A GLOBAL CONVENTION ON CHOICE OF COURT AGREEMENTS

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I. INTRODUCTION

A Special Commission of the Hague Conference on Private International Law will meet during the first nine days of December 2003 to consider a Draft Text on Choice of Court Agreements. That text was prepared by an informal working group in March of 2003, and is the fruit of nearly a decade of negotiations.[1] Those negotiations originally sought a rather comprehensive convention on jurisdiction and the recognition and enforcement of judgments, with a preliminary draft convention being prepared in October 1999, and further revised at the first part of a Diplomatic Conference in June 2001. When it became clear that some countries, particularly the United States, could not agree to the convention being considered, negotiations were redirected at a convention focused on bases of jurisdiction upon which consensus could be achieved. The result is now a text limited to one basis of jurisdiction; that is the consent of the parties.

While the current Draft Text is more limited in its scope and effect than drafts previously considered, it offers the possibility of both realistic success

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1. Hague Conference on Private International Law, Report on the work of the informal working group on the judgments project, in particular on the preliminary text achieved at its third meeting - 25-28 March 2003 (June 2003), *available at* ftp://ftp.hcch.net/doc/jdgm_pd22e.doc. (last visited Jan. 17, 2004) [hereinafter Hague Conference].

in its conclusion and adoption, and a foundation from which to consider possible future work on multilateral harmonization of jurisdiction and the enforcement of judgments. I will briefly review the substance of the Draft Text in order to explain its purpose, recognize its limits, and acknowledge issues yet to be decided. This review supports the conclusion that the Draft Text presents a workable foundation for a very useful convention.

II. THE DRAFT TEXT RULES

The Draft Text is perhaps most easily understood if one thinks of it as the litigation counterpart to the New York Arbitration Convention.[2] Like the New York Convention, this treaty would establish rules for enforcing private party agreements regarding the forum for resolution of any resulting disputes, and rules for recognizing and enforcing the decisions issued by the chosen forum. Thus, a Hague Choice of Court Convention would serve the business world by providing for choice of court agreements, a measure of predictability similar to that now provided for arbitration agreements under the New York Arbitration Convention. Exclusive choice of court agreements in business-to-business contracts would be honored by courts in contracting states, and the resulting judgments would be enforced.

Article 1(1) begins the process of defining the scope of the convention by providing that it "shall apply to agreements on the choice of court concluded in civil or commercial matters." This sets the basic focus of the convention on one basis of jurisdiction: choice of the court by the parties involved. Article 1(2) takes a carve-out approach to the scope issue by listing *types of contracts* to which the convention does not apply. Article 1(3) is similar in approach, listing exclusions from Convention coverage in terms of *subject matter of the dispute*. Of these exclusions, the most important is that found in Article 1(2)(a), which limits the Convention to business-to-business choice of court agreements by excluding coverage of consumer contracts.[3] This is done by adopting language very close to that found in Article 2(a) of the U.N. Sales Convention,[4] stating that the Convention shall not apply to agreements in which at least one party is a consumer ("acting primarily for personal, family or household purposes").

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2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

3. Hague Conference, *supra* note 1, at 1(2)(b) (explaining that the other type-of-contract exclusion from scope is found in art. 1(2)(b), which excludes "individual or collective contracts of employment.").

4. U.S. Ratification of 1980 United Nations Convention on Contracts for the International Sale of Goods, 52 Fed. Reg. 6264 (Mar. 2, 1987); *see also* Conference on Contracts for the International Sale of Goods, 19 I.L.M. 668 (1980).

The Draft Text deals with both exclusive and non-exclusive choice of court clauses. Article 2(1)(b) creates a presumption that if you list only one court or country, the clause is exclusive. This is important to enforcement of the agreement, because only exclusive choice of court clauses are entitled to Convention enforcement under Articles 4 and 5. This changes in the Article 7 rules, however, where judgments emanating from courts taking jurisdiction on the basis of any valid choice of court agreement (exclusive or non-exclusive) are entitled to recognition and enforcement under the Convention.

