

2000

An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: U.S. and European Perspectives

Michael Traynor

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/annlsurvey>



Part of the [International Law Commons](#)

Recommended Citation

Traynor, Michael (2000) "An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: U.S. and European Perspectives," *Annual Survey of International & Comparative Law*: Vol. 6: Iss. 1, Article 2.

Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol6/iss1/2>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

AN INTRODUCTORY FRAMEWORK FOR ANALYZING THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: U.S. AND EUROPEAN PERSPECTIVES

MICHAEL TRAYNOR*

This comment is based on remarks at the Eighth Regional Meeting of the American Society of International Law, at Golden Gate University School of Law, on March 19, 1999. Given developments in the draft convention since then, references in this comment are to the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999 and available at <<http://www.hcch.net/e/conventions/draft36e.html>>

I. INTRODUCTION

My role today is to provide an introductory framework for the remarks of Mr. Edward Lau,¹ a San Francisco lawyer and delegate to the Hague Conference on the proposed Convention, and of Professor Friedrich K.

* Partner, Cooley Godward LLP, San Francisco. B.A., University of California at Berkeley, 1955; J.D., Harvard Law School, 1960.

1. Edward Lau, *Update on the Hague Convention on the Recognition & Enforcement of Foreign Judgments*, 6 ANN. SURV. INT'L & COMP. L. 13 (2000).

Juenger,² who has written and commented extensively and taught both teachers and students the importance of a comparative law approach in considering these issues.³

I will address three topics: *First*, I will compare the approaches of U.S. law and European law to jurisdiction and recognition and enforcement of judgments. *Second*, I will sketch some key issues that the proposed Convention may address. *Third*, I will report on the project being considered in the American Law Institute for possible U.S. legislation to implement the Convention, if it is adopted by the United States, or to articulate federal law regarding foreign country judgments even if the Convention is not so adopted.

I acknowledge with appreciation the fine work of Professors Andreas Lowenfeld and Linda Silberman of the NYU School of Law who have developed the proposal for the American Law Institute project and from which I am drawing substantially for these remarks.⁴

II. A COMPARISON OF U.S. AND EUROPEAN LAW

A. JURISDICTION

In the United States, personal jurisdiction of courts is treated as a fact-intensive due process inquiry based on the principle of minimum contacts and fair play and substantial justice.⁵ Every case therefore is a potential candidate for review by the Supreme Court of the United States. In Europe, under the Brussels Convention⁶ and the Lugano Convention,⁷

2. Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOKLYN J. INT'L L. 111 (1998).

3. See, e.g., Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TUL. L. REV. 1309 (1999); *Book Review*, 44 AM. J. COMP. L. 521 (1996); *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995); *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1 (1993); *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195 (1984). See also Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389 (1995).

4. See Memorandum from the Reporters, Professors Andreas Lowenfeld and Linda Silberman, for the Council of the American Law Institute and accompanying commentary, in American Law Institute, *International Jurisdiction and Judgment Project*, Council Memorandum No. 1 (Nov. 19, 1999) <http://www.ali.org/ali/1999_LowenI.htm>.

5. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

6. *Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, Sept. 27, 1968, 1972 O.J. (L 299) 32, reprinted in 8 I.L.M. 229 (1969), as amended by 1990 O.J. (L 189) 1, reprinted as amended in 29 I.L.M. 1413 (1990) [hereinafter *Brussels Convention*].

essential rules for cases affecting parties from the member states based on certain critical and operative facts such as domicile are established, and the European Court of Justice serves to interpret them.⁸

In the United States, jurisdiction may be “general” jurisdiction if the defendant’s presence in the forum is sufficiently extensive.⁹ Ordinarily, however, jurisdiction in cases against nondomiciliary defendants is based on the idea that the defendant is “doing business” in the forum and has “purposefully availed” itself of the forum in some way related to the transaction or accident involved.¹⁰ Under Brussels/Lugano, a core principle is that persons domiciled in a Contracting State shall, whatever their nationality, be sued in the Courts of that State.¹¹

Here are just a few other comparative examples:

Tag Jurisdiction: In the United States, jurisdiction can be obtained by serving a defendant who is physically present in the state, even if only temporarily.¹² Under Brussels/Lugano, such jurisdiction is considered “exorbitant” and is not permitted for cases involving litigants from the member states.¹³

Tort Cases: In the United States, a detailed due process inquiry in some cases may lead to litigation in a forum distant from the accident.¹⁴ Under Brussels/Lugano, jurisdiction is at the place of the harmful event, close to the physical evidence.¹⁵

7. Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1998 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 (1989) [hereinafter Lugano Convention].

