November 30, 1998

(as revised)

Memorandum

To: The Council

Through: Professor Geoffrey Hazard

From: Professor Andreas F. Lowenfeld

Professor Linda Silberman

Subject: Proposal for Project on Jurisdiction and Judgments Convention

Introduction

Some 35 countries have been engaged since 1993 in negotiating a Convention on Jurisdiction and the Recognition of Foreign Judgments. The negotiations, proceeding on initiative from the United States, are conducted under the auspices of the Hague Conference on Private International Law, which has in recent years produced, among other agreements, the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (The Hague Service Convention 1965), the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (The Hague Evidence Convention 1970), and the Convention on the Civil Aspects of International Child Abduction (The Hague Child Abduction Convention 1980). Though at this writing (year-end 1998) it is not certain that a Jurisdiction and Judgments Convention will be approved by the Hague Conference and that the United States will sign the Convention, it appears likely that a convention will be agreed on and that the United States executive branch will support its adoption. The expectation is that the Convention will be submitted to the Senate for advice and consent, on the understanding that the President would not ratify the convention unless and until implementing legislation had been passed by both Houses of Congress. This procedure has been followed in a number of multilateral treaties related to adjudication, including the New York Arbitration Convention and the Hague Child Abduction Convention.

The project we propose to the Council and the Institute is addressed to preparation of the implementing legislation. The details of such legislation must, of course, await the final version of the Convention, but the general outlines of the Convention are sufficiently clear to foresee the needs and options in implementing legislation, and a semi-final text (i.e. the text to be submitted to a Diplomatic Conference to be held in October of the year 2000) will be available, according to the present schedule, shortly after June 1999. We believe also that in the course of considering the implementation of the Convention by the United States, the Institute may be able to offer suggestions useful to the drafters and negotiators of the final version of the Convention.[1]

[1] Both the Brooklyn Journal of International Law (Vol. 24, No. 1, 1998) and the Albany Law Review (Vol. 61, No. 4, 1998) have published symposia on the proposed Convention

The Proposed Jurisdiction and Judgments Convention

The Convention presently under discussion is to some extent modeled on the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters

(1968) in force among the members of the European Community, with the notable differences that it would be open to a much wider number of States, and that it would not have a final authority, such as the European Court of Justice, to oversee its operation. The point of departure is that civil judgments rendered in one treaty State against persons domiciled in another treaty State will be recognized in all other treaty States, subject to a narrow list of defenses, and provided the court that rendered the judgment had jurisdiction over the defendant according to an agreed standard. Unlike the Full Faith and Credit Clause of the U.S. Constitution, the proposed Hague Convention would make elaborate provision for jurisdiction of courts, as well as for recognition and enforcement of judgments.

The universal basis of adjudicatory jurisdiction will be the domicile, habitual residence, or principal place of business of the defendant. Some other bases of jurisdiction would be on an approved and possibly mandatory list, including probably place of injury in a tort action, place of performance in a contract action, and domicile of the insured in an action based on an insurance contract.[2] Certain other bases of jurisdiction would be prohibited as exorbitant, including transient or tag jurisdiction, jurisdiction on the basis of plaintiff's nationality, and jurisdiction solely on the basis of presence of the defendant's property in the foreign State. A third group of bases of adjudicatory jurisdiction, sometimes referred to as a "gray list", would be neither required nor prohibited, but would be permitted. It is not yet clear whether the bases of jurisdiction in this group would be listed in the convention or would simply not be mentioned in either the "approved" or the "prohibited" list. Among the candidates for this "gray area" (still being negotiated) are jurisdiction on the basis of doing business in the foreign State, place of contracting, and status as a co-defendant with a defendant over whom jurisdiction can be asserted.

[2] Whether the United States could accept mandatory grounds in the form they are drafted in the present conference documents remains an open question.

Exercise of jurisdiction by the courts of a treaty State over defendants domiciled in other treaty States under a prohibited basis of jurisdiction would not be permitted -- i.e., the prohibition would be binding in the first forum, not just implemented by denial of recognition in a second forum.

All treaty States would be required to recognize and enforce judgments rendered on the basis of jurisdiction on the approved list; judgments rendered on the basis of jurisdiction on the gray list (or in the gray area) would not be required to be recognized by other States, but States could declare (or be required to declare) which bases of jurisdiction would support judgments entitled to recognition in their courts.

