

**THE IMPACT OF JURISDICTIONAL RULES
AND RECOGNITION PRACTICE ON
INTERNATIONAL BUSINESS
TRANSACTIONS: THE U.S. REGIME^φ**

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I. INTRODUCTION

International business transactions are entered into in the shadow of both substantive and procedural rules. My paper focuses on the procedural framework for the litigation of disputes arising from international transactions and the impact those rules have on structuring transactions and litigating future disputes.

Questions about judicial jurisdiction (along with discretionary rules of *forum non conveniens* and *lis pendens*) and the recognition of judgments become important at two different points in time with respect to international business transactions. The obvious one is when the transaction breaks down and litigation is imminent. A potential plaintiff will want to identify the best place to sue the defendant and will need to determine whether jurisdiction over the potential defendant can be obtained there. Of course, the analysis will be affected by information about where the defendant has assets, and if a judgment—particularly if obtained other than in the place where the defendant has assets—will be enforceable in the jurisdiction where the assets are located. In addition, the procedural advantages of one forum over another as well as the application of particular law will bear heavily on the choice of forum. The potential defendant will also be thinking about those same issues—and whether he wants to wait to be sued by his adversary or obtain a first-move advantage by initiating litigation in a forum of his own choice. Such situations can often give rise to parallel litigation in different countries with a subsequent race to judgment. Alternatively, a party in the posture of defendant may want to think about moving a case to a more desirable forum once he has been sued, either by resisting jurisdiction in the plaintiff's forum of choice or by relying on doctrines such as *forum non conveniens* to move the case to another and more desirable (from his perspective) forum. Among the strategic choices confronting the defendant are whether to contest jurisdiction at the outset, or to default and challenge any judgment at the enforcement stage.

The less obvious but equally critical stage for these questions to be considered is at the time the transaction is entered into. That is because some of these matters can be

settled in advance of any litigation, for example, by including a forum-selection clause—either a choice-of-court or arbitration clause—as part of the contract or transaction, or by providing for a choice-of-law clause. Of course, the validity of such clauses will depend upon whether the particular country that is asked to decide the question will honor them. The use of such clauses is only effective if they will be upheld at the litigation, and later the judgment enforcement, stage. In a case involving an international business dispute between a U.S. and European party, it is important to have knowledge about both U.S. and European law on all of these questions. My paper addresses the “American side” of these issues—first, from the perspective of a lawyer considering the possibility of litigating a dispute in the United States and looking to obtain access to a forum in the United States; and second, assuming litigation has been undertaken elsewhere and a judgment has been entered by a foreign court, whether a court in the United States will enforce that foreign judgment against assets in the United States.¹

II. JUDICIAL JURISDICTION IN THE UNITED STATES

As I have noted in several other articles, rules of jurisdiction in the United States are in many respects actually more restrictive than rules of jurisdiction in Europe.² The United States is not a party to any treaty—such as Brussels, Lugano, or the E.U. Regulation—and thus the jurisdictional rules in the United States are the product of domestic law alone. Moreover, jurisdictional rules in the United States are more often than not

¹ I have also discussed these issues in other work. See Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319 (2002) [hereinafter Silberman, *Comparative Jurisdiction*]; Linda J. Silberman, *Can the Hague Judgments Project Be Saved?: A Perspective from the United States*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 158, 160-164 (John J. Barcelo III & Kevin M. Clermont eds., 2002) [hereinafter Silberman, *Can the Hague Judgments Project Be Saved?*]. For a comparative analysis of these issues, see Andrew S. Bell, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 24-36 (2003) (discussing the significance of procedure and forum shopping in the United States and foreign countries).

² See Silberman, *Comparative Jurisdiction*, *supra* note 1, at 322-23; Linda J. Silberman, *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension*, 28 VAND. J. TRANSNAT'L L. 389, 395 (1995).

the province of state law in the first instance.³ Whether by common law or statute, most states provide for jurisdiction with respect to any claim—that is, general jurisdiction—either at the residence or domicile of the defendant or on the basis of defendant's presence. Jurisdiction with respect to a particular claim related to the activity of the defendant—that is, specific jurisdiction—is predicated on the basis of certain acts by the defendant in the forum state or effects in the forum state caused by acts of the defendant elsewhere. With respect to specific jurisdiction, a defendant in a commercial case may be subject to jurisdiction in the forum state for a variety of different kinds of activity.⁴ In tort cases, the forum nexus creating jurisdiction may be acts of the defendant in the forum state or injury or effects there caused by the defendant.⁵ However, a unique

3. In most cases, the territorial reach of the court is based on common law principles or a state statute. Federal courts have no greater reach than the state courts, see FED. R. CIV. P. 4(k)(1), except where a federal statute otherwise provides, such as in antitrust and securities cases. In addition, Federal Rule of Civil Procedure 4(k)(2) provides a special rule for service and jurisdiction in cases arising under federal law when a defendant is not subject to jurisdiction in any individual state; in such situations, service is effective to establish jurisdiction if the defendant's contacts with the United States as a whole are sufficient to satisfy Due Process.

4. In most cases, jurisdiction will be conferred by state "specific-act" statutes. These statutes may use particularized criteria, such as "performance of a contract within the state," *Misco-United Supply, Inc. v. Richards of Rockford, Inc.*, 528 P.2d 1248, 1250 (Kan. 1974), or they may adopt a more generalized concept such as "transacts any business within the state", *Agency Rent A Car Sys., Inc. v. Grand Rent A Car Corp.*, 98 F.3d 25, 29 (2d Cir. 1996). With respect to the latter standard, courts consider a variety of factors to define "transacts any business." *See, e.g., id.* The determination of what constitutes "transacts any business" under the New York specific-act statute considers the totality of the circumstances and no one factor is dispositive. *Id.* In a contract case, the relevant factors are: "(1) whether the defendant has an on-going contractual relationship with a New York corporation, (2) whether the contract was negotiated or executed in New York," and whether post-contractual meetings took place in New York, (3) whether there was a choice-of-law clause in the contract, and (4) whether the contract calls for subsequent activity in the forum state. *Id.* When compared to the E.U. Regulation in respect of jurisdiction over contract matters—art. 5(1)(a), specifying jurisdiction "in the courts for the place of performance of the obligation in question," and art. 5(1)(b), defining "the place of performance"—the U.S. provisions are both more expansive and less predictable. *See* Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 5(1), 2001 O.J. (L. 12) [hereinafter E.U. Regulation].

5. A common provision in a state's specific-act statute is that jurisdiction may be exercised over any person who, in person or through an agent, commits a tortious act or injury within the state. *See, e.g.,* MICH. COMP. LAWS § 600.705 (2003).

feature of the exercise of judicial jurisdiction in the United States is that it is subject to the constitutional limitations of the Due Process Clause of the Constitution,⁶ and an elaborate and somewhat confusing jurisprudence has emerged from a set of Supreme Court cases defining those limits on judicial jurisdiction.⁷ The constitutional restraints on judicial jurisdiction in the United States focus upon the relationship between the individual defendant and the forum state⁸ rather than on the connection between the dispute and the forum state, which is characteristic of the European system.

