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INTRODUCTION

In June 1996 I had the pleasure of attending, as a Recording Secretary, the Hague Conference's second Special Commission on the recognition and enforcement of judgments. Although some of what I say here is drawn from my observations of the Special Commission, my comments are not an official statement of either the Hague Conference or the United States delegation. My purpose here is to identify some of the more difficult issues likely to present themselves during the negotiations.

Ultimately, I believe that it will be difficult—though not impossible—to negotiate a convention acceptable to the United States and the other members of the Hague Conference. However, in my judgment, the difficulty of the task does not counsel its abandonment. Even admitting the possibility that the project will prove unsuccessful, the large potential benefits still make it worth grasping at the gold ring.

I. ISSUE NO. 1: DO THE OTHER MEMBERS OF THE HAGUE CONFERENCE HAVE SUFFICIENT INCENTIVE TO BARGAIN?

By international standards, United States recognition of foreign judgments is extremely liberal. Although U.S. courts once demanded reciprocity,[1] nowadays it is not generally a requirement for foreign recognition.[2] Rather, U.S. courts require simply that the foreign proceedings be conducted in a generally fair manner, and that the judgment be unaffected by fraud, a lack of jurisdiction or some other well-established ground for collateral attack.[3] As a practical matter, a huge

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1. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 210 (1895).

2. *See* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 287 (1991).

3. *See, e.g.*, Petition of Breau, 565 A.2d 1044, 1049 (N.H. 1989) (Souter, J.)

fraction of judgments rendered by Hague member states qualify for recognition in the United States.

By contrast, it is much more difficult to obtain recognition of a U.S. judgment in most foreign nations. Although there is some movement towards liberalization,[4] concerns over large damage awards, punitive and multiple damages, jury trials and a general suspicion of our legal system[5] have led to any number of foreign devices for denying effect to U.S. judgments.[6]

So, if one considers only the number of judgments likely to be affected by a Hague Judgments Convention, the United States stands to gain disproportionately. This is not to say, however, that the United States is entirely without leverage. The enormous dimensions of the U.S. economy mean that a huge number of potential foreign judgment debtors have assets in the United States and are subject to enforcement without the need to present the judgment for recognition abroad. Contacts-based general jurisdiction—a doctrine much broader in scope than its European counterparts[7]—makes many foreign entities amenable to in personam jurisdiction on the basis of unrelated U.S. business activities.[8] Equally dubious principles of general jurisdiction—including the time-worn favorite of tag jurisdiction[9]—put foreign defendants at risk for assertions of jurisdiction that are unreasonable by international stan-

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(Canadian judgments are generally entitled to enforcement in U.S. courts).

4. *See, e.g.*, Peter Hay, *The Recognition and Enforcement of American Money Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729 (1992); *but see* Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 COLUM. J. TRANSNAT'L L. 641, 658-59 (1992) (arguing that case may not lead to significantly liberalized recognition).

5. Exacerbated, I fear, by the broadcasting of *People v. Simpson*, No. BA097211 (Cal. Super. Ct. 1995), and the morbid fascination that case drew here and abroad.

6. *See generally* MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE (1995).

7. *See* Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 133-37 (1992).

8. *See, e.g.*, Bryant v. Finnish Nat'l Airline, 208 N.E.2d 439 (N.Y. 1965) (small office in New York sufficient for jurisdiction in that state in an action to recover for injuries suffered in Paris, France).

9. Dating back in the United States at least to *Barrell v. Benjamin*, 15 Mass. 354, 358 (1819) and more recently confirmed in *Burnham v. Superior Court*, 495 U.S. 604 (1990).

dards.[10]

Thus, the main U.S. bargaining chip is to offer more predictable and narrow jurisdictional grounds. If a convention were, for instance, to allow for general jurisdiction over business entities only at their place of registration or principal offices and over individuals only at their habitual residence,[11] this would considerably diminish the risk of marginal jurisdictional assertions and subsequent enforcement proceedings. It remains to be seen, however, whether this is a big enough carrot to entice other member nations.

II. ISSUE NO. 2: DOES THE U.S. HAVE SUFFICIENT INCENTIVE TO BARGAIN?

Just as the other members of the Hague Conference might not be intensely interested in dealing, it is worth considering whether the United States has enough to gain to make the changes likely to be necessary to reach consensus. In one sense, of course, the current U.S. position is undesirable because of the difficulty of enforcing our judgments abroad. However, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[12] and increasing acceptance of arbitration agreements even in public law areas,[13] mean that many potential litigants can avoid the judicial process altogether.