8. “The Court of Justice of the European Communities shall have jurisdiction to give rulings on the interpretation of the [Brussels] Convention.” Brussels Convention, *supra* note 6, Protocol on Interpretation, art. I, *reprinted as amended in* 29 I.L.M. 1413, 1439 (1990). Under the Lugano Convention, the Contracting Parties agree to set up a system of exchange of information regarding relevant judgments under the Brussels Convention. *See* Lugano Convention, *supra* note 7, Protocol No. 2 on the Uniform Interpretation of the Convention, art. 2, *reprinted in* 28 I.L.M. 620, 641 (1989).

9. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984).

10. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

11. Brussels Convention, *supra* note 6, art. 2; Lugano Convention, *supra* note 7, art. 2. (The two Conventions are organized so that their articles correspond [hereinafter Conventions]).

12. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

13. Conventions, *supra* note 11, art. 3, listing jurisdictional provisions of particular countries that “shall not be applicable as against” member states..

14. *See World-Wide Volkswagen Corp.*, 444 U.S. 286.

15. Conventions, *supra* note 11, art. 5, subd. 3.

Multiparty Cases: Tort cases often involve multiple parties. The U.S. approach is a piece-meal one that requires a separate due process analysis for each defendant.¹⁶ Under Brussels/Lugano, claims against several defendants are allowed in the domicile of one, thereby facilitating third party practice.¹⁷

Contract Cases: The U.S. approach is a problematic one based in part on whether the defendant "reached out" from its home state to the forum state.¹⁸ The Brussels/Lugano test is based on "place of performance," which itself can sometimes be problematic, for example, deciding where "an employee habitually carries out his work" when it is performed in several contracting states.¹⁹

B. JUDGMENTS

Although the Full Faith and Credit Clause of the U.S. Constitution applies to recognition and enforcement of judgments among the sister states, it does not apply to judgments rendered in foreign countries.²⁰ For both domestic and foreign country judgments, however, the Supreme Court follows a unifying principle of finality that makes its judgments jurisprudence clearer than its jurisdiction jurisprudence. Under a leading case in 1895, the principles of finality and comity are followed for foreign judgments resulting from a foreign court that had jurisdiction and conducted a fair proceeding not impeachable by fraud or prejudice.²¹

The court, however, denied conclusive effect to the French judgment there for want of reciprocity on the part of France. Reciprocity is not a constitutional requirement. The courts today are rarely guided by considerations of reciprocity.²²

Under the Uniform Foreign Money-Judgments Recognition Act,²³ adopted in at least 28 jurisdictions including California,²⁴ a foreign money judgment is enforceable in the same manner as the judgment of a

16. *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987).

17. Conventions, *supra* note 11, art. 6, subd. 1.

18. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985).

19. Conventions, *supra* note 11, art. 5, subd. 1. *See, e.g., Rutten v. Cross Medical Ltd.* [1997] All ER (EC) 121.

20. *See* U.S. CONST., art. IV, § 1.

21. *Hilton v. Guyot*, 159 U.S. 113 (1895).

22. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6, comment k, and § 98, comment e (1971).

23. 13 U.L.A. 419 (1980).

24. CAL. CODE CIV. PROC. §§ 1713-1713.8.

sister state that is entitled to full faith and credit. Reciprocity is not required under the Uniform Act although it is in a few states that have otherwise adopted the act. A foreign judgment is not conclusive if the tribunal is not impartial, or its procedures do not satisfy due process, or if there is no personal or subject matter jurisdiction. In addition, the judgment need not be recognized if the defendant did not receive notice of the proceedings in sufficient time to enable him to defend; or there are other defenses such as fraud, public policy, conflict with another final judgment, or the foreign proceeding was seriously inconvenient or was contrary to a dispute resolution agreement between the parties. Even states that have not adopted the Uniform Act generally apply its principles.

