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The Hague Conference

By Peter D. Trooboff

FOR THE PAST eight years, the U.S. State Department, in cooperation with the practicing bar, industry and scholars, has been negotiating a proposed worldwide convention on international jurisdiction and the recognition and enforcement of foreign judgments. This treaty would provide significant benefits to U.S. litigants, including greater predictability concerning when foreign parties may be sued in the United States and when U.S. parties may be sued in other countries. Further, the treaty would clarify when U.S. judgments may be enforced elsewhere and streamline the procedures for such enforcement.

The State Department has consulted widely to formulate the U.S. government's position. Jeffrey Kovar, assistant legal adviser for private international law, has scheduled many public consultations and organized a U.S. delegation broadly representative of concerned U.S. interests. The American Law Institute has begun to study how the United States would implement such a convention.

Nonetheless, discussion of this important project has not yet reached the wider audience of what might be termed "middle-class litigants" who would particularly benefit from the proposed convention. These include U.S. litigants—individuals and businesses—that may have cross-border claims of $50,000 to $5 million, sums that, in the absence of such a treaty, do not justify the extensive legal research required to determine prospects for obtaining jurisdiction and enforcing a judgment abroad.

Beginning on June 6, the more than 50 member states of the Hague Conference on Private International Law began two weeks of negotiation in The Hague, the first phase of a diplomatic conference to complete the proposed convention. This negotiation is based on a draft completed in October 1999 and a detailed explanatory report. See www.hcch.net.

Convention could help U.S. entities sue foreign ones

What is the typical situation for which such a convention would be so useful? Suppose that an American company purchases from a European manufacturer foreign-made components that are delivered f.o.b. to a European port. The American company uses a purchase order to place its orders, the foreign manufacturer responds with a pro forma invoice and then the American company raises a letter of credit to pay for the goods. Alas, the documents contain no arbitration or choice-of-forum clause. The foreign-made components arrive, but the American company finds that they are defective or cause injury.

In this situation, assume that the foreign manufacturer has no branch and few assets in the United States, but officers of the foreign manufacturer regularly visit the United States to negotiate terms or to promote sales. In this rather common situation, U.S. practitioners readily recognize that personal jurisdiction over the foreign manufacturer will rely on the relevant state long-arm statute. Many are surprised, however, to learn that the United States is not a party to any treaty governing whether a resulting U.S. judgment can be enforced against the foreign manufacturer through proceedings in foreign courts in jurisdictions where the manufacturer's assets can be found. If the contract for purchase of the components had an arbitration clause, then any resulting award would most probably be enforceable, given the 123 countries that have ratified the 1958 New York Convention.

But having found no treaty, practitioners next discover that their problems are only beginning. First, they soon realize that despite the holding in *Hilton v. Guyot*, 159 U.S. 113 (1895), that reciprocity was required for the enforcement of a foreign judgment, U.S. courts have generally not imposed reciprocity. Thus foreign judgments in favor of foreign competitors receive U.S. recognition even though U.S. judgments often enjoy no similar benefit when American litigants seek to enforce them abroad.

Second, when U.S. litigants seek recognition and enforcement of their judgments in the courts of foreign countries, the obstacles are complex and often prevent collection. For example, some nations will enforce only the judgments of those countries with which they have treaties. Some require reciprocity but have difficulty with determining if it exists in those U.S. states having no statute on this subject—approximately half the states.

More critically, all foreign courts re-examine the base of jurisdiction on which the U.S. court acted. Our long-arm statutes and due process cases focus on the activities

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of the defendant in the jurisdiction and on the relationship of the court and the defendant resulting from those activities. In contrast, the jurisdictional rules of civil law countries are more formalistic and focus on the relationship between the court and the claim. The civil law rules require some semi-permanent physical presence (such as a branch or office) and allow only those claims arising from that presence. Further, civil law courts have difficulty understanding our case law and view as vague such U.S. jurisdictional tests as "purposeful availment" and reasonable expectation of being "haled into court."

In short, an American court would certainly assert constitutional activities-based jurisdiction in the previous example for claims in contract or tort arising from the sales and marketing described. Yet the resulting judgment may well not be enforceable in many other countries. These difficulties explain why the United States proposed in 1992 that the Hague Conference undertake the negotiation of the convention now being considered.

The conference seems ideally suited to coordinate such an undertaking because of its well-regarded expertise in the private international law field and its broad membership from Asia and Latin America as well as Europe, including all 15 European Union members. This is important because the E.U. member states and several other European states are parties to the 1968 Brussels and 1988 Lugano Conventions that establish a highly successful regime in Europe for jurisdiction and recognition and enforcement of judgments.

The proposed task of negotiating a worldwide convention might at first glance not appear too formidable. To achieve for foreign judgments an enforcement regime comparable to that enjoyed by arbitral awards under the New York Convention, a treaty need only ensure that choice-of-forum clauses will be respected and that the text include clear, practical rules on how to recognize and enforce foreign judgments without unreasonable challenges. Such a limited convention would probably also provide for suits against corporate defendants at appropriate locations (e.g., place of incorporation or central administration) and against an individual at his or her principal or habitual residence.

Of course, other members of the Hague Conference have little need for such a convention given *Hilton* and its progeny, which permit ready enforcement of foreign judgments in U.S. courts. The principal objective of their industries and governments in the Hague negotiations has been to clarify and, if possible, narrow U.S. jurisdictional rules. In particular, they wish to prohibit U.S. courts from asserting jurisdiction over non-U.S. defendant companies and residents when such entities are constitutionally subject to general jurisdiction in a U.S. state because they are engaged in "systematic and continuous" activity in that state. These countries take this position even if the foreign defendant has assets subject to execution in the United States and even if the proposed treaty did not obligate treaty parties to enforce the resulting judgment.

If the treaty succeeds, middle-class American litigants could benefit for years to come, assuming U.S. ratification.

After eight years, the Hague Conference delegations have nearly reached agreement on several key aspects of the proposed convention. These include the overall treaty structure for defining jurisdiction—a so-called mixed treaty specifying certain grounds of jurisdiction that would obligate courts in treaty states to hear cases with the resulting judgment being enforceable in other treaty states ("required" or white list); specifying certain grounds that courts would agree not to assert against entities and individuals from treaty states ("prohibited" or black list); and leaving to national law whether to allow other grounds of jurisdiction and whether to enforce judgments based on those grounds ("permitted" or gray list).

The delegations have also completed most of the provisions dealing with recognition and enforcement, including the difficult damages issue. They have worked out a carefully balanced approach to a possible reduction of judgments for noncompensatory damages when the enforcing state does not allow them. For compensatory damages, reduced enforcement might occur in those exceptional cases when the amounts awarded are "grossly excessive" after taking into account all relevant circumstances, including those in the state where the judgment was awarded.

Conflicts with civil law countries not easy to resolve

Many tough issues still remain. The civil law countries object to the broad terms that the U.S. delegation insists on as necessary in defining the white list activities-based jurisdiction for contracts, torts and other claims when the cause of action relates to such activities.

In addition, the Internet and e-commerce create challenging problems for defining jurisdictional rules. Consumer groups, human rights advocates, trademark, patent and copyright holders and multinational employers have raised issues about and even objected to the anticipated effect of specific proposed provisions. Finally, the United States must find a way to ensure that it enters into treaty relations only with those countries having truly independent judiciaries.

If the Hague Conference succeeds, middle-class American litigants could benefit for years to come, assuming United States ratification. If it fails, the involved governments will require another generation or more to resume discussion. In that event, the United States should consider resolving some of the issues through federal legislation and bilateral or regional treaties.