Chapter 52

THE 2019 JUDGMENTS CONVENTION: THE NEED FOR COMPREHENSIVE FEDERAL IMPLEMENTING LEGISLATION AND A LOOK BACK AT THE ALI PROPOSED FEDERAL STATUTE

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I. INTRODUCTION

In recent times, George Bermann is best known and has received high praise for his role as the Chief Reporter for the American Law Institute's new Restatement of the Law on U.S. Law of International Commercial and Investor-State Arbitration.[1] I too share great admiration and respect for George's leadership on the ALI project and the extraordinary volume(s) that he and his co-reporters have produced.[2] For that reason, I expect that many of the contributors to this Festschrift in honor of George will focus on various topics taken up in the Arbitration Restatement as well as George's prolific scholarship in the international arbitration field more generally, including issues addressed in his Hague Academy General Course on Arbitration and Private International Law.[3] Indeed, I myself was initially tempted to select an issue of international arbitration to write about for this tribute. However, George's expertise and productivity is much broader than international arbitration, and thus I decided to choose a topic in transnational litigation more generally where George has also left a distinctive mark.[4] As just one example of why George Bermann's name is so well-known to law students around the world interested in international litigation, George was the original and sole author of the popular West Nutshell

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[1] *See* Restatement of the U.S. Law of Int'l Commercial and Inv'r-State Arbitration (Am. Law Inst., Proposed Final Draft 2019).

[2] The Associate Reporters were Jack Coe, Christopher Drahozal, and Catherine Rogers.

[3] *See* George A. Bermann, *International Arbitration and Private International Law*, 381 RECUEIL DES COURS COLLECTED COURSES, 41-478 (2015).

[4] *See, e.g.*, George A. Bermann, *Parallel Jurisdiction: Is Convergence Possible*, 13 Y.B. PRIV. INT'L L. 21 (2011); George A. Bermann, *Provisional Relief in Transnational Litigation*, 35 COLUM. J. TRANSNAT'L L. 553 (1997); George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990).

on Transnational Litigation (2003), now in its second edition with William (Bill) Dodge and Donald (Trey) Childress as co-authors.

In addition to being the Chief Reporter on the Arbitration Restatement, George has played an important role at the American Law Institute, serving as an Adviser on several of its other transnational projects, including the recently published Restatement of the Law (Fourth) on the Foreign Relations Law of the United States (2018), the ongoing Restatement (Third) of Conflict of Laws, and the ALI Analysis and Proposed Federal Statute on the Recognition and Enforcement of Foreign Judgments (2006). The latter was the project on which Andy Lowenfeld and I served as co-Reporters, and thus my contribution to this Festschrift stems from that work and focuses on the upcoming need for implementation of the recently negotiated (July 2019) Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.[5] Given his participation as an Adviser on the ALI Foreign Judgments project, I am confident that George will share my view about the need for federal implementation of this new Convention.

II. BACKGROUND OF THE ALI JUDGMENTS PROJECT

The initial impetus for the ALI Analysis and Proposed Federal Statute on Recognition and Enforcement of Foreign Judgments[6] was the anticipated need for federal legislation to implement a potential Hague Jurisdiction and Judgments Convention then under negotiation from 1996-2001 at the Hague Conference on Private International Law. However, just as the ALI effort got underway, it quickly developed that no Convention was likely to be forthcoming. (I note that the recent Convention that was successfully negotiated at the Hague Conference in July 2019 is different from the prior attempt—the 2019 Convention is a single Convention that deals with judgment recognition/enforcement alone and only addresses jurisdiction at the recognition stage, identifying "indirect" jurisdiction as a matter of "eligibility" in the context of recognition/enforcement). Nonetheless, even when there was no Convention on the horizon, the ALI proceeded to develop a federal statute for the recognition and enforcement of foreign country judgments because it perceived the desirability of having a uniform

[5] *See* Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, *opened for signature* July 2, 2019, [hereinafter "Hague Judgments Convention"], https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

[6] Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Fed. Statute (Am. Law Inst. 2006) [hereinafter "ALI Proposed Federal Statute"].

federal regime in this area of foreign relations where state law now provides the governing standards.[7]

