

February 22, 2000

Mr. J.H.A. van Loon  
Secretary General  
Hague Conference on Private International Law  
6 Scheveningseweg  
2517 KT The Hague  
The Netherlands

re: Preliminary Draft Hague Convention on  
Jurisdiction and the Enforcement of Civil  
Judgments

Dear Hans:

After careful consideration by concerned officials within the United States government and after full consultation with the entire U.S. delegation, I write to summarize some of the major U.S. concerns with the current status of the draft Hague Jurisdiction and Judgments project. In submitting this letter, we are mindful that since the U.S. proposal in 1992 there have been enormous human and financial resources devoted to this project by the Permanent Bureau of the Hague Conference, the other Conference members through their delegations, and the chairman, rapporteurs, and observers. While the substance of this letter should not come as a surprise, it is nonetheless not easy to write and, I fully recognize, not welcome to receive. To facilitate the dialogue with the Conference members that we hope these views will promote, we have prepared this letter in a format that is suitable for distribution to other delegations. We would be obliged if you could circulate it to all the member states and to the other delegations participating in the project.

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As you know, the United States originally proposed this project to the member states of the Hague Conference with certain key expectations and reservations. We devoted several years before the project was officially accepted on the Conference agenda discussing the substance of those

expectations and reservations with other Conference members and listening to their views. We were always prepared for a hard negotiation, but wanted there to be no misconceptions about some of our bottom lines. We went forward believing there was a reservoir of understanding and willingness to find creative solutions and mutual accommodation in order to achieve a worldwide convention.

Our delegation has also done a great deal during the last 8 years to educate our Bar about the project so there would be a broad understanding of the perspective from which we were negotiating a convention that would address jurisdiction at the same time as recognition and enforcement of judgments. This has never been a project for which there is an easily identified and vocal support group in the United States. Rather, it is a project that is about helping to lay the legal structure necessary to support the growth of global markets, promote sensible international legal cooperation, and provide for the general well-being of all our societies. It is a project that we have believed in and felt we could sell to the American public. As you know, we must achieve the active support of almost all elements of the governmental and legal community. Without that support for the kind of sweeping change to our domestic litigation system contemplated by this project it will not be possible to achieve Senate advice and consent to U.S. ratification, and enactment by Congress of essential federal implementing legislation.

Negotiations in the Hague were proceeding in a slow and deliberate, but reasonably positive, manner until the last two sessions of the Special Commission. Indeed, one year ago I gave a very positive speech at the New York University Symposium about the work accomplished to that time, and sketched the general directions I felt were essential to continue making progress toward a compromise text. The story of the last two sessions, however, has been quite different: an incipient tendency at the November 1998 session toward bloc voting in support of established positions became fully developed and overwhelmed the two 1999 sessions.

Following the October 1999 session of the Special Commission, which produced the first largely complete draft of the convention, the U.S. delegation entered into extensive domestic consultations. We conferred with a

broad array of federal government agencies with substantial international litigation interests, the American Trial Lawyers Association, the American Bar Association, the American Corporate Counsel Association, industry groups, and numerous other groups, scholars, and lawyers from the private sector. Our consultations included a special study session of the American Law Institute, which is probably this country's most prestigious elected body of judges, scholars, and practitioners.

The message we heard from all these groups is that the United States must carefully weigh the potential advantages to U.S. litigants of recognition and enforcement of U.S. judgments against the disadvantages of the convention. The disadvantages identified include the loss of traditional litigation practices and the imbalances and economic losses that are likely to be caused by inconsistent application of the resulting convention. These concerns are particularly acute because the project sweeps across a vast spectrum of potentially affected private and public litigation interests.

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Our assessment, based on these consultations, is that the project as currently embodied in the October 1999 preliminary draft convention stands no chance of being accepted in the United States. Moreover, our assessment is that the negotiating process so far demonstrates no foreseeable possibility for correcting what for us are fatal defects in approach, structure, and details of the text. In our view, there has not been adequate progress toward the creation of a draft convention that would represent a worldwide compromise among extremely different legal systems. It is difficult for us to be optimistic that there is adequate support for reaching such a goal.

As a result, the United States is opposed to scheduling a diplomatic conference this year or next. We believe it would be helpful to convene a stock-taking session where delegations can discuss in a frank, informal, and serious way whether there is the desire and political will to depart from the current text and seek new avenues for agreement. If there is such a will, then a much more open-ended schedule of work may be possible along with agreement on more consensus-based negotiating methods. Indeed, the informal experts sessions on electronic

commerce and intellectual property issues are examples of the kind of process that should be given time to explore critical issues before any decision can be made on a future diplomatic conference.