The European approach is similar, although based on conventions, not common law or uniform acts. There seem to be fewer differences between the United States and Europe in the judgment area than in the jurisdiction area.

Under the Brussels/Lugano Conventions, the general rule requires recognition and enforcement of judgments of other contracting nations.²⁵ There are exceptions for conflicts with public policy, default judgments without proper service and opportunity to be heard, conflicts with earlier final judgments, inconsistency with certain jurisdictional provisions, and judgments involving status, capacity, or succession.²⁶

III. THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS

Some 35 countries have been engaged since 1993 in negotiating a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. The negotiations are under the auspices of the Hague Conference on Private International Law.²⁷ The United States has taken substantial initiative in this process.

25. Conventions, *supra* note 11, arts. 26, 29, 31.

26. *Id.* art. 27.

27. Catherine Kessedjian, Deputy Secretary General of The Hague Conference on Private International Law, has prepared several reports pertinent to the draft Convention that can be accessed at <<http://www.hcch.net/e/workprog/jdgm.html>> (last visited December 28, 1999): *Preliminary Document No. 7*, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Apr. 1997); *Preliminary Document No. 8*, Synthesis of the Work of the Special Commission of June 1997 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters (Nov. 1997); *Preliminary Report No. 9*, Synthesis of the Work of

The proposed convention is to some extent based on principles akin to the Brussels/Lugano Conventions. However, it would be open to a much larger number of states, and it would not have a single ultimate tribunal such as the European Court of Justice or the Supreme Court of the United States overseeing its operation.

Because the United States gives greater recognition and enforcement to foreign judgments than foreign countries give to U.S. judgments, the U.S. has something to gain from a convention, particularly, a higher level of reliable expectations that foreign countries who are parties to the Convention will enforce U.S. judgments;²⁸ however, the United States may have to relinquish some of its present notions on jurisdiction, but these are questionable anyway, especially in the international context. The problem is that these notions are based on principles of due process that the Supreme Court ultimately may decide it should reconsider in light of a convention to which the United States is a party.²⁹

Mr. Lau explores the proposed Convention in some detail. My remarks here accordingly will be quite brief and will simply identify central issues:

Coverage: The Convention would apply to civil and commercial matters but exclude various listed matters such as status and legal capacity of natural persons, domestic relations, wills and succession, insolvency, administrative law, taxation, customs, social security, arbitration and proceedings related thereto, and admiralty or maritime matters.³⁰

Jurisdiction: The current drafting seems to be based on the premise that jurisdiction should be governed by specific rules, an approach followed in the Brussels/Lugano Conventions, rather than on the U.S. minimum

the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters (1998); *Preliminary Report No. 10*, Note on Provisional and Protective Measures in Private International Law and Comparative Law (Oct. 1998). For additional background, see 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 BROOKLYN J. INT'L L. 7 (1998).

28. For country-by-country analysis of current practices and procedures, see ENFORCEMENT OF MONEY JUDGMENTS, VOL. I & II (Lawrence W. Newman ed., 1999). See also Dennis Campbell & Dharmendra Popat, *Enforcing American Money Judgments in the United Kingdom and Germany*, 18 S. ILL. U.L.J. 517 (1994).