One might think that since a Hague international judgments convention has now materialized, implementation as a matter of federal law would be non-controversial. However, federalism concerns often complicate even treaty implementation,[8] and some past history is revealing.[9] When the attempt at the broader jurisdiction and judgments treaty failed at the Hague, the Hague Conference turned to a more limited effort.[10] In 2005, the Conference produced a Choice of Court Convention setting forth international standards for enforcing choice of court agreements and the resulting judgments.[11] A small group convened by the State Department worked on potential draft legislation to implement the 2005 Hague Choice of Court Convention, but debate arose in that group as to whether implementation of the Choice of Court Convention should also include a State Uniform Act to be adopted by the states as a method of cooperative federalism and what its parameters might be. Although a draft was developed in this Group, it was not acceptable to all sides and no further action was taken.[12]

III. THE NEED FOR FEDERAL LEGISLATION TO IMPLEMENT THE 2019 HAGUE JUDGMENTS CONVENTION

Following the successful negotiation of the Choice of Court Convention, the Hague Conference renewed its effort to negotiate a broader global convention, addressing recognition and enforcement of judgments only and abandoning any attempt at consensus on direct assertions of jurisdiction. The result was the new 2019 Hague Judgments Convention. I am confident that George will agree with

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[7] ALI Proposed Federal Statute, *supra* note 6, at 1-10. For more on the background of the Project, *see* Linda Silberman & Andreas Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000).

[8] *See* Paul R. Dubinsky, Private Law Treaties and Federalism: Can the United States Lead?, 54 TEX. INT. L. J. 39 (2018); Stephen B. Burbank, Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States, 2 J. PRIV. INT'L L. 287 (2006).

[9] For further discussion of the federalism issue in the area of foreign judgments, *see* Ronald A. Brand, *New Challenges in the recognition and enforcement of judgments*, *in* PRIVATE INTERNATIONAL LAW, CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE (Franco Ferrari & Diego P. Fernandez Arroyo, eds. 2019), at 360, 383-89.

[10] *See* TREVOR HARTLEY AND MASATO DOGAUCHI, EXPLANATORY REPORT ON THE 2005 HCCH CHOICE OF COURT CONVENTION (2007), preface (describing how the Choice of Court Convention came about after the earlier Jurisdiction and Judgments Project had failed).

[11] *See* Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements, 44 I.L.M. 1294, http://www.hcch.net/upload/conventions/txt37en.pdf.

[12] *See* Memorandum of the Legal Adviser Regarding United States Implementation of the Hague Convention on Choice of Court Agreements (COCA) (Jan. 19, 2013).

me that the 2019 Judgments Convention provides another and better opportunity to develop federal implementing legislation and to enact broader comprehensive federal law with respect to recognition and enforcement of foreign country judgments.

In the absence of a treaty, existing law in the United States on recognition and enforcement of foreign judgments is state law.[13] Without rehashing all the reasons that national federal law on the recognition and enforcement would be preferable, it is enough to say that even in those jurisdictions where one of the Uniform Acts has been adopted,[14] there are variations in those adoptions, including whether or not reciprocity is required. Also, interpretation of certain provisions of these Uniform Acts has differed among the states. More significantly in my view, recognition and enforcement is, and ought to be, a matter of national concern.[15] That position should be reinforced now that there is an international treaty that addresses recognition and enforcement of foreign judgments in a limited way. In addition, because the Convention leaves gaps relating to how judgments within the scope of the treaty are to be enforced and because some judgments lie outside the Convention's scope, an overall national solution should be addressed in a comprehensive federal statute.

A. A First Look at the 2019 Hague Judgments Convention

The 2019 Hague Judgments Convention requires that all countries recognize "judgments in civil or commercial matters" that are within the scope of the Convention.[16] However, the scope of the Convention is relatively narrow and designates for exclusion a number of matters that do not come within the Convention.[17] Some of those exclusions were to be expected, such as antitrust,

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[13] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. a. at 438 (AM L. INST. 2018) [hereinafter Restatement (Fourth) of Foreign Relations Law]. *See generally* Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 COLUM. J. TRANSNAT'L L. 277, 286-88 (2017); Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM, 101, 103-04 (Paul B. Stephan ed., 2014).

[14] There are two of them, the original 1962 Act and the revised 2005 Act. *See* Unif. Foreign Money-Judgments Recognition Act (Unif. Law Comm'n 1962); Unif. Foreign-Country Money Judgments Recognition Act (Unif. Law Comm'n 2005).

[15] *See* Recognition and Enforcement of Judgments: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. (Nov. 12, 2011) (statement of Professor Linda J. Silberman).

