NEW YORK
CITY BAR

COMMITTEE ON
INTERNATIONAL COMMERCIAL DISPUTES

LAWRENCE WALKER NEWMAN
CHAIR
1114 AVENUE OF THE AMERICAS
NEW YORK, NY 10036
Phone: (212) 891-3970
Fax: (212) 310-1670
lawrence.w.newman@bakernet.com

DAVID ZASLOWSKY
SECRETARY
1114 Avenue of the Americas
New York, NY 10036
Phone: (212) 891-3518
Fax: (212) 310-1560
david.zaslowsky@bakernet.com

September 8, 2006

Hon. John Bellinger III
Legal Adviser to the Secretary of State
Department of State
2201 C Street N.W.
Washington, D.C. 20520

Dear Sir,

I am pleased to send herewith a report of the International Commercial Dispute Committee of the New York City Bar Association commenting on the proposed Hague Convention on Choice of Court Agreements. This report is the product of work done by a sub-committee consisting of Sheldon H. Elsen (Chairman), Professor Linda J. Silberman, Professor Louise Ellen Teitz, Judge John G. Koetl and Robert H. Smit (the principal drafter).

The sub-committee has, in the preparation of the report, worked with Assistant Legal Adviser David Stewart.

Yours sincerely,

Lawrence W. Newman

Lawrence W. Newman

Enclosure: Report of the Committee on International Commercial Disputes of the New York City Bar on the Hague Convention On Choice Of Court Agreements

CC: David Stewart, Assistant Legal Adviser
Sheldon Elsen
Robert H. Smit.

REPORT OF THE COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES OF THE NEW YORK CITY BAR ON THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

INTRODUCTION

At its Twentieth Session on June 30, 2005, the Hague Conference on Private International Law approved a new Convention on Choice of Court Agreements (the "Convention"), completing a decade-long process of work and negotiations among member countries. The United States is now to decide whether to ratify the Convention. The Committee on International Commercial Disputes of the Association of the Bar of the City of New York (the "Committee") has examined the proposed Convention with a view to assessing its potential influence on the interests of litigants in U.S. courts and U.S. businesses engaged in international trade. The following sets forth the Committee's views with respect to the proposed Convention from that perspective.

The Convention may affect the enforcement of choice-of-court agreements in at least six different ways relevant to the interests of U.S. litigants and U.S. businesses engaged in international trade:

(i) a U.S. court's duty to exercise jurisdiction where a U.S. court is chosen;

(ii) a U.S. court's duty to decline jurisdiction where a foreign court is chosen;

(iii) a U.S. court's duty to recognize and enforce a foreign judgment;

(iv) a foreign court's duty to exercise jurisdiction where the foreign court is chosen;

(v) a foreign court's duty to decline jurisdiction where a U.S. court is chosen; and

(vi) a foreign court's duty to recognize and enforce a U.S. judgment.

In order to assess the Convention from the U.S. perspective, the Committee has sought to determine how current U.S. and foreign law and practice with respect to the foregoing would be affected by U.S. and foreign ratification of the Convention. The first section of this Report identifies salient respects in which the Committee believes the Convention may change or otherwise impact current U.S. law and practice with respect to choice-of-court agreements – points (i)-(iii) above. The second section assesses the pros and cons of the Convention from the U.S. perspective in light of the likely effect of the Convention on both U.S. (points (i) – (iii)) and foreign (points (iv) – (vi)) law and practice with respect to choice-of-court agreements. Finally, the last section of the Report analyzes certain practical issues with respect to implementation of the Convention, including the Declarations that Contracting States may make under the Convention.

As explained below, the Committee believes that the Convention would serve the interests of litigants in U.S. courts and U.S. businesses engaged in international trade, principally by "levelling the playing field" as between U.S. recognition and enforcement of choice-of-court clauses and resulting judgments, which currently is relatively liberal, and foreign enforcement of such clauses and judgments, which is uncertain at best. Accordingly, the Committee recommends that the United States ratify the Convention, with the appropriate implementing legislation and Declarations discussed below.

I. THE CONVENTION V. CURRENT U.S. LAW ON CHOICE-OF-COURT AGREEMENTS

The Committee has identified the following areas in which the Convention, if ratified by the United States, would change (or at least create uncertainties with respect to) existing U.S. law on choice-of-court agreements.

A. Exclusivity of the Choice-of-Court Agreement

U.S. Law. Choice-of-court agreements may be either exclusive or non-exclusive. If exclusive, they require that any claims be brought in the chosen court, and preclude claims in any other forum. If non-exclusive, they permit claims in the chosen forum but do not preclude litigation elsewhere. Under U.S. federal and state law, whether a choice-of-court clause is deemed exclusive or not is a matter of interpretation determined on a case-by-case basis. However, forum selection clauses, including choice-of-court clauses, are generally presumed to be non-exclusive absent clear and express language making them exclusive.[1] Only in rare cases have U.S. courts construed forum selection clauses to be exclusive absent language clearly so indicating.[2]

Convention. Article 3(b) of the Convention provides that a choice-of-court agreement "shall be deemed to be exclusive unless the parties have expressly provided otherwise." The Convention would therefore reverse the general U.S. presumption with respect to exclusivity. The Convention's presumption of exclusivity is a Convention centerpiece that defines both the scope of application of the Convention — which applies only to *exclusive* choice-of-court agreements unless Contracting States specifically opt to expand the Convention's

