

9-1-1998

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### Recommended Citation

Arthur T. von Mehren, *Enforcing Judgements Abroad: Reflections on the Design of Recognition Conventions*, 24 Brook. J. Int'l L. (1998).  
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol24/iss1/3>

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# ENFORCING JUDGMENTS ABROAD: REFLECTIONS ON THE DESIGN OF RECOGNITION CONVENTIONS

Arthur T. von Mehren\*

## I. REGULATION OF ADJUDICATORY AUTHORITY IN INTERNATIONAL CONVENTIONS

### A. *The Design of Conventions Addressing Private International Law Topics*

Traditionally, private international law conventions have addressed a single subject matter, either choice of law or recognition and enforcement of foreign judgments (aside from some very general provisions in bilateral treaties of friendship and commerce, jurisdiction to adjudicate has not been directly regulated by international instruments).<sup>1</sup> In their design, these conventions were one dimensional. Theoretically, private international law conventions could, however, be one, two, or even three dimensional in character. For which—if any—areas of private international law does a multi-dimensional approach offer advantages over a uni-dimensional one?

In choice of law a one-dimensional approach is preferable for theoretical as well as practical reasons. Generally speaking, a forum's choice-of-law rules and principles depend neither upon the basis on which adjudicatory authority is claimed nor upon the prospects for the resulting judgment's enforcement abroad. Moreover, since enforcement may be appropriate in several states, each of which holds different views respecting choice-of-law methodologies and solutions, great difficulties would be encountered—at least in multilateral conventions—in linking closely choice of law with either jurisdiction to adjudicate or recognition and enforcement. To the extent that a legal

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1. The first international instrument to regulate broadly jurisdiction to adjudicate in the international sense is the 1968 Brussels Convention. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention] (for the consolidated, current text of this convention see 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413).

order takes specific choice-of-law rules into account in deciding whether to enforce a foreign judgment, an indirect control by imposing a choice-of-law test for recognition suffices. Little would be gained by regulating directly the State of origin's choice-of-law rule or methodology so far as these are employed for that State's own purposes or affect possible enforcement in third states. Accordingly, neither a three-dimensional convention nor a two-dimensional one dealing directly with choice of law and either jurisdiction to adjudicate or recognition and enforcement of foreign judgments is practical.

A two-dimensional approach is, however, feasible where jurisdiction to adjudicate and recognition of foreign judgments are in question. A symbiotic relationship, practically and theoretically speaking, exists between adjudicatory authority and enforcement of foreign judgments; recognition conventions almost invariably impose a jurisdictional test. Should these two problem areas be addressed separately or together, in a simple or a double convention?

This issue is raised by the decision of the Hague Conference on Private International Law, at its Eighteenth Session in October, 1996, "to include in the Agenda of the Nineteenth Session [in October, 2000] the *question of jurisdiction, and recognition and enforcement* of foreign judgments in civil and commercial matters."<sup>2</sup>

The considerations that support the Conference's decision to use the two-dimensional design are discussed below.<sup>3</sup> Before considering the form that a two-dimensional convention—a

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2. Hague Conference on Private International Law: Final Act of the 18th Session, Oct. 19, 1996, at B1 (emphasis added).

The project on which the Hague Conference has begun work is discussed in some detail in Arthur T. von Mehren, *Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention Be Useful?*, 57 RABELSZ 449, 449-59 (1993); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 271-87 (1994) [hereinafter von Mehren, *Recognition and Enforcement of Foreign Judgments*]; and Arthur T. von Mehren, *The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments*, 61 RABELSZ 86, 86-92 (1997). For general background, see also Arthur T. von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and in the United States*, 81 COLUM. L. REV. 1044, 1044-60 (1981) [hereinafter von Mehren, *Recognition and Enforcement of Sister-State Judgments*].

3. See discussion *infra* Parts II.A and II.B.

double convention (*convention double*), in the broad sense of the term—might take, the two basic variants are discussed: the full fledged or complete double convention (*convention double*) and the mixed convention (*convention mixte*).

