

Statement of Professor Linda J. Silberman
Martin Lipton Professor of Law
New York University School of Law

Before the Subcommittee on Courts, Commercial and
Administrative Law of the U.S. House of Representatives,
Committee on the Judiciary

“Recognition and Enforcement of Foreign Judgments”

November 15, 2011

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I am Professor Linda Silberman, and I am the Martin Lipton Professor of Law at New York University School of Law, where I have been teaching and writing about Civil Procedure, Conflict of Laws, Comparative Civil Procedure, Arbitration, and Private International Law for forty years. With respect to the subject of recognition and enforcement of foreign country judgments on which this hearing is focused, I was Co-Reporter, along with my colleague Professor Andreas Lowenfeld, of the American Law Institute Project entitled “Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute” (hereinafter “ALI Project”).¹ The ALI Project developed a comprehensive proposal for a federal statute governing the recognition and enforcement of foreign country judgments. The ALI Project reflects the position of the American Law Institute, but this written testimony and my statements today represent only my own views and not those of the Institute or of any group.

Let me begin by explaining the state of the law backdrop for the ALI Project and the proposal for a federal statute to govern the recognition and enforcement of foreign

¹ I have also written extensively on the subject of recognition and enforcement of foreign country judgments in the United States, including “Some Judgements on Judgments: A View from America,” 19 King’s Law Journal 235-263 (2008); “The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime”, 26 Houston J. Int’l L. 327 (2004); “Enforcement and Recognition of Foreign Country Judgments in the United States,” 16 Int’l L. Quarterly 534 (2004); “Can the Hague Judgments Project Be Saved?: A Perspective from the United States” in A Global Law of Jurisdiction and Judgments: Lessons from the Hague (Kluwer 2002); “A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute”, 75 Indiana L. J. 635 (2000)(with A. Lowenfeld). In addition, I have been involved in litigation both in the United States and abroad as consultant or expert on issues involving recognition and enforcement of foreign country judgments. My curriculum vitae is attached as Appendix B.

country judgments.² The United States has no bilateral or multinational treaty dealing with the recognition and enforcement of foreign country judgments. And unlike the full faith and credit obligation which is owed to domestic sister state judgments, foreign country judgments are not subject to the constitutional or statutory full faith and credit obligation that creates a national federal standard for enforcement. One might expect that foreign judgment recognition in the United States would also be subject to a national federal standard, either as an aspect of federal common law or even international law -- similar to how foreign acts of state are treated pursuant to the Act of State doctrine.³ Indeed, the only Supreme Court decision dealing with recognition and enforcement of foreign country judgments -- the early case of *Hilton v. Guyot*,⁴ -- viewed the recognition and enforcement of foreign judgments as a matter of federal common law informed by principles of international law.

In a curious twist, however, existing law in the United States treats recognition and enforcement of foreign country judgments as a matter of state law. It is not usual for the highest court of a state to be able to alter a precedent established by the Supreme Court, but that is the best explanation of how recognition and enforcement of foreign judgments was effectively transformed from a subject of national and federal law to that of state law. In *Johnston v. Compagnie Générale Transatlantique*⁵, the New York Court of Appeals rejected the view of the Supreme Court that recognition of a foreign judgment

² The ALI Project was initiated with a view to drafting proposed federal legislation to implement a potential multinational jurisdiction and judgments convention, negotiations for which were ongoing at the Hague Conference on Private International Law. Almost at once, however, the need was perceived for a federal statute even in the absence of a treaty, and the Project turned its attention to drafting a proposal for a federal statute on recognition and enforcement of foreign judgments generally. If the negotiations at the Hague Conference were to succeed, it was thought that the Project could be readapted to draft additional implementing legislation for the Convention with respect to States that joined the Convention.

³ See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁴ 159 U.S. 113 (1895).

⁵ 242 N.Y. 381, 387, 152 N.E. 121, 123 (1926).

was a matter of international, and therefore, national law, and identified the controversy as one of “private rather than public international law, of private right rather than public relations.” The New York Court of Appeals held that recognition of the foreign judgment depended only on New York law, without reference to the authority of the Supreme Court. Several other developments occurred by which that perception was entrenched. First, other states began to follow the New York approach, although the issue never reached the Supreme Court of the United States. Second, in the aftermath of *Erie R. Co. v. Tompkins*,⁶ federal courts in diversity actions followed state practice in cases involving foreign judgments. Third, in 1962, the Uniform Foreign Money-Judgment Recognition Act (1962) was developed and subsequently adopted by some 30 states; and in 2005, a revised Act was promulgated. Thus, without any imprimatur from the Supreme Court or the Congress, the law on recognition of foreign country judgments was transformed from a subject of national and international law into one of state law.

There is, of course, one area where a federal statute has restored certain aspects of foreign judgment enforcement -- or rather non-enforcement -- to the province of federal law. That example is the recent federal statute, “Securing the Protection of our Enduring and Established Constitutional Heritage Act” (“the Speech Act”), which amends Title 28 of the U.S. Code to add a provision that prohibits courts in the United States from recognizing or enforcing a foreign defamation judgment unless (1) the foreign law provides at least as much protection for freedom of speech and press that is provided by federal or state law, including the First Amendment; or (2) the speaker would be found liable for defamation by a domestic court applying federal or state law, including the First Amendment. A second provision prevents recognition and enforcement when the foreign

⁶ 304 U.S. 64 (1938).

court's assertion of personal jurisdiction over the defendant in the defamation action is inconsistent with U.S. due process standards.⁷ However, the Speech Act deals with only a very limited area of judgment recognition and enforcement.

Thus a patchwork of state laws continues to govern foreign judgment recognition and enforcement practice more generally, and that state of affairs is undesirable. Because there is no uniform federal law or statute, a judgment rendered abroad may be enforceable in New York or Illinois but not in Georgia or Texas. At the stage of U.S. enforcement, both the judgment creditor (in an enforcement proceeding) and the judgment debtor (via a declaration for non-enforcement) will have an opportunity to forum shop for a state law favorable to its position. At the earlier stage of deciding whether litigation abroad is feasible, predictions are difficult because a potential litigant may not know in which state in the United States an enforcement action will take place.

Notwithstanding the role of state law, courts continue to recognize that the issue of recognition and enforcement necessarily involves relations between the United States and foreign governments,⁸ and numerous commentators have argued that the recognition and enforcement of foreign country judgments should therefore be governed by a general rule of federal law.⁹ However, it is probably too late in the day to urge a return to "federal common law". But there remain persuasive reasons -- the need for uniformity, the avoidance of forum shopping, and the foreign relations interests of the United

⁷ See Pub. L. No. 111-123, 124 Stat. 2380 (2010).

⁸ See, e.g., *Toronto-Dominion Bank v. Hall*, 367 F. Supp. 1009, 1011-12 (E.D.Ark. 1973).

