choose the applicable law (*Art. 4*)

No requirement as to the form of choice of law (*Art. 5*)

Requiring consent (*Art. 6(2)*)

# Limitations of Choice of Law



Consolidated in  
Article 11

Specific rules for  
either adjudication  
by courts or arbitral  
tribunals

Reference to the  
mandatory  
provisions of the law  
of the forum and  
those of the law of  
another State

# Early Achievements



## ***20 January 2015***

- Paraguay promulgated *Law No 5393 on the Law Applicable to International Contracts*, based on the Hague Principles



## ***8 July 2015***

- UNCITRAL endorses the Principles during its Forty-eighth session
- First HCCH instrument officially endorsed by UNCITRAL



## ***Ongoing***

- Permanent Bureau in contact with ICC to get ICC official support for the Hague Principles

# Relevance of these instruments for East and Southern Africa



# Benefits in Cross-border Trade and Investment

- Regional Integration in East and Southern Africa
  - Since its inception in 1980 (as **SADCC**): policies and strategies for **Regional Integration** in support of economic growth and development.
  - East African Community (**EAC**) boasts one of the **largest single-bloc regional markets in Africa**.
- East and Southern Africa is **attractive to foreign investment**
- Implementing the Hague Principles would result in:
  - Provisions on choice of law that are in conformity with international legal standards
  - Possibility of adjusting the norms to the specific context of East and/or Southern Africa

# Benefits in Cross-border Trade and Investment

*(cont'd)*

## The Choice of Court Convention and the Hague Principles promote:

### Parties' interests in cross-border trade and investment, by

- Strengthening party autonomy
- Promoting legal certainty
- Improving access to justice

### Business interests, by

- Providing a reliable and effective cross-border dispute-resolution mechanism
- Enhancing effectiveness of the transaction
- Increasing legal certainty and predictability

### International trade and investment, by

- Reducing heterogeneity in commercial law
- Reducing transactional, litigation and recognition and enforcement risks:
  - Predictability as to the applicable law
  - Predictability as to the forum
  - Prevention of conflicting judgments
  - Recognition and enforcement abroad

### Better transactional planning

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