SOME THOUGHTS ON JUDGMENTS, RECIPROCITY, AND THE SEEMING PARADOX OF INTERNATIONAL COMMERCIAL ARBITRATION

RICHARD W. HULBERT*

The purpose of this essay is to invite reflection on the recent initiative to introduce a mandatory requirement of reciprocity as a prerequisite to the enforcement in the United States of foreign country judgments.

The international enforceability of judgments is, quite reasonably, thought to be relevant to the efficiency of international business. The enforceability of foreign judgments invites, in turn, consideration of the enforcement of foreign arbitral awards, for whatever may be the difficulties that confront the international enforcement of court judgments, there stands in striking contrast the comparative ease with which arbitral awards (whether rendered in the United States or elsewhere) are enforced around the world. Is this an anomaly, or are there lessons to be learned? After all, court judgments are the decisions of professional judges operating in public under detailed rules of procedure designed to assure justice, and these decisions are subject to appellate review. An award, on the other hand, represents a decision rendered by arbitrators—who need have no particular training or experience and who are not directly responsible to any national judicial system—reached after proceedings normally conducted in private under procedures that may well have been largely fashioned for the particular occasion. Moreover, the award is a decision which, in principle, is subject to no review on the merits.[1]

* The author is Senior Counsel to the law firm of Cleary Gottlieb Steen & Hamilton LLP and an Adjunct Professor at the New York University School of Law.

1 This is ancient learning: "If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation." Burchell v. Marsh, 58 U.S. 344, 349 (1854).

If the enforcement of foreign judgments were to be analyzed from the perspective of the modern treatment accorded such judgments in the courts of the United States, one would not be impressed by concern for difficulties. That was not always true. In 1895, the Supreme Court, in its famous decision in *Hilton v. Guyot*,[2] by a vote of 5-4 refused to give effect to a French judgment against an American that it otherwise judged entitled to enforcement. The ground for the decision was that, in the reverse case, the French court would have refused to enforce an American judgment against French citizens. The decision in *Guyot* did not, however, prove to define the American view. The foundation stone for the modern American majority view was a unanimous decision of the New York Court of Appeals thirty years after *Guyot* rejecting reciprocity as a requirement for enforcement of a foreign judgment.[3]

Once again, a French judgment against an American was at issue. The American, who had unsuccessfully brought suit in France, commenced a second suit on the same claim against the same defendant in New York. The defendant pleaded the French judgment as res judicata. The plaintiff contended that the French judgment should be denied recognition because, at the time, the French courts still did not recognize foreign (including American) judgments but instead subjected them to a review of the merits, the famous *révision au fond*. The plaintiff had no other criticism of the French proceedings or the resulting French judgment. The lower court and the Appellate Division accepted the American plaintiff's position on the authority of *Hilton v. Guyot* and, on the merits of the claim, held for the plaintiff. The New York Court of Appeals, in a unanimous opinion by Judge Pound, reversed and held the French judgment conclusive. In doing so, it declined to regard *Hilton v. Guyot* as controlling:

> But the question is one of private rather than public international law, of private right rather than public relations, and our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights. A right acquired under a foreign judgment may be established in this state without reference to the rules of evidence laid down by the courts of

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[2] 159 U.S. 113 (1895).

[3] Johnston v. Compagnie Générale Transatlantique, 152 N.E. 121 (N.Y. 1926).

> the United States. Comity is not a rule of law, but it is a rule of 'practice, convenience and expediency. It is something more than mere courtesy . . . since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question.' It therefore rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment. When the whole of the facts appear to have been inquired into by the French courts, judicially, honestly, and with full jurisdiction and with the intention to arrive at the right conclusion . . . it should no longer be open to the party invoking the foreign court against a resident of France to ask the American court to sit as a court of appeal from that which gave the judgment.[4]

It bears noting that had the French judgment in *Johnston* been an award in arbitration conducted in France at any time since the United States acceded to the New York Convention in 1970, the award could not have been challenged on the merits. Furthermore, in the absence of any of the narrow range of objections permitted by Article V of the Convention, the American court could not have refused to recognize and enforce the judgment.[5]

The rejection of a requirement of reciprocity in the *Johnston* decision came to represent the predominant American view of the matter. It was subsequently reflected in the Uniform Foreign Money-Judgments Recognition Act, which as adopted in most of the more than 30 states that have enacted it does not recognize lack

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[4] *Id.* at 123 (citations omitted).

