

A Different Challenge for the ALI: Herein of Foreign Country Judgments, an Interuational Treaty, and an American Statute[†]

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While the debate goes on about a new restatement of conflict of laws—and indeed about the restatement movement generally¹—we want to take the opportunity to describe a somewhat different kind of project recently undertaken by the American Law Institute (“ALI”) in which we will function as co-Reporters. We do not pretend that our project will take the place of restatements; we do believe that our project will interest anyone who is fascinated with conflict of laws, federalism, and the intersection of private and public international law.

I. THE PROJECT

Our project concerns the preparation of a draft (or possibly two drafts) of a federal statute concerning the recognition and enforcement of foreign country judgments.² The impetus for this project was not a sudden realization that federal law concerning recognition and enforcement of foreign country judgments would be an attractive idea.³ The catalyst was the current negotiation at the Hague Conference on Private International Law looking to the conclusion of a worldwide convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments.⁴ If a convention is concluded that is attractive to the United States, federal legislation would presumably be desirable to assure its implementation as United States law, and to sort out the inevitable problems of federalism that the Convention would pose. The ALI, with the encouragement of the U.S. State Department, has undertaken to help to shape such a statute. Even should the effort at The Hague fall short—which as of

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1. See, e.g., *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L. REV. 573 (1998).

2. See Andreas F. Lowenfeld & Linda J. Silberman, PROPOSAL FOR PROJECT ON JURISDICTION AND JUDGMENTS CONVENTION, Submitted for Discussion on May 20, 1999, at the Seventy-Sixth Annual Meeting of the American Law Institute.

3. See, e.g., Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 127-31 (1997).

4. The initiative for such a multilateral treaty at the Hague Conference was that of the United States. See generally Peter H. Pfund, *The Project of the Hague Conference on Private International Law To Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7 (1998); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994).

year-end 1999 is not at all out of the question—the project would continue, focused on a proposal for a federal statute imposing uniform standards of recognition and enforcement of foreign country judgments.

In directing its efforts to a proposed federal statute concerning foreign country judgments, the ALI puts itself in a position to change an important aspect of the law of recognition and enforcement. As we have found out in several contexts, it is virtually impossible to explain to French or Dutch or Japanese lawyers that a judgment originating in their country may be enforceable in New York but not in New Jersey, in Oklahoma but not in Arkansas. That is, however, the case. Recognition and enforcement of foreign country judgments in the United States is generally a matter of state law—regardless of whether enforcement is sought in state or federal court.⁵ And even though the adoption of the Uniform Foreign Money-Judgments Recognition Act⁶ by a significant number of states in recent years has diminished the degree of disuniformity of American recognition practice,⁷ a number of important substantive differences remain.

Several examples of such differences may be cited. The majority American rule, consistent with the Uniform Act and the *Restatement (Third) of the Foreign Relations Law of the United States*, rejects any requirement of reciprocity—that is, imposing as a condition for enforcement (and perhaps for recognition) of the judgment of Country *X* evidence that the courts of Country *X* would enforce the judgment of an American court if the facts were reversed.⁸ In several states of the United States, however, reciprocity has been retained as either a mandatory or a discretionary ground on which to refuse enforcement and recognition.⁹ Whatever the correct view

5. The rule is not absolute. For instance, if an issue of recognition of a foreign country judgment is asserted as a defense to a federal claim, federal rather than state law may be used. Likewise, claims in admiralty or under a federal statute or treaty would not rely on state law of recognition, but would probably seek to discover or formulate some kind of federal rule. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. a (1987) [hereinafter RESTATEMENT (THIRD)].

6. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (Supp. 1998). As of January 2000, the following jurisdictions had adopted the Uniform Act, some with minor variations: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virgin Islands, Virginia, and Washington.

7. Many (but not all) states apply the general principles of the Uniform Act even though they have not formally adopted the Act. *See* Andreas F. Lowenfeld & Linda J. Silberman, *United States of America*, in ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE (Charles Platto & William G. Horton eds., 2d ed. 1993); *see also* RESTATEMENT (THIRD), *supra* note 5, §§ 481-482 & reporters' notes.

