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Choice-of-Court Clauses

AMERICAN practitioners and their clients have an important stake in current negotiations at the Hague Conference on Private International Law that may soon result in a new treaty on the recognition and enforcement of judgments of courts arising from choice-of-court agreements in business-to-business contracts. The proposed Hague Convention on Exclusive Choice of Court Agreements has recently become available on the conference's Web site. See "Work in Progress," Jurisdiction and Foreign Judgments, Working Document 49 (results of December 2003 special commission) at www.hcch.net.

Like the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, the proposed treaty will require U.S. implementing legislation. Jeffrey Kovar (kovarjd@state.gov), the State Department's assistant legal adviser for private international law, will benefit from receiving comments on the draft from a broad range of U.S. interests potentially affected by its terms.

After a decade, the more than 60 members of the Hague Conference failed to achieve consensus on a more ambitious effort to negotiate a global convention on international jurisdiction and the recognition and enforcement of judgments. So they have focused on those aspects of the work that presented the greatest prospect for agreement—judgments resulting from choice-of-

By Peter D. Trooboff



court agreements among businesses.

Selecting a forum for dispute settlement is often the last issue addressed in lengthy negotiations of a contract for investment or a sales transaction. In the early 1960s, the issue became somewhat simpler when the United States ratified the 1958 New York Convention. If parties to a prospective international contract can agree on arbitration to resolve any future disputes, then the open issues relate generally to the selection of the arbitral rules, the language, the arbitral seat and, if possible, the applicable law.

Americans face issues with choice-of-court clauses

What happens if the parties do not agree to arbitration but rather wish to resolve any disputes in the courts of a particular country? This choice may occur because of the relationship of the parties or transaction to that jurisdiction or because of the expertise of its courts in disputes relating to international investment or sales. In that instance, Americans are disadvantaged because the United States is not a party to any treaty governing whether a judgment, rendered by U.S. courts, will be enforced by the courts of other nations. Further, while many countries enforce U.S. judgments under existing law or

practice, especially when based on choice-of-court agreements, the State Department has warned that, in some, U.S. litigants may face a host of legal and technical obstacles to enforcing U.S. judgments.

Working from ideas presented through a series of informal meetings, a special commission of the Hague Conference met in December 2003 and prepared the first draft of the new proposed Hague Convention that would enforce judgments based on an exclusive choice-of-court provision. Member states of the Hague Conference will consult with their bar, judiciary, business community and scholars. The likely next step will be another special commission to refine the draft, probably early in 2004, or a diplomatic conference later in 2004 or early in 2005.

From the practitioner's perspective, the proposed convention would promote greater legal certainty and reduce the costs of enforcing judgments. In brief, the convention would apply to judgments resulting from an exclusive choice-of-court agreement in civil or commercial matters. It would not apply to consumer contracts or to individual or collective employment contracts. Art. 1(2)(a). Thus, clauses entered into by small and medium businesses and libraries would be included.

The proposed convention would avoid interference with arbitration by precluding its application to arbitral proceedings and by denying enforcement to a judgment if the issuing court acted contrary to an arbitral agreement among the parties. Art. 1(5). The draft would also be inapplicable to a long list of proceedings that are governed by more specific legal regimes including family law, wills and succession, antitrust matters and rights in rem in immovable

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property. Art. 1(3).

U.S. practitioners will need to pay particular attention to the proposed convention's definition of "exclusive" choice-of-court clauses. Under accepted U.S. common law principles, U.S. courts have generally held that a choice-of-court provision is nonexclusive unless the parties indicate otherwise. In most of the rest of the world, choice-of-court provisions are regarded as exclusive unless the parties clearly express a contrary intention. Under the convention, a choice-of-court agreement would be "deemed to be exclusive unless the parties have expressly provided otherwise." Art. 2(2).

The Hague special commission discussed at length whether nonexclusive clauses might also be included within the proposed convention. For a variety of reasons, such a broadening now seems unlikely.

