

Tuesday Morning Sessions  
May 18, 2004

A Tuesday morning session of The American Law Institute convened in the Colonial Room of The Mayflower, Washington, D.C., and was called to order at 9:00 a.m. by First Vice President Conrad K. Harper.

**First Vice President Harper:** Good morning, friends. I understand that we made some progress yesterday through §§ 8 and 9. So we are in the middle of § 10 of the International Jurisdiction and Judgments Project, and I believe we are *in medias res*. So maybe the thing to do is to inquire whether the Reporters wish to say anything by way of introduction.

Andy, did you want to say anything?

**Professor Andreas F. Lowenfeld (N.Y.):** Well, I reserve my rights, but I don't want to get in the middle of the discussion. I'm not quite sure what has been said and what hasn't.

Registration is clearly one of the innovative features, and it is clearly one of those about which some people ask, do we need a statute? If you like registration, clearly, you do need a statute, and we think it is a pro-enforcement provision. And, particularly, it is useful, perhaps this was said yesterday, for example, under § 9 you have to bring an action or try to bring an action. In a federal court in Miami, you wait six months, whereas, by going to the registration provision, if there are no genuine defenses, you can move it along. You deal with clerks and diminish the opportunity of the judgment debtor to delay. That is the basic thrust of the section.

I understand there was some question about what you do with multiple registration and the preferred place. I'm not sure that is absolutely essential, but we thought that was a good way to smooth out some of the rough edges that might occur in the registration. But forgive me if I'm duplicating what was said yesterday.

**Vice President Harper:** I think the floor is open for discussion. Yes, at microphone 1.

**Mr. Peter D. Trooboff (D.C.):** When we stopped yesterday, we were discussing § 10 and the registration. I was going to ask a question about § 10(g), which speaks of the situation where, there having been a registration, the question is, when do you go back to what I will call the normal procedure to enforce, and the standard is raising a genuine issue with respect to recognition.

When you look at Comment *g* on that, and that is on page 117, the examples given are examples where if the party resisting enforcement

were to prevail, there would be, under § 5, a required nonenforcement. That is, the court of origin lacked personal jurisdiction, although I think the word “personal” is not there. So it could be subject-matter jurisdiction you are talking about or repugnance to public policy, which, again, would be a mandatory basis for rejection.

I think that the examples ought not to give the impression that you wouldn’t also go back to the normal procedure if your basis for objection were to seek discretionary nonenforcement under § 5(b) and, perhaps, your Comment ought to give an example from the § 5(b) list as well, or to make clear that whether your genuine issue relates to § 5(a) or is an appeal to the discretion under § 5(b), in either instance, you are out of registration and back to what I will call the normal procedure. If I’m right, that is what you did.

**Professor Linda J. Silberman (N.Y.):** You are right. That was the intent, and we will just change that in the examples. Thank you.

**Vice President Harper:** Further comments with respect to § 10?

**Professor Patricia Brumfield Fry (Mo.):** I think I’m going to reveal my ignorance, but I would appreciate a little help, if I might. Again, in subsection (g) it indicates that, once there has been that genuine issue raised, it is treated as brought under § 9. The thing that made me confused is literally the last sentence of Comment *i*, which indicates that, once the motion to vacate is filed, the judgment creditor may be subject to jurisdiction in the court. Under § 9, by bringing the action, obviously, the judgment creditor would have submitted to jurisdiction. The only thing I see about the jurisdiction over the judgment creditor is this last sentence in the Comment.

**Professor Lowenfeld:** Our thought is that the registration provision, where you go to a clerk and you say, “Here it is,” it is, in effect, a ministerial function and not an adjudicative function. That should not subject the judgment creditor to, for instance, counterclaims or jurisdiction on unrelated matters. But, once you move over to the procedure under § 9, that is, you are before a court and you have both parties addressing a genuine issue, then the judgment creditor is no longer immune from at least related counterclaims. That’s our thought.

**Professor Fry:** I think that is appropriate, and yet we have, if I understand correctly, the judgment creditor becoming subject to the jurisdiction of a court without having brought an action in the court. Basically, it is in the control of the judgment debtor.

**Professor Lowenfeld:** To some extent that is true, but it is true only where there is a serious issue, as contrasted with simply a debt to which

there is no defense. It is only true if the judgment debtor, for example, says, you shouldn't have brought this proceeding because the judgment has been satisfied, or because the judgment was rendered by default, or some other reason, and then that is the chance that the judgment creditor takes.

**Professor Fry:** I'm not arguing that the judgment creditor should not be subject to jurisdiction. As I said, I didn't find the text completely clear. One sentence in the Comments might make it clear that the issue of jurisdiction over the creditor is under the control of the judgment debtor. I think it might be clarified with that.

**Professor Silberman:** One possibility that your question raises, I think, is suppose that the judgment creditor wants registration, but, once defenses are raised, the judgment creditor is prepared to abandon the enforcement action. That is, if I can't get registration and I would have to submit to jurisdiction by bringing an action to enforce, maybe I don't want to do that. If that is the right answer, then we could make that also clear. I have to say we hadn't thought about that. We really were thinking about the person who gets registration. The registration is vacated. The action goes ahead as under § 9, and the judgment creditor is in the same position the judgment creditor would have been in had he brought the initial action.

**Professor Fry:** One of the things that had occurred to me is that a judgment creditor might seek to use registration as a way to avoid submitting to jurisdiction. If the mere motion by the judgment debtor is sufficient to convert registration to an enforcement action, you've got a problem, I think.

**Professor Silberman:** Yes. I think that's a fair point, and we ought to think about how to solve it. Would it be your view that, if the judgment creditor didn't participate in the § 9 action, he or she wouldn't be subject to jurisdiction?

**Professor Fry:** I don't believe your black letter does that.

**Professor Silberman:** It certainly doesn't, but we can fix that. We can change the black letter.

**Professor Fry:** I hate to admit this. I'm an academic. I'm not sure I have a position on the policy there.

**Professor Lowenfeld:** We don't either. It's a new wrinkle.

**Professor Silberman:** It's a new wrinkle.

**Professor Eric M. Freedman (N.Y.):** Pursuing that, what the Reporters might consider in the black letter of § 10(g) there, instead of "the court shall vacate the registration and treat the matter," is "and at the option of the judgment creditor treat the matter."

**Professor Lynn Dennis Wardle (Utah):** I have two very small points, but they may have some practical ramification. In § 10(e), your draft says that the clerk “shall promptly notify the judgment debtor of the registration of the judgment.” I suggest that, if the clerk is going to be given that responsibility, the judgment creditor be asked to advise the clerk of the address for notifying the judgment debtor. You might just add that in the affidavit required pursuant to subsection (c), the judgment creditor has to give the address or indicate where the judgment debtor can be notified.

And the second is a time limit. Subsection (f) of § 10 says that the motion to vacate “shall be filed within 60 days from the date of registration. . . .” Subsection (e) says that the court shall notify the judgment debtor promptly. If the court is a very busy district court, that “promptly” isn’t very specific and may take a good part of that 60 days, if not all of it. So perhaps you should revise (f) to say that the motion to vacate should be filed within so much time or so many days of the sending of notification. Those are just two minor points.

**Professor Silberman:** Thank you.

**Vice President Harper:** I think we’re ready now for § 11. I’m sorry, did you want to say something?

**Professor Douglas Laycock (Tex.):** I had not focused on the point that Lynn Wardle just called our attention to and my somewhat limited experience with a similar provision. Clerks of federal courts are supposed to notify the Attorney General if there is a challenge in a civil action to a statute of the United States. It doesn’t work. I had a case where it was called to the attention of the clerk, where the parties told the clerk you’ve got to notify and they didn’t notify, and the whole case was briefed, and two years later some judge in the panel noticed, “Oh, my God, we never notified the United States,” and had to start all over.

I think it would be much more reliable to say that the judgment creditor has to serve, even in a registration, rather than to rely on clerks of courts to be aware of and comply with a provision that will inevitably be unfamiliar to them because it doesn’t come up very often.

**Professor Lowenfeld:** I want to respond to that, if I may. We went back and forth in various drafts as to whether it should be the clerk or the judgment creditor, and maybe you’re right about that, that it should be the creditor, but it is not service. It is wherever the debtor may be at some other place. But maybe the way to do that is to say that the judgment creditor shall notify and then explain to the clerk or establish to the clerk that the creditor has done so. Would that be satisfactory?

**Professor Laycock:** I didn't mean to attach anything against the word "service," but the judgment creditor is looking for his money and has an incentive to figure out what the rules require and get this done. The clerk is a busy official with a thousand routine duties, and this odd one that he doesn't know about comes across his desk. He doesn't have the same incentive to figure it out and get it done.

**Professor Lowenfeld:** In response to the previous comment, if you notice, the last sentence of the middle paragraph, in § 10(e), does say, "The judgment creditor, upon . . . oath, shall furnish . . . the addresses" and "advance the costs. . ." But maybe we should have one more step and carry it out.

**Professor Laycock:** That would be my suggestion.

**Professor Lowenfeld:** That may not be a bad idea.

**Professor Janet Walker (Canada):** I just wanted to underscore the importance, I think, of the bracketed portion in § 10(a) allowing for reciprocal arrangements with other jurisdictions. In my experience, perhaps it is not a broad experience, American courts are, in fact, quite generous to foreign judgments in any event. But there is very great force in allowing for a judgment to be registered and to have greater administrative efficiency in enforcement in that way. So I think that it is a very important carrot in terms of all of the objectives that were once pursued in The Hague to allow this bracketed portion to stand and for those arrangements to be specifically directed at reciprocal jurisdictions.

**Professor Silberman:** Yes. We have that language in brackets only because we had the registration provision in. After various meetings with the Advisers and the Consultative Group, there has been the suggestion, as we heard yesterday, that it might be a very attractive incentive for reciprocal agreements, and so it is really there almost as an alternative should we use it in this way. I hear you say you think it would be best utilized in that way.

**Professor Walker:** Absolutely. And, certainly, not left open at large to other countries. It would certainly conflict with the concerns about fair procedures in § 5, and it would be good to have it stand as just a series of lists of countries or reciprocating jurisdictions.

**Vice President Harper:** I think we're now ready for § 11, on page 119. If there are any introductory comments from the Reporters, we will be glad to hear them. But, if not, we will move directly to comments from those in the audience.

**Professor Silberman:** I can say just a brief word. This is a section, again, I think, on the innovative side, designed to deal with parallel litiga-

tion in a foreign court, requiring a court in the United States to stay an action in certain circumstances. Obviously, the idea is to avoid duplicative proceedings in a context in which, if there was a parallel proceeding in a foreign court and it went to judgment, that judgment, if it met the standards of the Act, would be entitled to recognition. So we have a basic first-in-time rule, but it is not an absolute rule. It is modified with a concern about the appropriate forum.

I just want to make one other point about this section. The law in the United States on this subject is all over the map. That is, some courts say we will use *forum non conveniens*. Some say deferring to foreign proceedings is like abstention, and it is inappropriate. There are even some state courts that have domestic *lis pendens* statutes, and they have actually applied them to foreign proceedings. The issue has come up whether or not a federal court sitting in such a state is bound by a similar *lis pendens* rule. We provide for a discretionary standard, but the purpose is to provide some guidance to the court about how to deal with parallel litigation. And, obviously, the court need only defer when the foreign proceeding would be entitled to recognition under the Act.

**Professor Lowenfeld:** I'd just add one small point. Remember, as one of the Comments says, this is the flip side of what we have in § 5. That is, either way, we reject parallel litigation to the maximum extent we can do it. We can require American courts. We can't require foreign courts. But either way, we basically opt for a first-in-time rule, unless the first proceeding is in some way regarded as vexatious, frustrating, or for some other reason not entitled to deference.

**Professor Stephen B. Burbank (Pa.):** I want to commend the Reporters. I think this is a superb provision. I think it bears emphasis that the state of the law in the federal courts, particularly, is a mess, as Linda described it. Different circuits have different rules on this subject, and they use different domestic models in order to come up with those rules, at least one of which is itself incomprehensible or, at least, incoherent in the domestic context. So the notion that this is completely new is wrong, but what it is, if it were to be enacted, is a uniform provision that brings great order to an area that badly needs it.

Note, also, that it is very narrow and, indeed, quite a bit narrower, I think, than the law in some circuits, because it is restricted, as is the provision in the Brussels and Lugano Conventions, to a proceeding including the same parties and the same subject matter. So it is a very narrow *lis pendens* provision. I think the requirements in subsection (a)(i) and (ii) are wholly appropriate, as are the provisions in subsection (b). I note, in particular, the comment that it would be inappropriate for the court to grant

a stay if the foreign court exercised jurisdiction in contravention of a forum-selection clause, which I think is very important. So I think the Reporters have done a superb job, and this would represent a major advance in United States law.

**Professor Silberman:** Thank you.

**Vice President Harper:** The Reporters are not unhappy about your comments. (*Laughter*)

**Mr. Eric H. Zagrans (Ohio):** I agree with what Professor Burbank said about the efficacy of this provision. In particular, I think it wise to have included the criteria in subsection (b) where a court “may decline to stay or dismiss. . . .” And I’m wondering whether similar specific criteria would be appropriate for subsection (a). As it stands, the black letter says that a “court in the United States shall stay, or when appropriate, dismiss. . . .” Might not it be a good idea to provide a list of factors of when a United States court would decide to dismiss rather than to stay? In other words, when it would be appropriate to go to the next step and actually to dismiss the action. You can think of a variety of circumstances where that would be appropriate. Perhaps, they should be included, if not in the black letter, then in the Comment.

**Professor Silberman:** Let me think about that. I’m concerned about putting all of that in the black letter. But, possibly, thinking that through in the Comment would be right. Let me think about that.

**Mr. Zagrans:** Thank you.

**Mr. Peter D. Trooboff (D.C.):** Just a question. How do you determine whether the proceeding in the other country “has previously been brought and is pending” [§ 11(a)]. When we worked on this in The Hague, working on the larger convention, there were a lot of questions about precisely what was the first-in-time rule. For example, in some countries, service triggers the beginning. In other countries, triggering is the filing of the complaint.

This is a good rule, so we don’t want a lot of litigation about what it means. I’m wondering whether, looking back at some of the work done on the Hague Convention and the issues that were studied there, we might sharpen the provision to a point where we could almost assure that a lot of questions were answered and therefore make it a better rule.

**Professor Lowenfeld:** Peter, let me just ask you about that. Do you think the determination should depend on whatever rule F-1 has? Or should it be by what we regard as the best rule? For example, we could say

when issue is joined, when service is made, when the action is filed. I understand the variation, but what would be your proposed solution?

**Mr. Trooboff:** I well recall much discussion of this in Professor Kessedjian's presence, she having spent several years of her life thinking about just these sorts of issues. I'm going to be pretty modest, except to say, I'm not sure it really matters. What I think matters is that we have a very clear rule. I could live with the F-1 rule. I think, in some ways, I find it hard to start doing anything else that doesn't become very complicated, and I take the point made the other day about not making it complicated. But I just think we need a little more work on this. That is really the burden of my comment.

**Professor Lowenfeld:** Good.

**Professor Silberman:** I think that's a good suggestion.

**Professor John B. Oakley (Cal.):** I haven't devoted much of my own research to problems of international lis pendens. So, as in most matters, I'm inclined to be persuaded by Professor Burbank's ringing endorsement. I rise only to point out that there seems to me some possible ambiguity in the rule as stated by §§ 5 and 11 viewed from the perspective of someone who thinks this is the right policy, but is trained to worry about problems of joinder.

My concern is that I can't find any elaboration in the commentary or the Reporters' Note of just what is meant by "a proceeding including the same parties and the same subject matter . . ." [§ 5(b)(iii); § 11(a)]. We seem to be focusing, for policy purposes, on what the treatment should be of a second suit in the United States by Jones against Smith when there is a proceeding pending in the Federal Republic of Germany by Jones against Smith. But what if the proceeding in the United States is by Doe against Smith, perhaps, with the joinder of Jones as a necessary party?

Generally, in modern litigation with complex clusters of parties, it is very rare to have two suits, even involving the same subject matter, that have exactly the same parties. Now when I read "including the same parties," it sounds as if the suit by Doe in the United States may be foreclosed, because one out of several of the claiming parties has engaged in similar litigation against Smith or, perhaps, been named by Smith as a defendant in some declaratory litigation that is first in time in a foreign forum. How do you intend your rule to apply in those circumstances?

**Professor Lowenfeld:** I think what we are talking about is an adversary proceeding in both courts. It is not just that Smith is a party to both, but, if not all of the parties are named, then that's why you have judges to say, "Look, are they trying to race here? Is the danger real of inconsistent

results? Or will whichever comes first seek to enforce in the other forum?" That's what we're looking at.