⁹ See, e.g., Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 *Colum. L. Rev.* 783, 788 (1950) ("much can be said for the suggestion that the measure of respect to which judgments of foreign nations are entitled should be regulated by a uniform national law rather than be left to the diverse views of the individual states. Furthermore, since the effect of such judgments in this country clearly affects our relations with other nations, the question would seem properly to fall within the federal sphere.") See also Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 *Iowa L. Rev.* 53, 77-80 (1984); Moore, *Federalism and Foreign Relations*, 1965 *Duke L.J.* 248, 261-268, 285-86; Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 *Cal. L. Rev.* 1599 (1966).

States -- that argue for the recognition of foreign country judgments to be governed by a national and uniform federal standard.¹⁰ With those interests in mind, the American Law Institute offered a proposal for a federal statute that could be enacted by the Congress of the United States and would be applied by both state and federal courts in the United States.

Let me first provide a brief overview of the existing law in most states of the United States on recognition and enforcement of foreign country judgments. In general, recognition and enforcement of foreign country judgments has tended to be much more generous than the treatment given by foreign courts to U.S. judgments. The basic principles of recognition and enforcement practice in the United States can be found in Section 482 of the Restatement of the Law (Third) of the Foreign Relations Law of the United States. Foreign country judgments are recognized and enforced subject to two types of defenses -- those that mandate non-recognition and those that may be invoked as a matter of discretion to justify non-recognition. States differ in certain ways about the defenses, but generally speaking they can be classified as follows. The grounds for “mandatory” non-recognition are the failure to provide a system of impartial tribunals or procedures compatible with due process of law, lack of jurisdiction over the defendant, and lack of jurisdiction over the subject matter. Other defenses that may be invoked to refuse recognition as a matter of discretion include a failure to provide notice, fraud, conflict with another final and conclusive judgment, a violation of a forum-selection clause, serious inconvenience if jurisdiction is based only on personal service, and public policy. The law in most states rejects any requirement of reciprocity -- that is, the

¹⁰ See Comment, Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation, 37 *John Marshall L. Rev.* 229 (2003).

requirement that if a foreign country judgment is to be recognized and enforced in that state, the foreign country must also respect a judgment rendered in that state in similar circumstances -- but there are some states that continue to include it as a requirement for recognition and enforcement.

One might think that the existence of a Uniform Act on recognition and enforcement would at minimum allay concerns about uniformity. But that is not the case. First, the Uniform Act has not been adopted by all of the states in the United States. Second, there are now two Uniform Acts, with some number of states having the original 1962 Act¹¹ and others adopting the revised 2005 Act with its different provisions.¹² Even if states that have the original Act eventually enact the revised Act, from past experience we know that the adoptions are not necessarily uniform. For example, even though both the 1962 and 2005 versions of the Uniform Act do not have a requirement of reciprocity, some states have included reciprocity as a discretionary or mandatory ground for refusing to recognize or enforce a foreign judgment. Finally, under the existing regime, each state is entitled to apply the Act according to its own understanding and interpretation, and it is the highest court in each state that has the ultimate say as to the meaning of any particular provision.

The issue of reciprocity is a good example of the foreign relations implications of judgment recognition and enforcement,¹³ and thus an issue where there should be a national and uniform principle about whether reciprocity is to be required. There are

¹¹ Those states and territories are Alaska, Connecticut, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, the Virgin Islands and Virginia.

¹² Those states are California, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, and Washington

¹³ See, e.g., *Zschernig v. Miller*, 389 US. 429 (1968)(denial of inheritance to East German resident on the basis of an Oregon statute because of failure to prove reciprocity was an “intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”)

good arguments on both sides of the reciprocity debate, but the ultimate answer should be determined on the national federal level -- by Congress and not by individual states. A federal solution best attends to the foreign relations interests of the United States; it avoids forum-shopping within the United States with respect to enforcement of foreign-county judgments; and it offers a clear picture of practice in the United States to foreign courts that may themselves have a reciprocity requirement with respect to enforcement of U.S. judgments abroad.

Whether to include a reciprocity provision was perhaps the most controversial issue in the ALI deliberations on a proposed federal statute. Such a requirement was ultimately included in order to create an incentive for foreign countries to commit to recognition and enforcement of judgments rendered in the United States. Indeed, an integral part of the ALI reciprocity regime was a provision authorizing the Secretary of State to negotiate agreements with foreign states or groups of states, whereby the existence of such an agreement would satisfy reciprocity as to judgments covered by the agreement.

Reciprocity is not the only area where foreign relations interests of the United States are implicated and where a uniform national standard is imperative. For example, under the Uniform Acts and under the laws of most states that do not have the Act, a foreign judgment shall not be recognized or enforced if there was a “failure to provide a system of impartial tribunals or procedures compatible with due process of law.”¹⁴ Under

¹⁴ In one recent case, a district court, applying the Florida statute, refused to recognize and enforce a Nicaraguan judgment of over \$97million because the system did not provide procedures compatible with the requirements of due process of law and that Nicaragua as a whole did not provide impartial tribunals. On appeal, the Eleventh Circuit affirmed the district court’s holding that the judgment was unenforceable because of the lack of due process procedures but the court did not “address the broader issue of whether Nicaragua as a whole did not provide impartial tribunals” and declined to adopt the district court’s holding on that question. See *Osorio v. Dow Chemical Co.*, 635 F.3d 1277 (11th Cir. 2011).

the existing regime, each state is entitled to make that judgment according to its own interpretation. Questions about the quality and fairness of a foreign judicial system would seem to easily fall within the foreign relations concerns of the United States. There should be uniform federal criteria that determine that question and ultimate review by the Supreme Court of the United States if necessary.

Another concern with respect to recognition and enforcement that touches on the foreign relations interests of the United States is that of potential corruption in a judicial system that rendered a particular foreign judgment and where recognition is then sought in the United States.¹⁵ Both the ALI proposed statute and the Revised Uniform Act include a ground for discretionary non-recognition where the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment in question. Again, such a provision represents an aspect of the foreign relations interests of the United States. The defense of possible corruption in the rendering court is not one that has traditionally been an explicit ground for non-recognition, although that concern may give rise to one of the other usual defenses. Again, were a federal statute to be enacted, it would be Congress that would determine whether such a ground for non-recognition should be included and what criteria should be used to make the assessment. Both state and federal courts would ultimately interpret any such provision, but the Supreme Court of the United States would be available for ultimate guidance and interpretation. In this way, a uniform level of the proper protection

¹⁵ Corruption in foreign judiciaries has been the subject of substantial research and study, generally in the context of improving conditions for economic development. See Maria Dakolias and Kim Thachuk, "Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform," 18 *Wis. Int'l L.J.* 353 (2000).

for American interests can be established within a framework of recognition practice that encourages and sustains international global commerce.

