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HOW SUBSTANTIAL IS OUR NEED FOR A JUDGMENTS-RECOGNITION CONVENTION AND WHAT SHOULD WE BARGAIN AWAY TO GET IT?[†]

Russell J. Weintraub^{*}

I. INTRODUCTION

In 1992 the United States proposed that the Hague Conference on Private International Law¹ "undertake work on a convention dealing with the recognition and enforcement of foreign judgments."² A Special Commission impaneled to study the proposal concluded that a judgments convention would be "advantageous,"³ and work on a judgments convention is proceeding.

The reason for the U.S. proposal is that, with the exception of specialized tax treaties⁴ and the occasional operation of

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1. The Hague Conference on Private International Law is an organization of 38 member countries focusing on the drafting of multilateral conventions covering choice of law and procedural problems of international litigation. The Conference first met in 1893 and was joined by the United States in 1964. See Peter H. Pfund, *The Hague Conference Celebrates Its 100th Anniversary*, 28 TEX. INT'L L.J. 531, 532-33 (1993). The United States has ratified four of the Hague Conventions dealing with service abroad, taking evidence abroad, abolishing the requirement for legalization of foreign public documents, and international child abduction. See *id.*

2. Permanent Bureau, *Conclusions of the Working Group Meeting on Enforcement of Judgments*, in HAGUE CONFERENCE ON PRIVATE INT'L LAW, PROCEEDINGS OF THE SEVENTEENTH SESSION 10 TO 29 MAY 29, 1993, Tome I, 17 H.C.P.I.L. PROC. 257 (1995) [hereinafter *Working Group Conclusions*]. The proposal was contained in a letter of May 5, 1992 from the Legal Adviser for the U.S. Department of State to the Secretary General of the Hague Conference. See Arthur von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 282 (1994).

3. CATHERINE KESSEDJIAN, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 12 (Hague Conference on Private Int'l Law, Prel. Doc. No. 7, 1997) [hereinafter KESSEDJIAN REPORT].

4. See Alan R. Johnson et al., *Reciprocal Enforcement of Tax Claims Through Tax Treaties*, 33 TAX LAW. 469, 473-74 (1979) (discussing "general enforcement" and "limited enforcement" treaties); *id.* at 475-76 (discussing limited enforcement

a friendship, commerce, and navigation treaty,⁵ the United States is not a party to any convention that requires recognition of judgments. Most U.S. jurisdictions recognize and enforce the judgments of other countries,⁶ but there is a perception that this favor is not reciprocated abroad.⁷ In addition, a multilateral convention ratified by the United States and the members of the European Union (EU) would free the United States from the specter of judgments rendered by EU countries but founded on exorbitant bases for personal jurisdiction.⁸

Except for regional conventions such as the Brussels Convention⁹ and the Inter-American Convention,¹⁰ past attempts at judgments conventions have ended in failure. For several years the United States and United Kingdom negotiated a

treaties designed to prevent abuse of treaties limiting double taxation); *id.* at 484 (discussing mechanics of enforcement and desirability of a determination of liability by judgment in the taxing nation).

5. See *Choi v. Kim*, 50 F.3d 244, 248 (3d Cir. 1995) (stating that "[t]he Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217, elevates a Korean judgment to the status of a sister state judgment"); *Vagenas v. Continental Gin Co.*, 988 F.2d 104, 106-07 (11th Cir. 1993) (stating that the treaty between the United States and Greece, which guarantees to the citizens of each country the same access to the courts of the other country as the citizens of that country, precludes Alabama from applying a shorter statute of limitations to recognition of a Greek judgment than would be applied to a sister-state judgment).

6. See discussion *infra* Part II.B.

7. See discussion *infra* Part II.A.

8. See 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). See especially Article 3 (listing exorbitant bases for jurisdiction utilized by the European Union (EU) countries); Article 4 (providing that these exorbitant bases may be used against defendants not domiciled in the E.U.); Article 28 (requiring recognition of judgments of other E.U. countries even if an exorbitant basis for jurisdiction has been used); Article 59 (permitting E.U. countries to bind themselves by convention with a non-E.U. country not to recognize E.U. judgments when exorbitant bases for jurisdiction are used).

9. Brussels Convention, *supra* note 8. The Lugano Convention mirrors the Brussels Convention and is ratified by the E.U. countries and the non-E.U. members of the European Free Trade Association. See 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 (commonly referred to as the Lugano Convention).

10. Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, May 24, 1984, OAS Treaty Ser. No. A/39, reprinted in 24 I.L.M. 468 [hereinafter Inter-American Convention]. The United States has not ratified this convention.

judgments convention, and in 1976 the negotiators initialed an *ad referendum* text.¹¹ This text was subsequently amended to permit refusal to enforce judgments in excess of an amount considered proper in the recognizing country.¹² Despite this amendment, the attempt foundered because U.K. manufacturers and insurers feared huge U.S. jury awards.¹³ A previous Hague Conference project produced a judgments convention,¹⁴ but it was ratified by only three countries and has not entered into force even between these three because additional bilateral agreements, required by the convention, have not been concluded.¹⁵

Thus, based on past experience, the prospects for a multi-lateral judgments convention that will meet the needs of the United States are not bright. We are blessed with representatives of U.S. interests who are willing to contribute their formidable knowledge and skill to the endeavor.¹⁶ The questions that press upon our negotiators are what sort of convention can they realistically work toward and what concessions of U.S. interests are appropriate to facilitate a successful conclusion.

Part II of this Article explores in more detail the need for a convention. Part III surveys the possible forms for a convention. Part IV focuses on why U.S. Supreme Court decisions have created difficulties for our negotiators in reaching agreement on proper bases for personal jurisdiction. Part V discuss-

11. Draft Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, *initialed* Oct. 26, 1976, U.K.-U.S., *reprinted in* 16 I.L.M. 71.

12. *See* von Mehren, *supra* note 2, at 274 (quoting Article 8A added in 1978). For the wording of 8A, see text accompanying note 225.

13. *See* von Mehren, *supra* note 2, at 274.

14. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol, *done* Feb. 1, 1971, 1144 U.N.T.S. 249.

15. *See* von Mehren, *supra* note 2, at 275 n.17.

16. The U.S. delegates to the first meeting of the Hague Conference's Special Commission on Judgments in June 1997 were Professor Arthur T. von Mehren, Harvard Law School; Professor Ronald A. Brand, University of Pittsburgh School of Law; Peter D. Trooboff, of Covington and Burling, Washington, D.C.; David Epstein, Director, Office of Foreign Litigation, Criminal Division, Department of Justice; Peter H. Pfund, Assistant Legal Adviser for Private International Law, U.S. Department of State; Sean D. Murphy, Legal Counselor, American Embassy the Hague. *See* Memorandum from Peter H. Pfund to the Author and Others (May 27, 1997) (on file with author).

es what matters other than jurisdiction the convention might cover. Part VI concludes that the odds for success are not good, but that the exercise will, in any event, be useful if it does nothing but cause us to rethink those aspects of our legal institution that have created concern abroad.

II. THE NEED FOR A CONVENTION

A. *Current Data Is Needed*

The conventional wisdom driving the U.S. initiative for a judgments convention is that American states freely recognize and enforce foreign judgments,¹⁷ but that other countries do not accord reciprocal treatment to U.S. judgments.¹⁸ A member of the Study Group advising the Department of State on negotiations for the judgments convention, however, states that "the little empirical research conducted to date by the author and others has not demonstrated a great need for a convention."¹⁹ Up-to-date empirically verified information on the current treatment of U.S. judgments abroad²⁰ would greatly assist our negotiators. It is also useful to know to what extent difficulties encountered are the fault of the U.S. attorney who has blundered by not serving process on the foreign party in a manner that courts of other countries will countenance.²¹ In 1988, Professor Juenger conducted a survey of the

17. See Joseph J. Simeone, *The Recognition and Enforceability of Foreign Country Judgments*, 37 ST. LOUIS U. L.J. 341, 357 (1993) (stating that "the modern trend in the courts of the United States is to grant recognition of, and conclusive effect to, the foreign judgment if all the elements of due process and civilized procedures are followed").

18. See 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 & POLY INT'L BUS. 79, 81 (1994) (stating that "the consensus" in academic circles and in the U.S. Department of State "is that individuals seeking enforcement of U.S. judgments abroad have not had the same good fortune as foreign litigants seeking enforcement in the United States").

19. *Id.* at 80.

20. See *id.* at 82 (stating that "[t]here is no catalogue of the actual experiences of U.S. litigants seeking enforcement abroad").

21. See *id.* at 95 (stating that Korea, Japan, Mexico, Panama, Portugal, South Africa, Spain, Taiwan, and Venezuela "impose service of process procedures that are not common in the United States" and will not enforce a U.S. judgment if the defendant was not served according to these procedures); Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L.J. 1059, 1111 (1994) (stating that whether a Mexican court will recognize a U.S. judgment depends, in part, on the method used to serve process on the Mexican defendant).

treatment of U.S. judgments abroad and found the situation "far from satisfactory,"²² but much has changed since then.²³ With modern methods of instant communication of manuscripts, a reliable update by foreign experts should be feasible within a reasonably short time.²⁴ In addition, the resources of the U.S. government and national and local bar associations should expeditiously be able to compile a catalogue of experiences of a large sample of attorneys who have sought recognition abroad of a U.S. judgment.

Current reliable data on the reception of U.S. judgments abroad may be a two-edged sword. If, 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, but one should be easier to obtain with minimum concession of U.S. interests, such as giving foreign courts the right to pare down "excessive" judgments.²⁵ If there are grave difficulties in obtaining recognition for U.S. judgments abroad, there is more need for a convention, but one will be more difficult to obtain without concessions that many Americans will find unpalatable. If the situation is generally favorable to the treatment of U.S. judgments but there are a few important

22. Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 4 (1988).

23. See, e.g., Alan Lescht, *Hunting the Elusive Money Judgment*, LEGAL TIMES, Oct. 23, 1995, at 35, 36 (stating that "generally speaking, foreign courts will recognize and enforce U.S. money judgments provided that the plaintiff is able to demonstrate" that the defendant has been accorded a fair hearing in a court properly exercising jurisdiction, that judgment is final, is not contrary to public policy, and that the U.S. jurisdiction rendering the judgment would accord reciprocal recognition to the foreign courts' judgments); Giovanni M. Marini et al., *Recognition of Foreign Judgments*, INT'L COM. LITIG., Feb. 1996, at 25 (reporting on change in Italian law making it "easier to have a foreign judgment recognized and enforced in Italy").

24. The update should be assisted by Professor Lutz's bibliography of codes, conventions, and publications, though most of the publications are more than ten years old. See Robert E. Lutz, *Enforcement of Foreign Judgments, Part II: A Selected Bibliography on Enforcement of U.S. Judgments in Foreign Countries*, 27 INT'L LAW. 1029 (1993).

25. This was the effect of the amendment to the *ad referendum* text of the U.K.-U.S. draft Judgments Convention in a fruitless effort to obtain U.K. approval. See von Mehren, *supra* note 2, at 274 (giving courts in the recognizing country the right to "recognize and enforce the judgment in a lesser amount" if the "amount awarded by the court of origin is greatly in excess of the amount" that would have been awarded in the recognizing country). For the full text of the amendment, see *infra* text accompanying note 225.

black holes, U.S. lawyers can advise their clients accordingly and utilize arbitration agreements and other devices, such as letters of credit,²⁶ to avoid having to rely on a U.S. judgment that will disappear abroad without a trace. The United States has ratified the New York²⁷ and Panama²⁸ Arbitration Conventions, which require enforcement of awards.²⁹ Most of the world's major commercial powers have also ratified the New York Arbitration Convention.³⁰

The United States does not need a judgments convention to curtail use of exorbitant bases of jurisdiction in E.U. countries.³¹ There is no evidence that these bases are being used against U.S. defendants,³² and German courts have reined in one of the most notorious bases, general jurisdiction over the owner of real or personal property located in Germany.³³

26. A letter of credit provides a method of guaranteeing payment of an indebtedness. See U.C.C. § 5-108 (requiring the issuer of a letter of credit to pay a draft accompanied by the documents listed in the letter).

27. 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].

28. Inter-American Convention on International Commercial Arbitration, opened for signature Jan. 30, 1975, 104 Stat. 448, O.A.S.T.S. No. 42 [hereinafter Panama Convention].

29. See New York Arbitration Convention, *supra* note 27, art. III (requiring recognition and enforcement); *id.* art. V (limiting grounds on which recognition and enforcement may be refused); Panama Convention, *supra* note 28, art. 4 (requiring recognition and execution), *id.* art. 5 (limiting grounds on which recognition and execution may be refused).

30. As of January 1, 1997, 106 countries have ratified the New York Arbitration Convention and 16 countries have ratified the Panama Convention. See 9 U.S.C.A. §§ 201, 301 (Supp. 1997) (notes following these sections).

31. See *supra* text accompanying note 8.

32. See Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1212 (1984) (stating that "there is no indication in reported decisions to suggest that the Brussels Convention's jurisdictional discrimination has posed much of a practical problem"); Andreas F. Lowenfeld, *Thoughts About a Multilateral Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 271, 303 (1994) (stating that a convention is not needed to protect against EU enforcement of judgments based on exorbitant jurisdiction because "[w]e have seen no such cases in the twenty years since the Brussels Convention entered into effect, and it is unlikely that we will see such cases—or at any rate many such cases—in the future").

33. See Judgment of July 2, 1991, BGH, 1991 Neue Juristische Wochenschrift [NJW] 3092 (requiring that in addition to the location of assets, there must be a sufficient connection between the litigation and Germany); Judgment of Oct. 7, 1992, OLG München, 1993 Recht der Internationalen Wirtschaft (RIW) 66 (affirm-

We do not know how much the United States needs a judgments-recognition convention and until we do, we do not know how many chips to bargain away in order to obtain one.

B. U.S. Recognition of Foreign Judgments

The Full Faith and Credit Clause of the U.S. Constitution³⁴ does not apply to judgments of other countries.³⁵ The law of each state controls recognition of foreign judgments in that state.³⁶ Federal courts in diversity³⁷ and alienage³⁸ cases apply the law of the state in which they sit³⁹ concerning recognition of foreign judgments, but apply federal law in fed-

ing dismissal of a suit by a Saudi-Arabian plaintiff against a U.S. airline, which had assets in Germany, noting that the suit had no connection with Germany and that Germany was not the only jurisdiction in which the plaintiff could obtain a judgment that would be enforced in Germany).

34. U.S. CONST. art. IV, § 1 (stating that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State").

35. See *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912) (stating that the U.S. Constitution does not require full faith and credit "to the judgments of foreign states or nations").

36. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (Rev. ed. 1989).

37. "Diversity cases" are those in which judicial power is conferred on federal courts by U.S. CONST. art. III, § 2 over cases "between Citizens of different States."

38. "Alienage cases" are those in which judicial power is conferred on federal courts by U.S. CONST. art. III, § 2 over cases "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

39. See 18 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4473 at 742-744 (1981) (stating that recent federal decisions unanimously apply the law of the state in which the federal court sits, but questioning the wisdom of applying state standards to recognition of foreign judgments, especially in alienage cases); cf. Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1579 (1992) (stating that "assuming that the Constitution's foreign relations or foreign trade powers, without more, could ground uniform judge-made rules of recognition and enforcement, a showing could not be made, at least under most of the [United States Supreme] Court's recent federal common-law decisions, to support uniform rules as opposed to state law borrowed as federal law except where hostile to or inconsistent with federal interests"). But cf. Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 79 (1984) (stating that "[a]lthough the Republic can survive without federalizing the law of foreign judgment recognition, the arguments in favor of that position are strong and the principal argument against it amounts to little more than inertia"); 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, 300 (1991) (stating that "[f]ederal legislation would seem appropriate in the recognition of foreign judgments").

eral-question cases.⁴⁰

Except for a few states,⁴¹ U.S. courts recognize and enforce foreign money judgments. As of January 1, 1997, twenty-six states plus the District of Columbia and the Virgin Islands have adopted the *Uniform Foreign Money-Judgments Recognition Act (Uniform Act)*.⁴² With exceptions to protect due process rights⁴³ and otherwise assure the fairness of the proceedings,⁴⁴ the Act provides that "any foreign judgment that is final and conclusive and enforceable where rendered"⁴⁵ is "conclusive between the parties to the extent that it grants or denies recovery of a sum of money."⁴⁶ There is a "public policy" exception,⁴⁷ but it has seldom been used.⁴⁸ There is no

40. See *Gordon & Breach Science Publishers v. Am. Inst. of Physics*, 905 F. Supp. 169, 178-79 (S.D.N.Y. 1995) (rejecting claim that Swiss and German judgments preclude Lanham Act claim and applying federal collateral estoppel standards); WRIGHT, *supra* note 39, at 741 (stating that "[i]n deciding federal question cases, there is no apparent reason to consult state law and federal courts routinely determine the res judicata effect of foreign judgments without any reference to state law"). "Federal-question cases" are those in which U.S. CONST. art. III, § 2 confers judicial power on federal courts over cases "arising under this Constitution, the Laws of the United States, and Treaties made . . . under their authority."