Of course, with multiple parties, we understand the litigants may not always be exactly the same. That is similar to the case recently decided by the European Court in *Turner v. Grovit* [2004 Case C 159/02, 2 AER (Comm) 381 [2004]]. You had an individual here and a corporation there, but is it really the same party? That's the thrust of it.

**Professor Oakley:** Well, I would suggest you might work to sharpen the language, both in § 5(b) (iii) and in § 11. If "including the same parties" means including at least a pair of the same adversary parties, that would help. Right now, it doesn't even specify that the included parties be in an adversarial relationship.

**Professor Silberman:** Okay.

**Vice President Harper:** I think we are now ready for § 12, on page 124. Preliminary comments from the Reporters?

**Professor Lowenfeld:** This is one of the sections in which we offer, essentially, cooperation among courts. We look to the problem that it is so easy for debtors to move assets around in order to avoid judgments.

Generally, our rule in the past has been that only final judgments are entitled to enforcement, and we stick to that. But we say that provisional remedies in cooperation with another court may be used to secure either enforcement of a judgment that has been given or the possibility of enforcement of a judgment likely to be given, in both cases depending on the criterion that the judgment in the first forum is entitled to recognition. The section takes its lead, if you will, from the development, which has on the whole been successful in Britain and in all the other Commonwealth countries now, of the *Mareva* injunction.

The idea would be that the actual provisional remedy is granted by the court in the United States, based on the provisional remedies available either in federal or state proceedings, but in aid of the proceeding or the judgment in the first court.

**Professor Silberman:** Yes. I just underscore that. The section would authorize provisional measures in support of a foreign order, and I just wanted to emphasize that subsection (b) (ii) is a change in the authority that the federal courts now have from the *Grupo Mexicano* case [§ 12, Reporters' Note 2]. That is, it authorizes federal courts to issue an injunction freezing assets in this limited circumstance. But it is also, again, quite narrow, because it is limited to situations in which an order has been issued by the foreign court. So it does take up the suggestion that the Supreme Court made in *Grupo Mexicano* that the limitation on the power of the

injunctive remedy could be changed by Congress. It does not go the whole way. It extends only to the limited sense needed to authorize this injunction or this provisional measure in aid of a foreign proceeding.

**Professor Stephen B. Burbank (Pa.):** Again, kudos to the Reporters for what I think is a very good provision. One can only hope that Congress gets around to providing full asset-freeze-order authority to the federal courts, but this is an appropriately limited provision, given the scope of the project as a whole. I would only suggest for your consideration the possibility that some of the language in Comment c, particularly that at the top of page 128, really ought to be reflected in the black letter: “Before issuing an order in support of the order of a foreign court, the court in the United States must be satisfied,” etc. Some of that, it seems to me, belongs in the black letter and could easily be put there.

**Professor Silberman:** Well, thank you.

**Professor Patricia Brumfield Fry (Mo.):** One point that I raised yesterday, again, the word “security” appears in this section [§ 12(a)(ii); § 12(d)]. It appears in a number of sections, and I do believe that the meaning is different in the two cases in this instance, and I suggest that every time it is used the Reporters review it.

My other question, and it is a question, is whether, in giving provisional relief, the ordinary civil procedures preparatory to giving provisional relief must be complied with. You say, in § 12(b)(i), “the court is authorized,” but I’m wondering if the proceedings aren’t, or shouldn’t be, completely subject to the standard rules for provisional remedies.

**Professor Silberman:** Well, of course, for the most part, you are correct. We borrow state procedures under Rule 64 for the federal courts, and the states have their own procedures, which will be applicable in the state courts, and we assume that they may be able to have different “procedures” so long as they are consistent with the constitutional standard.

**Professor Lowenfeld:** But it would be an ex parte proceeding to begin with.

**Professor Silberman:** Yes.

**Professor Lowenfeld:** An ex parte proceeding with a requirement thereafter to give notice and an opportunity to respond.

**Professor Fry:** Okay. That had been my assumption. I’m not sure the black letter, necessarily, makes that clear. Thank you.

**Professor Thomas D. Rowe, Jr. (N.C.):** I noticed that § 12(c), on page 125 near the end, refers to Rule 65 of the Federal Rules of Civil Procedure. I believe that, in Professor Oakley’s Federal Judicial Code Revision Project, one of the things that they tried to make a practice out of was avoid-

ing reference to specific Federal Rules of Civil Procedure in case there were changes in the Federal Rules. I don't know whether you want to think about trying the same.

**Professor Catherine Kessedjian (France):** I think this rule is really terrific. The only problem or question that I would have concerns those summary judgments that we can get notably in France, which are called *référé*, which usually are granted in cases where there is not much dispute on the merits of the case. It's a money judgment, and it's contradictory, so it's not *ex parte*. The only thing is it's a summary procedure.

My first question is, under your rules, is that particular judgment subject to recognition and enforcement here? And, if the answer is yes, could you use § 12 for a provisional measure in aid of the enforcement of that summary judgment?

**Professor Lowenfeld:** Catherine, I think the first point is that the judgment, whether it is a summary judgment or a judgment rendered after full plenary proceeding, is subject to the Act. Typically, it is a final judgment, isn't it?

**Professor Kessedjian:** No, it is not a final judgment. The problem is that it is not a final judgment, but most of the time, 95 percent of the time, it is going to be enforced. Now the problem that I can see is that, if a summary judgment is rendered against a foreign defendant, and let's imagine there are no assets in France, you need to have enforcement, let's imagine, here. But it is not a final judgment.

**Professor Lowenfeld:** Maybe we should have a Reporters' Note on that. I mean, my instinct is, either it is a final judgment or it is a provisional remedy. Is it, for instance, rendered by default; is it rendered in an adversary or contradictory proceeding? Then § 12 ought to work where necessary. Remember, we are trying to support the judgment of the state of origin. If, for instance, the judgment in France says that the defendant's assets, wherever located, shall be used to satisfy the judgment, then § 12 would be a device to support that.

**Professor Kessedjian:** If I may, I have a second question about § 12(c), the last paragraph on page 125, "No order pursuant to this section shall be made," etc. Now you are talking, I think, about the U.S. procedure.

**Professor Lowenfeld:** That's correct.

**Professor Silberman:** Yes.

**Professor Kessedjian:** What about the fact that, in the foreign country, the defendant did not have this particular opportunity. Is that having an impact on the U.S. procedure, and why didn't you provide, as a condition, that the defendant had an opportunity to open the matter in the foreign

country itself as a condition for these provisional measures? So my point goes to the foreign proceedings where you may have first an ex parte procedure, but then you need, I think, for due-process purposes, that in the foreign country itself the defendant has an opportunity to reopen the procedure.

**Professor Silberman:** Well, the general rule about whether a foreign judgment will be entitled to recognition, which is the central canon of this provision to start with, requires that there be fair procedures. So, if the foreign procedure doesn't meet that standard, § 12 cannot be invoked. I just point out again, § 12 says it is used to secure either "enforcement of a judgment entitled to recognition and enforcement under" the Act [§ 12(a)(i)], or an order "likely to result in a judgment entitled to recognition and enforcement under this Act" [§ 12(a)(ii)]. So those requirements all have to be met.

Also, assuming that it stays in the Act, the reciprocity provision has to be satisfied. Not reciprocity with respect to saying the foreign court must also give provisional remedies in support of U.S. judgments. But the more general proposition applies that, in order to get recognition of a foreign judgment, the country of origin must give recognition to U.S. judgments.

**Professor Kessedjian:** You might want to specify that in the Comments or the Reporters' Notes so that it is absolutely clear.

**Professor Lowenfeld:** But you see, Catherine, in the state of origin, you may proceed by an ex parte order. And that ex parte order may itself lead to a freeze of assets in the United States, and then let's see what happens. Then the defendant can come in, either in the United States and say, "I didn't get a chance to defend in F-1," or he comes in France or Belgium, wherever you are, and resolves the order. But your suggestion is a good one.

**Professor Douglas Laycock (Tex.):** I wanted to endorse and emphasize Steve Burbank's point about putting the material from the top of page 128 [§ 12, Comment c] into the black letter. The difference between doing this on the creditor's say so and doing it where there is a real showing of a problem is fundamental and can't be left to legislative history.

**Mr. Guy Miller Struve (N.Y.):** Linda, I'm not sure you have completely answered the point that was made by the next previous speaker by saying that you have said in the statute that the judgment has to be either entitled to recognition or prospectively entitled to recognition. I think the previous speaker's point was that the court in the foreign country should have afforded, at least, after the order is entered, some reasonable, quick opportunity to be heard. You don't have that in the statute. So that's one

thing I would suggest for your consideration. It would be important to make that clear as well.

While we are talking about the language of the statute, and this goes back to a suggestion, made two or three speakers ago, that it would be useful to spell out not only are the courts authorized to use the same provisional remedies that are available under state or federal practice [§ 12(b)(i)], but also that the same requirements, such as irreparable injury, balance of equity, etc., apply. I think that's implied, but, again, in a statute it should be clear.

**Professor Silberman:** Thank you.

**Judge Jack Davies (Minn.):** A moment ago, in a previous section, we were talking about who gave the notice, and in § 12(c) here it says, "Notice . . . shall be given . . ." but does not specify by whom. Is that the clerk or the party who is the beneficiary of the order?

**Professor Lowenfeld:** I think we thought there that the court should do it.

**Judge Davies:** Well, I have no problem with imposing that duty on the court.

**Professor Lowenfeld:** The order, in this case, is given, both to some custodian of assets and to the putative debtor. Who do you think should give it? You're right. We did it in the passive voice.

**Judge Davies:** Well, I hated ever to impose the duty on a bureaucrat when a real party can do it. I leave you with that question.

Just a style thing, I think the last paragraph on page 125 [§ 12(c)] falls within something that seems up to that point to be a notice provision. That is a very substantive provision, and I think maybe it deserves a separate subsection.

**Professor Lowenfeld:** Could you just stay at the microphone another second? Remember, we have said that you use the procedures in the place where you are. If in New York, the court gives the order and, in Minnesota, the creditor gives the order; do we want a nationwide uniform provision or do we want conformity?

**Judge Davies:** Well, if that is a choice that you want to give, then I think there should be Comment to that effect.

**Professor Lowenfeld:** You never want to give an assignment to the bureaucrat, but you do give it to the Reporters. Right? (*Laughter*)

**Judge Davies:** The Reporters are much more reliable than bureaucrats.

**Vice President Harper:** I think we are now ready for § 13, on page 133. Any introductory comments?

I see Mr. Elsen heading towards a microphone. Excuse me.

**Mr. Sheldon H. Elsen (N.Y.):** I just wanted to comment on the last point. I wanted to suggest to the Reporters that you stick to the practice of letting whoever it is use their usual practice. I still remember in New York, and I told this story to Jack Weinstein who drafted the Civil Procedure Rules in New York. Five years after they had been enacted, the clerks of the courts were still following the old system, and he said, “Well, that’s normal.” I would suggest that we defer to the frailties of human nature and leave it to the usual practice as you now have it.

**Vice President Harper:** Now I think we’re ready for your introductory comments to § 13.

**Professor Lowenfeld:** Just to say the thrust of this section is that we are generally for cooperation with and respect for judicial proceedings in other countries, and we would hope the same applies the other way around. The fact that a court in a foreign country has entered some kind of order that is not entitled to “recognition and enforcement” — for example, a protective order, confidentiality order, that kind of thing — doesn’t mean that you shouldn’t pay attention to it. You have, let’s say, a suit between a manufacturer and a distributor, and then another suit between the distributor and an employee of the distributor who is alleged to have betrayed the distributor in favor of the manufacturer. In that kind of situation, one side seeks to use discovery obtained in the first case in the second case or, on the other hand, to act in breach of a confidentiality order. All we say to the court here in the United States is, listen to what is going on; it often makes sense to go along with and not contradict the other proceeding. We even go so far as to say we generally don’t like anti-suit injunctions, but “never say never.”

**Vice President Harper:** Comments with respect to § 13?

**Judge Evan J. Wallach (N.Y.):** I see the only reference to comity is a quote from Judge Keenan’s opinion [§ 13, Reporters’ Note]. We like comity, and we tend to respect it, so it might be good to have it somewhere in the actual commentary.

**Mr. Richard W. Hulbert (N.Y.):** The question I have is related to the previous question. Is reciprocity a requirement with respect to § 13? And, if not, why not, since you are fond of it?

**Professor Lowenfeld:** No. Well, it is a desideratum, but it is very difficult to establish that kind of thing. You mean reciprocity if § 7 passes as now written? Is that what you are asking?

**Mr. Hulbert:** No. I'm just wondering if it is the intention of the Reporters that an American court doing these things should pay some attention to whether, in the reverse situation, the foreign court would act likewise?

**Professor Lowenfeld:** Well, I think they should take it into consideration. This is, in any event, a discretionary provision. But to say you can disclose something that the court in the other state has put under a protective order because who knows what they would do, seems wrong. There should be cooperation, not tit-for-tat.

**Mr. Hulbert:** As you know, I agree with that.

**Mr. Howard Langer (Pa.):** I have a few questions. First, is "directly" intended to add anything to this? What would the difference be if it said, "shall not be enforced," as opposed to "directly enforced"?

**Professor Lowenfeld:** Well, you see the enforcement provisions in §§ 1 and 2 relate to judgments. These are not judgments we talk about. They are orders — do not disclose, have a protective order, that kind of thing. So we don't enforce them directly, but what you have is the court in the United States declining to grant discovery, for instance, because the foreign court has stated that certain things are not to be disclosed. That, again, is not enforcement. The order is by the U.S. court, but it is sort of "whereas" or "account of" what has happened abroad. So the word "enforcement" doesn't quite fit. It is not like saying the foreign judgment shall be enforced here.

It says in order to support or agree with the foreign proceeding, we will either grant or not grant discovery, a protective order, and so on. And we may even, in some cases, not go forward with a second proceeding when that has been enjoined for good, sufficient reason by the first forum. We are not big on anti-suit injunctions, but here is an example where it might be appropriate.

**Mr. Langer:** And then, in the end, where you say "motions to stay, dismiss, or otherwise regulate," was the intention to limit that to procedural circumstances? I don't know why those examples were chosen. I'll tell you what, I have this image in mind, and I don't know whether this changes the law as it is or not, but if you are seeking discovery, say, in an American antitrust proceeding from, say, a German corporation, and they obtain a German court order blocking production of that discovery, does this in any way change what an American court would do faced with that circumstance?

**Professor Lowenfeld:** It might, but probably a blocking order would not be entitled to great respect. I mean, we have seen these cases; *Laker*

[*Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984)], for instance, is an example of that. But what the section says to the court is think about it. You don't automatically say, well, that's not a final judgment, so we are not going to pay any attention to it.

**Mr. Langer:** Thank you.

**Professor David J. Aronofsky (Mont.):** This is merely a clarification question, but isn't the effect of comity to effectively enforce the order that we are showing comity towards? Now I'm into mechanics. Or are we going to develop a clear distinction between order 1 and order 2, meaning we are showing comity towards order 1, but, from a process standpoint, we are issuing another order. I'm not certain that the Comment is very clear, and for judges with less experience in international matters, like those in my jurisdiction, I would merely suggest that we talk about the effect of comity when it comes to recognizing the effect of that order and how it is going to work in practice.

**Professor Lowenfeld:** Anyone who asks for clarity always has our support, but the answer to your specific question is, yes, it is order 2. It is order 2 by the American court that the target of the order must follow or else it is subject to whatever contempt or sanction is appropriate.

**Professor Aronofsky:** Thank you.

**Mr. James C. McKay, Jr. (D.C.):** This would make a lot more sense as a statute if you just deleted the words "shall not be directly enforced by courts in the United States, but" and just focus the statute on what you are really talking about. When you say "not be directly enforced," that's just like you don't know which way you are going, and I think that might be a good Comment, but it isn't a really good statute.

**Professor Lowenfeld:** That's acceptable. Several of you seem to have made the same point. We can just take the "shall not . . . but" out.

**Mr. McKay:** Right.

**Professor Lowenfeld:** That's good.

**Mr. Ira M. Feinberg (N.Y.):** I appreciate the comment that this provision probably would not permit enforcement of a blocking order and discovery dispute of a foreign country because there does seem to be a special group of rules that relate to those, and I wonder whether it might be appropriate to have some commentary, some discussion about that particular problem, because it is a problem that comes up, actually, quite frequently and has its own distinct set of rules and I suspect is increasingly going to be a problem in commercial litigation.

**Professor Silberman:** Yes. Section 13 says that the foreign order "may be taken into account," and that is really all it says in terms of issu-

ing the order. So there is no requirement that any particular order be enforced. But I think the suggestion that we, perhaps, indicate some difference between different kinds of orders might be useful, either in the Reporters' Note or in the Comment.

