

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

August 7-8, 2006

RECOMMENDATION

RESOLVED, That the American Bar Association urges the United States government promptly to sign, ratify and implement the Hague Convention on Choice of Court Agreements.

REPORT

I. INTRODUCTION

On June 30, 2005, the Hague Conference on Private International Law concluded the Convention on Choice of Court Agreements in a formal signing in the Peace Palace, after almost thirteen years of negotiations on jurisdiction and judgments. The U.S., not a party to any bilateral or multilateral convention on the enforcement of foreign judgments, sought to find a means for private parties to enforce foreign judgments outside of the U.S. without relitigation and to “level the playing field” for litigants in the U.S. U.S. litigants trying to enforce U.S. judgments abroad have a more difficult time than those seeking to enforce foreign judgments in the U.S. The Convention from a U.S. perspective is focused directly on the exporting of U.S. judgments, making them more enforceable crossborder. The Convention would enforce forum selection clauses and resulting judgments, much as the New York Convention does with arbitration clauses and subsequent arbitral awards. The Convention has the potential to offer increased certainty for consensual commercial transactions.

From the U.S. perspective, the need for the Convention is clear. In a survey of practitioners conducted by the ABA Section of International Law in October-November 2003¹, over 98% of those responding indicated that a convention on choice of court agreements would be useful for their practice. Over 70% indicated that a convention would make them “more willing to designate litigation instead of arbitration” in their contracts. In addition, a significant number of lawyers and businesses have indicated to the State Department the need in transnational transactions for enforceable choice of court agreements and the judgments resulting from these.

II. The Structure of the Convention

The Convention is broken into four chapters: (1) scope, exclusions, definitions; (2) jurisdiction; (3) recognition and enforcement; and (4) general/relationship with other instruments. The Convention applies to exclusive choice of court agreements in civil or commercial matters not excluded from scope under Articles 2 or 21.

The text is built around three basic rules:

1) the court chosen by the parties in an exclusive choice of court agreement has

¹ The survey is a product of the ABA Working Group on the Hague Convention on Choice of Court Agreements, which was co-chaired by Louise Ellen Teitz and Janis H. Brennan, a partner at Foley, Hoag LLP in Washington, D.C. Douglas Earl McLaren at Bechtel SAIC Company LLC also helped to develop the survey. Help was also provided by the D.C. Bar Association and the Association of the Bar of the City of New York.

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jurisdiction (Art. 5);

2) if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case (Art. 6); and

3) a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement shall be recognized and enforced in the courts of other Contracting States (Art. 8/Art 9).

Article 5 provides that the chosen court shall decide a dispute, thus denying the forum the right to dismiss for forum non conveniens, “unless the agreement is null and void” under its “law,” including its choice of law rules. Article 6 then defines the obligations of the nonchosen forum, similar to a lis pendens but with exceptions: primarily if the agreement is null and void under the law of the chosen court; if capacity is lacking; or if the agreement would lead to “manifest injustice” or be “manifestly contrary to the public policy” of the seised court. Finally, Article 8 provides for recognition and enforcement of a judgment given by the chosen court, with Article 9 providing exceptions similar to Article 6 and a choice of law rule as well. Recognition and enforcement of a judgment that results from an exclusive choice of court clause designating a member state may be refused generally only if the agreement is null and void according to the chosen court’s whole law, the party lacked capacity under the law of the requested state, the defendant didn’t have sufficient notice, the judgment was obtained by fraud, or the recognition would be “manifestly incompatible” with public policy. The full text of the Convention is available on The Hague Conference’s website at www.hcch.nl.

The Convention also includes an optional reciprocal declaration for countries wishing to recognize and enforce judgments (not agreements) resulting from non-exclusive choice of court agreements (Art. 22), thereby providing broader enforcement of judgments rendered by a forum so empowered by a nonexclusive choice of court agreement. In addition, States may declare that they will not apply the Convention to specific matters (such as asbestos for Canada), which will result not only in non-enforcement of a judgment in the declaring State, but also non-enforcement of choice of court agreements that designate the courts of the declaring State (Art. 21).

The Convention language for non-enforcement of exclusive choice of court agreements is consistent with the current U.S. standard under the The Bremen case. The Convention does, however, change existing law in several ways. First, the Convention creates a presumption of exclusivity of a choice of court agreement if not otherwise stated (Art. 3(b)). The Convention also provides for severability of the choice of court clause (Art 3(d)). The Convention has a very limited requirement for form (Art 3(c)), but leaves substantive validity to national law. The Convention also removes the possibility of forum non conveniens dismissals in favor of another State, but specifically does not affect rules of internal allocation (e.g., transfer between judicial districts)(Art.5(2), 5(3), and 8(5)). Another change in existing law is to codify the ability of a court to sever an unenforceable part of a judgment from the enforceable part, contained in Article 15. This should be contrasted with the New York Convention approach to arbitration awards,

which has no similar provision. It is worth emphasizing again that this is a business to business convention, and does not apply to consumer transactions.

