



## United States Council for International Business

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### BY FACSIMILE

Jeffrey D. Kovar, Esq.  
Private International Law  
U.S. Department of State  
Washington, DC

Dear Mr. Kovar,

I would like to convey to you the current views of the members of the United States Council for International Business (USCIB) on the Interim Text of the Draft Hague Convention on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial matters — "Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 - 20 June 2001" (Interim Text). As you know, USCIB has been actively engaged in representing the views of its members on the Draft Convention.

The complexity of the Interim Text, with its bracketed text and alternative and variant provisions, reflects the lack of consensus on many of the white listed jurisdictional provisions. This lack of consensus stems in large part from the evolving nature of the Internet and electronic commerce as a borderless medium for communicating and conducting business. Similarly, the jurisdictional rules relating to the Internet and electronic commerce within many of the negotiating states are evolving. Our members believe that it would be unwise, in many circumstances, to hinder the evolution of legal principles currently underway within the United States and other negotiating states and prematurely set rules that may not work, via an international convention.

As indicated in a letter from me to then Secretary Albright dated October 30, 2000, I set forth the concerns of our members regarding the white-listed jurisdictional provisions. I also indicated that USCIB conducted a survey on the Draft Convention among our membership and received responses from a representative cross-sectoral sample. Without exception, the responses indicated that the concerns with the jurisdictional provisions significantly outweigh any potential benefit that the draft Convention would confer.

Many of the concerns raised in our previous letters remain despite the attempts of the negotiators to propose possible solutions. In fact, in many circumstances, the proposed solutions will leave the application of the jurisdictional provisions open to varying interpretations, thereby undermining the very uniformity that the Convention is meant to provide. Such lack of uniformity also reduces legal certainty for businesses. Examples are presented below in the comment on particular articles. It is our understanding that the Ministers of the participating member states will meet in January 2002 to discuss the future of the negotiations and will debate three possible scenarios:

- Discontinue the negotiations and the project;
- Limit the scope of the convention to jurisdictional matters where there is a consensus; or
- Continue to pursue a broad convention and seek consensus on all of the existing jurisdictional provisions.

USCIB members believe that the time is not ripe for the conclusion of a treaty with the scope of the current Draft Convention. As indicated above, the Internet and electronic commerce, and the law applying to it, should be afforded the opportunity to evolve through case-by-case decision-making. The complex jurisdictional issues presented by the Internet and electronic commerce present new and different challenges for governments, courts, businesses and consumers. More time is needed to resolve these issues through the evolution of the law and best practices.

If the U.S. Government and negotiators continue to pursue the negotiations, USCIB strongly urges that you consider a significant streamlining of the white-listed jurisdictional provisions, limiting them to business-to-business contractual activities. We hold this view for reasons similar to those mentioned above:

- Many of the white-listed jurisdictional provisions outside of the business-to-business context present very complex issues, on which stakeholders have not arrived at a consensus;
- It is imperative that the resolution of these issues is achieved through a consensus process; and
- Jurisdictional rules for the Internet and electronic commerce are evolving in many negotiating states and an international convention is not the appropriate mechanism to resolve these complex issues during the evolutionary process.

Finally, in light of the views set forth above, we highlight below some of the concerns presented by specific provisions of the Interim Text.

Article 1: The Convention should not preclude the ability of parties to engage in on-line alternative dispute resolution mechanisms, such as the Uniform Dispute Resolution Process (UDRP). Currently, Article 1.3. states the Convention does not apply to "arbitration and proceedings relating thereto. . ." USCIB believes that arbitration agreements and arbitration awards, should be respected, including their binding nature when agreed upon between the parties.

Article 4: USCIB has long held the view that the freedom of contract is a fundamental and necessary principle of jurisdiction. Therefore, we support the strongest form of party autonomy in the business-to-business context.

Article 6: The application of Article 6 to websites is problematic. As noted above, the different alternatives and variants attempt to address the complexities of the Internet and electronic commerce. However, doing so undermines the uniformity and certainty that the Convention strives to offer. This potential for lack of uniformity exists in the following provisions:

- Alternative A Article 6.1.b. on Contracts provides for jurisdiction in the State where the defendant has directed frequent [and] [or] significant activity". The definition of "frequent" and "significant" in the context of e-commerce is not yet understood, and is likely to vary among signatory states.

- Variant 2 of Article 6.3. limits the application of Article 6 where "the defendant has taken reasonable steps to avoid entering into or performing an obligation in that state." What constitutes "reasonable steps" on the Internet is not yet understood, and signatory states may define reasonable steps differently.

In addition, in Variant 2 of Article 6.2. the attempt to define the term "activity" does not resolve the problems relating to the application of this article to websites. For example, does a passive website with product offerings constitute "promotion of a contract"?

Article 7: Consistent with the views stated above, USCIB believes that this article should be stricken because numerous meetings and the different alternatives and variants clearly indicate that there is no consensus on this article. Particular concerns raised by different alternatives and variants include:

- Article 7.2.a) and b) -- A business does not necessarily know if the consumer took steps necessary for the conclusion of the contract in another state or if the goods or services were supplied to the consumer while this consumer was present in the other State when the subject of the dispute is a downloaded product;
- Article 7.3. limits the definition of activity, and thereby jurisdiction, when an "other party demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in the State." What constitutes reasonable steps to avoid concluding contracts with consumers habitually resident in the State, especially on the Internet? In this area in particular, acts necessary to constitute "reasonable steps" may vary among signatory states.

Article 8: The question of whether a particular working arrangement creates the relationship of employee and employer cannot be currently answered consistently throughout the world. Could an independent contractor be considered an "employee" in some countries? It is possible that this Article would subject a company to jurisdiction in courts of countries that define that relationship much more broadly than others, and inconsistently with the expectations of the hiring company. The question is particularly relevant for companies that contract with, e.g., software developers who provide services electronically.

Article 9: The mere presence of a website could be deemed to constitute a branch or "regular commercial activity". This would create significant uncertainty for businesses, and if it became a reality, would create a significant obstacle to businesses engaging in electronic commerce, especially small and medium sized enterprises, which may not expect to be haled into court in a foreign country.

Article 10: This Article raises complex issues in the context of e-commerce, including: (1) the meaning of "act" and "effect," (2) where the injury "arose" or "may arise;" (3) the concept of "foreseeability," and (4) the potential for inappropriate jurisdiction and enforcement of judgments against online service providers and other stakeholders, especially in light of variations in national definitions of particular torts, which will need to be discussed fully. These issues are particularly sensitive and have only begun to be addressed and considered in the past year and a half. Therefore, USCIB recommends that this Article be deleted from the Convention.

Article 12: Consistent with the recommendation to limit the jurisdictional provisions to business-to-business contracts, USCIB recommends that Article 12 be deleted.

Article 13: Given our call for the deletion of Article 10, and our strong support of party autonomy in business-to-business contracting, it is likely that Article 13 should be deleted as well.

Article 28: There are several questions relating to Article 28: What would be a sufficient public policy basis for not enforcing a judgment? How will the different views of signatories on this issue affect the application of this article in a global context?

Article 37: USCIB does not support carveouts for regional conventions. Such regional carveouts would undermine a global solution. Consequently, Article 37 should be deleted.

Finally, if the ultimate version of the Convention applies to consumers, we urge that "consumer" be defined narrowly, so as not to include entities such as non-profit corporations.

We appreciate having the opportunity to provide comments on the Interim Text and look forward to a continued productive exchange of ideas with the U.S. government delegation.

Sincerely,

*Thomas Niles/sd*

Thomas M.T. Niles

cc: Eleanor Lewis, Department of Commerce  
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