



United States Department of State

Washington, D.C. 20520

September 12, 2003

Mike Pickens, President
National Association of
Insurance Commissioners
2301 McGee St., Suite 800
Kansas City, MO 64108-2662

re: Recognition and Enforcement of Foreign Judgments

Dear Mr. Pickens:

Thank you for your letter informing me of your interest in the enforceability of U.S. judgments in foreign jurisdictions and how that might relate to your consideration of proposals to lower the collateral requirements for non-U.S. reinsurers. You have asked for my thoughts regarding the Department of State's position on several specific issues related to the ongoing project to negotiate a worldwide convention on the recognition and enforcement of foreign judgments. I will endeavor to answer your specific questions below:

WHAT IS THE CURRENT STATE OF THE LAW WITH RESPECT TO ENFORCEMENT OF U.S. JUDGMENTS IN FOREIGN JURISDICTIONS?

Our best information is that law and practice in most foreign countries is not generally favorable to the prompt, predictable enforcement of U.S. civil judgments. Law and practice vary widely. In a few countries, notably Canada, conditions are relatively favorable, particularly for money judgments in commercial matters. But in some of these countries there may be a host of technical obstacles for the unwary litigant. In a substantial number of other countries the written law appears to be more favorable than the actual practice. Finally, in many countries enforcement is not possible absent a treaty.

WHAT IS THE PURPOSE OF THE PROPOSED CONVENTION ON FOREIGN JUDGMENTS?

The purpose of the proposed convention on jurisdiction and the recognition and enforcement of foreign judgments is to level the international playing field for civil judgments. State law and practice in the U.S. is the most open in the world to the enforcement of foreign judgments. We believe that if other countries were to provide the same level of comity to U.S. and other foreign judgments there would be a substantial benefit to international trade and commerce.

WHY DOES THE U.S. VIEW THESE NEGOTIATIONS AS IMPORTANT?

The growth in international trade and investment has not been matched by developments in judicial dispute resolution. The Department of State and other U.S. Government agencies regularly receive inquiries from American attorneys and businesses seeking advice about how to pursue their legal rights with foreign parties. To achieve a convention that would provide a common legal structure and rules for the enforcement of judgments in the courts of our major trading partners would be of significant benefit for judgment-holders around the world. The Department of State has been seeking such a convention off and on for nearly 40 years.

WHICH FACTORS AFFECTING THE ENFORCEABILITY OF JUDGMENTS DO YOU ANTICIPATE MAY BE RESOLVED BY THE CONVENTION? ARE THERE OTHER FACTORS THAT MAY REMAIN UNRESOLVED?

The current negotiations have been underway more than a decade at the Hague Conference on Private International Law. The original, broad-scale project was recently set aside after it became clear that consensus could not be reached on many of the difficult issues raised. A new effort is underway to negotiate a narrower convention -- one focused on the enforcement of choice of forum agreements in commercial contracts and the enforcement of resulting judgments. This narrower project holds the promise of developing a convention that would be a companion to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards.

WHAT IS THE EXPECTED TIMEFRAME FOR DEVELOPMENT AND ADOPTION OF THE PROPOSED CONVENTION?

It is very hard to judge how long a negotiation might take. An intergovernmental negotiation is scheduled for the first week of December to consider the new choice-of-court text that was produced by an informal working group in the last year. Progress in that session will give a better sense of the overall timeframe.

WHICH JURISDICTIONS ARE PARTICIPATING IN THE NEGOTIATIONS?

There are over 60 member states of the Hague Conference, which includes virtually all major U.S. trading partners.

ARE THERE PUBLIC POLICY CONCERNS YOU BELIEVE U.S. INSURANCE REGULATORS SHOULD CONSIDER AS WE EVALUATE PROPOSALS TO REDUCE THE COLLATERAL REQUIRED OF FOREIGN COMPANIES TO SUPPORT THEIR U.S. OBLIGATIONS?

In the several decades in which the Department has been engaged in the pursuit of an enforcement of judgments convention -- both at the multilateral and the bilateral level -- we have experienced a significant amount of suspicion, prejudice, and hostility toward the U.S. legal system from our foreign counterparts. This has expressed itself in efforts to limit the obligation to enforce U.S. judgments and efforts to change U.S. rules of personal and subject-matter jurisdiction. We have found that U.S. attempts to generate good will and to lead by example by establishing an extremely liberal domestic enforcement regime through state legislation and federal and state judicial precedent have not provided much benefit in these negotiations. In fact, our generous approach through unilateral action may have hindered our negotiating position by removing any significant leverage to encourage our foreign colleagues to compromise.

DO YOU FORESEE ANY SPECIAL CIRCUMSTANCES ARISING WITH REGARD TO INSURANCE CASES IN THE NEGOTIATIONS?

European Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is in force for the European Community (except Denmark), has special rules related to insurance contracts that permit an insured to sue in its home jurisdiction in many instances in spite of a choice of forum agreement specifying another forum. While we have had no official contacts on this point, our impression is that the EC countries may seek special dispensation for these rules in the upcoming negotiations. I attach a brief memorandum from Professor Ronald Brand of the University of Pittsburgh Law School addressing the EC regulation, which you may find helpful.

I hope this brief recitation will be of use to you. Please do not hesitate to contact me again if you wish additional information. We would be pleased if members of your organization and other players in the insurance industry would coordinate actively with us as we prepare the U.S. delegation for the upcoming negotiations in the Hague. I would be happy to provide more information on how you may participate.

Yours Sincerely,

Jeffrey D. Kovar
Assistant Legal Adviser
for Private International Law

Attachment:
As stated