---

1 *See, e.g., City of New York v. Pullman Inc.*, 477 F.Supp. 438, 442 n.11 (S.D.N.Y. 1979) ("An agreement conferring jurisdiction in one forum will not be interpreted as excluding jurisdiction elsewhere unless it contains specific language of exclusion, [...] or it leaves it in the control of one party with power to force on its own terms the appropriate forum.") (citing *Keaty v. Freeport Idonesia, Inc.*, 503 F.2d 955 (5th Cir. 1974) and *Monte v. Southern Delaware County Authority*, 321 F.2d 870 (3d Cir. 1963); *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, C.A.9.Cal., 1989; *Paper Exp., Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, C.A.7.Ill.,1992 ("When venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless some further language indicates parties' intent to make venue exclusive.")

2 *See, e.g., General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095 (6th Cir. 1994); *Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, SpA*, 867 F.2d 697 (D.C. Cir. 1989).

reach to non-exclusive agreements pursuant to an Article 22 Declaration[3] — and the nature and effect of the choice-of-court clause.

Committee Comments. The Committee believes that the presumption of exclusivity in the Convention is an appropriate means to maximize both the scope and effect of the Convention. The Committee further believes, however, that U.S. parties and counsel may be caught unaware by this change in the legal presumption, and may inadvertently draft choice-of-court agreements that they believe to be non-exclusive (as they would be under U.S. law), but which are deemed exclusive under the Convention.[4] The Committee therefore believes that it will be important to educate the legal profession and the public not only as to the potential benefits of including choice-of-court clauses in their contracts in light of the Convention, but also as to the reversal of the presumption with respect to exclusivity in order to ensure that parties that want their choice-of-court agreement to be non-exclusive make that intention clear and express in their clause.

B. Separability of the Choice-of-Court Clause

U.S. Law. Under current U.S. case law, a forum selection clause, including an arbitration clause and a choice-of-court clause, contained in a contract is deemed "separable" or "independent" from the underlying contract, such that a challenge to the validity of the underlying contract does not also necessarily call into question the validity of the forum selection clause. The nature and scope of this doctrine of "separability" has been developed principally by U.S. federal case law concerning arbitration clauses, which "as a matter of federal law are 'separable' from the contracts in which they are embedded."[5] An important issue that has arisen in the United States with respect to the separability doctrine is whether the doctrine applies to challenges to the existence or validity *ab initio* of the underlying contract — *i.e.*, whether an arbitration (or other forum selection) clause may be deemed separable from a contract whose very existence is challenged.[6] Most U.S. courts have held that the separability doctrine does not extend to such challenges on the theory that "something can be severed only from something else that exists. How can the Court 'sever' an arbitration clause from a non-existent [contract]?"[7] As a result, the seized court, rather than the arbitral tribunal or the national court designated in the

---

[3] Article 22 Declarations are subject to reciprocity, however, so their effects will likely remain circumscribed.

[4] This risk is mitigated, however, by the fact that the Convention applies only to business-to-business commercial transactions and excludes personal, employment and consumer transactions. The Convention's transitional provisions also limit this risk because Article 16(1) states that the "Convention shall apply to exclusive choice-of-court agreements concluded *after* its entry into force for the State of the chosen court." (emphasis added.)

[5] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967).

[6] *See generally* William K. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitration*, 8 Am. Rev. Int'l Arb. 133 (1997); Robert H. Smit, *Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? or Can Something Indeed Come From Nothing?*, 13 Am. Rev. Int'l Arb. 19 (2002).

[7] *Pollux Marine Agencies, Inc. v. Louis Dreyfus Corp.*, 455 F. Supp. 211, 219 (S.D.N.Y. 1978).

parties' forum selection clause, is deemed competent to adjudicate the challenge both to the forum selection clause and to the underlying contract.

Convention. Article 3(d) of the Convention adopts the basic doctrine of separability with respect to choice-of-court agreements. Article 3(d) states: "an exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid."

Committee Comments. The Committee notes that the Convention does not designate which law governs the separability of the choice-of-court agreement, but rather appears itself to set forth a substantive rule of separability. Nevertheless, should the Convention be ratified by the United States, U.S. courts would likely refer to the U.S. arbitration case law on separability to determine the nature and scope of separability under the Convention. In that connection, the language of the second sentence of Article 3(d) may arguably go both too far in some respects, and not far enough in others, with respect to the scope of separability. It may go too far in extending separability to challenges to the validity of the underlying contract that *necessarily* also call into question the validity of the choice-of-court clause. For example, a claim that a party's signature on a contract has been forged necessarily also calls into question that party's consent to the choice-of-court clause contained in the contract.[8] On the other hand, Article 3(d) may not go far enough in applying separability to the extent it may be read to encompass only challenges to the "validity," and not to the very "existence," of the contract, as many national laws and most arbitration rules do.[9] For example, the fact that contract negotiations and the attendant battle of forms never matured into a final and binding contract does not necessarily also imply that the parties' negotiations did not crystallize into agreement on the arbitration clause in the form of contract.[10]

---

8 *See, e.g. Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992) (claim of forgery of contract containing arbitration clause must be resolved by a court); *Sphere Drake Ins. Ltd. v. All American Ins. Co.*, 256 F.3d 587, at 590-91 ("*Chastain* sensibly holds a claim of forgery must be resolved by a court. A person whose signature was forged has never agreed to anything.").