29. See also sources cited *infra* note 65.

30. See *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private Int'l Law, art. 1, adopted by the Special Commission Oct. 30, 1999 (last visited December 20, 1999) <<http://www.hcch.net/e/conventions/draft36e.html>> [hereinafter *Preliminary Draft Convention*].

contacts — fair play and substantial justice — due process approach. The crucial basis for jurisdiction will be the domicile, habitual residence, or principal place of business of the defendant.³¹ Specific rules will apply to supply and service contracts,³² consumer contracts,³³ employment contracts,³⁴ torts,³⁵ and trusts.³⁶ Multiple defendants may be sued in one action if they are sufficiently connected.³⁷

Federal or state law: In the United States, although bounded by federal due process limits, jurisdiction in the first instance is governed by state statutes or other state law.³⁸ Even in federal courts, unless a specific federal jurisdictional statute applies, the state statute of the forum state ordinarily applies.³⁹ One question will be whether to focus on the defendant's activity in or throughout the United States rather than in a particular state.⁴⁰ The Supreme Court has left this issue open.⁴¹

Choice of forum clauses: What are the requisites of an effective clause, the limitations on such clauses, and the effect of clauses that not only designate a particular jurisdiction but make it exclusive? The current draft Convention enables considerable party autonomy to provide for exclusive jurisdiction in a selected court.⁴²

Preclusion as "exorbitant" of certain bases of jurisdiction: The Convention precludes tag or transient jurisdiction and jurisdiction based on the plaintiff's nationality, or solely on the presence of the defendant's property.⁴³

31.. *Id.* art. 3.

32. *Id.* art. 6.

33. *Id.* art. 7.

34. *Id.* art. 8.

35. *Id.* art. 10.

36. *Id.* art. 11.

37. *Id.* art. 14.

38. There are two basic types of state statutes: those that reach as far as the Due Process Clause, *e.g.*, CAL. CODE CIV. PROC. § 410.10, and those that limit jurisdiction to enumerated grounds. *E.g.*, N.Y. C.P.L.R. § 302 (McKinney 1990). *See* *Bensusan Restaurant v. King*, 126 P.3d 25 (2d. Cir. 1997) (no jurisdiction under N.Y. statute in action for trademark infringement against owner of "The Blue Note" jazz club in Columbia, Missouri who created web site accessible in N.Y.).

39. FED. R. CIV. P. 4(e), (g), (h), and (k)(i).

40. *See* FED. R. CIV. P. 4(k)(2), which provides that in a federal court, "If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state."

41. *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987).

42. *Preliminary Draft Convention, supra* note 30, art. 4.

43. *Id.* art. 18.

“Grey” list: There has been much debate whether there should be a “grey” list of jurisdictional bases that are neither clearly permitted nor clearly precluded, for example, jurisdiction based on doing business in the state or the place of contracting or one’s status as a co-defendant with a defendant over whom jurisdiction is clearly permitted. One compromise reflected in the current draft is to allow jurisdiction “in the courts of a State in which a branch, agency or any other establishment of the defendant is situated [or where the defendant has carried on regular commercial activity by other means] provided that the dispute relates directly to the activity of that branch, agency or establishment [or to that regular commercial activity]”⁴⁴ but to prohibit jurisdiction based solely on “the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities.”⁴⁵

Judgments: The key principle is that a decision rendered in a Contracting State shall be recognized in another Contracting State if it has “the effect of *res judicata*” in the State of origin.⁴⁶ Similarly, if the decision is enforceable in the state of origin, it is enforceable in the state addressed.⁴⁷

Grounds for refusal of enforcement: What grounds for refusal should be allowed? The Convention identifies, for example, lack of jurisdiction according to the rules of the Convention,⁴⁸ pendency of other proceedings, inconsistency with prior judgment, violation of fundamental principles of procedure or inadequate notice, fraud, or manifest incompatibility “with the public policy of the state addressed.”⁴⁹

The First Amendment. The public policy issue includes a question of increasing concern given the explosion of international communications, especially over the Internet. Will an otherwise valid foreign country judgment be refused recognition and enforcement in the United States because it is based on substantive law principles that are unacceptable here based on the First Amendment? Defamation is a prime example.⁵⁰

44. *Id.* art. 9 (bracketed language is from the draft).

45. *Id.* art. 18, subd. 2-e.

46. *Id.* art. 25, subd. 2.

47. *Id.* art. 25, subd. 3.

48. *Id.* art. 25, subd. 1.

49. *Id.* art. 28.

