June 13, 2003

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

As you know, the library community has been following the development of this convention for several years because of the importance of jurisdictional matters, particularly those concerning contracts and intellectual property rights. This letter is written on behalf of the Association of American Law Libraries, the American Library Association, and the Association of Research Libraries. (A description of our associations is attached.) We appreciate your continuing efforts to provide information about the status of the convention, particularly over the past year as the draft has changed a great deal.

The current version of the convention would apply only to cases in which business and commercial parties have chosen a forum in their contract (so called “B2B contracts”); the convention would apply to both negotiated and non-negotiated contracts. The convention would provide for the enforceability of such “choice of court” agreements (including those governing copyrighted materials, including software) and the enforceability of judgments resulting from courts designated in such agreements.

Terms in non-negotiated contracts and licenses, which allow the licensor to designate in advance which court will hear the parties’ disputes, remain a significant and controversial issue for many groups, including libraries. Indeed, we see the issue of non-negotiated contracts – shrink-wrap or click-on agreements – implicated in the draft in several ways that concern us.

- Article 3 provides for the requirements of the “formal validity” of an agreement. We understand that Article 3 is supposedly “neutral” on the substantive validity of the underlying contracts (which is a matter of national law). However, the treaty would undoubtedly make
such agreements more easily enforceable, especially in certain courts (which might be the “chosen” forum to hear a contract dispute). Our concerns with enforcing terms in non-negotiated contracts that are contrary to public policy—such as those overriding fair use and even First Amendment rights—extend beyond the choice-of-court issues.

- Article 4 of the draft treaty provides that the designated forum or court—which is presumed to be the “exclusive” forum unless the agreement states otherwise (a reversal of the U.S. rule)—has jurisdiction to decide the case unless the court finds that the agreement is “null and void.”

- Similarly, Article 7 provides that the court called upon to enforce a judgment shall do so except in certain specified circumstances. One of those exceptions or “escape clauses” [Art. 7(1)(a)] is that the enforcing court finds that the “choice of court agreement was null and void.”

Though the Hague Project’s informal working group apparently intends “null and void” generally to mean “invalid,” it is entirely unclear how invalidity would be determined. For example, the working group has noted that some legal systems would closely examine a “click-wrap” agreement as to whether there was valid consent (and therefore whether a choice of court term should be validated), whereas other legal systems might consider such an agreement substantively valid but hold it “invalid in an appropriate case under some general rule (for injustice, unreasonableness, public policy or other).” Report of the Second Meeting of the Informal Working Group on the Judgments Project, Jan. 6-9, 2003, p. 9.

These escape clauses are simply unreliable and inadequate ways of addressing 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. It is conceivable that a U.S. court will feel obligated to enforce a judgment rendered by a foreign court designated in a choice of court agreement, when the U.S. court would have declined to exercise jurisdiction had it been designated because it would have concluded that the parties did not manifest assent to the choice of court agreement.

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. (Even now, for many libraries, especially smaller ones, non-negotiated licenses represent the bulk of their transactions.) The growing use of non-negotiated contracts presents serious issues for libraries, ones that could be greatly exacerbated by the draft Hague convention. Our concerns are shared by many other educational, research, and cultural organizations with whom we collaborate regularly.

In previous rounds of negotiations, the libraries have suggested a revision to Article 4 that would make it clear that such choice of court clauses in non-negotiated contracts are not enforceable where the agreement "has been obtained by an abuse of economic power or other unfair means." Alternatively, we have suggested that choice of court clauses in non-negotiated contracts with certain institutions should not be automatically enforced, through an exception 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.

Yet another option would be to exclude non-profit, non-commercial organizations (such as non-profit libraries, archives, and educational and other cultural institutions) from the Convention’s application altogether, such as has been done in Article 1(2) with consumers.

If none of these expressions of public policy are acceptable, then the convention as currently conceived is not acceptable. Despite all the hard work on the part of the U.S. delegation thus far, we would urge the U.S. delegation not to go forward in the Hague negotiations.

Sincerely,

Miriam Nisbet  
American Library Association  
Legislative Counsel  
1301 Pennsylvania Ave. NW  
Washington, D. C., 20004  
voice: 202-628-8410 or 800-941-8478  
fax: 202-628-8419  
mnisbet@alawash.org

Prudence S. Adler  
Associate Executive Director  
Association of Research Libraries  
21 Dupont Circle NW  
Washington, D.C. 20004  
voice: 202-296-2296  
fax:202-872-0884  
prue@arl.org

Robert Oakley  
Washington Affairs Representative  
American Association of Law Libraries  
111 G Street NW  
Washington, D. C. 20001  
voice: 202-662-9161  
fax: 202-662-9168  
oakley@law.georgetown.edu
The American Library Association (“ALA”) is a nonprofit educational organization of approximately 65,000 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.

The Association of Research Libraries (“ARL”) is a nonprofit association of 123 research libraries in North America. ARL’s members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service.

The American Association of Law Libraries (“AALL”) a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.