41. See *infra* notes 51, 242-46 and accompanying text.

42. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962) [hereinafter UNIFORM ACT]. For a list of jurisdictions that have adopted the *Uniform Act*, see the Table of Jurisdictions Wherein Act Has Been Adopted, at 13 U.L.A. 77 (Supp. 1997).

43. See UNIFORM ACT, *supra* note 42, § 4(a)(1), (2), 13 U.L.A. 268 (precluding recognition of foreign judgments in which the foreign court did not have personal jurisdiction over the defendant or when due process is otherwise violated).

44. See *id.* § 4(b), 13 U.L.A. 268 (permitting non-recognition if the defendant did not receive timely notice, the judgment was obtained by fraud, the judgment conflicts with another judgment, the proceeding violated a forum-selection agreement between the parties, or jurisdiction was based on personal service in a seriously inconvenient forum).

45. *Id.* § 2, 13 U.L.A. 264.

46. *Id.* § 3, 13 U.L.A. 265.

47. *Id.* § 4(b)(3), 13 U.L.A. 268 (permitting non-recognition if the claim "on which the judgment is based is repugnant to the public policy of this state").

48. See, e.g., *Jaffe v. Snow*, 610 So. 2d 482, 487-88 (Fla. Dist. Ct. App. 1993) (refusing to recognize a wife's Canadian judgment against a Florida bail bond company for loss of consortium when the acts of company agents who captured and returned her husband to face criminal charges were privileged under Florida law but not under Canadian law); *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661, 663-65 (Sup. Ct. 1992) (refusing to recognize an English libel judgment and noting the constitutional limits that the Supreme Court of the United States has placed on libel recoveries in the United States); cf. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (refusing to enforce Iranian default judgments against the sister of the former Shah because defendant could not have obtained due process in an Iranian court). But see *Tonga Air Service, Ltd. v. Fowl-*

reciprocity requirement in the Act,⁴⁹ but six states have added one to their versions.⁵⁰ The Colorado reciprocity provision in effect bars recognition of foreign judgments because it limits recognition to judgments of a country that has joined the United States in a judgment-recognition treaty.⁵¹ There is no such country.

The *Uniform Act* also precludes recognition if "the foreign court did not have jurisdiction over the subject matter."⁵² Professor Juenger has cogently argued that this provision is unwise because the intricacies of subject-matter jurisdiction should be thrashed out in the foreign jurisdiction.⁵³

er, 826 P.2d 204, 208, 213 (Wash. 1992) (en banc) (reversing a trial court opinion that had refused to recognize a Tongan judgment because Tongan procedure did not provide a verbatim transcript for appeal and holding that review of a trial court's refusal to recognize a foreign judgment under § 4 of the *Uniform Act* is de novo and not for abuse of discretion). *But cf.* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1004 (5th Cir. 1990) (holding that trial judge's refusal to recognize Abu Dhabi judgment because of failure to meet reciprocity requirement of Texas act "can only be set aside upon a clear showing of abuse" of the discretion conferred on the judge by the act and refusing to adopt exception from dictum in *Hilton v. Guyot*, 159 U.S. 113, 170 (1895), that the American should be bound by the Abu Dhabi judgment because she was the party who brought the suit there).

49. See UNIFORM ACT, *supra* note 42, § 4(b), 13 U.L.A. 268.

50. See COLO. REV. STAT. ANN. § 13-62-102(1) (West 1997) (defining "foreign state" whose judgment would be entitled to recognition as a "governmental unit [that] has entered into a reciprocal agreement with the United States recognizing any judgment of a court of record of the United States"); GA. CODE ANN. § 9-12-114(10) (1993) (stating that a foreign judgment "shall not be recognized if . . . the party seeking to enforce the judgment fails to demonstrate that judgments of courts of the United States and of states thereof of the same type and based on substantially similar jurisdictional grounds are recognized and enforced in the courts of the foreign state"); IDAHO CODE § 10-1404(2)(g) (1990) (stating that "a foreign country judgment need not be recognized if . . . judgments of this state are not recognized in the courts of the foreign state"); MASS. GEN. LAWS ANN. ch. 235, § 23A (West 1986) (stating that a foreign judgment "shall not be recognized if . . . judgments of this state are not recognized in the courts of the foreign state"); OHIO REV. CODE ANN. § 2329.92(B) (Banks-Baldwin 1994) (stating that if the foreign country does not have a procedure for recognizing judgments of other countries "substantially similar" to the *Uniform Act*, its judgments "may be recognized and enforced . . . in the discretion of the court"); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (West 1997) (stating that "[a] foreign country judgment need not be recognized if . . . it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state").

51. COLO. REV. STAT. ANN. § 13-62-102(1) (West 1997).

52. UNIFORM ACT, *supra* note 42, at 268 § 4(a)(3).

53. See Juenger, *supra* note 22, at 18; *cf.* N.Y. C.P.L.R. § 5304(b)(1) (McKinney 1978) (moving lack of subject-matter jurisdiction from mandatory bases for non-recognition to discretionary bases).

The states that have not enacted the *Uniform Act* recognize and enforce foreign money judgments in much the same generous manner as in the enacting states.⁵⁴ Section 481 of the *Restatement (Third) of Foreign Relations Law* states:

Except as provided in § 482,⁵⁵ a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.⁵⁶

A comment declares that the section "sets forth the prevailing common and statutory law of States of the United States."⁵⁷ *Hilton v. Guyot*,⁵⁸ a landmark U.S. Supreme Court opinion, based recognition of foreign judgments on "the comity of nations."⁵⁹ This is hardly an explanation as to why "comity" should be granted. Perhaps the best explanation is the purely practical one underlying the doctrine of *res judicata*—"promoting certainty and . . . avoiding duplication of litigation—

54. See, e.g., *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 359 (10th Cir. 1996) (applying Kansas law to recognize an Australian judgment and noting that although Kansas has not passed the *Uniform Act*, it applies traditional principles of comity).

55. Section 482 provides the same exceptions as the *Uniform Act* but moves lack of subject-matter jurisdiction from mandatory to discretionary grounds for non-recognition and omits jurisdiction based on service in an inconvenient forum. See *supra* notes 42-53 and accompanying text.

56. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1) (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS].

57. *Id.* cmt. a.

58. 159 U.S. 113 (1895).

59. *Id.* at 163. See also *id.* at 202 (stating that a foreign judgment should be recognized if there is no "special reason why the comity of this nation should not allow it full effect"). The Court defined comity as follows:

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Id. at 163-64. Although suit to enforce a French judgment was brought in federal court in New York, the case was decided forty-three years before *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which held that in diversity cases federal courts must apply the common-law rules of the state in which they sit. The Court did not apply New York law on recognition of foreign judgments.

tion, harassing both to the courts and the individual litigants.⁶⁰

In federal-question cases, as noted above,⁶¹ federal courts apply a federal standard to recognition of foreign judgments. *Hilton v. Guyot*⁶² established a generous recognition standard that is followed today:

[W]e are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.⁶³

A bare majority of the Justices in *Hilton v. Guyot* did establish reciprocity as a condition to recognition of a foreign judgment.⁶⁴ It is unlikely, however, that reciprocity is any longer part of the federal standard, just as it is not part of the standard in most states.⁶⁵

60. Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44, 58 (1962).

61. See *supra* note 40 and accompanying text.

62. 159 U.S. 113 (1895).

63. *Id.* at 202-03.

64. *Id.* at 228.

65. See *Tahan v. Hodgson*, 662 F.2d 862, 867-68 (D.C. Cir. 1981) (stating, in a diversity case, that "[i]t is unlikely that reciprocity is any longer a federally mandated requirement for enforcement of foreign judgments or that the District of Columbia itself has such a requirement that this court is obliged to follow"); *McCord v. Jet Spray Int'l Corp.*, 874 F. Supp. 436, 437 (D. Mass. 1994) (stating, in a diversity case, that "[t]he reciprocity requirement first announced by the Supreme Court in *Hilton v. Guyot* . . . is no longer an element of the federal law of enforcement of foreign judgments"); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, § 481 cmt. d (stating that "[t]hough [*Hilton's* reciprocity requirement] has not been formally overruled, it is no longer followed in the great majority of State and federal courts"). But see *Gordon & Breach Science Publishers v. American Inst. of Physics*, 905 F. Supp. 169, 179 (S.D.N.Y. 1995) (refusing in Lanham Act suit to

A member of the Study Group advising the Department of State on the judgment-convention negotiations has suggested that Congress enact a reciprocity requirement that would be binding on all U.S. courts recognizing foreign judgments and thus provide "a negotiating club" to the U.S. representatives in the Hague.⁶⁶ Enacting a reciprocity requirement is worth considering. If done by Congress, it would conform with the view of the dissenters in *Hilton* that "it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary."⁶⁷ If reciprocity is desirable, it should take the form of the Texas provision, which requires the judgment debtor to establish that the foreign country would not recognize a judgment of the U.S. forum.⁶⁸ This will avoid the "analytical circle"⁶⁹ that might result if both the United States and the foreign country require a showing of reciprocity before recognizing a judgment from abroad. Unlike the Texas provision, any Congressional requirement should be mandatory and not discretionary.

On the other hand, playing the reciprocity card is likely to be perceived as the negotiating tactic that it is and make a successful conclusion even less likely. On balance, I do not recommend it.

C. Recognition Abroad of U.S. Judgments

Although many countries impose a reciprocity requirement,⁷⁰ recognition of foreign money judgments is common⁷¹

give collateral estoppel effect to Swiss and German judgments against the plaintiffs and stating "lack of reciprocity" as one reason).

66. Adler, *supra* note 18, at 109.

67. *Hilton v. Guyot*, 159 U.S. 113, 234 (1895) (Fuller, C.J., dissenting, joined by Harlan, J., Brewer, J., and Jackson, J.).

68. TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (West 1997).

69. Brand, *supra* note 39, at 283.

70. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, § 481 Reporters' Note 6(d) (stating that in Germany "foreign judgments will be recognized, but only on the basis of reciprocity"); Brand, *supra* note 39, at 255 (stating that "enforcement of United States judgments overseas is often possible only if the United States court rendering the judgment would enforce a similar decision of the foreign enforcing court"); Barbara Kulzer, *Some Aspects of Enforceability of Foreign Judgments: A Comparative Summary*, 16 BUFF. L. REV. 84, 88 (1966) (stating that "[r]eciprocity is an important concept on the Continent"); Bernardo Rodriguez Ossa, *Recognition and Enforcement of Foreign Judgments*, LATIN AM. L. & BUS. REP., Sept. 30, 1996, at 18 (stating that Colombian courts require reciprocity in order to recognize foreign judgments); Ramon E. Reyes, Jr., *The Enforcement of Foreign*

and recent changes have accelerated the trend toward recognition.⁷² In 1990, the Supreme Court of Canada held that, as between Canadian provinces, judgments of one province must be recognized and enforced in another if the basis for personal jurisdiction over the defendant was sufficient for domestic judgments in the recognizing province.⁷³ Previously, judgments, even from another Canadian province, were recognized only if the basis for personal jurisdiction had been one of the narrow grounds that preceded modern long-arm statutes: citizenship, residence, voluntary appearance, or prior agreement.⁷⁴ More importantly for purposes of international rec-

Court Judgments in the People's Republic of China: What the American Lawyer Needs to Know, 23 BROOK. J. INT'L L. 241, 260 (1997) (stating that "[w]hen there is no treaty between [China and another nation], the principle of mutual reciprocity must be used"); Morio Takeshita, *The Recognition of Foreign Judgments by the Japanese Courts*, 39 JAPANESE ANN. INT'L L. 55, 72-73 (1996) (discussing Japan's reciprocity requirement).

71. See *Tahan v. Hodgson*, 662 F.2d 862, 868 (D.C. Cir. 1981) (stating that even if reciprocity were required for enforcement "we would still enforce the Israeli judgment since Israel in all probability would enforce a similar American judgment"); *McCord v. Jet Spray Int'l Corp.*, 874 F. Supp. 436, 439-40 (D. Mass. 1994) (holding that Belgium meets the reciprocity requirement imposed under Massachusetts law for recognition of a foreign money judgment); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, § 481 Reporters' Note 6 (discussing enforcement of foreign judgments in Great Britain, Canada, France, and Germany); Marcelo Bombau, *Enforcement of Foreign Awards*, 49 INT'L COM. LITIG. 41 (1995) (discussing enforcement in Argentina); Adrian U. Dörig, *The Finality of U.S. Judgments in Civil Matters as a Prerequisite for Recognition and Enforcement in Switzerland*, 32 TEX. INT'L L.J. 271, 275 (1997) (stating that Switzerland recognizes foreign decisions and does not review the judgment on the merits); Ossa, *supra* note 70, at 18 (stating that foreign judgments "may be recognized and accepted by Colombian courts without re-trial or examination of the merits"); Takeshita, *supra* note 70, at 57-58 (stating that re-examination of the merits in Japanese courts is prohibited at the recognition stage by case precedent and at the execution stage by statute); *id.* at 74 (stating that "most non-recognition cases are concerned with judgments emanating from the United States" and that "[t]his seems to reflect the differences in thinking between the two countries with regard to matters such as jurisdictional basis, service abroad, damages, and custody").

72. See *infra* notes 73-78 and accompanying text.

73. See *De Savoye v. Morguard Investments Ltd.*, 76 D.L.R.4th 256 (Can. 1990); cf. *T.D.I. Hospitality Management Consultants, Inc. v. Browne*, 117 D.L.R.4th 289, 296-97 (Manitoba C.A. 1994) (holding that under *Morguard*, suit can be brought on an Alberta judgment even though the judgment could not be registered because of the restrictive jurisdictional requirements of the Manitoba registration act); *Sims v. Bower*, 108 D.L.R.4th 677, 680 (New Brunswick C.A. 1993) (holding *Morguard* inapplicable to overturn restrictive jurisdictional requirements of New Brunswick foreign-judgment registration act).

74. See *infra* notes 79-82 and accompanying text discussing the current United Kingdom rule that is the same as the former Canadian practice.

ognition, some Canadian courts have applied the new relaxed jurisdictional requirements to U.S. judgments,⁷⁵ although others have not.⁷⁶ Recent legislation in Italy and China facilitates recognition of foreign judgments.⁷⁷ Perhaps the best known change in favor of recognition of foreign judgments, now more than thirty years ago, is the French Cour de Cassation's disapproval of *revision au fond*, under which there was re-examination of the merits.⁷⁸

There are dark spots that could be eliminated by a judgment-recognition treaty. The United Kingdom still clings to a double standard for personal jurisdiction and, absent a treaty, will not recognize foreign default judgments unless based on the nineteenth century bases⁷⁹ of service while present, appearance, or prior consent.⁸⁰ Yet, for its own courts, the U.K.