9 *See, e.g.* ICC Arbitration Rules, Art. 6(4)("Unless otherwise agreed, the Arbitral Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is *non-existent* provided that the Arbitral Tribunal upholds the validity of the arbitration agreement. The Arbitral Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even though the contract itself may be *non-existent* or null and void."); AAA International Arbitration Rules, Art. 15(1) & 15(2); LCIA Arbitration Rules, Art. 23.1; WIPO Arbitration Rules, Art. 36; UNCITRAL Arbitration Rules, Art. 21(1); *see also* English Arbitration Act of 1996, Art. 7; Swiss Law on Private International Law (1987), Art. 178(3); UNCITRAL Model Law (1985), Art. 16(1).

10 *See, e.g. Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990) (claim that "DRAFT" contract containing arbitration clause was not binding must be submitted to arbitration in the absence of "a challenge to the arbitration provision which is separate and distinct from any challenge to the underlying contract"); *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469 (9th Cir. 1991) (referring to a dispute arising out of a "Memorandum of Intent" to arbitration, pursuant to its arbitration provisions, notwithstanding the claim, and the district court's finding, that the Memorandum of Intent did not constitute a binding contract and that the contract "never existed at all."); Smit, *supra* note 6, at 37-38.

C. *Forum Non Conveniens*

U.S. Law. Under the discretionary doctrine of *forum non conveniens*, a U.S. federal or state court that has jurisdiction over a dispute may nevertheless decline to exercise that jurisdiction where an adequate alternative forum exists in a foreign country and it would be more convenient and fair to adjudicate the dispute in that foreign country.[11] Most courts, however, have refused to dismiss a case on *forum non conveniens* grounds where the parties have specifically chosen, by means of a choice-of-court clause, the court in which their contract disputes are to be heard. Nevertheless, many of those courts have noted that they still retain discretion to dismiss on *forum non conveniens* grounds where the parties have chosen a competent court even if they have not exercised that discretion to dismiss the case at bar.[12]

Convention. Article 5(2) of the Convention provides that, where a court has jurisdiction to decide a dispute by virtue of a valid and exclusive choice-of-court clause covered by the Convention, that court "shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State." The Convention, therefore, would effectively preclude application of the *forum non conveniens* defense in favor of the courts of a Contracting State where the contract contains a valid and exclusive choice-of-court clause.

Committee Comments. The Committee believes that the Convention's exclusion of the *forum non conveniens* doctrine to dismiss an action in a court designated by a valid choice-of-court clause is both consistent with the principle of party autonomy embodied in the

---

11 *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). As explained further below, whereas U.S. state courts invoke the *forum non conveniens* doctrine to dismiss cases in favor of either a foreign forum or a forum in another U.S. state, federal courts invoke the doctrine only to dismiss in favor of a foreign forum. The federal transfer statute, 28 U.S.C. §1404, is used to transfer actions from one federal court to another in the interests of fairness and convenience. The relevant analyses under the federal transfer statute and the *forum non conveniens* doctrine are similar.

12 In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the U.S. Supreme Court considered the effect to be given to an exclusive forum selection clause on a motion to dismiss for *forum non conveniens*. Under *The Bremen*, the presence of an exclusive forum selection clause is enforceable and is dispositive absent a showing that enforcement "would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 15. In 1988, the Supreme Court decided *Stewart Organization, Inc. v. Ricoh Corp.* 487 U.S. 22 (1988). *Stewart* established that, in the context of a §1404(a) analysis in a diversity case, a district court must engage in the multi-factor balancing test established by federal law. Specifically, the court held that §1404(a) requires "the district court to weigh in the balance a number of case-specific factors. The presence of a forum selection clause... will be a significant factor that figures centrally in the district court's calculus... The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences [though a forum-selection clause]... A forum selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration nor no consideration... but rather the consideration that Congress provided in §1404(a)." *Cf. Exum v. Vantage Press, Inc.*, 17 Wash.App. 477, at 479, 563 P.2d 1314 (1977) ("a trial court, faced with a motion to decline jurisdiction pursuant to a choice of forum clause which contractually provides jurisdiction will lie in another state, may refuse to decline jurisdiction when it concludes that the forum contractually chosen by the parties would be seriously inconvenient one for one of the parties to the particular action. In that event, the contractual provision selecting another jurisdiction will be deemed unfair and unreasonable.") *See, generally* Gary B. Born, *International Civil Litigation in United States Courts*, pp. 378-394, 431-453 (3d ed. 1996).

Convention and necessary to realize the Convention's objectives to harmonize and reduce uncertainty in Contracting States' enforcement of choice-of-court clauses. The Committee further believes that ratification of the Convention will not likely have significant impact on U.S. court practice as a practical matter because, as explained above, most U.S. courts already decline to dismiss actions commenced in the chosen court on *forum non conveniens* grounds where there is a valid choice-of-court clause.

D. Personal/In Rem Jurisdiction of Enforcing Court

U.S. Law. Where a foreign judgment is sought to be enforced in the United States, the U.S. federal or state court seized to enforce the foreign judgment must have some jurisdictional basis — be it personal, *in rem* or *quasi in rem* jurisdiction — to entertain the enforcement action. This is a Constitutional requirement in the United States by virtue of the due process clause. Thus, the enforcing court's lack of jurisdiction is a threshold defense in a U.S. action to enforce a foreign judgment.