Defenses to recognition and enforcement of judgments are still being negotiated. There will doubtless be a public policy defense, but its contours are not yet clear. For instance, it is not clear how judgments with multiple or punitive damages will be treated, and there are efforts to curb "excessive" damage awards, meaning tort judgments rendered on the basis of jury verdicts in the United States.

Overall, the proposed Convention is not likely to resemble an American wish list in all respects. It is true, however, that foreign judgments are recognized and enforced to a much greater extent in the United States than judgments rendered in the United States are recognized and enforced abroad.[3] Thus in some sense the United States stands to gain more than it gives up in a negotiated jurisdiction and judgments convention. How the convention would affect international litigation in the United States -- and indeed whether the convention is acceptable to the Senate and to the Congress as a whole -- will depend in significant part on the accompanying implementing legislation.

[3] See, e.g., Volker Behr, Enforcement of United States Money Judgments in Germany, 13 J. Law & Comm. 211 (1994).

The project here proposed -- with the encouragement of the Department of State -- would consist

of a draft Hague Jurisdiction and Judgments Convention Implementing Act, together with commentary and, where appropriate, optional approaches to difficult decisions. Some of the issues to be considered in drafting such a statute, particularly those involving questions of federalism, are described below. We suggest that even if a convention satisfactory to the United States does not emerge from current negotiations, an examination of the treatment of foreign judgments, and of national considerations involved in the uncertain status of judicial jurisdiction in the United States, can be both useful and creative, resulting in proposed federal legislation recommended by the Institute.

II

The Proposed Federal Implementing Legislation

A. Need and Scope of the Implementing Legislation

There is little doubt that adoption by the United States of the proposed Hague Convention on Jurisdiction and the Recognition of Judgments would need to be accompanied by authorizing and implementing federal legislation. The Convention would have significant effect on litigation both in the state and the federal courts, and would make recognition and enforcement of foreign country judgments an issue of federal law, which is not now the case. The constitutionality of the proposed legislation might itself be an issue, but we believe that the Commerce Power, as well as Articles III, IV, and VI provide ample authority for the legislation contemplated. The combination of treaty and implementing legislation has been followed in Chapter II of the Federal Arbitration Act, 9 U.S.C. §201 et seq. implementing the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards; in Chapter 121 of the Health Welfare Code implementing the 1980 Hague Convention on the Civil Aspects of International Child Abduction, 42 U.S.C. § 11601 et seq.; and pending legislation to implement the 1993 Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption.

One important change would be brought about by any multinational Judgments Convention to which the United States is a party. Under such a regime, the enforcement and recognition of foreign country judgments would be embraced within federal law, in contrast to the present, somewhat anomalous situation, according to which, at least since *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), recognition and enforcement of foreign-country judgments is regarded as a matter of state law, even if enforcement (or recognition) is sought in federal court.[4] In practice, recognition and enforcement of foreign country judgments is not very different among the states. Over half of the States have adopted the Uniform Foreign Money-Judgments Recognition Act,[5] and even states that have not formally adopted the Uniform Act generally apply the principles of the Act.[6]

4 See Restatement (Third) of the Foreign Relations Law of the United States §481, comment a.

5 15 Uniform Laws Annotated 261 et seq. As of January 1998, the follow-ing jurisdictions have adopted the Uniform Act, some with minor variations: Alaska, California, Colorado, Connect-i-cut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minneso-ta, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsyl-vania, Texas, Virgin Islands, Virginia, and Washington.

6See Andreas F. Lowenfeld and Linda J. Silberman, "United States of America" in Enforcement of Foreign Judgments Worldwide (2d ed. International Bar Association 1993) (attached hereto); also Restatement (Third) of Foreign Relations Law §§ 481-82 and Reporters' Notes thereto.