75. See *United States v. Ivey*, 139 D.L.R.4th 570, 574 (Ontario C.A. 1996) (applying *Morguard* to judgment of Michigan federal district court); *Wilson v. Hull*, 128 D.L.R.4th 403, 414 (Alberta C.A. 1995) (refusing to permit registration of Idaho judgment because of restrictive jurisdictional requirements of registration act, but leaving open the question of whether suit could be brought to enforce the judgment); Ivan F. Ivankovich, *Enforcing U.S. Judgments in Canada: "Things are Looking Up!"*, 15 NW. J. INT'L L. & BUS. 491, 500 (1995) (reporting on the application of *Morguard* in British Columbia, Alberta, and Prince Edward Island to recognize U.S. judgments).

76. See Ivankovich, *supra* note 75, at 504-05 (reporting that New Brunswick and Saskatchewan courts do not apply *Morguard* to foreign judgments because of the provisions of judgment-recognition statutes in those provinces).

77. See Legge 31 Maggio 1995, n.218, Riforma del Sistema Italiano di Diritto Internazionale Privato, Gazz. Uff. supp. n.68 al n.128 del 3 giugno 1995; Marini, *supra* note 23 (reporting on this Italian legislation that took effect on June 1, 1996); Reyes, *supra* note 70, at 256-58, 266 (reporting on Chinese legislation that took effect on April 9, 1991, although also stating that there may be difficulties in enforcement that affect all judgments, including Chinese judgments).

78. See *Munzer v. Munzer-Jacoby*, Cass 1e civ., Jan. 7, 1964, J.C.P. 1964, II, 13,590, obs. Ancel. See also RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, § 481 Reporters' Note 6(c) (discussing enforcement of foreign judgments in France); Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and A Suggested Approach*, 81 HARV. L. REV. 1601, 1666 (1968) (stating that "although there is no formal rule of stare decisis operative in French law, the issue is probably settled by *Munzer*").

79. See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (stating that a valid judgment may be rendered against a nonresident only if the nonresident is "brought within its jurisdiction by service of process within the State, or his voluntary appearance").

80. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, § 481 Reporters' Note 6 (stating that "in respect of foreign default judgments, Great Britain does not recognize many of the bases on which its courts would exercise jurisdiction over absent defendants"); 1 A.V. DICEY & J.H.C. MORRIS, DICEY & MORRIS ON CONFLICT OF LAWS Rule 36, at 472-73 (Lawrence Collins ed., 12th ed. 1993) (stat-

maintains a modern long-arm regime exercising specific jurisdiction⁸¹ in contract, maintenance, tort, and other matters.⁸²

Germany has famously rejected on public policy grounds the punitive damages portion of a judgment for sexual abuse of a child, but enforced the rest of the judgment.⁸³ This is not

ing that the U.K. will recognize foreign judgments only if required by treaty or where the basis for jurisdiction was service on the defendant while present, appearance, or consent). See also Civil Jurisdiction and Judgments Act 1982, ch. 27, § 33(1):

For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely (a) to contest the jurisdiction of the court; (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country; (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.

81. "Specific jurisdiction" refers to "jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). "General jurisdiction" refers to jurisdiction "over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.9.

82. Civil Jurisdiction and Judgments Act, 1982, ch. 27, pt. I, § 2 (declaring that the Brussels Convention, *supra* note 8, "shall have the force of law in the United Kingdom"); *id.* sched. 1 § 2 (reprinting the "special jurisdiction" provisions of the Convention).

In the nineteenth century, the English double jurisdictional standard for recognition of judgments might be explained by the fact that even if English courts considered an English statutory base for jurisdiction to be exorbitant, the courts had no power to invalidate an act of Parliament. See *Schibsy v. Westenholz*, 6 Q.B. 155, 160 (1870) (stating that if a foreigner is sued in an English court, the court must recognize the jurisdictional bases enacted by Parliament but if the judgment had to be enforced in the United States "a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created"). See also Peter Nygh, *The Common Law Approach, in* TRANSNATIONAL TORT LITIGATION: JURISDICTIONAL PRINCIPLES 21, 29-30 (Campbell McLachlan & Peter Nygh eds., 1996) [hereinafter TRANSNATIONAL TORT LITIGATION] (explaining current use of the British double jurisdictional standard as caused by the courts' continued distrust of statutory enlargement of common law bases).

83. The plaintiff, a fourteen-year old male and an American citizen, sued the defendant, who had dual United States and German citizenship, for sexual abuse. Although the defendant was represented by counsel in the preliminary stages of the litigation, neither the defendant nor his counsel appeared at trial. The plaintiff was awarded \$750,260, which included \$400,000 in punitive damages. The German Supreme Court held that, notwithstanding the 40% contingent fee to plaintiff's

surprising. Although some countries may recognize judgments for punitive damages,⁸⁴ many do not.⁸⁵ The United Kingdom has gone so far as to pass a "claw-back" statute that not only refuses to recognize foreign judgments for punitive and multiple damages, but also authorizes suits to recover any amount of the judgment already paid that was not purely compensatory.⁸⁶ Australia goes further and permits recovery of the entire judgment paid in an antitrust action if the country's Attorney General finds that the foreign court's assumption of jurisdiction is "contrary to international law or inconsistent with international comity or international practice."⁸⁷

The decision of the German Supreme Court⁸⁸ is a red flag warning us that treaty negotiations are likely to focus on punitive and "excessive" damages, particularly U.S. jury awards in what Lord Denning termed "fabulous" amounts.⁸⁹ Defense of

lawyer, the judgment would be enforced in Germany except for the punitive damages. The court stated that it was against German public policy to recognize "a lump-sum award of punitive damages in a not insubstantial amount." Judgment of June 4, 1992, BGH, 1992 Neue Juristische Wochenschrift [NJW] 3096 at 3104. For comments on the decision, see 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); 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 (1992). But cf. *Princess Caroline of Monaco v. Publisher of the Magazines "B" and "G"*, BGH, 1995 Neue Juristische Wochenschrift [NJW] 861. In *Princess Caroline of Monaco* the German Supreme Court held that damages for violation of the right of privacy should be awarded in an amount sufficient to provide satisfaction to the victim and to deter repetition of the conduct. The court held that the damages awarded by the Court of Appeals were not sufficient to have an impact on the defendant or present a genuine disincentive to such conduct. The case was remanded for a new determination of damages. Does this judgment authorize a form of punitive damages?

84. Cf. Ronald A. Brand, *Punitive Damages and the Recognition of Judgments*, 43 NETHERLANDS INT'L L. REV. 143, 169-71 (1996) (discussing a Swiss decision); *id.* at 147-48 (discussing decisions from Australia, Canada, and New Zealand awarding punitive damages in domestic cases).

85. See *id.* at 163-67 (discussing decisions from Germany and Japan); cf. *id.* at 146-47 (discussing the limits that the House of Lords has imposed on domestic judgments for punitive damages); Takeshita, *supra* note 70, at 67 (discussing refusal of Japanese courts to recognize a California judgment awarding "absolutely enormous" punitive damages).

86. See Protection of Trading Interests Act, 1980, ch. 11, § 6 (Eng.).

87. Foreign Proceedings (Excess of Jurisdiction) Act, 1984, §§ 9(1)(b)(ii), 10 (Austl.).

88. See *supra* note 83 and accompanying text.

89. *Smith Kline & French Lab. Ltd. v. Bloch*, [1983] 2 All E.R. 72, 74 (Eng. C.A. 1982) (Denning, M.R.) (stating that American juries "are prone to award fabulous damages").

punitive damages will not be helped by the fact that most states have, by statute or decision, placed limits on punitive awards⁹⁰ and that the U.S. Supreme Court has held that a "grossly excessive" award of punitive damages violates due process.⁹¹ Nor will another U.S. Supreme Court decision, holding punitive damages taxable because not compensatory,⁹² assist our treaty negotiators in defending American practice.

Although the German Supreme Court enforced the compensatory portion of the tort judgment,⁹³ and although Germany does not emulate the U.K.⁹⁴ in maintaining a double jurisdictional standard,⁹⁵ Professor Lowenfeld points out that a German trial court has refused to recognize a Massachusetts products liability judgment because the Massachusetts trial judgment did not contain written reasons for the compensatory award, which the German court regarded as excessive.⁹⁶ The German Supreme Court, on the ground that the judgment was for a gambling debt, has refused to enforce a U.S. judgment against a German citizen for losses on a commodity futures account.⁹⁷ The German Supreme Court has also refused to enforce a New York judgment rendered on a counterclaim against the German party because the contract that was the subject of the dispute permitted the German seller, but not the American buyer, to bring a suit on the contract outside of Ger-

90. See Brand, *supra* note 84, at 163 (stating that "at least 40 of the 50 states have imposed some kind of restriction on punitive damages awards, with a majority of those restrictions being enacted within the past 10 years").

91. See *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589, 1595 (1996).

92. See *O'Gilvie v. United States*, 117 S.Ct. 452, 454, 456 (1996) (holding that an award of punitive damages in tort suit is taxable because it is not within an Internal Revenue Code provision excluding from income damages received "on account of personal injuries or sickness" and stating that punitive damages "do not compensate for any kind of loss").

93. See *supra* note 83 and accompanying text.

94. See *supra* notes 79-82 and accompanying text.

95. See Dennis Campbell & Dharmendra Popat, *Enforcing American Money Judgments in the United Kingdom and Germany*, 18 S. ILL. U. L.J. 517, 540 (1994) (stating that "[u]nder German law, the foreign court is regarded as having international jurisdiction if, in the reverse situation, a German court would be competent").

96. See ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 440-44 (1993) (setting out an English translation of *Solimene v. B. Grauel & Co.*, [1989] RIW 988 (LG Berlin)). The *Solimene* case was settled pending appeal. See *id.* at 452.

97. See *id.* at 444-46 (setting out an English translation of *P. & Co. Inc. v. T.*, [1975] Neue Juristische Wochenschrift 1600 (German Sup. Ct.)).

many.⁹⁸

There are other trouble spots for recognition of U.S. judgments, including Austria, the Netherlands, Norway,⁹⁹ and Brazil.¹⁰⁰ A practitioner, frustrated with the *exequatur*¹⁰¹ procedure necessary to obtain recognition for a U.S. judgment in Mexico, has declared U.S. judgments "worthless" south of the border.¹⁰²

Thus, there are difficulties in enforcing U.S. money judgments abroad. We cannot know the extent of these difficulties or how they should affect U.S. negotiations for a judgments treaty without the survey recommended above.¹⁰³

III. WHAT KIND OF CONVENTION—"SINGLE," "DOUBLE," OR "MIXED"?

There are three basic forms that a judgments-recognition convention might take: single, double, and mixed. A single

98. See *id.* at 446-50 (setting out an English translation of *S.A.C. Inc. v. F. & J.*, BGHZ 52, 31 (1970), (German Sup. Ct.)).

99. See ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 109 & n.1 (1996) (stating that absent a treaty, those countries do not regard a foreign judgment as having effect outside the rendering state, but pointing out that Netherlands courts often recognize foreign judgments even though not required to do so). But see Juenger, *supra* note 22, at 38 (stating that the Netherlands has "advanced from a narrow, ethnocentric position to one of considerable liberality toward judgments rendered outside the Common Market").

100. See Chin Kim & Gretchen Cowen, *The Recognition and Enforcement of Foreign Judgments under Brazilian Law and the Uniform Foreign Money-Judgments Recognition Act*, 5 TRANSNAT'L LAW. 725, 735 (1992) (stating that Brazil will recognize a foreign judgment only if "the Brazilian domiciliary expressly submits to the foreign court's jurisdiction").

101. An *exequatur* procedure results in issuance of a writ that renders a foreign judgment subject to execution in the same manner as a domestic judgment. The formalities required for the procedure differ from country to country and can be onerous. See Kulzer, *supra* note 70, at 89 n.29 (describing *exequatur* in France); Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-MEX. L.J. 137, 147 (1997) (stating that *exequatur* is also known as homologación in Mexico).

102. David W. Kash, *Enforcement of Judgments: Across the Border with Mexico*, ARIZ. ATT'Y, July 1995, at 11, 13 (stating that a U.S. judgment is "worthless except in limited circumstances"). See also Matthew H. Adler, *Enforcement in a New Age: Judgments in the United States and Mexico*, 5 U.S.-MEX. L.J. 149, 152 (1997) (stating that a litigant can block enforcement of a U.S. judgment by bringing parallel litigation in Mexico); Vargas, *supra* note 101, at 147 (stating that even though all conditions for *exequatur* or homologación "are fully complied with, there is no guarantee the foreign judgment will be enforced").

103. See discussion *supra* Part II.A.

convention focuses solely on recognition and enforcement, listing the bases for jurisdiction that will entitle a judgment to recognition, but permitting judgments on other bases that a contracting state may, in its discretion, enforce.¹⁰⁴ A double convention lists the exclusive bases for jurisdiction, a "white" list, and may also contain a list of prohibited bases for jurisdiction, a "black" list.¹⁰⁵ A mixed convention contains a white list, perhaps a black list, and also provides that a signatory may, but need not, recognize judgments on bases not on either the white or black list.¹⁰⁶ The Inter-American Judgments Convention,¹⁰⁷ which the United States has not ratified, is a form of mixed convention with a white list, but no black list.¹⁰⁸

Variations on the single, double, and mixed convention forms provide seven major possibilities for a judgments convention. *One*: jurisdiction is not dealt with and signatory countries agree to recognize any judgment that is valid under the standards of the rendering state. It is unlikely that any country would ratify such a convention.¹⁰⁹ *Two*: a signatory state must recognize a foreign judgment that meets the receiving state's domestic jurisdictional standards.¹¹⁰ *Three*: the convention contains no black list, but an exclusive white list and judgments on other bases may not be recognized. *Four*: the convention contains no black list and permits recognition of judgments that are not on its white list. The *Uniform Act* is not a convention, but it is in this form.¹¹¹ *Five*: the convention contains a black list and a white list. The lists are exclusive for

104. See von Mehren, *supra* note 2, at 282.

105. See *id.* at 282-83.

106. See *id.* at 283.

107. Inter-American Convention, *supra* note 10.

108. See *id.* arts. 1-3 (listing those jurisdictional bases that entitle a judgment to recognition); *id.* art. 8 (providing that "[t]he rules contained in this Convention shall not limit any broader provisions contained in bilateral or multilateral conventions among the States Parties regarding jurisdiction in the international sphere or more favorable practices in regard to the extraterritorial validity of foreign judgments").

109. See Juenger, *supra* note 22, at 12 (stating that no legal system "accords automatic recognition, sight unseen, to foreign adjudications").

110. See Adler, *supra* note 18, at 97 (referring to this as a "simple, or single convention").

111. See UNIFORM ACT, *supra* note 42, § 5 (listing in (a) the bases that satisfy the jurisdictional requirement and then concluding in (b) "[t]he courts of this state may recognize other bases for jurisdiction").

judgments entitled to recognition, but, for domestic purposes, a signatory is free to exercise jurisdiction even on a black list basis. *Six*: the convention contains a black list and a white list that are mandatory if the defendant is domiciled in a signatory state, but not if the defendant is a non-domiciliary. The Brussels Convention is in this form.¹¹² *Seven*: the convention contains a black list and a white list, but signatories are free to adjudicate on other bases not on the black list and other signatories may, but need not, enforce such judgments.

Number seven, black list, white list, and "gray" jurisdictional bases for discretionary enforcement, is the form referred to as "mixed," and is the type of convention proposed by the U.S. negotiators.¹¹³ The *Kessedjian Report*, however, notes that "the Special Commission of 1994 showed a clear tendency to reject the possibility of negotiating a mixed Convention" and states as "the maximum goal" a strict double Convention in order to "give litigants the greatest possible degree of predictability."¹¹⁴ Apparently then, the United States must press for a double convention that contains a black list and a white list, but that, like the Brussels Convention, does not forbid the use of even black list jurisdiction against defendants not domiciled in signatory countries.¹¹⁵ This will give U.S. defendants protection against the Brussels Convention's black list¹¹⁶ and permit U.S. courts limited use of general jurisdiction founded on bases such as temporary presence or on continuous and systematic activities, which are likely to be black-listed in the forthcoming convention.¹¹⁷

112. See Brussels Convention, *supra* note 8, art. 3 (listing bases that "shall not be applicable as against" domiciliaries of contracting states); *id.* art. 4 (permitting use of Article 3 basis against defendants not domiciled in a contracting state); *id.* arts. 2, 5, and art. 6 (setting forth a white list).