There have been other developments that underscore the need to have a uniform federal approach to such issues as the fairness of tribunals and the integrity of a particular judiciary. International arbitral tribunals hearing bilateral investment disputes pursuant to bilateral investment treaties where foreign governments are defendants may produce rulings with respect to these issues. How those rulings are incorporated into domestic law is a matter for federal and not state authority.¹⁶ Also, Free Trade Agreements are likely to specifically address questions of enforcement of civil judgments, again underscoring the foreign relations aspect of judgment recognition and enforcement practice.¹⁷

I have pointed to specific aspects of the law of recognition and enforcement where federal and foreign relations interests are predominant and where I believe it is critical to look to a national uniform standard. However, I do not underestimate the role of state policy in many areas of recognition and enforcement practice. The creation of a federal statute should still leave significant room for the operation of state policies in areas where state law has a predominant role. One such area is the invocation of the defense of public policy to recognition and enforcement of a foreign judgment. As the ALI proposal explains, the defense of public policy may often pertain to the policy of the United States, or, when the relevant legal interest involves a policy regulated by state

¹⁶ Cf. *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000)

¹⁷ See, e.g., U.S.-Australia Free Trade Agreement, Article 14.7, http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html

law, the relevant public policy would be that of a particular state of the United States.¹⁸ Thus, in cases in which national policy is a concern, reference should be made to the public policy of the United States.¹⁹ In those areas where regulation is a function of state law, public policy should be determined by reference to the state with the predominant interest in the events and the parties in question. Such a choice-of-law reference would avoid forum-shopping, and accordingly it would not matter in which court recognition or enforcement is sought. When the public-policy defense is raised, the substantive standard and the relevant public policy should be the same in every court. The objective here is to prevent forum-shopping with respect to enforcement and recognition of a foreign judgment.²⁰

There are numerous other aspects of foreign judgment recognition and enforcement practice where greater clarity and predictability would be enhanced and international commerce promoted with the enactment of a federal statute. As noted earlier, appropriate personal jurisdiction in the rendering court is a requirement for recognition and enforcement of a foreign judgment, but existing law in the various states is unclear as to

¹⁸ Under ALI the proposed statute, §5(a)(vi), a foreign judgment would not be recognized or enforced if “the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States, or to the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law.

¹⁹ One case that is criticized in the ALI Project is *Jaffe v. Snow*, 610 So.2d 482 (Fla. App. 1992), review denied, 621 So. 2d 432 (Fla. 1993), cert. denied, 512 U.S. 1227 (1994), in which a Florida court denied enforcement to an Ontario judgment on the basis of Florida public policy even when the U.S. Secretary of State urged that the judgment be recognized. In such a case, it is suggested that it is the public policy of the United States that is relevant.

²⁰ It is unclear whether a judgment of one state with respect to recognition or non-recognition of a foreign judgment would be preclusive if a subsequent suit for recognition were brought in another state of the United States. A Texas court indicated that it was not required to give full faith and credit to a Louisiana judgment recognizing a foreign country judgment when to do so would be to undermine the reciprocity requirement that Texas imposed and Louisiana did not. See *Reading & Bates Constr. Co. v. Baker Energy Res. Corp.*, 976 S.W.2d 702 (Tex.App.-Hous. 1st Dist. 1998). Compare *Jaffe v. Accredited Surety & Casualty Co., Inc.*, 294 F.3d 584 (4th Cir. 2001), where the Fourth Circuit held that a prior Florida judgment refusing to enforce a Canadian judgment on grounds of Florida public policy was entitled to preclusive effect in Virginia, even if the Canadian judgment would not have violated Virginia public policy.

what bases of jurisdiction in a foreign court will be accepted. A federal statute, with provisions similar to those that were included in the federal Speech Act, would give much better guidance to defendants sued in foreign courts as to how to proceed there, in terms of the consequences to them in enforcement proceedings here. For example, a provision in the recently-enacted Speech Act statute makes clear that a court in the United States shall not recognize or enforce a foreign judgment [for defamation] unless the court in the United States determines that the exercise of personal jurisdiction by the foreign court satisfied the due process requirements imposed on courts in the United States. Even more significantly, the Speech Act clarifies that an appearance by a party in the foreign court does not represent a waiver of a jurisdictional objection in the recognition/enforcement proceeding. Attention to these types of issues in a general federal statute on recognition and enforcement would provide greater certainty and predictability for parties who must decide how to respond to foreign proceedings in terms of the possible enforcement of any judgment in the United States.

A federal statute could also address the effect of default judgments, procedures for enforcement, and limitations periods -- all areas of inconsistent treatment under existing state laws.

My message to this Committee is not one of special pleading for the specific proposal emanating from the American Law Institute.²¹ Some of the ideas suggested there may be useful and others not. More importantly, I am here to urge an important matter of principle that is embraced in that Project -- that recognition and enforcement of foreign judgments is and ought to be a matter of national concern. As the Supreme Court

²¹ To complete the record, however, I attach a copy of the ALI Proposed Statute (without Comments and Reporters' Notes) and the Introduction as Appendix A.

stated in *Hilton v. Guyot*: “[t]he most certain guide . . . for the decision of such questions is a treaty or statute of this country.”²² In the absence of treaty, it is for the Congress to take action. Such a statute can be administered through concurrent jurisdiction of the state and federal courts, but subject to a single standard and, ultimately, to the control of the Supreme Court.

The constitutional authority of Congress to enact a federal statute on recognition and enforcement is clear. Congress has power to regulate commerce with foreign nations²³ and it has a shared power with the executive over foreign relations.²⁴

This is an age of globalization and international commerce. Recognition and enforcement of judgments -- both here and abroad -- is necessary to enhance international commerce. A federal statute on recognition and enforcement will provide our global trading partners with clear, comprehensive, and uniform guidance on how to go about enforcing in the United States a foreign judgment obtained abroad. In turn, to the extent that reciprocity is a requirement for enforcement of U.S. judgments abroad, other countries do not look favorably upon the different policies on recognition and enforcement in the various states. Thus, the enactment of a federal statute will make it easier to have U.S. judgments enforced abroad.

I am grateful to the Subcommittee for the opportunity to present my views.

²² 159 U.S. at 163.

²³ See *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 315-321 (1936).

²⁴ See generally Louis Henkin, *Foreign Affairs and the U.S. Constitution* 63-67 (2d ed. 1996).

Appendix A

Introduction and Proposed ALI Statute
(without Comments)

INTRODUCTION
***NATIONAL LAW IN THE
INTERNATIONAL ARENA***

The proposal for federal legislation on Recognition and Enforcement of Foreign Judgments is a part of the mission of The American Law Institute since its founding to promote uniformity within the federal union in solution of legal problems where there ought to be a national standard. For various reasons apparent throughout the draft, it seemed clear that only a federal statute could achieve the goal of uniformity and close the gaps in the American law of foreign judgments that would remain if the solution were left to ad hoc judicial decisions.

