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Some Judgements on Judgments: A View from America

Linda J Silberman*

A. INTRODUCTION

I am honoured to have delivered and now to publish the 2006 Graveson Memorial Lecture. I never had the pleasure of knowing Professor Graveson, but his perspective in encouraging an international appreciation of private international law is one that I share.[1] In my lecture, and now in this article, I hope to show how an international perspective contributes to reform and brings insight to an area of law in which I have great interest and which is the subject of my lecture—the recognition and enforcement of foreign judgments. The affiliations of Professor Graveson with both King's College London and Gray's Inn have special meaning to me as well. In 1968–69, I was a Fulbright Scholar in London, undertaking a study of the English masters, under the auspices and guidance of Sir Jack Jacob, who was a great mentor to me from that time until his death in 2000. I took a course with Sir Jack at the University of London (Sir Jack was Professor at UCL) during my time in London and have fond memories of that experience. Like Professor Graveson, Sir Jack was a member of Gray's Inn, and now Sir Robin Jacob (Sir Jack's son) is (in 2007), as Professor Graveson once was, Master Treasurer of Gray's. So, I feel a particular kinship with Professor Graveson, with King's College London, and with Gray's Inn, and I am pleased to be a part of this lecture series.

* Martin Lipton Professor of Law, New York University School of Law. Special thanks are due to Jocelyn Burgos, NYU LLM 2006 and Research Fellow 2007, for her editorial and research help in developing the initial lecture into this more fully developed article. The Filomen D'Agostino and Max E Greenberg Research Fund has provided continuing financial support for my research efforts in private international law.

1 In the Preface to the seventh edition of his treatise on the conflict of laws, Professor Graveson commented on the ease with which the English system of conflict of laws accommodated developments at the Hague Conference on Private International Law. He proudly stated: 'In both range of innovation and in breadth of judicial approach, English private international law can now justly claim an international appreciation of the subject'. RH Graveson, *Conflict of Laws: Private International Law* (7th edn Sweet & Maxwell, London 1974) vii.

B. RECENT ATTENTION TO JUDGMENT RECOGNITION PRACTICE: BACKGROUND

The subject of this Graveson lecture—the recognition and enforcement of judgments—is one that has attracted current attention largely as the result of efforts by the Hague Conference on Private International Law over the last decade to negotiate a world-wide convention on the subject.[2] This broad objective failed, but in 2005 the Hague Conference was able to finalise a more limited convention dealing with choice-of-court agreements and the recognition of attendant judgments.[3]

The discussions at The Hague also led to a focus on transnational recognition practice at the national level. In the United States, for example, the American Law Institute undertook a project to propose legislation to create national federal law on the recognition and enforcement of foreign-country judgments.[4] In 2006, the Institute approved a proposed Foreign Judgments Recognition and Enforcement Act for enactment by Congress.[5] During that same period, the National Conference of Commissioners on Uniform State Laws revised its earlier 1962 Uniform Foreign Money-Judgments Recognition Act—the Uniform Law that is in effect in over half the states of the United

2 See generally Linda J Silberman, 'Can the Hague Judgments Project be Saved?: A Perspective From the United States' in John J Barceló III and Kevin M Clermont (eds), *A Global Law of Jurisdiction and Judgments: Lessons from the Hague* (Kluwer Law International, The Hague 2002) 159; Linda J Silberman and Andreas F Lowenfeld, 'The Hague Judgments Convention—And Perhaps Beyond' in James AR Nafziger and Symeon C Symeonides (eds), *Law and Justice in a Multistate World: Essays in Honor of Arthur T von Mehren* (Transnational, New York 2002) 121, 122–9; Samuel P Baumgartner, *The Proposed Hague Convention on Jurisdiction and Judgments* (Mohr Siebeck, Tübingen 2003) 1–9. For a dialogue of experts during the negotiations of the Convention, see Andreas F Lowenfeld and Linda J Silberman (eds), *The Hague Convention on Jurisdiction and Judgments* (Juris, United States 2001).

3 See Hague Convention on Choice of Court Agreements, 30 June 2005, available at the website of the Hague Conference on Private International Law: http://www.hcch.net. To access the full text of the Convention, select 'Conventions' from the main page, then select Convention No 37, 'Convention of 30 June 2005 on Choice of Court Agreements'. For a more detailed explanation of the Convention, see Louise Ellen Teitz, 'The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration' (2005) 53 *American Journal of Comparative Law* 543; Andrea Schulz, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements' (2006) 2 *Journal of Private International Law* 243–69.

4 The need for a uniform federal law is explained in American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* (2006) (hereafter 'ALI Proposed Federal Statute') 1–6. See also Ronald A Brand, 'Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance' (1991) 67 *Notre Dame Law Review* 253, 298–319. For a discussion of the federalism issues raised by the prospect of a federal statute or treaty in this area, see Silberman (n 2) 'Can the Hague Judgments Project be Saved?' 182–9; Stephen B Burbank, 'Federalism and Private International Law: Implementing the Hague Choice of Court Convention' (2006) 2 *Journal of Private International Law* 287, 293–8.

5 For background on the project, see ALI Proposed Federal Statute (n 4) xii. See also Linda J Silberman and Andreas F Lowenfeld, 'A Different Challenge for the ALI: Herein of Foreign Country Judgments, An International Treaty, and an American Statute' (2000) 75 *Indiana Law Journal* 635.

States.[6] Similarly, in Canada, the Uniform Law Conference of Canada has recommended for adoption in the separate provinces in Canada a judgment enforcement statute that would alter in limited ways the existing standards for enforcement of foreign judgments in Canada.[7]

I was fortunate to be the Co-Reporter (along with my colleague Andreas Lowenfeld) for the American Law Institute Project on Recognition and Enforcement of Judgments. Because our purpose in the ALI Project was to offer a proposal for what the law of recognition and enforcement should be for the United States, our task was much more interesting and creative than just 'restating' the rules on recognition and enforcement that exist in the United States.[8] And in undertaking this work, our sense was that it was necessary to look broadly and comparatively as part of the process of developing a national law for foreign judgment recognition and enforcement as well as to assess how US practice affects other national and transnational actors. To do that, we drew on the experience of other countries with respect to their recognition and enforcement practices. We looked to national solutions found in common law countries, such as England, Canada and Australia, and to the approaches in civil law countries, such as Germany and Italy, as well as to regional arrangements, such as the EU Regulation adopted for Member States of the European Union. And as to how the treatment of foreign judgment recognition practice in the United States impacts on other countries and other transnational actors, the negotiations at the Hague Conference were a continuing reminder. In addition to informing particular provisions that are included in the ALI Proposed Federal Statute, the comparative perspective led us to challenge some traditional thinking about judgment-recognition/enforcement practice and generated new insights into recognition practice more generally.[9] It is that broader understanding that is the subject of this Graveson lecture. I need not belabour the reasons for a shared international consensus for a liberal regime of foreign judgment recognition and enforcement. International commerce demands this kind of co-operation, and principles of judicial

6 The 1962 version of the Uniform Act—the Uniform Foreign Money-Judgments Recognition Act—has been adopted by 32 states and territories of the United States. See Uniform Foreign Money-Judgments Recognition Act (1962), 13 *Uniform Laws Annotated* Part II (2002 edn and 2007 Supp) 39. As of 1 August 2007, the 2005 revision to the Uniform Act—the Uniform Foreign-Country Money Judgments Recognition Act—replaced the earlier Act in one state and was adopted by another; the text of the revised Uniform Act is available in 13 *Uniform Laws Annotated* Part II (2007 Supp) 5.

7 See Uniform Enforcement of Foreign Judgments Act, available on the website of the Uniform Law Conference of Canada at: http://www.ulcc.ca. See generally Vaughan Black, 'Canada and the US Contemplate Changes to Foreign-Judgment Enforcement' (2007) 3 *Journal of Private International Law* 1.

8 For an overview of current recognition/enforcement practices in the US, see Linda J Silberman, 'Enforcement and Recognition of Foreign Country Judgments in the United States (2004) 16 *International Law Quarterly* 534; Brand (n 4).

9 See Linda J Silberman, 'Transnational Litigation: Is There a "Field"? A Tribute to Hal Maier' (2006) 39 *Vanderbilt Journal of Transnational Law* 1427, 1432–6.

economy and international comity are both served. Even some notable outliers to judgment recognition, such as Sweden and the Netherlands, have carved out judicial exceptions to non-recognition, and in 2004 Belgium changed its *revision au fond* procedure, so that review on the merits is no longer permitted.[10]

In looking comparatively at transnational recognition and enforcement practice, one finds a basic similarity of frameworks adopted in various countries even though the particular solutions turn out to be different. That is to say, most countries agree that recognition and enforcement of foreign judgments is appropriate, subject to particular limitations. And most agree on the criteria that should be considered in shaping recognition and enforcement practice, even when they come to different resolutions about which of those criteria to adopt. This lecture outlines the parameters of that framework and considers the various solutions that have been adopted, with a particular reference to the ALI Proposed Federal Statute.

An initial and basic question is: what kinds of judgments should be entitled to recognition or enforcement? A 2006 decision by the Canadian Supreme Court, *Pro Swing Inc v Elta Golf Inc*,[11] highlighted that issue. Second, an essential principle of private international law requires that a judgment, in order to be recognised or enforced, must have been obtained in fair and impartial proceedings. Whether that test is applied through means of an express provision—the approach taken under existing US law—or via a more general sense of 'natural justice' or 'public policy', the principle is one of fundamental and universal importance. Third, broader concerns of public policy have also traditionally provided a reason not to enforce a particular judgment, although there is a significant debate about the content and scope of that exception. Fourth, recognition/enforcement practice has been concerned with the jurisdictional link between the forum issuing the judgment and the underlying transaction and the parties. To put it another way, states requested to recognise or enforce a judgment will generally consider from their own perspective whether the original forum was an appropriate place to litigate the dispute such that the resulting judgment should be enforceable in the second state. Finally, there is the issue of reciprocity—whether a court of a country being asked to enforce a judgment from another country should condition enforcement and recognition on the receptivity of the court in the requesting state to recognising and enforcing a judgment from the requested state in similar circumstances.