There are two separate strands that have emerged in defining the U.S. constitutional standard. First, the defendant must have engaged in activity in the forum state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁹ Thus, a defendant who sells goods that cause injury in the forum state will not be held subject to jurisdiction in the place of injury unless the defendant has exploited the market in the forum state through sale or distribution of the goods.¹⁰ In addition, the leading Supreme Court case, *Asahi Metal Industry Co. v. Superior Court*,

6. When the jurisdictional authority is based on a state statute (or state common law principles), the Due Process Clause of the Fourteenth Amendment is invoked. See U.S. CONST. amend. XIV, § 1. If a federal jurisdictional statute is involved, the Due Process limitation is that of the Fifth Amendment of the Constitution. See *id.* at amend. V.

7. I have made this point in other writing. See, e.g., Linda J. Silberman, “Two Cheers” for *International Shoe* (and None for *Asahi*): An Essay on the Fiftieth Anniversary of *International Shoe*, 28 U.C. DAVIS L. REV. 755, 756 (1995); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT’L L. J. 501, 504 (1993) [hereinafter Silberman, *Developments in Jurisdiction*]; see also Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 89 n.1 (1999) (“[T]he American house of jurisdiction to adjudicate is not a place where any sensible person other than lawyer (if that is not redundant) wants to live.” (quoting Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 TUL. J. INT’L & COMP. L. 111, 123 (1999))).

8. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980); see also Ronald A. Brand, *Tort Jurisdiction in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 BROOK. J. INT’L L. 125, 154-55 (1998).

9. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

10. See *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

specifically addressing judicial jurisdiction in the international context, indicates that even where there is a sufficient connection between the defendant and the forum state, other factors—such as the burden imposed on a foreign defendant in defending in the United States—may make it unreasonable to require the defendant to defend in the United States.¹¹ The benchmark for commercial contractual disputes is found in the Supreme Court's opinion in *Burger King Corp. v. Rudzewicz*, where the defendant franchisees were held subject to jurisdiction in the franchisor's home state of Florida because the Michigan franchisees had embarked on a long-term contractual relationship with the Florida franchisor and there were continuing negotiations and communications between the franchisees and the Florida home office.¹² Although upholding jurisdiction on the facts before it, the Supreme Court in *Burger King* acknowledged that other factors could outweigh the forum's contacts with the defendant and make the assertion of jurisdiction unreasonable under the circumstances. Unlike the E.U. Regulation (and its predecessor, the Brussels Convention), the specific-act statutes in states of the United States have not generally included special jurisdictional provisions with respect to actions relating to employment and consumer contracts;¹³ however, it would be in keeping with the jurisdictional standard of reasonableness for courts to take into account at the constitutional level such factors as the relative strength of the parties' bargaining positions.

In some instances, the jurisdictional reach of U.S. courts turns out to be more restrictive than that of European courts; this is particularly true with respect to jurisdiction on behalf of consumers, who will generally not be able to sue in their home state unless the defendant has directed activity there.¹⁴ At the

11. *Asahi*, 480 U.S. at 103.

12. 471 U.S. 462, 463-64 (1985).

13. See E.U. Regulation, *supra* note 4, at arts. 15-17 (consumer contracts); *Id.* at arts. 18-21 (contracts of employment).

14. *Compare* *Chung v. NANA Dev. Corp.*, 783 F.2d 1124, 1129-30 (4th Cir. 1986) (finding Alaska seller who shipped single purchase of frozen antlers to Virginia buyer at buyer's request not subject to jurisdiction in Virginia, because "if a party's slightest gesture of accommodation were to impose personal jurisdiction, commercial dealings would soon

same time, there is probably a broader range of connections between the defendant and the forum that will justify an assertion of judicial jurisdiction in the U.S. system than under the European rules. For example, under the E.U. Regulation, in matters relating to contract, apart from suit in the defendant's domicile, jurisdiction is appropriate only "in the courts for the place of performance of the obligation in question."¹⁵ The solution in the E.U. Regulation reflects one of the objectives of the original Brussels regime—that rules adopted in the context of "special" jurisdiction should point to a single forum.¹⁶ By contrast, in the United States, a defendant is often amenable to specific jurisdiction in a number of places—such as where the contract negotiations occurred, where the contract was performed, and possibly (if there are additional activities) where the contract was entered into—all, of course, subject to the standard of "reasonableness" as interpreted in case law.

The one major area of jurisdiction where the assertion of jurisdiction by courts in the United States is different and broader than that of most civil law countries is the general "doing business" jurisdiction—that is, where jurisdiction may be asserted on the basis of defendant's substantial activity in the forum state, even when the claim is unrelated to those activities.¹⁷ Various misconceptions exist about the nature of the U.S. "doing business" jurisdiction, particularly in the international context. First, this type of jurisdiction should not be confused with the much more minimal standard of "transaction of business" which is invoked for cases when there is a claim related to the activity in the forum state, that is, specific jurisdiction. The general "doing business" jurisdiction

turn unobliging and brusque"), *with* *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696, 702 (3rd Cir. 1990) (holding that Florida boat manufacturer who accommodated buyer by delivering boat in New Jersey was subject to jurisdiction in New Jersey).

15. E.U. Regulation, *supra* note 4, at art. 5(1)(a).

16. See C.G.J. Morse, *International Shoe v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 999, 1005-06, 1024 (1995).

17. For a recent discussion of the general "doing business" jurisdiction, see Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119 (2001); Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 173 (2001).

tends to be invoked in suits against corporate defendants involving disputes unrelated to the corporation's activity in the forum. The underlying rationale is that the extensive and continuous activities of the corporate defendant in the forum state represent a manifestation of the defendant's presence there—analogous to the physical presence of an individual.¹⁸

The early Supreme Court decision in *Perkins v. Benguet Consolidated Mining Co.* presented a favorable set of facts for the exercise of such jurisdiction.¹⁹ The plaintiff brought suit in Ohio against a Philippine company to recover certain dividends and damages as a result of the company's failure to issue stock certificates. The company's operations had been closed down during occupation of the Philippines by the Japanese, and various operations of the company were conducted in Ohio during that period. Even though the claims did not relate to the activities of the corporation in Ohio, the Supreme Court found that it would be consistent with Due Process for the Ohio courts to exercise jurisdiction if they chose to do so. In effect, the "doing business" jurisdiction adds an additional prong to more internationally accepted bases of jurisdiction over corporate defendants, such as place of incorporation, principal place of business, or central administration. Historically, it also filled gaps in an era when specific jurisdiction had not yet emerged, and thus "doing business" jurisdiction established a forum in a place where the corporate defendant had a substantial presence.

With respect to what is necessary for such jurisdiction, courts in the United States have required more than just "some activity" in order to satisfy the common law standard for "doing business" jurisdiction; the level of activity must be continuous, ongoing, and pervasive.²⁰ In addition, the Due Process Clause, which sets constitutional limits on the exercise of such

18. See LINDA J. SILBERMAN & ALLAN R. STEIN, CIVIL PROCEDURE: THEORY AND PRACTICE 91-92 (2001). The Supreme Court has cast some doubt on whether general "doing business" jurisdiction can also be applied to individuals. See *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 610 n.1 (1990).

19. 342 U.S. 437 (1952).