8. Actually, the classic statement of the reciprocity rule, in the famous case of *Hilton v. Guyot*, is more limited, in that it explicitly denies enforcement only in the case where the judgment rendered in the foreign state is in favor of a citizen of that state against a noncitizen of that state. 159 U.S. 113, 205-06 (1895).

9. For discretionary application of the reciprocity requirement under the Uniform Act, *see*, for example, FLA. STAT. ANN. § 55.605(a) (West Supp. 2000); IDAHO CODE § 10-1404 (1998); OHIO REV. CODE ANN. § 2329.91 (West Baldwin 1998); TEX. CIV. PRAC. & REM. CODE ANN. § 36.004 (West 1997). *See also* *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d

of the reciprocity issue, we believe that the standard should be uniform throughout the nation. Adoption by the United States of a multilateral convention on judgments and the accompanying implementing legislation would, of course, result in a national standard applicable to judgments of countries that have also adopted the proposed Hague Convention. Even in the absence of a convention, or with respect to judgments of countries that do not join the convention, a federal statute could establish a uniform national standard on whether or not to require reciprocity.

A second aspect of enforcement practice that lacks uniformity and creates uncertainty relates to the jurisdictional grounds on which the foreign country judgment is founded. Lack of jurisdiction in the rendering court is, of course, a defense everywhere to recognition and enforcement of foreign judgments.¹⁰ But, at least at the margin, the standards by which to assess a foreign court's jurisdiction are far from clear. The Uniform Act lists a number of jurisdictional bases which are to be accepted, including personal service in the forum state, voluntary appearance by the defendant, prior agreement to the forum, domicile of an individual or principal place of business of a corporation in the forum state, a claim arising out of a motor vehicle or airplane accident in the forum state, and a claim arising out of business done by defendant through a business office in that state.¹¹ In addition, the Uniform Act provides that courts *may* recognize other bases of jurisdiction.¹² Thus, even among states of the United States that have adopted the Uniform Act, the jurisdictional grounds on which a foreign judgment will be accepted may well differ.¹³ Again, a uniform federal standard for those jurisdictional grounds that will be recognized for enforcement purposes would promote certainty and predictability.

1000, 1007 (5th Cir. 1990) (applying Texas law and refusing to recognize an Abu Dhabi judgment in favor of French bank on the ground that there was no assurance of reciprocity for U.S. judgments). Massachusetts and Georgia appear to have a mandatory reciprocity requirement under the Uniform Act. *See* MASS. ANN. LAWS ch. 235, § 23A (Law. Co-op. 1986); GA. CODE ANN. § 9-12-132 (1993).

10. *See* RESTATEMENT (THIRD), *supra* note 5, § 482(1)(b); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4, 13 U.L.A. 263 (1986).

11. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 5(a), 13 U.L.A. 263 (1986).

12. *Id.* § 5(b).

13. It is generally thought that a foreign judgment based on jurisdictional grounds consistent with U.S. jurisdictional standards will be enforced. *See, e.g.*, *Bank of Montreal v. Kough*, 430 F. Supp. 1243 (N.D. Cal. 1977) (enforcing a Canadian judgment rendered against a defendant who had breached a contract of guarantee with Canadian bank, where defendant was engaged in business in British Columbia, was a director and shareholder of a company operating there, and had signed a contract in British Columbia specifically related to dealings there), *aff'd*, 612 F.2d 467 (9th Cir. 1980). *But cf.* *Siedler v. Jacobson*, 383 N.Y.S.2d 833, 834 (App. Div. 1976) (refusing to enforce a default judgment of an Austrian court against an American defendant, where jurisdiction of the rendering court was based on defendant's purchase of antique porcelain during a one-week visit to Vienna). The court held that although New York's internal standard for jurisdiction was equally broad (claims arising from transaction of business within the state), it was not the intention to extend recognition of foreign country judgments to such "liberal" bases of jurisdiction.

Such a federal standard would probably emerge if a worldwide convention is accepted;¹⁴ even without the convention, a uniform federal standard of jurisdiction for enforcement and recognition could be adopted in a federal statute.