I will now turn to each of these issues and explain the approach of the ALI Proposed Federal Statute to each of them and how those solutions comport with approaches elsewhere.

10 See Belgian Code of International Private Law, article 25, paragraph 2, discussed in *Byblos Bank Europe SA v Sekerbank Turk Anonym Syrketi* 837 NYS 2d 54 (App Div 1st Dept 2007), aff'd 10 NY 3d 243 (2008).

11 [2006] 2 SCR 612, discussed further in the text following n 16.

C. TYPES OF JUDGMENTS

International enforcement practice is generally thought to be limited to final money judgments. But neither the English Foreign Judgments (Reciprocal Enforcement) Act 1933[12] nor the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters[13] excludes non-money judgments from its scope. In the United States, the Uniform Act covers money judgments (§1(2)), but other types of judgments have frequently been enforced on grounds of comity. Thus, a recent case in Texas enforced on grounds of comity a Hong Kong judgment ordering the delivery of stock (as well as payment of proceeds and profits from the sale of other pledged stock);[14] and a Florida court enforced a British order vesting all of a defendant's British and foreign assets in a receiver, rejecting the defendant's argument that the judgment should not be enforced because it was a 'foreign tax' or 'penal judgment'.[15] In the ALI Project, the scope of the proposed federal statute includes foreign judgments that grant or deny a sum of money, or 'determin[e] a legal controversy' (§1(b)). Although the principle of recognition and enforcement is mandatory (subject to limited defences) for most judgments, recognition/enforcement 'is not obligatory' (but not prohibited) for judgments dealing with taxes, fines and penalties (§2(b)(i)). Also, declaratory judgments and injunctions come within the statute and '*may* be entitled to recognition or enforcement under such procedures as the recognizing court deems appropriate' (§2(b)(ii)) (emphasis added).

In a 2006 case, *Pro Swing Inc v Elta Golf Inc*,[16] the Canadian Supreme Court considered whether enforcement/recognition of foreign judgments should be limited to money judgments or whether recognition and enforcement should be extended to equitable orders, in this case an order enjoining the defendant from marketing or selling a product with an infringing mark.[17] The particular order in question was a US court order of civil contempt directing the defendant to comply with the terms of a consent decree incorporating the injunction and executed in connection with a settlement agreement between the parties. The Canadian Supreme Court split 4-3, with the majority holding that this particular judgment was not entitled to recognition for various reasons. The majority viewed the order as quasi-criminal in nature and found the territorial scope of the injunctive relief in the consent decree uncertain. Nonetheless, the Court began its opinion by stating that it believed that the time was ripe to 'revise the traditional common

12 Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) (23 & 24 Geo 5 c13).

13 Council Regulation (EC) No 44/2001, OJ 2001 (L 12), amended by 2002 OJ (L 225).

14 *Siko Ventures Ltd v Argyll Equities, LLC* 2005 US Dist LEXIS 21257 (WD Tex 2005).

15 *Bullen v Her Majesty's Government of the United Kingdom* 553 So 2d 1344 (Fla App 1989).

16 [2006] 2 SCR 612.

17 For a comparative perspective on the question of enforcement of non-money judgments, see Richard Frimpong Oppong, 'Enforcing Foreign Non-Money Judgments: An Examination of Some Recent Developments in Canada and Beyond' (2006) 39 *University of British Columbia Law Review* 257.

law rule' that limited recognition and enforcement to final money judgments—but cautioned that the implementation of any such changes must be undertaken with care. In particular, the court majority observed that enforcement of an equitable order should trigger considerations of 'convenience for the enforcing state' and 'protection of its judicial system'.[18] With those considerations in mind, the court refused to enforce the particular Ohio order in this case. The dissenting Justices, including Chief Justice McLachlin, agreed with the majority that the common law should be extended to permit the enforcement of foreign non-money judgments, and believed that there was no reason to refuse to enforce substantial parts of the Ohio order.[19] They noted that the order was one of civil, not criminal, contempt and it had been issued to secure compliance with the consent order and not to impose punishment. In addition, the dissent found that most parts of the order were both final and clear, and that enforcement did not appear to require court supervision.

One interesting aspect of the majority opinion is its observation that courts in the United States might *recognise* judgments granting injunctions but would generally not *enforce* them, citing to the Restatement (Third) of the Foreign Relations Law of the United States.[20] Unfortunately, the Canadian Supreme Court had not seen a draft of the ALI Proposed Federal Statute prior to rendering its opinion. As explained earlier, the ALI proposal would permit enforcement (as well as recognition) of this order 'under such procedures as the recognizing court deems appropriate' (§2(b)(ii)). This latter qualification recognises, as did both the majority and dissent in the Canadian Supreme Court, the different context for injunctions and as observed in the Reporters' Note to this section, 'interpretation of foreign-court injunctions, and particularly of their intended territorial scope, will require special care'.[21] A similar view has been expressed by the United States Supreme Court in an interstate case involving enforcement of a sister-state injunction. In *Baker v General Motors Corp*,[22] the Supreme Court made clear that injunctions do fall within the Full Faith and Credit Clause of the Constitution but may be treated somewhat differently from money judgments and that particular attention must be paid to their territorial reach.

The philosophy underlying the ALI Proposed Federal Statute is not only an expansion of the types of judgments entitled to recognition and enforcement but also an endorsement of a more comprehensive approach to judicial co-operation. To that end, separate provisions were directed to other types of orders, such as 'asset-freezing orders' (the Mareva injunction),[23] whether issued in connection with a final judgment or as an

18 *Pro Swing* (n 16) [27].

19 *Ibid*, [84], [87], [112].

20 *Ibid* [39]. See also American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) §481 comment (b).

21 ALI Proposed Federal Statute (n 4) §2 Reporters' Note 2 at 41–42.

22 522 US 222 (1998).

23 For a comprehensive treatment of 'asset-freezing orders', see Mark SW Hoyle, *Freezing and Search Orders* (4th edn Informa, London 2006).

interim measure, and orders of confidentiality. Because such orders do not neatly fit the classic definition of a 'final judgment', two special provisions are included in the proposed statute. Section 12 provides for a court in the United States to grant provisional relief in support of a foreign order, whether or not final, designed (1) to secure enforcement of a judgment entitled to recognition/enforcement or (2) to provide security or disclosure of assets in connection with proceedings likely to result in a judgment entitled to recognition/enforcement. Section 13 authorises a court in the United States to 'take into account' the circumstances and reasons underlying an order of the foreign court, and, in appropriate cases, to act consistently with the order of the foreign court. An example here might be an order of a foreign court designed to prevent the use of confidential information, which, even though not directly enforceable, is to be respected by a court in the United States through its co-operation in effectuating the order.

D. FAILURE TO PROVIDE A SYSTEM OF IMPARTIAL TRIBUNALS

The fairness of procedures in the underlying proceedings is another universally accepted element in recognition practice, although it is implemented in quite different ways in various countries and produces quite different inquiries in the respective countries. In the United States, non-recognition is mandated when there is a failure to provide a system of impartial tribunals compatible with fundamental principles of fairness. An express provision in the Uniform Foreign Money-Judgments Recognition Act provides that a foreign judgment is not conclusive if 'the judgment was rendered under a (judicial) system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law' (§4(a)). The 2005 revision of the Act contains almost identical language (§4(b)(1)). The ALI Proposed Federal Statute adopts slightly modified language in incorporating that principle and provides that the foreign judgment will not be enforced if the party resisting recognition or enforcement establishes that 'the judgment was rendered under a system (whether national or local) that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness' (§5(a)(i)).

English courts address the topic of fair procedures in a different way, but will not enforce a judgment where the proceedings by which the judgment was obtained were 'opposed to natural justice'.[24] Unlike the approach in the United States, which is to look to a systemic flaw, the English courts appear to subject the *particular* proceedings in question to that standard.[25] Canadian courts also will refuse to recognise or enforce a foreign judgment if they find a lack of procedural justice or fair adjudication, and, like

24 See Sir Lawrence Collins (gen ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th edn Sweet & Maxwell, London 2006) 633–4.

25 See *Adams v Cape Industries plc* [1990] Ch 433, 564–6 (CA). See also *Masters v Leaver* [2000] BPIR 284 (CA).

England, appear to focus on the individual case.[26] In Germany, there does not appear to be a provision that precisely corresponds to these, but two other provisions of the German Code are used to ensure the fairness of proceedings. In Germany, a foreign judgment will not be recognised (1) if there has not been an appropriate means of notice and service[27] and (2) if it 'would give rise to a result that is manifestly incompatible with the basic principles of the German law'.[28] The latter limitation includes both the procedures under which the foreign judgment was obtained and the substantive law on which the judgment was based.[29]

The approach in the United States has been one that addresses only systemic concerns about foreign judicial systems and does not entail evaluation of the proceedings in the particular case. However, there are other specific defences to recognition/ enforcement under the Uniform Act (and US law more generally) relating to adequate notice of the proceedings (§4(b)(1)) and the absence of fraud (§4(b)(2)), and these provisions *are* directed to the particular proceedings in the individual case. Interestingly, the 2005 revision to the Uniform Act added a new discretionary defence to enforcement/ recognition that pays greater attention to the particular proceeding resulting in the foreign judgment: it specifies that a judgment need not be recognised or enforced when 'the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law' (§4(c)(8))—a move that is directed to the *adequacy of the particular proceedings*. The earlier resistance in the United States to this type of individualised approach—a resistance that is retained in the ALI Proposed Federal Statute—is a desire to avoid a detailed inquiry into specifics of the foreign proceedings.[30] However, it is important to note that even with this more specific inquiry, the standard is not a parochial one; courts in the United States have been clear that the requirement of 'fair procedures' was not meant to impose the specifics of US procedure such as cross-examination or discovery or juries upon the foreign court proceeding in order to qualify the resulting judgment for recognition. One of the more interesting US decisions on these points is *Society of Lloyd's v Ashenden*,[31] which involved one of a number of attempts to enforce in the United States English judgments obtained by Lloyd's against various Names allowing Lloyd's to recover certain assessments imposed by Lloyd's on the Names. Resisting enforcement, the Names argued that the English courts had refused to allow

26 See *Beals v Saldanha* [2003] 3 SCR 416.

27 German Code of Civil Procedure (*Zivilprozessordnung* or ZPO), §328(1)(2), reprinted in English in Charles E Stewart (trans), *German Commercial Code and Code of Civil Procedure in English* (Oceana, New York 2001) (hereinafter 'German Code').