A priori, it would strike anyone as strange to learn that the judgment of an English or German or Japanese court might be recognized and enforced in Texas but not in Arkansas, in Pennsylvania but not in New Jersey. Just as the recognition or enforcement of an American judgment in France or Italy is an aspect of the relations between the United States and the country where recognition or enforcement is sought, so a foreign judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy that resulted in the foreign judgment involves only private parties. In the analogous context of recognition by U.S. courts of foreign acts of state, Justice Harlan wrote:

[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationship with other members of the internation-

al community must be treated exclusively as an aspect of federal law.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964). That was the view of Marshall and Story, who had no doubt that private controversies coming before courts in the United States were subject to a single international law, construed and interpreted in a uniform manner, subject to the control of Congress and the Supreme Court. And it was the view of Justice Gray, who canvassed not only American and English sources, but the laws and scholarly writing of some 20 countries before reaching the conclusion in *Hilton v. Guyot*, 159 U.S. 113 (1895), that “international law . . . which it is our judicial duty to know and declare” supported the conclusion that the judgment before the Court ought to be denied enforcement. *Id.* at 228.

Until 1926, it was clear that the recognition and enforcement of foreign judgments was a federal issue, that is an issue on which courts in the United States—state and federal—applied international law under guidance from the Supreme Court. The dissolution of that vision, some 12 years before the discrediting of the vision of general law as set out by Justice Story in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), came about in a decision of the New York Court of Appeals, *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 386-387, 152 N.E. 121, 123 (1926). Rejecting the teaching of the Supreme Court that recognition of a foreign judgment was a matter of international, and therefore national, law, the highest state court held that the controversy before it was one of “private rather than public international law, of private right rather than public relations.” Accordingly, the court held that recognition of the foreign judgment depended only on New York law, without reference to the authority of the Supreme Court on matters of public international law.

The approach of the New York Court of Appeals was generally followed throughout the United States, and

after *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts in diversity actions felt compelled to follow state practice in cases involving foreign judgments.¹

The present project rejects the view of the New York Court of Appeals, and takes as its point of departure the view that recognition and enforcement of foreign judgments is and ought to be a matter of national concern, and it takes up the suggestion of the Court in *Hilton* that “[t]he most certain guide . . . for the decision of such questions is a treaty or statute of this country.” 159 U.S. at 163. The Foreign Judgments Recognition and Enforcement Act proposed herein is such a statute, to be administered, for the most part through concurrent jurisdiction of the state and federal courts, but subject to a single standard and, ultimately, the control of the Supreme Court.

There is no constitutional problem with the proposed statute. Whether regarded as inherent in the sovereignty of the nation, or as derived from the national power over foreign relations shared by Congress and the Executive, or as derived from the power to regulate commerce with foreign nations, see *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 315-321 (1936), legislation to govern recognition and enforcement of foreign judgments fits comfortably into the powers of Congress.² Return to a national standard for recognition and enforcement of foreign judgments could be accom-

¹ See, e.g., *Somportex Limited v. Philadelphia Chewing Gum Corporation*, 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972). For doubt about the persuasiveness of this approach, see Restatement Second, Conflict of Laws § 98, Comment *c* (1988 rev.); Robert Casad, “Issue Preclusion and Foreign Country Judgments: Whose Law?” 70 *Iowa L. Rev.* 53, 77-80 (1984); Scoles, Hay, Borchers and Symeonides, *Conflict of Laws*, § 24.35 and n.5 (4th ed. 2004).

² See generally Louis Henkin, *Foreign Affairs and the U.S. Constitution*, esp. pp. 63-67 (2d ed. 1996).

plished by treaty and statute, as has been done with respect to foreign arbitral awards,³ and as was contemplated when the present project was launched while negotiations for an international convention on judgments were in progress under the auspices of The Hague Conference on Private International Law. But there is no impediment to accomplishing the goal by statute without link to an international convention, as the legislation here proposed would do if adopted by Congress.

The proposed legislation would make a change in the allocation of authority within the United States with respect to foreign judgments, in that it would commit to Congress decisions that have been taken, at least since *Erie*, by states of the United States or by federal courts applying state law. The proposed Act would preempt state legislation, and in particular the Uniform Foreign Money-Judgments Recognition Act (1962) adopted by some 30 states, as well as the revised version of that Act that has been promulgated by the Commissioners but as of summer 2006 not yet adopted by any state. Preemption of state law is proposed not because the Uniform Act exceeds the powers of state legislatures, but because a deliberate decision would be made to adopt a national solution by act of Congress.⁴ In so doing, the Act would be consistent with the great majority of decisions of the Supreme Court that have considered the impact of state legislation or judicial decisions on federal law in relation

³See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, entered into force with respect to the United States in 1970, and implementation of that Convention as domestic law by Chapter 2 of the U.S. Arbitration Act, 9 U.S.C. §§ 201-208.

⁴Particular changes from the Uniform Act that would be made by this proposed Act are detailed in the Comments to the individual sections. In addition, the proposed Act addresses a number of topics not addressed in the Uniform Act.

Introduction

to the conduct of foreign relations. For instance, in *Hines v. Davidovitz*, 312 U.S. 52 (1941), the Court struck down the alien registration law of Pennsylvania, though there was no inconsistency between that law and the federal alien registration law, because, as the Court found, Congress had occupied the field.⁵ Again, in *Zschernig v. Miller*, 389 U.S. 429 (1968), the courts of Oregon had denied an inheritance to a resident of East Germany (at the time under Communist control) on the basis of an Oregon statute, because he could not prove that he would enjoy the inheritance without confiscation and that U.S. citizens had a reciprocal right to inherit in his country. Even though there was no contradictory or overlapping federal statute, the Supreme Court reversed, holding that the Oregon statute as applied was “an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress.”⁶

More recently, the Supreme Court invalidated a Massachusetts statute restricting corporations organized in that state from doing business in Burma as a sanction for violations of human rights by the government of that country. Congress had also adopted sanctions against Burma, and the Court held that the Massachusetts statute obstructed the full realization of the intent of Congress by undermining the extensive foreign-affairs powers delegated to the President in the federal statute. *Crosby v.*

⁵The Court wrote:

Consequently the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, “the act of Congress, or the treaty, is supreme, and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. . . .”

312 U.S. at 66.

⁶389 U.S. at 432. For discussion of these and other cases illustrating the strong federal interest in matters affecting foreign relations, see Restatement Third, The Foreign Relations Law of the United States § 1, Reporters’ Note 5.

National Foreign Trade Council, 530 U.S. 363 (2000). In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), the Court held that a California statute requiring any insurance company doing business in that state to disclose all information regarding insurance policies that it had sold in Europe during the Nazi regime was preempted by agreements and ongoing negotiations conducted by the federal government looking to settlement of claims of survivors of the Holocaust.