113. See von Mehren, *supra* note 2, at 281 (stating that "a state can on occasion appropriately exercise jurisdiction in situations where another state has legitimate grounds for refusing recognition of the resulting judgment"). Arthur T. von Mehren notes that "[t]he U.S. proposal to the Hague Conference is for a *convention mixte*." *Id.* at 283.

114. See KESSEDJIAN REPORT, *supra* note 3, at 88.

115. See *supra* note 112 and accompanying text.

116. See *supra* note 8 and accompanying text.

117. Jurisdiction based on service "on the defendant during his temporary presence" in the forum is black-listed in the Brussels Convention. Brussels Convention, *supra* note 8, art. 3. The Convention's only basis for general jurisdiction is domicile, which for a company is defined as its "seat." *Id.* arts. 2, 53.

Giving up general jurisdiction based on continuous and systematic forum

IV. THE CONVENTION'S JURISDICTIONAL PROVISIONS

A. *Problems Created by U.S. Doctrine*

U.S. negotiators will have difficulty obtaining agreement on both black list and white list items. U.S. jurisdictional law, primarily as developed by the Supreme Court of the United States, permits suit on bases considered exorbitant abroad and, paradoxically, refuses to approve bases readily accepted elsewhere.¹¹⁸ Black-listing jurisdictional bases approved by the U.S. Supreme Court creates a political but not a constitutional problem for our negotiators. White-listing bases rejected by the Supreme Court does present probably insuperable constitutional difficulties.

The first problem will be keeping mainstays of U.S. jurisdictional law off the black list. One U.S. doctrine that offends Europeans is general jurisdiction based on continuous and systematic activities in the forum.¹¹⁹ Professor Peter Schlosser, author of the Schlosser Report, an important tool for construing the Brussels Convention,¹²⁰ has published remarks in which he assumes "the role of a hypothetical friendly adviser to the United States" in its negotiations for a judgments convention.¹²¹ He states that Europeans "do not see how doing business unrelated to the lawsuit could establish jurisdiction."¹²² Professor Schlosser points to an extreme ex-

contacts is less of a sacrifice after *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408 (1984). *Helicopteros* restricts use of general jurisdiction based on forum contacts and, in that case, held it unconstitutional to exercise such jurisdiction over a company that not only had negotiated a contract in the forum, the faulty performance of which had resulted in the cause of action, but also had purchased most of its equipment and trained its personnel there. *Id.* at 410-11, 418-19.

118. See Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1045 (1995) (stating that "as long as our highest court persists in its misguided attempt to derive jurisdictional law from two incongruent sources—due process and state sovereignty—we cannot effectively deal with other nations").

119. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438, 445 (1952) (finding it "reasonable and just" to exercise jurisdiction over a Philippine corporation that conducted "continuous and systematic" activities in the forum).

120. The report was written when the Convention was revised to permit the accession of Denmark, Ireland, and the United Kingdom. See Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 9 n.* (1996) (containing brief biography of Professor Schlosser by Professor Robert C. Casad).

121. *Id.* at 39.

122. *Id.* at 42. See also Campbell McLachlan, *Transnational Tort Litigation: An*

ample that based general jurisdiction on business activities in the forum, *Frummer v. Hilton Hotels Int'l*,¹²³ which he characterizes as illustrating "a narrow protectionist approach which [Europeans] will certainly not accept."¹²⁴ Both the *Kessedjian Report* and the conclusions of the Working Group appointed by a Hague Special Commission to study the proposal for a judgments convention, single out general jurisdiction based on doing business for probable inclusion on the black list, though, with obvious reference to the U.S. position, they note that there is not a consensus on this.¹²⁵

As previously noted,¹²⁶ after *Helicopteros*¹²⁷ there is theoretically less opportunity to utilize doing business as a basis for general jurisdiction, although some state courts continue to flout that attempt to rein in the doctrine.¹²⁸ Agreeing to black list general jurisdiction based on forum contacts other than domicile or the seat of a company¹²⁹ will block suit in only a few cases in which the United States has a legitimate interest in providing a forum¹³⁰—cases like *Frummer* in

Overview, in TRANSNATIONAL TORT LITIGATION, *supra* note 82, at 1, 16 (stating that "[i]n practice, the doing business test is significantly wider than notions of domicile as recognized . . . in civil law systems or notions of presence of corporations recognized in the English common law").

123. 227 N.E.2d 851 (N.Y. 1967). *Frummer* upheld jurisdiction over a London hotel because the hotel, an English subsidiary of a Delaware corporation, used a reservation service also owned by the Delaware corporation. *Id.* at 854. At its New York office, the reservation service advertised and booked reservations for the London hotel, although the plaintiff did not use the reservation service on this occasion. *Id.* at 852-54. Suit was for injuries incurred by a fall in a bathtub in the London hotel. *Id.* at 855.

124. Schlosser, *supra* note 120, at 42.

125. KESSEDJIAN REPORT, *supra* note 3, at 80; *Working Group Conclusions*, *supra* note 2, at 261.

126. See *supra* note 117.

127. 466 U.S. 408 (1984).

128. See, e.g., *Schlobohm v. Schapiro*, 784 S.W.2d 355 (Tex. 1990). *Schlobohm* upholds jurisdiction over an individual based on his "continuing and systematic" contacts with the forum, *id.* at 359, and cites *Helicopteros* for the proposition that "where the defendant's activities in the forum are continuing and systematic, jurisdiction may be proper without a relationship between defendant's particular act and the cause of action." *Id.* at 357.

129. These are the only bases for general jurisdiction under the Brussels Convention. See *supra* note 117.

130. I regard cases in which a foreign plaintiff injured abroad is forum-shopping in the United States as ones in which the United States does not have a legitimate interest in providing a forum. Eliminating doing business as a basis for general jurisdiction will prevent such suits against foreign defendants.

which an American plaintiff is injured abroad. This is not much of a price to pay if a widely adopted judgments convention is otherwise useful and feasible. It is desirable and should be possible to retain this form of general jurisdiction in interstate cases. A plaintiff injured in a sister state should be able to sue at home if a tortfeasor is engaged in continuous and systematic transactions in the plaintiff's domicile, even though these transactions are unrelated to the injury.

The *Kessedjian Report* and the Working Group also select service on the defendant while temporarily present as a black list candidate, though again, they note a lack of consensus.¹³¹ In *Burnham v. Superior Court*,¹³² the Supreme Court unanimously approved "tag"¹³³ jurisdiction, but the defendant in *Burnham* was from New Jersey¹³⁴ and there was ample basis for suing him in California for additional child support without relying on his presence when served. Mr. Burnham, contrary to his agreement with his wife, sued for divorce in New Jersey.¹³⁵ The New Jersey courts dismissed his suit and told him to litigate the divorce in California finding that he "had deliberately and unfairly manipulated [Mrs. Burnham] into moving to California so that he could bring his divorce action in New Jersey where it would be the most convenient for him and most inconvenient for [her]."¹³⁶ Thus, Mr. Burnham induced his wife and children to go to California before Mrs. Burnham obtained a child support decree and the children were there in need of his support. Surely this is sufficient for specific jurisdiction over Mr. Burnham to obtain child support even if he had never set foot in California.¹³⁷

131. KESSEDJIAN REPORT, *supra* note 3, at 82; *Working Group Conclusions*, *supra* note 2, at 261.

132. 495 U.S. 604 (1990).

133. This term was apparently first used in Linda J. Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33, 75 (1978).

134. *Burnham*, 495 U.S. at 607.

135. *Id.* at 607.

136. Brief in Opposition to Petition for Writ of Certiorari, Appendix II, at app. 4, *Burnham v. Superior Court*, 495 U.S. 604 (1990) (No. 89-44) (appending *Burnham v. Burnham*, No. A-1522-88T2/A-5705-87T2 (N.J. Super. Ct. App. Div. July 24, 1989)).

137. See Uniform Interstate Family Support Act (1996) § 201(5), 9 pt. I U.L.A. 272, 282 (Supp. 1997) (providing for jurisdiction over a nonresident to establish a support order when "the child resides in this State as a result of the acts or derivatives of the individual"). The comment cautions that "an overly literal construc-

If the United States wishes to retain tag jurisdiction for interstate cases, so be it. The arguments for this are really arguments for nationwide jurisdiction when, as in *Burnham*, the forum has an interest in providing a remedy for the plaintiff and there is no unfairness to the defendant. Perhaps the Supreme Court would not extend *Burnham* to a case in which the defendant was from a foreign country.¹³⁸ In any event, we will have to agree to black list tag jurisdiction if we want a convention.

Another problem that U.S. jurisdictional doctrine creates for our negotiators is that the U.S. Supreme Court has rejected bases for jurisdiction that are white-listed under the Brussels Convention. *Kulko v. Superior Court*¹³⁹ denied jurisdiction in a child support suit brought at the child's domicile even though the father acquiesced in the child's going there to join her mother. The Brussels Convention permits jurisdiction in support suits wherever "the maintenance creditor is domiciled or habitually resident."¹⁴⁰ The *Kessedjian Report* labels any

tion of the terms of the statute will overreach due process," *id.* at 283, but this should not be a danger on the facts of *Burnham*. The comment may have in mind *Kulko v. Superior Court*, 436 U.S. 84 (1978), which denied jurisdiction over a father who had acquiesced in his daughter's wish to join her mother. The mother had moved to California. For discussion of *Kulko* and the problem it poses for convention negotiations, see *infra* notes 139-41 and accompanying text.

138. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, § 421(2)(a) (stating that service on the defendant while present in the forum confers jurisdiction only if the defendant is present "other than transitorily"); *id.* cmt. e (stating that "jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law").

139. 436 U.S. 84 (1978).

140. Brussels Convention, *supra* note 8, art. 5(2). Jurisdiction under art. 5(2) was even upheld in a suit for child support by an unmarried Irish mother against a putative Belgian father, who denied paternity. See Case C-295/95, *Farrell v. Long*, [1997] 3 W.L.R. 613, 626 (Ct. Justice of E.C.) (stating that Article 5(2) applies "to all actions brought in maintenance matters, including the initial action brought by a person applying for maintenance, and that consideration of the question of paternity as a preliminary issue in such proceedings did not prompt the authors of the Convention to adopt any different solution"). The report does not state whether the mother was allegedly impregnated by the putative father in Ireland. Where the mother was impregnated is apparently irrelevant under Article 5(2), but is crucial under due process. Impregnating a forum resident in the forum meets the due process test for support jurisdiction. See *Larsen v. Scholl*, 296 N.W.2d 785, 787 (Iowa 1980) (upholding jurisdiction over nonresident who allegedly impregnated Iowa mother in Iowa). Jurisdiction has even been upheld when intercourse in the forum did not result in the pregnancy. *Howells v. McKibben*, 281 N.W.2d 154, 155, 159 (Minn. 1979) (upholding jurisdiction over Wisconsin resident who allegedly impregnated a Minnesota mother in Wisconsin, but who

weakening of the Brussels Convention provisions for maintenance jurisdiction "a regrettable backward step" and states that if the U.S. position on this matter is maintained, the future convention will likely exclude maintenance obligations from its scope.¹⁴¹

*Asahi Metal Industry Co. v. Superior Court*¹⁴² rejected jurisdiction in California over the maker of a component part. The suit was one for contribution and indemnity by the manufacturer of the product who had settled a suit for injury and death allegedly caused in California by the defective part. Under the Brussels Convention there would have been jurisdiction pursuant to Article 5(3), which provides jurisdiction in tort suits "where the harmful event occurred"¹⁴³ or 6(2), which permits impleader for contribution and indemnity "in the court seised of the original proceedings."¹⁴⁴ Moreover, the Court of Justice of the European Communities has given Article 5(3) an expansive interpretation, holding that a Netherlands horticultural company could sue in the Netherlands for damage to its seedbeds caused by defendant's alleged discharging of pollutants into the Rhine River in France.¹⁴⁵

In *Asahi*, four of the justices would have reduced the stream of commerce to a pathetic trickle by denying jurisdiction over the component part maker even in a suit on behalf of the maimed and killed Californians because, even though the part manufacturer was aware that commercial distribution of the product would reach California, there was no act by that defendant "*purposefully directed toward the forum State.*"¹⁴⁶

also had intercourse with her in Minnesota). On the other hand, the fact that the mother has come to the forum to give birth, is not sufficient for jurisdiction over the father. *Barnhart v. Madvig*, 526 S.W.2d 106, 108 (Tenn. 1975) (denying jurisdiction when mother impregnated in another state and "elected to come to Tennessee to have her child").

141. KESSEDIAN REPORT, *supra* note 3, at 20. *But cf. Working Group Conclusions*, *supra* note 2, at 259 (stating that "the Group was inclined not to favour inclusion of a forum such as [provided in the Brussels Convention for maintenance suits]" and leaving open the question of whether to exclude such suits from the convention's scope (emphasis in original)).

142. 480 U.S. 102 (1987).

143. Brussels Convention, *supra* note 8, art. 5(3).

144. *Id.* art. 6(2).

145. Case 21/76, *Bier v. Mines de Potasse d'Alsace*, 1976 E.C.R. 1735, [1977] 1 C.M.L.R. 284.

146. *Asahi*, 480 U.S. at 112 (O'Connor, J., joined by Rehnquist, C.J., Powell, J. and Scalia, J.) (emphasis in original).

Federal and state courts have differed on whether they are bound to follow this part of the opinion, and some have rejected it as unduly restrictive and not authoritative because it did not receive five votes.¹⁴⁷

Perhaps not so surprisingly, the European negotiators may welcome adopting the "purposefully directed" requirement that got four votes in *Asahi*.¹⁴⁸ European product manufacturers are not eager to be subject to damage suits wherever the chain of commercial distribution brings their product. Professor Schlosser states that if the U.S. negotiators insist on inserting a "purposeful availment" requirement into the Convention's tort long-arm provision, he does "not think that this will meet major objections."¹⁴⁹ Both the Working Group and the *Kessedjian Report* express disenchantment with the expansive interpretation of Brussels Convention Article 5(3) by the Court of Justice of the European Communities.¹⁵⁰

Apparently then, the way is smoothed for incorporating a narrow tort long-arm provision in the convention. I am opposed to any provision that shields from U.S. jurisdiction foreign manufacturers whose products have reached the United States in the normal course of commercial distribution and caused injury here. I would rather not have a convention and take a chance that a future U.S. Supreme Court will rule that a manufacturer's act of introducing its product into the chain of commercial distribution renders the manufacturer subject to

147. See, e.g., *Ham v. La Cienga Music Co.*, 4 F.3d 413, 416 n.11 (5th Cir. 1993) (stating that the Fifth Circuit will continue to follow its pre-*Asahi* cases absent rejection of those cases by a Supreme Court majority); *Showa Denko K.K. v. Pangle*, 414 S.E.2d 658 (Ga. Ct. App. 1991); *Cox v. Hozelock, Ltd.*, 411 S.E.2d 640 (N.C. App. 1992); *Hill v. Showa Denko K.K.*, 425 S.E.2d 609 (W. Va. 1992). But see *Boit v. Gar-Tec Prod., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992) (adopting "Justice O'Connor's plurality view" and citing cases in accord from the 1st, 8th, and 11th circuits). *Boit's* inclusion of the Eighth Circuit is thrown into doubt by *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 614 (8th Cir. 1994) (holding that a seller may not insulate itself from jurisdiction by utilizing a multi-level distribution system and noting that five justices in *Asahi* did not share Justice O'Connor's view).