28 *Ibid*, §328(1)(4).

29 For a nuanced discussion of the German approach to recognising/enforcing US judgments, see Wolfgang Wurmnest, 'Recognition and Enforcement of US Money Judgments in Germany' (2005) 23 *Berkeley Journal of International Law* 175.

30 ALI Proposed Federal Statute (n 4) §5 comment (c) at 58–60, and Reporters' Note 2 at 68–70.

31 233 F 3d 473 (7th Cir 2000).

any set-offs, such as fraud, to be asserted in the English suits for assessments against the Names and had treated the assessments as 'conclusive' in the absence of manifest error; these procedures or lack thereof, the Names contended, were inconsistent with due process. In the Seventh Circuit Court of Appeals, Judge Posner, writing for a unanimous panel, first observed that under the Uniform Act, recognition was only excused when the judgment was 'rendered under a *system* that does not provide impartial tribunals or procedures compatible with the requirements of due process of law'.[32] Thus even were there procedural infirmities in an individual case, the exception to recognition is not triggered because the focus is on the 'system' and not on 'individual proceedings'. A second point emphasised by Judge Posner was that the Uniform Act provision did not impose a particular set of procedural requirements of US law on foreign courts; rather, the procedure undertaken in the foreign court must have been 'fair' in a broader international sense.[33] Given the new provision adopted in the 2005 revision to the Uniform Act, this last point is particularly important since it reminds us that even under a more individualistic or 'retail' approach to the proceeding, the standard is an international and not a US specific one.[34]

In another area, the ALI Proposed Federal Statute has taken a different approach, providing for an additional defence to recognition/enforcement 'if the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court' (§5(a)(ii)). The National Conference of Commissioners on Uniform State Laws also adopted a similar 'integrity of the court' provision in their revision of the Uniform Act (§4(c)(7)). Although such a defence has not traditionally been part of recognition practice in the United States, concerns about corruption in the judiciaries of certain countries and the effect of corruption in a given case were the catalyst for the addition of this defence to recognition/enforcement practice.[35] Unlike the defence of 'fair procedure,' however, this defence does call for a showing specific to the litigation on which the judgment in question is based.

32 *Ibid*, 476. Other circuit courts in the United States have taken the same position with respect to Lloyd's judgments against the Names. See eg *Society of Lloyd's v Siemon-Netto* 457 F 3d 94, 105–6 n 12 (DC Cir 2006); *Society of Lloyd's v Reinhart* 402 F 3d 982, 994 (10th Cir 2005), cert denied 126 S Ct 366 (2005); *Society of Lloyd's v Borgers* 127 F App'x 959, 960 (9th Cir 2005).

33 Canada adopted a similar position in a challenge to the enforcement of judgments against certain Canadian 'Names' arising out of the same events. See eg *Society of Lloyd's v Saunders* (2001) 55 OR (3d) 688 (Ont CA) [21]: 'natural justice is a very flexible concept, the basis of which is notice and an opportunity to be heard. Specific procedures vary not only from forum to forum, but at different courts and tribunals within a forum.'

34 Courts in the US have uniformly followed the approach in *Ashenden* in assessing compatibility with due process according to an 'international' standard. See eg *CIBC Mellon Trust Co v Mora Hotel Corp NV* 100 NY 2d 215, 222; 792 NE 2d 155, 160 (2003) (holding that an English default judgment issued for non-compliance with an English asset-freeze order (ie a Mareva injunction) was not incompatible with due process, even though New York courts did not have authority to issue such broad asset-freeze orders).

35 For material on corruption, see Maria Dakolias and Kim Thachuk, 'Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform' (2000) 18 *Wisconsin International Law Journal* 353 and sources there cited; see also eg Edgardo Buscaglia, *Judicial Corruption in Developing Countries: Its Causes and Economic*

E. PUBLIC POLICY AND *ORDRE PUBLIC*

This residual grant of authority to deny recognition or enforcement to a foreign judgment otherwise entitled to recognition is contained in every statute or treaty concerned with recognition and enforcement of foreign judgments or arbitral awards. For example, the Japanese Code requires that the 'contents of the judgment and the procedures of the litigation are not contrary to the public order or morals of Japan'[36]; the German formulation is that a foreign judgment will not be recognised if it 'would give rise to a result that is manifestly incompatible with the basic principles of the German law'.[37] Similar provisions are also found in Article V(2)(b) of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and in the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments, although the language was changed from the original formulation that appeared in the Brussels Convention so that Article 34 now provides that a judgment shall not be recognised 'if such recognition is *manifestly* contrary to public policy in the Member State in which recognition is sought' (emphasis added).[38] 'Public policy' may encompass both substantive and procedural aspects of the relevant forum law, or even a combination of both. For example, a German court refused enforcement of a US tort judgment against a German manufacturer based on a jury verdict because the judgment did not contain a written statement of reasons and US law was based on strict liability.[39]

(1) Substantive Public Policy

Differences in substantive law may give rise to a defence of 'public policy' to deny recognition/enforcement of a foreign judgment,[40] but its invocation today is rarer than

Consequences (Hoover Institution at Stanford University, 1999); *Judicial Reform in Latin American Courts: The Experience in Argentina and Ecuador* (World Bank Technical Paper No 350, 1996); Ethan S Burger, 'Corruption in the Russian Arbitrazh Courts: Will there be Significant Progress in the Near Term?' (2004) 38 *International Lawyer* 15.

36 1996 Japanese Code of Civil Procedure, Art 118(iii), translated by Masatoshi Kasai and Andrew Thorson, and included as end material in Yasuhei Taniguchi, Pauline C Reich and Hiroto Miyake (eds), Takaaki Hattori and Dan Fenno, *Civil Procedure in Japan* (revised 2nd edn Juris Publishing, New York 2004) (hereinafter 'Japanese Code').

37 ZPO §328(1)(2), German Code (n 27) 277.

38 For a survey of decisions on public policy by national courts bound by the Brussels Convention/European Regulation, see Alexander Layton and Hugh Mercer (eds), *European Civil Practice* vol 1 (2nd edn Sweet & Maxwell, London 2004) 887–9.

39 *Solimene v B Grauel & Co*, Landgericht Berlin, 13 June 1989, translated in Andreas F Lowenfeld, *International Litigation and Arbitration* (3rd edn Thomson/West, St Paul MN 2006) 534–7.

40 See, for example, the 1975 decision of the German Federal Supreme Court which denied recognition to a New York judgment rendered in a suit arising from certain stock exchange transactions on the ground that under German law the German defendant did not have capacity to enter into such contracts: BGH 4 June 1975, *RJW* 1975, 500, cited in Norel Rosner, *Cross-Border Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (Ulrik Huber Instituut, Groningen 2004) 281.

one might have predicted. There has always been rhetoric that the public policy exception should be applied narrowly, and with respect to money-judgments, this appears to be the case. The exception seems to be a resistance to enforcement of US judgments abroad on the basis of punitive damage awards or 'excessive' jury verdicts in tort cases.[41] More recently, it is the United States that has been making more robust use of a substantive public policy exception, often without giving proper consideration to principles of private international law that I believe should be part of the public policy inquiry. Two recent cases in the United States are illustrative. Both cases involved English libel judgments that were refused enforcement because defamation law in England was less protective of First Amendment values of freedom of speech and freedom of the press than would be required under United States law as shaped by *New York Times v Sullivan*.[42]

The more egregious case, I think, is *Telnikoff v Matusevich*[43], where a libel judgment was obtained by one resident of England (Telnikoff) against another resident of England (Matusevich), both of whom were Russian émigrés. The libel was first contained in a letter written by Matusevich, which accused Telnikoff of being a racist hatemonger. Later the comments were published in an English newspaper. The court in *Telnikoff* refused to enforce the English judgment because it found that Maryland and English defamation law were rooted in fundamental public policy differences concerning freedom of the press and speech. One can make several observations about the decision. The first question is whether the high threshold for triggering a violation of public policy—that is, repugnance to the public policy of the United States—was really met in this case. It may well be that the underlying *claims* would have triggered First Amendment concerns under US libel law, but differences of applicable law do not necessarily rise to violations of fundamental public policy. The second and more telling inquiry is directed to a broader issue of private international law: when does a state have interests that are implicated sufficiently to invoke the public policy defence? In *Telnikoff*, neither of the parties nor the transaction had any connection to the United States at the time of the transaction or the proceedings in England. The only nexus with the United States is the fact that the judgment debtor eventually moved to the US and had assets there. One can imagine a finite number of situations where there would be an international consensus about norms that would deem recognition or enforcement of a judgment to violate public policy without looking to any territorial nexus. However, in this case, where what is at stake are differing views about the appropriate balance between defamation protection and free speech, it is England that has

41 See eg Gerhard Walter and Samuel P Baumgartner, 'General Report: The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions' in Gerhard Walter and Samuel P Baumgartner (eds), *Civil Procedure in Europe: Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions* (Kluwer Law International, The Hague 2000) vol 1, 30 n 249; Joachim Zekoll, 'Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany' (1989) 37 *American Journal of Comparative Law* 301, 336; Rosner (n 40) 313–14.

42 367 US 254 (1964).