50. *See* *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (1962). *See also* *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (1997); *Matusevitch v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995), *affirmed*, 159 F.3d 636 (D.C. Cir. 1998). Likewise, there

Other public policy issues. Another public policy question may be whether a copyright infringement judgment obtained in a foreign court against an internet service provider under a law that is inconsistent with the statutory protections for defendants who comply with the provisions of the Online Copyright Infringement Liability Limitation Act in the Digital Millennium Copyright Act,⁵¹ would be enforceable in the U.S., even if the foreign court had jurisdiction.

In addition to policies based on the Constitution of the United States or on a federal statute, there will be questions whether a foreign country judgment should be enforced if it is based on a law that violates, in Justice Cardozo's famous words, "some deep-rooted tradition of the common weal."⁵²

Punitive damages or extraordinary compensatory damages: There are key issues regarding judgments awarding punitive damages and damages that may go beyond principles of compensatory damages in other countries. Large damage awards based on pain and suffering are an example. The draft presently provides that a judgment awarding exemplary or punitive damages "shall be recognized at least to the extent that similar or comparable damages could have been awarded in the state addressed."⁵³ If the judgment debtor also claims and establishes that "grossly excessive damages have been awarded, recognition may be limited to a lesser amount,"⁵⁴ but "[i]n no event . . . less than that which would have been awarded in the state addressed in the same circumstances, including those existing in the state of origin."⁵⁵ Given the differences among countries in recoverability of compensatory damages as well as of costs and attorneys' fees, the draft also provides that in applying the foregoing principles, the court addressed shall take into account whether and to what extent the damages "serve to cover costs and expenses relating to the proceeding."⁵⁶

may be a question whether a defamation judgment obtained in a foreign court against an internet service provider under a law that is inconsistent with the statutory immunity of the defendant under section 230 of the Communications Decency Act, 47 U.S.C. § 230, would be enforceable in the U.S., even if the foreign court had jurisdiction. There is also a question whether the First Amendment should preclude recognition and enforcement of an otherwise valid foreign country judgment based on a foreign communication affecting only foreign litigants at the time it is rendered although the *Matusevitch v. Telnikoff* cases do not draw this distinction.

51. 17 U.S.C. § 512.

52. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1988).

53. *Preliminary Draft Convention*, *supra* note 30, art. 33, subd. 1.

54. *Id.* art. 33, subd. 2-a.

55. *Id.* art. 33, subd. 2-b.

56. *Id.* art. 33, subd. 3.

Procedure for recognition and enforcement; interpretive principles: The draft currently provides that such procedures are governed by the law of the state addressed.⁵⁷ It also provides for principles governing interpretation of the Convention⁵⁸ and its relationship with other international instruments.⁵⁹

Other issues. Significant additional issues concern jurisdiction based on national law on grounds that are not prohibited by the Convention;⁶⁰ *lis pendens*;⁶¹ *forum non conveniens*;⁶² violations of human rights where an exception to the general prohibition on “tag” jurisdiction may be necessary;⁶³ electronic commerce;⁶⁴ and the question whether a treaty could permit any expression of jurisdiction beyond the reach presently permitted by the due Process Clause.⁶⁵

IV. PROPOSED U.S. LEGISLATION AND THE ALI PROJECT

Whether the proposed Convention will be approved by the President and concurred in by the Senate⁶⁶ may depend on whether the accompanying implementing statute is acceptable to both houses of Congress, which would enact the statute.

The American Law Institute is developing a possible project for such implementing legislation. The project would encompass a draft

57. *Id.* art. 30.

58. *Id.* arts. 38, 39, 40.

59. *Id.* art. 41 (Proposal 1 and Proposal 2).

60. *Id.* art. 17.

61. *Id.* art. 21.

62. *Id.* art. 22.

63. *Id.* art. 18, subd. 3. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

64. Hague Conference on Private International Law, Press Release, *Geneva Round Table on Electronic Commerce and Private International Law* (last visited Dec. 20, 1999) <<http://www.hcch.net/e/events/press01e.html>>; Lead Report, *Electronic Commerce – Hague Jurisdiction Treaty Revisions Weighed in Light of International Impact of Internet*, 4 Electronic Commerce & Law. Rep. (No. 47, Dec. 15, 1999); Michael Traynor, *Personal Jurisdiction and the Internet: 1999 and Looking Ahead*, 2 Practising Law Inst., THIRD ANNUAL INTERNET LAW INSTITUTE 109, PLI COURSE HANDBOOK No. G—564 (1999).