20. See *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 565 N.E.2d 488, 490 (N.Y. 1990) (holding New York activities of certain foreign underwriters affiliated with Lloyd's of London insufficient for "doing business" jurisdiction).

jurisdiction, reinforces that requirement by setting the threshold very high. In its most recent decision on that issue, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, the Supreme Court held that a Colombian defendant that had purchased four million dollars worth of helicopters and equipment from a Texas company, sent prospective pilots and other personnel to Texas for training, negotiated a contract of transportation with a joint venture headquartered in Texas, and received various payments drawn on a Texas bank, did not have a constitutionally sufficient connection with Texas to be sued on a claim resulting from an accident in Peru.²¹

One difficulty with the doing business jurisdiction is its indeterminacy. Case law has failed to give useful direction as to when state standards make a defendant sufficiently present in a state to be subject to jurisdiction with respect to disputes that do not arise in the forum state;²² and the U.S. Supreme Court decisions, which are few and far between, have not offered much in the way of constitutional guidance. Also, recent cases involving internet activity by defendants indicate that the “doing business” jurisdiction could become even more expansive.²³

Critics of U.S. “doing business” jurisdiction point to the

21. 466 U.S. 408 at 409-10, 418-19 (1984).

22. Compare *In re Ski Train Fire in Kaprun, Aus.*, 230 F. Supp. 2d 376, 380, 382-84 (S.D.N.Y. 2002) (finding that Siemens AG, a German corporation that had engaged in significant sales transactions in New York, had used New York courts to enforce a settlement agreement, and had maintained a website advertising its growing presence in the United States, thereby conducted sufficient activities to constitute “doing business” jurisdiction under New York law and was subject to suit in New York by U.S. plaintiffs with respect to a ski train accident in Austria), with *In re Ski Train Fire in Kaprun, Aus.*, No. 01 Civ. 7342, 2003 U.S. Dist. LEXIS 5575, at *10-15 (S.D.N.Y. April 3, 2003) (holding that Verbund-Austrian Hydro Power AG, an Austrian corporation that had engaged in cross-border leasing transactions closed in New York, had accepted New York jurisdiction for matters related to the transactions, and had maintained a website to attract U.S. and New York investors, was not subject to general “doing business” jurisdiction under New York law in suit by U.S. plaintiffs with respect to the same ski train accident).

23. See, e.g., *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1081-82 (9th Cir. 2003). The Ninth Circuit Court of Appeals held that L.L. Bean’s electronic advertising in California and its highly interactive web-site from which California consumers regularly make purchases subjected L.L. Bean to jurisdiction in California in a declaratory judgment action by plaintiff that its software program of pop-up window advertising did not dilute Bean’s trademark or constitute unfair competition. *Id.* at 1075, 1078-79.

broad forum-shopping opportunities it presents. In the international context, multinational defendants with offices or extensive activities in the United States can be sued here even on claims that bear no relationship to the activities in the United States. To some extent, the most egregious excesses of this type of jurisdiction are mitigated through application of the doctrine of *forum non conveniens*.²⁴ Thus, if neither party to the dispute is a resident of the United States and the dispute is centered abroad, the case is likely to be dismissed on *forum non conveniens* grounds. However, if the plaintiff is a U.S. resident, a dismissal on *forum non conveniens* grounds is less likely; it is these situations where the argument for suit in the United States is more compelling. For example, many major multinational enterprises—such as Siemens, Phillips, Daimler-Chrysler, and Novartis—have permanent establishments in the United States. Notwithstanding the fact that these companies have formally incorporated and maintained their principal places of business and legal headquarters outside of the United States, from the U.S. point of view, they do have an established presence in the United States.²⁵ Particularly when U.S. citizens or habitual residents are injured—even with respect to a claim originating outside the United States—there does not seem to be

24. *Forum non conveniens* has its roots in the common law and permits a court to decline the exercise of judicial jurisdiction if the court finds that an alternative forum would be substantially more convenient or appropriate. For more on the origin of this common law doctrine, see GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 289-97 (3d ed. 1996).

25. Also, many such multi-national corporations have subsidiaries located in the United States, which may create a basis for the exercise of jurisdiction over the parent itself. Although the presence of a subsidiary alone does not establish the parent corporation's presence in the state, *see, e.g., Jazini v. Nissan Motor Co., Ltd.*, 148 F.3d 181, 184 (2d Cir. 1998), the interrelationship of business activities between the corporations may be sufficient to make the subsidiary the agent for the parent for jurisdictional purposes. *See, e.g., Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir. 1967). In a recent case, *In re Ski Train Fire in Kaprun, Aus.*, 230 F. Supp. 2d at 376, the German corporation, Siemens AG, was found to be "doing business" in New York because its New York subsidiary, Siemens Corp., was held to be conducting Siemens AG's core business. *Id.* at 384, 386 (alternative holding). Siemens AG was also found to have engaged in direct activities itself so as to be "doing business" in New York; the court pointed to the totality of Siemens AG's conduct, such as: employing individuals in New York, utilizing investment specialist firms, conducting sales over the Internet, employing a press contact and using a New York law firm to register its 7,000 U.S. patents. *Id.* at 383-84.

great unfairness in allowing the resident plaintiff to sue such a defendant in the plaintiff's home state.²⁶ These situations are not altogether different from the recent addition to the Warsaw Convention that extends jurisdiction to the State in which the passenger is a "principal and permanent resident"—the so-called "fifth forum"—if the "carrier operates services for the carriage of passenger by air" in that State.²⁷ However, one recent case is indicative of the potential for manipulation of that rule to reach foreign plaintiffs. In *In re Ski Train Fire in Kaprun, Austria*,²⁸ American plaintiffs whose relatives died in a ski train fire in Austria sought and conditionally received class certification (on an opt-in basis)²⁹ with respect to the liability of numerous foreign defendants. Most members of the class are non-Americans, and certification of the class to include these foreign plaintiffs makes it possible for them to sue in the United States and take advantage of class and other procedural devices unavailable to them in their home jurisdictions for an accident totally unconnected to the United States.

In the recent negotiations for a world-wide jurisdiction and judgments convention at the Hague Conference, the "doing business" jurisdiction was a source of much contention. The Preliminary Drafts had placed all of the "doing business"

26. Silberman, *Can the Hague Judgments Project be Saved?*, *supra* note 1, at 175. I elaborate on this proposition elsewhere. Silberman, *Comparative Jurisdiction*, *supra* note 1, at 340-46.

27. See *Convention for the Unification of Certain Rules of International Carriage by Air*, art. 33(2), ICAO Doc. 9740 (May 28, 1999).