*B. Double Conventions: The Two Basic Variants*

The distinguishing characteristic of a full-fledged double convention is that the courts of each Contracting State are, subject perhaps to a limited *forum non conveniens* exception,<sup>4</sup> required to decide cases brought before them on a jurisdictional basis prescribed by the convention but must otherwise refrain from adjudicating on the merits. In litigations within a double convention's scope, either the matter proceeds on a convention-prescribed basis and a judgment entitled to recognition and enforcement results or the proceeding is aborted for lack of adjudicatory authority and a judgment on the merits cannot be given. In a pure double convention, all jurisdictional bases not required are prohibited. Each Contracting State is required to make available and, subject perhaps to minor qualifications, to exercise certain bases of jurisdiction in the international sense. Only these required bases can be invoked—permitted bases that are not required have no place—and all resulting judgments are, subject to rare exceptions, enforceable in the other Contracting States.

A mixed convention differs from a pure double convention in that it divides bases of adjudicatory authority into three—rather than two—groups: (1) required bases that each Contracting State must make available if the litigation falls within the scope of the convention and whose use results in judgments entitled, in principle, to recognition and enforcement under the convention; (2) permitted bases that a Contracting State is not forbidden to use but whose use results in judgments whose enforceability *vel non* is determined, as has traditionally been the case internationally, under the State addressed's general law of recognition and enforcement; (3) prohibited bases that a Contracting State is not entitled to invoke in litigation that is within the scope of the convention.

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4. The duty to exercise adjudicatory authority when a required jurisdictional basis is present can also be qualified by convention rules respecting *lis pendens* or by exclusive jurisdiction requirements.

### C. *Are Brussels and Lugano Pure Double Conventions?*

No example exists of a pure—or true—double convention.<sup>5</sup> It is often—and incorrectly—assumed that two regional conventions—Brussels (1968) and Lugano<sup>6</sup> (1988)—are true double conventions. Article 3 of each convention does provide that “Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2-6 of . . . Title [II Jurisdiction].”<sup>7</sup> The conventions would be purely double in character had they regulated directly not only the assumption of adjudicatory authority over *defendants domiciled* in a Contracting State but *also over those not so domiciled*.

Where *nondomiciliary* defendants are concerned, Brussels and Lugano function as simple or single conventions (*conventions simples*), albeit of a most radical type. Article 4, paragraph one, provides that “[i]f the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16 [providing for exclusive jurisdiction], be determined *by the law of that State*,” not by the convention.<sup>8</sup> Pursuant to Article 26 of Title III, Recognition and Enforcement, such judgments “[s]hall be recognized in the other Contracting States . . . .”<sup>9</sup> To clinch the matter, Article 28 goes on to provide that, subject to certain exceptions irrelevant for present purposes, “the jurisdiction of the court of the State of origin may not be reviewed; the test of public policy referred to in . . . Article 27(1) may not be

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5. One international instrument—the New York Convention—employs the duality principle in approaching recognition problems. Its Article II regulates the adjudicatory authority of arbitral tribunals and Articles III through V govern recognition and enforcement of the resulting awards. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, arts. II-V, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with respect to the United States Dec. 29, 1970). Inasmuch as arbitral authority rests on a single basis—party agreement—regulation of the jurisdictional issue is far less complex and controversial than where the adjudicatory authority of courts is in question.

6. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620 [hereinafter Lugano Convention].

7. Brussels Convention, *supra* note 1, art. 3; Lugano Convention, *supra* note 6, art. 3 (closely parallel language).

8. Brussels Convention, *supra* note 1, art. 4 (emphasis added); Lugano Convention, *supra* note 6, art. 4.

9. Brussels Convention, *supra* note 1, art. 26; Lugano Convention, *supra* note 6, art. 26.

applied to the rules relating to jurisdiction.”<sup>10</sup>

Where defendants *not* domiciled in a Contracting State are in the picture—certainly a phenomenon that is not purely theoretical, Brussels and Lugano thus represent a radical form of the *convention simple*. Previously, all one-dimensional recognition conventions had imposed jurisdictional tests; the judgment had to satisfy a requirement designed to assure that the court of origin’s assertion of adjudicatory authority satisfied minimum standards of fairness and justice. Under traditional recognition conventions, judgments resting on many of the “exorbitant” bases of jurisdiction catalogued in Article 3, paragraph 2, of the Brussels and Lugano conventions would be denied recognition and enforcement except—perhaps—in situations where the court addressed would itself employ the basis in question.<sup>11</sup> Brussels and Lugano give instead the State of origin *complete control* over the jurisdictional bases that it chooses to use where nondomiciliary defendants are concerned and then requires essentially automatic recognition and enforcement of the resulting judgment by other Contracting States.<sup>12</sup>

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10. Brussels Convention, *supra* note 1, art. 28; Lugano Convention, *supra* note 6, art. 28 (closely parallel language).