43 347 Md 561, 792 A 2d 230 (Ct App Md 1997) (on certified question from DC Circuit).

the relevant policy interests with respect to these parties and the transaction in question.[44] In a traditional conflict-of-laws analysis, the United States would have 'no interest' in applying its standards of behaviour and recovery to these parties. Therefore, it is inappropriate for US standards to be invoked as a public policy defence in a recognition/enforcement context.

Both German and Swiss courts have paid attention to such 'nexus' factors in evaluating the public policy defence in their recognition and enforcement practices.[45] For example, although the portion of a US judgment that awarded $200,000 in damages for pain and suffering by a court in the United States went well beyond what a German court would grant, the German Federal Court of Justice (the German Federal Supreme Court) did not find a violation of German public policy, explaining that the defendant was a dual German-American citizen who had committed the acts of sexual abuse giving rise to the proceedings and the judgment in the United States and who had lived his entire life in the United States until he fled to Germany after the events and the proceedings.[46] Likewise, a Swiss court did not invoke a public policy defence when requested to enforce a $50,000 punitive damage award when the defendant Swiss company operated on a global basis and the contract underlying the judgment involved shipments between England and the United States, and the parties had chosen English law to govern the transaction.[47]

The Italian courts have been even more explicit about this point in two recent decisions.[48] If the foreign judgment relates only to foreign citizens, recognition can only be refused if there is a violation of 'international' public policy. When an Italian citizen is involved, the question becomes a matter of 'internal' public policy, requiring less deference to the foreign judgment.

44 For a critical view of the use of English courts by foreign claimants against foreign defendants in libel cases, see Robin Morse, 'Transnational Libels, Foreign Parties and English Courts' (draft, on file with author). For a more thorough treatment of the private international law issues arising in defamation and invasion of privacy suits, see Robin Morse, 'Rights Relating to Personality, Freedom of the Press, and Private International Law: Some Common Law Comments' (2005) 58 *Current Legal Problems* 133.

45 Walter and Baumgartner (n 41) 28–29.

46 See 118 BGHZ 312, 346-350 (1992), cited in Walter and Baumgartner (n 41) 29 n 238. See also Joachim Zekoll, 'The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice' (1992) 30 *Columbia Journal of Transnational Law* 641, 652–3 (discussing the decision in detail and noting that 'the absence of sufficient contacts to Germany mandates that a greater tolerance be shown toward the foreign decision').

The court did not enforce the punitive damages portion of the United States judgment, however, because there was no evidence that punitive damages were awarded as compensation for actual or future loss: *ibid*, 656–7. Excerpts from the case are translated into English in Gerhard Wegen and James Sherer, 'Germany: Federal Court of Justice Decision Concerning the Recognition and Enforcement of US Judgments Awarding Punitive Damages' (1993) 32 *International Legal Materials* 1320.

47 See Zivilgericht Basel in (1991) 31 *Basler Juristiche Mitteilungen* 34–35, cited in Walter and Baumgartner (n 41) 29 n 238.

48 See Michele Angelo Lupoi, 'Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions: Italy' in *Civil Procedure in Europe* (n 41) vol 3, 357–8.

One can contrast the *Telnikoff* case with an earlier decision, that of *Bachchan v India Abroad Publications*,[49] where a New York state trial court also refused to enforce an English libel judgment. However, in *Bachchan*, the Indian plaintiff sued a foreign news agency operating in New York and elsewhere that had distributed a news story carried in both England and New York that an English court held to be defamatory. Although the story related to misconduct in India, the news story did affect US as well as English interests. In this context, one might worry that a plaintiff would use the courts in England to circumvent constitutional protections provided by US libel law for publications in the US. Whether or not *Bachchan* is rightly decided, at least from the private international law perspective, interests of the United States in this case are properly taken into account in assessing a public policy defence.

The recently decided Second Circuit case, *Sarl Louis Feraud International v Viewfinder, Inc*,[50] emphasised an additional aspect of the First Amendment public policy analysis. In *Sarl*, the French designer plaintiffs obtained a default judgment in France against the operator of a US-based website on which pictures of their designs had been posted. The District Court had refused to enforce the judgment as violating US public policy on the basis of protections of the First Amendment. The Second Circuit, in determining whether liability for the unauthorised use of the intellectual property at issue in *Sarl* was in tension with the protection afforded by the First Amendment and therefore a violation of US public policy, held that it is necessary to assess protections that the French intellectual property regime affords to a news entity engaged in the unauthorised use of intellectual property in comparison with protections under US law.[51]

These First Amendment concerns have surfaced in several recent litigations in the United States. Two foreign country defamation judgments, one from France and one from England, have been the catalyst for legislative action in the United States even though there was no attempt in either case to enforce the foreign judgment in the United States. Rather in both cases, the judgment debtors (both Americans) against whom the foreign libel judgments were rendered brought suit themselves in the United States for declarations that the judgments were not enforceable. In *Yahoo! Inc v La Ligue Contre Le*

49 585 NYS 2d 661 (Sup Ct NY 1992).

50 489 F 3d 474 (2d Cir 2007).

51 *Ibid*, 481–2. The Court observed that if the publication of photographs of copyrighted material would not constitute 'fair use' under US law, then the French intellectual property regime sanctioning the same conduct 'certainly would not be repugnant to public policy'. Similarly, if the sole reason that the defendant's conduct would be permitted under US copyright law is that the designs were not copyrightable, the French judgment should not be deemed to be repugnant because 'copyright laws are not "matters of strong moral principle" but rather represent "economic legislation based on policy decisions that assign rights based on assessments of what legal rules will produce the greatest economic good for society as a whole"': *ibid*, 480 fn 3 (citations omitted). The French law need not offer protections *identical* to those contained in the First Amendment; indeed, the court framed the questions as 'whether such protections are *sufficiently comparable* to that required by the public policy of New York': *ibid*, 482 and 484 (emphasis added).

Racisme,[52] the Ninth Circuit Court of Appeals dismissed the action on a combination of lack of jurisdiction and failure of ripeness grounds; and in *Ehrenfeld v Bin Mahfouz*,[53] the Second Circuit Court of Appeals ruled that in a suit by a US plaintiff for a declaration of non-enforcement of an English libel judgment there was no personal jurisdiction over the Saudi banker who had obtained a default judgment in England. Because of concerns that even the potential for enforcement of such judgments could have a harmful impact on rights of free speech in the United States, both the New York legislature and the Congress have sought legislative cures. In 2008, New York amended its version of the Uniform Act to provide an additional discretionary basis for non-enforcement of a foreign judgment. Specifically, when a defamation judgment is obtained outside the United States, the judgment need not be enforced unless the court in New York determines that the defamation law applied by the foreign court provides at least as much protection for freedom of speech and press as would be provided by both the United States and New York Constitutions.[54] In addition, the jurisdictional statute in New York was amended to provide that any person who obtains a judgment in a defamation proceeding outside the United States against a New York resident or person amenable to jurisdiction in New York with assets in New York is subject to jurisdiction in New York provided the alleged defamatory publication was made in New York and the person against whom the judgment was rendered has assets in New York or may have to take action in New York to comply with the judgment.[55] Proposed federal legislation has been introduced in Congress; of the pending proposals one would offer exorbitant measures,[56] but its prospect for success is uncertain.

52 433 F 3d 1199 (9th Cir 2006) (en banc).

53 518 F 3d 102 (2d Cir 2008).

54 2008 NY Laws 66.

55 *Ibid.*

56 The proposal would create a federal cause of action in favour of a US person against whom a foreign lawsuit for defamation was brought if the matter was published or disseminated in the United States and did not constitute defamation under US law. Jurisdiction in the United States is authorised if a person or entity has filed a foreign lawsuit for defamation against a US party and there are assets in the United States against which the judgment could be executed. The remedies for the US plaintiff include a declaration for non-enforcement, damages in the amount of the foreign judgment along with costs attributable to the foreign lawsuit and damages for harm due to decreased opportunities to publish. Moreover, if the US plaintiff can show that the foreign lawsuit was brought to suppress First Amendment rights by discouraging the exercise of free speech rights, treble damages may be awarded. See HR 5714 (110th Congress, 2d Sess, April 16, 2008); S 2977 (110th Congress, 2d Sess, May 6, 2008). Possibly recognising the exorbitant reach of such a proposal, a more limited bill has been introduced, merely providing that domestic courts should not recognise or enforce a foreign judgment concerning defamation unless the foreign judgment is consistent with the First Amendment of the US Constitution. HR 6146 (110th Congress, 2d Sess, May 22, 2008).

(2) Procedural Public Policy

A number of countries include an assessment of the foreign court's procedures as an aspect of the public policy defence. These include such issues as notice and service, impartiality in proceedings, and even the reasoning of the foreign judgment; and in some systems extend to a conflict with an existing judgment or with a proceeding commenced prior to the proceeding resulting in the foreign judgment. In other countries, these types of defences may be specifically identified in the code or statute. In the United States, as noted earlier, both the original and revised Uniform Acts in the United States contain specific provisions on many of these matters. For example, under the 1962 version of the Uniform Act, a judgment need not be recognised or enforced if the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend (§4(b)(1)); the judgment was obtained by fraud (§4(b)(2)); or the judgment conflicts with another final and conclusive judgment (§4(b)(4)). The 2005 revision to the Uniform Act includes these defences as well as two additional ones: that the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment (§4(c)(7)), and that the *specific proceeding* in the foreign court leading to the judgment was not compatible with the requirements of due process of law (§4(c)(8)). In the United States, it was the ALI Project that first considered the possibility of a defence dealing with concerns about integrity and corruption in the rendering court, and such a defence is included in the Proposed Federal Statute (see §5(a)(2)). However, the ALI Project rejected the approach in the 2005 revision to the Uniform Act that introduced a defence permitting a general review of the specific proceedings to ensure that they are compatible with due process. Like both the original and the revised Uniform Acts, the ALI Proposed Federal Statute includes as a defence to recognition/enforcement the lack of notice reasonably calculated to inform the defendant of the pendency of the proceeding in a timely manner (§5(a)(iv)) or fraud that deprived the party of adequate opportunity to present its case (§5(a)(v)). Both the original and revised Uniform Acts include as a defence that 'the judgment conflicts with another final and conclusive judgment' (1962 Uniform Act, §4(b)(4); 2005 revised Uniform Act, §4(c)(4)). The ALI Proposed Federal Statute refines that rule to permit non-recognition where the 'judgment is irreconcilable with another foreign judgment' (§5(c)(ii)), and in the Comment emphasises that a court in the United States should look to see whether the later foreign judgment took into account the prior judgment.[57] The ALI Proposed Federal Statute pays additional attention to problems