148. See *supra* note 146 and accompanying text.

149. Schlosser, *supra* note 120, at 41.

150. See, e.g., KESSEDJIAN REPORT, *supra* note 3, at 70 (stating that the Court's decision "makes too much room for concurrent jurisdiction"); *Working Group Conclusions*, *supra* note 2, at 259 (stating that the Court's interpretation of art. 5(3) "might be too broad in the context of a worldwide convention"). Both are referring to the *Bier* case. See *supra* note 145 and accompanying text.

suit wherever along that chain its product causes harm. I suspect that U.S. plaintiffs' attorneys will agree and muster the political forces necessary to prevent ratification of a convention that would force U.S. victims of defective products to sue foreign manufacturers abroad if the manufacturers take the precaution of parting with the product early in the distribution process.

B. A Convention Cannot Trump the U.S. Supreme Court

If the convention white lists bases for jurisdiction that the U.S. Supreme Court has rejected as a violation of due process, the Court may reconsider and overrule cases that declare unreasonable what an international consensus regards as desirable.¹⁵¹ Another less likely possibility is that the Court may adopt a more relaxed due process standard to test the reasonableness of the jurisdictional bases of foreign judgments.¹⁵² If the Court neither overrules cases restricting the jurisdiction of U.S. courts nor adopts a more forgiving international standard for foreign judgments, there is no likelihood that the convention can overcome due process objections to recognition of foreign judgments that use the offending bases.

Any argument to the contrary recalls a bizarre chapter in U.S. constitutional history involving a treaty between the United States and the U.K. for the protection of migratory birds.¹⁵³ Congress enacted legislation to implement the treaty, but in

151. See Carol S. Bruch, *Statutory Reform of Constitutional Doctrine: Fitting International Shoe to Family Law*, 28 U.C. DAVIS L. REV. 1047, 1058 (1995) (stating that "we can expect the Court to understand and defer to well-thought-out jurisdictional schemes, even when they deviate from announced Supreme Court doctrine"); Juenger, *supra* note 118, at 1044 (stating that the U.S. Supreme Court "might well be prepared" to "countenance a change of jurisdictional bases by treaty").

152. See Willis L.M. Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 796 (1950) (stating that "if the Constitution should apply [to recognition of a foreign judgment] the standard of due process would be similar if not identical to that of natural justice, since both are equated to the criterion of reasonableness"); Smit, *supra* note 60, at 47 (stating that "consideration of all relevant circumstances might—at least in some cases—warrant the conclusion that domestic recognition of a foreign judgment would not violate due process, even though the foreign proceedings did not on all counts measure up to standards domestically applied").

153. Convention for the Protection of Migratory Birds, *proclaimed* Dec. 8, 1916, U.S.-Gr. Brit., 39 Stat. 1702.

*Missouri v. Holland*¹⁵⁴ the state of Missouri sued to enjoin a U.S. game warden from enforcing the statute. Under the restricted view of the commerce power, which then prevailed,¹⁵⁵ Missouri claimed "that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment."¹⁵⁶ Two federal district court opinions had invalidated an earlier statute "that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States."¹⁵⁷ Justice Holmes, writing for a majority of the Court, upheld the treaty and the statute¹⁵⁸ stating that "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."¹⁵⁹ Although Holmes did not cite a constitutional provision, he was referring to the Supremacy Clause of the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"¹⁶⁰

Holmes also stated, however, that "[w]e do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way"¹⁶¹ and that "[t]he treaty in question does not contravene any prohibitory words to be found in the Constitution."¹⁶² Nevertheless, the notion that a treaty could legitimize Congressional action that would otherwise be unconstitutional created controversy and triggered an unsuccessful attempt to amend the Constitution to declare that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty."¹⁶³

154. 252 U.S. 416 (1920).

155. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918) (holding unconstitutional as exceeding the commerce power of Congress an act prohibiting the transportation in interstate commerce of goods produced by child labor).

156. *Missouri v. Holland*, 252 U.S. at 431.

157. *Id.* at 432 (citing *United States v. Shauver*, 214 F. 154 (D.C.E.D. Ark. 1914), and *United States v. McCullagh*, 221 F. 288 (D.C. Kan. 1915)).

158. *Id.* at 435.

159. *Id.* at 433.

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

161. *Missouri v. Holland*, 252 U.S. at 433.

162. *Id.*

163. S.J. Res. 43, 82d Cong. (1953) (the so-called "Bricker Amendment," named

Finally Justice Black sought to end the controversy. *Reid v. Covert*¹⁶⁴ invalidated application of a provision of the Uniform Code of Military Justice to civilian dependents who accompanied members of the armed forces overseas in time of peace. Justice Black rejected an attempt to justify the Code provision as implementing U.S. treaties with Great Britain and with Japan.¹⁶⁵ He stated that there was nothing in the language of the Supremacy Clause¹⁶⁶ "which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution."¹⁶⁷ He explained *Missouri v. Holland*¹⁶⁸ as simply recognizing that "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier."¹⁶⁹

Thus, no treaty can authorize the use of bases for personal jurisdiction that have been held to violate due process. The Supreme Court can take the occasion of the treaty to reconsider and perhaps overrule its former decisions, or may apply a different international standard to foreign judgments. It would be foolhardy to negotiate with the assumption that the Court will take either action.

C. *Specific Jurisdiction in Libel Actions*

Another clash between the Brussels Convention and U.S. Supreme Court jurisdictional decisions is one in which the result reached by the European Court of Justice is so sensible that the Supreme Court might be especially amenable to rethinking its conclusion. In *Keeton v. Hustler Magazine*,

after the Senator who sponsored it). See Michael J. Glennon, *Process Versus Policy in Foreign Relations: Foreign Affairs and the United States Constitution*, 95 MICH. L. REV. 1542, 1543 (1997) (reviewing LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* (2d ed. 1996)) (referring to "[t]he Bricker Amendment, a constitutional amendment proposed in 1953 that would have presumed all treaties to be nonself-executing").

164. 354 U.S. 1 (1957).

165. *Id.* at 16 (joined by Warren, C.J., Douglas, J., and Brennan, J.). Whittaker, J. took no part. *Id.* at 41. Frankfurter, J. and Harlan, J. concurred in the result. *Id.* at 41, 65. Clark, J. dissented in an opinion joined by Burton, J. *Id.* at 78. Thus, Justice Black wrote for a plurality.

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

167. *Reid*, 354 U.S. at 16.

168. 252 U.S. 416 (1920). See *supra* notes 153-62 and accompanying text.

169. *Reid*, 354 U.S. at 18.

Inc.,¹⁷⁰ a woman, allegedly libeled in several issues of the defendant magazine, brought her suit for damages in a New Hampshire federal court. The plaintiff was a New York resident and "one percent or less" of each issue of the magazine in which plaintiff claimed that she was defamed was distributed in New Hampshire.¹⁷¹ The reason that she sued there was that the statute of limitations had expired in every state except New Hampshire, which had an "unusually long (6-year) limitations period for libel actions."¹⁷² The Supreme Court held that defendant's "regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine."¹⁷³ The Court then added, "[t]his is so even if New Hampshire courts, and thus the District Court under *Klaxon Co. v. Stentor Electric Mfg. Co.*¹⁷⁴ . . . , would apply the so-called 'single publication rule'¹⁷⁵ to enable [plaintiff] to recover in the New Hampshire action her damages from 'publications' of the alleged libel throughout the United States."¹⁷⁶ On remand, the Supreme Court of New Hampshire responded to questions certified to it by the First Circuit¹⁷⁷ and declared that under New Hampshire law a single action could be brought to recover for harm in all states in which the magazines had been published and that the New Hampshire six-year statute of limitations applied to recovery for harm suffered in other states.¹⁷⁸ Thus, the benighted rule that the forum's statute of limitations applies in all cases¹⁷⁹ was combined with a jurisdictional rule

170. 465 U.S. 770 (1984).

171. *Keeton v. Hustler Magazine, Inc.*, 828 F.2d 64, 67 (1st Cir. 1987).

172. *Keeton*, 465 U.S. at 773.

173. *Id.* at 773-74.

174. 313 U.S. 487, 496-97 (1941). *Klaxon* held that in diversity cases, federal district courts must apply the choice-of-law rules of the states in which they sit.

175. The "single publication rule" provides that only one cause of action arises from a single edition of a book or newspaper no matter how many copies are published and, in that action, damages can be recovered for harm suffered wherever the copies were published. See RESTATEMENT (SECOND) OF TORTS § 577A(3), (4) (1977).

176. *Keeton*, 465 U.S. at 774 (footnotes added).

177. See *Keeton v. Hustler Magazine, Inc.*, 828 F.2d 64, 67 (1st Cir. 1987).

178. See *Keeton v. Hustler Magazine, Inc.*, 549 A.2d 1187, 1188, 1197 (N.H. 1988).

179. The RESTATEMENT OF CONFLICTS originally treated a statute of limitations as a matter of "procedure" so that if the forum's time for suit had not expired, actions could be brought even for wrongs governed in other respects by the law of

that permitted a nonresident to sue a magazine for harm caused outside the forum when the defendant's only forum contact was distribution of less than one percent of its magazines.

Far more sensible is the decision of the Court of Justice of the European Communities in *Shevill v. Presse Alliance*,¹⁸⁰ which held that:

[T]he victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the state of the court seised.¹⁸¹

states where suit was barred by passage of time. See RESTATEMENT OF CONFLICT OF LAWS § 604 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142(2), 143 (1971) (unless the foreign statute barred "the right and not merely the remedy"). It was not until the second Restatement was revised that the forum was prevented from applying its longer statute of limitations if "maintenance of the claim would serve no substantial interest of the forum; and the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142(2) (rev. ed. 1989). It is doubtful that the revised Restatement rule would have changed the decision of the Supreme Court of New Hampshire which stated that it had a "substantial" interest in permitting suit because a significant number of defendant's magazines were distributed in New Hampshire. *Keeton*, 549 A.2d at 1193. In *Keeton*, application of the New Hampshire six-year statute was particularly bizarre because by the time of the New Hampshire Supreme Court's decision the statute had been changed to three years and under the new statute, which did not apply retroactively, suit would have been barred even in New Hampshire. See *Keeton*, 549 A.2d at 1188, 1196.

180. Case C-68/93, 1995 E.C.R. I-450.

181. *Id.* at I-462. Cf. *David Syme & Co. v. Grey*, 115 A.L.R. 247 (Austl. Fed. Ct. 1992). The plaintiff sued in the Australian Capital Territory for defamation resulting from publication there and in other Australian territories. The Federal Court of Australia ordered the action stayed with leave for the plaintiff to amend the pleadings to recover only for harm resulting from publication in the forum territory. *Id.* at 293. The defendant was "not present, and does not carry on business" in the Capital Territory. *Id.* at 250 (Neaves, J.). The plaintiff did not serve process in accordance with Australian "cross-vesting" legislation, which extends "the scope of valid service of originating process of all Australian courts to the limits of the Australian nation." *Id.* at 291 (Higgins, J.).

Perhaps the U.S. Supreme Court could be persuaded to reconsider *Keeton* and conform to the *Shevill* holding, at least for foreign defendants when the bulk of publications are outside of the United States. To permit *Keeton*'s forum shopping in international cases would be particularly offensive. Justice Souter, while sitting on the New Hampshire Supreme Court, dissented in *Keeton* on the ground that "New Hampshire's limitation period may not properly be applied" to harm in other states.¹⁸² If the U.S. Supreme Court does not rein in the *Keeton* opinion, this will mark another instance in which due process permits what the Europeans regard as exorbitant. Black-listing jurisdiction to recover for harm caused by libel published outside a forum that is not the defendant's principal place of business or place of incorporation would encourage reconsideration of *Keeton*.

D. The "White List"

It is almost certain that the bases that will be approved for general jurisdiction¹⁸³ are the domicile, or perhaps less technically, habitual residence of an individual,¹⁸⁴ and the principal place of business or place of incorporation of a company.¹⁸⁵ Other likely grounds for general jurisdiction are knowing and voluntary consent either before or after suit is brought,¹⁸⁶ with exceptions to protect consumers¹⁸⁷ and employees¹⁸⁸ from contracts of adhesion and possible exceptions

182. *Keeton*, 549 A.2d 1187, 1205 (Souter, J., dissenting).

183. See *supra* note 81.

184. See KESSEDJIAN REPORT, *supra* note 3, at 78 (recommending habitual residence). See also Inter-American Convention, *supra* note 10, art. 1(A)(1) (permitting suit against a "natural person" at "his domicile or habitual residence").

185. See KESSEDJIAN REPORT, *supra* note 3, at 78 (recommending "the place of the principal establishment or head office" as a basis for general jurisdiction against a "legal person"); see also Inter-American Convention, *supra* note 10, art. 1(A)(1) (permitting suit against a "juridical person" at "its principal place of business"); *id.* art. 1(A)(2) (permitting suit against a "private non-commercial or business enterprise" at "its principal place of business" or where it is "organized").

186. See Brussels Convention, *supra* note 8, art. 17 (permitting agreement to exclusive jurisdiction "to settle any disputes which have arisen or which may arise in connection with a particular legal relationship"); Inter-American Convention, *supra* note 10, art. 1(A)(4) (providing for jurisdiction if the defendant has consented in writing or has entered a general appearance).

187. See Brussels Convention, *supra* note 8, art. 15(1) (providing that a consumer can agree to be sued outside of her domicile only "after the dispute has arisen").

188. See *id.* arts. 5(1), 17 (Article 17 providing that an agreement conferring

if the convention provides that some matters shall be in the exclusive jurisdiction of designated courts.¹⁸⁹

The most likely bases for specific jurisdiction¹⁹⁰ are tort and contract long-arm jurisdiction, but what form these provisions will take is doubtful. As indicated above,¹⁹¹ the Europeans are not anxious to duplicate the expansive tort jurisdiction effected when the Court of Justice of the European Communities gave a literal reading to the Brussels Convention's words "where the harmful event occurred."¹⁹² At the other extreme, jurisdiction should not be circumscribed by requiring that the defendant's activities be "purposefully directed" toward the forum, as favored by four Justices in *Asahi*.¹⁹³ A desirable compromise is that, in product liability cases, a manufacturer be subject to jurisdiction wherever the product causes personal injury or property damage if the defendant could foresee that the product would reach that forum in the ordinary channels of commercial distribution.¹⁹⁴

The *Kessedjian Report* states that "[i]f it is decided to include a special jurisdiction rule for contracts, we should not take inspiration from the text of Article 5.1 of the Brussels Convention."¹⁹⁵ That article provides jurisdiction "in matters relating to a contract [other than an employment contract], in the courts for the place of performance of the obligation in

jurisdiction over an employee is valid "only if entered into after the dispute has arisen or if the employee invokes it to seise courts other than those for the defendant's domicile" and cross-referencing Article 5 to further provide such jurisdiction where "the employee habitually carries out his work").

189. See *id.* art. 17 (providing that consent to jurisdiction elsewhere cannot deprive a court of its exclusive jurisdiction); Inter-American Convention, *supra* note 10, art. 1(A)(4) (providing that consent to jurisdiction is valid only "[i]n the case of non-exclusive fora").

190. See *supra* note 81.

191. See *supra* notes 148-50 and accompanying text.

192. Brussels Convention, *supra* note 8, art. 5(3).

193. See *supra* note 146 and accompanying text.

194. Cf. KESSEDJIAN REPORT, *supra* note 3, at 82 (recommending the listing as an exorbitant basis for jurisdiction "the mere presence of a product manufactured by the defendant which has caused damage, although he could not anticipate that this product would be found on this particular territory"); Convention on the Law Applicable to Products Liability, opened for signature Oct. 1, 1973, art. 7, reprinted in 11 I.L.M. 1283 (providing that the law of the place of injury does not apply "if the person claimed to be liable establishes that he could not reasonably have foreseen that the product or his own products of the same type would be made available in that State through commercial channels").