[5] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The implementing federal statute provides that a federal court before which an award "falling under the Convention" may come "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207 (2000). The Convention grounds permitting recognition to be refused are the procedural deficiencies specified in Article V(1)(a)-(d), the annulment of the award where rendered (Article V(1)(e)), and the two grounds set forth in Article V(2): that the subject matter of the award was not capable of settlement by arbitration under American law or that enforcement of the award "would be contrary to the public policy" of the United States. The public policy ground has been narrowly construed. *See, e.g.*, Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

of reciprocity as a defense.[6] Whatever may once have been the status of "general federal law" on this subject, since the Supreme Court's 1938 decision in the *Erie* case,[7] federal courts exercising diversity jurisdiction have followed state law on the question of reciprocity.[8] The proposition that reciprocity is not a prerequisite to enforcement of a foreign judgment in the United States is also reflected in the American Law Institute's Second Restatement of Conflict of Laws[9] and Third Restatement of the Foreign Relations Law of the United States.[10]

The established doctrine faithfully reflects the special significance that American jurisprudence attaches to putting an end to litigation. Not only have we, like other judicial systems, accepted the concept of res judicata, but we have gone further to embrace the concepts of defensive and offensive non-mutual collateral estoppel.[11] One is drawn to conclude that the dominant policy reflected in current American recognition law, as it has developed, is a preference for rendering justice in the particular case rather than sacrificing that objective in the pursuit of more abstract normative objectives.

Three-quarters of a century of relatively well-established law has now been cast into question by the proposition that:

> A foreign judgment shall not be recognized or enforced in a court in the United States [that is to say, in any American court, state or federal] if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.

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[6] UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. pt. 2, at 39 (Supp. 2006).

[7] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[8] *See, e.g.*, Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971).

[9] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971).

[10] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481–82 (1987).

[11] Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (sustaining offensive non-mutual collateral estoppel); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) (sanctioning so-called "defensive" non-mutual collateral estoppel). These concepts do not appear to be accepted in foreign country res judicata doctrine. *See* Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 61–70 (1984) (reviewing issue preclusion under English, French, German, Argentine, Japanese, Swedish, and Mexican law).

That is the text of section 7(a) of the proposed federal statute on the recognition and enforcement of foreign judgments recently approved by the American Law Institute.[12] The proponents of this major reversal of American law insist that they are not opponents of the recognition of foreign judgments. On the contrary, the basic contention—and indeed almost the only argument—urged in support of the reciprocity requirement is that the generous American recognition practice has created no incentive for our commercial trading partners to dismantle obstacles placed in the path of the recognition of American judgments abroad.

> The purpose of the reciprocity provision in this Act is not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive for foreign countries to commit to recognition and enforcement of judgments rendered in the United States.[13]

In the long run, say the proponents of reciprocity, introducing a reciprocity requirement in American law will force other countries to rethink their ways and thus ultimately further the international recognition and enforcement of judgments.

There is no basis whatever to question the sincerity of the Reporters in that insistence. Nor, more broadly, is there ground to challenge the high quality and total professionalism of the ALI project. Although intended as a statute, the text is presented in the customary format of an ALI restatement. The "black letter" text of the proposed statute is elaborated in many thoughtful Comments and accompanied by the invaluable research reflected in the extensive Reporters' Notes. (It is interesting to speculate how much of the Comments and Notes, if the statute were enacted, would constitute citable "legislative history.") If one accepts the premises of the project, it cannot be imagined how the work of the Reporters could have been better done.

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[12] FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 7(a) (Proposed 2005), *in* AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006) [hereinafter ALI ANALYSIS & PROPOSED STATUTE].

[13] FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 7 cmt. b. (Proposed 2005), *in* ALI ANALYSIS & PROPOSED STATUTE, *supra* note 12. Section 7(e) of the proposed statute authorizes the Secretary of State "to negotiate agreements with foreign states or groups of states setting forth reciprocal practices concerning recognition and enforcement of judgments rendered in the United States." *Id.* § 7(e).

This seriously considered proposal, which was controversial at the ALI[14] and is sharply debated in the literature,[15] invites consideration of four points and a preliminary question.