In addition to submission of the proposed Act for consideration by Congress, the project will serve as a concrete expression of The American Law Institute's views with respect to the subject matter of recognition and enforcement of foreign judgments. Courts seeking guidance in the context of a particular case could well be aided by the articulations of the "black letter" and the analysis reflected in the Comments and Reporters' Notes. As in the case of other ALI legislative projects, the Judgments project can influence executive policy and judicial decisionmaking even if it is not enacted.

In sum, a coherent federal statute is the best solution to this important set of questions. The federal legislation here recommended would address a national problem with a national solution. It would authorize negotiation of agreements with foreign countries pertaining to reciprocal enforcement of each others' judgments, and would offer a number of incentives to foreign countries and their courts to recognize and enforce judgments emanating from the United States. The legislation fits well within the constitutional authority of Congress, and it would be consistent with the needs of a legal and commercial community ever more engaged in international transactions and their inevitable concomitant, international litigation.

The Foreign Judgments Recognition and Enforcement Act (without Comments)

§ 1. Scope and Definitions

(a) This Act applies to foreign judgments as herein defined other than:

(i) judgments for divorce, support, maintenance, division of property, custody, adoption, or other judgments rendered in connection with matters of domestic relations;

(ii) judgments rendered in connection with bankruptcy, liquidation, or similar proceedings; and

(iii) foreign arbitral awards or court orders in respect of agreements to arbitrate, except that if judgments of foreign courts confirming or setting aside arbitral awards are sought to be recognized or enforced, they are subject to the criteria for recognition and enforcement set out in the Act.

(b) “Foreign judgment” means any final judgment or final order of the court of a foreign state granting or denying a sum of money, or determining a legal controversy. A judgment or order that is subject to appeal or where an appeal is pending is nonetheless final for purposes of the Act if it is subject to enforcement in the state of origin.

(c) “Foreign state” means any governmental unit outside the United States or outside any territory under control of the United States, including subdivisions of federal states or independent administrative units.

§ 2. Recognition and Enforcement Generally

(a) Except as provided in subsection (b), a foreign judgment shall be recognized and enforced by courts in the United States in accordance with this Act.

(b) (i) Judgments for taxes, fines, and penalties may be recognized and enforced provided they meet the criteria of this Act, including reciprocity in accordance with § 7, but recognition and enforcement of such judgments is not obligatory.

(ii) Declaratory judgments and injunctions or comparable orders that meet the criteria of this Act may be entitled to recognition or enforcement under such procedures as the recognizing court deems appropriate.

(c) An action or other proceeding to enforce a judgment shall be brought within 10 years from the time the judgment becomes enforceable in the rendering state, or in the event of an appeal, from the time when the judgment is no longer subject to ordinary forms of review in the state of origin.

§ 3. Effect of Foreign Judgment in the United States

(a) A foreign judgment that meets the standards set out in this Act is entitled to recognition and enforcement by a court in the United States with respect to the liability or nonliability of a party, and with respect to the damages or other relief, whether monetary or non-monetary, as well as interest and costs, including attorneys' fees, awarded to the prevailing party. If the foreign judgment orders payment in a foreign currency, a court in the United States may order payment in that currency or in United States dol-

lars at the exchange rate prevailing on the date of the judgment granting enforcement.

(b) A foreign judgment rendered in default of appearance of the defendant is entitled to recognition and enforcement, provided that the party seeking recognition satisfies the court in the United States that (i) the rendering court had jurisdiction over the defendant in accordance with the law of the state of origin of the judgment; (ii) the defendant was served with initiating process in accordance with the law of the state of origin; and (iii) the rendering court had jurisdiction over the defendant on a basis not unacceptable in the United States under § 6 of this Act.

(c) If the party resisting recognition or enforcement appears in the proceeding in the United States, that party bears the initial burden of challenging the jurisdiction of the rendering court; if a credible challenge to the jurisdiction of the rendering court is raised, it is up to the party relying on the judgment to establish that the jurisdictional and due-process requirements for enforcement of foreign judgments have been met. If the party resisting recognition or enforcement does not appear in the proceeding in the United States, the party relying on the judgment must make the required showing.

(d) A judgment of dismissal rendered by a foreign court, if otherwise entitled to recognition, shall be treated in the same way as a judgment for the defendant, except

(i) if the ground for dismissal was lack of jurisdiction of the rendering court;

(ii) if the ground for dismissal was that the action was time-barred, unless the party seeking to rely on the judgment of dismissal estab-

lishes that the claim is extinguished under the law applied to the claim by the rendering court;

(iii) if the dismissal was based on other grounds not regarded by courts in the United States as constituting dismissal with prejudice, including defective service, failure to pay the required filing fees, failure to post security, failure to join required parties, or similar defects.

§ 4. Claim and Issue Preclusion; Effect of Challenge to Jurisdiction in the Court of Origin

(a) Except as provided in § 3, a foreign judgment that meets the standards set out in this Act shall be given the 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. The party seeking to rely on the preclusive effect of a foreign judgment shall have the burden to establish that the claim or issue is precluded.

(b) If the judgment debtor challenged the jurisdiction of the rendering court in the foreign proceeding,

(i) findings of fact pertinent to the determination of jurisdiction of the rendering court are conclusive in the proceeding in the United States,

(ii) legal determinations as to the jurisdiction of the rendering court under the law of the state of origin are conclusive in the proceeding in the United States,

but the judgment debtor or other party resisting recognition or enforcement may show that such jurisdiction is unacceptable under § 6.

(c) If the judgment debtor has appeared in the foreign action without challenging the jurisdiction of the rendering court, the judgment debtor or other party resisting recognition or enforcement may not challenge the jurisdiction of the rendering court under the law of the state of origin in the proceeding in the United States, but may show that such jurisdiction is unacceptable under § 6.

§ 5. Nonrecognition of a Foreign Judgment

(a) A foreign judgment shall not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that:

(i) 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;

(ii) the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question;

(iii) the judgment was rendered on a basis of jurisdiction over the defendant unacceptable under § 6;

(iv) the judgment was rendered without notice reasonably calculated to inform the defendant of the pendency of the proceeding in a timely manner;

(v) the judgment was obtained by fraud that had the effect of depriving the party resisting recognition or enforcement of adequate opportunity to present its case to the court; or

(vi) the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States, or to the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law.

(b) (i) Except as provided in subsections (ii) and (iii), a foreign judgment shall not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that the judgment resulted from a proceeding undertaken contrary to an agreement under which the dispute was to be determined exclusively in another forum.

(ii) If the party resisting recognition or enforcement participated in the proceeding before the rendering court without raising the defense of the forum-selection agreement, the judgment shall not be denied recognition or enforcement unless it is clear that raising the defense would have been futile.

(iii) If the party resisting recognition or enforcement raised the defense of the forum-selection agreement and the rendering court held that the agreement was inapplicable or invalid, the judgment shall not be denied recognition or enforcement unless the determination of inapplicability or invalidity of the agreement was manifestly unreasonable.