Of course, not all potential litigants can avoid court. Tort

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10. The Permanent Bureau's report lists both service of the summons while the defendant is temporarily in the forum and the mere "doing" of business in the forum as potentially "exorbitant" bases of jurisdiction that might be specifically enjoined by the Convention. *See* CATHERINE KESSEDJIAN, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 80-82 (Hague Conference on Private Int'l Law, Prel. Doc. No. 7, Apr. 1997) [hereinafter KESSEDJIAN REPORT].

11. *See* HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY RESULTS OF THE WORK OF THE SPECIAL COMMISSION CONCERNING THE PROPOSED CONVENTION ON INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS §§ 3.1.1.-3.1.2, at 5 (Info. Doc., Sept. 1997) [hereinafter PRELIMINARY RESULTS].

12. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with respect to the United States Dec. 29, 1970) [hereinafter New York Arbitration Convention].

13. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (international antitrust dispute is the appropriate subject of arbitration).

plaintiffs, for instance, usually cannot practically enter into pre-dispute arbitration agreements and strongly prefer judicial fora. However, this is precisely where foreign suspicion of the U.S. judicial system runs deepest. Strict products liability, punitive damages, multi-year discovery, and well-publicized multi-million and multi-billion dollar jury verdicts all contribute to a great deal of foreign uneasiness about U.S. judgments. Further, the interest groups that may have the most to gain by a convention are not ones whose political influence is on the rise, as the successful drives for "tort reform" in state legislature after state legislature attest.[14]

The concessions that the United States will have to make may be so large in relation to the benefit to domestic interests as to doom the possibilities of ratification. In short, it may be that a convention acceptable to the other members of the Hague Conference cannot be ratified, and a convention that the United States would ratify may not be acceptable to the other members.

III. ISSUE NO. 3: WHAT ABOUT INCONSISTENCIES WITH UNITED STATES JURISDICTIONAL STANDARDS?

There is no realistic possibility that a convention will resemble the "minimum contacts" test[15] that dominates U.S. jurisdiction. The wild unpredictability of, and enormous volume of litigation generated by, this jurisdictional test are well documented.[16] The other members of the Hague Conference will have no desire to subject themselves to such a messy standard.[17]

Provisions in a convention that narrow jurisdiction over foreign parties would be unproblematic. A ratified convention would be the "[S]upreme Law of the Land"[18] and preempt

14. *See, e.g.*, Paul Burke & Patricia Kilday Hart, *The Best and the Worst Legislators 1997*, TEX. MONTHLY, July 1997, at 90 (discussing in part the previous session's passage of tort reform legislation).

15. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

16. *See, e.g.*, Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995); Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531 (1995).

17. I clearly recall, for instance, a member of the British delegation describing the minimum contacts test as "rather diffuse," which is perhaps the most diplomatic assessment one could make.

18. U.S. CONST. art. VI, cl. 2.

inconsistent state standards.[19]

The more interesting problem would arise if the convention were, in some circumstances, to allow for broader jurisdiction than allowed for under the minimum contacts test. For instance, in tort cases the Brussels and Lugano conventions allow for jurisdiction in "the place where the harmful event occurred."[20] It seems very likely that other delegations at the Hague will press for a similar tort standard, or at least one that is equally predictable.[21]

The two most prominent U.S. cases on tort jurisdiction, *World-Wide Volkswagen Corp. v. Woodson*[22] and *Asahi Metal Industry Co. v. Superior Court*,[23] forbid jurisdiction in the injury state in some cases. Thus, if the convention were to adopt a Brussels-style rule, and it were to be ratified by the United States, it would require U.S. courts to depart from the *World-Wide/Asahi* line of cases in order to honor the convention. Whether U.S. courts would then follow the convention or the *World-Wide/Asahi* line of cases is an interesting question.[24] In my view, there are excellent reasons for a U.S. court

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19. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (treaties preempt inconsistent state laws).

20. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 5(3), 1972 O.J. (L 299) 32 [hereinafter Brussels Convention] (for the consolidated, current text of this convention see 1990 O.J. (C 189) 2, *reprinted in* 29 I.L.M. 1413); Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, art. 5(3), 1988 O.J. (L 319) 9, 10, *reprinted in* 28 I.L.M. 620, 624 (popularly known as the Lugano Convention); *see also* Borchers, *supra* note 7, at 144-45.

21. Interestingly, the preliminary report drawn up by the Permanent Bureau of the Hague Conference suggests that Article (5)(3) of the Brussels Convention is problematic because it allows for "concurrent jurisdiction" in too many cases. *See* KESSEDJIAN REPORT, *supra* note 10, at 70; *see also* Brussels Convention, *supra* note 20, art. 5(3). The proposed solution, however, is a presumptive rule of jurisdiction in the victim's domicile, a standard that would conflict with the minimum contacts test in more cases than the Brussels standard. *See* KESSEDJIAN REPORT, *supra* note 10, at 70-72.

