

Choice of Court - Alert re German Bar Association
Courtesy translation by the Permanent Bureau

The ratification of the Convention is to be welcomed, as well as the hereto related unification of the law on choice of court agreements and rules on recognition and enforcement of foreign judgments issued by a court designated in an exclusive choice of court agreement.

In view of the expected ratification by the United States of America, the Convention could be of significant practical importance in the future, as under the Convention, European parties would have the possibility to exclude the jurisdiction of U.S. courts in civil and commercial disputes by entering into exclusive choice of court agreements. Given U.S. case-law relating to damages, viewed with criticism in Europe, a substantial interest could exist with regard to this possibility, in particular in relation with the U.S.

The possibility to restrict or extend the scope of the Convention should be pursued in the following way:

A declaration under article 19, pursuant to which courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute, should not be made. A choice of the exclusive jurisdiction of the courts of a State which has, except for the location of the chosen court, no connection with the parties or the dispute is likely to be rare. This situation makes the most sense if the parties also agree on the law of that State as being applicable. It is then questionable whether in such a case the choice of law already establishes a connection between that State and the dispute, so that the possibility of refusal would in any case no longer exist. Even if one does not see it that way, from a German perspective, the possibility of a declaration should not be used. Rather, the accessibility of German courts even for cases which are not otherwise connected to Germany reflects the spirit of the "Law - Made in Germany" initiative and the efforts to promote the attractiveness of German law and the possibilities of enforcement provided by the German legal system. Cost considerations are unlikely to have a significant impact. Therefore, no use should be made of the possibility of such a declaration.

The possibility of a declaration limiting recognition and enforcement under Article 20 should be used. This is to prevent decisions of the courts of another State being recognised and enforced in a purely domestic or intra-community dispute.

The need to exclude specific matters on the basis of Article 21 of the Convention is not apparent.

Finally, a declaration pursuant to Article 22 of the Convention extending the scope of the Convention as to non-exclusive choice of court agreements should be made. Considerations for not applying the Convention to simple choice of court agreements are not apparent. The declaration would only be effective if it is made both by the State of the chosen court and by the State where recognition and enforcement is sought.