195. KESSEDJIAN REPORT, *supra* note 3, at 68 (citations omitted).

question¹⁹⁶ Both jurisdictional requirements, "place of performance" and "obligation in question" have presented difficult problems of interpretation.¹⁹⁷ U.S. courts have done no better in defining the due process limits of jurisdiction for breach of contract.¹⁹⁸ The *Kessedjian Report* suggests "a minimalist provision which would apply only to certain types of contracts and would prefer an enforcement situs easily defined in practice [such as] the effective delivery locus of the thing or the property [or] the place of performance of the service."¹⁹⁹ Perhaps, in light of the difficulties experienced with contract long-arm provisions in both the EU and the United States, this is the best that can be done. It is regrettable that because of the ease of modern travel and communication we cannot simply provide that commercial buyers and sellers who deal with one another can bring suit in their home forums in disputes arising out of the sale. If the objection to permitting either party to sue at home is that "[i]t makes too much room for concurrent jurisdiction,"²⁰⁰ contracting parties have a simple remedy for parallel litigation—include a choice-of-forum clause in their contract.²⁰¹

196. Brussels Convention, *supra* note 8, art. 5(1).

197. See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 140-41 (1992) (discussing the interpretation of this language by the European Court of Justice). Moreover, the Court of Justice of the European Communities has refrained from giving a uniform meaning to "place of performance," holding that this is determined under the substantive law chosen by the forum's choice-of-law rules. Case 12/76, *Industrie Tessili Italiana Como v. Dunlop AG*, 1976 E.C.R. 1473, 1486, [1997] 1 C.M.L.R. 26, 53. The Court has imposed some limits on the meaning of "place of performance." See *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, (Case No. C-106/95) [1997] CEC (CCH) 859, 879 (holding that an agreement between contracting parties "on the place of performance which is designed not to determine the place where the person liable is actually to perform the obligations incumbent upon him, but solely to establish that the courts of a particular place have jurisdiction, is not governed by art. 5(1) . . . but by art. 17 [dealing with forum selection], and is valid only if the requirements set out therein are complied with").

198. See *Hall's Specialties, Inc. v. Schupbach*, 758 F.2d 214, 216 (7th Cir. 1985) (stating the uncertainty in determining whether a merchant buyer can get jurisdiction over its merchant seller in a breach of contract action).

199. KESSEDJIAN REPORT, *supra* note 3, at 70.

200. *Id.* (referring to jurisdiction in tort wherever the harm occurs).

201. See *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 20 (1972) (enforcing a clause consenting to the exclusive jurisdiction of an English court). See also Brussels Convention, *supra* note 8, art. 17 (permitting consent to exclusive jurisdiction in a court of a contracting state).

Courts at the situs of real and personal property should have jurisdiction to adjudicate disputes over ownership of the property.²⁰² It would be a mistake, however, to deprive any court with jurisdiction over the parties of the power to affect the interests of those parties in property situated elsewhere. The Brussels Convention restricts suits adjudicating "tenancies of immovable property" to courts at the situs.²⁰³ If the purpose of this provision for exclusive jurisdiction is to protect residential tenants who are likely to be in an inferior bargaining position,²⁰⁴ it is preferable to do so by special provisions for consumer tenants that mirror the provisions for consumer buyers of goods and services.²⁰⁵

E. The "Black List"

Whether the convention should have a "black list" of exorbitant jurisdiction depends upon whether the "white list" contains the exclusive jurisdictional bases that may be used by courts in signatory countries. If there is such an exclusive list, the *Kessedjian Report* notes that a black list would be present for "only pedagogical reasons."²⁰⁶ If, however, signatories are free to utilize bases for jurisdiction not on the white list, although other signatories need not recognize the resulting judgments, a black list is essential to give U.S. defendants protection against the Brussels Convention black list²⁰⁷ and to give other signatories protection against U.S. bases for general jurisdiction, such as presence and doing business, that are

202. See *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (stating that "when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction"). An exception should be made for personal property brought into the forum by force or fraud. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 82 (1971) (providing that "[a] state will not exercise judicial jurisdiction, which has been obtained by fraud or unlawful force, over a defendant or his property").

203. Brussels Convention, *supra* note 8, art. 16(1)(a). The Convention contains an exception for "tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months." *Id.* art. 16(1)(b).

204. See Case 241/83, *Rösler v. Rottwinkel*, 1985 E.C.R. 99, 124 (holding that a suit between German lessor and lessee had to be brought at the Italian situs and giving this explanation).

205. See *supra* note 187.

206. KESSEDJIAN REPORT, *supra* note 3, at 78.

207. See *supra* note 112 and accompanying text.

considered exorbitant abroad.²⁰⁸ The United States should seek to retain these jurisdictional bases when the relevant events occurred in the United States and all parties are U.S. citizens, and should expect other countries to recognize the resulting judgments. How the United States arranges interstate jurisdiction of state and federal courts is not a concern of other signatories.

If a black list is included, the *Kessedjian Report* lists six candidates as a summary of "the conclusions of the Working Group and the Special Commission of June 1994."²⁰⁹ presence of property to obtain general jurisdiction over the owner;²¹⁰ nationality, domicile, or habitual residence of the plaintiff;²¹¹ doing business as a basis for general jurisdiction;²¹² tag jurisdiction;²¹³ and "unilateral choice of the court by the plaintiff (for example, on an invoice), without any 'express consent' by the defendant."²¹⁴ This last item seems misplaced. It presents a problem known in the United States as the "battle of the forms"²¹⁵ and is dealt with in section 2-207 of the Uniform Commercial Code²¹⁶ and in Article 19 of the United Nations Convention on Contracts for the International Sale of Goods.²¹⁷ Whether or not one contracting party is bound by a term proposed by the other should be left to the contract law that is selected by the forum's choice-of-law rules.

The *Kessedjian Report* suggests as possible additions to

208. See *supra* notes 119-38 and accompanying text.

209. KESSEDJIAN REPORT, *supra* note 3, at 80.

210. *Id.*

211. *Id.* Although the KESSEDJIAN REPORT refers to "the nationality of one of the parties," it is the plaintiff's nationality that has been an exorbitant basis for jurisdiction. See Brussels Convention, *supra* note 8, art. 3 (referring to the French Civil Code). The report of the Working Group confirms that it is plaintiff's nationality that is the improper basis for jurisdiction over the defendant. See *Working Group Conclusions*, *supra* note 2, at 261.

212. KESSEDJIAN REPORT, *supra* note 3, at 80.

213. *Id.* at 82.

214. *Id.*

215. See Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1217-19 (1982) (stating that when printed forms exchanged by buyer and seller contain different terms, a dispute over whether one of the parties may withdraw before goods are accepted or what terms govern after goods are accepted "is commonly called a 'battle of the forms'").

216. U.C.C. § 2-207 (1977).

217. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 19, U.N. Doc. A/CONF. 97/18 Annex I (1980).

the black list:

- the mere presence of a product manufactured by the defendant which has caused damage, although he could not anticipate that this product would be found on this particular territory;
- the rendering of a provisional or interim measure in order to adjudicate on the merits;
- the enforcement or registration of a judgment in order to adjudicate on additional or supplementary claims.²¹⁸

The first item on this list might be utilized to state its converse—that in product liability cases, a manufacturer is subject to jurisdiction in any country where the product causes harm and that the manufacturer could “anticipate” its product would reach in the course of commercial distribution.

V. OTHER ISSUES FOR CONVENTION DRAFTERS

A. *Punitive Damages and “Fabulous”²¹⁹ Verdicts*

As previously stated,²²⁰ convention negotiators are likely to focus on U.S. punitive damages and large jury verdicts as a possible topic for special treatment. The *Kessedjian Report* states that “[t]he difficulties associated with the enforcement of judgments awarding punitive damages or damages regarded as ‘excessive’ preoccupied the two Special Commissions of June 1994 and June 1996.”²²¹ The Report suggests provisions permitting signatories to deny enforcement to the punitive portion of a judgment, and to enforce only single damages if multiple damages are awarded.²²² Furthermore, the Report suggests

218. KESSEDJIAN REPORT, *supra* note 3, at 82.

219. This is the word used by Lord Denning to describe U.S. jury verdicts. *See* Smith Kline & French Lab. Ltd. v. Bloch, [1983] 1 W.L.R. 730, 734 (Eng. C.A. 1982) (Denning, M.R.).

220. *See supra* text accompanying notes 88-89.

221. KESSEDJIAN REPORT, *supra* note 3, at 106. *See also* Takeshi Kojima, *Cooperation in International Procedural Conflicts: Prospects and Benefits*, 57 LAW & CONTEMP. PROBS. 59, 74 (1994) (stating that “[i]n order to obtain the cooperation necessary to reach international agreement on this issue, the United States must assure the numerical propriety of punitive damage awards”); Schlosser, *supra* note 120, at 46 (describing U.S. punitive, multiple, and excessive damages as “the issue which is probably the most delicate” for the convention negotiators).

222. *See* KESSEDJIAN REPORT, *supra* note 3, at 106. *But see* Adler, *supra* note 18, at 103 (stating that “[a] treaty that eliminated treble and punitive damages

that the convention include a definition of "excessive" compensatory damages²²³ and notes that "the Special Commission of June 1996 also emphasised the value of contemplating inclusion of a clause similar to the one proposed in Article 8A of the draft bilateral treaty between the United Kingdom and the United States,"²²⁴ which read as follows:

Where the respondent establishes that the amount awarded by the court of origin is greatly in excess of the amount, including costs, that would have been awarded on the basis of the findings of law and fact established in the court of origin, had the assessment of that amount been a matter for the court addressed that court may, to the extent then permitted by the law generally applicable in that court to the recognition and enforcement of foreign judgments, recognize and enforce the judgment in a lesser amount.²²⁵

All of these provisions are undesirable. The problem of punitive, multiple, and excessive damages can be dealt with under a general public policy exception,²²⁶ which any judgments convention will undoubtedly include.²²⁷ There should be no attempt to specify what falls within this exception,²²⁸ whether it be punitive damages or a bizarre choice of law.²²⁹

could be challenged on due process and equal protection grounds").

223. See KESSEDJIAN REPORT, *supra* note 3, at 106.

224. *Id.* at 108.

225. See von Mehren, *supra* note 2, at 274 (quoting Article 8A added in 1978).

226. See Brand, *supra* note 84, at 174 (stating that German, Swiss, Japanese, and U.S. cases dealing with requests to enforce foreign judgments and arbitration awards "indicate that the international system has dealt adequately with punitive awards in civil judgments through the traditional public policy exception to recognition and enforcement"); cf. Brand, *supra* note 39, at 295-96 (stating that "[t]o face concerns about the size of United States jury awards, a treaty provision could allow for discretionary refusal of recognition and enforcement based on public policy").

227. See Juenger, *supra* note 22, at 21 (stating that "[n]ot merely domestic law but most recognition treaties and conventions recognize [a public policy] reservation"); Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis?*, 18 LOY. L.A. INT'L & COMP. L.J. 795, 796 (1996) (stating that "the public policy exception is necessary to ensure the eventual adoption of a multilateral judgments convention because it allays the concerns of states that are reluctant to join a multilateral convention without such a 'safety valve'").

228. See Juenger, *supra* note 22, at 22-23 (stating that "[a]ny attempt to enumerate the instances in which the public policy reservation can be legitimately invoked would be futile").

229. See *id.* at 34 (stating that "if a foreign court's choice of law should be so

There is no indication that courts abuse the public policy exception when asked to recognize foreign arbitration awards and judgments.²³⁰ If omitting specific mention of excessive judgments creates an impasse in treaty negotiations, then language such as the following might be inserted in the provision permitting non-recognition of judgments that are contrary to the public policy of the state in which recognition is sought: "If the state in which recognition is sought objects on public policy grounds to a judgment awarding punitive, multiple, or excessive compensatory damages, that state shall nevertheless recognize and enforce that judgment in an amount that is compatible with public policy."²³¹

B. The Degree of Finality that Entitles A Judgment to Recognition

The Convention should specify when a judgment is ripe for recognition and enforcement. The Inter-American Judgments Convention represents one extreme, stating that "[f]oreign judgments shall not have extraterritorial validity unless, in addition to being final and non-appealable, they are entitled to recognition and execution throughout the territory of the State Party in which they were rendered."²³² The Brussels Convention provides for recognition and enforcement of "any judgment

grossly erroneous or capricious as to amount to a miscarriage of justice, the public policy reservation offers a sufficient remedy"); von Mehren & Trautman, *supra* note 78, at 1639 (stating that "the choice-of-law question should not generally be open in recognition practice, but we would permit a court to deny recognition when the foreign judgment rests on a highly unusual and arbitrary choice of law").

230. See Brand, *supra* note 84, at 174 (stating that "the international system has dealt adequately with punitive awards in civil judgments through the traditional public policy exception to recognition and enforcement"); Juenger, *supra* note 22, at 23 (stating that "courts do not employ [the public policy] safety valve in an unduly expansive manner").

231. Lowenfeld, *supra* note 32, at 293 (stating that he "would be prepared to agree expressly that punitive damages (properly defined) be excluded from international recognition and enforcement, provided it was clearly stated that a judgment awarding both punitive and compensatory damages could be upheld as to the compensatory elements" and repeating this statement with regard to multiple damages); Schlosser, *supra* note 120, at 48 (stating that "American negotiators . . . would be well advised to insist that American judgments awarding damages are recognized and enforced to such degree as is compatible with the public policy of the respective member state in which enforcement is sought").

232. Inter-American Convention, *supra* note 10, art. 5.

given by a court or tribunal of a Contracting State,"²³³ but states that the enforcing court "may stay the proceedings" if an appeal is pending.²³⁴ I suggest that the enforcing state mirror the circumstances in the rendering state. If the judgment is subject to immediate enforcement where rendered, it should be enforced elsewhere. If enforcement is stayed where rendered either automatically on appeal or on posting of a bond, enforcement should be suspended elsewhere.²³⁵

C. *Lis Pendens*

Although not an issue of judgment recognition, the Convention might have a provision governing a court's power to take jurisdiction of the case if the same dispute is being adjudicated elsewhere. The Brussels Convention provides that "any court other than the court first seised shall decline jurisdiction in favour of that court."²³⁶ This solution has the disadvantages of inviting a rush to bring suit before the possibility of settlement has been explored²³⁷ and also of requiring a definition of "first seised."²³⁸

Another possibility is to follow the procedure in some U.S. courts of allowing parallel international litigation to proceed unless the forum's jurisdiction is threatened in the foreign court, and to give appropriate *res judicata* effect to the first judgment.²³⁹ I suggest a flexible approach under which ordi-

233. Brussels Convention, *supra* note 8, art. 25.

234. *Id.* art. 30; *cf.* New York Arbitration Convention, *supra* note 27, art. VI (stating that if a party has asked the proper authority to set aside or suspend an arbitration award, the recognizing court may "adjourn the decision on the enforcement . . . and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security").

235. *But see* von Mehren & Trautman, *supra* note 78, at 1657 (stating that pending appeal in the rendering state, enforcement elsewhere "subject to appropriate safeguards, seems clearly proper").

236. Brussels Convention, *supra* note 8, art. 21.

237. *See* KESSEDJIAN REPORT, *supra* note 3, at 86 (stating that giving preference to the court first seised "is not satisfactory" because it encourages a rush to file suit).

238. *See* Neste Chem. SA v. DK Line SA, [1994] 3 All E.R. 180 (Eng. C.A.) (holding that an English court is "seised" of a case within the meaning of Article 21 of the Brussels Convention when the writ is served and not when the court orders service of process out of the jurisdiction); KESSEDJIAN REPORT, *supra* note 3, at 86 (stating that "differences among legal systems regarding the concept of 'seisin' . . . often give rise to difficulty in defining" this term).

239. *See* Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1352-53 (6th Cir.

narily parallel litigation proceeds, but the courts are encouraged to communicate with one another to determine whether one of them is clearly the more appropriate site for adjudication, and if so, that is where the suit will continue while the other suit will be stayed or dismissed.²⁴⁰ This procedure was followed in an international bankruptcy case involving the distressed enterprises of the late Robert Maxwell, in which the Second Circuit deferred to an English court.²⁴¹ The last thing that we want is a cumbersome proceeding, such as that of the Conflict of Jurisdiction Model Act,²⁴² which emanated from the American Bar Association Section of International Law and Practice.²⁴³ Under the Act, parallel proceedings must always be avoided by a determination of the proper adjudicating forum applying factors similar to those used in forum non conveniens determinations.²⁴⁴ Moreover, if an "adjudicating forum" has not been determined before judgment, forum courts are directed not to recognize a foreign judgment unless the foreign court qualifies as the proper adjudicating forum.²⁴⁵ This bar to recognition is likely to preclude recognition of the judgments of any enacting state in countries that require a showing of reciprocity as a condition precedent to recognition.²⁴⁶

1992) (adopting the view of the Second and D.C. Circuits that a foreign suit should not be enjoined unless necessary to protect the forum's jurisdiction or important public policies, but noting that in the Ninth and Fifth Circuits, duplication of parties and issues is sufficient for an injunction).