22. 444 U.S. 286 (1980).

23. 480 U.S. 102 (1987).

24. The problem would not necessarily be limited to tort cases. For instance, international conventions on child support generally allow for jurisdiction in the child's domicile or habitual residence. *See, e.g.*, Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, Apr. 15, 1958, 539 U.N.T.S. 27. The Permanent Bureau's report, not surprisingly, seems to favor this jurisdictional rule in a Hague Judgments Convention. *See* KESSEDJIAN REPORT, *supra* note 10, at 76. However, the minimum contacts test forbids jurisdiction in the child's home state, at least in some cases. *See,*

to follow a convention rather than existing minimum contacts precedent.[25] But, of course, the problem has not been resolved by the Supreme Court, which places the U.S. delegation in a somewhat uncertain position.[26] Complete confidence that U.S. courts would fully enforce a ratified convention would either require the U.S. delegation to negotiate for convention provisions that are entirely consistent with the minimum contacts test—probably an impossible task—or hope that a general escape provision—perhaps under the rubric of *ordre public*[27]—will solve the problem. In any event, the chaotic state of U.S. jurisdiction is likely to prove problematic either in the negotiations, ratification battle, or implementation of a convention.

IV. ISSUE NO. 4: WHAT ABOUT "EXCESSIVE" DAMAGES?

There can be little doubt that the propensity of the U.S. legal system to award damages considerably in excess of those usually awarded by other systems is now, and will be, the source of much concern in the negotiations.[28] Moreover, certain types of damages—notably tort punitive damages and statutory multiple damages such as those provided for by the anti-trust laws—are enormously unpopular abroad.[29]

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e.g., Kulko v. Superior Court, 436 U.S. 84 (1978).

25. The upcoming program of the Conflict of Laws Section of the Association of American Law Schools will examine this question. Papers will be published in the ALBANY LAW REVIEW. For an encouraging sign that jurisdiction in international cases may be subject to a more flexible test, see *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935 (11th Cir. 1997) (under Fifth Amendment due process standards, jurisdiction exists as long as the defendant has contacts with the United States as a whole and the choice of forum is not severely inconvenient).

26. Professor von Mehren has noted the problem, and expressed some concern regarding the ability of a convention to extend beyond jurisdictional limits currently articulated by the Supreme Court. *See* Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 281 (1994).

27. *Cf.* New York Arbitration Convention, *supra* note 12, art. V(2)(b), 21 U.S.T. at 2520, 330 U.N.T.S. at 42 (recognition of an arbitral award may be denied if a court finds that "[t]he recognition or enforcement of the award would be contrary to . . . public policy . . . .").

28. *See* KESSEDJIAN REPORT, *supra* note 10, at 106.

29. *See* Rookes v. Barnard, [1964] App. Cas. 1129 (H.L.) (restricting punitive damages in English cases to unusual circumstances); Protection of Trading Interests Act, 1980, ch. 11 (U.K.) (giving judgment debtors in Sherman Act cases a civil cause of action for two-thirds of the judgment; popularly known as the

One possible partial answer would be to exclude punitive and multiple damages from the scope of the convention altogether.[30] This would leave the (punitive) judgment creditor to the mercy of foreign courts and—as a practical matter—make it extremely difficult to enforce the punitive portion of the judgment abroad.[31] It seems clear that some exception like this will have to be made for punitive damages, because it is impossible to imagine other member states agreeing to enforce such judgments without re-examination.[32]

The more interesting question is whether exclusion of punitive and multiple damages will be enough to satisfy other member nations. Large pain and suffering awards may well be seen as "excessive" by other nations, but—unlike punitive damages—are difficult to exclude categorically.[33] The failed efforts at a bilateral treaty between the United States and the United Kingdom included a late-inserted Article 8A, which would have allowed the recognizing courts to enforce a judgment in a lesser amount if the judgment debtor could establish "that the amount awarded by the court of origin is greatly in excess of the amount, including costs, that would have been awarded . . . in the court of origin . . . ."[34] Even this far-reaching provision was not enough to allay the concerns of the British insurance industry, causing a breakdown in negotiations.[35] If this obstacle prevented the more modest project of concluding a bilateral agreement with a nation with which we share a language and the common law heritage, it seems safe to say it will be a major issue in negotiations with forty or so

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"Clawback Act").

30. *Cf.* KESSEDJIAN REPORT, *supra* note 10, at 108.

31. *See generally* Hay, *supra* note 4 (discussing German case refusing to recognize the punitive portion of a tort judgment).