65. See Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89 (1999); Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661 (1999); Stanley R. Cox, *Could A Treaty Trump Supreme Court Jurisdictional Doctrine?: Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 ALB. L.J. 1177 (1998); Joachim Zekoll, “*Could a Treaty Trump Supreme Court Jurisdictional Doctrine?: The Role and Status of American Law in the Hague Judgments Convention Project*,” 61 ALB. L. REV. 1283 (1998).

66. See U.S. CONST., art. II, § 2.

implementing statute, with commentary and optional approaches to difficult decisions.

Even if a convention satisfactory to the United States is not adopted, an examination of the issues by the ALI may be useful and may lead to constructive federal legislation.

The central considerations for such an implementing statute include:

Constitutionality: Article I (commerce power), Article III (Judicial power), Article IV (the States and the Federal Government), and Article VI (the Supremacy Clause of the Constitution of the United States), would seem to provide arguable if not ample support, notwithstanding federalism and Tenth Amendment contentions that states should be able to determine the rules governing the recognition and enforcement of foreign country judgments.

Precedent: The combination of treaty and implementing legislation has been followed in the Federal Arbitration Act⁶⁷ implementing the UN (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and in the federal act⁶⁸ implementing the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

Federal law: Under the proposed ALI project, the recognition and enforcement of foreign country judgments would be governed by federal law. At present, recognition and enforcement are regarded as matters of state law, even if sought in a federal court.⁶⁹ Such a federal law would build on the pioneering efforts of the National Conference of Commissioners on Uniform State laws that resulted in the present uniform state law and its enactment in various states. A federal law would provide governing principles throughout the United States.

Reciprocity: Assuming that reciprocity is eliminated in the Convention as finally adopted, as it is in the draft, it would also be eliminated in the implementing statute. Under the Supremacy Clause, doing so would override the rules of those states that use lack of reciprocity as a ground for discretionary refusal to recognize or enforce a foreign country judgment.

67. 9 U.S.C. § 201 *et seq.*

68. 42 U.S.C. § 11601 *et seq.*

69. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 481, comment a (1987).

Jurisdictional attack on judgments: Another key provision would likely be that if a judgment is rendered on one of the bases identified in the Convention, states could not decline recognition or enforcement on jurisdictional grounds. At least the mandatory standards of jurisdiction in the Convention would be binding on every state. With regard to any remaining “grey” areas of jurisdiction, if the Convention has any, there is likely to be a move for a uniform federal recognition practice in the United States.

Federal-state issues: Other important issues are whether a foreign country judgment will be enforceable in a federal court; and whether federal jurisdiction will be concurrent with or exclusive of jurisdiction of state courts. A related issue will be whether and under what circumstances an enforcement action filed in a state court is removable to the federal court.⁷⁰ Diversity of citizenship jurisdiction may also be available in various cases as a basis for federal court jurisdiction.

Public policy: The public policy exception is also likely to provoke discussion. Should that policy be only “national” policy as in the case of the First Amendment or may it be state policy? What is “national” or “federal” policy in areas where substantive regulatory policy is reserved to the states under the Tenth Amendment?

Procedure: Implementing legislation will likely also address procedures for recognition and enforcement including ways to prevent delays and obtain “fast track” enforcement.

V. CONCLUSION

The proposed Convention and attendant debate afford an opportunity to reexamine the United States’ constitutionalized and highly factual approach to jurisdiction as well as to establish acceptable principles for the recognition and enforcement of judgments founded on agreed jurisdictional rules. The proposed American Law Institute project for U.S. implementing legislation affords a comparable opportunity for examining our present law, even if a Convention is not ultimately adopted.

70. Cf. 9 U.S.C. § 205, implementing the New York Arbitration Convention.