The first of the four points poses the issue of what (if anything) we are to make of the fact that the specific circumstance that gave rise to the felt need to create a reciprocity requirement, the Hague Conference negotiations, no longer exists. Indeed, at that time, because of the international negotiations then in progress, it may be that no other position on the issue of reciprocity could have been taken. Those negotiations, however, did not succeed. Should we now look for guidance to the ancient adage *Cessante ratione, cessat ipsa lex*? (See Point 2, below).

Second, the introduction of a reciprocity requirement will impose burdens, possibly substantial burdens. It will necessarily lead to duplicate litigation on the merits of cases where the foreign judgment has been denied recognition in the United States for lack of reciprocity. It may well spawn a cottage industry in collateral litigation over whether the requirements of reciprocity have been met. (See Point 3, below).

Third, a further resulting burden of the introduction of the reciprocity requirement is that it must necessarily operate to the prejudice of the litigants who have already tried their case once to a judgment that otherwise meets the requirements for recognition. (See Point 4, below).

The fourth point is not so much a proposition as a question: will this pressure point—the introduction of a requirement of reciprocity—in fact lead to a material improvement in the reception of American judgments abroad? (See Point 5, below).

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But first, the preliminary question: what, in fact, is the state of play with respect to recognition and enforcement of American judgments abroad, for it is the perception that such judgments fare

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14 "The membership of the Institute was divided on whether a federal statute concerning foreign judgments should contain a reciprocity requirement . . . ." ALI ANALYSIS & PROPOSED STATUTE, *supra* note 12, at xiii.

15 *See, e.g.*, Franklin O. Ballard, Comment, *Turnabout is Fair Play: Why a Reciprocity Requirement Should Be Included in the America Law Institute's Proposed Federal Statute*, 28 HOUS. J. INT'L L. 199 (2006) (favoring a reciprocity requirement); Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239 (2004) (opposing such a requirement).

badly, in ways that a reciprocity requirement would ameliorate, that is the engine driving the project. It would seem obvious that this starting point should be firmly established, but it appears that this is a subject on which reliable evidence is unavailable. One authority has confessed that "broad empirical evidence regarding the enforcement of American judgments abroad is hard to find," although noting "significant anecdotal evidence."[16] Another writer states that "[a]lthough there are many scholarly works that discuss the perceived problems litigants face in seeking recognition and enforcement of U.S. judgments, this perception currently is not supported by empirical data," noting that his anecdotal evidence did not indicate difficulties in enforcing U.S. judgments abroad.[17] A third commentator laments the absence of "[c]urrent reliable data on the reception of U.S. judgments abroad. . . ."[18]

The most detailed recent consideration of the question appears to be a survey conducted under the auspices of the Committee on Foreign and Comparative Law of the Association of the Bar of the City of New York. The survey covered twelve countries: Canada and Mexico in the Western Hemisphere; South Africa; Japan, China (the People's Republic of China, that is), and Hong Kong in Asia; and six countries in Europe: England, France, Belgium, Italy, Spain, and Switzerland.[19] The survey found no official anti-American bias, as such, but it did note various problems in the enforcement of American judgments.

The principal problem stems from the fact that, because the

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[16] Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing An Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 548 (2005).

[17] Matthew H. Adler, *If We Build It, Will They Come? – The Need For a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79, 82 (1994) (footnotes omitted). The author states that he conducted "an informal telephone survey of attorneys throughout the United States with the assistance of the state bar associations of Florida, Texas and New York. This survey yielded no attorneys with negative experience in enforcing U.S. judgments abroad." *Id.* at 82 n. 11.

[18] Russell J. Weintraub, *How Substantial Is Our Need For A Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 171 (1998). He adds that "[i]f, as I suspect, judgments obtained by U.S. lawyers who follow proper procedures are readily recognized and enforced abroad, there is little need for a convention . . . ." *Id.*

[19] The Comm. on Foreign & Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 REC. ASS'N BAR CITY N.Y. 378 (2001) [hereinafter City Bar Survey].