(c) A foreign judgment need not be recognized or enforced in a court in the United States if the party resisting recognition or enforcement establishes that:

(i) the state of origin of the court that issued the foreign judgment did not have jurisdiction to prescribe, or the foreign court was not com-

petent to adjudicate, with respect to the subject matter of the controversy;

(ii) the judgment is irreconcilable with another foreign judgment entitled to recognition or enforcement under the Act and involving the same parties;

(iii) the judgment results from a proceeding initiated after commencement in a court in the United States of a proceeding including the same parties and the same subject matter, and the proceeding in the United States was not stayed or dismissed; or

(iv) the judgment results from a proceeding undertaken with a view to frustrating a claimant's opportunity to have the claim adjudicated in a more appropriate court in the United States, whether by an anti-suit injunction or restraining order, by a declaration of nonliability, or by other means.

(d) The party resisting recognition or enforcement shall have the burden of proof with respect to the defenses set out in subsections (a) and (c). If a defense is raised pursuant to subsection (b) that the judgment was rendered in contravention of a forum-selection agreement, the party seeking recognition or enforcement shall have the burden of establishing the inapplicability or invalidity of the agreement.

§ 6. Bases of Jurisdiction Not Recognized or Enforced

(a) A foreign judgment rendered on any of the following bases of jurisdiction shall not be recognized or enforced in the United States:

(i) except in admiralty and maritime actions, the presence or seizure of property belonging to the defendant in the forum state,

when the claim does not assert an interest in or is otherwise unrelated to the property;

(ii) the nationality of the plaintiff;

(iii) the domicile, habitual residence, or place of incorporation of the plaintiff;

(iv) service of process based solely on the transitory presence of the defendant in the forum state, unless no other appropriate forum was reasonably available;

(v) any other basis that is unreasonable or unfair given the nature of the claim and the identity of the parties. A basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in the United States.

(b) A foreign judgment based on an assertion of an unacceptable basis of jurisdiction as defined in subsection (a) shall not be denied recognition or enforcement if the factual circumstances would clearly support jurisdiction not inconsistent with subsection (a).

(c) An appearance by the defendant in the rendering court, or an unsuccessful objection to the jurisdiction of the rendering court, does not deprive the defendant of the right to resist recognition or enforcement under this section.

§ 7. Reciprocal Recognition and Enforcement of Foreign Judgments

(a) A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.

(b) A judgment debtor or other person resisting recognition or enforcement of a foreign judgment in accordance with this section shall raise the defense of lack of reciprocity with specificity as an affirmative defense. The party resisting recognition or enforcement shall have the burden to show that there is substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments of courts in the United States. Such showing may be made through expert testimony, or by judicial notice if the law of the state of origin or decisions of its courts are clear.

(c) In making the determination required under subsections (a) and (b), the court shall, as appropriate, inquire whether the courts of the state of origin deny enforcement to

(i) judgments against nationals of that state in favor of nationals of another state;

(ii) judgments originating in the courts of the United States or of a state of the United States;

(iii) judgments for compensatory damages rendered in actions for personal injury or death;

(iv) judgments for statutory claims;

(v) particular types of judgments rendered by courts in the United States similar to the foreign judgment for which recognition or enforcement is sought;

The court may also take into account other aspects of the recognition practice of courts of the state of origin, including practice with regard to judgments of other states.

(d) Denial by courts of the state of origin of enforcement of judgments for punitive, exemplary, or multiple damages shall not be regarded as denial of reciprocal enforcement of judgments for the purposes of this section if the courts of the state of origin would enforce the compensatory portion of such judgments.

Courts in the United States may enforce a foreign judgment for punitive, exemplary, or multiple damages on the basis of reciprocity.

(e) The Secretary of State is authorized to negotiate agreements with foreign states or groups of states setting forth reciprocal practices concerning recognition and enforcement of judgments rendered in the United States. The existence of such an agreement between a foreign state or group of foreign states and the United States establishes that the requirement of reciprocity has been met as to judgments covered by the agreement. The fact that no such agreement between the state of origin and the United States is in effect, or that the agreement is not applicable with respect to the judgment for which recognition or enforcement is sought, does not of itself establish that the state fails to meet the reciprocity requirement of this section.

§ 8. Jurisdiction of Courts in the United States

(a) The district courts of the United States shall have original jurisdiction, concurrently with the courts of the states, of an action brought to enforce a foreign judgment or to secure a declaration with respect to recognition under this Act, without regard to the citizenship or residence of the parties or the amount in controversy.

(b) Any such action brought in a state court may be removed by any defendant against whom

the enforcement or declaration is sought to the United States District Court for the district embracing the place where the action is pending, without regard to the citizenship or residence of the parties or the amount in controversy. A notice of removal shall be filed in accordance with the time limits and procedures of 28 U.S.C. § 1446(b).

The district court may, in its discretion, remand any claim to which the foreign judgment does not apply. In exercising its discretion, the district court shall consider whether the claims involving the foreign judgment are so closely related to the other claims that it would be efficient to hear the entire action.

[(c) Any action brought in a state court in which a foreign judgment asserted to be entitled to recognition or enforcement under the Act is raised as a partial or complete defense, set-off, counterclaim, or otherwise, may be removed to the United States District Court for the district embracing the place where the action is pending, without regard to the citizenship or residence of the parties or the amount in controversy. Any party by or against whom such defense, set-off, counterclaim or other claim is asserted is entitled to remove the action. A notice of removal shall be filed by such party within 30 days after the issue of recognition is raised.

(d) (i) When an action has been removed pursuant to subsection (c), the district court may, prior to determining whether the foreign judgment is entitled to recognition, decide to retain the entire action or, in its discretion, remand to the state court from which the action was removed, any claim with respect to which recognition of a foreign judgment is not invoked. In exercising the discretion to remand pursuant to

this subsection, the district court shall consider whether the claims or defenses involving recognition of a foreign judgment are so closely related to other claims or defenses that it would be efficient to retain the entire action.

(ii) After making a determination as to whether the foreign judgment is entitled to recognition, the district court may decide to retain the action, or, in its discretion, remand all or part of the action to the state court from which the action was removed. In exercising the discretion to remand pursuant to this subsection, the district court shall consider the impact of the determination with respect to recognition on the remaining claims and issues in the case, the interests of the parties, and judicial efficiency.

(iii) A remand pursuant to subsections (d)(i) or (d)(ii) shall not be subject to review by appeal or otherwise; however, in a case remanded under subsection (d)(ii), the determination by the district court with respect to recognition of the foreign judgment under this Act shall be subject to immediate appellate review as a final decision.]

§ 9. Means of Enforcement of Foreign Judgments

(a) (i) Any foreign judgment entitled to recognition and enforcement under this Act may be enforced by means of a civil action, as provided in this section.