[16] Hague Judgments Convention, *supra* note 5, at Art. 1, Art. 4. For an excellent overview of the Convention, *see* Andrea Bonomi & Cristina M. Mariottini, *A Game Changer in International Litigation? Roadmap to the 2019 Hague Judgments Convention*, 20 Y.B. PRIV. INT'L L. 537-67 (2018/2019). *See also* FRANCISCO GARCIMARTÍN & GENEVIÈVE SAUMIER, EXPLANATORY REPORT ON THE CONVENTION OF 2 JULY 2019 ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS 44-183 (2020).

[17] Hague Judgments Convention, *supra* note 5, at Art. 2.

bankruptcy, maintenance, and arbitration (several of which are the subject of other international treaties), but others such as defamation, privacy, and intellectual property were more debatable. Also, the Convention only reaches judgments that are based on particular jurisdictional grounds set forth in Article 5 of the Convention, identified in the Convention as judgments "eligible" for recognition and enforcement.[18] Although those jurisdictional grounds are more limited than what would constitutionally be permitted under U.S. law, the listed bases do satisfy U.S. constitutional standards. The permissible grounds to refuse recognition and enforcement are set forth in Article 7. Most of those defenses are similar to what is found in the Uniform Acts in the U.S, the EU Regulation/Recast, and the national judgment-recognition laws of many countries. These include lack of notice, fraud, incompatibility with the public policy of the requested state, including with reference to specific proceedings, incompatibility with fundamental principles of procedural fairness, and inconsistency with an earlier judgment.[19] One last ground permitting non-recognition is unusual from a U.S. perspective:

> [R]ecognition or enforcement may be postponed or refused when proceedings between the same parties on the same subject matter are pending before a court of the requested State and that court was seised prior to the proceedings in the court of origin, and there is a close connection between the dispute and the requested State.[20]

Although none of the listed defenses mandate non-recognition of the judgment, it can be expected that most countries, including the United States, will refuse to enforce a judgment when one of these defenses – with possibly one exception relating to parallel litigation – is established.

The Convention allows States to take declarations to limit the Convention in certain cases. They include (1) when the parties are resident and all elements of the dispute are connected with the requested State;[21] (2) specific matters in which the requested State has a strong interest;[22] and proceedings against the State itself or government agency of the State.[23]

Reciprocity is, of course, established in the Treaty instrument itself since it applies only between Contracting States. And although the Convention is open to all States, including non-Member States of the Hague Conference, Article 29 provides for an opt-out mechanism for a State to object, at the time of deposit

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[18] *Id.* at Art. 5(1) ("*Bases for recognition and enforcement*. 1. A judgment is eligible for recognition and enforcement if one of the following requirements is met . . . .").

[19] *Id.* at Art. 7(1)(a)–(f).

[20] *Id.* at Art. 7(2).

[21] *Id.* at Art. 17.

[22] *Id.* at Art. 18.

[23] *Id.* at Art. 19.

of its instrument of ratification or accession, to a relationship with a particular Contracting State.[24] This provision allows a State to avoid applying the treaty to any Contracting State where there is concern about the fairness, politicization, and/or corruption in a country's legal and judicial system.

One of the most important features of the Convention which underscores the desirability of having a comprehensive federal statute is Article 15, which provides that (subject to one exception for in rem actions) the Convention does not prevent the recognition or enforcement of judgments under national law.[25] Thus, the architecture of the Convention establishes a floor but not a ceiling for recognition and enforcement. Countries are free to provide broader recognition to foreign country judgments than what is required under the Convention. Indeed, if one surveys existing law in the United States on recognition and enforcement,[26] one will find that little would need to be done to ensure that the U.S. is in compliance with the treaty. Moreover, the existing approach under the law of most states in the United States can be said to be even more pro-enforcement than the Convention itself. Assuming that the United States wants to continue with its more liberal approach to recognition and enforcement, it would be a mistake to so continue with a patchwork of inconsistent state law in light of an international convention with the objectives of harmonization, transparency, and predictability.

It is also worth noting that because the Hague Conference negotiators viewed the 2005 Choice of Court Convention and the 2019 Judgments Convention as a "package," the Judgments Convention did not include consent to jurisdiction via an exclusive choice of court agreement within the list of jurisdictional filters eligible for recognition and enforcement. Whether or not the entire Choice of Court Convention which covers agreements as well as judgments should also be implemented through federal legislation, it is imperative that the judgment recognition portion of the Choice of Court Convention be part of the legislation implementing the 2019 Convention.