11. Brussels Convention, *supra* note 1, art. 3; Lugano Convention, *supra* note 6, art. 3.

12. Under Article 59, however, Contracting States can assume, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 [the so-called “exorbitant” bases of jurisdiction].

Brussels Convention, *supra* note 1, art. 59; Lugano Convention, *supra* note 6, art. 59.

The remedy provided by Article 59 is both incomplete and difficult to put into effect. Third States are required to negotiate recognition and enforcement conventions with Brussels and Lugano States, which often may be feasible, if at all, only through long, bilateral negotiations. In all events, very little use has been made of Article 59.

Two conventions taking advantage of the article came into force in 1977: A bilateral convention of June 17, 1977 between Germany and Norway; and a multilateral convention of October 11, 1977 between Norway, Denmark, Finland, Iceland, and Sweden. Both were rendered obsolete by the Lugano Convention.

More recently, both the United Kingdom and France have negotiated with Canada bilateral conventions that utilize Article 59. The Convention Between the United Kingdom of Great Britain and Northern Ireland and Canada Providing For the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial

To this regime, one exception is made; a tinge of duality is introduced that makes matters worse. The second paragraph of Article 4 provides that:

As against . . . a defendant [not domiciled in a Contracting State], *any person domiciled in a Contracting State* may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and *in particular those specified in the second paragraph of Article 3 [the so-called "exorbitant bases"]*, in the same way as the nationals of that State.<sup>13</sup>

It hardly exaggerates to characterize "this aspect [Article 3, paragraph two, and Article 4, paragraph two] of the Brussels [and Lugano] Convention[s] . . . [as] the single most re-

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Matters, Apr. 24, 1984, 1988 Gr. Brit. T.S. No. 74 (Cmd. 519), came into effect on January 1, 1987. See Reciprocal Enforcement of Foreign Judgments (Canada) Order 1987, S.I. 1987 No. 468. The Convention, in English and French texts, is set out in the Schedule to the Order and in the Canada United Kingdom Civil and Commercial Judgments Convention Act, R.S.C., ch. C-30, sched. (1985) (Can.). The Convention was amended by an exchange of Notes in 1995 to include a reference to the Lugano Convention in Articles I, II(1), and IX(1). See UK Reciprocal Enforcement of Foreign Judgments (Canada) (Amendment) Order 1995, S.I. 1995 No. 2708. At present, the Convention does not apply in Quebec and the two Canadian territories.

The Convention Between the Government of Canada and the Government of the French Republic on the Recognition and Enforcement of Judgments in Civil and Commercial Matters and Mutual Legal Assistance in Maintenance was signed in June 1996. It is not yet in force as neither Canada nor France has yet adopted the necessary domestic implementing legislation.

The United Kingdom signed with Australia on August 23, 1990 an Agreement providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters. See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Australia Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, Aug. 23, 1990, 1995 Gr. Brit. T.S. No. 45 (Cmd. 2896). It seems that the convention has not yet been brought into effect. Cf. Caryn Mackenzie, *England and Wales*, in ENFORCEMENT OF FOREIGN JUDGMENTS 150 (Dennis Campbell ed., 1997).

The United Kingdom and the United States began in the early 1970s bilateral negotiations for a Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters that was designed, *inter alia*, to take advantage of Article 59. An *ad referendum* text was initialed in 1976. Ultimately, the negotiations broke down, due in large measure to concerns respecting product-liability claims on the part of U.K. manufacturers and the U.K. insurance industry. See von Mehren, *Recognition and Enforcement of Foreign Judgments*, *supra* note 2, at 273-74; PETER NORTH, *ESSAYS IN PRIVATE INTERNATIONAL LAW* 213-14 (1993).

13. Brussels Convention, *supra* note 1, art. 4 (emphasis added); Lugano Convention, *supra* note 6, art. 4 (emphasis added).

gressive step that has occurred in international recognition and enforcement practice in this century."<sup>14</sup> Clearly, the Hague Conference cannot follow the lead of the Brussels and Lugano so far as defendants not domiciled in a Contracting State are concerned.

## II. THE ADVANTAGES OFFERED BY A TWO-DIMENSIONAL APPROACH TO JURISDICTION AND RECOGNITION CONVENTIONS

### A. *In General*

Without prejudice to whether a mixed or a pure double convention is preferable, is a two-dimensional approach superior to a one-dimensional one where jurisdiction to adjudicate and enforcement of foreign judgments are in question?