Convention. Article 8(1) of the Convention states that enforcement of a judgment rendered by a court designated by an exclusive choice-of-court clause "may be refused only on the grounds specified in this Convention," and the remainder of Article 8 and Article 9 go on to set forth the exclusive grounds for postponing or refusing enforcement under the Convention. Significantly, Articles 8 and 9 do not identify lack of jurisdiction of the enforcing court as a ground for the enforcing court to refuse enforcement of the foreign judgment. If the Convention is construed to preclude lack of jurisdiction of the enforcing court as a defense to an enforcement action, this would effectively change prevailing U.S. practice.

Committee Comments. The Committee notes that a similar issue has already been addressed by U.S. courts in the arbitration context under the New York Convention.[13] Whereas the New York Convention — like the proposed choice-of-court Convention — purports to sets forth the exclusive grounds for non-enforcement of foreign arbitration awards, and does not include lack of jurisdiction of the enforcing court as a ground for such non-enforcement, several U.S. courts have nevertheless held that an enforcing court cannot entertain an enforcement action, and therefore enforce a foreign arbitration award, absent a Constitutionally adequate jurisdictional basis for hearing the action.[14] The Committee agrees that an adequate jurisdictional basis is Constitutionally required for a U.S. court to entertain an action to enforce either a foreign arbitration award or a foreign judgment. The Committee further believes, however, that the location of assets in the jurisdiction in which enforcement is sought should ordinarily constitute a sufficient *in rem* or *quasi in rem* jurisdictional basis for a U.S. court to entertain an action to enforce a money damages award or judgment and that, as a practical

---

[13] For the Committee's views on that issue, *see* the International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 Am. Rev. Int'l Arb. 407, 411-427 (2004) ("Committee Report").

[14] *See, e.g., Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2003); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (4th Cir. 2002); Committee Report, at 411-13.

matter, parties are likely to seek enforcement only in jurisdictions where assets are located. (Personal jurisdiction may be required to enforce an award or judgment requiring or forbidding action by the party against whom the award or judgment was rendered.) Should the Convention be ratified by the United States, the Committee believes that U.S. courts could still require a jurisdictional basis for the enforcing court to entertain the enforcement action, on the theories (i) that the jurisdictional requirements are Constitutional, and U.S. Constitutional requirements trump U.S. treaty obligations under the Convention, (ii) that the jurisdictional requirements are "procedural" and Article 14 of the Convention allows Contracting States to enforce foreign judgments in accordance with the enforcing court's own local procedures,[15] or (iii) that the Convention simply does not address jurisdiction of the enforcing court. The Committee is of the view that the latter two theories are the most compelling.

E. Validity of the Choice-of-Court Agreement

U.S. Law. Under U.S. law, a court may refuse to honor a choice-of-court clause if trying the case in the chosen forum would violate fundamental concepts of fairness and due process.[16] Courts may also refuse to enforce a foreign judgment if the basis for the foreign court's jurisdiction violates fundamental U.S. concepts of due process.[17] These due process requirements derive from the U.S. Constitution and therefore are not waivable either by individual contracting parties or by the United States.

Convention. Article 9(a) of the Convention provides that enforcement of a judgment may be refused if "the [choice-of-court] agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid." The Convention thus refers to the law of the country of the chosen court to determine the validity of the choice-of-court agreement and would not, at least on the face of Article 9(a), permit a U.S. enforcement court to refuse enforcement on the grounds that litigation of the dispute in the chosen foreign forum would violate U.S. concepts of fundamental fairness and due process. However, Article 9(e) of the Convention which provides for non-enforcement where enforcement "would be manifestly incompatible with the public policy of the requested State including situations where *the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of the State.*" (emphasis supplied) – may be

---

15 Article 14 of the Convention provides in relevant part: "The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise."

16 *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

17 *See Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986) (the judgment debtor must have been given adequate notice and opportunity to appear in the foreign proceeding and the minimum standard for notice adequacy is defined by the due process clause); *Victoria De La Mata v. American Life Insurance Co.*, 771 F.Supp. 1375, at 1385 (D.Del. 1991) ("A determination that there was valid service of process under Bolivian law does not end the analysis. The court must also determine whether service of process under a foreign country's laws comports with traditional American notions of due process.")

read to allow non-enforcement in the United States of a foreign judgment where the basis for the foreign court's jurisdiction violates U.S. concepts of fundamental fairness.[18]

Committee Comments. The Committee believes it unlikely that a U.S. court would ever enforce a judgment based on a choice-of-court clause that the U.S. court deemed to violate fundamental U.S. concepts of fairness. The Committee further believes, however, that Article 9(e) should and will be construed by U.S. courts to allow a court to refuse enforcement on such U.S. due process grounds. The Committee recommends that this construction of Article 9(e) be clarified in any implementing legislation or otherwise.