B. The Components of a Comprehensive Federal Statute

There are a number of areas where additional gap-filling with respect to the 2019 Judgments Convention is necessary and/or desirable. It is worth emphasizing that the U.S. interest in this Convention is **not** about harmonizing U.S. law on recognition/enforcement but rather about ensuring that U.S. judgments are enforced in other countries that have had significantly more restrictive regimes on recognition generally and/or are hostile to U.S. judgments

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[24] *Id.* at Art. 29.

[25] *Id.* at Art. 15.

[26] *See generally* Restatement (Fourth) of Foreign Relations Law, *supra* note 13, at §§ 481–484.

in particular.[27] To some degree, the Convention will help achieve the U.S. objective of obtaining greater recognition and enforcement of U.S. judgments abroad. First, it will liberalize judgment enforcement regimes in a number of countries if those countries join the Convention. Second, when an action is brought in the United States against a foreign defendant and it is perceived that recognition and enforcement abroad might be required, the jurisdictional filters in Article 5 provide some assurance that another Contracting State will enforce that U.S. judgment if jurisdiction in the U.S. is either based on or factually satisfies one of those grounds. Thus, the Convention will provide clarity and guidance as to what is necessary in order to have a U.S. judgment enforced abroad and channel litigation behavior accordingly. Although one may need to look past the Convention to the national laws of particular countries to determine if other grounds of jurisdiction might be recognized in that country, that further inquiry does not represent a change from present practice. Of course, it is always possible that some countries may change their more liberal recognition/enforcement regimes to provide for recognition and enforcement only when required to do so under the Convention. However, I doubt that such a retrenchment will occur. The message from the Convention is for a pro-recognition and pro-enforcement world order.

One Convention defense to recognition and enforcement that may be surprising to a lawyer trying to enforce a U.S. judgment abroad is that found in Art. 7(2) in connection with parallel litigation that allows a country to refuse to enforce a judgment if the court in the requested state was "first seised" of a matter involving the same parties and the same claim. Although non-recognition is only discretionary, there is no clear mechanism under U.S. law to discourage that situation from arising. In U.S. proceedings, there is no formal *lis pendens* mechanism as there is under the national law of many countries[28] and under the EU Recast which even extends to proceedings in non-Member States.[29] In the U.S., objections that a prior parallel litigation is pending elsewhere is generally addressed by looking to the discretionary doctrine of *forum non conveniens*, but a parallel proceeding is only one factor in determining whether or not to dismiss

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[27] For further explanation of the reasons for non-recognition of U.S. judgments, *see* Andrea Bonomi, *Recognition and Enforcement of U.S. Civil Judgments in Europe: Old Problems and Recent Trends*, *in* US LITIGATION TODAY: STILL A THREAT FOR EUROPEAN BUSINESSES OR JUST A PAPER TIGER? 277, 280-95 (Andrea Bonomi & Krista Nadakavukaren eds., 2018). For the view that various developments in U.S. law as well as changes in foreign recognition law have increased the likelihood that a U.S. judgment will be enforced abroad, *see* Sarah E. Coco, Note, *The Value of a New Judgments Convention for U.S. Litigants*, 94 N.Y.U. L. REV. 1209, 1221-34 (2019).

[28] *See* Linda Silberman, *Lis Alibi Pendens*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1158-66 (Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio eds., 2017).

[29] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351) Arts. 29, 30, 33, 34.

the case in the U.S.[30] The concern about non-recognition in that situation can be addressed as part of a comprehensive U.S. federal statute. The federal implementing legislation could include a provision for the declination of jurisdiction when a prior foreign action is pending, thus eliminating the unnecessary burdens of parallel litigation in situations where enforcement of the U.S. judgment abroad might be necessary. Such a provision was included in the ALI Proposed Federal Statute, even when there was no Convention to consider.[31] The particular details of that discretionary *lis pendens* provision are less important than a basic acknowledgment that such a provision would be desirable in the federal implementing legislation for this Convention. As the ALI Commentary explained: "Declination of jurisdiction . . . is closely related to recognition and enforcement of foreign judgments."[32]

From the perspective of litigants in other Contracting States who are seeking recognition and enforcement of foreign judgments in the United States, a comprehensive federal statute setting forth national law is highly desirable. It would, of course, be possible to treat the Hague Judgments Convention once ratified as "self-executing"; and if existing state law on judgment recognition complied with the treaty standards, there might not be a need for federal legislation at all. However, in light of recent trends, I find that path unlikely, and I suspect that federal implementing legislation at minimum would cover judgments within the scope of the Convention. That leaves an open question of whether state law regimes on recognition and enforcement could operate in parallel even as to judgments within the scope of the Convention so long as the requirements for recognition and enforcement are not inconsistent with the federal legislation or the treaty. However, a consequence of allowing parallel state and federal regimes would be to permit recognition or enforcement of a foreign judgment within the scope of the treaty even if that country had not joined the Convention where reciprocity is a built-in requirement. Most state law regimes, including those with the Uniform Act, do not require reciprocity.[33] Thus I would argue that with respect to judgments that fall within the Convention, an exclusive federal regime is called for.