If, after a frank and constructive stock-taking and some experience with alternate work methods, it emerges that the gaps between our positions are found to be too wide to be bridged at this time, then we believe the project should be suspended. If it goes to completion in the near future, the great effort that has been put into achieving a worldwide convention will essentially be lost for a generation or longer. If the effort is suspended, however, this would leave open the possibility that the underlying views and dynamics could mature over time, with the hope that achieving a viable Hague convention would ultimately be possible. This would also be the safer course in relation to the revolutionary changes underway in our lives through the electronic medium, which we have not even begun to assess as part of this negotiation. During a suspension, technical discussions could continue on specific issues, major shifts in domestic and regional law and legal institutions could be completed and consolidated, and revolutionary changes in commercial practice in the area of electronic commerce could have time to mature and be evaluated.

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It is impossible to give an adequate point-by-point assessment of the preliminary draft convention because of the enormous scope and complexity of its provisions. Nevertheless, a summary of some of our more pronounced concerns is offered here as an illustration of the obstacles facing the current text from a U.S. perspective. It is important to stress, however, that this list is not intended to be comprehensive or final. The list does not, for example, attempt to address crucial concerns related to electronic commerce and intellectual property issues.

#### Structure

- Despite nearly eight years of discussion of the fundamental importance and need for a mixed convention, and agreement by vote that the Special Commission would work to that end, what we see in the present text is for all intents and

purposes a narrow double convention. The gray area seems to cover little more than antitrust and anticompetition lawsuits brought in the forum where the economic injury arose (see Article 10.2 below). Thus, the gray area as it stands does not assist in worldwide acceptability of the Convention, but rather creates another problem.

- None of the reasons repeatedly put forward by the U.S. delegation for departing from the Brussels scheme in a worldwide convention have changed. We believe that unless there is a clear, well-defined permitted area of jurisdiction that allows for growth and development in the future, the convention will not have the flexibility it needs to meet the requirements of a changing world. In our view there should be carefully defined bases of required jurisdiction reflecting all delegations' legal traditions, a limited list of well-known exorbitant grounds of jurisdiction, and a substantial permitted area that will provide the flexibility for the convention to adapt to changing circumstances.
- Regrettably, the current draft creates rigid principles and factors for prohibiting jurisdiction that will lead to excessive litigation and to conflict among parties over the resulting lack of uniformity of application. The result is likely to be substantially diminished support for the convention.
- This issue appears to be an insuperable barrier to the success of the convention.

#### Scope

- In attempting to evaluate from a domestic standpoint the potential benefits and disadvantages of the draft convention, the loss of certain jurisdictional practices is clear. Moreover, the cost of litigation under the convention in both the F1 and F2 courts is almost certainly going to be very high.

- Article 1 (Substantive Scope): Unfortunately, it is not easy to assure that the benefits of the convention will be available in practice for many potential plaintiffs. For example, the draft defines its scope of application with reference to "civil and commercial" and "administrative matters" -- terms for which we know there are vast differences of meaning and application in the domestic law of different states. Clarity here is essential; otherwise inconsistency of scope of application will seriously undermine confidence in the convention.
- We have found it difficult to engage delegations on government litigation issues. Considerable effort is still necessary to reach agreement on the precise scope of the types of government litigation that should be included in (and therefore benefit from) the convention, and provisions incorporated to memorialize that agreement.

#### Jurisdiction

- Article 3 (Defendant's Forum): The failure to define the fundamental concept of "habitual residence" means that there could be significant differences in application of the basic ground of jurisdiction at the defendant's forum. We believe this provision needs more careful consideration.
- Article 6 (Contracts): This is too narrow a ground of contract jurisdiction because it does not include cases of non-performance. A provision granting jurisdiction on the basis of substantial commercial activity of the defendant in the forum is needed to fill the gap.
- Article 7 (Consumer Contracts): This article repeats formulations from the Brussels Convention. These formulations have raised a storm of controversy in the electronic commerce world. It is an important illustration of the broader problems with electronic commerce

mentioned above to note the severe policy problems this article raises.

- Article 8 (Employment Contracts): This article, which is derived from the Brussels Convention, seems to us to be out of touch with modern employment practice, good economic policy, and evolving practices. It does not permit even sophisticated employees (e.g., senior and middle management of major multinationals from all Conference member states) to agree to a choice of forum.
- Article 9 (Branches [and Regular Commercial Activity]): We detected very little support for the bracketed language in the conference room. Yet even that language may not go far enough to satisfy our litigating Bar, which believes strongly in the basic notion that there should be jurisdiction over defendants at a minimum in any forum where a cause of action arises out of their commercial activity in that forum. Without this provision we are at a loss how we can convince the American private sector and the state and federal public sector that the white list of jurisdiction covers all bases of jurisdiction that are reasonable, sensible, and necessary. This seems to be an insuperable barrier to success of the convention.
- Article 10 (Torts): This article contains a jurisdictional standard (place of injury) that is very attractive to tort lawyers. However, there may be a risk that the foreseeability test would not survive U.S. Supreme Court review. A required ground of jurisdiction that provided jurisdiction in the forum where a tort arises out of the defendant's activity in that forum would ensure that there was no gap in coverage. We do not believe we can convince our Bar that there is adequate tort coverage in the required grounds of jurisdiction without such an activity basis of jurisdiction.
- Article 10.2, which excludes antitrust, consumer fraud, and anticompetition lawsuits from the white list, creates a powerful incentive for

those with interests in these areas of practice to oppose the convention. It ensures that they are subject to the black list prohibitions but are unable to benefit from the white list for purposes of enforcement of a major class of judgments. The resulting opposition of these interests is likely to be decisive unless such lawsuits are excluded altogether from the scope of the convention.