II. THE OUTLINES OF THE CONVENTION

Many but not all of the provisions of the proposed convention have been developed at this point;¹⁵ in any event, they are sufficiently clear to foresee the needs and options for implementing legislation.¹⁶ The Convention presently under discussion is to some extent modeled on the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters¹⁷ in force among the members of the European Community. Among notable differences, however, the proposed Hague Convention would be open to a much wider number of States, and there would be no final authority comparable to the European Court of Justice to oversee its operation. The point of departure is that civil judgments rendered in one treaty State against persons domiciled in another treaty State will be recognized in all other treaty States, subject to a narrow list of defenses, provided the court that rendered the judgment had jurisdiction over the defendant according to an agreed standard. Unlike the Full Faith and Credit Clause of the United States Constitution,¹⁸ the proposed Hague Convention would make elaborate provision for jurisdiction of courts,¹⁹ as well as for recognition and enforcement of judgments.

The negotiations at The Hague are complex and must harmonize different sets of conflicting interests. Because foreign judgments are recognized and enforced to a much greater extent in the United States than judgments rendered in the United States

14. The proposed Hague Convention itself might create the basis for a federal common law rule to be developed by the courts. See Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility*, 61 ALB. L. REV. 1207, 1224-35 (1998). We believe it would be more desirable to specify such a standard in implementing legislation.

15. The latest Convention Draft was adopted at the October session of the Special Commission. The original plan to hold a final diplomatic conference in October 2000 may need to be revised, in light of the many controversial issues that have arisen.

16. Two journals have published symposia on the proposed Hague Convention. See Symposium, "Could a Treaty Trump Supreme Court Jurisdictional Doctrine?", 61 ALB. L. REV. 1159 (1998); Symposium, *Enforcing Judgments Abroad: The Global Challenge*, 24 BROOK. J. INT'L L. I (1998).

17. Sept. 27, 1968, 1990 O.J. (C 189) 2 (consolidated) [hereinafter Brussels Convention]. The Brussels Convention is in effect for the 12 states that were members of the European Community (European Union) prior to January 1, 1995. A parallel Convention, the Lugano Convention, adopts the principles of the Brussels Convention for the European Free Trade Association countries but without opportunity for recourse to the European Court of Justice. See 1988 O.J. (L 319) 9.

18. U.S. CONST. art. IV, § 1.

19. The direct regulation of jurisdiction is one major difference between this proposed Hague Convention and an earlier Hague Convention that proved to be unsuccessful. See Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 249 (having only a few signatories and no practical effect). See generally von Mehren, *supra* note 4, at 271, 274-82.

are recognized and enforced abroad,²⁰ the interest of the United States is in gaining an increased commitment from other countries to enforce American judgments and in limiting many of the objections that foreign countries have to recognizing and enforcing U.S. judgments.²¹ For other countries, whose judgments are already enforced here in the absence of a treaty and without any requirement of reciprocity, the primary interest in a convention is in establishing a narrower scope of jurisdictional authority over their domiciliaries.²² Whether or not the appropriate compromises can be reached internationally and whether they will be acceptable internally remain to be seen.²³ Both for the United States and for most other countries, a judgments convention would be a symbol of closer cooperation and harmonization in the field of law.

The present preliminary draft of the proposed Hague Convention²⁴ attempts to identify universally acceptable grounds for jurisdiction and possibly to mandate their use. The bases for “general jurisdiction,” that is, regardless of the claim being asserted, would include habitual residence for individuals and place of incorporation, statutory seat, principal place of business, and central administration for other juridical entities.²⁵ Choice of forum clauses will confer exclusive jurisdiction (unless otherwise provided);²⁶ and appearance by the defendant other than for the purpose of

20. See, e.g., Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & COM. 211 (1994); see also ANDREAS F. LOWENFELD, *Recognition and Enforcement of Judgments*, in INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 109, 129-36 (1996).

21. Other countries have consistently expressed concern over enforcement of judgments with multiple or punitive damages as well as “excessive” damage awards, generally meaning tort judgments rendered on the basis of jury verdicts in the United States.