By incorporating significant elements of duality, a convention can clarify considerably the positions in international litigation of plaintiffs and defendants alike. Consulting the convention, plaintiffs can determine with relative ease and accuracy where they can bring an action capable of generating a judgment assured of recognition and enforcement in States parties to the convention. On the other hand, defendants can know in which convention States they cannot be sued. Accordingly, basic information needed to make litigation decisions is more accessible to both parties than under a *convention simple* regulating only recognition and enforcement.<sup>15</sup> In particular, "double" conventions provide clear, easily accessible information as to where an action can be brought and where it cannot be. (Pure double conventions enjoy here, of course, an informational advantage over mixed conventions since the latter's *permitted* jurisdictional bases are one-dimensional in character.)

A further advantage that both types of two-dimensional conventions offer when well designed is a regime more evenly balanced between plaintiffs and defendants than that provided by one-dimensional recognition conventions. The latter afford

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14. von Mehren, *Recognition and Enforcement of Sister-State Judgments*, *supra* note 2, at 1060.

15. One-dimensional conventions dealing with jurisdiction to adjudicate are not considered specifically in the discussion that follows; they have little attraction and are not encountered in practice.



defendants no protection where a judgment can be enforced in the State of origin or in another State under the latter's general—non-convention—law of recognition and enforcement. On the other hand, to the extent that a convention is dual in nature, at the minimum it aborts actions based on exorbitant bases of jurisdiction and thus protects defendants not only in the putative State of origin but also in third States not parties to the convention.

The two-dimensional approach—whether in a pure or a mixed form—offers as well significant informational advantages that a one-dimensional recognition convention cannot provide. The latter is silent as to which states can exercise adjudicatory authority in given circumstances; in order to answer this basic question, a party must analyze the legislation and the case law of each state with respect to which the issue arises.

Obtaining recognition and enforcement abroad tends to be a more central and difficult issue for plaintiffs than defendants. Plaintiffs, by bringing an action, consent to the forum's exercise of adjudicatory authority; accordingly, where judgment is for the defendant, normally an objection to the court's exercise of jurisdiction cannot be made and the jurisdictional requirements for recognition and enforcement are satisfied. Adjudicatory authority over defendants can, of course, rest on consent; for example, the parties may have agreed upon a forum-selection clause. Typically, however, plaintiffs must establish a basis for adjudicatory authority over defendants that turns on a relationship between either a party (usually the defendant) or the underlying controversy and the forum. A one-dimensional convention thus provides information respecting jurisdictional requirements for recognition purposes that is vital for the plaintiff in selecting the forum but, at least at this stage, of relatively little help to the defendant since he does not control the choice of forum.

Of course, when a successful plaintiff seeks recognition and enforcement abroad, the defendant may benefit from these requirements. The thrust of contemporary recognition conventions is, however, to render judgments more easily and fully enforceable abroad in light of the increasing globalization of economic and social relationships. Overall, one-dimensional recognition conventions thus offer considerably more to plaintiffs than to defendants. For reasons suggested above, two-

dimensional conventions, whether pure or mixed, allocate advantage more equally between the parties.

*B. Pure and Mixed Double Conventions: Comparative Advantages*

Is then the pure double-convention model feasible for a recognition convention designed to be world-wide in scope? And, if so, are such a convention's synergies—or those of a mixed convention—more likely to result in a well balanced and useful instrument?

At first blush, the full fledged double-convention model has a strong appeal. Such conventions give the parties more complete information respecting litigational possibilities. Moreover, at least in theory, a double convention can provide an appropriately limited number of required jurisdictional bases that strike a fair balance between the claim of plaintiffs to reasonably convenient and accessible forums in which to seek justice and the claim of defendants that limits be set to the advantage that plaintiffs enjoy because they control forum-selection. Since only *required* jurisdictional bases can be invoked, such a convention can in theory ensure a more appropriate balance between the positions of plaintiffs and defendants than can a mixed convention. The attractiveness of a true double convention thus depends in considerable measure on the appropriateness and fairness of the jurisdictional bases that it provides.

Were international conventions drafted by Solons speaking for utopian republics, a pure double convention could perhaps be undertaken in the confidence that the theoretically best—or next best—solution would be achieved. In the real world, however, the drafters of a double convention will be severely tempted to achieve agreement by accepting each others' marginal jurisdictional bases. When the stark choice between canonizing and demonizing a basis for assuming adjudicatory authority is faced, it is more likely than not that either unqualified acceptance will be given to a significant number of bases whose merit is dubious or the negotiations will break down.

