

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
*Preliminary draft convention on jurisdiction
and the effects of judgments in civil and commercial matters*

UNICE Comments

1. On a number of occasions, industry in Europe has expressed serious reservations about the efforts of the Hague Conference on Private International Law to achieve a worldwide Jurisdiction and Enforcement Convention. The texts prepared by the Conference were seen to entail a serious risk of exposure of companies in Europe to excessive jurisdiction of foreign courts, and export to Europe of excessive judgments handed down by these courts. The economic consequences for companies in Europe could be severe. Europe is the home of many companies operating on world markets and certain clauses in the draft Convention could have serious economic effects (we refer to the UNICE position paper dated 22 October 1999, as attached, which makes special reference to the US).
2. The draft convention has a couple of features which can lead to considerable legal uncertainty such as jurisdiction on intellectual property issues and, activity based jurisdiction for e-commerce activities. It covers elements of a political nature (e.g. human rights) which are not suitable for regulation in a convention on civil matters.
3. We understand that in order to bridge differences of opinion on controversial aspects of the draft Convention, proposals are being considered to progress the project in a less ambitious manner. This would take the form of Convention with a more limited scope. Consideration is being given to the idea of a 'Choice of Court Convention'. A Choice of Court Convention would achieve global recognition of contractual forum selection clauses. It would thus achieve worldwide recognition and enforcement of judgments rendered by courts *agreed by parties engaged in commerce*. This could be a first step towards a Convention with a wider scope.
4. UNICE is of the view that European industry will support the development of a Choice of Court Convention. The New York Convention of 1958 offers worldwide enforcement of arbitration agreements and arbitral awards. Article 17 of the Brussels/Lugano Convention offers a similar regime for court decisions, but its scope is limited to Europe. A worldwide Choice of Court Convention would, as it were, lift the Brussels/Lugano regime to world level. Thus, it would offer parties in commerce on world markets an attractive alternative to arbitration. It would offer legal certainty in particular if the Convention would clearly and unequivocally oblige courts in all member-states to enforce jurisdiction clauses. This principle is more extensively discussed below (no 7).
5. Parties in international transactions often take resort to international arbitration to settle their disputes. This is driven by a number of factors. One element is the fact that the New York Convention has no corollary for international recognition and enforcement of court judgments. At the same time, international arbitration has a number of less attractive features: time, cost, lack of appeal, difficulty to join proceedings, in many cases no possibility of interim relief. As a result of such factors, parties to international contracts are looking at non-binding forms of alternative dispute resolution (ADR). However, whilst ADR offers advanced methods for settlement negotiation techniques it does not offer a solution if the ADR attempt fails. Parties will still need a binding decision by an expert decision-maker. Courts often offer such experts. However, concerns about the enforceability of jurisdiction selection clauses are often a reason for parties to

eschew a jurisdiction selection clause. There are quite a few examples of courts outside the scope of the Brussels/Lugano regime¹ not recognizing a jurisdiction selection clause.

6. In a number of branches of trade and commerce, there is a standard practice to refer to the courts of a particular country or a particular court because of its specialist expertise (e.g. the Commercial court in London for many, shipping, trading and other commercial disputes). Companies active in these fields would be greatly served by a Choice of Court Convention. Many standard contract conditions would benefit from greater legal certainty if such a Convention were to become law.
7. A Choice of Court Convention would be particularly beneficial if the Convention would have the following features:
 - a. The courts of the country chosen by the parties ('forum State') should take jurisdiction irrespective of a connection between the dispute or the parties and the forum State;
 - b. Courts in any country (party to the Convention) other than the forum State should not take jurisdiction;
 - c. Decisions handed down by courts in the forum State should be recognized in all other Convention Member states;
 - d. Decisions rendered by any courts other than the courts mentioned under c. should not be recognized in any Convention member State;
 - e. The forum State should have exclusive jurisdiction to decide on the validity of the choice of law clause (the applicable law being determined by general rules of conflict of laws, including the freedom of parties to select the proper law);
 - f. Choice of court clauses should be considered to be exclusive unless the parties have explicitly stipulated otherwise;
 - g. In the field of intellectual property, at least industrial property (patent, trademarks and designs) should be excluded from the scope of a Choice of Court Convention.
8. For all of the reasons set out above, UNICE would welcome the development of a Choice of Court Convention, especially if it were to meet the criteria set out in this note. We would welcome any opportunity to contribute to this development.

¹ E.g., recently a Pennsylvania state court decision: *Morgan Trailer Mfg. Co. v. Hydratoll, Ltd., et al.* 759 A.2d 926 (2000): the appellate court held that the forum selection clause was unreasonable since its enforcement would "seriously impair" the plaintiff's ability to pursue the action. Another striking example is a decision by the Supreme Court of Korea dated 9.09.1997 (96da 20093).