22. It is a common but incorrect assumption that judicial jurisdiction of United States courts is more expansive than that of other countries. The United States and many European countries have remarkably similar jurisdictional bases in many situations, and often the jurisdictional reach of foreign courts is broader than that of United States courts, particularly in multiparty cases where jurisdiction over one defendant establishes jurisdiction over other defendants. See, e.g., Brussels Convention, *supra* note 17, art. 6(1)-(2), 1990 O.J. (C 189) at 4-5. However, United States courts’ assertions of “general jurisdiction” on grounds of “tag” and “doing business” are often viewed as excessive and exorbitant by other countries. These perceptions of expansive jurisdiction and excesses of other aspects of American procedure—broad discovery, trial by jury, contingent fees, and U.S. choice-of-law rules which often tilt toward application of U.S. law—have led to resistance abroad to enforcing U.S. judgments. For a more detailed discussion of these issues, see Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT’L L. 389, 395-96, 401-402 (1995).

23. For discussion of this question, see Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away To Get It?*, 24 BROOK. J. INT’L L. 167 (1998).

24. See *Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (Oct. 30, 1999, as amended) (visited Feb. 3, 2000) <<http://www.hcch.net/e/conventions/draft36e.html>> [hereinafter *Proposed Hague Convention*].

25. See *id.* art. 3.

26. See *id.* art. 4.

challenging jurisdiction is another required base of jurisdiction.²⁷ There are also special provisions for particular kinds of claims, that is, specific jurisdiction in American parlance. For example, in tort cases, the appropriate forum under the proposed Hague Convention is a court of the State where the tortious act or injury takes place, subject to a foreseeability requirement.²⁸ If the injured person does not have a habitual residence in the place of injury, the court has jurisdiction only in respect of injury occurring in that State.²⁹ The proposed Hague Convention excludes jurisdiction based on injury resulting from antitrust violations,³⁰ an exclusion resisted by the U.S. negotiators.

As for contract actions, the specified forum is a court of the State where the goods or services were provided or supplied.³¹ A more specialized rule articulated for contracts concluded by consumers authorizes suit at the habitual residence of the consumer if the defendant has engaged in related activities in that State and the consumer has taken steps necessary for conclusion of the contract in that State.³² Similarly, a special provision relating to individual contracts of employment permits suit at the employee's habitual residence.³³ A somewhat more embracing activity-based jurisdiction contemplates jurisdiction in a court of a State where defendant carries on regular commercial activity in respect of claims directly related to that activity;³⁴ that provision appears in brackets in the most recent draft and would expand the present provision which confers jurisdiction on the basis of the existence of a branch or other establishment of the defendant when the dispute relates directly to that activity.³⁵

Most of the jurisdictional provisions in the proposed Hague Convention would seem to meet U.S. constitutional standards,³⁶ even though some of the bases are expressed differently than many of the specific-act statutes in the United States. However, several provisions, introduced in the latest Convention Draft, might be inconsistent with U.S. constitutional norms. One provision authorizes jurisdiction over multiple defendants when one defendant is habitually resident in the State and other nonresident defendants are closely connected to the resident defendant and there is a substantial connection between the State and the dispute involving the nonresident defendant. Another authorizes jurisdiction over a third-party defendant for indemnity or contribution when that court has jurisdiction over the original defendant, the third-party action is permitted by national law, and there is a substantial connection between the State and the dispute involving the third-party

27. *See id.* art. 5.

28. *See id.* art. 10(1).

29. *See id.* art. 10(4).

30. *See id.* art. 10(2).

31. *See id.* art. 6.

32. *See id.* art. 7.

33. *See id.* art. 8.

34. *See id.* art. 9.

35. *See id.*

36. *See generally* Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 *BROOK. J. INT'L L.* 125, 154-55 (1998); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 *CORNELL L. REV.* 89, 116-18 (1999).

defendant. Because the constitutional due process standard in the United States stresses the relationship between the *individual defendant* and the forum—rather than the relationship between the dispute and the forum alone³⁷—such provisions could pose constitutional problems if they remain as required bases of jurisdiction.³⁸