57 ALI Proposed Federal Statute (n 4) §5 comment (j) at 65–66. A recent case decided by the highest court in New York confirms that position. See *Byblos Bank Europe SA v Sekerbank Turk Anonym Syrketi* 10 NY 3d 243 (2008) (recognising a Turkish judgment in favour of the defendant and refusing to recognise and enforce a later Belgian judgment in favour of the plaintiff because the Belgium court, relying on a now-repealed Belgian statute, reviewed the merits of the Turkish judgment and came to the opposite result; the Belgian

of parallel litigation and the potential of inconsistency between a foreign and US judgment with the inclusion of provisions permitting a court in the United States to refuse to enforce a judgment that results from a proceeding initiated after commencement of a proceeding in the US that was not stayed (§5(c)(iii)), or from a proceeding that was undertaken to frustrate a claimant's opportunity to bring suit in a more appropriate court in the United States (§5(c)(iv)).[58]

It is interesting to examine whether the defences in US practice—particularly those introduced in the recent reform proposals—are consistent with approaches in other countries. Fraud which taints a foreign proceeding is almost always a defence to a foreign judgment, whether it is regarded as a subcategory of *ordre public* or an independent defence, though there are differences in various countries as to the nature of the fraud and the circumstances in which it can be raised.[59]

Inadequacy of notice of the proceedings is also a defence under the national law in almost every country; Germany, Japan and Switzerland address the issue specifically in their statutes. The German Code of Civil Procedure excludes recognition if the defendant who did not participate in the proceedings is not served with the pleadings in the regular way and not in a position to defend.[60] The Japanese Code of Civil Procedure lists the receipt of service of summons or other order necessary to commence proceedings as one of the conditions for recognition of a foreign judgment.[61] The Swiss Private International Law Code has a more particularised rule on service: the defendant must be properly served with process according to the law of its domicile or the law of its habitual residence or the judgment will not be recognised.[62] The EU Regulation includes an express

court's failure to give comity to the earlier Turkish judgment was the basis for the New York court's exercise of discretion in refusing to recognise the Belgian judgment). As regards a conflict between a foreign judgment and a US judgment, the Full Faith and Credit Clause of the United States Constitution obligates a court in the United States to recognise the US judgment, regardless of whether the foreign action or the action in the United States was commenced first and regardless of which judgment was first entered.

58 An effort to avoid the problem of parallel litigation and irreconcilable judgments of courts in the United States and foreign countries is provided for in a different provision of the ALI Proposed Federal Statute—§11—which sets forth criteria for courts in the United States to decline jurisdiction when prior foreign proceedings are pending. For further discussion of this declination-of-jurisdiction provision, see Linda Silberman, 'A Proposed Lis Pendens Rule for Courts in the United States: The International Judgments Project of the American Law Institute' in T Einhorn and K Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (TMC Asser, The Hague 2004) 341. As to existing law in the United States on the subject of parallel proceedings, see Louise Ellen Teitz, 'Both Sides of the Coin: A Decade of Parallel Proceedings and Foreign Judgments in Transnational Litigation' (2004) 10 *Roger Williams University Law Review* 1.

59 See Walter and Baumgartner (n 41) 31.

60 ZPO §328(2), German Code (n 27) 277.

61 Japanese Code of Civil Procedure, Art 118(2), in Japanese Code (n 36).

62 Swiss Private International Law Statute, art 27(2)(a), reproduced in English in Pierre A Karrer, Karl W Arnold and Paolo Michele Patocchi (trans and eds), *Switzerland's Private International Law* (2nd edn Kluwer Law and Taxation Publishers, Cambridge MA 1993) 54.

condition stating that a judgment shall not be recognised if the defendant did not obtain proper service to enable him to arrange for his defence, unless the defendant failed to challenge the judgment when it was possible to do so.[63] The text of the Regulation is limited to judgments where there has been a default of appearance, but in cases other than defaults, where the defendant has been denied the opportunity to be heard, there may be a public-policy defence under Article 34(1).[64] In France, case law makes clear that recognition is barred where the party against whom a judgment is asserted has not been given adequate notice and service of the proceedings,[65] and similar case law can be found in England[66] and in the various provinces in Canada.[67]

Many countries make some provision for a defence to recognition and enforcement when a foreign judgment is inconsistent with another judgment or an ongoing proceeding in the recognising state, but the solutions vary among the states.[68] For example, the German Code of Civil Procedure excludes from recognition a judgment that is 'inconsistent with a judgment issued here or with an earlier foreign judgment subject to recognition or in the event that the proceedings on which it is based are inconsistent with an earlier proceeding here which shall have become final'.[69] The Italian Law Reforming Private International Law contains two provisions dealing with parallel judgments and

63 Article 34(2) provides that a judgment shall not be recognised 'where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so'.

64 Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (4th edn Informa Professional, London 2005) 511.

65 Robert Byrd, 'France' in Charles Platto and William G Horton (eds), *Enforcement of Foreign Judgments Worldwide* (2nd edn Graham & Trotman and International Bar Association, London 1993).

66 With respect to recognition of judgments at common law, failure to give proper notice is characterised as a breach of natural justice: *Dicey, Morris and Collins* (n 24) 633–4. In addition, in England, the Foreign Judgments (Reciprocal Enforcement) Act 1933—which applies to countries with which a treaty pursuant to the Act has been made—provides a specific defence where there is a failure on the part of the defendant to receive notice of the proceedings in time for the defendant to defend himself. See section 4(1)(a)(iii).

67 In those provinces where recognition and enforcement is at common law, a foreign judgment can be impeached for failure of proper notice as 'contrary to natural justice'. Janet Walker, *Castel & Walker: Canadian Conflict of Laws* (6th edn LexisNexis Canada, Ontario 2005) §14.8(b). The most recent uniform law promulgated by the Uniform Law Conference of Canada—the Uniform Enforcement of Foreign Judgments Act (n 7)—includes a defence to recognition and enforcement if the judgment 'was rendered in a proceeding that was conducted contrary to the principles of procedural fairness and natural justice' (s 4(f)). A recent decision by the Ontario Court of Appeal refused recognition of an Illinois judgment and allowed the Canadian plaintiffs to bring their own class action in Ontario, notwithstanding an Illinois class action settlement judgment that purported to include Canadian residents as members of the class. The Ontario court held that the notice given to the Canadian class members in an opt-out class was not only different from that given to US class members but also was inadequate; as a result, the Illinois judgment constituted a denial of natural justice and was not entitled to recognition. See *Currie v McDonald's Restaurants of Canada Lit* (2005) 74 OR (3d) 321.

68 See Walter and Baumgartner (n 41) 33–34.

69 ZPO §328(1)(3), in German Code (n 27) 277.

proceedings: a judgment shall be recognised if it does not conflict with any other final judgment pronounced by an Italian court/authority[70] and if no proceedings are pending in Italy between the same parties and on the same subject, which were initiated prior to the foreign proceedings[71]. A Japanese court, relying on a more general 'contrary to the public order' provision of the Japanese Code, held a US judgment unenforceable where the judgment was inconsistent with a final and irrevocable judgment rendered by a Japanese court.[72] Pursuant to French case law, a French judgment contrary to a foreign judgment on the same subject matter and between the same parties may be a basis to refuse to recognise the foreign judgment regardless of whether the foreign judgment was prior in time.[73] As a matter of common law, English courts will deny recognition to a foreign judgment inconsistent with a prior English or foreign judgment.[74] The fact that a foreign proceeding was instituted prior to the later judgment of another court is apparently not relevant. Interestingly, the EU Regulation gives precedence to any local judgment by providing that a Member State shall not recognise a judgment of another Member State if it is 'irreconcilable' with a local judgment rendered in a dispute between the same parties[75]. As a practical matter, however, such cases should be rare because Article 27 of the Regulation requires that where proceedings involving the same cause of action and the same parties are brought in the courts of different Member States, the second-seised court is required to decline jurisdiction. As to other judgment conflicts, the Regulation provides that a judgment shall not be recognised if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and the same parties, if the earlier judgment was one which satisfied the conditions for recognition.[76]

(3) Choice of Law

Related to the defence of public policy and at one time meriting an independent inquiry in the context of recognition/enforcement is the question of the law applied by the foreign court. In a number of countries, choice-of-law review was once part of recognition/enforcement practice, but it is rarely used today, except in family law or succession cases.

70 Law 218/95, art 64(1)(e), translated in (1996) 35 *International Legal Materials* 760. For a description of Law 218/95 and a survey of recent case law, see Alessandro Barzaghi, 'Recognition and Enforcement of United States Judgments in Italy' (2005) 18 *New York International Law Review* 61.

71 Law 218/95, art 64(1)(f).

72 See *Marubeni America Corp v Kansai Iron Works* 361 Hanta 127 (Osaka Dist Ct, 22 December 1977), discussed in Takao Sawaki, 'Battle of Lawsuits: Lis Pendens in International Relations' (1979–80) 23 *Japanese Annual of International Law* 17.

73 Byrd (n 65) 176.

74 Briggs and Rees (n 64) 560.

75 EU Regulation, Art 34(3).

76 *Ibid*, Art 34(4). For a thorough discussion of these issues, see *European Civil Practice* (n 38) vol 1 918–27 and 930–3.