F. Lack of Capacity as a Ground for Non-Enforcement

U.S. Law. Under U.S. law, a U.S. court may refuse to enforce a foreign judgment where the foreign court's jurisdiction is based on a choice-of-court clause entered into by a party that lacked capacity to enter into that choice-of-court agreement. While U.S. courts have not always been consistent in determining which law should govern the party-in-question's capacity, most U.S. courts have referred to their own (*i.e.*, the enforcing court's) conflict-of-law rule to determine what law should govern the capacity issue and, applying that conflict-of-law principle, found that (at least for non-sovereigns) the law of that party's nationality, domicile or place of incorporation governed whether that party had capacity to enter into the forum selection clause.

Convention. Article 9(b) of the Convention states that a foreign judgment need not be enforced if "a party lacked the capacity to conclude the [choice-of-court] agreement *under the law of the requested State*." (emphasis supplied). Article 9(b) appears to refer capacity issues to the substantive law of the country in which enforcement of the judgment is sought, rather than either to the conflict-of-law principles of the enforcing forum or to the law designated by the enforcing court's conflict-of-law principles to govern the issue of capacity.

Committee Comments. As noted above, the Committee believes that the language of Article 9(b) may be somewhat confusing as to which conflict-of-law or substantive capacity law should apply if a party's capacity to enter into the choice-of-court agreement is challenged. If "the law of the requested State" in Article 9(b) is intended to encompass the requested State's conflict-of-law principles, rather than refer to the requested State's substantive law concerning capacity – which would bring the Convention approach in line with the U.S. approach – the Committee believes that intent should be made clear in any implementing legislation or otherwise.

II. Assessment of Convention in Light of U.S. Interests

As the preceding section notes, the Convention would change U.S. practice with respect to the enforcement of choice-of-court clauses and foreign judgments based on such clauses in certain respects. The Committee does not believe, however, that the Convention

---

[18] In addition, an Article 20 Declaration would permit the enforcement forum to deny enforcement where all of the elements of the dispute, including the parties but other than the location of the chosen court, were located in the enforcement forum. As explained below, however, the Committee recommends against U.S. adoption of Declaration 20.

would effect a radical departure from prevailing U.S. practice as a whole. More specifically, the Convention would not radically or prejudicially change (i) a U.S. court's duty to exercise jurisdiction where a U.S. court is chosen, (ii) a U.S. court's duty to decline jurisdiction when a foreign court is chosen, and (iii) a U.S. court's duty to enforce foreign judgments.

On the other hand, the Committee understands that the Convention, if ratified by the member states that negotiated the Convention, would significantly enhance the enforceability abroad of choice-of-U.S. court agreements and, even more significantly, U.S. judgments based on such choice-of-U.S. court clauses, which currently is unpredictable at best. The Convention would thus "level the playing field" as between U.S. enforcement of foreign judgments, which currently are relatively liberally enforced, and foreign enforcement of U.S. judgments, whose enforcement currently is unpredictable. In the Committee's view, this alone justifies U.S. ratification of the Convention, as it would significantly enhance the enforcement of U.S. judgments obtained by U.S. litigants and, in particular, by U.S. businesses engaged in international trade that have obtained U.S. judgments against their foreign counterparties.

III. IMPLEMENTATION OF THE CONVENTION

The following examines issues relating to implementation of the Convention, including Declarations that Contracting States may make when ratifying and implementing the Convention.

A. Implementation and Internal Allocation of Jurisdiction Issues

1. Self-Executing v. Non-Self-Executing Convention

If it ratifies the Convention, the United States will have to decide whether the Convention should be self-executing or whether it should be implemented by means of a legislative or other instrument. The Committee recommends that the United States implement the Convention by means of legislation. Such legislation will provide an opportunity to clarify several implementation issues discussed below. Legislation will also create a favorable context for the uniform application of the Convention, whose key objective, as articulated in its Preamble, is to provide "uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters."

2. Federal or State Implementing Legislation

Assuming the United States implements the Convention by means of legislation, the next issue is whether that legislation should be federal or state legislation. While the enforcement of choice-of-court agreements and judgments is currently governed principally by state law, the Committee believes that the Convention – like the New York Convention on the enforcement of foreign arbitration awards – should be implemented by means of federal legislation because, among other reasons, (i) the international recognition and enforcement of judgments is a matter of foreign commerce more appropriately governed federal law, and (ii) implementation by a single federal statute, rather than 50 state statutes, will enhance uniform construction and application of the Convention within the United States. In short, U.S. enforcement of choice-of-U.S. and foreign court agreements, and U.S. enforcement of foreign judgments based on choice-of-foreign court clauses – like the enforcement of international

arbitration agreements and awards under the New York Convention – should be governed by federal law.

3. Federal or State Jurisdiction over the Convention's Enforcement

Assuming the Convention is implemented by means of federal legislation, the question remains as to which courts in the United States – state and/or federal courts – should have subject matter jurisdiction to enforce choice-of-court agreements and foreign judgments falling under the Convention. The Committee believes that the New York Convention on the enforcement of international arbitration agreements and awards (as implemented by the Second Chapter of the Federal Arbitration Act) provides an appropriate model for allocating jurisdiction to enforce the Convention to federal and state courts.

In accordance with that model, both state courts and federal courts should have subject matter jurisdiction to enforce Convention choice-of-court agreements and foreign judgments. With respect to the enforcement of foreign *judgments,* if an action to enforce a foreign judgment subject to the Convention is brought in state court, the state court may hear the action, but the action should be subject to removal to federal court by the defendant on conditions similar to those prescribed in the New York Convention removal provision, 9 U.S.C. §205.[19] If the enforcement action subject to the Convention is originally brought in federal court, the district court should have original federal subject matter jurisdiction to adjudicate the enforceability of the foreign judgment under the Convention.