A second category of jurisdictional bases is expressly prohibited as exorbitant. Not only would Contracting States be required to deny recognition and enforcement to judgments based on jurisdiction in this category, but also they would be prohibited from directly asserting jurisdiction on any of the prohibited grounds. The proposed Hague Convention identifies as prohibited jurisdiction any rule of jurisdiction provided for under the national law of a Contracting State “if there is no substantial connection between that State and the dispute.”³⁹ In particular, it identifies, as exorbitant, jurisdiction based solely on: the presence of the defendant’s property in the forum State; nationality, domicile, habitual or temporary residence or presence of the plaintiff; nationality, temporary residence or presence of the defendant as well as service of the writ upon the defendant (that is, so-called “tag” jurisdiction); unilateral designation of the forum by the plaintiff; the signing of a contract from which the dispute arises; and the carrying on of commercial activities by the defendant unless the dispute directly relates to those activities.⁴⁰ An exception to the exorbitant category for certain types of “human rights” claims is being contemplated.⁴¹

Unlike the Brussels/Lugano Convention under which jurisdiction is either required or prohibited, the proposed Hague Convention includes a third category of jurisdiction, which is neither required nor prohibited; a Contracting State would be permitted to exercise jurisdiction on such a basis, but other Contracting States would not be under any obligation to recognize or enforce a judgment based on such jurisdiction. This additional category was necessary because it was unlikely that given the participation of a large number of States with different legal systems and cultures there would be a consensus on what belonged in the areas of prohibited and required jurisdiction.⁴² This “middle” or “gray area” category of jurisdiction appears as article 17 of the proposed Hague Convention, which states that the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that it is not one of the prohibited bases of jurisdiction.⁴³ Until the required and prohibited categories are completed, it is unclear just what will fall

37. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

38. Still, in limited contexts, treaty and legislative proxies could be relevant to the constitutional calculus. See Linda J. Silberman, “Two Cheers” for International Shoe (*And None for Asahi*): *An Essay on the Fiftieth Anniversary of International Shoe*, 28 U.C. DAVIS L. REV. 755, 762-67 (1995); Clermont, *supra* note 36, at 124-25.

39. *Proposed Hague Convention*, *supra* note 24, art. 18(1).

40. See *id.* art. 18(2).

41. See *id.* art. 18(3).

42. The result is a so-called “mixed” convention. See generally Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT’L L. 17, 25-28 (1998).

43. *Proposed Hague Convention*, *supra* note 24, art. 17.

within this "gray list."⁴⁴

From the United States's perspective, one particular aspect of the jurisdictional provisions generating serious controversy is the treatment of general "doing business" jurisdiction as an exorbitant and prohibited basis of jurisdiction. Courts in the United States have traditionally exercised jurisdiction when a defendant conducts systematic and continuous activities within the forum state, even when the claim is unrelated to the activity.⁴⁵ Thus, when multinational enterprises have a permanent establishment or other substantial activities in the United States, jurisdiction is easily obtainable in the United States under existing law even with respect to a claim that arises outside the United States.⁴⁶ In many such cases, an action brought in the United States can also be enforced in the United States when the defendant has assets here; thus there is no need to obtain enforcement abroad. In order to join the Convention as it presently stands, however, the United States would have to agree to abandon jurisdiction against foreign defendants, whether or not enforcement abroad is necessary.⁴⁷ Efforts thus far by U.S. delegates to have "doing business" jurisdiction moved from the prohibited list to the "gray list" have not succeeded, and it is possible that the issue may be a deal-breaker at the Hague.

The proposed Hague Convention also addresses *lis pendens*,⁴⁸ that is, the possibility of staying an action in deference to another previously commenced action, and *forum non conveniens*.⁴⁹ The provision for *lis pendens* applies to "proceedings based on the same causes of action" and adopts in general a first-to-file (first-seised) rule.⁵⁰ The first-seised rule does not apply to actions requesting determinations of nonliability,⁵¹

44. For example, if jurisdiction based on the defendant's carrying on of regular commercial activity when the dispute relates to that activity, now in brackets in article 9, is not finally included as a basis of required jurisdiction, it will probably not be prohibited, and accordingly will be included in the gray area. Similarly, if jurisdiction over a defendant based on status as a co-defendant or third-party, as provided for in articles 14 and 16, presents constitutional difficulties for countries like the United States, it may be shifted from a "required" basis to the middle category of "permitted" jurisdiction. In addition, some areas of jurisdiction, such as intellectual property issues, have not yet been addressed by the negotiators at the Hague.

45. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). See generally Philip B. Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 577-86 (1958).

46. See, e.g., *Frummer v. Hilton Hotels Int'l, Inc.*, 227 N.E.2d 851 (N.Y. 1967). Of course, where defendant's activities have been viewed as too thin, jurisdiction has been rejected as inconsistent with due process. See, e.g., *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 498 (1984); see also ANDREAS F. LOWENFELD, *National Jurisdiction and the Multi-National Enterprise*, in INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS, *supra* note 20, at 81-108.

47. Several commentators favor the elimination of the "doing business" jurisdiction in this context. See Clermont, *supra* note 36, at 114-15; Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT'L COMP. L. 111, 119 (1999).

48. *Proposed Hague Convention*, *supra* note 24, art. 21.

49. *Id.* art. 22.

50. *Id.* art. 21(1).

51. See *id.* art. 21(6)

and a court second-seised may proceed if the plaintiff has failed to pursue the action or if the court has not rendered a decision within a reasonable time.⁵² The court first-seised may itself decline to proceed if there is a more convenient forum elsewhere.⁵³ A more general forum non conveniens provision appears in a separate article for use in "exceptional circumstances."⁵⁴

As for recognition and enforcement in the second State, all States party to the Convention would be required to recognize and enforce judgments grounded on jurisdiction on the mandated list; any judgment resting on a prohibited basis of jurisdiction would be denied enforcement or recognition. As explained above, judgments rendered on a basis of jurisdiction in the "gray area" would not be required to be recognized by other States; States would be free to recognize or not recognize judgments based on jurisdiction in this category.⁵⁵

A federal statute implementing the Convention would set forth the jurisdictional prerequisites for recognition and enforcement of judgments and, at minimum, identify direct assertions of jurisdiction prohibited by the Convention. The statute might also impose the Convention's mandated category of territorial jurisdiction on whatever court (state or federal) is appropriate to hear the action;⁵⁶ alternatively, the statute could authorize territorial jurisdiction in the federal courts when individual states do not exercise the territorial reach required by the Convention. The federal statute would probably not address direct assertions of jurisdiction in the gray area, but it could identify those bases of jurisdiction on the gray list that courts in the United States would recognize, thereby creating a uniform domestic standard for recognition and enforcement.⁵⁷

III. THE QUESTION OF PUBLIC POLICY

Every statute, treaty, model law, or rule concerning recognition of foreign judgments the world over provides an escape hatch termed public policy, or *ordre public* or some comparable vague and undefined term, and this is true of the proposed Hague Convention.⁵⁸

52. *See id.* art. 21(3).

53. *See id.* art. 21(7).

54. *Id.* art. 22. *See generally* Hague Conference on Private International Law, Note on the Question of "Forum Non Conveniens" in the Perspective of a Double Convention on Judicial Jurisdiction and the Enforcement of Decisions, Hague Conf. Prelim. Doc. No. 3 (Apr. 1996).

55. It is possible that the Convention could make a provision for declarations by States when joining the Convention as to which bases of jurisdiction in the gray area they will accept as supporting a judgment entitled to recognition and enforcement.

56. For a discussion of whether Congress has power to command the state courts to exercise the territorial jurisdiction imposed under the Convention, see Clermont, *supra* note 36, at 128.

57. In the absence of a convention, a federal statute would address all aspects of jurisdiction only indirectly, that is, in the context of the necessary jurisdictional prerequisites for recognition and enforcement. Such a statute would thus offer a uniform national standard for when a judgment resting on the jurisdiction of a foreign court has an appropriate basis for recognition and enforcement.