United States is not a party to any judgments conventions,[20] American judgment creditors never have access to the simpler, cheaper, quicker avenues for enforcement provided by treaty. Instead they must proceed by common law action (as in England, Canada, South Africa, and Hong Kong) or under residual statutory procedures in civil law countries. These alternative approaches are more complicated, slower, and in some cases present uncertainty in points of detail.[21]

Different concepts of jurisdiction may create another set of problems. For example, "tag jurisdiction," which the Supreme Court recently validated,[22] is generally regarded as "exorbitant," and a judgment based on it or U.S.-style "long-arm" jurisdiction may be denied enforcement.[23]

The definition of what constitutes a "civil" judgment (as distinct from an administrative or penal judgment) may present another problem.[24]

The treble damages awarded in civil antitrust litigation and the sometimes gaudy punitive damages awarded in American tort judgments are likely to present problems almost everywhere.[25]

Then there is reciprocity itself, required by some of the countries surveyed, but not by all (not by England, Belgium, or

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[20] The Choice of Courts Convention, concluded June 30, 2005, at the Hague Conference, which was signed on behalf of the United States, will change this in a modest way, if the Convention comes into effect and is ratified by the United States.

[21] City Bar Survey, *supra* note 19, at 382–83.

[22] Burnham v. Superior Court, 495 U.S. 604 (1990).

[23] City Bar Survey, *supra* note 19, at 384–89. *See also* Friedrich K. Juenger, *A* Shoe *Unfit For Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1040 (1995) ("The difficulty of presenting our confused jurisdictional law to the outside world is bound to impede the negotiation of recognition treaties and conventions with foreign nations.").

[24] City Bar Survey, *supra* note 19, at 394.

[25] *Id.* at 391. So common is foreign resistance to such judgments that the proposed ALI statute incorporates a special provision in proposed Section 7(d) excluding them from consideration:

> Denial by courts of the state of origin [of the foreign judgment sought to be recognized] of enforcement of judgments for punitive, exemplary or multiple damages shall not be regarded as denial of reciprocal enforcement of judgments for the purposes of this section if the courts of the state of origin would enforce the compensatory portion of such judgments.

FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 7(d) (Proposed 2005), *in* ALI ANALYSIS & PROPOSED STATUTE, *supra* note 12.

South Africa, and no longer required in Switzerland after the recent enactment of the Private International Law Act).[26] The general tenor of current American recognition practice offers what would seem to constitute reciprocity, but as current American recognition law is state law (the proposed ALI statute would change this but not eliminate state court jurisdiction[27]), there has been an issue as to how American reciprocity is to be judged (to what forum does one look?). Until the proposed new substantive law is reflected in consistent judicial decisions, that problem may well continue.

What these difficulties represent quantitatively, however, it seems we do not know. How many American judgment creditors attempt enforcement abroad? How many of those attempts succeed? What explains the failure of those that do not succeed? How many American judgment creditors do not attempt to enforce their judgments abroad because they are dissuaded by real or supposed obstacles? Looking at the other side of the question, how important is enforcement in the United States of judgments obtained in other countries, i.e., what leverage do we really have? On none of these points have we seen serious data. Had there not been the pressure of the Hague negotiations, it seems unlikely that so substantial a change in American law as the introduction of a mandatory reciprocity requirement would have been proposed against a background of such uncertainty.

2.

The origin of the proposed reciprocity requirement lay in the long, drawn-out, and ultimately unsuccessful negotiations for a general jurisdiction and judgments convention under the auspices of the Hague Conference on Private International Law.[28]

The American Law Institute project "began with the

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[26] City Bar Survey, *supra* note 19, at 400–01.

[27] The proposed statute would impose a nationwide substantive federal law on recognition and enforcement; it would not, however, eliminate concurrent state court jurisdiction but permit removal to the federal court. FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 2(a) (Proposed 2005) *in* ALI ANALYSIS & PROPOSED STATUTE, *supra* note 12 (preemptive federal standards); *id.* §§ 8(a)–(b) (concurrent federal and state court original jurisdiction; removal).

[28] For a summary of the events leading up to the Hague Conference negotiations, see Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994).

encouragement of the United States Department of State,"[29] presumably eager for assistance in the Hague negotiations. The project focused initially on drafting a statute for American implementation of the hoped-for broad convention. It was forcefully argued at the ALI that if the ALI were to propose a federal statute on the recognition and enforcement of foreign judgments that did not contain a reciprocity requirement, the position of the American negotiators at The Hague would be severely compromised.[30] Those negotiations, however, ultimately failed. This not only deprived the reciprocity requirement of its initial rationale—to assist in achieving an international judgments convention acceptable to the United States—but also forced a redirection of the ALI project from the preparation of a statute to implement such an international convention to the preparation of a stand-alone federal statute once the prospects for international agreement had evaporated.