The allocation of state/federal jurisdiction is somewhat more complex with respect to enforcement of Convention *choice-of-court agreements*. If a contract action is commenced in state court, and a party claims either that (i) the case should be dismissed under Article 6 of the Convention because the parties' contract contains a choice-of-court clause that designates a foreign court, or (ii) the choice-of-court clause designates that state court, but the choice-of-court clause is invalid or otherwise unenforceable under Article 5 of the Convention, and the state court lacks any other basis of jurisdiction to hear the case, the state court should have jurisdiction to determine: (a) whether the choice-of-court clause should be enforced and, accordingly, the case dismissed in scenario (i) above, or jurisdiction confirmed in scenario (ii) above; (b) if the choice-of-court clause is deemed unenforceable, whether the state court has jurisdiction to hear the case by virtue of a cognizable basis for jurisdiction, and (c) if such jurisdiction exists, the merits of the parties' contract dispute. That state court action, however, should be removable to federal court, as is a petition to enforce an arbitration agreement under the New York Convention. The federal court will then have jurisdiction to determine the enforceability of the choice-of-court clause, in either scenario (i) or (ii) above, under the Convention. If, in scenario (i), the federal court finds the choice-of-foreign court clause to be valid, it will dismiss the case and no further proceedings are necessary. If, however, the federal court finds the choice-of-foreign court clause to be invalid, it should remand the action back to

---

[19] Where the subject matter of an action pending in state court is related to an arbitration agreement or award falling under the New York Convention, 9 U.S.C. § 205 permits the defendant or defendants to remove that action to federal district court "at any time before the trial thereof." The ordinary federal removal procedures govern removal, except the ground for removal – *i.e.,* the arbitration clause or award – need not appear on the face of the complaint but may be shown in the petition for removal.

state court for the state court to determine whether it has jurisdiction and, if so, decide the case. If, in scenario (ii) above, the federal court finds the choice-of-U.S. state court clause to be enforceable, it should remand the case to state court for adjudication of the merits of the dispute. If, on the other hand, the federal court finds that choice-of-court clause to be unenforceable, the federal court should remand the case to state court for the state court to determine (a) whether an independent basis for its jurisdiction exists and, (b) if so, the merits of the case. In the latter case, however, the federal court should be competent itself to determine the jurisdictional and merits issues if an independent basis for federal subject matter jurisdiction exists — *i.e.*, diversity or federal question jurisdiction. This will avoid having the federal court remand the case to state court only to have it removed back to federal court if the defendant failed to assert all possible bases for federal subject matter jurisdiction in its original removal petition.

4. Enforcing Choice-of-Court Clauses

Article 6 of the Convention provides for enforcement of a choice-of-foreign court clause by requiring the domestic enforcing court to suspend or dismiss an action brought in contravention of the clause. The Committee notes that -- consistent with the strong U.S. policy favoring enforcement of choice-of-forum clauses -- U.S. courts have enforced forum selection clauses that designate either arbitration or a foreign forum as the chosen forum not only by dismissing the U.S. action, but also by affirmatively compelling the parties over whom it has jurisdiction in that action to honor the forum selection clause by adjudicating the dispute in the chosen arbitration or foreign court forum. The Committee believes that the Convention should not be construed to replace or otherwise preclude the latter relief – *i.e.*, motions to compel adjudication in the chosen foreign forum – just as the New York Convention has been construed to accommodate motions to affirmatively compel arbitration under 9 U.S.C. §4. This, too, might be clarified and confirmed in the implementing legislation or otherwise.

5. "Recognition and Enforcement"

Chapter III of the Convention is entitled "Recognition and Enforcement" and governs recognition and enforcement of foreign judgments. While Chapter III clearly contemplates proceedings to confirm or enforce a foreign judgment, the Committee notes that the term "recognition" may also be construed to encompass recognition of a foreign judgment by means of affording that judgment *res judicata*, collateral estoppel or other preclusive effect in a subsequent action. The Committee does not believe that the Convention, or federal original or removal jurisdiction under any legislation implementing the Convention, should be triggered by an argument that a lawsuit or claim is barred by *res judicata* or collateral estoppel, as this would appear to be beyond the intended scope and effect of the Convention and could be very disruptive of state court proceedings if they were subject to removal whenever *res judicata* or collateral estoppel is invoked. Again, this might be clarified and confirmed in the implementing legislation or otherwise.

6. Internal Allocation of Jurisdiction

Article 5(3)(b) of the Convention provides that the Article 5(2) rule that a chosen court "shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State" – *i.e.*, dismiss the case on *forum non conveniens* grounds in favor of

another Contracting State – "shall not affect rules . . . on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties." Article 8(5) goes on to say that the Convention rules governing enforcement of judgments "shall also apply to a judgment given by a court of a Contracting State pursuant to a transfer of the case from the chosen court in that Contracting State as permitted by Article 5, paragraph 3. However, where the chosen court had discretion as to whether to transfer the case to another court, recognition or enforcement of the judgment may be refused against a party who objected to the transfer in a timely manner in the State of origin."