58. Article 28 of the proposed Hague Convention provides that recognition or enforcement

In the United States, as in other federal states, it is often not clear whether public policy is derived from the nation, or the subdivision in which the forum is located, or from some brooding omnipresence that one knows even when he cannot see it. Two recent cases—both arising from English libel judgments denied enforcement in the United States—underscore the misunderstanding that sometimes accompanies invocation of the public policy defense with respect to judgments. In both cases, enforcement was refused because the defamation law of England was thought by the American court to be less protective of First Amendment values of freedom of speech and freedom of the press than required by the law in the United States as shaped by *New York Times v. Sullivan*.⁵⁹

In *Telnikoff v. Matusевич*⁶⁰ a libel judgment had been obtained by one resident of England (Telnikoff) against another resident of England (Matusевич), both of whom were Russian émigrés.⁶¹ The alleged libel was contained in a letter written by Matusевич, which accused Telnikoff of being a racist hatemonger.⁶² Later, the letter was published in an English newspaper. As the dissenting judge emphasized, it is hard to see how freedom of the press or any United States interest was implicated in the case, because there was no American interest in the parties or the transaction.⁶³ Nevertheless the Maryland Court of Appeals, on certification from the U.S. Court of Appeals for the D.C. Circuit, held that enforcing the judgment of the English court would be “repugnant to Maryland public policy.”⁶⁴

In *Bachchan v. India Abroad Publications, Inc.*,⁶⁵ American public policy was perhaps more to the point. The defendant was a New York operator of a news service, and the stories alleged to be libelous had been carried both in New York and in England.⁶⁶ Thus a U.S. court might well be concerned about the opportunity of a plaintiff in a libel action to circumvent constitutional protections granted to American publications by choosing to sue the defendant in a foreign forum, and then seeking to enforce a resulting judgment in the United States. Taking the two cases together, it would seem that a correct understanding of a meaningful public policy defense should identify the United States interests at stake and show how they are threatened, rather than just applying forum public policy without differentiating between a cause of action and the respect due to a judgment.⁶⁷ We may be overly optimistic in

may be refused if it “would be manifestly incompatible with the public policy of the State addressed.” Other defenses, particularly the express limitations on recognition for certain types of damages in article 33, are more controversial.

59. 376 U.S. 967 (1964).

60. 702 A.2d 230 (Md. 1997), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998).

61. *See id.* at 235.

62. *See id.* at 233.

63. *See id.* at 257 (Chasanow, J., dissenting).

64. *Id.* at 249.

65. 585 N.Y.S. 2d 661 (Sup. Ct. 1992).

66. *See id.* at 661.

67. Compare, in the United States interstate context, the famous case of *Fauntleroy v. Lum*, 210 U.S. 230 (1908), in which the Supreme Court, by a 5-4 vote, required enforcement of a Missouri judgment by the courts of Mississippi, although the underlying transaction on which the judgment was based had taken place in Mississippi and was contrary to law and public policy in Mississippi.

suggesting that embodying the public policy defense in a federal statute will lead to acceptance of these insights, but it is our aim to try.⁶⁸

IV. THINKING ABOUT THE STATUTE

As mentioned previously, the proposed Hague Convention has two principal aims—to establish rules on judicial jurisdiction, and to establish rules on recognition and enforcement of judgment. Other issues inevitably occur to one trying to think through the problem of treatment in one State of litigation initiated in another.⁶⁹ Meshing the different perspectives on these subjects in a convention designed to bring together some forty countries (and more would be welcome) is a formidable challenge.⁷⁰ For a statute to be presented to the U.S. Congress, one may consider some related questions, and hope that the U.S. delegation to the Hague Conference acts to preserve the freedom of the parties to the proposed Hague Convention to adopt legislation suitable to their respective needs and values. It would be premature for us to offer answers to these questions now, and we expect to receive plenty of advice. The following is just in the nature of an agenda, and does not purport to be complete.

A. Jurisdiction of Courts—Federal, State, or Both

Would federalizing enforcement and recognition of foreign country judgments also call for federal court jurisdiction for suits brought to enforce a foreign judgment? We would think that at minimum federal jurisdiction concurrent with state court jurisdiction should be provided, but one might also consider exclusive jurisdiction in the federal courts. When a foreign country judgment is asserted as a defense to an action brought in state court, removal to federal court could be expressly authorized, following the model of the removal provision in chapter 2 of the Federal Arbitration Act, implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷¹ Again, this is not the only possible solution.