Nonetheless, there are a few important substantive points of difference among the states in the enforcement and recognition of foreign judgments. To the extent an international convention adopts particular requirements, a uniform federal standard will control the recognition and

enforcement of foreign country judgments. But even where State parties to the convention retain flexibility to apply domestic law standards, an international convention suggests that those standards should be uniform, and therefore federally prescribed, within the United States. For example, several states of the United States -- even those that have adopted the Uniform Act -- include lack of reciprocity as a ground for discretionary refusal to recognize or enforce a foreign country judgment. Under the Convention and the Supremacy Clause, states of the United States would no longer be permitted to require reciprocity as a condition for recognition or enforcement of judgments rendered in other Convention states. As a second example, lack of judicial jurisdiction of the rendering court is presently a common defense to recognition and enforcement of foreign judgments. With respect to judgments rendered on one of the bases of jurisdiction listed in the Uniform Act, states may not decline recognition or enforcement on jurisdictional grounds. However, under the Act states are free to accept or reject other bases of jurisdiction, and these may differ in the various states. As explained in Part I, the proposed Convention is likely to mandate recognition and enforcement when based upon standards of jurisdiction agreed to in the Convention, and certain other bases of jurisdiction are likely to be prohibited. The mandatory standards of jurisdiction would be binding upon every state in the United States. But even with respect to those jurisdictional grounds neither prohibited nor required by the Convention (the "gray area" or "gray list"), it would be highly desirable to effect a uniform federal recognition practice within the United States, so that it could not happen that the judgment of a foreign country would be enforceable in Pennsylvania but not in New Jersey. A federal statute, applicable both to State and to federal courts (see below) would accomplish this aim.

Once it is clear that enforcement of foreign country judgments under the Convention is a matter of federal law, the question will arise where enforcement should take place -- in state or federal court. We think it is clear that a suit to enforce a judgment falling under the Convention would be cognizable in federal court regardless of the citizenship of the parties, but the legislation should specify whether federal jurisdiction is to be concurrent or exclusive, and the circumstances in which removal to federal court would be permitted. Recognition of a foreign judgment falling under the Convention might be raised as a defense to an action on the underlying claim, and thus would not, under existing practice, provide an initial basis for federal jurisdiction. If the model of the legislation implementing the New York Arbitration Convention, 9 U.S.C. § 205, were followed, provision could be made for removal to federal court of such cases regardless of the amount in controversy or the citizenship of the parties. In the sections that follow, we identify possible subjects on which federal implementing legislation might be necessary and explore some of the options.

B. State or Federal Court

As mentioned in part I, the Convention presently being negotiated has two basic aspects -- (1) provision for required, prohibited, and permitted bases of judicial jurisdiction; and (2) provision for the conditions of recognition and enforcement. Each aspect may have consequences for the allocation of jurisdiction between the state and federal courts in the United States.

1. Impact of the Convention’s Jurisdiction Requirement

The requirements or limitations under the Convention with respect to personal jurisdiction will be binding on both state and federal courts, and the federal implementing legislation can so state.[7]

[7]The Convention will refer to the exercise of jurisdiction by each Contracting State, e.g., the United States, but the federal-state clauses in the Con-vention make clear that such references shall be construed to apply to the territorial unit -- i.e., the relevant state -- in appropriate situ-ations. It is possible for the Institute to recommend legislation that would make the exercise of jurisdiction over foreign defen-dants dependent on the foreign defendant's contacts with the United States as a whole and not just a particular state. Since under existing law only a small number of cases come within this category, see FRCP 4(k)(2), the U.S. dele-gation to the Hague Convention Project should be alerted to the pos-sibility that such a proposal is within the contempla-tion of the Institute.

But acceptance by the United States of international standards for judicial jurisdiction in particular cases would not create federal jurisdiction not otherwise available. The implementing legislation would provide that the jurisdictional rules of the Convention apply to actions in one Contracting State against domiciliaries of other Contracting States, if that in fact is the scope of the Convention. It is likely that many of the cases to which the jurisdictional rules of the Convention would apply will meet the diversity of citizenship requirements and thus qualify for original as well as removal subject matter jurisdiction.