28. No. 02 Civ. 2492, 2003 U.S. Dist. LEXIS 17958 (S.D.N.Y. Oct. 8, 2003).

29. The creation of an opt-in class is itself unusual. Courts generally do not certify class actions in mass tort actions, but the court did so here on the issue of liability alone. *Id.* at *3-4. In addition, plaintiffs who choose to be part of the class must agree that they will not sue any of the foreign defendants elsewhere in the event they lose in the U.S. action. *Id.* at *40. The condition was imposed presumably because there is no assurance that other countries will recognize a class action judgment in defendants' favor. But this unusual class action structure presents numerous difficulties. First, there is no reason to believe that a foreign court will necessarily "enforce" the waiver rule imposed as a condition on the opt-in class members. Second, as to damages, the court observed that the non-American plaintiffs will not be able to bring their damage actions against the foreign defendant in the United States, because there is no subject matter jurisdiction in the federal courts over an action between a foreign plaintiff and a foreign defendant. Thus, a second action in a foreign court may be necessary in any event, although presumably a damage action could proceed in a state court, subject of course to the possibility of *forum non conveniens*.

jurisdiction on the list of prohibited jurisdictions.³⁰ Not surprisingly, the United States had strong objections to any such proposal because the prohibition went not merely to the enforcement by foreign courts of U.S. judgments resting on “doing business” jurisdiction, but to the very exercise of such jurisdiction by courts in the United States—even when the defendant had substantial assets in the United States and no foreign enforcement would ever be necessary. A compromise along the following lines might have broken the stalemate: allow courts of a State to exercise general “doing business” jurisdiction only in those situations that are the most compelling—such as where the defendant has a branch office or an established place of business such that the defendant could be said to have a substantial presence in the forum, and where the plaintiff is a habitual resident of the forum State. In all other situations, the exercise of “doing business” jurisdiction would be prohibited, and States party to the Convention could not exercise such jurisdiction with respect to domiciliaries of Member States. In addition, States that continued to view any kind of “doing business” jurisdiction as objectionable would not have to enforce judgments rendered on the basis of such jurisdiction.³¹ Such a compromise would have had many salutary effects. The standard for “doing business” jurisdiction in international cases in the United States would have been clarified and moderated. Clearly, if the foreign defendant had assets in the United States, enforcement of judgments resting on this narrower basis of “doing business” jurisdiction could be had in the United States. But other countries would still retain the option whether or not to recognize a judgment rendered even on this more restrictive “doing business” standard of jurisdiction. As a result, there also would be a disincentive for plaintiffs to even attempt to assert jurisdiction on this basis if the prospect of foreign enforcement were likely.

No such compromise went forward; and the attempt at The Hague for a broad jurisdiction and judgments convention has

30. See Silberman, *Comparative Jurisdiction*, *supra* note 1, at 337-39.

31. See Silberman, *Can the Hague Judgments Project Be Saved?*, *supra* note 1, at 175-79; see also Silberman, *Comparative Jurisdiction*, *supra* note 1, at 342-46.

stalled for the moment, leaving the present rules of U.S. jurisdiction in place. The most difficult problem for foreign defendants in dealing with the existing regime of U.S. jurisdictional standards—whether the exercise is that of general or specific jurisdiction—is the inability to extrapolate clear rules and the resulting lack of predictability in knowing how to structure affairs or to make decisions with respect to litigation strategy. The jurisdictional statutes in the context of specific jurisdiction are straightforward, but the Due Process overlay of “minimum contacts” and “reasonableness” leaves the constitutional standard—and thus the bottom-line—uncertain. As for general jurisdiction, even apart from what is constitutionally required, the scope of “doing business” jurisdiction is almost completely case-law generated and difficult to define. The unfortunate result is often extensive litigation about where to litigate.³² Finally, the recent district court decision that effectively extends the use of the general “doing business” jurisdiction to foreign plaintiffs because they are part of a class action brought by American plaintiffs for an accident outside of the United States is sure to ignite the continuing controversy over the propriety of this aspect of U.S. jurisdiction.

III. DEALING WITH PARALLEL LITIGATION IN THE UNITED STATES

Unlike many civil law countries that include rules of *lis pendens* as part of their procedural codes and have incorporated formal provisions into their international arrangements (the Brussels and Lugano Conventions and the E.U. Regulation), American law does not generally include a formal *lis pendens* doctrine.³³ A typical reaction from a U.S. court faced with

32. The factual record that is necessary to make determinations about personal jurisdiction often means that extensive discovery on the jurisdictional issues is necessary. See *In re Ski Train Fire in Kaprun, Aus.*, 230 F. Supp. 2d 392, 402 (S.D.N.Y. 2002) (finding that plaintiff is entitled to discovery with respect to nature of relationship between parent and subsidiary corporations in order to try to establish personal jurisdiction).

33. See James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L.J. 499, 506-11 (2002); James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 821 (1999); Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 209-10 (2001); Russell J. Weintraub, *Parallel Litigation and Forum-Selection*

parallel litigation is that “the preferred course of action is to permit each sovereign to reach judgment and apply the findings of one to the other under principles of *res judicata*.”³⁴ However, that is not to say that courts in the United States will never stay an action when there is a parallel proceeding, but rather that they adopt a relatively loose standard of “international comity” and not a rule of priority for a first-filed action.³⁵ Like the related common law doctrine of *forum non conveniens*, the standard for this type of “international abstention” is a discretionary one.³⁶ In determining whether or not to proceed with an action, courts identify a variety of factors, specifically (1) respect for the courts of foreign nations, (2) fairness to the litigants (which includes order of filing, relative convenience of the forum, and possible prejudice), and (3) efficient use of judicial resources. Often the decision with respect to staying or proceeding with an action may turn on the court’s view as to whether there is a substantial likelihood that the foreign litigation will dispose of all claims present in the U.S. case.³⁷

Clauses, in LAW AND JUSTICE IN A MULTISTATE WORLD 229-233 (James A.R. Nafziger & Symeon Symeonides eds., 2002); Linda Silberman, *A Proposed Lis Pendens Rule for Courts in the United States: The International Judgments Project of the American Law Institute*, in INTERNATIONAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW—ESSAYS IN MEMORY OF PETER E. NYGH (T. Einhorn & K. Siehr eds., forthcoming 2004) [hereinafter Silberman, *A Proposed Lis Pendens Rule*].

34. See *Am. Cyanamid Co. v. Picaso-Anstalt*, 741 F. Supp. 1150, 1159 (D. N.J. 1990).

35. See *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519-21 (11th Cir. 1994). The same point can be made about most state court systems. A few states have explicit provisions for stays or dismissals in deference to a parallel action, see 735 ILL. COMP. STAT. ANN. 5/2-619(a)(3) (Michie 1993); N.Y. C.P.L.R. 3211(a)(4) (McKinney 1992), but they do not always apply to actions in foreign courts. See *Abkco Indus. Inc. v. Lennon*, 377 N.Y.S.2d 362, 368 (N.Y. Sup. Ct. 1975) (“Pendency of suit in a foreign [country] jurisdiction does not support a dismissal on grounds of prior action pending.”); cf. *Philips Elecs. v. N. H. Ins. Co.*, 692 N.E.2d 1268, 1274 (Ill. App. 1998) (finding its *lis pendens* rule applicable if foreign country court’s judgment will be recognized in Illinois). Florida has a common law *lis pendens* rule that directs stays in favor of prior proceedings in other courts of competent jurisdiction, including foreign country courts. See *Reuther v. Reuther*, 524 So. 2d 1035 (Fla. Dist. Ct. App. 1988) (holding that in parallel German suit, jurisdiction lies in Germany since service of process was first perfected in the German suit).

36. The courts in the United States often refer to parallel litigation in the international context as “international abstention.” See, e.g., *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222 (11th Cir. 1999).