**Mr. Feinberg:** That's what I had in mind.

**Professor Lowenfeld:** The particular issue of the blocking order that we have seen was designed against American antitrust cases is different from a typical neutral order based on different rules of disclosure. I'm happy to put that in the Comments.

**Mr. Feinberg:** No. I understand, but I don't think the discovery problem is limited to the antitrust context. There are many contexts, including securities litigation and others, that have an international component where the vastly different understandings of proper pretrial discovery come into play when you are dealing with a foreign defendant.

**Professor Lowenfeld:** Understood.

**Mr. Howard Langer (Pa.):** If that last proposed change was to be made — that is, to take out that middle section and just say “may be taken into account” — I think that this issue of blocking orders and so on has to be written into the statute. This is a statute that no one is ever going to look at the commentary again when it comes up and that is going to change the law. It is going to make those blocking orders a bigger factor in the American court because it is giving a specific sanction to the court to look at those in a way in which courts have really not respected them in the past. So I think that it is crucial that there be some actual text in the statute making that distinction. Because, if it goes into the Comment here, it is going to be buried if the statute is ever adopted.

**Professor Lowenfeld:** Let me react to that. Maybe the way to do that is to have the same kind of criterion that we have in some of the other sections, that is, an order specifically aimed at frustrating a U.S. proceeding is not meant to be covered by this section. Something like that. Is that what you mean?

**Mr. Langer:** Look, we just, frankly, had an issue this year that Professor Hazard argued for us involving the Hague Convention and seeking discovery against a German parent company, and the German rule wasn't designed, specifically, against the American statute. It was just a clash of civil jurisdiction versus common-law jurisdiction. So, no, I don't think that would cure it. I think that there is a distinction between blocking orders and things of that kind or the effect of blocking orders and what this provision was intended to cover, which is a respect, generally, for orders of other jurisdictions that aren't final orders.

**Professor Silberman:** If, in fact, there are decisions on this issue, if you have them, and you could get them to us, that might be useful for us as well in the Reporters' Note.

**Mr. Langer:** Well, just in the general context of things, the procedure here is that you first may use the Hague Convention or not. If discovery is frustrated, then you can use the Rules of Civil Procedure. There is a whole jurisprudence on that particular subject that this is going to affect, particularly if you take out the language in the beginning that kind of really vitiates the strength of what you are trying to achieve. If it just says, "may be taken into account," that is stronger than "shall not be directly enforced" and "may be taken into account." I will be happy to send you what I have on it, but I'm really concerned about that. I know what the provision is intended to capture, but I think that it is going to capture a great deal more.

**Professor John B. Oakley (Cal.):** Andy's willingness to consider striking the imperative language from § 13 raises questions in my mind of whether I understand the structure of the Act as a whole. I had thought that §§ 1 through 11 dealt with the recognition and enforcement of foreign judgments, and then you sort of had two back-of-the-book things to deal with. What about orders for provisional relief, and then what about anti-suit injunctions? So I don't see anything in the Act that forecloses a court in the United States from taking "into account for purposes of determining motions to stay, dismiss, or otherwise regulate related proceedings in the United States" [§ 13]. And it is not normal, in a statute, to say you can do what you already can do.

Now I understand that you would want to have that in if you kept what I thought was the force of the statute, which is, you are saying as a matter of federal law, binding on all state courts under the Supremacy Clause, that they shall not directly enforce anti-suit injunctions. Now that's an important element of a statute; whether it ought to be in there or not, I don't know. But, to just say, well, we can accomplish the same thing and take out the only imperative in the clause, just doesn't make sense to me.

**Professor Lowenfeld:** I think your basic understanding of the Act as a whole is completely correct. If we eliminate § 13, then somebody is going to say, "Well, you told us everything we can do." Everything that's not in the Act, you can't do. You can't pay attention to foreign relief. We say, no, that's not what we meant to do. We want to give you the opportunity to respect, in appropriate circumstances, other orders, final or not, of foreign courts. That's what we're trying to do. If you want to call it comity, you can. We have tried to avoid that word because it has so many sort of mushy definitions. But it seems to me it is useful to put something in about that. Now the "shall not be enforced" maybe is more explanatory than prohibitory,

and I think we can take that out as both Lance Liebman and I, at least, tentatively agreed.

**Professor Oakley:** I would suggest that, if you are going to redraft it, and you think you need to keep it in just to avoid confusion, that perhaps you could phrase it slightly differently, to say that a court of the United States is under no duty to enforce anti-suit injunctions, under no duty to enforce orders of a foreign court, but may take them into consideration.

**Mr. Guy Miller Struve (N.Y.):** I'm rising really to a legal-process point, because the speaker before the last speaker said, at one point, in substance, if this is enacted as a statute, no one is ever going to read the Comments, and I noticed a quizzical look on the face of both Reporters. Because it is an important point, I hope the group will forgive me for making Judge Easterbrook's point, because Judge Easterbrook is not here today to make it.

You remember, when we met in Chicago last year, he made the point that there are a lot of federal judges — he modestly failed to mention he is a prime example — who interpret the text of the statute, stop there, do not regard the legislative history as authoritative, still less would they regard the commentary as authoritative. What this brings us back to is, if this is a statute, it is very important that it be self-contained and that the statute itself say what we mean.

This, I think, has implications for some of the things that we have been talking about in § 13. It means, I think, that we would be well-advised to keep the words “shall not be directly enforced by courts in the United States, but” because, otherwise, we are not making that important point clear. It also suggests the wisdom of being more specific about in what ways do we want courts to take these foreign orders affecting U.S. litigations into account.

But the basic point, that it is a statute that we are working on, has application to what we are doing in every one of these sections and subsections.

**Professor Lowenfeld:** I'd like to address that, if I may, and forgive me if it was addressed yesterday when I wasn't here. Part of that is mentioned in the Foreword by the Director. That is, the thought is that what is in the Comment, as we get to Congress, if we get to Congress, would make up something like section-by-section analysis or reports by the relevant committee.

Furthermore, maybe the most successful project that the ALI has ever done is the Uniform Commercial Code. Of course, the UCC has Official Comments, and they are taken into account a great deal. That is not to

say we can't make the small change that was suggested here, like "is under no duty," but we do think you can't put everything in the statute or it is going to look like the Revenue Code.

**Director Liebman:** I do think it is important to bear in mind, since the suggestion is that this would be a federal statute, that the federal courts today are increasingly under the sway of the view that the language of the statute is what controls and that, if there is something that you want the courts to do, get it into the language of the statute where Congress can focus on it, no question that everybody knew it. Whether or not well-justified, there is extreme skepticism among many federal courts about legislative history. So that, with all due respect to the Uniform Commercial Code, which has a different history and a different context, I don't think we should assume that something that is not in the statute, but is in the Comments, will be paid any attention to.

**Judge Evan J. Wallach (N.Y.):** I guess it is a tremendous relief to know that I don't have to look at the legislative history anymore. It seems to me that the fertile minds of lawyers will look at this language, and, if you take out the word "directly," will say, well, of course, by taking out the word "directly" what you are implying is directly or indirectly. And so, judge, you can't indirectly enforce this foreign order, which means, you can't issue the order you intended to issue in this discovery matter because it indirectly enforces this foreign order. Do you follow what I'm saying, Andy?

**Professor Lowenfeld:** No.

**Judge Wallach:** Okay.

**Professor Lowenfeld:** Sorry.

**Judge Wallach:** By dropping the word "directly," right, then what you are implying is both directly and indirectly, "shall not be enforced by [the] courts." If it wasn't in there to start with, maybe I would say it doesn't give rise to the implication. But, by dropping the word "directly," you are implying that a federal court can't indirectly enforce that foreign order by, for example, doing what it intended to do in the first place.

**Professor Lowenfeld:** I think, maybe, Professor Oakley's suggestion will solve the problem. If we say the courts of the United States are under no duty to enforce an order, but may take it into account.

**Judge Wallach:** I agree with that.

**Professor Lowenfeld:** Okay.

**Professor Carol S. Bruch (Cal.):** As someone who has done a fair amount of drafting, I would suggest that, although this would not be a uniform act, that there might be virtue in a section that specifically states that,

in the interest of uniformity, the court is directed to the clarifications provided by the Reporters' Notes and Comments.

**Professor John B. Oakley (Cal.):** As someone who has recently sat in the seats of the Reporters, I wanted to endorse what Guy Struve had to say about the tremendous problem that a contemporary legislative draftsman has in trying to walk the right line between a prolixity and shortcut phrases that will not be interpreted by some judges who have a more mechanistic view of interpretation in accordance with legislative history than some other judges would. So, taking advantage of Lance's presence here, I just want to suggest that there is no more pressing problem for the Institute to address than the patterns of legislative interpretation. It is not just a federal issue, although the federal courts are divided. It has a certain common-law quality because it is generally resolved, not by reference to statute or constitution, but by the common law of the various states, and there are many different types of codes of legislative interpretation. Some, I think, are much more coherent than others.

It is really becoming a burning issue. I think we have lost a great deal in this country when courts stop acting as working partners with legislatures and ignore their policy prescriptions unless perfectly worded. So I would hope that, at some point, since we are getting more and more, as an Institute, into the creation of statutory projects, that this becomes, itself, an issue for the Institute to investigate.

**Mr. Sheldon H. Elsen (N.Y.):** I'm not 100 percent sure what you did with the "directly enforced." Did you say you are thinking of changing that to "shall be under no duty"? I think that waters it down, frankly, because the judge sits there and says I have no duty to enforce it, so I can do whatever I want. Whereas, as it now stands, they "shall not be directly enforced," means you shouldn't do it. I would urge you, given some of the remains of the British imperial tradition that we still find coming out of London with these anti-suit injunctions, that you not water that down, and leave it just as it is. I also would endorse what my colleague says, that is, we ought to come down with an anti-Scalia decision some day, but maybe not here.

**Mr. George Clemon Freeman, Jr. (Va.):** I just want to pick up on that. If something is really important, you'd better put it in the black letter and don't leave it in the text, otherwise, you've lost two votes on the Supreme Court. (*Laughter*)

**Vice President Harper:** We turn now to § 7, the subject of reciprocity, which has already been mooted to some degree. Are there any introductory comments from the Reporters?

**Director Liebman:** Andy, can I say something first, please?

**Professor Lowenfeld:** Please.

**Director Liebman:** The Reporters may improve on what I'm about to say, or are likely to, but my understanding is that it was two years ago, upstairs, but in this hotel, that we took this subject up. There was a very high-quality discussion, on both sides, and there was a straw vote, and the straw vote was in favor of reciprocity. It is now two years later than that. It is entirely appropriate that Mr. Hulbert has filed his motion, very well-written and argued, and I'm sure we will have a good discussion today.

I think, as I said at the end of the discussion yesterday, that it is highly likely that this project, for its final consideration, will be in front of the Institute a year from now in Philadelphia. It may be that, at the end of this morning's discussion, you will be ready to be finished with the project, but there are quite a number of issues that have been raised for the Reporters to work on, and so I think we will probably be bringing it back next year.

Now that raises the question of what we should do about reciprocity, which I know continues to divide serious people in the audience today, in the Meeting today, but I'd like us to hear it discussed for a reasonable amount of time today, and I lean towards there being a vote on Mr. Hulbert's motion, because otherwise we are putting that important issue over for another year. If, by chance, the decision is against a reciprocity requirement, then a lot of drafting still has to be done. So it seems to me we should take this up today. The world is always open. In a year, somebody may want to come back and have a new argument, but to take it up a second time today, for instance, if the group still has the view it had two years ago, then the Reporters know what they are doing. They can bring back a final draft of the whole project next year, and we will be finished.

This is a bureaucrat speaking to you who has an interest in this project coming to a conclusion at a reasonable and appropriate time that doesn't rush anybody. So I would like us to take this up, to discuss it in a good way and to vote on it, and see what the group thinks.

**Professor Lowenfeld:** Believe it or not, the Reporter is grateful to the bureaucrat. I think we do want some guidance. Let me, though, see if I can guide the guidance a little bit. That is, there are people who might vote one way if you asked the question abstractly, reciprocity or not, and another way as we frame the reciprocity issue in parts. That is, you could, for example, say, if we have a reciprocity requirement and the burden is on the judgment creditor, I'm against it. But, if it is on the judgment debtor, I'm for it.

So one of the issues we have to decide, and maybe we vote in parts, is, assuming there is reciprocity, even before we decide the overall issue, whom should the burden be on. And the other point that Bill Williams

raised is, what has to be established? Williams pointed out that, in our alternative version, subsections (a) and (b) are not wholly consistent. The reason they aren't is, if you say the judgment debtor has to prove something, well, how do you prove a negative? And so we proposed, in the second alternative in subsection (b), that the debtor has to show substantial doubt. Now is that the right standard? Perhaps not. Perhaps, if the judgment debtor has the burden, he should prove by a preponderance of the evidence that the state of origin would not enforce a judgment coming from the U.S. court.

We are troubled by the issue of evidence. We have tried to do the best we could by saying that the question of establishing reciprocity is like other questions of foreign law. That is, you get experts. Well, some people say that experts are not only expensive, but also they cause delay and do not always result in convincing proof. I have, for example, in my casebook, a very interesting case in which a German court in Berlin declined to enforce a judgment of an American court in a product-liability case arising out of a jury verdict, and the court says, among other things, we will not enforce because we can't really tell the reasons for the American judgment because it was a jury verdict.

Now is that the German law? Well, the case was settled pending appeal. So the issue of burden of proof becomes a difficult one.

One final point, if I may. Why do we have reciprocity at all? Well, in part, our notion is it would give an incentive for foreign courts to recognize American judgments. That is, it is not an anti-recognition section. And, also, in turn, we give incentives in the other provisions that we have talked about — § 10, registration; § 12, provisional measures; and so on. So we do think it is the part of the whole framework of the Act.

**Professor Silberman:** Just, if I would, one small point. We do recognize the difficulty of proof and, of course, § 7(e), which authorizes agreements, is, in some sense, behind this, because the hope is that we will get these agreements, and then the issue of the burden of proof will, to some extent, go away. So that is the general objective and hope of this provision. And, as Andy said, it is designed with that incentive in mind.

**Vice President Harper:** Mr. Hulbert, since you have a pending motion, I wonder whether you have some introductory comments. You can feel free to rely upon the written submission, but I wanted to give that opportunity to you.

**Mr. Richard W. Hulbert (N.Y.):** Oh, well, what lawyer ever declines an opportunity to talk, however wise it might be for him to be more prudent. I think it would be helpful to a consideration of this question if the burden-of-proof question were clarified. It seems to me a main reason for

being as unhappy as I am about the introduction into American law of a mandatory requirement of reciprocity, which we have never had, not in the last century.

To some extent, the reciprocity issue is a moving target. I don't know where the burden of proof is going to lie. It seems to me the Reporters probably have a preference, but they don't express it.

**Vice President Harper:** I understand that the Reporters do have a preference, and that is to discuss the burden of proof first. Yes, sir.

**Professor Stephen B. Burbank (Pa.):** I was going to suggest that that is the way to go. And I favor reciprocity, but I would also favor putting the burden on the party resisting recognition or enforcement. It seems to me that it may be a little bit too easy to raise a question. There could be some difficult problems of proof. One has to be sensitive to that. It seems to me that even somebody who favors reciprocity, as I do, wants to cut down on unnecessary costs and, therefore, I would put the burden on the party resisting recognition or enforcement.

I'm not sure that you are going to be able to improve much, if at all, on the formulation that you now have. Because the notion of certainty in many of these situations is illusory, so the burden to show that there is substantial doubt seems to be about as good as you are going to be able to come up with.

**Vice President Harper:** I'm going to treat that as a motion in those terms. Is there a second?

**Unidentified Speaker:** Second.

**Vice President Harper:** Now we have discussion on that motion.

**Mr. Peter D. Trooboff (D.C.):** I'd like to speak in favor of the motion. To revert back to the most important point that Professor Silberman has made, namely the purpose of this is pro-enforcement, pro-enforcement of American judgments abroad, pro-enforcement of judgments from other countries here. And it's pro-enforcement through (e), which encourages agreements, agreements that I suggest might well be negotiated before this even becomes a statute. Because, if the ALI endorses this and invites those kinds of agreements, it is very likely that some of those agreements and the model and process would occur before we ever had the statute.

So the purpose here, while not written into the black letter, and I wouldn't encourage doing so, is really quite fundamental here. I would never have been in favor of this section if that weren't what we are trying to accomplish. And so, for that reason, I think the burden should very much be put on the party resisting judgment, because I'm hoping this will rarely come up. The agreements will be there. There won't be resistance, and the

issue will go forward. So I think the purpose of those who very much wanted the overall provision was always in the direction that is supported by the motion. Thank you.