- Article 10.4 creates a jurisdictional limitation tied to the existence of damages in more than one state. This principle could put serious and unwarranted burdens on plaintiffs. While there may be some justification in having such a rule to moderate the reach of national defamation laws, we feel strongly that it is not appropriate to introduce it as a general principle.
- Article 12 (Exclusive Jurisdiction): The exclusive jurisdiction provisions in this article need careful attention and fresh thinking. They are likely to give rise to difficult cases, the resolution of which will not be uniform in different states. It is important to consider in this context whether the Hague Convention should attempt to regulate exclusive jurisdiction in the court of first instance, given the absence of a single supervising court. Perhaps there should be consideration whether the concerns embodied in this article could be better addressed through exceptions to the obligation to recognize and enforce judgments. Some of these issues will be addressed in the context of further work on intellectual property rights.
- Article 17 (Jurisdiction Based on National Law): As noted in the discussion on structure, the gray area jurisdiction fails to achieve what we consider to be its essential purpose and the cross-references to other articles are ambiguous and problematic. It has always been our view that one of the keys to a successful convention is the use of this article to create a meaningful and flexible gray area of jurisdiction.



- Article 18 (Prohibited Grounds of Jurisdiction): The provisions on prohibited jurisdiction are out of balance with what we believe should be the goal of this convention. This article ties the creation in paragraph 1 of a minimum legal standard for jurisdiction to a long illustrative list in paragraph 2 of both national jurisdictional practices and new factual elements. These examples are then declared not to meet the minimum standard individually and in combination. The result is a provision that is both broad and vague, and which creates uncertainty of application. It is likely to spawn a great deal of litigation in cases that would otherwise rest in the gray area and not benefit from recognition and enforcement. This will create strong disincentives to join the convention, and foreclose the ability of the gray area to permit national courts to adapt jurisdiction to a changing world.
- Article 18.3 (Human Rights Exception): A generally-acceptable provision that exempts existing civil suits to redress human rights violations from prohibition under Article 18 is necessary or there will be intense opposition to this convention in the United States.
- Article 19 (Authority of the Court Seised): The bracketed language represents an effort by many civil law delegations to change the practice of common law courts by which clerks enter default judgments. In our view, it is inappropriate to use this convention to attempt to change long-standing court procedures.
- Article 21 (Lis Pendens) & Article 22 (Declining Jurisdiction): The lis pendens and forum non conveniens provisions in articles 21 and 22 represent good faith attempts to create novel provisions to bridge legal traditions that do not know one or the other practice. Nevertheless, controversy over them could pose a substantial risk to the wide acceptability of the convention.

## Recognition and Enforcement

- We are concerned that there has not been an effective process for conducting a thorough and careful review of the articles of this section. This illustrates the more general need for such a deliberate review of the whole text of the convention after major areas of dispute are resolved.

## Other Provisions

- Article 37 (Relationship With Other Conventions): The relationship of this convention to other conventions is one of the most critical and potentially complex provisions of the text. Some preliminary discussions suggest that many delegations envision a Hague Convention that would defer to the Brussels Convention in so many instances that the point of a worldwide convention for non-EU countries could be substantially diminished. Such a result would not be acceptable. This issue needs careful attention and cannot be dealt with at the last minute.
- Article 41 (Federal Clause): This provision cannot simply repeat provisions from recent Hague conventions. Given that this convention would make sweeping changes in national litigation law and practice, the problems of federal states should be carefully rethought. For example, there should be more consideration of the possible effects of the existence of islands of non-convention practice within a federal state.

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I would like to reiterate the central point of this letter: that in the view of the U.S. delegation there is not enough common ground demonstrated in the current preliminary draft text to warrant scheduling and moving forward to a diplomatic conference. Nor do we sense that there is a strong enough interest in the creation of a worldwide convention for a controlling majority of delegations to depart substantially from the approach of Brussels-Lugano. At this point the gap seems too wide.

Perhaps time is required for countries to reassess the benefits of a successful global convention.

In short, we believe serious discussions about the future of the project are necessary. If those discussions, and the experience of alternative work methods in experts meetings on electronic commerce and intellectual property issues, do not reveal an adequate basis to be confident that a text representing a wide global consensus can be negotiated, then we believe the project should be suspended so that it can be resumed at a more propitious time.

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Please accept, Hans, the deep appreciation of the United States for the superb and tireless efforts that you and your staff are making to ensure the success of this project and the success of the work of the Hague Conference. I want to assure you that the concerns expressed here are not intended to detract in any way from those efforts or from U.S. commitment to the work of the Hague Conference.

With all best wishes,

Yours sincerely,

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