The Draft Text creates three basic rules upon which the operation of the Convention turns. They are:

> 1) The court chosen by the parties in an exclusive choice of court agreement has jurisdiction;
> 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; and
> 3) A judgment resulting from jurisdiction exercised in accordance with a choice of court agreement (exclusive or non-exclusive) shall be recognized and enforced in the courts of other Contracting States.

Article 4(1) sets out the basic rule that the court chosen by the parties in an exclusive choice of court clause "shall have jurisdiction:"

> If the parties have agreed in an exclusive choice of court agreement that a court or the courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or the courts of that Contracting State shall have jurisdiction, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

This rule applies only to international business-to-business contracts containing choice of court agreements. Thus, Article 4(2) provides that the rule does not apply "if all the parties are habitually resident" in the Contracting State in which a case is brought, and they have "agreed that a court or courts of that same Contracting State shall have jurisdiction to determine the dispute."

There is no explicit rule providing whether or not a court which is chosen in an exclusive choice of court agreement may decline to hear the case based on discretionary grounds such as *forum non conveniens*. The Secretariat's Report states that one of the Convention's "three aims" is that "the chosen court has to hear the case."[5] This, however, is inconsistent with the explicit language

5. Hague Conference, *supra* note 1, at 6.

of Article 5 that allows a court not chosen in such an agreement to hear the case if "the chosen court" has "declined jurisdiction."[6] Thus, the explicit language of Article 5(c) would suggest that such discretionary doctrines are not affected by the Draft Text.[7]

Article 4(3) does make clear that Convention rules govern only *in personam* jurisdiction, and that private parties cannot create subject matter jurisdiction that does not otherwise exist in a national legal system. Thus, for example, parties cannot agree to submit a dispute to a specialized court when only the local courts of general jurisdiction have subject matter jurisdiction over the type of dispute in question within the chosen legal system.

While Article 4 serves to tell the chosen court how to respond to an exclusive choice of court agreement, Article 5 provides the rule applicable in courts that are not chosen. Thus, a court in a Contracting State that is not selected in an exclusive choice of court agreement "shall decline jurisdiction or suspend proceedings." The only exceptions to this rule occur when:

> (a) that court finds that the agreement is null and void, inoperative or incapable of being performed;
> (b) the parties are habitually resident in that Contracting State and all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with that Contracting State; or
> (c) the court chosen has declined jurisdiction.[8]

The Draft Text includes no general public policy exception to enforcement of a choice of court agreement. This is consistent with the structure of the New York Arbitration Convention, which provides no public policy exception in its Article II obligation of Contracting States to recognize arbitration agreements, but does have an Article V public policy exception to the Article III obligation to recognize and enforce the resulting arbitral awards.[9]

The second exception to deference by a derogated court to the chosen court is the counterpart to the Article 4(2) domestic case rule for chosen courts. Thus, Article 5(b) allows a court not chosen to determine that the case is a local matter within the Contracting State in which that court sits, and thereby refuse

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6. *Id.* at 18.

7. One might argue that the chosen court's Article 4(1) authority to determine that "the agreement is null and void, inoperative or incapable of being performed," or the domestic case exception under Article 4(2), constitute explicit Convention rules by which the chosen court could "decline jurisdiction." This runs counter to the explicit language of the text, however, since these are exceptions to jurisdiction under the Convention and not authority to decline jurisdiction that otherwise exists.

8. Hague Conference, *supra* note 1, at 18.

9. *See* New York Convention, *supra* note 2, at 2519 – 20.

to respect the choice of the parties in the choice of court agreement. This can occur, however, *only* if "all other elements relevant to the dispute and the relationship of the parties, other than the choice of court agreement, are connected with that Contracting State."

Article 7 provides the basic rule on recognition and enforcement of a judgment issued by a court of a Contracting State, and for which jurisdiction was founded on a choice of court agreement. Such a judgment "shall be" recognized and enforced. Unlike the language of Articles 4 and 5, the terms of Article 7 do not limit the recognition and enforcement obligation to judgments resulting from exclusive choice of court agreements, but authorize recognition and enforcement under the Convention of judgments resulting from all choice of court agreements. The definitional provisions of Article 2(1) operate to mean that Contracting States are obligated to enforce judgments resulting from both exclusive and non-exclusive choice of court agreements. This result is intentional. Rules obligating courts to respect non-exclusive choice of court agreements would have been much more complex and difficult at the Article 4 and 5 stage.