**Mr. Sheldon H. Elsen (N.Y.):** When Steve Burbank rose this time, he did not compliment the Reporters. (*Laughter*)

**Vice President Harper:** You can do it.

**Mr. Elsen:** But I would like to borrow from him his kudos and give it to Dick Hulbert, who came up with what I think was a very statesmanlike solution to the problem. As previous speakers said, the party that has the burden of proof should be the judgment debtor, and the party that has the burden of proof, as those of us who have struggled with foreign law know, is in deep trouble.

Andy has something in the casebook. I've struggled with issue preclusion from civil-law countries, which is virtually impossible to show, and I'm sure that in the Third World it is far worse. So I think Dick Hulbert is right. If you want to reduce the problem of recognition as a bar to enforcement of foreign judgments to an absolute minimum, let's go with the burden of proof, put it on the judgment debtor. I think, even without the State Department acting yet, the problem basically solves itself.

**Mr. William J. Williams, Jr. (N.Y.):** I have to leave in a moment, so I just state my position that I am against reciprocity. But if it is kept, I think it ought to be optional rather than mandatory. I would support putting the burden of proof on the judgment debtor, but I submit that the current language is not adequate because, if the judgment debtor simply raises a substantial doubt, what does the court do then? It seems to me that the judgment debtor has to prove the requirements of subsection (a) that the judgment would not be enforced in comparable circumstances. So I don't support Professor Burbank in proposing the existing language, but suggest that you have to go further.

**Vice President Harper:** Just a moment, I want to keep our parliamentary circumstances relatively straightforward. Are you making a substitute motion to place the burden upon the judgment debtor? I know that Mr. Elsen used that language as well. I was treating that as a loose formulation, but I'm now getting the feeling that maybe we ought to take it up precisely.

**Mr. Williams:** Am I permitted to make a substitute motion?

**Vice President Harper:** Of course.

**Mr. Williams:** Then I would move that we place the burden of proof on the judgment debtor by the normal standards of proof.

**Vice President Harper:** Is there a second to the substitute? It dies for want of a second.

**Mr. Jeffrey D. Kovar (D.C.):** I think that the discussion of this motion so far has demonstrated that the question as to whether to put the burden on the creditor or the debtor is linked, fundamentally, to the question of whether there should be a reciprocity provision.

Some of the speakers have promoted the current motion on the basis that it would, essentially, make the reciprocity provision disappear, or largely disappear, so I think, in a way, it may not have been the fairest approach to look at this issue first.

Let me just say in general terms, looking at the issue of reciprocity from the standpoint of existing law in the United States, there really is very little need for the ALI project. The state law works exceedingly well for the enforcement of foreign judgments. So the burden, from a federal policy standpoint of proposing a statute like this, is considerable.

To propose federalizing an area of the law that works so well, certainly, would call upon the Institute to define very clearly what federal policies would be promoted by this. The one federal policy that, certainly, the federal government itself has been most concerned about for the last 30 years has been what to do about American judgments, which may be held by Americans or may be held by others, but the judgments issued by American courts. The fact is that those judgments are not as readily enforceable overseas as foreign judgments are in this country.

The proposal to include reciprocity in this project was understood, at least by me, as something that would ensure that, if the Institute were to be proposing to Congress a huge sweeping federalization of this area, it would naturally also be proposing a strong and workable provision to encourage foreign countries to provide reciprocal treatment to American judgments.

I think the experience of the last 100 years and more is that other countries don't necessarily respond to U.S. practice that is very forthcoming to foreign projects, to foreign judgments and foreign court proceedings, and it is necessary to give some incentive to do that. So, speaking strictly from a personal standpoint, I think it would be a mistake to put the burden in this provision on the party resisting enforcement, for the very reasons that were mentioned in support of it; that it would essentially make the reciprocity provision disappear.

If the reciprocity is going to work, it will have to be based on international agreements. It is really the only way. Courts to date have shown they are not comfortable making determinations on a case-by-case basis. They won't be under this statute any more than they are comfortable doing

it in the eight or nine states in the United States that have a reciprocity requirement.

This provision, really, I think needs to be reworked in several respects to make the federal agreement the primary basis for establishing reciprocity. Thank you very much.

**Vice President Harper:** I think we are ready for the question. The question before the house is whether or not the burden of proof should be put on the party resisting enforcement.

I'm sorry. Someone has just stood up while I've been speaking. The speaker at microphone 2.

**Mr. Peter D. Ehrenhaft (D.C.):** I just wanted to share with the members some experience that the ABA Multijurisdictional Practice Commission had with regard to the issues of reciprocity.

One would think that the very simple issue as to whether a lawyer admitted in one jurisdiction can appear in another would be the simplest kind of question that any lawyer ought to be able to ascertain. But what we found was the simple requirement on that simple issue is just very difficult to obtain. That experience suggests to me that the notion that anyone can adequately determine whether a particular order could be reciprocally enforced in another country is a very difficult question.

We can talk about it, in academic terms, about types of judgments that might be generally enforced or not, but if you are talking about the particulars of a case and the basis upon which a judgment was made, I suggest that most litigants cannot adequately ascertain the facts about reciprocal enforcement in time for an appropriate judgment in an American court. This is a very, very difficult issue and, therefore, I think we are getting into a morass in attempting to place that burden on any party, either the plaintiff or the defendant.

So I think that one has to look at it more from a larger policy point of view the way that Jeff Kovar was suggesting. But I'm suggesting that the notion that one, in fact, is going to have a better rule by imposing any obligation to prove reciprocity in the foreign country is a very unmanageable one and, therefore, perhaps, ought not to be included.

**Professor Carol S. Bruch (Cal.):** Simply, perhaps, to dot the "i" and cross the "t," if there is to be a rule for reciprocity, which I do not support, then to give with one hand and take away with the other, by placing the burden on the defendant, seems to me ambivalent in the extreme, and one ought rather simply to vote against this motion and against reciprocity.

**Professor Johan A. Erauw (Belgium):** I think, with regard to this motion, I should refer also to the problem of the registration of decisions.

I submit that if, indeed, the burden of proof would lie with the defendant, with the party resisting enforcement, I think you would be in deep trouble with the whole process of registration. By the way, § 10 explicitly indicates that, in the present state of mind of the drafters, the burden was to lie with the claimant. I think that it would be wholly unintelligent to have different burdens of proof on the one side in the procedure to enforce or to recognize and, on the other side, in the proceedings or the procedure that you have described for the registration.

**Professor Silberman:** Well, the one observation I'd make with respect to registration is that we have discussed and thought hard about whether the registration procedure would work best in only those situations where there is an agreement under § 7(e) for precisely the reason that you suggest. And, having heard the discussion, I don't think we have made any formal, final judgment about that. But I think, given the discussion yesterday, there is some movement, at least by me, in thinking that § 10, perhaps, should be limited to a situation where there are state-to-state agreements, at which point reciprocity would disappear as an issue.

**Professor Lowenfeld:** Johan, I just want to add something. I agree with what Professor Silberman said, but we did not contemplate in any of the versions of § 7 that the reciprocity has to be clause-per-clause. For example, if an agreement provides that, say, Belgium and the United States recognize each other's judgments, but Belgium doesn't have a registration procedure, that doesn't matter in applying the American registration provision under the Act. Belgium is on the white list, if you will, not on the black list. And that's true with respect to § 12 on provisional remedies as well.

So the effort in the various versions is simply to say to Country X, if you don't recognize our judgments, we will not give you the benefits of the Act. Now we do have problems, for instance, as you know better than I do, with countries such as the Netherlands, which formally don't recognize foreign judgments, but, in fact, if you look hard enough they do, because there is, in effect, preclusion against bringing up an issue that has been decided in the foreign court. That is part of the problem, again, of proof.

**Professor Erauw:** Yes. But, just looking at the one decision, and I'm not saying that I understand that you require reciprocity for the specific type of registration procedures, but, just looking at the one decision, for a party who is the creditor of that decision, there is a facility to register, and I think it would be wholly incompatible to give a facility that would put a stronger burden on the side of the creditor than in the normal proceeding. That would not be a facility.

**Professor Lowenfeld:** I agree with that.

**Professor Stephen B. Burbank (Pa.):** Empirical vacuums abound in this area. Sheldon Elsen has tried to fill it with an assertion that I don't agree with. If I agreed with him that putting the burden on the party resisting enforcement would, essentially, gut the reciprocity provision, then I would certainly agree with Jeff Kovar and withdraw my motion. I don't believe that at all.

What prompted me to support it in the first place is the notion that, without putting the burden on the party resisting enforcement, that party will have an inducement to raise an issue of reciprocity, thereby shifting the burden under the alternative formulation and causing delay and expense for the parties seeking enforcement.

If I believed, again, that this would gut the provision, I would not vote for it myself. I do not believe that. That is simply Mr. Elsen's unsupported, empirical assertion.

**Professor Eric M. Freedman (N.Y.):** I would suggest that the path tentatively laid out by Reporter Silberman makes some kind of sense. That if you left § 7(e) here, and left it as an incentive to getting your judgment registered, that would be simple and workable. If you do either of what is being suggested here — it really doesn't matter which — you are definitely building yourself a fundamental contradiction, which was stated at the very beginning by Professor Lowenfeld. If what you say is that we have here a pro-enforcement statute, then, of course, what you want to do is put the burden on the party resisting enforcement, and that will make it more difficult for them.

If what you have is a reciprocity policy, then, of course, you want to make it difficult for there to be enforcement. You want to put the party trying to enforce to the burden of showing that there would be reciprocity. That is the way you enforce your stick, and those two things, necessarily, are working at cross-purposes, whichever way you come out on this particular motion.

**Professor Silberman:** Well, I don't agree with that at all. I think Peter Trooboff's comments from the floor were quite accurate. The hope is that the reciprocity provision and the burden issue will disappear because the Act will be a real incentive to have agreements under § 7(e). So it is pro-enforcement. It is just not pro-enforcement only of U.S. judgments. It is pro-enforcement of judgments globally and internationally, and the best way to do that, in our view, is to have a provision like § 7(e), which is in some sense the incentive. Reciprocity, you are quite right, operates a bit as a stick to encourage agreements under § 7(e); for carrots we have § 12, § 10, and, to some extent, § 11.

So I think we have tried to put out both carrots and sticks and to say what we want is enforcement of judgments internationally, not just enforcements of judgments in the United States. We think this is the attractive way to do that.

**Professor Amos Shapira (Israel):** Before deciding on the burden-of-proof issue, I would like to understand better, Linda and Andy, what exactly is the standard of reciprocity you contemplate? You used the terms “comparable judgments,” but what is the degree of identity or similarity between the two systems that you have in mind?

**Professor Lowenfeld:** Well, you are right to say that we didn’t specify too much because we don’t want to look at forms of action and so on. But, for instance, if we know that Country X normally enforces commercial judgments, but not tort judgments or multiple damage judgments, then we would say, okay, a commercial judgment from Country X presented in the United States for recognition should be recognized.

But what is exactly comparable we leave a little vague. We don’t want to say that because a country excludes, for example, antitrust judgments, its judgments are disqualified from enforcement in the United States. Now some people say those are civil judgments, some say they are penal. Well, we don’t want to make this penal.

**Professor Shapira:** I think it might be useful, however, if, in the commentary, at least, you elaborate a bit more about what is the standard that you contemplate. What is the reciprocity that is required? And the burden of proof, logically, comes after it. Once we know what is the standard, then we ask ourselves, well, who is to establish it?

**Professor Lowenfeld:** Actually, we have Comment *f* coming before Comment *g*, Amos, so we do agree with you, at least, in form.

**Professor Shapira:** Thanks.

**Professor Michael P. Waxman (Wis.):** My point kind of touches upon what was just being talked about, only it relates to § 7(d), and you’ve touched upon it; the question of antitrust, for example, where the statute requires trebling of damages. In countries such as Japan, where they would not enforce multiple damage judgments, which are actually thought of as punitive damages, the problem would be that they don’t enforce the anti-monopoly law in the same way as our antitrust law, but they do have tort provisions, which have business aspects.

If one were to try a U.S. case, the judgment debtor would have to try to show that one could, in the United States, either show (1) that a treble-damage case was reduced to compensatory damages and attempted to be enforced in Japan and rejected, or, (2) show that, in Japan, compensatory

damages are not given for the same types of injuries. That is a very high burden for a judgment debtor to try to show.

**Professor Lowenfeld:** No. I think, with respect, that is a misunderstanding. We are not saying how does the Japanese legal system enforce its anti-monopoly law. We are saying how would the Japanese system enforce an American judgment. If, for example, they say, “We will enforce the compensatory, but not the treble-damage part,” that is probably okay. If they say, “We don’t enforce a competition-law judgment at all,” well, then a Japanese anti-monopoly judgment sought to be enforced in the United States, if you can imagine that, would not be enforced. But still, a judgment arising from an automobile accident in Japan, because somebody forgot you drive on the left side, could still be enforced.

**Professor Waxman:** Well, Professor Lowenfeld, I think you beg the issue, because the real issue — I wrote an article about this about 10 years ago — is trying to enforce a compensatory award from the United States in Japan. There are no such cases, and it would be shocking to an American court, first, even to allow it. So you are not going to have a position where they could actually come up with such a situation. Indeed, authors writing in Japan don’t write about that, and I think it would be very difficult. It puts almost an impossible burden in a situation where courts in the U.S. don’t even offer compensatory damages in types of antitrust cases.

**Professor Lowenfeld:** But I think you can tell a tort judgment from an antitrust judgment, and we do have cases in Europe, where a judgment including punitive damages is sought to be enforced in Europe. In some instances, the foreign court will say the judgment is okay. It is not wholly tainted as against public policy, but we will only enforce the compensatory damages and not the punitive element of damages. That’s okay. That would, as we see it, meet our standards for reciprocity. Again, the more you clarify it, people say, well, it should be in the statute or in the Comment or in the Reporters’ Notes. It’s very hard. We have thought this one through fairly carefully.

**Professor Waxman:** Okay.

**Mr. Bruno A. Ristau (D.C.):** I want to remind my distinguished colleagues here and you that the similar argument of the issue of reciprocity must have been carried on exactly 40 years ago when Congress enacted the dramatic revision of the Federal Code, among others, changing the basis of international judicial assistance.

Now the big debate was whether we should assist foreign courts based on reciprocity, and Congress took the unusual step and said no reciprocity; we are going to do it unilaterally. It has worked surprisingly well, at least in my experience, and I think it would behoove you to consider

what Congress did 40 years ago and whether we should continue on that path or return to the 19th-century ideas of reciprocity: you scratch my back, I'll scratch your back. Then you have a battle of experts as to how the back scratching goes on in a given country. Thank you.

**Professor Silberman:** Well, that's certainly one example. I'm not so sure how effective the American treatment of § 1782 [28 U.S.C. § 1782] has actually been, and I'm not sure that it is regarded, in this context, particularly, as very desirable by many of the foreign countries. I don't think they want our help on discovery. But I just point to another example, which is in Reporters' Note 5, on page 91, in which Congress has had a more recent opportunity to consider the role of reciprocity.

Again, a somewhat closer analogy, I think, deals with enforcement of support orders. And, in that context, there is a provision for reciprocity. It works a little differently in that it provides for the Secretary of State to authorize or designate a foreign reciprocating country. We actually thought about that as a model for this Act. But in the discussions in the Institute for the last several sessions, we decided that we didn't want to limit recognition or enforcement to situations in which there was there a sort of white list and black list. So we have moved to what I would say is a mixed system, allowing parties to show reciprocity, but, hoping that § 7(e) will encourage these international agreements as Jeff Kovar mentioned earlier on, because I do think that is the best way of obtaining that result.

**Vice President Harper:** There are now four putative speakers, as they say in England, on their legs, and I'm going to recognize them, followed by any comments that the proponent, Mr. Burbank, wants to make for the motion, followed by any comments to be made by the Reporters, and then we shall come to a vote. So, next, the speaker at microphone 1, Mr. Elsen.

**Mr. Sheldon H. Elsen (N.Y.):** I think I owe it to Steve Burbank and others to spell out a little more fully the point that I was making, which I made rather elliptically. I drew on proving issue preclusion from civil-law countries as an example of difficulty, following Andy's example of another example of difficulty in proving foreign law.

Some civil-law points are easy to prove. You can prove claim preclusion under civil law much more readily. The authorities are clearer. But when we are talking about reciprocity, I do not have scientific evidence on this point, there are no controlled experiments on the issue. But when you come to the countries where you are concerned about lack of recognition, you are dealing, typically, with countries where legal materials are not readily decipherable and easy to come by.