The considerations that can lead to the breakdown of negotiations for a double convention are not limited to insistence on the acceptance of jurisdictional bases of marginal quality. In addition, one legal order may have strong reasons for claiming

adjudicatory authority while another has, from its perspective, strong reasons for refusing recognition of the resulting judgment. The likelihood and intensity of such tension increase as a function of the differences between the social, sociological, political, and economic cultures of the legal orders in question. In groupings of states that have relatively common backgrounds and cultures, these conflicts can often be resolved in favor of unqualified acceptance or unqualified rejection of the basis in question; this is especially so where the states aspire to a more closely knit legal, economic, and political order.

World-wide, however, in many cases these tensions will be too deeply rooted to be resolved in the either-or fashion that a true double convention requires. Arguably, by introducing a general choice-of-law test and by a broad and lax conception of *ordre public* one could reduce the stringency of a full-fledged double convention sufficiently to make the approach acceptable in a world-wide convention. Such cures would, however, deprive the resulting convention of much of its value: A choice-of-law test introduces complexity and uncertainty at the stage of recognition and enforcement; an expansive conception of *ordre public* unbridles judicial discretion.

A strict duality approach in a world-wide convention also carries with it a practical difficulty worth noting: States adopting such a convention would typically experience complications resulting from the co-existence of two quite different regimes regulating exercises of adjudicatory authority—one for litigation generally, the other for litigation falling under the convention. This situation would lead to complications and confusion.

In light of the difficulty—perhaps impossibility—of drafting, at least for world-wide use, an acceptable double convention, a more nuanced and less comprehensive application of the duality principle has considerable attraction.

Strict adherence to duality requires that a convention divide all possible bases for assertions of adjudicatory authority into two—and only two—groups: Bases for exercising adjudicatory authority that are acceptable and, conversely, bases that are not. A more flexible approach divides jurisdictional bases—like Caesar's Gaul—into three parts: required, permitted, and prohibited. States could—but would be free not to—make permitted—as distinguished from *required*—bases available but judgments resting on a permitted basis would *not* be entitled to recognition and enforcement under the convention.

Instead, the enforceability *vel non* of judgments resting on such bases would be handled, as has traditionally been the case internationally, under the addressed State's general law of recognition and enforcement.<sup>16</sup>

In a mixed convention the pressure to include marginal bases in the required list is far less than in a double convention; bases that are seen as marginal or problematic need neither be canonized by placing them on the required list nor demonized by placing them on the prohibited list. Their ambivalent quality is instead recognized. The educational effect of a mixed convention on general thinking respecting the appropriate scope of adjudicatory authority is, therefore, more constructive than that of a full-fledged double convention. In addition, states would be free to make permitted bases available where they had strong reasons for claiming adjudicatory authority but the resulting judgments could be denied recognition by other Contracting States.

A mixed convention has a beneficial incentive effect that a double convention lacks; it encourages the use in practice of sound, rather than marginal, jurisdictional bases. A pure double convention provides no incentive for a plaintiff to avoid using a marginal *required* basis since all required bases yield judgments entitled to recognition and enforcement under the convention. Under a mixed convention, on the other hand, a plaintiff who proceeds on a permitted basis that would be a required basis in a double convention, cannot enforce the resulting judgment under the convention.

A further advantage of the mixed-convention approach is that—in comparison with a double-convention approach—fewer complications are produced by the coexistence of two regimes regulating exercises of adjudicatory authority. The bases of *permitted* jurisdiction remain the same regardless whether the convention is invoked; accordingly, drastic revision of the state's existing law of jurisdiction is not required. Of course, to the extent that a state's general law had previously *not* provided a *required* basis, the basis would have to be added—either as an effect of ratifying the convention or in implementing

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16. A possible refinement would allow states to agree bilaterally that the use by one of *certain permitted* bases would yield judgments entitled to recognition by the other under the convention. Bilateralization has, of course, its own difficulties.