These rules would allow a chosen U.S. *federal* court to transfer a case to another federal court under the federal transfer statute notwithstanding the parties' express choice-of-court agreement. It is less clear whether Article 5(3)(b) would also allow a chosen U.S. *state* court to dismiss an action on *forum non conveniens* grounds in favor of another U.S. state court. On the one hand, Article 5(2)'s prohibition against a chosen court's dismissal of a case on *forum non conveniens* grounds would not appear to apply to a U.S. state court's dismissal in favor of another state court insofar as, on its face, Article 5(2) only applies where the case is being dismissed in favor of "a court of another [Contracting] State" -- *i.e.,* a foreign court. On the other hand, under Article 25(1)(c), a reference to the courts of a State is to be construed as referring to the courts in the chosen "territorial unit" of that State -- *e.g.,* the chosen state within the United States – such that transfer from the chosen U.S. territorial unit/state to another territorial unit/state would be prohibited. In addition, the second sentence of Article 5(3)(b) and Article 8(5), both refer to and allow "transfer," not dismissal, of a case in favor of another court within the Contracting State. In the latter connection, it would appear somewhat anomalous for the Convention to permit federal court-to-federal court reallocation of jurisdiction, but not state court-to-state court reallocation merely because the procedural means of reallocation is different in the federal and state systems. Such different treatment may be rationalized, however, to the extent the negotiating member states had greater confidence in their co-member states' federal court systems than in their state or territorial court systems, and thus were prepared to allow reallocation of jurisdiction on the federal, but not state, level.

If Article 5(3)(b) is read to allow inter-federal transfer and/or state court dismissal of a case, the Committee believes that there is a potential for unexpected and unfair results. A foreign party, for example, who has agreed, in a choice-of-court agreement, to resolve disputes in a New York state or federal court because it has confidence in the courts of New York as a centre of international commerce, may, by operation of Article 5(3)(b) and U.S. internal allocation of jurisdiction rules, unexpectedly find itself litigating in a Texas state or federal court in which it would never have agreed to litigate in the first place. This would appear to be both unfair to the foreign party and inconsistent with the principle of autonomy of the parties that inspires the Convention. The Committee has thus considered whether, in implementing the Convention, the United States should preclude chosen U.S. state and federal courts from *forum non conveniens* dismissing or §1404 transferring actions subject to the Convention to other jurisdictions within the United States, notwithstanding Article 5(3)(b). The Committee ultimately concluded, however, that such a measure is not warranted. In the first place, as a practical matter, chosen U.S. courts rarely actually dismiss or transfer cases in favor of another

U.S. forum in contravention of an express choice-of-court clause,[20] so the risk of unfair results under Article 5(3)(b) would appear to be quite low in actual practice. The fact that Article 5(3)(b) specifically cautions the chosen court to give "due consideration" to the parties' choice of court, and that Article 8(5) creates a further disincentive to dismiss or transfer the case by providing that the transferee court's judgment may not be enforceable against the party who objected to transfer, further mitigate this already low risk. This relatively low risk of unfair results would not appear to warrant creating a unique and unprecedented exception to a federal court's transfer powers under § 1404 or a state court's discretion to dismiss a case in favor of another state court. Finally, any risk of unfair results under Article 5(3)(b) is a risk that the foreign Contracting States specifically contemplated, mitigated and assumed when they negotiated and agreed to the provisions of Articles 5(3)(b) and 8(5) of the Convention.

B. Declarations

The Convention affords Contracting States the opportunity to make certain Declarations that would either limit or expand the scope of application of the Convention. The Committee addresses those Declarations below.

1. Article 19: "Declaration limiting jurisdiction"

Article 19 of the Convention provides: "A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute."

The Article 19 Declaration, if adopted by the United Stated, would effectively reinstate a more limited version of the *forum non conveniens* defense to enforcement of a choice-of-U.S. court clause notwithstanding Article 5(2),[21] and would provide further support for U.S. courts' authority to decline to exercise jurisdiction over disputes having no connection with the United States. It might also provide a disincentive for parties to engage in fraudulent choice-of-court agreements.

The Committee, however, recommends that the United States not make an Article 19 Declaration. First, the Declaration would compromise the autonomy of the parties principle upon which the Convention is based. Second, any risk that parties choose a U.S. court for improper reasons may adequately be addressed under Article 5(1), which allows a chosen U.S. court to decline jurisdiction if the chosen court determines that the choice-of-court clause "is null and void under the law of that [chosen] State." Third, the fact that some U.S. jurisdictions, such as New York, have already declared themselves willing to resolve essentially foreign disputes where the parties have chosen New York law to govern those disputes suggests that risk is not a

---

20 *See supra* at footnote 12.

21 Article 19 is more limited than *forum non conveniens* because a chosen court could only refuse to hear the case under Article 19 if there are *no* contacts with the chosen forum other than the choice-of-court clause whereas a chosen court can decline to exercise jurisdiction under *forum non conveniens* whenever the balance of contacts, fairness and convenience favors litigation in an adequate alternative foreign forum.

paramount U.S. concern. Finally, the Committee understands that the United States has taken a leading role in promoting the Convention and its broadest application possible. Adopting the Article 19 Declaration would be inconsistent with the United States' role in promoting the Convention, and could encourage other countries to follow suit in limiting the scope of the Convention.