Now I don't know what Egypt does, for example, but Judge Rakoff of the Southern District of New York has told me of his efforts to penetrate Egyptian law on the stealing of antiquities. The difference between Egyptian law on the books and in practice and in the offices, in the offices where money is passed and where money is not passed and the like, is very, very hard to sort out. So he came up with some sort of a practical solution. But when the party has the burden of proof in dealing with a legal system of that sort, it is a very difficult ploy. So I wouldn't necessarily say, in deference to Steve's insistence on scientific method, that I have a definitive answer that this would gut it. But, as a practical matter, and based upon our experience of laws of Third World countries and those that were unlikely to grant enforcement, it would be a very difficult burden, and, in practice, it is probably going to solve most of your problems.

**Professor Detlev F. Vagts (Mass.):** There is, in fact, quite a lot of empirical evidence about how an affirmative burden works in the German history, which I think the Reporters have tidied up a bit in terms of how messy it has been in the past. I notice that Germans would have a problem so long as reciprocity was on a state-by-state basis with what is the law in Montana. Montana has never faced the problem, and somebody has to guess what they would do. Now Germany has the Max Planck Institute to give opinions, but I think, over time, it has been a very messy experience and does tend to say that, if this motion were adopted, the defendants would lose.

**Professor Henry L. Chambers, Jr. (Mo.):** Let me ask about the burden of proof in terms of whether there is an overlay of a standard of proof on top of the burden of proof. Instead of talking about laying the burden on the party resisting enforcement, take a look at putting it on the judgment creditor. What I'm asking is whether providing that the judgment creditor or other person seeking to rely on a foreign judgment shall have the burden to show that the courts in the state of origin would grant recognition and enforcement to a comparable judgment would constitute an overlay on a preponderance-of-the-evidence standard on that question. Or is the assumption that there is not going to be an overlay on the preponderance of evidence on that standard?

**Professor Silberman:** I think, and Andy said it at the outset, that there was an inconsistency between subsections (a) and (b) to some degree, and I think we would have to specify that the burden would be the normal burden of preponderance of the evidence.

**Professor Chambers:** Okay.

**Professor Silberman:** I think that clarifies that. You agree with that, yes?

**Professor Lowenfeld:** Yes, I do.

**Professor Chambers:** Okay. Because, moving to putting the burden on the party resisting enforcement, that is a very bizarre burden. That it is more likely than not that there is a substantial doubt that the courts — is there any way of resolving that, because that actually lowers the burden quite a bit and may actually make it relatively easy to demonstrate that there is no reciprocity.

**Professor Lowenfeld:** Well, we tried to avoid making the burden on the debtor too difficult, i.e., to prove a negative. Suppose, for example (and we have a case that is cited in the Notes coming out of Texas [§ 7, Reporters' Note 3]), the debtor says, we have no evidence that Country X has ever enforced an American judgment. Now is that sufficient? The judgment creditor says, I have a Professor here who says there is no reason to think a judgment would be rejected. Well, maybe we still don't have enough. But, if the Professor says, for instance, well, a Canadian judgment and a Dutch judgment were enforced in X and we think an American judgment would be treated the same way, then, on that basis, the judge can make a decision. If we don't have anything like that, then that was our formulation. It is a little bit vague. As I responded to Mr. Williams earlier, it is not as precise as it could be, but that is the difficulty of requiring proof of a negative.

**Professor Chambers:** Right. And I don't disagree with that. It is just that, given that some folks have suggested that the standard is almost impossibly high, it seems as though, if there is an overlay of the preponderance of the evidence on top of a standard of proving a substantial doubt, maybe the standard is not all that high.

**Professor Silberman:** Not with respect to the party resisting. That is, you asked me, initially, about the judgment creditor, and I think that is part of the problem. That is, we reformulated the burden differently for the burden that lies with the judgment debtor, precisely because we were concerned that it would be too hard. That is, we would gut the reciprocity provision by imposing a burden on the party resisting enforcement to have to prove a negative by preponderance of the evidence. We have formulated this in the version that you have before you as substantial doubt, so as not to gut the reciprocity provision and to have a defendant who is resisting enforcement be able to show that there was doubt and, therefore, make the lack of reciprocity a meaningful concept.

**Professor Chambers:** It might or might not be worthwhile to indicate that there is no overlay if the party resisting enforcement is the one who has the burden.

**Professor Lynn Dennis Wardle (Utah):** Not only does the motion to put the burden of proof on the party resisting enforcement make the burden of proof come into line with the burden of pleading, which I think is a wise general rule, but it is also consistent with § 5, in which the defense provides that a foreign judgment shall not be recognized if the person resisting recognition or enforcement establishes one of the defenses there listed. Actually, there are 11 defenses, and, as to 10 of those 11, the burden lies with the party resisting enforcement.

So I think there is a consistency, and I think also that there is some similarity. That is, cases in which the party would raise the defense of non-reciprocity will also be cases in which some of these other defenses listed in § 5, as to jurisdiction, would also be raised. So I think there should be a consistent standard and, also, I think that it is wise to allow nonreciprocity as a defense, because often that would be a less intrusive, less offensive, less sensitive basis for nonrecognition than some of these about unacceptable procedures.

**Professor Lowenfeld:** I was going to say the speaker is quite right. In all the defenses in § 5, we put the burden on the judgment debtor. We don't want the judgment creditor to come in and assert that the judgment is not against public policy or was not rendered by a corrupt court, and so on. The question before the house is whether § 7 should have the same, as the speaker suggests, or a different version.

**Professor Silberman:** Just let me add, though, and I just want to be quite clear, in § 5(c), we generally take the principle that Professor Wardle and Professor Lowenfeld have identified. But we do have an exception. Except for the defense raised pursuant to subsection (a)(v), which is the forum-selection clause. There the party seeking recognition "shall have the burden of establishing the invalidity of the clause." So, in at least one instance, we have a set of policy reasons change the burden. In general, you are quite right, but there are a couple of instances in which we have changed the burden for specific reasons, and that is one of them.

**Professor Lowenfeld:** And that exception is where a party has negotiated and contracted and it is reasonable then to put the burden on the party who wants to get out of the contract they made.

**Professor Silberman:** Yes. I'm not quarreling with that. I just want to clarify for anybody who hadn't quite focused on § 5(c).

**Vice President Harper:** Concluding remarks from Mr. Burbank.

**Professor Stephen B. Burbank (Pa.):** I was hardly expecting scientific method. I have come painfully to the recognition that the plural of anecdote is data, (*laughter*) however unreliable those data may be. I'm afraid

that a few more war stories have not persuaded me that putting the burden of proof on the party resisting enforcement would gut the provision. Again, if I thought it would, I wouldn't vote for my own motion. I simply, more generally, wanted to respond to Mr. Ristau. The notion that Congress did anything consciously and advertently when it passed § 1782 [28 U.S.C. § 1782] is ludicrous. Anybody who has studied the legislative history knows that those provisions were drafted by a commission established and then not funded by Congress, but rather by the Carnegie Commission, drafted, I think, by Hans Smit. The legislative history is verbatim the report written by that Commission. Congress didn't do anything except adopt what the Commission proposed.

More importantly, what the Commission proposed, perhaps, consistently with the time, was the arrogant view that, if we lead, they will follow. Build it and they will come! Well, we built it and they didn't come, which is why we need reciprocity.

**Vice President Harper:** Concluding remarks from either or both of the Reporters? *(Laughter)*

**Professor Lowenfeld:** Words fail me.

**Vice President Harper:** Then I think we are ready for the motion. You have it before you, namely, the burden of proof should lie on the party resisting enforcement. All those in favor, please say aye.

*(There was a chorus of ayes.)*

**Vice President Harper:** All opposed?

*(There was a chorus of noes.)*

**Vice President Harper:** The ayes have it. The motion is carried.

**Professor Lowenfeld:** Do you think the ayes have it?

**Vice President Harper:** Oh, yes. There's no doubt about it. *(Laughter)*

Mr. Hulbert, do you want now to present the balance of your motion? Please.

**Mr. Richard W. Hulbert (N.Y.):** I will not speak at any length. I think the discussion of the last half hour has done more than I could in five minutes of demonstrating the desirability of eliminating the requirement of reciprocity. As Jeff Kovar has put it, I wouldn't have the authority to assert it myself. The system we have now works quite well, and generally speaking it does not require reciprocity and, over the last essentially a century, has not required reciprocity.

The first question that comes to mind is, what has happened that suddenly now makes it mandatory or important that reciprocity be added in a revolutionary reversal of American law in the last century? There are

problems. American judgment creditors, that is, persons holding American judgments, cannot benefit from the simplified, expedited procedures for enforcement elsewhere that judgment conventions provide, because the United States is a party to no such convention.

We also produce judgments that, essentially, nobody will respect, punitive damages in civil cases, for example; treble damages in RICO and antitrust cases. We have to accept that. The question is, with respect to judgments that we might reasonably expect to be enforced, is the situation getting worse or getting better? I don't pose as an expert on this subject. I have read what the Reporters have written. I have read what the New York City Bar Association report states. I have read some papers on recent German decisions and changes in Swiss law, and the impression clearly conveyed is that there is a stumbling forward progress, that things are less narrow minded than they were. The French no longer insist on reviewing the facts and the law in enforcing judgments, and they don't require reciprocity.

The Swiss have a somewhat less restrictive law than they used to have. German decisions are more welcoming than they once were. It does not seem to me that this is a basis on which we should now embark on a process that the discussion of the last half hour has shown will be fraught with collateral litigation that will not be pro-enforcement in anybody's judgment.

New York State now has a law that enforces foreign judgments if they meet, in effect, fundamental due-process requirements. Any country in the world that wants reciprocity can look at New York's statute and easily conclude that it exists. New York will enforce their judgments. If that is a requirement to get a New York judgment enforced in Zambia, okay, we have met it. We now introduce this new requirement. Where do we stand? Are we reciprocal with anybody? We have a statute that says we will do it if you will do it, and you have a statute that says we will do it if you will do it. Somebody has to do something.

It seems to me there will be discovery. There will be conflicting and expensive expert opinions. There will be appeals, all in aid of trying to decide what to do with a judgment that, otherwise, is entitled to be enforceable, enforcement under our notions of what constitutes a fair adjudication between adverse parties. That is a judgment rendered by a legal system that we believe is capable of doing fair work between the parties in a particular case without flaws that are called to the court's attention, rendered by a court having subject-matter and personal jurisdiction over the parties.

But, ah ha, reciprocity. Maybe we won't enforce this. Maybe we will require the parties to do it all over again, taxing the already overdrawn resources of our courts to what purpose. I mean, *res judicata* is a fundamental principle of American law. If parties have had a fair litigation of their controversy, why do we insist upon exploring, to the extent you can explore it, what the foreign country's legal system might be expected to do, maybe, in a parallel case? It seems to me we are just purchasing a lot of trouble in aid of a tactical maneuver. We are trying to compel people to do what we haven't been able to persuade them to do, although, as I say, they seem to be moving toward it.

I think we should do what we think is right. If there are tactics to be introduced, let tacticians, not The American Law Institute, introduce them. It does not seem to me right to put the whole thing as a mechanism to get the State Department to persuade a few people. Will they do it in a decade? Who knows? In the meantime, we have, I think, a greatly complicated and much less satisfactory system for the enforcement of judgments. Thank you.

**Vice President Harper:** The motion is to strike, in its entirety, § 7, except subsection (e). Correct?

**Mr. Hulbert:** It was to get rid of the requirement that is stated in § 7(a) and whatever else has to go to implement that.

**Vice President Harper:** But you explicitly except subsection (e)?

**Mr. Hulbert:** Section 7(e) I explicitly except. Section 7(e) seems to me an admirable proposal. I congratulate the Reporters for having come up with it. If the State Department, in fact, can charm birds out of trees, more power to them. (*Laughter*)

I can't see how we could possibly object to that. I suspect the rest of § 7 goes, and maybe there are some changes elsewhere that would need to follow from that, but the Reporters are much more expert at the implications of this than I would be.

**Vice President Harper:** Is there a second?

**Unidentified Speaker:** Second.

**Vice President Harper:** Mr. Struve.

**Mr. Guy Miller Struve (N.Y.):** I oppose the motion. I'd like to point out a very important respect in which I think Richard Hulbert, inadvertently, overstated what it is that Jeff Kovar said. What Jeff said was that the system by which states in the United States enforce foreign judgments is working exceedingly well. I agree with that, and I will mention that again in connection with my own motion, because it is a very important point.

But Jeff did not say that the system by which foreign states enforce or do not enforce American judgments is working exceedingly well. He did not even say it is working well. In fact, it is not working well at all, and the best that Richard Hulbert was able to say for it is that some foreign governments are stumbling forward. Bear in mind that the charter of The American Law Institute is to consider not only legal theory, but also the lessons of experience.

In this case, what the lessons of experience teach us is what Steve Burbank said better than I can say it. The idea that we will build it and they will come has not worked. Therefore, we need something to encourage what I think we all want, including Richard Hulbert. You notice he leaves § 7(e) intact. Even Richard would prefer a world in which we had bilateral or multilateral conventions concerning foreign judgments. The question is, how do we get there from here? And what experience has taught us is that relying on our being generous and then they will be generous has not been a sufficient incentive to accomplish what § 7(e) is looking for.

If I understand correctly what the Reporters have said, that is their basic rationale for supporting reciprocity. It is mine, too. I oppose the motion.

**Professor Ronald A. Brand (Pa.):** I speak in opposition to the motion. Despite what we might think, reciprocity is a part of our law now, and it is a very important part of our law. If you look at the preamble to the Uniform Foreign Money-Judgments Recognition Act, you will see that it is in the preamble, but not in the statute itself. It stated that one of the principal reasons for this Act is so that judgments from U.S. courts will be more likely to be enforced abroad, and I can tell you that, in 1990, when Pennsylvania enacted the Uniform Act, that was one of the main reasons. It wasn't to make it any more difficult to enforce judgments here, but to make it easier for someone with a Pennsylvania judgment to take that judgment abroad and prove reciprocity because reciprocity is required in much of the world.

Twelve years ago, I might have thought we should leave the reciprocity requirement out of this, but the experience at the Hague Conference has convinced me otherwise, just as 40 years hasn't caused other countries to follow us in terms of statutes we have adopted in aid of discovery. I don't think it is going to happen here. In fact, what has happened is just the opposite in the Hague Conference. We have other states that now will enforce our judgments contemplating restrictions on the enforcement of those judgments.

Canada, in the *Beals* case [§ 7, Reporters' Note 7], in the Supreme Court in December, is very favorable to enforcement of the U.S. judgment,

but, at the same time, you have the Canadian Justice Department and others drafting a uniform act that would invite Canadian courts to cut back on the recognition of U.S. judgments.

If the purpose of going to federal legislation instead of state legislation is, in part, because this is a foreign-relations issue, then, as Jeff Kovar indicated, we must keep in mind that we are writing the statute for the United States for foreign-relations purposes, in part. If that is what we are doing, then I think it would be an incredible mistake to leave out a reciprocity requirement. Thank you.

**Professor Louise E. Teitz (R.I.):** I would also speak against the motion and would argue that we need reciprocity. Dick Hulbert asked if things have gotten worse, and I would say there are negotiations at The Hague currently, and last month, in April, on a less comprehensive convention, we found that 60 some countries, basically, were going to make things worse. They were going to provide for cutting back on compensatory damages as well. If we go ahead and drop the reciprocity requirement, there is absolutely no reason for them not to do that.

**Mr. K. King Burnett (Md.):** I wanted first just to inform the body a little bit about what has been happening in the family-law area. It has been mentioned about the Uniform Interstate Family Support Act and how that works with the certification by the state, which is different and much softer and I think a much more in keeping provision, but also the Uniform Child Custody and Jurisdiction Act, which has now been adopted by a majority of states. We worked on that with the State Department. It provides, really, that a foreign nation is a state for two-thirds of the Act, and then, for the other third of the Act, you just have to prove jurisdiction under American standards in order to be treated as a state. So that is the way that that is going.

Now I wanted also just to mention the question here of the burden, I think, on the people that want this in. We are talking about reversing two Restatements of this body. We are talking about reversing the law in almost every state. There are only two states that have a mandatory requirement of reciprocity, and those states haven't dared really to have a case. They are Massachusetts and Georgia. It is just on paper. The others are really just states that say that they might do it, and they aren't really doing it.

I think there is a heavy burden here on the people to show that there is some real reason, some fundamental reason for this, not just we are going to help them out on a negotiation that is not taking place at The Hague. The only thing that is taking place at The Hague now is a negotiation about whether we are going to enforce forum clauses, and we are not talking about reciprocity in that context.

I must say I have been ambivalent about this. Even at the first meeting of the Advisers to this project, I stood up and said they are not doing anything with it; maybe we ought to think about reciprocity. But the more I thought about it, I just don't think it is the right thing for us to do. I don't know that it will be effective. I don't think it will be effective. This is some kind of shot across the bow, they want The American Law Institute to take, for some negotiation that is not really taking place.

When we get into the question of what is a comparable judgment, all the complications of this, of who got what, it is just not worth it, and I would urge the body to support the motion.