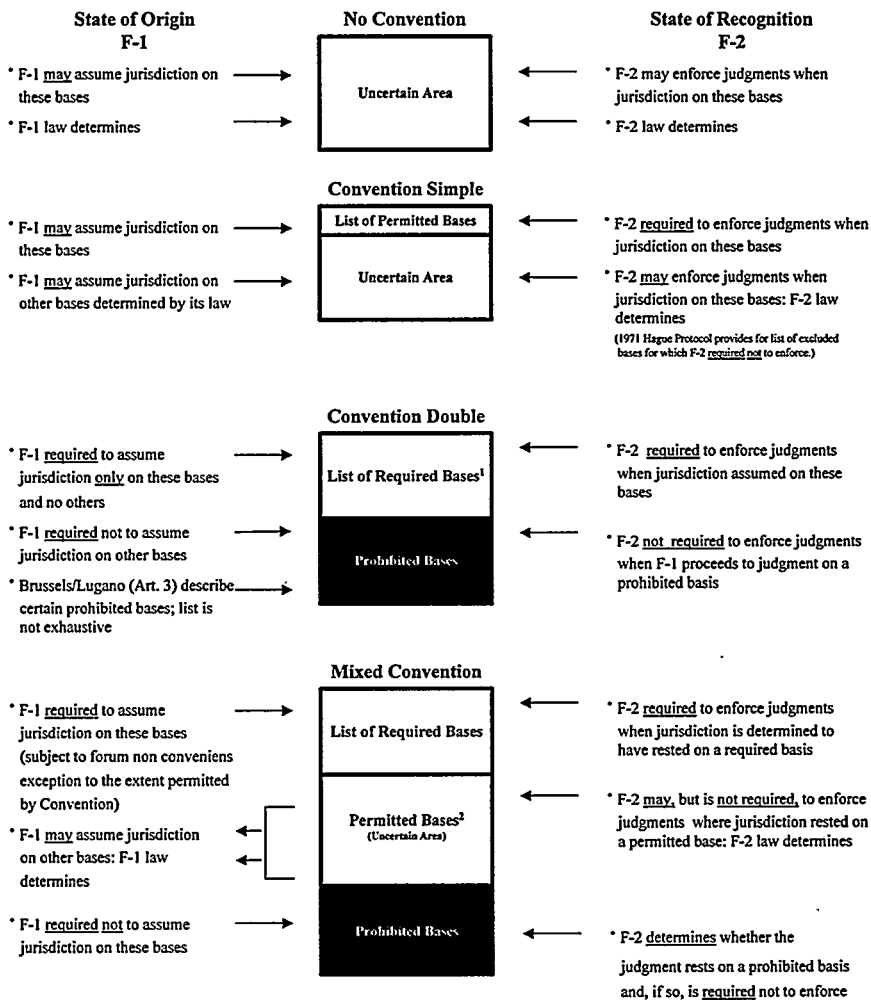
legislation—to the State's jurisdictional repertoire for litigations falling within the convention's scope. Likewise, where the convention applies, a State would be under an international obligation to forgo use of *prohibited* jurisdictional bases. For the rest, however, each State's general law of jurisdiction can remain undisturbed.

Because of its flexible format, a balanced and acceptable mixed convention should be draftable. Such a convention offers reliable, low-cost information to plaintiffs and defendants and would improve their lot generally. By designating *required* and *prohibited* jurisdictional bases, it would also both encourage the use of higher quality bases and protect defendants against various exorbitant claims of adjudicatory authority. Over time, a well designed mixed-convention should have as well a distinctly beneficial effect on general thinking and practice respecting the exercise of adjudicatory authority and the enforcement of foreign judgments.

### III. CONCLUDING REMARKS

Adopting the mixed-convention approach would, of course, leave many difficult issues unresolved; these arise, however, as well for pure double-conventions and are, if anything, even more intractable in that setting. For example, to what extent—if at all—will *forum non conveniens* stays or dismissals be allowed when a required jurisdictional basis is in question? Will the convention accept the *lis pendens* principle and, if so, how will it apply to proceedings seeking declaratory judgments? Should the convention prohibit anti-suit injunctions? What measure of recognition will be accorded judgments awarding punitive or multiple damages? If certain conditions are satisfied, should a state be permitted to enforce, but in a reduced amount, damage awards that are, under its standards, grossly excessive? Finally, is there any way to deal effectively with a concern that arises with all recognition conventions that are, in principle, open to every interested State: Should—and can—a degree of protection be afforded the judgment debtor when enforcement is sought for a judgment emanating from a State, party to the convention, whose administration of justice is regarded as falling, at least on occasion, below internationally acceptable standards?

## Types of Foreign Judgments Recognition Conventions

<sup>1</sup> All bases not listed as Required are Prohibited.<sup>2</sup> All bases not listed as Required or Prohibited are Permitted.