The requirement of reciprocity continues to be defended on the necessarily speculative basis that it will provide needed leverage in future bilateral negotiations to obtain better treatment of American judgments. The hoped-for general convention was a game in progress, with a definite objective and a finite timetable to achieve that objective. An obvious, and desired, consequence of its achievement would have been reciprocal acceptance of judgments by the parties to the convention within its terms. Reciprocity would be the essence of a convention and was, indeed, the purpose of the negotiations. No such concrete prospect is now in sight. There is only the hope of bilateral or multilateral negotiations of unknown scope with as yet unidentified countries and within no stated time frame, to be conducted by the State Department, whose future ambitions and continuing interest in the matter, as against its many other concerns, must necessarily be uncertain.

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[29] ALI ANALYSIS & PROPOSED STATUTE, *supra* note 12, at xiii.

[30] *See* Peter D. Trooboff, Esq., Remarks at the Annual Meeting of the American Law Institute (May 15, 2002), *in* 79 A.L.I. PROC. 309, 359–60 (2002).

> I want to suggest that failure to include the reciprocity provision, nothing could more easily undermine the effort to negotiate what's going on in The Hague today. I say that, having been on the delegation for the last 10 years and bent my sword a great deal on trying to convince others that they should give us what we gave them a century ago.

Id.

3.

Introduction of the reciprocity requirement will inevitably spawn satellite litigation over whether the requirement is satisfied by the foreign country of origin of the judgment sought to be enforced. If reciprocity is not shown, the merits of the case must be retried, a burden on the parties and an American court that the doctrine of res judicata would otherwise preclude. To establish whether reciprocity exists may pose a formidable challenge. By definition, a suit to enforce a judgment is only required because the judgment debtor will not willingly pay it. It can thus be expected that the judgment debtor will seize on whatever may be the possibilities to litigate the issue of reciprocity. It is not difficult to predict that in many cases expert evidence will be required, and if the case is in a state court, an intermediate appeal may be available.

To give a taste of what may be in store for us, consider the following:

The proposed statute refers to "comparable" judgments. What is being compared? The proposed statute necessarily speaks in generalities: the American court "shall, as appropriate, inquire" as to whether the courts of the state of origin deny enforcement to judgments of various kinds (five categories are listed), and it "may also take into account other aspects of the recognition practice of courts of the state of origin . . . ."[31]

Are jury cases "comparable" to non-jury cases? If the country of origin of the foreign judgment requires every judgment to contain a summary statement of the facts found and law applied—hardly an irrational requirement, one might think—and thus refuses to enforce, among others, judgments entered on jury

[31] FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 7(c) (Proposed 2005) *in* ALI ANALYSIS & PROPOSED STATUTE, *supra* note 12. The court's inquiry "does not aim to find precise congruence between judgments issued by courts issued in the United States and the judgments for which recognition or enforcement is sought . . . . The [§ 7(c)] list is illustrative, not exhaustive, and no one factor is conclusive." *Id.* § 7(c) cmt. F. Noting that a "recurring issue" is the approach taken abroad to American tort judgments, the commentary to the statute states, "The fact that tort judgments from a given country could not pass the test of reciprocity *might not* show lack of reciprocity with respect to other kinds of judgments . . . ." (emphasis added). *Id.* The examination of reciprocity in at least some cases promises to be intensely fact-specific, time-consuming and expensive.

verdicts, may the American court enforce a (necessarily non-jury) judgment?

If the country of origin will not enforce judgments based upon long-arm jurisdiction where the facts relevant to the finding of jurisdiction are unrelated to the cause of action, does this require the American court to refuse to enforce a foreign judgment entered on an unexceptionable jurisdictional basis?

Suppose that lack of reciprocity is conceded or established, but the foreign judgment was rendered by a court specifically chosen by the parties pursuant to a choice of court agreement. Does the reciprocity requirement give the losing party the right to repudiate its solemn agreement and successfully oppose recognition of the judgment in the United States?

How will reciprocity be determined if relevant judgments on the issue of reciprocity, either in this country or the country of origin, are inconsistent?

With fifty state jurisdictions and thirteen federal circuits, diverse decisions in the United States are to be expected. Doctrinal controversy over what does or does not constitute reciprocity can only feed the fire. The Supreme Court, if it chooses to do so, can ultimately bring some degree of order to bear, but how soon or how often will it intervene?