(ii) A foreign judgment for a sum of money only, entitled to enforcement under this Act, other than a judgment rendered by default or a judgment subject to appeal, may also be enforced by registration, as provided in § 10.

(b) An action to recognize or enforce a judgment under this Act may be brought in the appropriate state or federal court

(i) where the judgment debtor is subject to personal jurisdiction; or

(ii) where assets belonging to the judgment debtor are situated.

(c) Process in such actions may be served upon the judgment debtor in accordance with applicable state or federal law, including treaties to which the United States is a party.

(d) (i) When a judgment creditor brings more than one action to enforce a foreign judgment in the United States, at least one such action must be brought in the state or federal court for the place where the judgment debtor (if an individual) is domiciled or (if a juridical entity) has its principal establishment in the United States, or where the judgment debtor has substantial assets.

(ii) If pursuant to paragraph (i) the judgment creditor brings an action where the judgment debtor is domiciled or has its principal establishment, that action is deemed the “main enforcement action,” and the court at such place is deemed the “main enforcement court.” If the judgment creditor has not brought an action in such place or there is no such place, the judgment creditor shall designate the action at a place where the judgment debtor has substantial assets as the “main enforcement action,” and the court at such place is deemed the “main enforcement court.”

(iii) A judgment creditor bringing more than one action pursuant to this section shall inform each court in the United States where

such action is brought of all other proceedings relating to the same judgment and shall identify the main enforcement action. Such information shall be supplemented as appropriate.

(iv) All issues concerning the recognition of a foreign judgment under the Act shall be decided by the main enforcement court, and proceedings relating to the issue of recognition shall be stayed in all other courts in the United States where an action to enforce the judgment may be pending. The decision on recognition shall be binding on all such courts and every other court in the United States.

(e) Any court where an action to enforce is pending may, in appropriate circumstances, require the party resisting enforcement to post security to prevent dissipation of assets.

§ 10. Registration of Foreign Money Judgments in Federal Courts

(a) Except as provided hereafter, a foreign judgment issued by the court of a state that has entered into an agreement with the United States for reciprocal recognition of judgments pursuant to § 7(e) of this Act may be registered in accordance with this section in any United States court for a district in which the judgment debtor has property when the debtor (if an individual) is domiciled in the state or (if a juridical entity) has an establishment in the state. Alternatively, a judgment may be registered in any United States court for a district in which the judgment debtor has substantial assets. A judgment so registered, upon expiration of the 60-day period provided for in subsection (f), or upon denial of a motion to vacate pursuant to

subsection (g), shall be a judgment of the district court, and may be enforced in like manner. This section authorizes registration only of money judgments, and does not authorize registration of judgments rendered by confession, in default of appearance or for failure to defend on the merits, or of judgments subject to appeal. A judgment not eligible for registration under this section may not be registered in a state court.

(b) A judgment creditor seeking to register a foreign judgment shall file with the clerk of the registering court (i) a certified copy of the judgment, together with a certified translation into English where necessary; (ii) a statement setting forth the agreement between the state of origin of the judgment and the United States pursuant to § 7(e); (iii) proof that the judgment was rendered within the period prescribed by § 2(c); and (iv) the affidavit prescribed by subsection (c).

An application for registration under this section does not expose the judgment creditor to personal jurisdiction.

(c) The affidavit required by subsection (b) shall set forth (i) grounds for the belief that the judgment debtor is domiciled or has an establishment in the state and has property in the district where the federal court is located, or alternatively, has substantial property in the district where the federal court is located; (ii) that the judgment was not rendered by confession, in default of appearance or for failure to defend on the merits; (iii) that all appeals from the judgment have been exhausted or the time for appeal has expired; (iv) that the judgment has not been satisfied; and (v) that the judgment debtor has insufficient assets in the state of origin of the judgment to satisfy the judgment, or that the

judgment debtor has taken steps to conceal assets in the state of origin. The affidavit shall also identify any other court in the United States in which registration or enforcement has been sought. The judgment creditor is under a duty to supplement or correct the affidavit in order to keep the required information current.

(d) Upon receipt of the application for registration and supporting documents, the clerk of the court shall register the foreign judgment in the same manner as a judgment of the court in which it is registered. A judgment so registered shall have the same effect as a judgment of the registering court, including creation of a lien in accordance with state law.

(e) (i) The judgment creditor shall promptly notify the judgment debtor of the registration of the judgment, by first-class mail or other reliable means.

(ii) If the judgment debtor has a registered agent in the United States, notice of the registration shall be given to such agent; if the judgment debtor is a juridical entity with an establishment in the United States, notice shall be given to a managing agent or other responsible person at any such establishment; in other cases, notice shall be given at the last known address or addresses of the judgment debtor, as well as at other addresses of the debtor over the preceding five years known to the creditor, in the United States and elsewhere. The judgment creditor, upon certification under oath, shall furnish to the clerk a list of the addresses to which the notice has been sent and a copy of the notice showing its date.

(iii) The notice shall advise the judgment debtor that a writ of execution may be issued

60 days from the date that notice of the registration is sent to the judgment debtor, unless within that time the judgment debtor files a motion addressed to the court to vacate the registration.

(f) A motion to vacate the registration shall be filed with the clerk of the registering court, with a copy to the judgment creditor, within 60 days of the date that notice of the registration is sent. Unless the court orders otherwise, any lien or other security in place under subsection (d) shall remain in effect, but may not be enforced before the motion to vacate is decided. Notice that a motion to vacate the registration has been filed shall be given by the clerk of the district court where the motion is pending to all other courts in the United States in which registration or enforcement has been sought, and no execution shall issue in any court while the motion to vacate is pending. The court may, in appropriate cases, require a bond or other security to be furnished by the person seeking enforcement.

A motion to vacate does not expose the judgment debtor to personal jurisdiction if such jurisdiction is not otherwise available.

(g) (i) A motion to vacate the registration may be made on the basis that the foreign judgment is not entitled to recognition or enforcement on the ground of any of the defenses set out in this Act.

(ii) A motion to vacate registration of a foreign judgment under this section may also be made on any of the following grounds: that the judgment debtor has no property under the jurisdiction of the registering court available for execution; that the affidavit submitted by the judgment creditor is erroneous; that the

judgment has been satisfied; that the judgment has been overturned on appeal; or that an appeal of the judgment is pending in the state of origin.

(h) When a motion to vacate the registration under this section raises a genuine issue with respect to recognition of the foreign judgment under the Act, the court shall vacate the registration and if the judgment creditor chooses to proceed, treat the application as an action to enforce the judgment as under § 9. In such case, the judgment creditor shall have process served upon the defendant in accordance with federal law. If the motion to vacate is granted, the court shall decide whether to continue any lien that may be in effect or to order the judgment debtor to give security under such conditions as may be necessary.