240. See KESSEDIAN REPORT, *supra* note 3, at 86 (suggesting a "dialogue between the two or more courts addressed").

241. *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1054-55 (2d Cir. 1996).

242. See Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21, 56-62 (1992) (containing the text of the Act and drafters' comments). Connecticut has enacted the statute. See CONN. GEN. STAT. ANN. §§ 50a-200 to -203 (West 1994). See also Friedrich K. Juenger, *Judicial Control of Improper Forum Selection: Some Random Remarks and a Comment on How Not To Do It*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 311, 322 (Jack L. Goldsmith ed., 1997) (stating that "[a]ll in all, the ABA subcommittee's Model Act is an undesirable piece of legislation").

243. See Houston Putnam Lowry & Peter W. Schroth, *Survey of 1991 Developments in International Law in Connecticut*, 66 CONN. B.J. 64, 74 (1992) (stating that the Act was drafted by a subcommittee of this section).

244. CONN. GEN. STAT. ANN. § 50a-202 (West 1994). See discussion of forum non conveniens *infra* Part V.F.

245. CONN. GEN. STAT. ANN. § 50a-201(a), (d) (West 1994).

246. See *supra* note 70 and accompanying text. See also Juenger, *supra* note 242, at 322 (stating that Connecticut courts will be compelled to give full faith and credit to the judgment of a sister state that recognized a foreign judgment,

D. Provisional and Protective Measures

Provisional and protective measures are often desirable to "maintain the status quo" pending final judgment or "to secure assets out of which an ultimate judgment may be satisfied."²⁴⁷ Some U.S. courts have issued protective orders in aid of foreign litigation,²⁴⁸ but others have refused.²⁴⁹ Interim orders granted by common-law courts are likely to be unfamiliar in civil law jurisdictions.²⁵⁰ Nevertheless both the *Kessedjian Report* and Professor Schlosser agree that the Convention should set out jurisdictional rules for making orders necessary to provide interim protection with regard to litigation abroad.²⁵¹

even if the foreign judgment does not meet the Act's standards).

247. COMM. ON INT'L CIVIL & COM. LITIG., INT'L L. ASS'N (ILA), PRINCIPLES ON PROVISIONAL AND PROTECTIVE MEASURES IN INTERNATIONAL LITIGATION 18 [hereinafter PRINCIPLES ON PROVISIONAL AND PROTECTIVE MEASURES], reprinted in KESSEDJIAN REPORT, *supra* note 3, Annex I. The Principles were endorsed by the Executive Council of the ILA on November 16, 1996. See 36 I.L.M. 1052.

In England, the "Mareva" injunction is used to order a party not to transfer assets in England or abroad. The injunction takes its name from *Mareva Compania Naviera S.A. v. Int'l Bulk Carriers S.A.*, [1980] 1 All E.R. 213 (Eng. C.A. 1975), in which a shipowner sued a charterer for breach of contract and, in an *ex parte* proceeding, enjoined the defendant from removing funds from a London Bank. In *Derby & Co. v. Weldon*, [1989] 2 W.L.R. 412, 413 (Eng. C.A. 1988), a Mareva injunction was used to freeze assets outside of England pending litigation outside of England.

Another example of an English provisional remedy is an "Anton Pillar" order, which is issued *ex parte* to permit the applicant to enter the other party's premises and inspect, remove, or make copies of documents. The order is named for the case that established the practice, *Anton Piller K.G. v. Manufacturing Processes Ltd.*, [1976] 1 All E.R. 779 (Eng. C.A. 1975).

248. See *Cardenas v. Solis*, 570 So.2d 996, 1000 (Fla. Dist. Ct. App. 1991) (affirming an injunction freezing husband's Florida bank accounts on request of Guatemalan court).

249. See *Pilkington Bros. P.L.C. v. AFG Indus. Inc.*, 581 F. Supp. 1039, 1047 (D. Del. 1984) (refusing to issue an injunction duplicative of an interim injunction issued by an English court against a Delaware corporation).

250. See KESSEDJIAN REPORT, *supra* note 3, at 74 (stating that some of the principles stated in the PRINCIPLES ON PROVISIONAL AND PROTECTIVE MEASURES, *supra* note 247, "may be unfamiliar to legal systems in the Roman law tradition"); Schlosser, *supra* note 120, at 46 (stating that civil law and common law countries draw different distinctions between orders in rem and orders in personam and that "[t]his difference also causes difficulties in regard to provisional measures within the framework of the Brussels Convention").

251. See KESSEDJIAN REPORT, *supra* note 3, at 74 (stating that "rules of jurisdiction concerning provisional and interim measures . . . are essential"); Schlosser, *supra* note 120, at 46 (stating that "the judge in the country addressed should have discretionary powers on how to enforce a foreign interim order").

The *Principles on Provisional and Protective Measures in International Litigation* promulgated by the International Law Association provide that "[t]he mere presence of assets within a country should be a sufficient basis for the jurisdiction to grant provisional and protective measures in respect of those assets."²⁵² The Principles also provide protection for a defendant whose assets are the subject of interim orders.²⁵³ The *Kessedjian Report* praises the *Principles on Provisional and Protective Measures* as striking "a fair balance between the respective interests of the plaintiff and the defendant" and states that they are "very useful for the purposes of the Special Commission" drafting the judgments convention.²⁵⁴

E. Recognition of Equitable Decrees

It may be that the convention negotiators will have all they can handle drafting rules for recognition of money judgments. Recognition of equitable decrees is a difficult topic because of the discretion involved in issuing the decrees²⁵⁵ and because of differences in remedies for violation. Even within the United States with regard to full faith to judgments, the *Second Restatement of Conflicts* takes the position that sister-state equitable decrees must be "given the same res judicata effect with respect to the persons, the subject matter of the action and the issues involved that it has in the state of rendition,"²⁵⁶ but declines to make a "definite statement" with regard to enforcement.²⁵⁷ State courts have refused to enforce anti-suit injunctions issued by sister states.²⁵⁸

252. PRINCIPLES ON PROVISIONAL AND PROTECTIVE MEASURES, *supra* note 247, ¶ 11.

253. *Id.* ¶¶ 6, 7 (assuring the defendant notice and opportunity to be heard); ¶ 8 (giving the court authority to require security before issuing an order); ¶ 13 (stating that "[t]he provisional and protective measure should be valid for a specified limited time" and subject to renewal).

254. KESSEDJIAN REPORT, *supra* note 3, at 74.

255. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 cmt. c (1971).

256. *Id.* cmt. b.

257. *Id.* cmt. c.

258. See *James v. Grand Trunk W. R.R.*, 152 N.E.2d 858, 862 (Ill. 1958) (denying recognition of a Michigan decree enjoining administratrix from proceeding with a wrongful death suit first filed in Illinois); cf. *Baker v. General Motors Corp.*, 118 S. Ct. 657, 667 (1998) (holding that the Full Faith and Credit Clause does not prevent a United States district court sitting in Missouri from compelling the testimony of a former GM employee whom a Michigan state court had enjoined

Despite these difficulties, the convention drafters should seriously consider including judgments that order the performance or non-performance of conduct other than payment of money, at least to the extent of making such judgments res judicata on issues decided,²⁵⁹ and not precluding full recognition and enforcement.²⁶⁰ There are hopeful signs that the drafters will be amenable. The Working Group noted "a consensus" that the convention should "not necessarily [be] limited to money judgments,"²⁶¹ and the *Kessedjian Report* states that "[i]njunctions . . . should also be included, except those relating only to the jurisdiction or seisin of a foreign court, such as 'anti-suit injunctions.'"²⁶²

F. *Forum Non Conveniens*

Under the doctrine of forum non conveniens, a court may decline to exercise its jurisdiction "if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff."²⁶³ The doctrine is almost unknown in civil law jurisdictions²⁶⁴ and is not available under the Brussels Convention.²⁶⁵ Nevertheless,

from testifying in product liability litigation involving GM).

259. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, § 481 cmt. b (stating that "[j]udgments granting injunctions . . . are not generally entitled to enforcement, but may be entitled to recognition").

260. See LOWENFELD, *supra* note 99, at 136 (stating that the convention should "at least" include a provision making it clear that it does not preclude recognizing injunctions).

261. *Working Group Conclusions*, *supra* note 2, at 259.

262. KESSEDJIAN REPORT, *supra* note 3, at 90.

263. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971).

264. See *Fox v. Board of Supervisors*, 576 So.2d 978 (La. 1991) (rejecting forum non conveniens on the ground that it is a common-law doctrine and Louisiana is a civil law jurisdiction). But see Case C-365/88, *Kongress Agentur Hagen GmbH v. Zeheaghe BV*, 1990 E.C.R. I-1845 (holding that in deciding whether to permit impleader of a third party in an action on a warranty under Brussels Convention Article 6(2), a national court may apply its own procedural rules to determine whether the action is admissible); Schlosser, *supra* note 120, at 44 (describing *Kongress Agentur Hagen* as accepting "a kind of reasoning which is very close to forum non conveniens considerations").

265. See Case 42/76, *Wolf v. Harry Cox B.V.*, [1990] 2 C.M.L.R. 43, 53 (1976) (stating that "nobody is entitled to invoke the principles of common law on the subject as a means of escaping the system laid down by the Convention, with which all the Contracting States must comply"); *Working Group Conclusions*, *supra* note 2, at 261 (stating that "[u]nder Brussels/Lugano, there is, in principle, no room for this practice"). But cf. *In re Harrods (Buenos Aires) Ltd.*, [1992] Ch. 72 (Ch. App.) (holding that, despite the Brussels Convention, a forum non conveniens

it is essential that U.S. courts be able to turn away forum-shopping foreigners when they are injured abroad by products made by U.S. manufacturers.²⁶⁶ The Working Group noted "that further study was needed" as to whether the convention should permit a forum non conveniens dismissal.²⁶⁷ The *Kessedjian Report* seems hostile to the doctrine of forum non conveniens, stating that all the reasons given for excluding it from the Brussels Convention "are still current"²⁶⁸ and that, if the doctrine is allowed, the convention would have to specify the factors to be taken into account in ruling on a forum non conveniens motion.²⁶⁹ This specificity is designed to allay the civil law discomfort with judicial discretion on jurisdictional matters.²⁷⁰ Trying to specify how a court should exercise its discretion is like trying to fix a drop of mercury with a pin, but if that is the price of getting forum non conveniens into the convention,²⁷¹ so be it. A good place to look for these specifics is the primer that the Supreme Court of Florida wrote for the guidance of lower Florida courts when Florida's highest court

stay was proper when the defendant was domiciled in England and the alternative forum was in Argentina).

266. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) (stating that a foreign plaintiff's choice of a U.S. forum to sue a U.S. defendant "deserves less deference" than is usually accorded to a plaintiff's choice of forum).

267. *Working Group Conclusions*, *supra* note 2, at 261.

268. KESSEDJIAN REPORT, *supra* note 3, at 44. See also Gerhard Walter & Rikke Dalsgaard, *The Civil Law Approach*, in TRANSNATIONAL TORT LITIGATION, *supra* note 82, at 41, 46 (stating that "[t]he rationale behind" the Brussels Convention's exclusion of forum non conveniens "is that the typical interests of both parties have been balanced in the statutory jurisdiction rules in general and *a priori*" and therefore "there is no need to rebalance these interests in the particular case at the expense of legal certainty").

269. KESSEDJIAN REPORT, *supra* note 3, at 44.

270. See Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314, 318 (1997) (stating that "the continental European countries generally reject *forum non conveniens*, on the basis that it would introduce judicial discretion where discretion does not belong").

271. See also Schlosser, *supra* note 120, at 43 (stating that "the United States could make a good bargain" by agreeing to "[g]ive up doing business as a basis of general jurisdiction in exchange for being permitted to decline jurisdiction according to forum non conveniens principles"). But see Peter Schlosser, *Product Liability*, in TRANSNATIONAL TORT LITIGATION, *supra* note 82, at 59, 80 (stating that "[i]t is understandable that the United States should try to avoid" attracting foreign litigants seeking "huge amounts of damages," but that it is up to the U.S. "to reconsider their substantive private international law rules to ensure that US standards do not invariably apply to any tort litigation conducted in US courts").

broadened the scope of forum non conveniens.²⁷²

G. Merger

The traditional U.S. rule has been that, unlike the case with sister-state judgments,²⁷³ a cause of action does not merge with a foreign judgment in favor of the plaintiff.²⁷⁴ Although the res judicata effects of the foreign judgment on fact issues minimize the consequences of this non-merger rule,²⁷⁵ one important practical consequence is that the plaintiff can seek recalculation of damages hoping to recover a larger amount.²⁷⁶ The non-merger rule for foreign judgments makes little sense, and it is doubtful that it now represents the prevailing U.S. view.²⁷⁷ The convention should give the non-merger rule its quietus and provide that between the parties a judgment shall be given the same preclusive effect that it had in the country whose courts rendered the judgment, no more,

272. *Kinney Sys., Inc. v. Continental Ins. Co.*, 674 So.2d 86, 94-96 (Fla. 1996).

273. See RESTATEMENT (SECOND) OF JUDGMENTS § 18(1) (1982) (stating that after "a valid and final personal judgment is rendered in favor of the plaintiff [t]he plaintiff cannot . . . maintain an action on the original claim . . . although he may be able to maintain an action upon the judgment").

274. See Friedrich K. Juenger, *An International Transaction in the American Conflict of Laws*, 7 FLA. J. INT'L L. 383, 388 (1992) (stating that "foreign country judgments do not merge the cause of action"); Reese, *supra* note 152, at 788 (stating that "[i]n contrast to the well-settled rule concerning judgments of American origin, the prevailing view in this country is that the original cause of action is not merged in a judgment or decree rendered in a foreign nation").

275. See Reese, *supra* note 152, at 788 (stating that "since the judgment will normally be held conclusive of the issues involved, even though there is no technical merger, the question seems of no practical import").

276. RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. b (1982) (stating that if it were not for the merger rule, "if the claim was unliquidated, the plaintiff might [sue again on the original cause of action and] hope to recover a larger sum than that awarded to him by the judgment").

277. See UNIFORM ACT, *supra* note 42, § 3 (stating that a foreign judgment "is conclusive between the parties to the extent that it grants or denies recovery of a sum of money [and] is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit"); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, §481 cmt. c (stating that "[a] foreign judgment is generally entitled to recognition by courts in the United States to the same extent as a judgment of a court of one State in the courts of another State"); EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 957 (2d ed. 1992) (stating that "[t]he non-merger rule has been subject to criticism and indeed makes little sense today"). But see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 95 cmt. c, illus. 1 (rev. ed. 1989) (stating that "[n]o merger results, however, in the case of a judgment for money damages rendered in a foreign nation").

but surely no less.²⁷⁸ "No more" is important because some foreign countries permit bringing separate suits for what a U.S. court would regard as a single cause of action,²⁷⁹ and it would not be fair or efficient to tell a plaintiff who had relied on this permissiveness that the judgment abroad in its favor bars it from pursuing here a claim still available there.

The *Kessedjian Report* recommends that the convention not give res judicata effect to an unsuccessful jurisdictional challenge.²⁸⁰ I disagree. It is proper, perhaps mandatory, that the forum view the foreign judgment through the forum's jurisdictional lens when the foreign jurisdictional rules are not the same as the forum's.²⁸¹ When different jurisdictional regimes are operating, jurisdictional objections that the forum would find cogent could not have been raised abroad. Under the convention, all signatories will be applying the same white list jurisdictional standards.²⁸² If, in what should be a rare case, a court believes that a foreign judgment flouts the convention's jurisdictional standards, recognition and enforcement may be denied under the public policy exception.²⁸³ It is unnecessary

278. Cf. KESSEDJIAN REPORT, *supra* note 3, at 94 (stating that "[i]t would be a good thing if the Convention could take a position on these [res judicata] issues").