Recognition and enforcement of a judgment that results from an exclusive choice of court clause designating a member state may be refused generally only if the agreement is null and void according to the chosen court's whole law, the party lacked capacity, under the law of the requested state, the defendant lacked sufficient notice, the judgment was obtained by fraud, or the recognition would be "manifestly incompatible" with public policy. Thus, there is the opportunity for review of the validity of the exclusive forum selection clause three times: by the chosen court when it takes jurisdiction; by the non-chosen court when it must suspend or dismiss proceedings contrary to the exclusive forum selection agreement; and by the enforcing court at the time of recognition and enforcement of the judgment. The determination of validity is to be made under the law of the court chosen, but the nonchosen court and the enforcing court still have the possibility in rare cases to apply their public policy.

Article 21's systems of exclusions of narrow specific matters was necessitated largely by two problems: (1) the inability of some countries to include in "public policy" certain specific matters;² and (2) the applicability of the chosen court's law for purposes of determinations of "null and void" in Articles 6 and 9. Article 21 usefully allows a more predictable and transparent use of public policy³ as well as a disciplining effect of the reciprocal nature of the declarations.

The Convention has the potential to offer increased certainty and subsequent enforceability for commercial transactions. Factors supporting United States interest in a multilateral judgments convention include reciprocity of enforcement of American court judgments in signatory countries; at present, American courts have a policy of enforcement based on comity principles (whether by statute or common law) without exclusive regard to reciprocity, and the need to address the problem in a growing global economy. The Convention also validates party autonomy. In other words, it is not merely a dispute resolution mechanism, but has transactional implications and supports parties' right to freedom of contract. It should also be emphasized that the Convention is, in essence, about enforcing United States judgments abroad, and therefore serves to level the playing field for American litigation.

III. U.S. IMPLEMENTATION

The Hague Convention requires implementing legislation. Currently, the enforcement of foreign judgments in the U.S. is largely a matter of state law. It would complement and, to the

² For example, Canada insisted that it could not use public policy as a defense to avoid enforcing judgments dealing with asbestos.

³ *But see* Choice of Court Convention art. 32 (articulating the timing for declarations).

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extent applicable, take precedence over the Uniform Enforcement of Foreign Country Money Judgments Act that have been adopted in over thirty states and which only applies to money judgments. Implementing legislation would need to consider issues of jurisdiction (federal or concurrent) and several other details.

It is recommended that the United States opt in to Article 22, which allows for recognition of judgments based on non-exclusive choice of court agreements. This provides broader recognition and enforcement when parties have actually litigated in a place that they selected.

IV. COORDINATION

The ABA Section of Litigation, through its International Litigation Committee, as well as the ABA Section on Business Law are apprised of The Hague Convention. We are aware of no opposition to The Hague Convention in these groups or elsewhere in the ABA.

V. CONCLUSION

The Choice of Court Convention addresses a specific perceived need for facilitating global transactions and providing certainty for US parties and litigants. It can be understood as a contract drafting tool and should be part of cross-border planning starting today. The Convention is also a means of dispute resolution, providing a viable alternative to arbitration.

Given the ABA's support for private international law initiatives, it is appropriate for the ABA to give its strong support to the implementation of The Hague Convention.

Respectfully submitted,

Michael H. Byowitz
August 2006

GENERAL INFORMATION FORM

Submitting Entities: Section of International Law

Submitted By: Michael H. Byowitz

1. Summary of Recommendation.

The Recommendation supports the prompt signature, ratification, and implementation of the Hague Convention on Choice of Court Agreements by the United States.

2. Approval of Submitting Entities.

The Council of the Section of International Law approved the recommendation at its Spring 2006 meeting.

3. Has this or a similar recommendation been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

None.

5. What urgency exists which requires action at this meeting of the House?

On June 30, 2005, the Hague Conference on Private International Law concluded the Convention on Choice of Court Agreements. The Convention requires implementing legislation. While the U.S. has not yet signed on to the Convention, in a survey conducted by the Section, over 98% of those responding indicated that a convention on choice of court agreements would be useful for their practice.

6. Status of legislation.

Not applicable.

7. Cost to the Association.

None.

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8. Disclosure of interest (if applicable)

Not applicable.

9. Referrals.

Simultaneous with this submission, referral is being made to all other ABA Sections and Divisions.

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