The proposed convention grants jurisdiction to the designated court and denies use of the forum non conveniens doctrine to decline exercising jurisdiction. Arts. 4(1), (2). Courts of other parties to the convention would be obligated to suspend or dismiss proceedings if the parties agreed to settle their disputes in a designated court. Art. 5. The courts of parties to the convention would continue to have their subject-matter jurisdiction venue rules determined by national law. Art. 4(3).

It remains to be decided whether, if the parties have chosen a particular state court, the U.S. implementing legislation could permit removal (e.g., to a federal court) or transfer to another state court under state venue rules. While the draft includes a proposed exclusion for purely domestic cases, it is uncertain how the conference will frame this provision and what will be the relevant time for the applicable test. Arts. 4(4), 5(f) and n.3.

The proposed convention requires enforcement of judgments based on exclusive choice-of-court agreements and specifies applicable procedures for litigants to follow, including what documents are to be produced. Ch. III, arts. 7-12. The key to the effectiveness of the proposed convention is the prohibition of any review of the merits of the judgment by the courts of another party to the convention. Art. 7(2). Factual findings of the issuing court would be binding except for default judgments.

Enforcing courts would be obligated to

recognize and enforce noncompensatory damages only to the extent that the court "could have awarded similar or comparable damages." Art. 10(1). In making this assessment, enforcing courts are to take into account whether the damages awarded by the issuing court cover costs and expenses relating to the proceedings. Art. 10(3). The special commission included a further limitation on enforcement that would permit an enforcing court to disallow enforcement

The proposed Hague Convention would enforce judgments in commercial matters based on an exclusive choice-of-court provision.

of "grossly excessive damages." Art. 10(2). Many will question the need for this "grossly excessive" provision when the parties have expressly selected the court where their dispute will be decided and its standards on awarding damages are fully known to the parties.

Refusing enforcement for invalidity

The Hague Conference faces a difficult issue in determining when a choice-of-court agreement will not be enforced on the ground of substantive invalidity and a resulting judgment will be denied enforcement on a similar ground. Under the New York Convention, the applicable test for agreements is "null and void, inoperative or incapable of being performed." The U.S. Supreme Court has broadly supported the enforceability of choice-of-court clauses unless giving them effect would be "unreasonable and unjust" or they are invalid for reasons such as "fraud or overreaching." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). The draft convention applies the "null and void"

test to agreements and also permits a court in the state not selected to hear the case if "giving effect to the agreement would lead to a very serious injustice" or be "manifestly contrary to fundamental principles of public policy." Arts. 4(1), 5(c).

As for judgments, the draft adds a number of additional grounds for non-enforcement, including lack of capacity, failure to provide the defendant with sufficient notice of the original proceedings and judgments secured by extrinsic fraud. Art. 7(1)(a)-(d). In addition, an enforcing court could deny enforcement to judgments "manifestly incompatible" with that court's public policy, including those that are clearly unjust because they result from procedural unfairness in the original proceedings. Art. 7(1)(e) and n.6 (precise terminology still under discussion). These provisions are designed to maintain internationally the delicate balance of respect for agreements and commercial stability with protection for weaker parties that the Supreme Court articulated domestically in *The Bremen*.

Other important issues remain to be resolved before work on the proposed Hague Convention is completed. The scope of coverage of agreements relating to intellectual property rights and the impact of the provisions on e-commerce and Internet services present a number of difficult questions. See Art. 1(3)(k), (l) and (4), Art. 7 n.4. Also significant is how the convention will address a request to a court for grant of interim measures of protection pending an enforcement action by that or another court. Art. 6.

In addition to commenting on the special commission draft, U.S. practitioners need to be thinking about how any choice-of-court clauses that they draft now might be varied to take account of the terms of an eventual Hague Convention (e.g., specifying expressly when exclusivity is not desired). Some choice-of-court agreements entered into at present may at a future date fall within the scope of the proposed convention. **NLJ**

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