**Professor Lynn Dennis Wardle (Utah):** I oppose Mr. Hulbert's motion. I really think that reciprocity is a wise principle in the international context, but it should be used with caution. So I like the way that § 7 now exists, that we do have a reciprocity requirement or provision, but we place the burden of proof on the party who is raising that to show that there is nonrecognition. I think that also does provide the court an alternative basis that is less offensive to foreign nations than other grounds that would clearly be caught up with that as a basis, such as unfairness, lack of integrity, fraud, and so forth.

But I would like to propose a substitute motion for Mr. Hulbert's motion. That would be to soften § 7 in one little way further, and that is in § 7(a) to substitute, for "shall not be recognized," "may," and you would have to revise the last two lines. Something like, "a court in the United States may decline to recognize or enforce a foreign judgment, if," and then the rest of it continues so that the court may choose to decline if nonrecognition in the foreign country is shown. It can, in fact, use reciprocity then, but it isn't required to, because there probably are cases in which it would be unjust not to enforce a judgment simply on grounds of reciprocity.

**Vice President Harper:** Is there a second to the substitute motion?

**Professor David J. Aronofsky (Mont.):** Second.

**Vice President Harper:** Is there a response from the Reporters?

**Professor Silberman:** Well, I would not be in favor of such a provision. One of the reasons we moved to a reciprocity provision and one of the reasons that we have argued for a federal statute is to make this law uniform. In fact, as I said yesterday, the uniform law on judgments is not uniform. Two states have mandatory reciprocity provisions. Six states, I think, have discretionary provisions. I think you would create the same kind of uncertainty and nonuniformity by a discretionary standard in this context. I understand the sense of the substitute motion, but I think we

ought to have a uniform position about this, and I think it is that, with the appropriate burdens and so on, the standard should be a mandatory one.

I said that without consulting my Co-Reporter, though. He may have a different view. It wouldn't be the first time.

**Professor Lowenfeld:** I'll waive.

**Vice President Harper:** We are now having discussion only on the substitute. Does anyone who is now standing want to speak directly to the substitute motion?

**Unidentified Speaker:** To substitute "may" for "shall"?

**Vice President Harper:** That's right, in § 7(a). Mr. Trooboff.

**Mr. Peter D. Trooboff (D.C.):** Thank you very much. I do want to speak to it, because I think we are forced to make a policy decision here. I think we need to recognize that all the references that have been made to the Hague Conference and what has gone on there are really relevant only insofar as they deal with the experience that that process has given us, just as the experience of § 1782 [28 U.S.C. § 1782] has given us, just as 100 years since the Supreme Court decision in *Hilton v. Guyot* [See, e.g., § 7, Comment a] has given us. What we learned from all that is, if we want to encourage the enforcement of judgments in both directions, we need to have a world in which we do this by agreement. And the way to do that is by The American Law Institute's endorsing, with a mandatory requirement, the kind of reciprocity provision that is here, not on a "may" basis, so that in the period between now and when this actually reaches the Congress the kinds of agreements we are talking about will have been worked out. It is the single strongest statement the Institute can make in favor of reciprocal enforcement.

I think Mr. Burnett, when he first suggested this, had the right instinct. I regret that he has reconsidered, but the experience of the negotiation over the last 10 years has taught us this is not something that is going to happen by unilateral decision of other countries. It is going to happen through cooperation.

One additional point, because I don't want to speak again to the main motion, is —

**Vice President Harper:** Hold that, if you would, Mr. Trooboff. Let me see whether anyone else has anything to say about the substitute. If not, I think we are ready for the question.

**Professor David J. Aronofsky (Mont.):** I seconded the motion. I actually stood up with the intent of making a substitute motion very similar to Professor Wardle's. I would suggest that, if this is passed, we consid-

er the substitution of the word “need” for the word “shall” so that it would read “need not be recognized.” Now let me explain my reasons for supporting Professor Wardle’s substitute motion, and, if need be, the motion in chief.

I have a real problem telling our courts they can’t enforce a judgment. I don’t have a problem with The American Law Institute or Congress suggesting to the courts that they need not enforce judgments unless reciprocity exists, but I can think of examples where grave injustices could occur in our court system when judgments subject to this language, if it were to become law, were not enforced. So I think we are taking away far too much discretion from our judges.

I refer to the controversy over sentencing guidelines as an example where Congress has told judges what they must do and what they can’t do in a criminal-law context. I don’t think The American Law Institute wants to proceed in that direction, and that is what this language appears to do. Let’s give our judges discretion. I think Professor Wardle’s motion, as a substitute, does that. Let’s not say we can’t enforce judgments in court when the effect of that is to create an injustice. Thank you.

**Vice President Harper:** Does anyone else wish to address the substitute motion, the text for which has been put before you as suggested by Elena Cappella?<sup>1</sup> I trust that that is acceptable with Mr. Wardle.

**Professor Wardle:** “May not” is up to the drafters. We get the point.

**Vice President Harper:** The permissiveness is the key issue?

**Professor Wardle:** Right.

**Vice President Harper:** Mr. Kovar.

**Mr. Jeffrey D. Kovar (D.C.):** Thank you. Just to speak quickly in opposition to the substitute motion. The result of the substitute motion would be a very involved article that could lead to a lot of procedural gaming in cases with very little effect. If we are going to have a reciprocity provision, it should be one that is mandatory. Thank you.

**Vice President Harper:** I think we are ready for the question on the substitute. All in favor of the substitute, please say aye.

*(There was a chorus of ayes.)*

All opposed?

*(There was a chorus of noes.)*

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<sup>1</sup> For text of amendment, see Appendix 2(A.1).

The noes have it. The motion is defeated. We are now back to the main motion, and Mr. Trooboff, I think, has the floor with respect to that. Mr. Trooboff?

**Mr. Trooboff:** Thank you very much, Mr. Chairman. I had just one further additional point, which is there are parts of the proposal that lend themselves to the kind of agreement that is being proposed here. If it turns out that the ALI endorses a mandatory reciprocity provision like the one we have described here, and if the agreements that I think will come into place before the Congress acts in fact come in, then the provision would go into the law through the Congress in a way that is entirely satisfied.

If it turns out that that weren't the case, one could look again at the whole point. But, in the meantime, you will have, at least, encouraged the very process we want. But, most important, these agreements would also help to knit together some of the provisions in the Act that we have already talked about like *lis pendens*, like provisional measures. These very much lend themselves to the kind of bilateral discussions that § 7(e) proposes. So, not only because experience has taught us that we should go the reciprocity route in order to get these agreements, but because the agreements themselves will facilitate the very provisions we have worked on, we should not adopt the motion that is pending. We should have a reciprocity provision. Thank you.

**Vice President Harper:** Mr. Kovar, I think you now want to address the main motion?

**Mr. Kovar:** Yes, thank you, to oppose the motion. I have already stated why I think reciprocity is really the principal federal interest in this project. And what is being proposed here is a sweeping federalization of law that works. So, if one of the reasons for this proposal, and this has been clear in the Reporters' documentation, is to clean things up, to make things more uniform, to address some areas, the Uniform Law Commissioners are perfectly capable of doing that, and the states are perfectly capable of addressing that. In fact, the Uniform Law Commissioners have begun a process for looking again at the Uniform Act. So, the ALI doesn't really need to do that. Or, if it intended to do that, it should do it in cooperation with the Uniform Law Commissioners and not by itself.

But the basis for this project has always been reciprocity. This project began as an implementing legislation project for the Hague Judgments Convention, and the Hague Judgments Convention didn't work. We were not able to reach agreement on that for a number of reasons that have been discussed in the past. People can ask us again outside if they would like. But this project has continued because, essentially, the notion is we still need to provide a way to create a world where there is more move-

ment of judgments from country to country, not just movement of judgments into the United States for enforcement, but also judgments going outside the United States. The only way to do that is to create a system of agreements, and I think it is an admirable initiative to incorporate in this Act a reciprocity provision. I think it can still be improved. I think the role of the federal agreements should be made more important, but, in the end, it is essential. Without it, there is no purpose for this project, in my view.

**Vice President Harper:** Thank you. There are two more persons ready to be heard. I think, after them, we will hear from Mr. Hulbert and then from the Reporters and then come to the question. So, the speaker at microphone 1.

**Mr. Michael Marks Cohen (N.Y.):** I am in favor of the motion. I have been of two minds concerning reciprocity now for quite a long time, but I think I have come down in favor of eliminating it for basically two reasons. The first is that what is going on is a sacrifice of private interest for what is believed to be some greater public good, and the second is the experience that we have had with reciprocity, which nobody talks about because there hasn't been so much of it. But the experience that we have had is that it has led, almost invariably, to injustice. About the only reciprocity provision I'm aware of that has been consistently enforced in this country has been the requirement that, in order to sue the United States for damage by a public warship, the claimant must show that, if an American had been injured, he could have sued in the foreign country for damage by a foreign warship.

Invariably, what has happened is you get these tort claims by individuals against the United States, and their claims are thrown out because the country that they emigrated from, from which they may hold a green card, for example, doesn't have a comparable provision. So that there has been a sacrifice of a private interest for what is believed to be a public good, namely, we are going to encourage foreign governments to allow American citizens to sue in their courts for damage done by foreign warships.

I think we should focus on exactly what kinds of judgments we are talking about. We are talking about a judgment by an individual against an American company in tort. Now there isn't any question that the standards that were applied by the foreign court were all up to snuff. There isn't any question there was a basis for it. All of those concerns are, presumably, eliminated. You have a valid judgment by an injured person against, say, an American company issued by a foreign court. That judgment is carried to the United States for enforcement here, and it is denied enforcement simply because there is a lack of reciprocity. I say that is unjust.

Similarly, you have the decision of a foreign court, say, in a commercial matter where the American company has agreed that disputes would be decided according to a foreign forum. Now they have gone to the foreign forum, they have litigated the dispute in the foreign forum, they have lost in the foreign forum, the prevailing party carries that judgment to the United States, and the judgment again is not enforced because there is a lack of reciprocity.

I say that is unjust. I do not believe we should, as a matter of policy, sacrifice private interests for public good, generally speaking, but I definitely don't think we should do so when it will, almost invariably, unquestionably lead to injustice.

**Vice President Harper:** Mr. Burbank.

**Professor Stephen B. Burbank (Pa.):** Thank you. The last comments actually lead in to what I had already been planning to say. We were asked to do what is right here. First of all, let's remember who the "we" is. Of course, "we" are The American Law Institute. But what we are doing is drafting a statute to be enacted, we hope, by Congress. It is, of course, the difficulty of courts engaging in foreign relations that makes it totally inappropriate for states — as well as, of course, inappropriate because they are states — to make American foreign policy.

In my view, the question of reciprocity in connection with the recognition and enforcement of foreign judgments is a decision to be made only by Congress, in combination with the President of the United States, which is another reason — not that we need one — why judicial decisionmaking by individual judges would not be a good idea.

The "we" here is Congress. By the way, I don't believe Congress would ever pass this statute without reciprocity, particularly in today's world as has been described to us by the people most intimately familiar with it, namely, those who have been negotiating for us at The Hague and seeing what the rest of the world is doing.

In terms of whose private interests are involved, I would suggest that we should not neglect the private interests of those who hold — often Americans — American judgments and want to have them recognized and enforced abroad. Let's not leave them behind either. It is not a question of private interest versus public interest; doing the right thing in 2004, in my view, is to suggest to Congress that the statutes that they pass should include this very focused — and it will be further refined — reciprocity provision. Thank you.

**Vice President Harper:** Mr. Hulbert —

**Professor Janet Walker (Canada):** Can I ask —

**Vice President Harper:** Oh, I thought I had already said we had reached the end, but you look so disappointed, please speak. (*Laughter*)

**Professor Walker:** I'm sorry. I would like to just add one more word to that, and that is that fear of a lack of reciprocity is a very powerful effect, and it is having a very powerful effect, I think, on this group. And I think that what we want to have an impact on is what happens on the ground, meaning what happens in the courts, not only in the United States but elsewhere.

I think the small *in terrorem* effect of a demonstrated lack of reciprocity will have a powerful effect in those courts and on those judges. If you put the question frontally, as has been done for a number of years in The Hague, and you discuss with governments what they are prepared to undertake, you might get a very different answer.

So if you ask the government of Canada whether it was prepared to endorse X or Y with regard to judgments coming from the United States, they might enter into a discussion about other matters, things like the war in Iraq or softwood lumber, but if you asked a court in Canada whether it was prepared to enforce a money judgment from the United States, it may well be able to say yes, we will enforce that judgment, and that is what has happened in the Supreme Court of Canada.

So I would endorse a concern for a lack of reciprocity, but I would not endorse a full-frontal requirement of reciprocity, demonstrable probably in an efficient way only through an agreement of a foreign government.

**Vice President Harper:** Mr. Hulbert, do you have any further and final comments?

**Mr. Richard W. Hulbert (N.Y.):** Thank you, Mr. Chairman. We don't live in very optimistic times. The sort of traditional American model of an open society is a model that is taking a lot of abuse these days, and, if I weren't as old as I am, I might not be an optimist. But I am an optimist, and I think that we are taking a gloomy view. I don't think we ought to take a gloomy view, and it seems to me that the tit-for-tat reciprocity — which is inevitably involved in reciprocity — is not going to lead to the enforcement of more judgments, it is going to lead to the denial of enforcement of many judgments that would have been enforced but for the requirement, and that seems to me retrograde.

I would rather rely on the exposure to civil-law fellows that we have seen in the last day. I do not believe that the world is composed of people who are merely narrow-minded because they are not Americans, and they spend their time trying to do us ill. It seems to me time to take a somewhat more optimistic stance.

**Vice President Harper:** Final words from the Reporters?

**Professor Silberman:** I will make this brief. I think it is important to understand something that Steve Burbank said on the floor, and that is that this is a proposed statute for Congress. We have had many meetings about the reciprocity provision, we have had it in a variety of ways, and it has been very hard to think about and to draft. I think it is quite right that, if there is any real hope of Congress enacting such a statute, it will be with some reciprocity provision. And I think this is a reciprocity provision, just as we have seen changes made in it today, that has been thought through and worked out. Quite honestly, I think it would be a real undermining of the project to have reciprocity pulled out of it.

I say that because of other things that we have put in the statute, which include the declination of jurisdiction, the registration provisions, and provisional remedies. So I think it is a whole, and I think this is a very important piece of it, and I think, as a practical matter, some reciprocity provision will eventually be required if we are to have a statute. Thank you.

**Vice President Harper:** Okay. We are going to have the vote. The motion on the floor is to strike in its entirety § 7, except subsection (e). All those in favor?

*(There was a chorus of ayes.)*

All opposed.

*(There was a chorus of noes.)*

There must be a division of the house. The Chair is in doubt.

So those in favor, please raise your hands.

*(There was a show of hands.)*

All those opposed.

*(There was a show of hands.)*

The vote is 55 in favor and 68 opposed. The motion is lost.

Are there any other comments with respect to § 7 on reciprocity? Yes, the speaker at microphone 1.

**Mr. Alan B. Morrison (D.C.):** I have two questions: What effect might this rule on reciprocity have on issues relating to claims of forum non conveniens? Suppose somebody brings a claim here in the United States, and one of the arguments is going to be send it to whatever country; I don't know that we have an answer, but I urge the Reporters to think about it.

The second question is, am I correct in understanding that the non-enforcement of judgment also applies to a judgment that is favorable to the

defendant abroad such that the plaintiff could then relitigate the case in the United States on the theory that there is no res judicata because there was no reciprocity?

**Professor Lowenfeld:** On the second question, we define judgments entitled or not entitled to recognition, and recognition and enforcement are equally covered by the Act. So a judgment for the defendant, if it is entitled to recognition, will be recognized; if it is not entitled, because the country doesn't meet the reciprocity requirements, then it will not have the effect of res judicata.

**Mr. Morrison:** So the plaintiff gets two bites —

**Professor Lowenfeld:** That is what the statute says.

**Mr. Morrison:** I just want to be clear about that.

**Professor Lowenfeld:** Yes, that is a clear answer.

Now the other question, you know, early on, Alan, before I think you were a part of this process, we debated whether we should have a forum non conveniens section, and an early draft had a sort of sketch without a specific draft. We decided, with the advice of the membership, not to go forward with that. It comes up, in a sense, in the lis pendens and in the forum-selection provision, but not directly for forum non conveniens.

So, let's say, a U.S. court dismisses an action because of forum non conveniens, it is then heard in the other state, and the other state issues a judgment, then we look at it the same way we do any other judgment.

**Mr. Morrison:** So you could be tossed out here in the United States, sent abroad, and then come back to this country and be told that there is no reciprocity and that you can't enforce your judgment that you were sent abroad to get.