2. Article 20: "Declarations limiting recognition and enforcement"

Article 20 provides: "A State may declare that its courts may refuse to recognize or enforce a judgment given by a court of another Contracting State if the parties were resident in the requested State, and the relationship of the parties and all other elements relevant to the dispute, other than the location of the chosen court, were connected only with the requested State."

The Article 20 Declaration – which is the enforcement of judgment corollary to the Article 19 Declaration concerning choice-of-court agreements – would allow a U.S. court to refuse to enforce a judgment rendered by a foreign court designated by a choice-of-court clause where all elements relevant to the dispute, other than the choice-of-court clause, were connected with the United States. Like the Article 19 Declaration, it might also provide a disincentive for parties to choose unrelated fora for improper reasons if they know judgments from those fora may not be enforced.

Nevertheless, the Committee recommends against U.S. adoption of the Article 20 Declaration for reasons similar to those for not adopting Article 19. Like Article 19, Article 20 runs counter both to the autonomy of the parties principle embodied in the Convention and to the United States' role in promoting as broad an application as possible for the Convention. Moreover, any risk that the judgment rendering court was chosen by the parties for improper reasons may be addressed under Article 9(e), which would permit a U.S. court to refuse enforcement of a foreign judgment where the "proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State."

3. Article 21: "Declarations with request to specific matters"

Article 21 of the Convention provides in relevant part: "Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter." The Committee does not see any need for the United States to make any Article 21 Declarations at this time. The Committee notes, in that regard, that Article 2(2) already excludes a number of subject matters of a "public policy" nature from the scope of the Convention, and Articles 6(c) and 9(e), respectively, would permit a U.S. court to deny enforcement of a choice-of-foreign court or a foreign judgment on public policy grounds. In any event, should the United States later wish to make an Article 21 Declaration with respect to a specific matter, it will be able to do so under Article 32(1), which provides that an Article 21 Declaration may be made "at any time" after accession to the Convention.

4. Article 22: "Reciprocal declarations on non-exclusive choice-of-court agreements"

Article 22 provides in relevant part: "A Contracting State may declare that its courts will recognize and enforce judgments given by courts of other Contracting States designated in a choice of court agreement concluded by two or more parties that meets the requirements of Article 3, paragraph *c)*, and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, a court or courts of one or more Contracting States (a non-exclusive choice of court agreement)." Thus, Article 22 would expand the scope of the judgment recognition and enforcement provisions of the Convention to encompass "non-exclusive" choice-of-court agreements.[22]

The Committee recommends that the United States make the Article 22 Declaration because it would expand the scope of the Convention, and thus potentially also the benefits to U.S. interests that the Convention is expected to yield. In particular, assuming other countries also adopt the Article 22 Declaration, U.S. adoption of the Declaration would enhance the enforceability abroad of U.S. judgments rendered by a U.S. court designated in a non-exclusive choice-of-court agreement.

5. Article 26(5): "Relationship with other international instruments"

Article 26(5) provides: "This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration." Thus, should the United States make an Article 26(5) Declaration, the Convention would not trump application of any treaty governing jurisdiction or the enforcement of judgments with respect to a specific matter. Absent such a Declaration, on the other hand, the Convention would presumptively trump any such treaty.

Article 26(5) would not affect any current U.S. treaty obligations because the United States is not currently a party to any treaty governing the enforcement of judgments with

---

[22] The term "non-exclusive" is potentially confusing as applied to a choice-of-court agreement that designates two or more jurisdictions as the only jurisdictions in which a dispute may be brought. On the one hand, such a choice-of-court clause is 'exclusive' to the extent it excludes commencing a suit in any jurisdiction other than the chosen ones. On the other hand, it appears that the term "non-exclusive," as used in Article 22, is intended to encompass any choice-of-court agreement other than an "exclusive choice of court agreement," as those terms are defined in Article 3(a) —*i.e.*, a choice-of-court agreement that designates the "courts of *one* Contracting State . . ." (italics supplied). Thus, "non-exclusive choice-of-court agreements" under Article 22 presumably include choice-of-court agreements that (i) designate a single jurisdiction on a non-exclusive basis, (ii) designate two or more jurisdictions on a non-exclusive basis, or (iii) designate two or more jurisdictions on an 'exclusive' basis, (*i.e.*, permit litigation in those jurisdictions and nowhere else).

respect to any specific matters. With respect to potential future treaties, an Article 26(5) Declaration would increase the United States' flexibility to negotiate even more favorable terms than those of the Convention for jurisdiction or judgment enforcement with respect to specific subject matters. On balance, however, the Committee recommends against the United States making an Article 26(5) Declaration because the terms of the Convention are already quite favorable to the United States for all the reasons described above, and limiting future application of the Convention by means of an Article 26(5) Declaration could suggest a lack of U.S. commitment to the Convention. Moreover, should the United States later wish to make the Declaration in order to accommodate a future treaty, it will be able to do so under Article 32(1), which provides that an Article 26 Declaration may be made "at any time" after accession to the Convention.

6. Article 28: "Declarations with respect to non-unified legal systems"

Article 28 provides in part: "If a State has two or more territorial units in which different systems of law apply in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that the Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time." The Committee recommends against the United States making any Article 28 Declaration, and believes the Convention should apply throughout all U.S. territories.

CONCLUSION

For the reasons explained above, the Committee recommends that the United States ratify the Convention, making only Declaration 22.

NYCDMS/1012567.1