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[30] *See generally* Louise Ellen Teitz, Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation, 10 ROGERS WILLIAMS U. L. REV. 1 (2004).

[31] ALI Proposed Federal Statute, *supra* note 6, at § 11, at 131-32.

[32] *Id.* at Comment a, at 132. *See also* Linda Silberman, A Proposed Lis Pendens Rule for Courts in the United States: The International Judgments Project of the American Law Institute, in INTERNATIONAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW 354 (Talia Einhorn & Kurt Siehr eds., 2004).

[33] For a discussion of how various states in the United States deal with the question of reciprocity, *see* ALI Proposed Federal Statute, *supra* note 6, at § 7 Reporters' Note 3, 100-01. *See also* Restatement (Fourth) of Foreign Relations Law, *supra* note 13, at § 484 cmt. k and Reporters' Note 10, at 464-65.

In addition, even though national law in a country remains a basis for recognition and enforcement for judgments under Article 15 of the Convention, there is a distinct advantage for a single comprehensive federal law rather than differing state laws even for judgments not within the scope of the Convention. Consider such issues as (i) whether a foreign judgment has an "eligible" jurisdictional basis in addition to the listed Convention grounds or (ii) whether a foreign judgment outside of the Convention's scope is also enforceable. The question of whether reciprocity is to be a condition for recognition/enforcement of foreign judgments also emerges with respect to judgments that do not fall within the Convention. That issue is subject to debate, but certainly the answer should be one made at the national federal level and not by individual states. What additional bases of jurisdiction asserted by a court in a Contracting State should be sufficient to qualify for recognition and enforcement of a judgment that does come within the scope of the Convention? Again, the answer to that question should be provided in the federal legislation implementing the Convention. In the context of an international treaty, clear, uniform, and transparent national law to fill the Convention's gaps is necessary to achieve the full objective of this Convention. Again, I do not say that the solutions offered in the 2005 ALI Proposed Federal Statute are necessarily what should be adopted in legislation implementing the Convention, but I do say that its premise—that there should be a uniform federal law—is even more compelling than it was in the absence of a Convention.

Implementation of the Convention by federal legislation including gap-filling federal standards would not leave states in the United States without a significant role in the recognition/enforcement regime. Similar to what was suggested in the ALI proposed federal statute,[34] there should be concurrent jurisdiction of the state and federal courts to recognize and enforce a Convention judgment. In a suit brought to recognize and enforce a Convention judgment, the traditional federal statutory framework would appear to permit removal to federal court if the action were brought in a state court. When a Convention judgment is raised as a defense to an independent action in the state court, a more expansive removal regime might be appropriate, such as one alternative proposed in the ALI Federal Statute.[35] The same, or slightly different jurisdictional provisions, could also cover non-Convention foreign judgments, to the extent a comprehensive federal statute also extends to those judgments.

Another issue that needs to be addressed in federal implementing legislation is the procedure for bringing an action to recognize and enforce a foreign country judgment under the Convention or under a more comprehensive federal statute. Article 13 of the Convention makes clear that the procedure for bringing

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[34] ALI Proposed Federal Statute, *supra* note 6, at § 8, at 105-07 ("Jurisdiction of Courts in the United States").

[35] *Id.* at § 8(c)-(d).