However, a few countries continue to use a choice-of-law check as part of the law on foreign-judgment recognition and enforcement practice. For example, in France, an important 1964 decision of the Cour de Cassation identified application of the proper law as one of the conditions that must be satisfied to obtain recognition or enforcement of a foreign judgment.[77] The obligation does not mean a re-examination of the actual application of law to the merits but rather a check to ensure that the proper law, according to French conflicts principles, is not distorted.[78] Moreover, the position of many French commentators today is that choice-of-law review no longer exists in France,[79] although the Cour de Cassation has not yet sanctioned this view.[80] By contrast, in Portugal, the issue of applicable law continues to be a serious impediment to recognition.[81]

(4) The Role of 'Human Rights' Norms

For those countries that are party to the European Convention on Human Rights, the jurisprudence of the European Court of Human Rights in interpreting that Convention may play some role in shaping the contours of recognition practice.[82] For example, the interpretation of the requirements of the right to a fair trial may influence how the public policy defence is construed under both the Brussels Regulation and national law. In *Krombach v Bamberski*,[83] the European Court of Justice, construing the public policy defence in the Brussels Convention,[84] held that failure of the French proceedings to allow the accused to present a defence was a violation of the right to a fair hearing as expounded by the European Court of Human Rights and thereby constituted a violation of public policy such that the German court would be justified in refusing to recognise the French judgment.[85] Indeed, there is some authority that the European Court of Human Rights

77 *Munzer v Munzer* Cass 1e civ, 7 January 1964.

78 See Walter and Baumgartner (n 41) 33 n 279.

79 For a summary of the views of various commentators, see Rosner (n 40) 248.

80 See Walter and Baumgartner (n 41) 32 n 278.

81 *Ibid*, 33.

82 See generally James Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 *International and Comparative Law Quarterly* 1, 20–30; Ben Juratowitch, 'The European Convention on Human Rights and English Private International Law' (2007) 3 *Journal of Private International Law* 173; Patrick Kinsch, 'The Impact of Human Rights on the Application of Foreign Law and on the Recognition of Foreign Judgments—A Survey of the Cases Decided by the European Human Rights Institutions' in Einhorn and Siehr (n 58) 197.

83 Case C7/98 [2000] ECR I-935.

84 Article 27(1) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, now Article 34(1) of the EU Regulation on Jurisdiction and Judgments.

85 Following this decision, the German Supreme Court determined that the French judgment was unenforceable as contrary to German public order, making express reference to the right to be heard enshrined in the German Constitution. See Decision of Bundesgerichtshof, IX Civ Sen, 29 June 2000, [2000] IPRax 50. For a detailed account of the proceedings before the European Court of Justice, the German Supreme Court and the European Court of Human Rights, see Andreas F Lowenfeld, 'Jurisdiction, Enforcement, Public Policy and Res Judicata: The Krombach Case' in Einhorn and Siehr (n 58) 229.

regards a treaty country as obligated to refuse recognition/enforcement of a foreign judgment, even one from a non-Contracting State, if the underlying proceedings are in breach of Convention norms.[86] However, an interesting English case in the House of Lords, *Government of the United States of America v Montgomery*,[87] offers a somewhat different perspective, holding that even if the American 'fugitive disentitlement doctrine' (denying a party the right to appeal the judgment against her) constituted a breach of Article 6 of the Convention, it could not be regarded as a 'flagrant denial' of the Article 6 right to a fair trial, and therefore the US judgment was entitled to enforcement.[88]

F. JURISDICTIONAL LINK

Judicial jurisdiction is generally an integral part of judgment recognition/enforcement practice. Indeed, within the European Union, the Brussels/Lugano Conventions, and now the EU Regulation, tie jurisdiction and recognition/enforcement together even more closely for purposes of the common internal market. The jurisdictional rules of the EU Regulation provide not only the bases upon which a judgment will be recognised but also the agreed-upon set of rules for the exercise of direct jurisdiction over persons domiciled in Member States.

This approach of linking the grounds of direct jurisdiction to those which provide the appropriate bases of indirect jurisdiction in the context of recognition and enforcement was one of the reasons for breakdown of the negotiations at the Hague for a world-wide Convention on jurisdiction.[89] The proposed Hague Convention ultimately proceeded as a 'mixed' convention, establishing a category of 'permitted' bases of jurisdiction in addition to the 'required' and 'prohibited' categories that characterise a true double Convention in the manner of the EU Regulation. Under the proposed Hague 'mixed' Convention, if jurisdiction came within the middle category, courts were permitted to exercise direct jurisdiction on such ground; and in the context of recognition, it was to be left to national law whether to afford recognition to a judgment rendered on such a basis of jurisdiction. But a continuing problem in the negotiations was reaching a consensus on jurisdictional grounds appropriate to the 'gray' area. If recognition of

86 Compare *Pellegrini v Italy* (2001) 35 EHRR 44 (suggesting that full compliance with procedural safeguards of the Convention is necessary in order to recognise a foreign judgment) with *Prince Hans-Adam II of Liechtenstein v Germany*, Judgment of 12 July 2001, no 42527/98 ECHR 2001-VIII (indicating that Convention requirements were not necessarily determinative of the adequacy of proceedings in a non-Convention country). The cases are discussed at length in Kinsch (n 82) 218–28.

87 [2004] 1 WLR 2241 (HL).

88 The case involved the registration in England, pursuant to an English statute, of a confiscation order made in the United States.

89 See Linda Silberman, 'Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?' (2002) 52 *DePaul Law Review* 319, 320–4.

judgments had been the primary objective of the Hague negotiations, it could easily have been achieved by identifying a limited number of bases for indirect jurisdiction that would support a judgment of a foreign court. But, of course, the Europeans—with the Brussels/Lugano model in mind—had a second purpose in mind and that was to establish restraints on direct jurisdiction in some countries—taking specific aim at the United States.[90] It is not surprising that given the variety of legal cultures and jurisdictional traditions, it was not possible to reach a consensus in developing jurisdictional rules of both direct and indirect jurisdiction in a world-wide Convention. Indeed, it may be useful to think about indirect jurisdiction rules quite apart from the rules of 'direct jurisdiction' even as a matter of national law.

To that end, it is useful to examine the approach taken by various countries. Some countries adopt what is often characterised as 'mirror image' jurisdiction. That is, if a country permits the exercise of a particular basis of jurisdiction over a foreign defendant by its courts, it will accept a similar assertion of jurisdiction by a foreign court as an appropriate basis of jurisdiction in the recognition/enforcement context. Such is the approach in Germany and Italy.[91] A leading Supreme Court case in Canada, *Beals v Saldhana*,[92] held that Canada would apply to foreign judgment recognition and enforcement the standard it had adopted for recognition and enforcement of inter-provincial judgments: that there is a real and substantial connection between the foreign court and the facts on which the proceeding was based.[93] That is also the constitutional standard in Canada for an assertion of direct jurisdiction.[94] In other countries, such as Switzerland, the jurisdictional grounds that will support a foreign judgment are more restrictive than the rules under which a Swiss court will itself take jurisdiction in

90 *Ibid*, 321–2.

91 For Germany, see ZPO §328(1)(1), in German Code (n 27) 277; for Italy, see Law 218/95, art 64(1)(a), translated in (1996) 35 *International Legal Materials* 779–80.

92 [2003] 3 SCR 416. *Beals* was a 6-3 decision, and vigorous dissents argued that the domestic rules of jurisdiction did not sufficiently calibrate the burdens on a defendant in a transnational case. For similar critiques, see Janet Walker, '*Beals v Saldanha*: Striking the Comity Balance Anew' (2002) 5 *Canadian International Lawyer* 28; Tanya J Monestier, 'Foreign Judgments at Common Law: Rethinking the Enforcement Rules' (2005) 29 *Dalhousie Law Journal* 163, 181–4; H Scott Fairley, 'Open Season: Recognition and Enforcement of Foreign Judgments in Canada after *Beals v Saldanha*' (2005) 11 *ILSA Journal of International and Comparative Law* 305.

93 The new Uniform Enforcement of Foreign Judgments Act (n 7) would slightly modify that standard by providing an 'escape clause' whereby a foreign judgment would not be enforced if the judgment debtor proved to the satisfaction of the enforcing court that it was clearly inappropriate for the court to take jurisdiction (§10(b)). See H Scott Fairley and John Archibald, 'After The Hague: Some Thoughts on the Impact on Canadian Law of the Convention on Choice of Court Agreements' (2006) *ILSA Journal of International and Comparative Law* 417, 424–6.

94 *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077. Although the case was not argued in constitutional terms, the Supreme Court of Canada stated in *Hunt v T & N plc* (1993) 4 SCR 289 that the rules in *Morguard* are 'constitutional imperatives': Monestier (n 92) 170 n 28.

international matters.[95] Specifically, in a number of situations, Swiss law generally prevents the recognition of a foreign *in personam* judgment against a defendant domiciled in Switzerland.[96] That is also true of the English approach, and thus the grounds for assertions of direct jurisdiction of English courts under Rule 6.20 will not suffice as bases on which a foreign court could exercise its jurisdiction for purposes of recognition/enforcement in England.[97] Only a limited number of grounds will be accepted as sufficient for recognition/enforcement of a foreign judgment in the English courts, and they are presence, residence, and various forms of consent or submission. On the other hand, in France, the jurisdiction of the foreign court may be adequate to support recognition/enforcement of a judgment even when the foreign basis of jurisdiction would not suffice for an exercise of direct jurisdiction in France. Under French law, a foreign court is deemed to have jurisdiction for purposes of recognition/enforcement if there is a significant relationship between the dispute and the foreign forum ('*lien caracterise*'), irrespective of the French rules on direct jurisdiction.[98] But until recently, it was thought that a court in France would not recognise judgments against a French national due to the exclusive jurisdiction vested in a French court pursuant to Article 15 of the French Civil Code.[99] However, in a recent case, the Cour de Cassation held that Article 15 does not defeat the jurisdiction of a foreign court so long as the dispute has a significant link to the foreign court and so long as the choice of the foreign forum was not fraudulent.[100] Of course, what constitutes a *lien caracterise* and whether the requirement is a relative concept that is measured by the intensity of the links as between France and the foreign forum or can be satisfied by any significant connection is still not clear.