While the scope of the general recognition and enforcement rule is broader than the general jurisdictional rule, it is also subject to more exceptions. Here, there arises, again, a basic issue of definition and structure. Article 7(1) provides an exhaustive list[10] of grounds for refusing recognition and enforcement if the judgment is based on an exclusive choice of court agreement. Article 7(2) then provides additional grounds for refusal if the judgment is based on "a choice of court agreement other than an exclusive choice of court agreement." This reflects the fact that the general rule on recognition and enforcement found in Article 7(1) applies beyond the types of cases emanating from Article 4 jurisdiction under the Convention.

The list in Article 7(1) includes grounds for non-recognition that should seem familiar to anyone accustomed to the Brussels Convention and Regulation, the New York Arbitration Convention, or the U.S. Uniform Foreign Money-Judgments Recognition Act. A court in a Contracting State may refuse recognition or enforcement if:

> (a) the court addressed finds that the choice of court agreement was null and void;
> (b) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not

10. Hague Conference, *supra* note 1, at 20 (explaining that recognition or enforcement may be refused "*only*" if one of the listed grounds is satisfied. Note, however, that courts "*may*" refuse recognition and enforcement under this provision, meaning that non-recognition is not mandatory if one of the listed grounds is satisfied).

> notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defense;
> (c) the judgment was obtained by fraud in connection with a matter of procedure;
> [(d) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed;] or
> (e) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.[11]

The Article 7(2) grounds for non-recognition represent an acknowledgment that non-exclusive choice of court agreements may produce parallel proceedings resulting in inconsistent judgments. Thus, non-recognition may be allowed where contrary obligations exist as a result of parallel proceedings.

While the provisions of paragraphs (1) and (2) of Article 7 allow non-recognition, they do so only in limited circumstances. Paragraph (3) follows by strengthening the effect of the original judgment, providing that the court asked to recognize and enforce a judgment cannot review the merits of the decision in the originating court.

The Draft Text changes the result in earlier drafts on the issue of validity of a choice of court agreement. There was the belief within the Working Group that incorporation of a choice of law rule in the text would tip the balance on things like shrink-wrap contracts. Thus, there is no provision allowing a contract to be held void, for example, if its terms are "manifestly unjust," and there is no choice of law rule. What we have is the rule that a choice of court clause shall be enforced unless the clause is null and void. This approach was taken from Article II(2) of the New York convention, and a court will apply its own rules on validity. This rule is found in 3 places: Article 4 (for the court chosen), Article 5 (for courts not chosen), and Article 7 (for the recognizing court). In each instance, the court has to decide the validity of the agreement under the law it deems to be applicable. Thus, while "formal" validity of a clause is governed by Article 3, substantive validity is left to the court seized in each of the three possible situations.

III. CONCLUSION

With over 130 Contracting States, the New York Convention has had a significant impact on dispute resolution practice in international transactions. The existence of a system that supports the enforcement of both agreements to arbitrate and the resulting arbitral awards adds predictability and efficiency that cause business parties often to favor arbitration over litigation. The availability of a convention that would do for litigation what the New York Convention has

11. *Id.*

done for arbitration would serve to place litigation and arbitration on a more equal footing in global commerce, thus allowing parties to transnational transactions the opportunity to select the form of dispute resolution based on its individual merits.

The March 2003 Draft Text on Choice of Court Agreements offers a framework for the negotiation of a workable Hague Convention. Such a convention would both present a valuable opportunity to place litigation on a more equal status with arbitration for international private dispute resolution, and serve as a foundation for discussion and development of further progress in the realm of cross-border jurisdictional practice in national courts. Thus, it seems that the Draft Text can bring the focus of jurisdiction and judgments work at the Hague Conference into the realm of the possible, building on the consensus that does exist for a convention dealing with jurisdiction and the recognition and enforcement of judgments. It offers a valuable opportunity that brings with it few, if any, disadvantages.