279. See von Mehren & Trautman, *supra* note 78, at 1604 (stating that "[m]any countries . . . are prepared to allow the parties, if they desire, to fragment a controversy that could be handled as a single matter").

280. KESSEDJIAN REPORT, *supra* note 3, at 98-100.

281. See *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 444 (3d Cir. 1971) (concluding that an English court's exercise of personal jurisdiction over a U.S. company "comports with our standards of due process"); UNIFORM ACT, *supra* note 42, § 5(a)(2) (providing that a "foreign judgment shall not be refused recognition for lack of personal jurisdiction if . . . the defendant voluntarily appeared in the proceedings, other than for the purpose . . . of contesting the jurisdiction of the court over him").

282. See *supra* text accompanying note 105. This assumes that the U.S. proposal of a "gray list" of jurisdictional bases that other signatories may, but need not, recognize is unsuccessful. See *supra* notes 113-14 and accompanying text.

283. See *supra* notes 226-27 and accompanying text. But cf. Brussels Convention, *supra* note 8, art. 28 (stating that "the test of public policy . . . may not be applied to the rules relating to jurisdiction"). For the Brussels Convention, however, the Court of Justice of the European Communities sits as the final arbiter of jurisdictional disputes and provides protection against a signatory's flouting of the Convention's requirements. See Protocol on the Interpretation by the Court of Justice of the Convention, June 3, 1971, 1971 O.J. (L 304) 97, reprinted in 29 I.L.M. 1439, 1440 (as amended by accession of additional E.U. members), art. 1 (stating that "[t]he Court of Justice of the European Communities shall have jurisdiction to give rulings on . . . interpretation"). The Court of Justice, however, can respond only to interpretation requests submitted by a national court or by a

and inefficient to require that in all cases the defendant be permitted to renew a jurisdictional challenge that failed abroad. No such second bite at the apple is permitted under the Brussels Convention.²⁸⁴

Whether persons who were not parties to a prior judgment may invoke its *res judicata* effects should, in most circumstances, be decided under the law of the state in which the judgment was rendered. A defendant who claims that a suit is barred by facts determined in a prior suit by the plaintiff against another defendant, is invoking the doctrine of "defensive collateral estoppel."²⁸⁵ A plaintiff who claims that a defense is barred by facts determined in a prior suit by another plaintiff against the same defendant is invoking the doctrine of "offensive collateral estoppel."²⁸⁶ Under the convention, a judgment should be given the same nonmutual collateral estoppel effect in the recognizing state as in the rendering state.²⁸⁷

public official, not by a party. See *id.* art. 2 (listing the "courts [that] may request the Court of Justice to give preliminary rulings on questions of interpretation"). See also *id.* art. 4 (listing the public officials who may request a ruling). For examples of the Court of Justice exercising this interpretation authority see *supra* notes 145, 180-81 and accompanying text.

284. See Brussels Convention, *supra* note 8, art. 28 (stating that "[s]ubject to the provisions of the first paragraph [providing exceptions for insurance, consumer contracts, exclusive jurisdiction, and treaties between a signatory and non-signatory excluding the exorbitant bases listed in Article 3] the jurisdiction of the court of the State of origin may not be reviewed").

285. See Steven R. Harmon, *Unsettling Settlements: Should Stipulated Reversals Be Allowed to Trump Judgments' Collateral Estoppel Effects Under Neary?*, 85 CAL. L. REV. 479, 486-87 (1997) (stating that "[d]efensive collateral estoppel occurs when a defendant attempts to preclude a plaintiff from litigating an issue that the plaintiff has previously litigated unsuccessfully against another party"). The classic example is *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 122 P.2d 892 (Cal. 1942), in which the court precluded a plaintiff, who had unsuccessfully sought to prove that a person had improperly withdrawn money from a bank, from suing the bank for permitting the withdrawal.

286. See Patricia Anne Solomon, *Are Mandatory Class Actions Unconstitutional?*, 72 NOTRE DAME L. REV. 1627, 1641 n.58 (1997) (stating that a "free rider" problem exists if a party who has opted out of a class action can "if the judgment is favorable [to plaintiffs] . . . assert non mutual offensive collateral estoppel and secure a judgment against the defendant without any effort, expense, or risk").

287. See Burbank, *supra* note 39, at 1585 (stating that giving greater preclusive effects to a foreign judgment than it has at home "would impose unwanted costs on the foreign court system" because knowledgeable parties would litigate the first case more intensively than they otherwise would); cf. *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985) (holding it a violation of full faith and credit for a federal court to give a state court judgment more defensive collateral estoppel effect than it would have in the state where rendered). But see

A limited exception might be made for defensive estoppel in which the second state can, as a matter of its own policy of judicial efficiency, bar suit there but not preclude the plaintiff from suing elsewhere.

H. Excluded Matters

The *Kessedjian Report* states that "the scope of the instrument should be confined to civil and commercial matters, but this concept must be clarified."²⁸⁸ The terms "civil and commercial" are not defined in the Brussels Convention, but the Court of Justice of the European Communities can assure a uniform interpretation.²⁸⁹ For other conventions using these terms, the lack of a definition has resulted in disparate views among signatories on the scope of the convention.²⁹⁰

What topics should be excluded from the convention? The *Kessedjian Report* states that "it appears to be settled"²⁹¹ that "civil status and capacity of natural persons," "matrimonial property regimes," "wills," "succession to the estates of deceased persons," "bankruptcy and other similar procedures," "social security," and "arbitration" will be excluded either because they are covered by other conventions "or because they raise particular problems and thus require a special regulatory

Andes v. Versant Corp., 878 F.2d 147, 151 (4th Cir. 1989) (refusing to preclude the plaintiff from suing defendants not joined in an English action even though he would be precluded under English law); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, § 481 cmt. c (stating that "no rule prevents a court in the United States from giving greater preclusive effect to a judgment of a foreign state than would be given in the courts of that state"); Smit, *supra* note 60, at 63 (stating that giving res judicata "deference [to the rules of a foreign country] is not only illogical, but imposes on every person relying on a foreign judgment the often difficult and expensive burden of proving the foreign law of res judicata"). Perhaps an answer to Professor Smit's objection is that the forum should presume that foreign res judicata rules are the same as the forum's unless one of the parties rebuts this presumption.

288. KESSEDJIAN REPORT, *supra* note 3, at 12.

289. See *supra* note 283.

290. The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents, for instance, has no definition of "civil." See Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. Signatories have differed on the meaning of "civil." See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 56, § 471 cmt. f (stating that the U.S. and the United Kingdom regard as "civil" all non-criminal proceedings, but that France also excludes "fiscal" matters, and Germany excludes "any matters involving enforcement of 'public law'").

291. KESSEDJIAN REPORT, *supra* note 3, at 16.

framework of their own."²⁹² Also, because of the large number of other bilateral conventions dealing with fiscal matters, customs duties, and fines, the Report suggests that these topics be excluded.²⁹³ On the other hand, the Report suggests not excluding civil suits for environmental damage²⁹⁴ or suits between private parties "based on a breach of competition law or acts of unfair competition."²⁹⁵

The Report's suggestions regarding excluded topics are sensible and should not be a matter of controversy.

I. *Mass Torts*

The *Kessedjian Report* has the following suggestions for mass torts, apparently not the single-event mass tort involving many victims of a disaster,²⁹⁶ but the temporally-and-geographically-dispersed mass tort in which many persons are injured by the same cause, typically a defective product:

[D]isputes involving a multiplicity of parties (often the victims), all of whom want to take proceedings in their own courts, are much more problematic [than cases with one victim and one defendant]; the defendant being compelled to defend his interests in many different jurisdictions. If the Convention is also to cover these cases of multiple litigation in cases of tort or quasi-tort, thought should be given to including, perhaps, a clause providing for a different ground of jurisdiction than the one chosen in cases where there is only one claimant and one defendant.²⁹⁷

Although the Report does not state what this "different

292. *Id.* at 18.

293. *Id.* at 28.

294. *Id.* at 24.

295. *Id.* at 26. *But cf.* Inter-American Convention, *supra* note 10, art. 6, which excludes "torts" as well as "[p]ersonal status and capacity of natural persons;" "[d]ivorce, annulment, and marital property;" "[c]hild support and alimony;" "[d]ecedents' estates (testate or intestate);" "[b]ankruptcy, insolvency proceedings, composition with creditors, or other similar proceedings;" "[l]iquidation of business enterprises;" "[l]abor matters;" "[s]ocial security;" "[a]rbitration;" and "[m]aritime and aviation matters."

296. A classic example is *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987), in which an explosion at Bhopal, India released poison gas allegedly resulting in "deaths of over 2,000 persons and injuries of over 200,000." *Id.* at 197.

297. KESSEDJIAN REPORT, *supra* note 3, at 22.

ground of jurisdiction" would be, the obvious solution would be to compel all the victims to sue at the defendant's principal place of business or place of incorporation. I disagree. A victim injured by a defective product distributed in the victim's home state through normal commercial channels should be able to sue at home and not incur the added expense and inconvenience of suing abroad. Moreover, if the defendant is a U.S. manufacturer, it would prefer that those injured by its products sue at home and not forum shop for a generous U.S. jury. The typical tactic of a U.S. manufacturer in this situation is to move for a forum non conveniens dismissal.²⁹⁸ U.S. manufacturers will oppose any convention that seeks to compel product liability litigation in the manufacturer's country.

J. *Conflicting Judgments*

The convention should indicate which of two conflicting foreign judgments are entitled to recognition and enforcement. Countries differ as to whether the judgment that prevails is the first or the last in time.²⁹⁹ The Brussels Convention selects the "earlier judgment,"³⁰⁰ and this seems a sensible way to discourage post-judgment attempts by disappointed litigants to get a better result in another forum.³⁰¹

The Brussels Convention does not define "earlier judgment," but definition is desirable. I suggest that "earlier judgment" be defined as the first judgment that is no longer subject to modification at the trial level, although it may be subject to appeal. Another possibility is to select the judgment resulting from the suit first filed in order "to discourage multiple lawsuits between the same parties."³⁰² This, however, would en-

298. See *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985) (dismissing suit brought by 58 Costa Rican agricultural workers allegedly injured by defendants' pesticides); *Harrison v. Wyeth Lab. Div. of Am. Home Prod. Corp.*, 510 F. Supp. 1 (E.D. Pa. 1980) (dismissing suit by U.K. citizens allegedly injured by defendant's oral contraceptive), *aff'd*, 676 F.2d 685 (3d Cir. 1982).

299. See Juenger, *supra* note 22, at 25 (stating that "[t]he national reports indicate the lack of a general agreement on [whether] the first or the last should be honored"); cf. *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939) (establishing a last-in-time rule for interstate full faith and credit purposes).

300. Brussels Convention, *supra* note 8, art. 27(5) (referring to "an earlier judgment given in a non-contracting State").

301. See Juenger, *supra* note 22, at 25 (stating that "[t]he first-in-time rule would seem preferable because it deters post-judgment forum shopping").

302. *Id.*

courage a race to court and discourage pre-suit settlement negotiations.³⁰³

The Brussels Convention departs from the first-in-time rule to give absolute preference to home-court judgments.³⁰⁴ This parochialism should not be reflected in the new convention.³⁰⁵

VI. CONCLUSION

I have made the following suggestions to the U.S. negotiators of the judgments convention:

1. Conduct a survey of current reception of U.S. judgments abroad to determine how great is the U.S. need for the convention.³⁰⁶

2. Retain, for U.S. domestic purposes and for use against defendants not domiciled in signatory countries, bases for jurisdiction likely to be black-listed, such as general jurisdiction based on doing business and tag jurisdiction.³⁰⁷

3. Do not agree to a tort long-arm provision adopting the "purposefully directed" requirement that got four votes in *Asahi*.³⁰⁸ The tort provision should subject a manufacturer to suit wherever its product causes harm if the manufacturer could foresee that the products would reach there in the ordinary channels of commercial distribution.³⁰⁹

4. Any provision providing exclusive jurisdiction at the situs of realty for in rem proceedings should permit courts elsewhere with jurisdiction over the parties to affect the inter-

303. Cf. *supra* notes 236-38 and accompanying text, discussing the "first seised" rule of the Brussels Convention for avoiding duplicate litigation.

304. Brussels Convention, *supra* note 8, art. 27(3) (stating that a judgment "shall not be recognized . . . if . . . irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought").

305. See Juenger, *supra* note 22, at 26 (stating that "[t]o prefer forum determinations irrespective of when they were rendered, as some nations do, serves neither comity nor judicial economy").

306. See *supra* note 20 and accompanying text.

307. See *supra* notes 115, 137-38 and accompanying text.

308. See *supra* notes 146-50 and accompanying text.

309. See *supra* note 194 and accompanying text.

ests of those parties in the realty and otherwise resolve disputes between them related to the property.³¹⁰

5. Resist any attempt to provide an exception specifically covering punitive, multiple, or "excessive" damages. If this results in impasse, insert in the public policy exception language such as the following: If the state in which recognition is sought objects on public policy grounds to a judgment awarding punitive, multiple, or excessive compensatory damages, that state shall nevertheless recognize and enforce that judgment in an amount that is compatible with public policy.³¹¹

6. Whether a judgment on appeal is entitled to enforcement in the recognizing state should depend on whether it is entitled to immediate enforcement where rendered.³¹²

7. No provision should attempt to bar parallel litigation, but courts should be encouraged to communicate and defer to another court that is clearly the more appropriate site for adjudication.³¹³

8. Provide that the presence of assets is sufficient for jurisdiction to issue provisional and protective orders concerning those assets and provide protection for a defendant whose assets are the subject of interim orders.³¹⁴

9. Decrees ordering conduct other than payment of money should be recognized at least to the extent of making them res judicata on issues decided, with discretion to accord the decrees full recognition and enforcement.³¹⁵

10. Provide that a court with white list jurisdiction has discretion to stay or dismiss the action for litigation in a more appropriate forum.³¹⁶

310. See *supra* notes 202-05 and accompanying text.

311. See discussion *supra* Part V.A.

312. See discussion *supra* Part V.B.

313. See discussion *supra* Part V.C.

314. See discussion *supra* Part V.D.

315. See discussion *supra* Part V.E.

316. See discussion *supra* Part V.F.

11. Provide that a judgment has the same issue and claim preclusion effect that it has where rendered, including an unsuccessful attack on jurisdiction. Include a limited exception for discretion to permit use of nonmutual defensive collateral estoppel to bar suit in the forum but not preclude suit in other signatories.³¹⁷

12. Oppose any attempt to limit jurisdiction for mass tort claims to courts at the manufacturer's principal place of business.³¹⁸

13. Adopt a first-in-time rule for conflicting judgments and make no exceptions for judgments of the receiving state or for judgments rejecting objections to jurisdiction.³¹⁹

Despite initial resistance,³²⁰ the Hague judgments project is off and running. I suspect that, after much time and effort, drafting will reach an impasse or that few countries will ratify any convention that does emerge.³²¹ The EU, with its Brussels Convention, has little incentive to agree to recognize and enforce U.S. judgments. I hope that I am wrong. In any event, negotiating the convention will do us good by driving home to us what aspects of our legal system appall some of our best friends. This instruction may produce salutary changes in the administration of justice in U.S. courts.

317. See discussion *supra* Part V.G.

318. See discussion *supra* Part V.I.

319. See discussion *supra* Part V.J.

320. See remarks of Mr. Philip, a delegate from Denmark, in I 17 H.C.P.I.L. PROC. 327 (1993) (stating that "there were profound problems associated with the project and that it was too ambitious").

321. See LOWENFELD, *supra* note 99, at 129 (stating that "I have some doubt whether the world is ready for such a convention").