95 Rosner (n 40) 301–2.

96 See Walter and Baumgartner (n 41) 20. The Swiss Code of Private International Law contains express provisions addressing the grounds of jurisdiction of a foreign court that will support the foreign judgment. See eg Art 26 and Art 149. Article 149(2) includes such bases as where the foreign decision 'concerns a contractual obligation' and was 'rendered in the country of performance of that obligation' (Art 149 (2)(a)) or 'concerns an unlawful act' and was 'rendered at the place of the act or its effect' (Art 149(2)(f)), but both include the condition that the 'defendant was not domiciled in Switzerland'. Thus a Swiss defendant has a basis to resist recognition and enforcement of a foreign judgment if the foreign court exercises jurisdiction on one of these grounds. See generally Rosner (n 40) 301–7.

97 *Dicey, Morris and Collins* (n 24) 604–5.

98 *Fairhurst v Simitch* Cass Civ, 1st Sect, 6 February 1985. See also Rosner (n 40) 232–4.

99 Article 15 of the French Civil Code provides that 'A Frenchman may be brought before a court of France for obligations by him contracted in a foreign country, even with a foreigner': John H Crabb (trans), *The French Civil Code* (Fred B Rothman & Co, Littleton, Colorado, revised edn, 1995). Although Article 15 addresses only the question of direct jurisdiction by a French court, it had also been invoked by French defendants to resist recognition and enforcement in France of a foreign country judgment. See Walter and Baumgartner (n 41) 19–20 and 23.

100 *Prieur v Montenach* Cass Civ, 1st Sect, 23 May 2006, discussed in Marina Matousekova, 'Would French Courts Enforce US Class Actions Judgments?' [2006] *Contratto E-Impresa/Europa* 651, 657–9.

Existing law in the United States appears to be quite close to the mirror image approach, though it is not always easy to tell.[101] The Uniform Act, both in its present incarnation and in its revised form, lists a number of jurisdictional criteria that provide an appropriate jurisdictional nexus for enforcement of a foreign judgment. They are traditional grounds for the exercise of direct jurisdiction, such as personal service (§5(a)(1)), voluntary appearance (§5(a)(2)), agreements submitting to jurisdiction (§5(a)(3)), domicile of an individual or the manifest corporate presence of a corporation (§5(a)(4)), a claim arising out of an accident in the state (§5(a)(6)), or a claim arising from activities of a business office in the state (§5(a)(5)). An additional provision of the Act states that other bases of jurisdiction may be acceptable (§5(b)); and the case law in the US reveals that most American courts will recognise foreign judgments where the basis of the foreign court's jurisdiction is similar to a jurisdictional ground that would be accepted for direct jurisdiction in the US. Moreover, even where the basis for jurisdiction *articulated* by the foreign court, such as jurisdiction over a second defendant because one defendant is domiciled in the forum, would fall short of US constitutional requirements, if the facts would support jurisdiction on a jurisdictional ground that the US does have—such as jurisdiction over co-conspirators—the foreign judgment is still likely to be enforced.[102]

The approach taken by the ALI Proposed Federal Statute is unique, certainly to the American experience, and possibly to practice elsewhere in at least one respect. Rather than identify bases of jurisdiction that will support recognition/enforcement, the ALI Proposed Federal Statute lists certain bases of jurisdiction that are *unacceptable* for purposes of recognition (§6).[103] These include: presence of property of the defendant when there is no direct right to the property being asserted, nationality, domicile or place

101 See Linda J Silberman, 'The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The US Regime' (2004) 26 *Houston Journal of International Law* 327, 354–6.

102 See eg *Nippon-Emo Trans Co Ltd v Emo-Trans, Inc* 744 F Supp 1215 (EDNY 1990) (finding jurisdiction in Japan consistent with New York's requirements for general jurisdiction even though the bases for jurisdiction articulated by the Japanese court—failure to remit payment in Japan and presence of an affiliate—were not sufficient under New York law); *CIBC Mellon Trust Co v Mora Hotel Corp, NV* 743 NYS 2d 408 (App Div, 1st Dept 2002), aff'd on other grounds, 100 NY 2d 215 (NY 2003) (enforcing an English judgment even though the particular basis of jurisdiction—the English rule that if one defendant was domiciled in England, other defendants could be brought in as necessary or proper parties—did not meet US standards of due process because a New York court could exercise jurisdiction on a similar set of facts); *Bank of Montreal v Kough* 430 F Supp 1243, aff'd 612 F 2d 647 (9th Cir 1980) (recognising a Canadian judgment based on the rule providing for service outside the province on the basis of a breach of contract within the province where the defendant had extensive contacts with the province. The court noted that the judgment would not have been recognised if the defendant's contacts with the province had been less pronounced, suggesting that either the 'American standard' or some 'international standard' of fairness must be met before a judgment will be recognised or enforced).

103 The EU Regulation (Annex I) does expressly identify certain 'exorbitant' bases of jurisdiction that are unacceptable as direct bases of jurisdiction. However, any basis of jurisdiction that is not expressly provided for in the Regulation is also prohibited. Moreover, the judgment of a Member State cannot be challenged at the recognition stage on the basis of jurisdiction, other than in a few specified situations.

of incorporation of the plaintiff, and transitory presence of the defendant, unless no other appropriate forum was reasonably available. In choosing these as inappropriate grounds for jurisdiction, the proposed statute incorporates international and not necessarily US norms. In addition, a final basis of 'unacceptable jurisdiction' with respect to a foreign judgment is 'any other basis that is unreasonable or unfair given the nature of the claim and the identity of the parties' (§6(a)(v)). The Comment explains that a basis of jurisdiction that would not be acceptable for courts in the United States to exercise as a matter of direct jurisdiction might still support recognition of a foreign judgment.[104] Its purpose is to accommodate other jurisdictional regimes in the transnational order when the parties to the judgment are part of that regime. For example, within the European Union, domiciliaries of Member States are subject to suit in a forum where any one of a number of defendants is domiciled if the claims are closely connected. Under American due process standards, jurisdiction over a defendant without contacts in the forum state would be unconstitutional, and under existing standards of recognition practice in the United States such a judgment would generally not be recognised or enforced. But the proposed ALI provision allows for recognition of such a judgment because the 'multiple defendant' provision is an appropriate basis of jurisdiction for those defendants/judgment debtors who were subject to jurisdiction in the foreign court pursuant to the EU Regulation.[105]

In addition, the ALI Proposed Federal Statute includes a separate provision—similar to a provision in both the original and revised Uniform Act—that a foreign judgment shall not be recognised or enforced if the judgment resulted from a proceeding undertaken contrary to an agreement under which the dispute was to be determined exclusively in another forum (§5(b)). Interestingly, the European Regulation does not excuse recognition of a Member State judgment even if that judgment is the result of proceedings that fail to respect an exclusive choice-of-court agreement for jurisdiction in another Member State.[106] Although Article 23 of the Regulation requires the court of a Member State to honour a choice-of-court clause involving one or more domiciliaries of a Member State, an objection that the proceedings are in violation of such clause must be taken in those proceedings and may not be asserted at the recognition stage.[107] The rationale in this context is that it is necessary to trust that courts in other Member States will apply correctly the choice-of-court provision of the Regulation.

104 ALI Proposed Federal Statute (n 4) §6 comment (c) at 87.

105 *Ibid*, §6 Reporters' Note 3 at 89–90.

106 See Briggs and Rees (n 64) 502–3.

107 The result is clear from Article 35 of the Convention. Also, in *Gasser GmbH v MISAT Srl* [2003] ECR I-14693, the European Court of Justice held that pursuant to the *lis pendens* provision (Article 21 of the Convention, now Article 27 of the Regulation), the second-seised court—the forum chosen in an exclusive choice-of-court agreement—was required to stay its proceedings to allow the first-seised court to rule on the issue of jurisdiction.

Outside of the Regulation, however, in a number of countries disregard of a previously agreed-upon forum selection clause will justify non-recognition of a foreign judgment. That is the case, for example, in England[108] and in Italy.[109]

The ALI Proposed Federal Statute contains other protections for the judgment debtor who is unsure of how to proceed given uncertainty about the jurisdiction being asserted over him. Consider a defendant who believes that the assertion of jurisdiction over him is inappropriate or unfair. A default by the defendant can be a risky tactic, if enforcement is likely to be sought in a jurisdiction, like the United States, that enforces default judgments and the defendant cannot be certain that the jurisdictional basis would be unacceptable to the enforcing court. Or the defendant can make a jurisdictional objection in the rendering court, but if he loses, he has a difficult choice when there is uncertainty as to whether the jurisdictional ground asserted by the court of origin would be considered a fair basis of jurisdiction in the enforcing court. If the defendant in that situation raises the objection, loses on jurisdiction in the rendering court and goes on to defend on the merits, in many jurisdictions, such as England, the defendant will be seen to have 'submitted' to the jurisdiction of the rendering court.[110] That too seems quite harsh. The ALI Proposed Federal Statute rejects the view that a defendant who raises a jurisdictional objection and goes on to defend the merits has consented or submitted to the jurisdiction of the foreign court. The proposed Act expressly permits a defendant to object to jurisdiction and defend on the merits in the foreign court and still raise a jurisdictional objection at the enforcement stage (§6(c)). The reasoning is that a foreign court's determination that it has personal jurisdiction under its own law does not necessarily make it acceptable to the United States; moreover the defendant ought not to have to bear the risk of a default in order to challenge at the enforcement stage when there is no agreed view as to the fairness of certain assertions of jurisdiction.

G. RECIPROCITY

The inclusion of a reciprocity requirement as a defence to recognition or enforcement of a foreign judgment was perhaps the most controversial of the provisions that were adopted by the membership of the ALI.[111] In the United States, reciprocity has not

108 See eg the Civil Jurisdiction and Judgments Act 1982, s 32(1).

109 Lupoi (n 48) 355.

110 *Dicey, Morris and Collins* (n 24) 357–9.