2. Jurisdiction for Purposes of Enforcement and Recognition

a. Enforcement

The situation with respect to enforcement (and recognition) may be slightly more complicated. Under traditional definitions of "arising under" jurisdiction (28 U.S.C. §1331), a suit brought to enforce a Convention judgment could be said to arise under federal law, but for the avoidance of doubt it would be desirable for the implementing statute to expressly so state. Two analogies may be cited. Section 203 of the Federal Arbitration Act provides for federal jurisdiction of actions falling under the New York Convention on the Recognition and the Enforcement of Foreign Arbitral Awards and Section 205 permits a defendant to remove such an action from state court to federal court. The International Child Abduction Remedies Act (ICARA), 42 U.S.C. §11603(a), which implements the Hague Convention on International Child Abduction, provides that a suit for return of a child under that Convention may be brought either in state or in federal court, but does not make express provision for removal to federal court, though removal is permitted under the general removal statute, 28 U.S.C. §1441.

Whether federal jurisdiction to enforce a Convention judgment should be exclusive or concurrent with state courts is a more difficult question, and a policy matter that the Institute will need to address. Can the state courts be entrusted with the enforcement obligation undertaken by the United States in the Convention, or do recent examples of parochial bias with respect to alien defendants argue for making jurisdiction in these situations exclusive to the federal courts?[1] Are dangers of state parochialism mitigated by the fact that enforcement issues under the Convention are matters of federal law subject to Supreme Court review? Would exclusive jurisdiction in the federal courts impose too great a burden on the federal courts?

[1] Compare the recent claim brought by a Canadian corpora-tion against the United States contending that anti-foreign bias in a Mississippi state court amounts to a denial of justice and there-fore is equivalent to expropriation under the Investment Chapter of the North American Free Trade Agreement (NAFTA).

b. Recognition

Recognition presents a somewhat different problem from enforcement because the recognition of a prior judgment usually arises by way of a defense to a separate action, which may have been brought either in state or in federal court.[2] Thus, under the existing federal statutory scheme, it is the nature of the independent action that determines whether the case proceeds in state or federal court. One option, discussed above, would be to authorize removal to federal court when recognition of a Convention judgment is raised as a defense to an action brought in state court. Alternatively, interpretation of the Convention and judgments that fall under it could be left for determination by state courts, subject to review by the Supreme Court.

[2] When recognition arises as a defense to a claim arising under federal law, the dimensions of claim or issue preclusion as well as the recognition of the judgment have been viewed as a matter of federal law. See e.g., Alfadda v. Fenn, 966 F. Supp. 1317 (S.D.N.Y. 1997), aff'd on other grounds, 159 F.3d 41 (2d Cir. 1998).

3. The Public Policy Exception: A State or Federal Standard?

As noted in Part I, the Convention is likely to include as one of the defenses to enforcement and recognition that the judgment in question is "manifestly contrary to the public policy of the State addressed." Because enforcement and recognition practice under existing law have been matters of state and not federal law, the policy invoked as a defense to a foreign judgment is often *state* policy.[3] A question presented by the proposed Convention is how any such public policy exception should be understood. Is "public policy" only "national" policy? And what is "federal" or "national" policy in those areas where substantive regulatory policy is reserved to the States under the Tenth Amendment?

[3] See, e.g., Jaffe v. Snow, 610 So. 2d 482 (Fla. App. 1992) (enforcement of an Ontario judgment based on defendants' kidnaping of plaintiff's husband refused by Florida court despite interven-tion by U.S. Secretary of State, on the basis that the person kidnaped was a fugitive from Florida justice and enforcement of the judgment would be contrary to Florida's public policy); Telnikoff v. Matusevitch, 347 Md. 361, 702 A.2d 230 (Md. App. 1997)(on cer-tified question from D.C. Circuit, Maryland court held, one judge dis-senting, that English libel judgment was contrary to the public policy of Maryland and therefore that it should be denied recogni-tion).

C. Definitions Under the Convention: Statutory Guidance or Common Law Development

Under any proposed Convention, a number of terms and issues will be left for definition or interpretation by the domestic authorities of the parties to the Convention. A recurring issue in drafting the implementing legislation will be when specific federal statutory guidance should be provided and when questions should be left to development by the courts. In contrast to the Brussels Convention, there will be no supra-national body to provide uniform binding interpretations. Thus, many issues of interpretation will be left to domestic law. One example might be what is meant by "civil and commercial matter" under the Convention; another might be how to define domicile or habitual residence. In the United States, the problem of interpretation is compounded, particularly if both state and federal courts are exercising jurisdiction concurrently. Thus, one option would be to provide federal statutory guidance on questions of this type.