37. See *AAR Int’l, Inc. v. Nimelias Enter., S.A.*, 250 F.3d 510, 510 (7th Cir. 2001);

The conceptual difference between the doctrine of *forum non conveniens* and the doctrine of international abstention discussed above is that in the former there is no parallel foreign proceeding, while in the latter there is. If there is no parallel proceeding, a party can rely only on the doctrine of *forum non conveniens*. If a parallel proceeding does exist, a party can rely on both doctrines. However, some courts believe that the factors that inform the decision on *forum non conveniens* are fully responsive to those that would inform a decision to stay in favor of a parallel foreign action and that a “detailed presentation on both grounds is simply unwarranted.”³⁸

In the United States, the doctrine of *forum non conveniens* occupies a central role in international litigation. Thus, a plaintiff who establishes jurisdiction under the formal rules of jurisdiction described earlier cannot be certain that its choice of forum will ultimately prevail. Once again, the U.S. predilection for discretion rather than clear rules may mean further litigation about where to litigate. If the plaintiff wants the U.S. forum, it is inevitable that the defendant will not and will attempt to move the case elsewhere. The federal courts and most state courts will apply the doctrine of *forum non conveniens* in an appropriate case and dismiss the action. According to the Supreme Court of the United States, *forum non conveniens* is only a procedural rule developed in response to court administrative and private litigant problems that result from a plaintiff’s misuse of venue and does not affect the primary conduct of litigants.³⁹ Such an interpretation has allowed the state and federal courts to define the doctrine for their respective courts, and indeed courts in some states reject or limit its application in various ways.⁴⁰ As a result, in some instances, a state rather than a federal court may be a more attractive forum for a plaintiff because that court is less likely to

Gen. Motors Corp. v. Lopez de Arriortura, 948 F. Supp. 656, 669 (E.D. Mich. 1996) (holding that no stay was required because the counterclaim in the German suit and the claim in the U.S. suit were not identical).

38. See Am. Cyanamid Co., 741 F. Supp. at 1154; see also Reavis v. Gulf Oil Corp., 85 F.R.D. 666, 671 n.3 (D. Del. 1980).

39. See Am. Dredging Co. v. Miller, 510 U.S. 443, 453-54 (1994).

40. See Silberman, *Developments in Jurisdiction*, supra note 7, at 518-25.

dismiss a case on *forum non conveniens* than is a federal court. A consequence of such disparate regimes is the opportunity for forum-shopping in transnational litigation in the United States between the state and federal courts and among the various state courts.

The federal courts generally insist that a plaintiff's initial choice of forum be given substantial weight. However, a non-U.S. plaintiff's choice of forum is usually accorded less deference than that of a U.S. plaintiff, particularly when the transaction or injury has occurred abroad.⁴¹ Case law indicates that courts must first look to whether the alternative forum is an adequate one, and if it is, to proceed to balance the public and private interests of the respective fora. With respect to private interests, the courts look to the litigation burdens on the respective parties based on their residences, the ease of obtaining witnesses and proof for trial, the need for translation of documents, the ability to join or implead other parties, and the enforceability of any judgment. As to public interests, the courts consider both the "burden on" and the "interest of" the forum in hearing the suit. In an important recent ruling by the Second Circuit Court of Appeals sitting en banc, *Iragorri v. United Technologies Corp.*, an additional perspective for evaluating a *forum non conveniens* motion was introduced—the strategic motivations of the parties.⁴² The Court distinguished plaintiffs who had "legitimate reasons" for choosing a particular forum from those seeking to gain a "tactical advantage."⁴³ The court instructed the lower courts to cast a skeptical eye when viewing both the plaintiff's initial choice of forum and the defendant's resistance—i.e., the *forum non conveniens* motion—on inconvenience grounds.⁴⁴ However, what is "tactical" and what is "legitimate" may be an almost impossible line to draw and may prove to be just another issue over which to litigate. Consider, for example, some of the reasons a plaintiff may find a forum in the United States desirable—avoiding a bond requirement in a foreign court that is required as part of its cost-shifting system; taking advantage

41. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

42. 274 F.3d 65, 73 (2d Cir. 2001) (en banc).

43. *Id.*

44. *Id.*

of U.S. procedural rules, such as class actions, juries, and discovery; or looking to favorable U.S. law, including punitive damages. One can predict that the strong presumptive deference that is accorded to a plaintiff's choice of forum will continue to turn on whether the plaintiff is a foreign or a local plaintiff.⁴⁵ In a post-*Iragorri* decision, *Pollux Holding Ltd. v. Chase Manhattan Bank*, the Second Circuit Court of Appeals rejected the argument that a foreign plaintiff's choice to sue in the defendant's home forum is entitled to the same presumptive deference given to a plaintiff's choice to sue in its home state.⁴⁶ The court observed that litigants were rarely concerned with promoting their adversary's convenience at their own expense, and thus suit in the defendant's home forum was as likely to be motivated by trial strategy as by convenience.⁴⁷

One situation where even a local plaintiff's choice of forum may be discounted is when it is orchestrated through use of the declaratory judgment or negative declaration to wrest away a "natural forum." In *Hyatt International Corp. v. Coco*, the Seventh Circuit offered an approach that introduced concerns about forum-shopping into the interest balancing of public and private factors, noting that the federal court action for a declaratory judgment "wrested the choice of forum from the 'natural' plaintiff."⁴⁸ In cases such as *Hyatt*, *forum non conveniens* may serve to avoid the difficulties that flow from the absence of a formal *lis pendens* rule. But without a principled rule for allocating the choice of forum at the outset of parallel litigation, the default rule may be a race to judgment—that is, in situations of parallel litigation, the case that reaches judgment

45. See *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 71 (2d Cir. 2003) ("when a plaintiff sues in his home forum, that choice is generally entitled to great deference . . . because it is presumed to be convenient"). The Second Circuit in *Pollux Holding* also addressed the effect of the "Friendship, Commerce and Navigation" treaties that offer "freedom of access" to the courts of the respective countries. The court did not believe that the treaty gave foreign and U.S. citizens the same "deference" to a choice of court, but even if it did, both a foreign citizen and a U.S. citizen living abroad would be entitled to "less deference" in the choice of forum than a U.S. citizen residing in the forum and choosing to sue there.

46. *Id.*

47. *Id.* at 74.

48. 302 F.3d 707, 718 (7th Cir. 2002).

first will control. Because the United States gives broad recognition to foreign country judgments, this may mean that a foreign judgment—even if the underlying case were initiated later in time than the U.S. suit—is entitled to recognition and will have preclusive effect in the U.S. action. Of course, in situations where the U.S. judgment is rendered first, the later-rendered foreign judgment may conflict with “another final and conclusive judgment,” and thereby be denied recognition.⁴⁹

There are numerous disadvantages to a system which is generous to parallel litigation and strict with respect to recognition of a first-rendered judgment. Parallel litigation is clearly inefficient. Litigants and witnesses bear costs on two fronts, and judicial resources are wasted through duplication. Litigants, particularly those with superior resources, are encouraged to file a second action, particularly if they can achieve a faster resolution in their forum of choice. The judgment that prevails does so only because it is “first in time.”