**Professor Lowenfeld:** That's possible.

**Professor Silberman:** Yes, but Alan, in general, it will be no different than the way in which forum non conveniens works now: that is, they will look to see whether or not there would be enforcement of a judgment — which is sometimes one of the factors that you look at — and at least here there would be a proposed statute that would give you some sense as to whether or not the judgment was going to be enforced.

**Mr. Morrison:** The same, except there is now reciprocity.

**Professor Silberman:** That's correct.

**Mr. Michael Marks Cohen (N.Y.):** Section 7(b), the very last sentence, this is going to be presumably a federal statute. There already is a Federal Rule of Civil Procedure concerning how you prove foreign law. Would the Reporters explain why it is necessary to have a special provision

in § 7(b) about how foreign law is to be proved when we already have Rule 44.1?

**Professor Lowenfeld:** Well, two reasons: One, as someone else said, we shouldn't rely on rules that may change. But, more specifically, this is a statute that applies equally to state and federal courts. Now New York also has a rule essentially the same, but not all states do. It seemed useful to clarify. It is not inconsistent with the Federal Rule.

**Mr. Cohen:** Well, all right, then wait, that raises another issue. I'm not aware of what the practice is in all of the states, but I'm assuming then that what you are saying is there are some states that don't provide for judicial notice of foreign law but still require — as they do in England — that foreign law be proved as a fact.

So if I understood your answer, Andy, what you are suggesting is we are going to force onto the states the requirement that they take judicial notice, even though the state law does not authorize the courts to take judicial notice of foreign law generally.

**Professor Lowenfeld:** It is not a requirement, but it, in effect, overrules the notion that foreign law must be treated as fact.

By the way, I think England has modified that recently as well. They are beginning to see that the old rule doesn't make sense. Our proposed Act says, whatever some state says that you must provide foreign law by evidence, even though there is a statute on the books that is clear, then the federal rule overtakes. Of course, what we are trying to do is to achieve uniformity.

**Mr. Cohen:** I'm all for uniformity, you know that, but there are times when I think it is best not to plunk for such a policy. You don't want to raise, if you are going to have this as a federal statute, a federal/state point, because that will cause opposition to rise up in the Congress that the federal government is attempting to impose rules on the states. And it is unnecessary. I mean, it is such a small thing having to do with evidence, I would suggest to the Reporter that that sentence be eliminated.

**Professor Silberman:** Michael, maybe one of the things we should do in the year we seem to have ahead of us is to look at the state statutes on judicial notice in this context, and it may be possible to put in — as we have done in other places — “in accordance with state law,” if we think it would not be inconsistent with the general principle of uniformity. I would like to do that at least and then consider your suggestion.

**Mr. Cohen:** Well, let me say, just in response to that, Linda, that if you were going to do that, there is no need for the sentence at all.

**Professor Silberman:** That's right.

**Mr. Cohen:** So for you to engage in such a project only to decide that you are going to modify the sentence to make it unnecessary, it seems to be —

**Professor Lowenfeld:** I don't accept this, I'm sorry to say. Look, we have been talking about burdens of proof and what kinds of burdens there are. Clearly if you have, let's say, competing experts, then you need in effect a finding by the court. But, if not, we don't want to put the burden so hard by saying it has to be fact.

My instinct is to have a uniform rule and not do what Linda says. It is not the first time — we will come to an agreement on this, it is not a make-or-break issue. But my instinct is yes, to impose a federal rule.

**Professor Silberman:** All I wanted to do was get some information before I made a decision.

**Professor Lowenfeld:** I will write the statute, you write the Notes. *(Laughter)*

**Professor Silberman:** If that is the way it is done, it won't be any different than anything else, but merely to find out what the practice is in the state courts. Because if, in fact, it is similar — and I suspect it probably is — then Andy's concerns will go away, and we can solve both problems at once, and I would like to at least take a look at that and consider it.

**Professor Mary Coombs (Fla.):** This may be a very minor point, but when I look at § 7(c)(vi), apart from the grammar, it seems to say, courts should “inquire whether the courts of the state of origin deny enforcement . . . with regard to judgments of other states.” Apart from the grammar problem, I just don't understand what that provision is about, what you are trying to accomplish.

**Professor Silberman:** Well, I think the concern here is when there is no evidence about how a foreign state will deal with an American judgment. So people will say, well, there is no evidence one way or the other. If it turns out that this country doesn't enforce the judgments of any country, even though we don't have a decision rejecting enforcement of a U.S. judgment, that is pretty good evidence that there is no reciprocity.

So it really is designed to deal with the sort of general treatment by foreign courts of judgments of foreign countries more generally if there is no specific evidence of how they would treat a U.S. judgment.

**Professor Coombs:** If it said, “would deny enforcement to,” and then just said “judgments of other states,” would that do it for you without that first part of that paragraph?

**Professor Silberman:** I'm sorry, could you repeat that?

**Professor Coombs:** If you just change § 7(c)(vi) to say “judgments of other states,” because you’ve got the rest of it in the —

**Professor Lowenfeld:** No, no, it says we have a judgment of State A —

**Professor Coombs:** Right.

**Professor Lowenfeld:** Okay. We have no evidence of State A vis-à-vis American judgments.

**Professor Coombs:** Right.

**Professor Lowenfeld:** But how does State A deal with judgments from B and C?

**Professor Coombs:** Right, but if you look at your beginning language in § 7(c), the introductory thing, “inquire whether the courts of the state of origin deny enforcement to . . . judgments of other states” [§ 7(c)(vi)].

**Professor Lowenfeld:** That is exactly what we wrote; that to say (i), (ii), (iii), (iv), (v). But when you get to (vi), that is what we are doing.

**Professor Silberman:** Oh, I see, I see, it is a grammar problem. It is a grammar problem, I think, but I would like to keep in the concept of “recognition practice,” and we will try to fix the grammar. Absolutely. Thank you.

**Mr. Jeffrey D. Kovar (D.C.):** Two questions about the drafting of § 7. I’ll take them in reverse order, first subsection (e).

It is clear that the existence of the reciprocity agreement, the international agreement between governments, establishes reciprocity full stop for purposes of this section. However, the last sentence of § 7(e), in the middle, where it talks about the fact that, if there is “no such agreement between the state of origin and the United States . . . in effect, or” — and this is the language — “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.”

Now if you marry that with the new provision or what we have decided in § 7(b) that the party resisting enforcement has to show that there is a substantial doubt that there is reciprocity, you could create a real problem. Here is the scenario: The United States enters into a bilateral agreement with a foreign country on reciprocity, and that agreement declares that there is reciprocity in certain specific areas. Now if you have a case that falls out of that area, it may not be that hard to say that there is substantial doubt whether there is reciprocity. If the governments were unable

to establish in their agreement that there was reciprocity, it certainly should raise a substantial doubt as to whether or not there is reciprocity.

But this language would suggest that the court could not take into account the fact that that agreement did not call for reciprocity in that particular area. I think that may be an unintended consequence here, maybe a drafting issue, but I think that is an important point.

**Professor Lowenfeld:** Let me respond to that, Jeff. Many countries take the position — as you know better than the rest of us — that they will do these agreements on civil and commercial matters, and they define those terms in somewhat narrow ways. Now we get a case involving an inheritance or an estate, and it doesn't prove that there isn't some kind of a reciprocal arrangement, simply that they didn't want to do this by way of agreement or it is a different ministry or so on. We wanted to say that there is no inevitable inference from a limited agreement, and there may be a good reason why the limited agreement does not create a doubt or the doubt could be easily resolved. It does not sort of create a *res ipsa* presumption. That's all we wanted to say.

**Mr. Kovar:** Well, I can see that that may be your intention, and it may be that this is really something that could stand more precise drafting to avoid the problem case.

Now, in § 7(d), this is the point that “[d]enial by courts of the state of origin of enforcement of judgments for punitive, exemplary,” and so on damages “shall not be regarded as denial of reciprocal enforcement of judgments for the purposes of this section if” they “would enforce the compensatory portion of such judgments.”

Now what about the case where the foreign-court judgment is for exemplary damages, but we know that that particular foreign court will not enforce punitive or exemplary damages coming from the United States. This subsection (d) could be misunderstood as saying the U.S. court would still be required to enforce the foreign punitive-damage award even though that court would — in this hypothetical case — clearly not be able to enforce the American punitive-damage award.

**Professor Lowenfeld:** Are you asking whether it could be misunderstood? Anything can be misunderstood. Our notion is in the concept of comparable judgments.

**Mr. Kovar:** Well, it may be again that this is something that could be drafted. The various Hague drafts have tried to create language that would make it clear that the court should enforce a judgment including punitive damages if they have some basis for doing so, but they need not do so, if

they do not, and I think getting that concept in may be helpful. Thank you very much.

**Professor Catherine Kessedjian (France):** Now that you have a reciprocity requirement — against which I didn't speak, but I very strongly think this is a mistake and it will not help you — I was wondering whether you would be ready to consider that, outside recognition or enforcement, there may be effects that you want your courts to take into consideration such as the proof effect, the evidence effect of a foreign judgment.

The scenario is that the judgment creditor is having a full court hearing outside the United States and is obliged, because of the lack of reciprocity, to start again on the merits here in this country. You may want to allow at least the fact that the court may look at the foreign judgment as evidence of fact or even an *effet de fait*, as we say in French law.

I could give you references to French cases and to French literature, if you want. You probably don't need it.

**Professor Lowenfeld:** I think we wouldn't mind getting the evidence from you, Catherine, but, in fact, even the Supreme Court in the *Hilton v. Guyot* case [See, e.g., § 7, Comment a] — which denies enforcement — says but the judgment can be used as evidence. So you don't have to start from square one.

For example, let's say the signature of a document is in controversy and the foreign court has determined that the signature is genuine; you don't have to prove it all over again. But maybe we should say that. I agree with the point.

I think so do you, Linda, right?

**Professor Silberman:** Yes.

**Mr. Richard W. Hulbert (N.Y.):** I have a question as to one word. In § 7(a), does “comparable” mean “similar?” I'm thinking of the poet's phrase, “Shall I compare thee to a summer's day?” You can compare anything with anything, apples and oranges, whatever you like. What do you mean? If you mean “similar,” why not say so?

**Professor Silberman:** I think we had “similar” at one point, and we were advised to change it to “comparable.” (*Laughter*) And since we're bureaucrats, we do what we're told.

**Mr. Peter D. Trooboff (D.C.):** Yesterday, the question of the meaning of “security” came up in a different context, and I'm directing my comment to § 7(f), where there is this discretion “to give security.” This question of security comes up in a number of places where it is clear you are referring to state rules on security and what would be the required security, what would be the basis for losing that security.

Here, at least, some elaboration may be appropriate, because it isn't quite clear whether we are talking about security for the underlying enforcement of the judgment, or whether we are talking about for the vexatious nature of the defense. I think some thought needs to be given to this point.

We haven't, I recall, discussed it very much in the Advisers' sessions, and, as I see it now, in light of the question that was raised when Andy wasn't here yesterday, I just wanted to highlight that we would need to think a little more on this, I think.

**Professor Silberman:** Thank you, Peter. I think we have to go back over each of the sections in which we have made a sort of shorthand reference to security and spell that out to some degree. So this is another place, and I will mark it.

**Professor Bernard H. Oxman (Fla.):** I would like to commend two issues to the drafters before we meet again. The first concerns the word "if" in the second line of § 7(a). I read "if" to mean "to the extent that" or "if and to the extent that," and that was one of the things that shaped my vote. I would commend to you to take that issue into account when you work on the drafting, since you have already made the point that there will be a conformity issue between (a) and (b).

**Professor Lowenfeld:** I'm sorry, I didn't understand your point. Could you say it again?

**Professor Oxman:** Anyway, the second point —

**Vice President Harper:** He wants to hear the first point again.

**Professor Lowenfeld:** I didn't understand your point.

**Professor Oxman:** It now says, "A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable. . . ." I read "if" to mean "to the extent that." Thus, for example, if a foreign state would not enforce punitive or moral damages, a U.S. court would be required to refuse to enforce moral damages on the other side but could enforce the compensatory part of the award, and I read that as the intent where you specifically refer to the punitive-damages issue.

So I think there should be some tightening of drafting here. The reciprocity goes to the extent that there is no reciprocity. The mere fact that there is no reciprocity doesn't mean that the whole house of cards falls, and I think that that drafting problem can be cleared up.

Second, I voted with the majority on both votes but with some misgivings about asking the courts to perform political functions. Since the object of the reciprocity requirement is, in fact, political, I would commend to those working on the draft the question of not requiring, but authoriz-

ing, the Secretary of State or the Attorney General or some combination thereof to prepare a white list and/or black list.

**Vice President Harper:** Not so named, I trust.

**Professor Oxman:** No, not so named. In other words, establishing a list where there is reciprocity or a list where there is not. I'm not saying it would have to be conclusive or whatever, but it would have obviously enhanced our bargaining leverage if the Department of State could threaten —

**Professor Lowenfeld:** One of our earlier versions had that suggestion. It was debated — particularly in the Council — and rejected partly for political grounds and partly because some people said, "I wouldn't trust the State Department with anything." (*Laughter*) So we really did go through that. It is interesting that Florida had this and then eliminated it. Australia still has such a list, and it doesn't seem to have worked very well.

**Professor Oxman:** Well, I commend it to you again as a permissive, not as a mandatory one.

**Professor Amos Shapira (Israel):** Now that a reciprocity requirement has been adopted and we did not adopt the "may" instead of "shall" softening revision, I would urge you to put, at least in the commentary, a message for a soft interpretation of the term "comparable" or "similar"; in other words, to reduce the size of the requirement to begin with.

**Professor Lowenfeld:** Will "analogous" do?

**Professor Shapira:** I don't know. More than a word, Andy. I think it requires a couple of paragraphs to send the message that when we say "comparable" we don't mean anything that comes close to "identical" or something like that.

**Vice President Harper:** We now are at a point where we can return to the text that has previously been considered at length by the Institute. I have in mind, of course, §§ 1 through 6 of the document before us. I think we will start there and see what, if anything, anyone wants to say. We have a motion addressed to § 5 and, of course, we have another motion addressed to the entire text.

However, I see Mr. Boskey is standing, and I'm not sure in what context he is standing.

**Mr. Bennett Boskey (D.C.):** Well, yesterday I extracted a promise from the Reporter that we would, indeed, get back to § 1.

**Vice President Harper:** Well, now we have returned to it.

**Professor Silberman:** And we did.

**Mr. Boskey:** And here we are.

**Professor Silberman:** I can be trusted.

**Mr. Boskey:** I do have a point that I think affects § 1, and it is, I think, a point of importance. Let me tell you how I came to it. When I read the tail end of Comment *d* of § 1, on page 25, which said that this statute does not apply to the judgments of international tribunals, I thought that was new. I don't quarrel with it, but it got me to thinking about what else should be said. As a minimum, I thought it ought to be said that this statute is not intended to foreclose any court in the United States from considering and, if it feels fit to do so, enforcing the judgment of an international tribunal. But then I thought I'd better look at the rest of § 1 to see whether § 1 really met what I think might be the proper requirements on the preemption question.

At the beginning of your black letter in § 1, you say what this statute does not apply to. And it seemed to me that it was pretty clear that, if it does not apply to an alimony judgment of a German court or a child-support judgment of a German court, then if the state of Illinois wishes to enforce such a judgment, there should be nothing in this statute that prevents the state of Illinois from doing it. But it is not necessary to subscribe to the somewhat bizarre views of Justice Scalia on statutory interpretation to think that there ought to be some reasonably explicit statement in a statute as to what it does not preempt. You don't want implicitly to raise the argument whether there is a *Hines v. Davidowitz* [312 U.S. 52 (1941)] doctrine here that the Congress has occupied the whole field of foreign judgments and that those that aren't covered can never be enforced.

So I think you've got to draft a decent explicit statement as to what happens under this statute to the judgments that are excluded from the Act. That is the point I'm making, and that is what I think is missing from this statute.

The inattention of Congress to this kind of preemption point has caused great misery in other fields. In ERISA, for example, the terrible language of Congress on what was or what wasn't preempted caused term after term, case after case in the Supreme Court trying to puzzle it out. We ought to be clear in this statute what we do and don't mean to preempt, what we do and don't mean to occupy in the field.

**Professor Silberman:** That is a fair comment. I just want to explain, not necessarily so much to you, but to others who may wonder what the reasoning behind this sort of structure is. With respect to § 1(a), the reason we have taken those out is because either there is other federal law dealing with that subject or because there is a detailed set of state statutes or rules in that area.

Our main concern here — the reason we included things like penal judgments — is to make it clear that they come under the statute, because we want a uniform federal treatment, and we don't want them left to state law. So things that are excluded in § 1 (a) are either covered by another federal statute or covered comprehensively by state law, as in the child custody and other areas.