68. An additional aspect of the public policy defense with respect to enforcement relates once again to the federal/state issue. Because recognition and enforcement practice under existing law has been a matter of state and not federal law, the policy invoked as a defense to a foreign judgment is often state policy. If the proposed Hague Convention and/or a federal statute makes enforcement a national issue, should public policy be understood as invoking only *national* policy? And can there be *national* policy in those areas where substantive regulatory policy is reserved to the states under the Tenth Amendment, for instance with respect to family law and succession? For more on the public policy exception in the context of the proposed Hague Convention, see Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1300-07 (1998).

69. See, e.g., Patrick J. Borchers, *A Few Little Issues for the Hague Judgments Negotiations*, 24 BROOK. J. INT'L L. 157 (1998); Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289 (1994).

70. For doubts about a worldwide convention of this type, see Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111 (1998).

71. See 9 U.S.C. § 205 (1994).

B. Definition of Terms

The proposed Hague Convention uses the term "habitual residence," rather than domicile, as the principal basis of jurisdiction over the defendant. The concept is not well understood in the United States and might benefit from definition in the implementing legislation. "Final judgment" may also turn out to be a term of art. As to each of these terms the Convention may or may not contain a suitable definition. The statute may undertake to restate or reformulate these terms in the American idiom.

C. Res Judicata and Issue Preclusion

The general understanding in the United States has been that, as in the case of a sister-state judgment, a judgment of a foreign court has no greater effect in the United States than in the country where the judgment was rendered. However, no rule prevents a court in the United States from giving greater preclusive effect to a foreign judgment than would be given in the foreign state,⁷² but expectations and incentives to litigate in the initial forum must be considered. A federal statute might make some provision with respect to the preclusive effects to be given to a foreign judgment.

D. Lis Pendens

Given the inclusion of a lis pendens provision in the proposed Hague Convention, implementing legislation should provide guidance for courts in the United States as to when they are authorized, and when required, to grant a stay in light of litigation commenced in another Convention country, and what kind of security should be available. One might also think about authorizing courts in the United States to communicate with the relevant foreign court, at either court's initiative.

E. Procedure for Enforcement

It is likely that the proposed Hague Convention will do little more than direct "expeditious and summary" procedures for enforcement. Federal implementing legislation might make provision for summary enforcement in cases falling under the convention, at least in federal courts and perhaps in state courts as well. A different provision might be made applicable to cases not falling under the Convention. Registration of foreign country judgments is probably premature, but it may be worth thinking about, particularly with regard to judgments of close neighbors such as the Canadian provinces.

F. Standards for Judicial Jurisdiction

A final issue in this preliminary menu is whether the jurisdiction to be exercised by the courts in the United States, on the basis of stated contacts, should be understood to refer to contacts with a particular state of the United States or to a national or

72. See RESTATEMENT (THIRD), *supra* note 5, § 481 cmt. c & reporters' note 3 (1987).

aggregate standard of jurisdiction. It would certainly be possible to make the exercise of jurisdiction over foreign defendants dependent upon the foreign defendant's contacts with the United States as a whole and not just a particular state, but one needs to think further about whether this would be desirable.⁷³

CONCLUSION

We think that preparing a draft statute and commentary concerning recognition and enforcement of foreign country judgments is an exciting project, worthy of the State Department, of the Congress—and of the American Law Institute. The project is not, of course, an alternative—or even a supplement—to a new restatement. But our project should be provocative in several ways to those thinking about a third restatement of conflicts and its possible content. First, it reminds that the principles of conflicts do not operate only within the boundaries of the United States and that private international law has a role to play in thinking about choice of law, jurisdiction, and the enforcement of judgments. Second, the Judgments Project illustrates that there are alternative models to restatements for developing and changing law, as the American Law Institute has recognized on other occasions. Thus, a possible “Conflicts Project” might set forth and explore various choice of law methods and explain how each of those methods is appropriately invoked. Options (possibly even with favored recommendations) might be set forth for adoption by courts.

For the present, however, we hope to enlist interested parties in our project—an immediate task of manageable proportion. It can usefully engage the energies of the law professors, practitioners, judges, and government officials who constitute the membership of the American Law Institute, and at the end come out with a needed improvement to the legal environment of the United States, and to its relations with its treaty partners.

73. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.* (1987).