32. For instance, the draft U.K.-U.S. bilateral treaty did not apply to judgments "to the extent that they are for punitive or multiple damages." Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, *initialed* Oct. 26, 1976, U.S.-U.K., art. 2(2)(b), 16 I.L.M. 71, 73 [hereinafter U.S.-U.K. Convention]; *see also* von Mehren, *supra* note 26, at 274.

33. *See* KESSEDJIAN REPORT, *supra* note 10, at 106.

34. David Luther Woodward, *Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom and the European Economic Community*, 8 N.C. J. INT'L L. & COM. REG. 299, 327 (1983) (Appendix containing revisions to the U.S.-U.K. Convention, *supra* note 32, which were proposed in negotiations that began on September 18, 1978).

35. *See* von Mehren, *supra* note 26, at 294.

nations, most of which are not of the common law heritage. The Permanent Bureau's report recognizes exactly this problem, and suggests either that "excessive" damages be defined in terms of the sorts of risks generally insurable in the state of the recognizing court or the use of a provision like Article 8A.

Even assuming that a provision like Article 8A is enough to soothe the anxieties of the other member states, there remains the question of whether this would leave anything worth ratifying from the U.S. perspective. Discussing Article 8A in the context of the upcoming Hague negotiations, one U.S. commentator urged that the notion of such damages-only revision be "discarded permanently."[36] Perhaps it should. But, if something like Article 8A is viewed as both too great and too small a concession it becomes difficult to see where the common ground lies.

V. OTHER ISSUES

There are many other issues likely to require extensive attention, though they are of less fundamental importance than those mentioned above. One is the much debated question of whether the convention should be of the "double" or "mixed" variety. The United States proposal for a mixed convention—which would allow for a "grey" zone of jurisdictional bases that are not forbidden but also do not require foreign recognition—appears to be the most sensible given the other difficult negotiating problems.[37] However, perhaps because of European familiarity with Brussels and Lugano, the current preference among the Hague member nations is for a strict double convention.[38] A double convention may well be an unrealistic expectation and—cognizant of this—the Permanent Bureau's report suggests that it may be only a starting point in the negotiations.[39]

Another formidable issue is the large number of "specialty"

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36. Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289, 294 (1994).

37. *See generally* von Mehren, *supra* note 26 (discussing advantages of a mixed convention).

38. *See* KESSEDJIAN REPORT, *supra* note 10, at 86-88.

39. Confirmation of this appears in PRELIMINARY RESULTS, *supra* note 11, § 2.2, at 3 ("[I]t is not certain that . . . [a purely double] convention is attainable.").

areas that might conceivably be excluded from the convention's scope. The Permanent Bureau's report states that it is "settled" that the status of natural persons, marital property, wills, succession of the estates of deceased persons, bankruptcy and social security will all be excluded from the scope of the convention.[40] The Permanent Bureau's report also mentions maintenance (*i.e.*, support) obligations, complex (especially environmental) torts, competition law, civil fines and customs duties and intellectual property matters as possible exclusions.[41] As a practical matter, consensus may often be reached more easily by excluding controversial areas. If, however, the exclusions become too numerous, any convention will be deprived of a good deal of its usefulness.

The general difference in legal philosophy between civil and common law nations is also likely to manifest itself peculiarly in a judgments convention.[42] One practical difficulty is likely be the question of whether the new convention should include provisions for discretionary declination of jurisdiction in the nature of *forum non conveniens*.[43] Demonstrating greater comfort with the idea of judicial discretion, the common law countries seem to favor the doctrine; demonstrating greater suspicion of the idea of judicial discretion, the civil law countries seem to oppose it.

Certainly, none of these—nor dozens of other—issues are insurmountable. But, it seems very likely that they will cause difficulty in the negotiations, even assuming the most fundamental obstacles can be overcome.

CONCLUSION

The U.S. position on this matter is a difficult one. The United States has a poor record of ratifying Hague conventions specifically, and private law conventions generally. Successful

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40. *See* KESSEDJIAN REPORT, *supra* note 10, at 16-18.

41. *Id.* at 18-28.

42. For an excellent discussion of the differences between the two systems and the difficulties associated with attempting to have both traditions co-exist in one state, see Catherine Valcke, *Quebec Civil Law and Canadian Federalism*, 21 YALE J. INT'L L. 67 (1996).

43. For a worldwide study of this doctrine, see J.J. FAWCETT, DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW (1995). It is somewhat simplified to describe the doctrine as only a creature of the common law, as some civil jurisdictions allow it in some form.

negotiations will require the overcoming of deeply held suspicions of the U.S. legal system. But, the Hague negotiations represent an enormous opportunity. A satisfactory judgments convention would be a giant step toward a more closely integrated world-wide legal system in which the goal of access to justice and fairness to litigants without regard to international boundaries could come much closer to realization.