One alternative for avoiding parallel litigation is a pure *lis pendens* rule, as was adopted by the European Union—initially in the Brussels and Lugano Conventions and continued in the E.U. Regulation. But this system, even when adopted in a treaty regime, poses its own set of difficulties. Parallel litigation is eliminated, but strategic behavior of the litigants is increased—parties now have an incentive to be the first to file, thereby increasing the likelihood of litigation. Within the system of the European Union, the possibility of forum choice is limited at the outset by the jurisdiction rules of the E.U. Regulation, but a first-to-file system is less easily transported when there is a range of possible fora.⁵⁰ Moreover, even in the more closed

49. See UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(4), 13 U.L.A. (Part II) 43, 59 (2002 & Supp. 2003). One of the discretionary grounds for non-recognition under the Uniform Foreign Money-Judgments Recognition Act [Uniform Act] and under American law generally is that “the judgment conflicts with another final and conclusive judgment.” If the conflicting judgment is a U.S. judgment, the U.S. judgment will control under the Full Faith and Credit Clause of the U.S. Constitution.

50. See Stephen B. Burbank, *Jurisdiction Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COM. L. 203, 217, 223 (2001); see also LEUVEN/LONDON PRINCIPLES ON DECLINING AND REFERRING JURISDICTION IN CIVIL AND COMMERCIAL MATTERS (Int'l Law Ass'n 2000). The Principles propose a regime for determining the priority of competing actions within an international system. For further

system of the European Union, abuses of a first-to-file rule have become common. The institution of proceedings can be used as a device for blocking proceedings as a practical matter by bringing suit in a Member State of the European Union with a slow-moving judiciary.⁵¹

Thus, a modified *lis pendens* rule would have more attraction for courts in the United States. As Reporters for the International Jurisdiction and Judgment Project of the American Law Institute (ALI),⁵² Professor Andreas Lowenfeld and I have proposed a rule of “Declination of Jurisdiction When Prior Action is Pending.”⁵³ Under this provision, a court in the United States is instructed to stay or dismiss an action if the proceeding brought in a court in the United States includes the same parties and the same subject matter as a proceeding that “has been brought and is pending in the courts of a foreign country,” when the foreign court has a fair basis of jurisdiction under U.S. standards and the foreign court can be expected to render a timely judgment that would be recognized under the

discussion, see also CONFLICT OF JURISDICTION MODEL ACT, proposed by a subcommittee of the ABA section on International Law and Practice and discussed in Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT’L LAWYER 21, 38-55 (1992).

51. See the description of the “Italian Torpedo” in Trevor C. Hartley, *How to Abuse the Law And (Maybe) Come Out on Top: Bad-Faith Proceedings Under the Brussels Jurisdiction and Judgments Convention*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN, 73-81 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002).

52. The ALI has undertaken a project to develop a proposed federal statute governing the recognition and enforcement of foreign country judgments. The effect would be to create national and uniform law in this area. Of course, any formal change in that direction would have to be undertaken by the Congress of the United States, and that is why the project takes the form of a proposed statute. For a fuller account of the evolution of the project, see Linda J. Silberman & Andreas F. Lowenfeld, *The Hague Judgments Convention—and Perhaps Beyond*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 121-36 (James A. R. Nafziger & Symeon Symeonides eds., 2002); Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty and an American Statute*, 75 IND. L. J. 635, 635 (2000).

53. See INT’L JURISDICTION & JUDGMENTS PROJECT § 11 (Tentative Draft 2003). For a more extensive discussion of the proposal, see Silberman, *A Proposed Lis Pendens Rule*, *supra* note 33.

principles of the Act.⁵⁴ But no stay is called for in situations where the first-filed court is not an “appropriate” forum. The foreign proceeding is not appropriate if (1) it operates to preempt the otherwise natural forum, for example by a declaration of nonliability,⁵⁵ (2) it appears to be a vexatious or frivolous proceeding,⁵⁶ or (3) if there are other compelling reasons for the action to proceed in the United States.⁵⁷ The latter exception is to take account of the substantial differences in the procedures and available remedies between litigation in the United States and in other countries.⁵⁸ In addition, because no U.S. rule could require a foreign court to defer to a prior proceeding brought in a court of the United States, the proposed ALI statute includes a provision for non-recognition of a foreign judgment where a foreign proceeding was second-seized⁵⁹ or where the foreign proceeding was undertaken to frustrate a claimant’s right to sue in a more appropriate forum, such as the case of an anti-suit injunction or a negative declaration.⁶⁰ Of course, these ALI proposals are just that and for the present, problems of parallel litigation continue to be left to the mechanisms of *forum non conveniens* or anti-suit injunctions.⁶¹

IV. CHOICE OF FORUM CLAUSES

One possible way to avoid (or at least drastically reduce) litigation about where to litigate is to use a forum-selection clause. Arbitration clauses, by virtue of the New York Convention,⁶² have been extremely effective. Both agreements to

54. INT’L JURISDICTION & JUDGMENTS PROJECT § 11(a).

55. *Id.* § 11(b)(i).

56. *Id.* § 11(b)(ii).

57. *Id.* § 11(b)(iii).

58. *Id.* § 11 Reporter’s Note 3.

59. *Id.* § 5(b)(iv).

60. *Id.* § 5(b)(v).

61. The U.S. law on anti-suit injunctions is beyond the scope of the paper, but is discussed in Margarita Trevino de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT’L L.J. 79 (1999). See also Markus Lenenbach, *Antisuit Injunctions in England, Germany, and the United States: Their Treatment Under European Civil Procedure and the Hague Convention*, 20 LOY. L.A. INT’L & COMP. L. REV. 257 (1998).

62. See Convention on the Recognition and Enforcement of Foreign Arbitral

arbitrate and arbitral awards receive broad enforcement internationally, which is one reason for their popularity.

Choice of court clauses in international transactions have received a strong vote of confidence in the United States Supreme Court. In *M/S Bremen v. Zapata Off-Shore Co.*, the Supreme Court upheld a choice-of-court clause providing for jurisdiction in London even though the transaction—a contract for towage of an oil rig from Louisiana to Italy—bore no relation to the chosen forum.⁶³ The Supreme Court ruled that forum selection clauses were “prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.”⁶⁴ The *Zapata* standard is technically a standard for admiralty cases,⁶⁵ but the lower federal courts have applied the *Zapata* rule in other contexts.⁶⁶ The state courts are free to adopt their own standards with respect to whether to honor a choice-of-forum clause, but it is fair to say that most state courts appear to have adopted something close to the *Zapata* standard,⁶⁷ despite a few outliers.⁶⁸ However, the possible differences among the states

Awards, *adopted* May 3, 1956, 21 U.S.T. 2517, 330 U.N.T.S. 4.

63. 407 U.S. 1, 8 (1972).

64. *Id.* at 10.

65. See also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991) (upholding choice of forum clause as part of cruise line passenger ticket); *Vimar Seguros y Reaseguros, SA v. M/V Sky Reefer*, 515 U.S. 528, 530 (1995) (enforcing forum-selection clause for arbitration in COGSA maritime case and indicating that forum-selection clauses selecting a foreign court were also enforceable).

66. See, e.g., *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998) (en banc); *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33, 35 (5th Cir. 1997); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992); see generally Ronald A. Brand, *Forum Selection and Forum Rejection in US Courts: One Rationale for a Global Choice of Court Convention*, in REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW. ESSAYS IN HONOUR OF SIR PETER NORTH 51, 60-61 (James Fawcett ed., 2002).