4.

In every case where enforcement of a foreign judgment is denied because of a finding as to lack of reciprocity, the winning party is deprived of its victory and not because of any defect in the proceedings leading to the judgment sought to be enforced. The reciprocity requirement comes into play only when the judgment in question otherwise calls for enforcement under applicable law, for if that were not the case, the issue of reciprocity need not be addressed. So what is at issue is a judgment rendered by a court system that provides impartial tribunals and processes compatible with American notions of due process where the foreign court had personal jurisdiction over the defendant,[32] where there is no evidence of fraud or inadequate notice, where the cause of action sued upon was not repugnant to relevant American public policy, and where the foreign proceeding was not contrary to an

[32] *See* N.Y. C.P.L.R. § 5304(a) (1970) (stating the primary grounds for the non-recognition of a foreign country money judgment).

agreement between the parties that the dispute was to be settled otherwise than by proceedings in that court (for example, by arbitration).[33] The party thus deprived of rights under the foreign judgment is penalized, not for any cause for which that party is responsible, but because the American court refusing enforcement decides that some hypothetical American judgment in some other hypothetical case would not, or might not, be enforced by (some or all of the) courts in the country of origin. And that, in turn, is because the United States and the country of origin have not, for whatever reason, come to agreement on provisions for the enforcement of judgments. In short, the American court, asked to enforce a judgment otherwise entitled to recognition under the relevant American law, but precluded from doing so for lack of reciprocity, finds itself, in effect, the obligatory servant of the public policy of the country of origin.

5.

The fourth point, related to the first, is more a political than a legal question: will the introduction of a reciprocity requirement achieve the hoped-for leverage to overcome the putative obstacles to acceptance of American judgments abroad?

The recent unsuccessful negotiations at The Hague presumably sought to reduce such obstacles, with the threat of federal legislation introducing a reciprocity requirement hanging overhead. For whatever aggregate of reasons, that strategy was unsuccessful. Will it succeed now? And if so, how long must we wait to harvest the fruit, in the meantime refusing enforcement of foreign judgments? Aficionados of game theory, who, indeed, have weighed in on the reciprocity controversy,[34] can be left to prove their case, if they can. For the rest of us, history is not encouraging. The United States has pursued aggressive strategies on other aspects of international litigation—those dealt with by two previous Hague Conventions to which the United States is a party, the Hague Evidence Convention and the Hague Service

[33] *See* N.Y. C.P.L.R. § 5304(b) (1970) (enumerating other grounds for non-recognition).

[34] *See, e.g.*, Susan L. Stevens, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 135–58 (2002) (applying game theory analysis to the proposed ALI statute in order to explain why the statute should contain a reciprocity requirement).

Convention—and has implemented amendments to the Federal Rules of Civil Procedure that appear to invite litigants in the federal courts to violate foreign law. There is scholarly literature suggesting that this course of action has been counterproductive.[35] Did the memory of it contribute to the failure of the Hague negotiations this time? If the variant of strong-arm tactics reflected in the new reciprocity proposal draws forth not acquiescence to some of our current practices, jurisdictional and other, but rather resistance, do we promote, or do we retard, acceptance of American judgments abroad?

As the City Bar report points out, there have been favorable changes in foreign attitudes toward American litigation practices and resulting judgments. For example, the French practice of *révision au fond* (review of the merits), which was at issue in the *Johnston* case, was abandoned by the Cour de Cassation in 1964.[36] The fear of possible enforcement in the European Union of a judgment against an American rendered on the basis of exorbitant jurisdiction, although it figures as a nightmare in academic writing, has apparently yet to be realized in practice over the nearly forty years that the Brussels Convention (now the Brussels Regulation) has been in effect.[37] Do we encourage or discourage further favorable changes by adoption of the reciprocity requirement?

We should recognize that at bottom, what the proposed reciprocity requirement aims at is to retain features of the American civil litigation process, largely rejected elsewhere as justifiable elements of due process, while forcing the results of what are taken to be our procedural eccentricities on the rest of the world to some larger extent than has been possible to date. In other words, having failed to reach agreement at The Hague, we will now attempt to exact through introduction of a reciprocity requirement what could not be obtained at The Hague. Will it work? Or will it have negative consequences? Time alone will tell, and in the meantime, which may be a long time, private litigants

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[35] *See* SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS 74–117 (2003) (reviewing the history of German cooperation in U.S. litigation after World War II); Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law For International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103 (1994).

