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### **The draft Hague Convention on Jurisdiction and Enforcement of Judgments: what does it mean for libraries?**

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#### ***Abstract:***

*The draft Hague Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Cases would create jurisdictional rules governing international lawsuits and provide for recognition and enforcement of judgments by the courts of Member States. Member States would be required to recognize and enforce judgments covered by the Convention if the jurisdiction in the court rendering the judgment is founded on one of the bases of jurisdiction required by the Convention. Discussions on the draft Convention began in 1992, and various meetings have been held since then.*

*The current text of the draft Convention was provisionally adopted by the Special Commission on June 18, 1999, and then was revised at a meeting held at The Hague from October 25-30, 1999. The first part of a Diplomatic Conference on the draft Convention is being held in June 2001, and the second part will be held in 2002.*

*The library community has a huge stake in the outcome of the deliberations on jurisdictional matters, particularly those concerning contracts and intellectual property rights. ALA has been working with the U.S. delegation to bring forward issues that could adversely affect libraries and to consider changes to the current draft.*

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### **Contracts and "choice of forum" clauses**

Our libraries 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 will undoubtedly be affected by the international rules to which the U.S. agrees regarding where suits may be brought, which country's law applies and whether even onerous terms in non-negotiated contracts will be enforced.

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.

ALA has suggested to the U.S. delegation to the Hague Conference 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. If such an express embodiment of public policy is not acceptable, then we have urged 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."

### **Exposure to alleged infringement by users**

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.

The U.S. Delegation has taken the position that the above result would be no different under the draft Convention than it is now, that is, U.S. courts would ordinarily enforce such judgments today. (And it is the reverse situation -- getting foreign courts to enforce our court judgments -- that is sought, in part, to be remedied.) Even conceding that probability, we believe that 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) of the Convention. 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. 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, 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 has not yet taken a position on that issue, 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.

### **Other issues and other stakeholders**

There have been many issues raised on behalf of consumer protection groups which have studied the draft Convention. See, for example, <http://www.cptech.org/ecom/jurisdiction/hague.html>. Other stakeholders that have been participating in these meetings are the technology industry, including internet service providers (ISPs) and the copyright content industry.

ISPs, for example, have expressed concern that the current draft treaty could accelerate a trend of foreign countries claiming jurisdiction over U.S. web sites, such as in the recent controversial case involving Yahoo! In that case, a French court ordered Yahoo! to prevent web users in France from accessing a site containing racist materials. Under the draft treaty, a U.S. court could refuse to enforce the French judgment only if the American court found that enforcement would violate public policy (such as

embodied in our First Amendment). Other countries who were signatories of the treaty, however, might well enforce the French court judgment.

### **Future developments**

As of this writing (June 8, 2001), the U.S. Delegation is participating in the first part of a Diplomatic Conference being held in The Hague beginning on June 6, 2001. A new draft of the Convention is expected to emerge from that meeting. That draft, which we hope will be available in time for the IFLA General Conference in August 2001, will then need to be reviewed and analyzed by the affected communities in the U.S. and the other member States. As with the issues discussed above and others as well, 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.