67. See, e.g., *Paradise Enter., Ltd. v. Sapir*, 811 A.2d 516, 520-21 (N.J. Super. Ct. App. Div. 2002); *Union Bancaire Privee v. Nasser*, 751 N.Y.S.2d 440, 440 (N.Y. App. Div. 2002); *IDV N. Am., Inc. v. Saronno*, No. CV 99058059, 1999 WL 773961, at *9 (Conn. Super. Ct. Sept. 9, 1999); see Brand, *supra* note 66, at 60; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (1986 revision) (“The parties’ agreement as to the place of the action will be given effect unless it is unfair or unreasonable.”)

68. See, e.g., *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 730 (Iowa 1995) (in a domestic, not international context, treating forum selection clause as

may mean that a particular state court in the United States may refuse to honor a forum selection clause, either with respect to the conferral of jurisdiction on the particular court (prorogation)⁶⁹ or in refusing to dismiss a case on the basis of a chosen forum elsewhere (derogation).⁷⁰

Another problem that can arise from choice-of-court clauses in the United States is ambiguity in construing the clause as exclusive or non-exclusive. The general rule in the United States is that choice of court clauses should be construed as non-exclusive unless clearly stated otherwise.⁷¹ Explicit language that the choice of forum clause is an exclusive one will usually solve this problem, although provisions for alternative fora or for possible contingencies may present difficulty.⁷² *Forum non conveniens* may also play a role in determining whether a court

invalid but considering it a factor in a motion to dismiss for *forum non conveniens*); see also William W. Park, *Bridging the Gap in Forum Selection: Harmonizing the Law of Arbitration and Court Selection*, 8 TRANSNAT'L L. & CONTEMP. PROB. 19, 23-24 & n.29 (1998) (identifying states that were hostile to forum-selection clauses as of 1998).

69. Courts are generally unanimous that a defendant can consent to personal jurisdiction and that a forum-selection clause operates as such consent. However, a court may still dictate whether a particular case will be heard in its court, and forum-selection clauses do not prevent a court from dismissing for lack of subject matter jurisdiction or for *forum non conveniens*. For example, even states that consider themselves commercial centers, such as New York, may attach conditions to the kinds of cases that its courts can hear when there is no connection to the dispute. See, e.g., N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2003) (providing that the parties must also choose New York law and the transaction must be worth at least one million dollars). The New York statute also makes clear that it does not "affect the enforcement of any provision respecting choice of forum in any other contract, agreement or undertaking." New York also has a rule on "inconvenient forum," but it makes an express exception for actions to which § 5-1402 applies. N.Y. C.P.L.R. 327

70. See, e.g., *Morgan Trailer MFG Co. v. Hydraroll, Ltd.*, 759 A.2d 926, 931 (Pa. Super. Ct. 2000) (finding England an unreasonable forum because evidence and witnesses were located in Pennsylvania).

71. See, e.g., *K & V Scientific Co. v. BMW*, 314 F.3d 494, 499 (10th Cir. 2002); *John Boutari & Son, Wines, & Spirits, S.A. v. Attiki Importers & Distribs., Inc.* 22 F.3d 51, 52-53 (2d Cir. 1994) ("The general rule in cases containing forum selection clauses is that '[w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive.") (quoting *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989)); see also Brand, *supra* note 66, at 78; Born, *supra* note 24, at 454.

72. See the interesting discussion on these points in *Hartford Ins. Co. v. Hapag-Lloyd Container Line*, No. 02-22154, 2003 U.S. Dist. LEXIS 1175, at *11-12 (S.D. Fla. Apr. 28, 2003).

in the United States will hear a case when the parties have chosen the U.S. forum but the case has little connection to the United States. Whether a *forum non conveniens* dismissal is appropriate may turn in part on whether the forum-selection clause is permissive or mandatory.⁷³

One additional complication results from the different standards with respect to the enforcement of forum-selection clauses among judicial systems within the United States. In using a forum-selection clause, parties must take account of the different rules in the various states in choosing a forum in the United States; conversely, courts in the different states have adopted different standards in deciding whether to dismiss a case brought in contravention of a forum-selection clause. Also, it remains unclear whether federal courts sitting in diversity of citizenship cases involving state law are required to follow state law or are free to apply a federal standard.⁷⁴

From the U.S. perspective, even with all of the open questions, use of choice of forum clauses offers a substantial degree of certainty with respect to a proper forum for a transnational dispute. If the forum selected is outside of the United States, a court in the United States will ordinarily dismiss a lawsuit in derogation of the clause; and a foreign

73. Compare *N.W. Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 378 (7th Cir. 1990) (stating that agreement to an exclusive forum selection clause waives objections on the basis of cost or inconvenience to the party), with *Royal Bed & Spring Co., Inc. v. Famosul Industria e Comercia de Moveis Ltd.*, 906 F.2d 45, 51 (1st Cir. 1990) (stating that forum selection provision is "simply one of the factors that should be considered and balanced by the courts in the exercise of sound discretion" in *forum non conveniens* motions; note that the court does not specify whether the clause in question was permissive or mandatory). See N.Y. C.P.L.R. 327 (McKinney 2003) (providing that rule on inconvenient forum is not applicable to a contract or agreement covered by N.Y. GEN. OBLIG. LAW § 5-1402); see also Brand, *supra* note 66, at 74-84.

74. Whether a federal court sitting in diversity must follow state law in this regard is an open question. See, e.g., *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512-13 (9th Cir. 1988) (applying *Zapata* analysis to uphold forum selection clause because "federal procedural issues raised by forum selection clauses significantly outweigh the state interests"); see also Young Lee, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663, 676 (1997). In international cases, it could be argued that the law governing forum selection clauses should be one of federal common law. See Silberman, *Developments in Jurisdiction*, *supra* note 7, at 529-30.

country judgment resulting from jurisdiction on the basis of a forum-selection clause will normally be enforced in the United States. A court in the United States is also likely to accept a conferral of jurisdiction and entertain the case, subject to exceptions for fraud, public policy, or “unreasonableness.” Thus, the use of a choice-of-forum clause for international business transactions can offer a useful alternative to arbitration.⁷⁵ To ensure greater uniformity and consensus in the use of forum-selection clauses internationally, a Special Commission at the Hague has recently directed its efforts to formulating a preliminary Draft of a Choice of Court and Recognition of Judgments Convention.⁷⁶ An international convention would have even greater benefits than a federal statute. Both would lead to a uniform national standard on enforceability of forum-selection clauses within the United States,⁷⁷ but a treaty would also offer an international norm that would ensure not only enforcement of agreements but also recognition of judgments—providing greater certainty for the use of such clauses in international business transactions.

V. ENFORCEMENT OF JUDGMENTS

As noted in the introduction, the effect of a particular regime of jurisdictional rules is most meaningfully tested in the context of enforcement of judgments. The U.S. rules of judicial jurisdiction, *lis pendens*, and *forum non conveniens* described above can be used with great confidence if the foreign defendant has assets in the United States. However, if one must seek enforcement of a U.S. judgment abroad, many of these rules—

75. For my particular take on some problems with international arbitration, see Linda Silberman, *International Arbitration: Comments from a Critic*, 13 AM. REV. INT. ARB. 9 (2002).