[36] City Bar Survey, *supra* note 19, at 393.

[37] *See* Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289, 303 (1994).

will pay the price.

American involvement in international commercial arbitration may offer a useful perspective on what can be achieved. The United Nations Convention on the Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention, was negotiated in 1958 at a conference in New York under UN auspices. There was an American delegation at the conference, but it was instructed to maintain a low profile.[38] At the conclusion of the conference the delegation's report "strongly" recommended against American participation in the Convention. One of the major reasons offered for this was an argument from federalism: arbitration was then mainly a matter of state law, which in many states refused to enforce agreements to arbitrate, so that effective American adherence to the Convention would thus make substantial changes in United States domestic law.[39]

When pressure to accede to the New York Convention became intense a decade later, the United States took the plunge. But the only choice open to it was to accept the Convention as it stood. Renegotiation was not an option, and in fact was not seriously considered. The reason for that no doubt lies in the fact that international commercial arbitration in the United States is, generally speaking, much like arbitration elsewhere. In any case, it depends upon initial party consent and reserves to the parties a determinant role in the composition of the arbitral tribunal and a major role in the organization of the procedure to be followed, if they choose to exercise their powers.

This contrasts sharply with the vastly different procedures in civil litigation in the United States as compared with litigation in

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[38] United Nations Conference on International Commercial Arbitration, May 20–June 10, 1958, *Official Report of the United States Delegation* (August 15, 1958) (on file with author).

> In accordance with its instructions, the United States Delegation participated in the conference in a limited way. It did not attempt to exert a strong influence on the content of the convention, confining itself to exposition of its views on matters of basic principle and emphasizing the value of the pragmatic as opposed to the multilateral convention approach to progress in arbitration.

Id. at 2.

[39] *Id.* at 22–24. It was only in its decision in 1984 in *Southland Corp. v. Keating* that the Supreme Court announced that the Federal Arbitration Act of 1925, despite its text and its legislative history, was in fact substantive congressional legislation preempting inconsistent state arbitration law. 465 U.S. 1 (1984).

other countries.[40] In the matter of civil court judgments, the United States was unwilling to sign on to the Lugano Convention (the counterpart to the Brussels Convention open to non-EU member states), even if one is prepared to assume that it would have been invited to do so had it wanted the invitation.[41] To take that step would have involved, among other matters, major sacrifices in American jurisdictional theories and practices—concessions the United States was presumably unwilling to make, and concessions that it was recommended the United States not make for both policy and constitutional reasons.[42]

CONCLUSION

Instead of introducing a reciprocity requirement as a prerequisite to the enforcement of foreign judgments, may it not be the part of wisdom that we "rather bear those ills we have than fly to others that we know not of?"[43] Is "ills," indeed, the right word? In the matter of judgment recognition, American law may stand where it ought to stand: open to the world, conscious of the need to bring litigation to a close, and focused on the deficiencies, if any, in the particular foreign judgment sought to be enforced so as to do justice between the parties. One can readily accept that the enforcement of foreign judgments is properly a national concern and thus appropriately made subject to a national standard in place of a variety of state laws. It does not follow, however, that individual rights, the protection of which is surely also a national concern—rights that rest on a foreign judgment not otherwise subject to challenge—should be sacrificed in the pursuit of a political abstraction.

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[40] "America . . . has a set of procedural characteristics that seem to set it off from almost all of the rest of the world." Richard L. Marcus, *Putting American Procedural Exceptionalism Into a Globalized Context*, 53 AM. J. COMP. L. 709, 709 (2005). *See also* Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002).

[41] The late Professor von Mehren thought it "unlikely" that the United States would be invited to join the Lugano Convention, and constitutionally impossible for it to do so, even if invited, because some of the jurisdictional bases of judgments that it would have been required to enforce could not pass muster under the Due Process Clause. von Mehren, *supra* note 28, at 280–81.

[42] A number of scholars argued strenuously against concessions that would seem to have been required in order to obtain from the Hague negotiations a convention satisfactory to the other negotiating parties. *E.g.*, Lowenfeld, *supra* note 37; von Mehren, *supra* note 28, at 280–82; Weintraub, *supra* note 18.

[43] WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.