(i) In the case of multiple registrations under this Act, each district court to which a motion to vacate is addressed shall decide issues focused on the property alleged to be situated within the district; for issues concerning recognition under the Act, the proceeding called for by subsection (g) shall be held in the court for the district in a state where the judgment debtor (if an individual) is domiciled or (if a juridical entity) has its principal establishment in the United States, provided that the judgment debtor has property in that district and that an application for registration has been filed in that district. If these conditions are not met, the proceeding called for by subsection (g) shall be held in the district court where the first application for registration was filed. If the judgment creditor brings both an action under § 9 and an application for registration under this section, the proceeding called for by subsection (g) shall be held in the main enforcement court as defined in § 9.

(j) Pending decision on the motion to vacate, no writ of execution may be issued, and no other court shall hear or determine the issue of recognition. If the motion to vacate is granted, all courts before which registration or enforcement has been sought shall be notified, and all liens entered pursuant to subsection (d) shall be discharged, unless the court granting the motion orders the liens to remain in effect pending appeal, or orders security as may be appropriate if the action proceeds under § 9.

§ 11. Declination of Jurisdiction When Prior Action Is Pending

(a) Except as provided in subsection (b), when an action is brought in a court in the United States and it is shown that a proceeding concerning the same subject matter and including the same or related parties as adversaries has previously been brought and is pending in the courts of a foreign state, the court in the United States shall stay, or when appropriate, dismiss the action, if:

(i) the foreign court has jurisdiction on a basis not unacceptable under § 6; and

(ii) the foreign court is likely to render a timely judgment entitled to recognition under this Act.

(b) A court in the United States may decline to stay or dismiss the action under subsection (a) if the party bringing the action shows

(i) that the jurisdiction of the foreign court was invoked with a view to frustrating the exercise of jurisdiction of the court in the United States, when that court would be the more appropriate forum;

(ii) that the proceedings in the foreign court are vexatious or frivolous; or

(iii) that there are other persuasive reasons for accepting the burdens of parallel litigation.

§ 12. Provisional Measures in Aid of Foreign Proceedings

(a) A court in the United States may grant provisional relief in support of an order, whether or not it is final, issued by a foreign court

(i) to secure enforcement of a judgment entitled to recognition and enforcement under this Act; or

(ii) to provide security or disclosure of assets in connection with proceedings likely to result in a judgment entitled to recognition and enforcement under this Act.

(b) Before granting provisional relief in support of the order of a foreign court, the court in the United States shall require the applicant to show that the court of origin has determined that the judgment debtor or defendant is likely to dispose of or conceal assets, that the assets within the jurisdiction of the foreign court are or are likely to be insufficient to meet the obligations determined to be owing in the principal action, and that the judgment debtor or defendant has been given notice and a reasonable opportunity to be heard before the court of origin or that it was impossible to give such notice.

(c) In granting provisional relief in accordance with this section,

(i) the court is authorized to make use of such remedies and procedures as are available to it in connection with ordinary proceedings in courts in the United States;

(ii) a federal court may grant an injunction freezing assets of the defendant situated anywhere in the United States.

(d) An order issued pursuant to subsection (c)(i) and notice thereof shall be in accordance with the applicable state statute or rule; an order issued pursuant to subsection (c)(ii) and notice thereof shall be in accordance with the provisions of the Federal Rules of Civil Procedure pertaining to injunctions. Notice of an order issued pursuant to this section shall be given to the judgment debtor or defendant in the foreign action whether or not the judgment debtor or defendant is present in or subject to personal jurisdiction in the United States.

No order pursuant to this section shall be made unless it provides an opportunity for the judgment debtor or defendant within a reasonable time to contest the issuance of the order or to apply for a modification.

(e) The applicant for provisional relief in accordance with this section may be required to give security.

(f) A court in the United States to which application has been made in accordance with this section for provisional relief in aid of an order of a foreign court may, in the interests of justice, communicate directly with the foreign court.

§ 13. Foreign Orders Concerning Litigation in the United States

Orders of a foreign court that may concern or affect litigation in the United States may be taken into account for purposes of determining motions to stay, dismiss, or otherwise regulate related proceedings in the United States.

Appendix B

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PROFESSIONAL EMPLOYMENT

NEW YORK UNIVERSITY SCHOOL OF LAW
New York, New York
Martin Lipton Professor of Law, 2001-present
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PROFESSIONAL ACTIVITIES

- Scholar-in Residence, Wilmer Cutler, Pickering, Hale & Dorr (Fall, 2009)
- Member, U.S. Department of State Advisory Committee on Private International Law (2009-present)
- American Law Institute, Adviser, Restatement (Third) on International Commercial Arbitration (2009-present).
- Fellow, American Bar Foundation (2007)
- International Law Association, Committee on Civil Litigation and the Interests of the Public (2007)
- Institute of Judicial Administration, Board of Directors (present)
- American Bar Association (1971-present)

- Editorial Advisory Board, Journal of Private International Law (2005-present)
- American Law Institute, Reporter (with A. Lowenfeld), Recognition and Enforcement of Foreign Judgments Project (1999-2006)
- American Law Institute, Member (since 1980)
- American Law Institute, Members Consultative Group, Principles on the Law of Aggregate Litigation (2004-present)
- American Law Institute, Adviser, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes (2002-present)
- International Commercial Disputes Committee, Association of the Bar of the City of New York (2000-present)
- Lecturer, Hague Academy of International Law, Summer 1999
- Department of State, Study Group, Hague Convention on Enforcement of Judgments (1996-2005)
- Member of U.S. Delegation, Hague Conference Special Commission on Child Abduction (2006, 2002, 2001, 1997)
- Expert Consultant to Hague Conference Second Special Commission on Child Abduction (1993)
- Member of U.S. Delegation, Hague Conference Special Commission on Protection of Minors (1993-1996)
- Adviser, Federal Courts Study Committee (1989-90)
- Third Circuit Task Force on Rule 11 Sanctions (1987-88)
- ABA Task Force, Torts and Insurance Practice (Jurisdiction and Choice of Law) (1987-1990)
- Department of State, Study Group, Hague Convention on Choice of Law Applicable to International Sales (1985-1987)
- Department of State, Study Group, Hague Convention on International Child Abduction (1985)
- Consultant, New York Law Revision Commission, Custody Legislation (1983-1985)
- ABA Family Law Section, Committee on Custody (1984-86)
- Assistant Reporter, Advisory Committee on Federal Rules of Civil Procedure (1979-82)
- ABA Family Law Section, Committee on Mediation and Arbitration (1983-84)
- Consultant, Divorce Mediation Project, Post-graduate Center for Mental Health (1980-83)
- Director, Lay Judges Project, Institute of Judicial Administration (1978-79)
- Committee on Federal Courts, Association of the Bar of The City of New York, (1974-77)

- Participant (Numerous conferences and symposia on family law, conflicts, federal courts, and international litigation)

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