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INTERNATIONAL LAW

Foreign Judgments

By Peter D. Trooboff

Three major projects concerning the recognition and enforcement of choice-of-court agreements and foreign-country judgments reached milestones over the past several months. Each potentially affects and benefits many litigants in American courts and U.S. businesses engaged in international trade. Each has a relationship to the other and includes useful research materials for practitioners addressing many aspects of this subject.

In June, the Hague Conference on Private International Law completed more than a decade of work by approving at its Twentieth Diplomatic Conference a new Hague Convention on Choice of Court Agreements (June 30, 2005). See www.hcch.net. At the urging of Harvard Professor Arthur von Mehren and others, the United States initiated this project in the conference because of its potential value to U.S. litigants and multinational businesses. This explains why a number of the 65 member states of the conference may await U.S. implementation of the convention before ratifying it. Interested parties are likely to encourage the U.S. Department of State to prepare promptly the necessary congressional submission so that the Senate may expeditiously consider advice and consent to ratification and Congress may evaluate the required implementing legislation.

When it becomes effective, the convention will ensure the recognition and enforcement of exclusive choice-of-court agreements in international transactions among businesses and the enforcement of judgments resulting from such agreements. In some respects, the convention will provide for these agreements and judgments the predictability and enforceability that parties to arbitral agreements enjoy for their undertakings and resulting awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

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Obligations of courts under the new convention

The new convention will require courts of contracting states to adjudicate a dispute when parties to an international business-to-business agreement have selected that court under an exclusive choice-of-court agreement (Art. 5). Consumer contracts and agreements relating to matters governed by specialized legal regimes (e.g., employment, bankruptcy, family law and antitrust) will be outside the scope of the convention, but government commercial contracts will be covered (Art. 2). If either party takes the dispute to a court in a contracting state that was not selected under an agreement, that court is required to decline to hear the claim (Art. 6). Limited exceptions to this obligation to decline jurisdiction include the refusal of the selected court to hear the case or the agreement's nullity under the law of the chosen court, or that enforcement of the agreement would work a "manifest injustice" or be "manifestly contrary to the public policy" of that other state.

Courts of contracting states will be obligated to enforce judgments that are based on choice-of-court agreements that are rendered by courts of other contracting states (Art. 8). The conference prepared a valuable recommended form for the court granting such a judgment to confirm its issuance and content. Further, the convention usefully provides that documents forwarded to an enforcing court are exempt from legalization or analogous formalities such as an apostille under the 1961 Hague Legalization Convention (Art. 18). There are limited exceptions to the enforcement obligation; for example, nullity of the agreement under the law of the chosen court, inadequate notice to the defendant affecting its ability to present a defense, or a result "manifestly incompatible with the public policy" of the enforcing state (Art. 9).

The negotiators strongly supported, and the report on the convention will emphasize, the limited scope that they intended for the public policy exception to enjoy. The convention also makes clear that the awarded amount of compensatory damages in a judgment is not reviewable. Refusal of enforcement is permitted only for damages "that do not compensate a party for actual loss or harm suffered" including, for example, punitive damages (Art. 11). The final report on the convention will include a negotiated and agreed-upon narrow interpretation on this critical point.

Practitioners should begin studying the convention even though it has not become effective because they may be able to

ensure that some current choice-of-court agreements become subject to its provisions. For example, disputes concerning copyrights are within the convention's scope. Further, validity issues relating to, for example, trademarks and patents are covered when they arise as preliminary issues in an agreed-upon court hearing disputes over such matters as licensing agreements.

The conference negotiators recognized that many international business interests, notably financial institutions, use choice-of-court agreements that designate several agreed-upon courts. To address this situation, contracting states may declare that the convention will apply to judgments resulting from nonexclusive choice-of-court agreements (Art. 22). The United States will need to consider carefully making such a reciprocal declaration. The conference agreed that contrary to the general rule (Art. 16), the convention will apply to judgments resulting from such agreements even if entered into before the convention becomes effective in the state of the chosen court. Thus, parties may want to include such nonexclusive provisions in their international contracts to anticipate possible effectiveness of the convention in an enforcing jurisdiction that makes such a reciprocal declaration.

More than five years ago, the American Law Institute (ALI) initiated a project designed to implement a broader judgments convention that the Hague Conference tried unsuccessfully to negotiate. In May, the ALI approved, subject to editorial revision, the final draft of its project titled the Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute. See www.ali.org. The completed ALI draft statute would provide a uniform federal regime for state and federal recognition and enforcement of foreign judgments including procedural provisions facilitating enforcement. As approved, the project incorporates a creative approach to encouraging other nations to enter into reciprocal agreements with the United States to enforce foreign judgments, including many not within the scope of the new Hague Convention.

The completed ALI project also includes in the comments and reporter's notes a valuable compendium of research by the co-reporters, professors Andreas Lowenfeld and Linda Silberman of New York University School of Law. In addition, they responded effectively to the strongly held views of ALI members and drafted balanced and informative notes on a number of controversial subjects. For example, they addressed the difficult issue of when and how

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the public policy exception applies to recognition and enforcement of judgments that are alleged to violate rights protected by the First Amendment (e.g., libel judgments arising from publications about public figures). Reporters' Note 6(d), § 5.

Completing the trio of related actions in the judgments field, the National Conference of Commissioners on Uniform State Laws (NCCUSL), at its 114th meeting in Pittsburgh during July, approved finally what will now be called the Uniform Foreign-Country Judgments Recognition Act (2005). See www.nccusl.org.

Amendments would clarify application of 1962 act

The NCCUSL drafting committee was asked to prepare amendments to the 1962 Uniform Foreign Money-Judgments Recognition Act, which has been enacted in 30 states, the District of Columbia and the U.S. Virgin Islands. NCCUSL's charge to the drafting committee made clear that the proposed changes were to be limited "to those issues necessary to correct problems created by the current Act and its interpretation by the courts." Thus, the drafting committee states that "[t]he goal...is not to change the basic rules or approach of the current Act, but rather to clarify its application in situations in which issues have arisen." The drafting committee reporter, Professor H. Kathleen Patchel of Indiana University School of Law, prepared a valuable study on the current legislation.

The most important proposed changes in the Recognition Act include imposing expressly the burden of proof for establishing application of the act on the party seeking recognition (§ 3(c)); providing a specific procedure by which recognition of a foreign-country money judgment under the act must be sought (§ 6); clarifying and, to a limited extent, expanding upon the grounds for denying recognition in light of differing interpretations of those provisions in the current case law (§§ 4 and 5); and establishing a statute of limitations that provides for filing for enforcement of a judgment not later than the end of the period of its effectiveness in the foreign country or 15 years from the date of effectiveness in the foreign country, whichever comes earlier (§ 9). The amendments would also make clear that the public policy exception applies when either the judgment or the cause of action is "repugnant" to state or U.S. public policy (§ 4(c)(3) and Comment 8); see also ALI Reporters' Notes 6(b), § 5.

The drafting committee and NCCUSL decided not to craft a new reciprocity requirement. In a prefatory note, NCCUSL states, "While recognition of U.S. judgments continues to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of U.S. judgments than does the approach taken by the Act." On this key issue, many will respectfully disagree. The ALI proposed a reciprocity requirement for uniform federal legislation after an extensive study of several years' duration and intense debate among leading American and non-U.S. scholars, judges and practitioners. Congress and state legislatures will ultimately have to resolve this issue. NLJ