**Mr. Boskey:** Well, take the enforcement of an alimony judgment.

**Professor Silberman:** Yes.

**Mr. Boskey:** That is excluded from this Act.

**Professor Silberman:** That's right, and the states can deal with such judgment under their respective state law.

**Mr. Boskey:** What federal law says that it remains to be covered by state law? That is the point I'm making. When you pass a new federal statute, you've got to be explicit on what you are not gathering in —

**Professor Silberman:** What we are not preempting, yes.

**Professor Lowenfeld:** The other part, if I may, of Bennett's comment — he said he started looking at Comment *d* about international tribunals. We have had some question about that lately. We may learn a little bit more when the Supreme Court decides the *Intel* case [Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2466 (2004)], which involves the European Commission.

Our notion was we have bitten off enough here. For example, when the European Community looks at competition-law issues that also come up in American courts, Microsoft being an interesting example, where both the American and the European inquiries look to abuse of dominant position with somewhat different criteria but similar facts, what should we do about that?

We decided we don't know yet. We don't want to foreclose it, but we don't want to mandate it. If somebody feels strongly about that subject, we are open to further consideration. But for the moment, we have left it out. In respect to arbitration, of course, we have a treaty.

**Professor Silberman:** That is maybe an area where you would certainly want a uniform federal standard and not, as in some of these other sections, left to state law. So maybe we have to try to deal with this in a more careful way.

**Mr. Michael Marks Cohen (N.Y.):** If we had an English arbitration award that was a domestic award under the law of England, I take it the Reporters would agree that arbitration award would not be enforceable in the United States under the New York Convention.

**Professor Lowenfeld:** No, I wouldn't agree with that.

**Mr. Cohen:** A domestic English award —

**Professor Lowenfeld:** English. It falls under the Federal Arbitration Act if it is an award — an award in a foreign country can be enforced in the United States under § 201 of the Federal Arbitration Act.

**Mr. Cohen:** Section 201 of the Federal Arbitration Act implements the New York Convention.

**Professor Lowenfeld:** That's correct.

**Mr. Cohen:** What I hoped I was defining, Andy, was not an international award, a domestic arbitration award in England. On the other hand, I agree with you that such an award should be enforceable here, and that is the basis for my calling to the Reporters' attention § 1(a)(iii). You start out in § 1(a)(iii) saying, "This Act applies to foreign judgments as herein defined other than: . . . foreign arbitral awards. . . ." Okay, I agree with that.

But then, when you go down further, you say, "except that" it would apply to "judgments of foreign courts confirming or setting aside foreign arbitral awards. . . ."

My suggestion is that you should eliminate the second "foreign," that it would apply to "judgments of foreign courts confirming or setting aside arbitral awards," whether they are foreign or domestic.

**Professor Silberman:** But it is the second "foreign" —

**Mr. Cohen:** Yes, it is the second "foreign."

**Professor Silberman:** We looked at this once before — we had "foreign" circled, and we looked at the first "foreign arbitral awards," and said no, no, it's right —

**Mr. Cohen:** No, that's right.

**Professor Silberman:** — that foreign arbitral awards. But you say a judgment that enforces an —

**Mr. Cohen:** English domestic award.

**Professor Silberman:** — is like any other judgment —

**Mr. Cohen:** Correct.

**Professor Silberman:** — and is entitled to the enforcement. I think that's right, and I will get it right this time when I jot my notes down. Thank you.

**Professor Malvina Halberstam (N.Y.):** I'm addressing the subsection that excludes judgments relating to domestic matters, such as custody, support, divorce, and so on [§ 1(a)(i)]. If I read it correctly, if there is a foreign judgment for support — an order for support — and then there is a judg-

ment in that country for arrears for nonpayment of support, that would still not be enforceable under this Act, is that correct?

**Professor Silberman:** Under this Act, yes.

**Professor Halberstam:** Well, I would urge you to reconsider that. I realize you cite various other Acts that now have been adopted to deal with the problem. Unfortunately, there is still something like 80 percent of the cases in which the noncustodial parent does not pay support after a year or so, and, in most situations, the custodial parent is a woman, and women find it very hard to get judgments enforced, notwithstanding the recent attempts to do so.

I don't see why having such a judgment enforceable — if we limit it to what has already been reduced to a money judgment like any other money judgment, the fact that it is originally based on support should preclude adding this particular means of doing it. Here, particularly, you have registration as a means, which I think would make it much easier in most cases. So I would urge you to reconsider and include judgments for money, even if based on an initial support order.

**Professor Silberman:** Well, I have two responses. One is that there is extensive state law in this area that certainly doesn't work perfectly, but it is a reason not to bring it within the compass of the federal Act.

Secondly, there is, at The Hague, an ongoing negotiation dealing with support, so at that point you may get separate federal law, but it is a good reason for us to stay away from it for the moment. We have thought about it, and that is the reason.

**Professor Halberstam:** Well, we are not staying away from the rest of it even though The Hague isn't adopting it, and I don't really see why you need to exclude a money judgment just because the basis of the judgment is an original support order. It is really a very difficult situation. I have had many people talk to me about it, and I think anything we can do to add to the enforceability of judgments, we should do.

**Professor Lynn Dennis Wardle (Utah):** I have a couple of minor points. On § 1(a)(i), the exclusion of domestic-relations cases generally, as I read that over, I don't propose that you make a long laundry list, but one that was not included was property division or distribution, which would come within the general category of other judgments rendered in connection with matters of domestic relations, I would assume. Except when I read Comment *b*, the second sentence says that this Act includes such judgments as "determine rights to property. . . ." So then the question arose, is property division or distribution in fact excluded from the exclusion and included deliberately? I don't think that is the intent, and I don't think it

should be the intent because property division is so often closely intertwined with alimony or even custody — the party getting custody gets possession of the house — and so I think that it ought to be clear, perhaps just in Comment *c(1)*, that property division is excluded.

I wonder also, in Comment *c(1)*, if it wouldn't be wise to refer to the fact that there is another reason why we exclude domestic-relations judgments, and that is these judgments that are intended to be covered by this Act are judgments as to which we think it is desirable to have uniformity in the United States. But as to domestic relations, that is not the presumption or the practice and probably not desirable. There are very profound reasons why we believe that domestic-relations issues are better resolved at a local level, state by state, rather than uniformly for the entire country.

Third, there is a concern — and I don't know where to address it — I think of it in the context of domestic-relations judgments because that is an area that I teach, but I think the concern is broader than domestic relations, and that is the problem of evasive actions and judgments, people who cannot get a judgment in one state — because, under the substantive law, they could not — going to another jurisdiction where they can, in fact, get that judgment, a foreign jurisdiction, and then coming back into this country. That, in fact, has been the experience in some adoption cases: people who are ineligible to adopt here are going abroad and adopting, and now, under the Hague Convention — which the Congress has ratified, and we now have implementing rules — would appear to mean that the states now must recognize those adoption judgments, even though substantively they would never allow those adoptions. So there are some profound evasion issues that perhaps ought to be considered, I'm not sure if in § 1 or elsewhere.

**Professor Lowenfeld:** If I could just briefly respond, our view was that property issues ought to be covered. For example, if you will notice in Reporters' Note 1 of § 1, we referred to *Watts v. Swiss Bank Corporation*; it is on page 25. We think that is a good judgment and ought to be, in effect, generalized through this law. We would not want to exclude that kind of a judgment. It is a little different from alimony and, if you will, equitable distribution; these are decedent-succession cases. So maybe we ought to make that clearer. But I think I disagree with your initial point.

**Professor Wardle:** Then I would suggest that that be considered carefully. Because, unlike decedent or intestate succession, or succession under a will — inheritance — or taking a probate kind of an issue, property division is very closely aligned with alimony, and if you say this doesn't apply to alimony —

**Professor Lowenfeld:** Make that distinction here, that's correct.

**Professor Wardle:** — but it does apply to property division, you are going to swallow the exception.

**Professor Carol S. Bruch (Cal.):** I'd like the Reporters to rethink the exclusion of family-law decisions. It seems to me, number one, that although substantively this has been a matter addressed at the state level, the history really is that the states have desperately turned to the federal government for assistance in many ways, including the agreements that are now brought about by the State Department to help facilitate things.

And I think that leaving a creditor who has a judgment to the vagaries of having a more difficult road really can't be justified on a policy ground. The thought that something might happen at The Hague that we might choose to ratify itself also does not necessarily undercut a different, and perhaps what ultimately might be an additional or alternative, method for enforcement. I think, for example, of child custody in the snatching area, for example, where state law has sometimes and frequently provided for the return of children even where the subsequent Hague Convention did not.

So that it seems to me that giving certain kinds of creditors in this sense — whether for support monies or for property divisions — access to greater enforcement than they might otherwise have is an admirable goal.

**Professor Silberman:** Carol, I think that some of the family-law judgments require a different kind of treatment. I think you can see from this project that it is complicated enough to deal with the general area of civil and commercial judgments, and I think, at least at this stage and for this project, it is unlikely — I don't want to say "never" — but it's unlikely we will change our minds about this issue.

There are federal statutes in the child-support area, as you know better than I, there is this potential treaty going on at The Hague in the area of child support. The State Department has played a role, and it's just not for this project, I think, to take on those issues.

**Professor Bruch:** I understand your approach, but I would note that this whole project began while something was underway at The Hague and did not wait for its conclusion. I urge your reconsideration.

**Mr. Jeffrey D. Kovar (D.C.):** Just a quick comment on the question of the exclusion for these different family-law matters. As has been said, I think, by Professor Silberman, there is a whole range of both statutory provisions and international negotiations at the bilateral and at the multilateral level addressing child support. We have a huge federal system for it, it is intimately linked in with the Uniform Child Support Act, which is in force for all the states, and there really is a comprehensive system. To throw

those judgments into this Convention would create a great deal of confusion.

There is also, as has been said, an Adoption Convention. The State Department is trying to put the last piece together, which is the regulatory piece, to bring it into force. Child custody is an incredibly divisive and difficult issue that we are dealing with in the context of another convention, the Abduction Convention, and I really think it is too much for this particular project to take on.

My point really was subsection (c) of § 1, and the purpose of this is really to keep the words, “‘Foreign state’ or ‘foreign country’” from being read too literally. There are two ways in which “‘Foreign state’ or ‘foreign country’” might be read too literally. One is where it would be read not to include the courts of a province or a state. In that circumstance, it is my view that there probably would be little danger of ambiguity, but if one thought that there really could be a court in the United States that would not enforce a judgment from the courts of Ontario — because those are not the courts of a foreign country, a foreign state — then I think it would be better to say that expressly in subsection (c). The problem with saying that it means “any governmental unit outside the United States” [§ 1(c)] is that would be phenomenally broad and general and I think broader than it has to be. I think you can refer specifically to provincial or similar units or governments.

The second point, the other types of courts I assume you are really interested in are courts coming from regional organizations that are like states in some way or another. In principle, what I assume you are thinking about are courts that could be set up in the context of the European Union, for example, or similar regional integration organizations that are somewhere between a sovereign state and simply a treaty organization. And I think there is language that I would be happy to provide, in various treaties, that very nicely describes the types of regional integration organizations that are commonly treated in international practice.

Also, I think subsection (c) could be redrafted to refer specifically both to the provincial level and to that regional integration organization level without creating this ambiguity —

**Professor Silberman:** Just to interrupt a second. We have been dealing with this language for a while and have had trouble finding the right term. So if you actually have some suggested language in the context of this section, that would be very helpful.

**Mr. Kovar:** I’d be happy to provide that.

**Professor Lowenfeld:** But I think, as I was saying earlier, in response to Mr. Boskey, we have tended to not include regional organization judgments, so that regarding the European Community or the Law of the Sea Tribunal or the European Human Rights Tribunal, we have decided, at least tentatively, not to embrace them in this statute.

**Mr. Kovar:** Well, I guess the answer to that would be, one, you may not need subsection (c) at all; if the purpose of your Note is to exclude entirely the courts of the European Community, then you don't need (c). Because I don't think you will have a problem with provincial courts being treated as foreign courts. On the other hand, there is a difference between a judgment coming from, let's say, a future European patent court — which is on the books for being created — and a judgment coming from the Law of the Sea Tribunal. Those are really different types of courts, and I think you could draw a distinction in the statute between those without great difficulty.

So I guess part of it then is a policy issue, what you would like to cover. My suggestion, I think, would be that we may want to be able to cover the courts of the European Union in certain circumstances — whether or not the Human Rights Court, I don't know, that is actually a Council of Europe court, that is not a court of the Community. There may be future human-rights decisions coming out of European Union courts under the Constitution that will follow, but these are all future developments that we don't know at this point. Thank you.

**Professor Silberman:** I repeat, if you have some language for us to help on this, that would be great.

**Professor Catherine Kessedjian (France):** My point is exactly following that of Jeffrey Kovar. I was concerned about the commentary by the Reporters, in Comment *d* of § 1, excluding, as if it were an international court, the European Court of Justice. My point goes to the following: In the reciprocity requirement that you have now, the chances are that the State Department will have to, in the very immediate future, negotiate agreements not with any single member of the European Union but with the European Union as one, or not 99 percent but 99.99 percent, because the competence, the jurisdiction, of the European Union is every day enlarged. Therefore, my point is that the European Court of Justice and any court that is now considered within the European Union are actually internal courts to a regional integration. My point is that you want to reconsider that. And there is a huge difference between the International Court of Justice, the Law of the Sea Tribunal, the European Court of Human Rights — and I'm not speaking of the Inter-American Court of Human Rights, because I know very little about that — but those three

courts that I just mentioned on one side and the European Court of Justice, plus other European tribunals on the other. So again, if you need help with language or references, I would be happy to do that.

**Professor Silberman:** Yes, we will take you up on that. Thank you.

**Professor Lowenfeld:** While you are at the microphone, Catherine, let me just ask you: one of the communications we got said that the European Court of Justice doesn't really deal with individual parties. Now that isn't quite true anymore, but largely it is true because it is countries or courts that refer cases to the Court.

**Professor Kessedjian:** It is not true in competition cases, which you referred to yourself, and that is one of the reasons I'm here at the microphone.

**Professor Lowenfeld:** That is one of the problems we had, and we are groping with it.

**Professor Kessedjian:** But it is going to change. And this statute, by the time it is in Congress, the chances are that it is going to be very different. So you want to look at the future, what the European integration is going to do.

**Vice President Harper:** Just before Ms. Kay speaks, let me observe that I know we are going to stop in roughly nine minutes, and I'm going to treat that as the end of our discussion of § 1. So, accordingly, let me ask the three speakers who are standing, if they could, to confine their comments to roughly a minute and a half. Ms. Kay.

**Professor Herma Hill Kay (Cal.):** Thank you, Chairman Harper. I want to rise in support of the Reporters' decision to exclude family-law matters from this statute. I think I was the one who suggested the other judgments in connection with matters of domestic relations precisely to exclude the division of property that Professor Wardle has mentioned. I think that is the right approach to take.

I do, however, think that you might want to consider the point that Malvina Halberstam has made about judgments affecting support that have been reduced to judgments encompassing arrears due. Those are now purely money judgments; they have no relation to the underlying subject matter, and they might be the subject of an appropriately carved-out exception, and perhaps Malvina — wherever she is — and I can work together to furnish you with some appropriate language.

**Professor Malvina Halberstam (N.Y.):** I thank you for that support. I was rising for something a little less, if you are not willing to go all the way. Assume that the spouses have agreed, in a document signed by them, for support of a certain amount. One of the spouses, the supporting spouse,

breaches the agreement, and the other spouse brings an action. Now I would think that would be an action for breach of contract. And technically, if that spouse gets a judgment, that would be a judgment in contract. Nevertheless, the language in § 1(a)(i) is a little ambiguous in connection with matters of domestic relations. Would that judgment still be excluded because the contract dealt with support that involves matters of domestic relations?

So if you are willing to accept Dean Kay's suggestion, I would certainly go along with that. If you are not, could you at least have a statement in the Comments saying that this, of course, would not exclude judgments based on contracts even if the subject of the contract was support? Thank you.

**Professor Lowenfeld:** I'm not sure it's "of course." (*Laughter*) I'm willing to think about it.

**Mr. Michael Marks Cohen (N.Y.):** In § 1(c), you talk about "'foreign state' or 'foreign country,'" but, as far as I can tell, you only use the term "foreign country" once in the black letter, and that's in § 11 [§ 11(a)]. I was wondering whether you might not consider deleting that altogether, and just being consistent throughout and referring to "foreign states" rather than "'foreign state' or 'foreign country.'"

**Professor Lowenfeld:** I think it's a style point.

**Mr. Cohen:** Right. Yes. It's a style point.

**Vice President Harper:** We have now reached the point where we shall stand for adjournment until 2:00 p.m. Thank you very much.

*(At 12:39 p.m., the session was adjourned.)*