

ALA American Library Association

June 4, 2001 [by fax and e-mail to Mr. Kovar in The Hague]

Mr. Jeffrey Kovar
Assistant Legal Advisor for Private International Law
U.S. Department of State
2430 E Street, NW
Suite 203, South Building
Washington, DC, 20037-2851

Dear Mr. Kovar:

Re: draft Hague Convention on Jurisdiction and
Foreign Judgments in Civil and Commercial Matters

The American Library Association ("ALA") appreciates the hard work of the U.S. delegation to the Hague Conference in fostering understanding and discussion of the complex issues associated with the current draft of the convention on jurisdiction and enforcement. We appreciate the openness of the delegation to hearing from the various U.S. stakeholders and believe that the public meetings and roundtable discussions over the past several months have been very beneficial to those who have concerns about the draft convention. Hopefully, the meetings have proved to be helpful to the U.S. delegation as well.

As you begin the deliberations at the next diplomatic conference on the draft convention in The Hague this week, we ask that the delegation continue to take into consideration the concerns of the U.S. library community. As it happens, ALA's Annual Conference takes place almost at the same time (June 15-20), during which its governing committees and its Council will likely consider a formal resolution on the draft Hague convention.

ALA is a nonprofit educational organization of approximately 61,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services and the public's right to a free and open information society. In addition to ALA, the various libraries in this country (and in some cases, in other countries) are represented by the other four major national library associations, with which ALA works closely: Association of Research Libraries, American Association of Law Libraries, Special Libraries Association, and Medical Library Association.

The library community has a huge stake in the outcome of the deliberations on jurisdictional matters, particularly those concerning contracts and intellectual property rights. We believe that our concerns are shared by many other educational, research, and cultural organizations with whom we collaborate

regularly on information policy issues. We further believe that, even at this late date, the U.S. delegation would benefit from a representative of these public interest information institutions and we ask that you consider taking that step.

1. Our libraries and educational institutions have embraced technological advances and are a significant element in the United States' electronic commerce. We not only provide patrons with computerized access to electronic information products and services, we also use software to run our internal operations. As a result, we are among the largest consumers of software. In addition to expenditures for hardware, software, network support and equipment, and personnel, we are also the largest consumers of fee-based electronic services and databases. The nation's public, academic, medical, special and government libraries expend hundreds of millions of dollars in fees each year for databases and electronic library materials. These purchases are utilized across the entire academic and library enterprise, affecting payroll operations; safety, health and environmental programs; accounting systems; and more.

Libraries negotiate contracts for goods and services every day. In doing so, we are able to ensure that the contract terms to which we agree will take into account our mission to the public as well as our business and institutional needs, and that those terms comply with other legal requirements (e.g., state legal requirements for state institutions). Increasingly, though, contracts for information goods and services are non-negotiated instruments, and we expect this trend to continue. The growing use of non-negotiated contracts presents serious issues for libraries, one that could be greatly exacerbated by the Hague agreement as currently drafted.

In that regard, Article 4 of the current draft treaty would make "choice of court" provisions enforceable without exception, including those provisions contained in non-negotiated contracts (such as shrink-wrap or click-on contracts). Our concerns with enforcing terms in non-negotiated contracts that are contrary to public policy extend beyond the choice-of-court issues, but we confine our comments here to the manifest unfairness of allowing one party to a contract to mandate, with no opportunity for negotiation, which court shall have jurisdiction to hear and settle disputes between the parties. The current Article 4 by its very terms implies an "agreement" between the parties, whereas non-negotiated shrink-wrap or click-on contracts allow no opportunity for a "meeting of the minds" -- long considered to be an essential element of a contract.

We have suggested a revision to Article 4 that would make it clear that such choice of court clauses in non-negotiated contracts with certain institutions would not be automatically enforced, along the following lines:

Agreements conferring jurisdiction and similar clauses in non-negotiated contracts with non-profit, non-commercial organizations, including non-profit libraries, archives, and educational institutions, shall be without effect.

If such an express embodiment of public policy is not acceptable, then we urge that the U.S. delegation consider at least revising Article 4 to include language that would except the automatic enforcement of court-of-court provisions where the agreement "has been obtained by an abuse of economic power or other unfair means."

2. Access to information is essential not only to research and educational institutions, but also to our citizenry at large. The role of libraries in the dissemination and preservation of information in our society and our culture -- indeed, throughout the world -- is directly and critically affected by today's economic and technological developments. We are being challenged in new ways to ensure the balance in law and public policy between protecting intellectual property and providing access to it. In this regard, we are concerned that the draft Convention, with its rules regarding forum selection, could subject Internet users

in the United States to intellectual property infringement in other countries for activities that are lawful in the U.S. For example, users could be sued for engaging in conduct falling within the fair use doctrine, codified at 17 U.S.C. Section 107, or conduct that would be protected by our First Amendment. Such judgments would have to be enforced by U.S. courts under the Convention as it now stands.

We are aware that the U.S. Delegation has taken the position that the above result would be no different under the draft convention than it is now, i.e., that U.S. courts would ordinarily enforce such judgments today. (And that is the reverse situation -- getting foreign courts to enforce our court judgments -- that is sought, in part, to be remedied.) Even conceding that probability, one cannot disregard the practical, and perhaps dispositive, effect of the treaty, if signed, on the ability of our courts to refuse enforcement. The only grounds then available for an American court to refuse would be Article 28(f). That provision allows a court of a member country to refuse to enforce a judgment if recognition of the judgment "would be manifestly incompatible with the is public policy" of the enforcing state. Surely Article 28(f) must be viewed as an extraordinary "out," lest the U.S. lose the benefit of the treaty in ensuring enforcement of our court judgments. As such, we suggest that it is far better to ensure that the convention does not put our courts in that extremely difficult situation.

These and numerous other problems that have been identified in the course of recent discussions about the draft convention have led to a debate over whether copyright cases and other intellectual property matters should be taken out of the draft convention altogether. ALA is not yet able to take a position on that issue at the moment, but it is clear that it would be in the public interest for the U.S. delegation to promote continued discussion of these issues among the various stakeholders.

Finally, there have been many issues raised on behalf of consumer protection groups which have studied the draft convention. Those concerns, which ALA shares, need not be addressed here, as they are being ably aired by others. As with the other issues discussed above, we believe that there must be continued public discussion, as has occurred over the past six months, in order for the U.S. community and the U.S. delegation to be fully informed.

Sincerely,

Frederick W. Weingarten, Director
ALA Office for Information Technology Policy
(202) 628-8421
Fax (202) 628-8424
rweingarten@alawash.org

Miriam M. Nisbet, Legislative Counsel
ALA Office of Government Relations
(202) 628-8410 or 800-941-8478
Fax (202) 628-8419
mnisbet@alawash.org

American Library Association
1301 Pennsylvania Ave. NW - # 403
Washington, D.C. 20004-1701