D. Fast-Track Enforcement

Because at the present stage of the negotiations the proposed Convention makes no mention of the procedures for enforcement, discussion of this issue may be somewhat premature. The Convention is unlikely to prescribe any particular procedure for enforcement other than to authorize "expeditious and summary" procedures, and to preclude certain defenses. It may, however, be possible to use the Convention as a means to introduce "fast-track" enforcement in certain categories of cases. Federal implementing legislation should then authorize such special procedures. Certainly, federal legislation could make provision for summary enforcement in the federal courts, but

there may be some question as to whether such procedures could or should be imposed by federal legislation upon the state courts.

E. Should the Assertion of Judicial Jurisdiction in the United States be Based on Activity throughout the Nation?

As noted earlier, the Hague Jurisdiction and Judgments Convention will refer to the rules for exercise of jurisdiction by Contracting States, not by subdivisions. In the United States, the outer limits of judicial jurisdiction are prescribed by federal constitutional standards, but assertion of jurisdiction in diversity and federal question cases (in the absence of an applicable federal statute providing for nationwide jurisdiction) is, in the first instance, a matter of state law.[1] Moreover, the focus of the jurisdictional inquiry in actions against non-residents is generally the activity by the defendant in the *individual* forum state, not in the United States as a whole. One option in the context of an international convention on jurisdictional standards would be to focus on the defendant's activity throughout the United States. In *Asahi Metal Industry Co. v. Superior Court of*

California, 480 U.S. 102 (1987), involving suit against a defendant domiciled in Japan, the Supreme Court itself took note of this issue, without making any decision or recommendation.[2]

[1] An exception is FRCP Rule 4(k)(2), authorizing jurisdic-tion based on the defendant's contacts with the United States as a whole in cases arising under federal law when there is no single state with which the defendant has the requisite jurisdic-tional contacts.

[2] The Court wrote, at 480 U.S. 113, note *:

> We have no occasion here to determine whether Congress could, consistent with the Due Pro-cess Clause of the Fifth Amend-ment, authorize federal court personal jurisdiction over alien de-fendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits.

A number of interesting questions are raised in consideration of this option: Is an aggregate contacts approach desirable? Would such an approach be limited to assertions of jurisdiction by the federal courts, or could Congress authorize state courts to assert jurisdiction based on aggregate contacts of the defendant with the United States? Are there constitutional difficulties with proposals of this type?

F. What if the Hague Convention Project Fails?

There is a possibility that negotiations of the proposed Hague Jurisdiction and Judgments Convention will not result in agreement, or will result in an agreement which the United States cannot accept. It is fair to ask is whether in those circumstances an ALI project on the Enforcement of Foreign Country Judgments would be moot. We believe that the project here proposed would still be viable and important, although its contours might be slightly (but not significantly) different.

As pointed out earlier, we do not believe that the present American approach to the enforcement and recognition of foreign country judgments is a sensible one. There is no reason that a foreign judgment should be enforceable in one state of the Union but not in another. Whether or not the Hague Convention project succeeds, a proposal for the adoption of a federal statute imposing uniform standards for recognition and enforcement of foreign judgments would be a valuable contribution by the Institute. Several of the issues identified for treatment under a Hague Convention regime would clearly be relevant: e.g., the bases for jurisdiction that should be accepted as a basis for recognition, and the treatment of the public policy defense. Others, such as the definition of particular Convention terminology, would not be.

Conclusion

We believe a project by the American Law Institute directed to recognition and enforcement of foreign country judgments would be challenging and useful. Such an effort would draw on the work of the Institute in the Study of the Division of Jurisdiction between State and Federal Courts (1969); the Restatement (Second) of Conflict of Laws (1971); the Restatement (Second) of Judgments (1982); and the Restatement (Third) of the Foreign Relations Law of the United States (1987). It would also fit in with (but not overlap) recent projects concerning Transnational Rules of Civil Procedure and Transnational Insolvency. In the light of the present negotiations at The Hague, the right time for the project would be the period 1999-2001. In order to have maximum input on behalf of the Institute into the shaping of the Convention, work on this project should begin promptly.