

August 20, 2007

Mr. David Stewart  
Office of Legal Advisor  
U.S. Department of State  
2430 E Street, NW  
Washington, DC 20037

Re: Hague Convention on Exclusive Choice of Court Agreements

Dear Mr. Stewart:

During the course of the negotiations on the Hague Convention on Exclusive Choice of Court Agreements, many of the undersigned entities expressed concern to the U.S. delegation that the scope of the Convention included choice of court provisions in non-negotiated agreements. Such non-negotiated agreements are becoming increasingly prevalent as ever more information products, such as software, databases, and websites, are made available subject to shrink-wrap and click-on licenses. In many instances, there is unequal bargaining strength between the parties to such “agreements.” Often, terms are not displayed to the licensee until after he has purchased the product and agreed to the terms – for example, by opening the product’s packaging. Furthermore, the terms contained in these unilateral agreements may be contrary to what the licensee would reasonably expect. For example, the agreement may require a licensee to waive his fair use privilege under 17 U.S.C. § 107.

Compounding the problem of including non-negotiated agreements within the scope the Convention is that the Convention sets too ambiguous a standard for a court to decline to enforce a forum selection clause. Article 7 of the Convention permits a court in another forum to exercise jurisdiction only when “giving effect to the agreement would lead to a very serious injustice or would be manifestly contrary to fundamental principles of public policy.” Similarly, Article 9 would allow a court to decline enforcement of a foreign judgment when “recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.”

Significantly, these standards could be interpreted as differing from those in current U.S. law. Under *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) and *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594-95 (1991), a forum selection clause will not be enforced if it is 1) unreasonable; 2) unjust; 3) obtained by fraud; 4) obtained by overreaching; or 5) in contravention to a strong public policy of the forum.

Given the significant risk of over-reaching, unreasonableness, and unfairness in contracts formed without a meaningful opportunity to negotiate, we request that legislation implementing the Convention, if any, exclude non-negotiated agreements. Alternatively, we request that implementing legislation contain “escape clauses” consistent with

*Bremen* and *Carnival Cruise* to ensure that U.S. courts have the appropriate discretion to decline enforcement of foreign judgments.

We look forward to working with you on this matter.

Respectfully submitted,

American Association of Law Libraries  
Americans For Fair Electronic Commerce Transactions  
Association of Research Libraries  
Medical Library Association  
Special Libraries Association