111 A review of the scholarly literature reveals divergent views on the topic. For an endorsement of the reciprocity provision in the ALI Proposed Federal Statute, see Louisa B Childs, 'Shaky Foundations: Criticism of Reciprocity and the Distinction Between Public and Private International Law' (2006) 38 *New York University Journal of International Law and Policy* 221; Franklin O Ballard, 'Turnabout is Fair Play: Why a Reciprocity Requirement Should be Included in the American Law Institute's Proposed Federal Statute' (2006) 28 *Houston Journal of International Law* 199. For a highly critical view of the ALI position, see eg

generally been a requirement, and it is not included in either the official version of the 1962 Uniform Act or the 2005 revision.[112] However, in several US states, including states that have adopted the Uniform Act, the reciprocity requirement has been retained as either a mandatory or discretionary basis for non-recognition.[113] In short, the US practice—even under the Uniform Act—is not uniform. The approach of the majority of states as well as the Restatement (Third) of Foreign Relations Law—no reciprocity—is particularly interesting given that the Supreme Court of the United States, in the 1895 decision *Hilton v Guyot*,[114] held (5-4) that a French judgment in favour of French plaintiffs against an American defendant would not be enforced because if the circumstances were reversed, the French court would not enforce the judgment of a US court against French citizens. Thus, the only Supreme Court case on the subject of recognition and enforcement of foreign judgments appears to approve a reciprocity requirement. But since the 1920s, enforcement of foreign-country judgments has been viewed as a matter of the law of the individual states in the United States,[115] and the dissent in *Hilton* rejecting reciprocity has prevailed in most states. However, it is worth noting that the dissent in *Hilton* emphasised that the principle of retorsion was one better left to the legislative and judiciary branches than to the courts,[116] and the ALI Proposed Federal Statute would constitute just such a legislative effort.

When one looks to the practice in other countries, reciprocity is still a formal requirement in a number of countries, but it generally can be satisfied by evidence of recognition practice in the requesting state. That is the experience in Germany, which has a reciprocity provision in its Code of Civil Procedure.[117] On the other hand, in Austria, reciprocity must still be formally guaranteed by treaty or ministerial declaration.[118] The

Katherine R Miller, 'Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into US International Recognition and Enforcement Law' (2004) 35 *Georgetown Journal of International Law* 239, 287–318.

112 The drafters of the 2005 revision of the Uniform Act recognised that enforcement of US judgments abroad was often 'problematic' and considered adopting a reciprocity requirement, but ultimately decided against doing so because they did not find sufficient 'evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of US judgments'. See Uniform Foreign-Country Money Judgments Recognition Act, Prefatory Note, 13 *Uniform Laws Annotated* Part II (2007 Supp) 6.

113 At the time of writing, ten states have adopted the Uniform Act with a provision concerning reciprocity. Seven of these states (Florida, Idaho, Maine, North Carolina, Ohio, Oregon and Texas) authorise, but do not require, the court to deny recognition on grounds of lack of reciprocity; three other states (Colorado, Georgia and Massachusetts) have adopted the Uniform Act with a mandatory provision that reciprocity be established as a condition for recognition or enforcement. However, Colorado courts do enforce foreign judgments under 'the common law doctrine of comity': *Milhoux v Linder* 902 P 2d 856, 860 (Colo App 1995).

114 159 US 113 (1895).

115 See eg *Johnston v Compagnie Générale Transatlantique* 242 NY 381, 152 NE 121 (1926).

116 *Hilton* (n 108) 159 US 234.

117 ZPO §328(1)(5), in German Code (n 27) 277.

118 See Walter and Baumgartner (n 41) 34.

trend in many other countries—Italy, England, Canada—is to reject reciprocity altogether.[119]

Some have criticised the approach adopted by the ALI as 'regressive' and out of step with contemporary practice. Not surprisingly, as Co-Reporter for this proposal, my answer is that the balance struck in the Proposed Federal Statute was a reasonable solution for both principled and pragmatic reasons. First, as a matter of principle: the formal Comment on the reciprocity provision explains that the objective of the reciprocity provision in the Act is not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive for foreign countries to commit to recognition and enforcement of judgments rendered in the United States.[120] While a reciprocity requirement may mean that the United States will enforce fewer foreign judgments in the immediate future, the hope is that adoption of such a rule will in the long run lead to more liberal recognition/enforcement practices at the transnational level. Thus, the objective of the ALI Proposed Federal Statute was to create a more co-operative atmosphere for the recognition and enforcement of judgments both in the United States and elsewhere. That is particularly true in light of the provisions in the proposed statute for implementing the reciprocity requirement. In addition to identifying criteria to determine whether a 'comparable judgment' from a court in the United States would be recognised or enforced in the requesting state, the proposed federal statute authorises the Secretary of State to negotiate agreements with foreign states or a group of states for reciprocal practices, thereby dispensing with the need to make a showing of reciprocity in an individual case (§7(e)). However, this is only one means of establishing reciprocity, and reciprocity may also be established through expert testimony or by judicial notice if the law or decisions of a foreign court are clear. Other aspects of the provision are crafted to minimise obstacles to efficient enforcement and recognition even with a reciprocity requirement. Lack of reciprocity must be raised with specificity as an affirmative defence, and the party resisting recognition/enforcement bears the burden of showing that 'there is substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments' (§7(b)). As noted, the reciprocity rule is one directed at recognition and enforcement of 'comparable judgments' and the Act lists criteria to help make the comparability assessment. The formal Comment to §7 also makes clear that the fact that a tort judgment from a given country might not pass the test of reciprocity would not mean that other kinds of judgments, such as judgments for breach of contract or breach of a fiduciary relationship, would also fail.[121] Moreover, subsection (d) makes clear that refusal by a court to enforce punitive or multiple-damage

119 For Canada, see Vaughan Black, 'Commodifying Justice for Global Free Trade: The Proposed Hague Judgments Convention' (2000) 38 *Osgoode Hall Law Journal* 237, 250. For England, see *Dicey, Morris and Collins* (n 24) 569. For Italy, see Lupoi (n 48) 358.

120 See ALI Proposed Federal Statute (n 4) §7 comment (b) at 95.

121 ALI Proposed Federal Statute (n 4) §7 comment (f) at 97.

awards does not lead to the conclusion that reciprocity is denied; that provision clearly states that denial by courts of enforcement of judgments for punitive, exemplary or multiple damages shall not be regarded as denial of reciprocity if the courts would enforce the compensatory portions of such judgments.

As a matter of pragmatism, it was unlikely that the Congress of the United States would adopt a statute that did not contain a reciprocity requirement. Existing laws in other areas, such as the enforcement of support obligations, contain reciprocity requirements; for example, with respect to support, the Secretary of State is authorised to declare any foreign country to be a 'foreign reciprocating country' in order to take advantage of the procedures in that federal statute.[122] As Reporters for this Project, we believed that if Congress were to seriously consider national federal law on the subject of the recognition/enforcement of foreign country judgments, any realistic hope of enacting legislation would necessarily have to include a reciprocity provision. Thus, our task was to assess the type of reciprocity rule that could best work. We investigated various possibilities. For example, the Australian Foreign Judgments Act 1991 proceeds with a 'list' procedure that operates both affirmatively and negatively.[123] If the Governor-General determines that substantial reciprocity of treatment will be given, that determination is published in appropriate regulations and a judgment creditor with a judgment from that country may register the judgment for enforcement. If it is determined that a country does not accord recognition to Australian judgments, that too will be published and Australian courts will not enforce those judgments. If a country does not appear on either list, a judgment of that country may be recognised or enforced under the common law, without the benefit of the registration provisions.

An earlier draft at the ALI proposed some type of list procedure, but it was thought unwise and impractical. At the same time, there was a desire for certainty and clarity of some kind with respect to establishing reciprocity—hence a move to provide incentives for the creation of bilateral arrangements. One of these incentives appears in section 10 of the Act, which provides for an expedited registration procedure available only for judgments issued by courts of countries that have made agreements with the United States for reciprocal recognition.

122 See 42 USC §659a.

123 The Foreign Judgments Act 1991 ss 5 and 6 provide that, if the Governor-General is satisfied that substantial reciprocity of treatment will be given in the courts of a country to judgments of Australian courts, such a determination will be published in appropriate regulations, and a judgment creditor from such country may register the judgment and apply for enforcement in the same way as enforcement of the judgment of an Australian court. Section 13 provides that the Governor-General is to publish a list of countries found to accord to Australian judgments substantially less favourable treatment than Australian courts accord to judgments of that country, and thereafter Australian courts may not enforce judgments from that country. If a country is neither on the 'white list' nor on the 'black list', a judgment of that country may be recognised or enforced under the common law, without the benefit of the registration provisions.

H. CONCLUSION

One outside observer characterised the attitude behind the ALI proposal as one of getting 'tough on [the enforcement of] foreign judgments'.[124] While I can understand why someone would take that message from the project, the analysis of the statute in which I have engaged here provides an alternative perspective from which I hope the project will be understood and evaluated. I would characterise the proposed federal statute as 'internationalist'—that is, it takes into account specific issues that are often part of transnational litigation and accommodates and shapes judgment recognition against that landscape. In various ways, the proposed statute is informed by comparative procedures as well as comparative recognition practices. The reciprocity requirement is designed to achieve greater recognition/enforcement internationally; the rules on indirect jurisdiction are designed in light of jurisdictional regimes accepted elsewhere, at least when the parties are members of that community; the fairness of judicial procedures is evaluated according to international and not US-specific standards; the scope of the public policy exception is limited to those situations where US concerns are directly implicated; and other specific provisions in the statute are designed to promote judicial co-operation in the international arena.

In the absence of world-wide agreement on a recognition convention, national laws themselves can incorporate a transnational perspective. The hope is that the ALI project is a step in that direction.

124 Black (n 7) 10.