CCBE
eprésentant les avocats d'Europe
Representing Europe's lawyers

CCBE COMMENTS ON DRAFT CONVENTION ON EXCLUSIVE CHOICE OF LAW AGREEMENTS

1. INTRODUCTION

The Council of Bars and Law Societies of the European Union (CCBE) is the representative body of over 700,000 European lawyers through its member bars and law societies. In addition to membership from EU bars, it has also observer representatives from a further 13 European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

This paper is the response of the CCBE to the draft convention on exclusive choice of law agreements which has been prepared by the Hague conference on private international law. It has been prepared by one of the experts of the CCBE working group which has issued comments both on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation and also on the proposal for a regulation on the law applicable to non-contractual obligations.

2. COMMENTS ON DRAFT CONVENTION

▪ General Comments

The CCBE welcomes this document which appears well drafted and well thought out.

One of the central issues with regard to the enforcement of decisions in private international law is the degree of discretion to be afforded to the court to recognise and enforce judgments originating in another jurisdiction. The draft convention is understandably cautious in this respect (see comments below in relation to Article 7), and permits a greater degree of Defendant 'safeguard', than for example the Brussels Regulation. This undoubtedly reflects the greater geographical and jurisdictional scope of the Hague Convention. The obvious danger here is that the effectiveness of the convention may be limited in certain key respects. These issues are discussed more fully in the comments below.

- **Article 1 paragraph 5**

The CCBE welcomes the incorporation of the principle that enforcement should not be available where there is a breach of an agreement for the settlement of disputes by arbitration. It may be questionable whether the provision is needed, given that the draft convention only provides for enforcement of judgments following an exclusive choice of law agreement. If the arbitration agreement is effective, then there can be no question of enforcement under the convention, since an arbitration agreement and an exclusive choice of court agreement cannot be both equally effective.

- **Article 2 paragraph 1**

The CCBE believes that the drafting is slightly confusing. Article 2 paragraph 1 appears to provide that the exclusive choice of court agreement must itself provide for exclusivity where Article 2 paragraph 2 however provides that there will be an assumption of exclusivity unless otherwise provided, which must mean that the agreement itself need not expressly provide for exclusivity. The CCBE would then suggest the last ten words of 2 paragraph 1 to be omitted to avoid any confusion.

- **Article 2 paragraph 3**

This Article omits agreements based on the particular practice of the parties, and might be therefore too restrictive. It may be preferable for a provision such as Article 23(b) of the Brussels Regulation to be included ("…in a form which accords with the practices which the parties have established between themselves").

- **Article 2 paragraph 4**

The CCBE welcomes this provision which reflects the case law of the Court of Justice in respect of the Brussels Convention.

- **Article 3 paragraph 1**

The broad definition of the term "judgment" is welcome.

- **Article 3 paragraph 2**

The CCBE wonders if it is assumed in this paragraph that contracting states will apply their own rules to determine domicile where e.g. statutory seat and principal place of business are in different States.

- **Article 4 paragraph 2**

The CCBE considers that this is a fundamental provision which appears to disallow the principle prevailing in some common law countries that courts may decline jurisdiction in

certain circumstances (*forum non conveniens*). It might be necessary to clarify that it should be subject to Article 14 (see comments below).

- **Article 4 paragraph 4**

The CCBE assumes that the purpose of this Article is to ensure that the convention only applies to legal relationships spanning contracting states. The effect presumably is that domestic rules on jurisdiction will apply notwithstanding an exclusive choice of court agreement. There appears to be a slight ambiguity in the bracketed wording: is it the intention that an exclusive connection with the State is effective to prevent application of Article 4, or would Article 4 not apply even if there is a connection both with the State concerned and with other States? Some clarification may be needed.

- **Article 5 paragraph a**

The CCBE believes that the court seised should not be entitled to assume jurisdiction where the determination of validity is pending in the chosen court; in other words something similar to the *litis pendens* rule in the Brussels Regulation should apply. This assumes that the chosen court has jurisdiction to rule on the validity of the choice of law agreement. This is an issue which perhaps would need to be dealt with in the convention.

- **Article 5 paragraph c**

This allows a court other than the court chosen in the exclusive choice of law agreement to take jurisdiction 'if giving effect to the agreement would lead to a very serious injustice'. The CCBE considers that this provision is objectionable on two grounds. First, it seriously detracts from the freedom of contract philosophy underlying the convention. Second, a degree of legal uncertainty is bound to arise in respect of the meaning of 'very serious injustice'. This terms is clearly not a matter of public policy (a public policy derogation is given in the alternative), and is inherently open to variable interpretation which may undermine confidence in the effectiveness and consistency of the convention. It is questionable whether sensible legal distinctions could be made between mere serious injustices, which would still require a court to give effect to the choice of law agreement, and very serious injustices which would not.

- **Article 7 paragraph 1 (a)**

The CCBE believes that this Article appears to allow a defence to enforcement on the grounds that, notwithstanding the court selected in an exclusive choice of law agreement has given judgment, that agreement was in fact null and void 'unless the chosen court has determined that the agreement is valid'. (Note that this validity stipulation is not included in the equivalent provision in Article 5(a)). This emphasises one of the characteristic features of the draft convention – enforceability is not general, but is predicated entirely on a legally valid choice of court agreement. It begs the question however as whether a defendant is entitled to plead the invalidity of the agreement at enforcement if this matter

has not been considered at judgment in the chosen court (e.g. because the chosen court has assumed the validity of the agreement without making a legal determination to that effect).

- **Article 7 paragraph 1 (c)**

This provision appears to differ from the equivalent provision in the Brussels Regulation in that it does not allow this defence to be defeated if the defendant could have challenged notification but failed to do so. In other words, it is felt that the defendant should not be permitted to decline to contest notification in respect of the original judgment but should raise notification, as a defence, in the enforcement proceedings. The CCBE would recommend to include such a sensible provision.

- **Article 7 paragraph 1 (e)**

The CCBE believes that the wording set out in the draft is preferable to that suggested in the footnotes as a possible alternative. It is surely sufficient for the court in question to apply general principles of procedural fairness and not look for particular instances of injustice notwithstanding that the procedural rules in both jurisdictions have been respected.

In general, it is believed that there should be a defence to enforcement on the basis of irreconcilable judgments, and this appears as being a significant omission from this part of the draft convention.

- **Article 7 paragraph 2**

There appears to be a drafting error here: the draft refers to the findings of fact on which the court of origin based its 'jurisdiction' where it should read 'judgment'. The distinction is quite important since discretion for the requested court to look into the substance of the judgment would seriously undermine the effectiveness of the convention. The court should however equally be bound by findings of fact in relation to the choice of court agreement.

- **Article 10 paragraph 2 (a)**

There is an obvious tension in this paragraph with the general principle that the enforcing court should not look into the substance of a judgment. This provision, which is probably principally aimed at jury awards of damages, should be without prejudice to Article 7(2) – in other words factual issues should not be reopened when assessing the basis of the damages award.

- **Article 14**

This appears to allow for the possibility of the application of the *forum non conveniens* rule in common law jurisdictions. As such it achieves compromise between civil and common law approaches at the cost of seriously impairing the consistency of the convention. The CCBE believes that it will introduce a degree of uncertainty as to the effectiveness of the choice of law agreements in those jurisdictions which take advantage of this Article.

3. CONCLUSION

The CCBE welcomes the opportunity given by the European Commission at this stage of the negotiations to provide comments on this draft convention and would be happy to have further opportunity to comment.

20 April 2004.