an action to recognize or enforce a Convention judgment is governed by the law of the requested State and merely directs that the requested State "act expeditiously."[36] However, the Convention does preclude the requested State from applying the doctrine of *forum non conveniens* at the recognition or enforcement stage.[37] But the Convention does not appear to address the question of whether national law in the court of the requested State can nonetheless require that a court have jurisdiction over the defendant in order to proceed with such an action. Most courts in the United States do require that a defendant to a recognition or enforcement proceeding be subject to the personal or quasi in rem jurisdiction of the court.[38] Most often it is the attachment of the defendant's property (i.e. quasi in rem jurisdiction) that subjects the defendant to jurisdiction up to the limit of that property. However, there are a few states in the United Sates that appear not to require any jurisdictional nexus with the defendant to bring an enforcement action. Again, a uniform national answer on this point should be addressed in the federal implementing legislation. The ALI proposal provided that an action to recognize or enforce a foreign judgment can be brought "where the judgment debtor is subject to personal jurisdiction; or where assets belonging to the judgment debtor are situated."[39] However, in an important decision rendered after the promulgation of the ALI proposal, the U.S. Supreme Court in *Daimler AG v. Baumann* imposed constitutional due process limits on the forum connections that suffice for an assertion of general jurisdiction over a defendant corporation.[40] When a defendant to a recognition/ enforcement proceeding does not have assets in the jurisdiction, courts have usually looked to principles of general jurisdiction in order to proceed against the defendant. It is unclear whether the constitutional standard, enunciated in *Daimler* in the context of a plenary action against a foreign defendant, is equally applicable in a proceeding for recognition and enforcement. I have argued in other writing that it is not,[41] but in any event, the federal legislation will need to set forth the jurisdictional requirements for bringing a recognition and enforcement proceeding. In addition, in order to expedite the enforcement

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[36] Hague Judgments Convention, *supra* note 5, at Art. 13(1).

[37] *Id.* at Art. 13(2) ("The court of the requested State shall not refuse the recognition or enforcement of a judgment under this Convention on the ground that recognition or enforcement should be sought in another State.").

[38] *See* Restatement (Fourth) of Foreign Relations Law, *supra* note 13, at § 486 cmt. c and Reporters' Note 2, at 469-70 ("Enforcement of Foreign Judgments"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481, cmt. g. (AM. LAW INST. 1987). *See also* Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT'L ARB. 439, 444 (2012).

[39] ALI Proposed Federal Statute, *supra* note 6, at § 9, at 111-12 ("Means of Enforcement of Foreign Judgments").

[40] *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

[41] *See* Linda J. Silberman & Aaron D. Simowitz, Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?, 92 N.Y.U. L. REV. 344, 359-64 (2016).

process, federal legislation could offer the possibility of registration for certain types of foreign money judgments.[42]

There are other possibilities for interstitial federal legislation with respect to the recognition and enforcement relating to foreign country judgments. These may be less important than the others I have discussed, but they are worth a brief mention. The Convention expressly states that interim provisional relief is not covered,[43] but again nothing would prevent federal legislation from addressing such relief. Alternatively, the implementing legislation could authorize courts in the United States to use provisional measures available under U.S. law in support of a foreign order, whether or not the foreign order is final, as the ALI proposal did.[44]

One curious omission from the Convention is any provision dealing with the effect of the judgment in the state of origin.[45] Earlier drafts of the Convention produced during negotiations had addressed the point, stating that the recognizing court should give the same effects to the judgment as the judgment has in the State of origin.[46] It is obvious that the Convention obligation to recognize a foreign judgment implies that the same claim or cause of action cannot be relitigated in another state. But the issue of whose law determines the preclusive scope of the judgment – that of the state of origin or the requested state of enforcement – is not addressed. Given the inconsistency of present law in the United States on this question, it might be useful for federal implementing legislation to take a position, as the ALI did in its Proposed Federal Statute, providing in black letter that the foreign judgment should be given:

> [T]he same preclusive effect by a court in the United States that the judgment would be accorded in the state of origin, unless the rule of preclusion applicable in the state of origin would be manifestly incompatible with a superior interest in the United States in adjudicating or not adjudicating the claim or issue in question.[47]

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[42] Such a provision was included in the ALI Proposed Federal Statute. *See* ALI Proposed Federal Statute, *supra* note 6, at § 10, at 119-23 ("Registration of Foreign Money Judgments in Federal Courts").

[43] Hague Judgments Convention, *supra* note 5, at Art. 3.

[44] ALI Proposed Federal Statute, *supra* note 6, at § 12, at 139-41 ("Provisional Measures in Aid of Foreign Proceedings").

[45] The Convention merely provides that "A judgment shall be recognized only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin." Hague Judgments Convention, *supra* note 5, at Art. 4(3).

[46] *See* Peter Arnt Nielsen, *The Hague 2019 Judgments Convention—from failure to success?*, 16 J. PRIV. INT. L. 205, 225-26 (2020).

[47] ALI Proposed Federal Statute, *supra* note 6, at § 4, at 47-48.

IV. CONCLUSION

I hope that those working on the development of implementing legislation for this 2019 Judgment Convention will entice George to bring his insights and expertise to this effort, as he has successfully done on so many other projects.