76. See INFORMAL WORKING GROUP ON THE JUDGMENTS PROJECT, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRELIMINARY RESULT OF THE WORK OF THE INFORMAL WORKING GROUP ON THE JUDGMENTS PROJECT (Prel. Doc. No. 8, 2003); see also ANDREA SCHULTZ, HAGUE CONFERENCE ON PRIVATE INT'L LAW, REPORT ON THE FIRST MEETING OF THE INFORMAL WORKING GROUP ON THE JUDGMENTS PROJECT – OCTOBER 22-25, 2002 (Prel. Doc. No. 20, 2002). For more on this effort, see Brand, *supra* note 66 at 84-85.

77. Several proposals have been made to have a federal statute. See Park, *supra* note 68, at 21, 30-31; Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 59 (1992).

even if favorable to a party seeking to litigate in the United States—must be substantially discounted. A lawsuit in the United States may not be worth pursuing at all if an eventual judgment cannot be enforced abroad where the defendant has assets.

Many countries are quite restrictive when it comes to enforcing judgments rendered by courts in the United States. And the resistance goes well beyond judgments for multiple and punitive damages, judgments pertaining to public law areas, such as securities and antitrust, particular areas of public policy,⁷⁸ or even judgments based on perceptions of excessive jurisdiction, such as the general “doing business” jurisdiction. Ordinary, plain, vanilla U.S. money-judgments are often not enforced because certain countries restrict enforcement of foreign country judgments to those rendered on a limited set of jurisdictional grounds—even when their own courts would themselves assert a more extensive jurisdictional reach.⁷⁹ Other countries, such as Italy and Germany, appear to be more generous with respect to jurisdiction exercised by U.S. courts and adopt a “mirror image” standard; that is, they will recognize a U.S. money-judgment if the judgment was rendered on jurisdictional grounds similar to those exercised by the courts in

78. These issues are often the basis for non-recognition of U.S. judgments by foreign courts. See Comm. on Foreign and Comparative Law Ass'n of the Bar of the City of New York, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 THE RECORD 378, 389-91 (2001) [hereinafter New York City Bar, *Survey on Foreign Recognition*].

79. The Swiss Private International Law Statute contains various rules indicating what bases of foreign jurisdiction will be recognized in the context of an enforcement action. The grounds are more restrictive than the circumstances under which a Swiss court will itself take direct jurisdiction in international matters. See COMMENTARY ON PRIVATE INTERNATIONAL LAW, (Heinrich Honsell et al, eds. 1996) at art. 26 IPRG, n3. Under article 26, a foreign judgment will be recognized if the defendant has a domicile in the country where the decision was rendered, if the defendant unconditionally consented to jurisdiction, if the defendant brought a related counterclaim, or if the parties agreed to a forum selection clause. Other specific provisions for recognition of foreign decisions are found by specific subject matter. For example, under art. 149 dealing with obligations, a decision of a foreign court where jurisdiction was based on the place of performance of a contract or the act, the effect, or both of a tort will be recognized, but not if the defendant was domiciled in Switzerland. See ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 216-17 (Charles Platto & William G. Horton eds., 2d ed. 1993).

that country.⁸⁰ But much of the activity-based jurisdiction on which U.S. judgments are predicated would not ordinarily be an accepted basis of jurisdiction in the enforcing state, and thus such U.S. judgments may not be entitled to enforcement.⁸¹ Of course, the one basis of jurisdiction that offers the greatest likelihood of being accepted, thereby securing recognition and enforcement of the judgment, is that of a forum-selection clause.

For parties who choose to pursue litigation in courts outside of the United States, one of the concerns ultimately will be the rules in the United States for the recognition and enforcement of foreign country judgments. In general, recognition and enforcement of foreign country judgments in the United States has tended to be much more generous than the treatment given by foreign courts to U.S. judgments. Although foreign country judgments do not fall within the Full Faith and Credit Clause of the U.S. Constitution and thus, unlike sister state judgments, are not subject to the constitutional command of recognition and enforcement, they have generally been held entitled to recognition on grounds of comity.⁸² Somewhat surprisingly, enforcement and recognition of foreign country judgments is not subject to a national federal standard but is within the province of the respective states. That said, as a general matter, the practice with respect to enforcement of foreign judgments within the fifty states of the United States is largely uniform. The principles for enforcement of foreign country judgments can be found in the Uniform Foreign Money-Judgments Recognition

80. See *id.* at 194; see also New York City Bar, *Survey on Foreign Recognition*, *supra* note 78, at 386-87. As to Italy, see Italy: Law Reforming the Italian System of Private International Law, art. 64, 35 I.L.M. 760, 779-80.

81. For example, if under the jurisdictional rules of the enforcing state, jurisdiction in a contract suit is based on the place of performance, a U.S. judgment that rested on other activity of the defendant, such as solicitations and negotiations in the forum state, would not likely be enforced. An interesting Italian case is *Semeraro Confezioni Mario Valente-Firenze S.r.l. v. Mario Valente Collezioni Ltd.* (Bari Court of Appeal, 11 May 2000), in which a U.S. judgment was enforced in Italy despite the fact that the performance of the contract was exclusively in Italy. The Italian court pointed out that the judgment concerned not only contractual claims but also tort claims, such as commercial fraud and unfair competition, and that the effects of the tort occurred in the United States—a basis of jurisdiction recognized in Italy, and thus enforceable under Art. 64. See *Mario Valente Collezioni, Ltd. v. Confezioni Semeraro Paolo, S.R.L.*, 115 F. Supp. 2d 367, 373, 376-77 (S.D.N.Y. 2000).

82. See *Hilton v. Guyot*, 159 U.S. 113, 166, 181-82 (1895).

Act,⁸³ adopted by more than thirty states, and in common law decisions that reflect the principles of the Uniform Act.⁸⁴ However, at the margins there are some important differences, and a party thinking about enforcement of a foreign country judgment will still want to pay attention to the particular state in which enforcement is sought.

The major point on which the states differ is whether to require reciprocity as a condition for enforcement of a foreign country judgment. Despite the fact that the early Supreme Court case of *Hilton v. Guyot* imposed a reciprocity requirement,⁸⁵ it was the dissenting view in that case—no reciprocity—that became the dominant position in the United States.⁸⁶ The Uniform Act does not have such a requirement, although several states have inserted a reciprocity requirement into their versions of the Uniform Act⁸⁷ or adopted a separate provision on reciprocity.⁸⁸

A. Mandatory Defenses to Recognition / Enforcement

The Uniform Act lists certain defenses that mandate non-recognition of a foreign judgment and other defenses that permit

83. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT 13 U.L.A. (Part II) 43–80 (2002 & 2003 Supp.).

84. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481, 482 (1987).

85. 159 U.S. 113, 188 (1895). The Supreme Court viewed the issue as one of international law and held (in a 5-4 ruling) that the judgment of a French court would not be enforced in the United States in favor of French citizens against an American citizen, because, if the circumstances were reversed, French courts would not enforce the judgment of an American court against French citizens. *Id.* at 227-28.

86. *Id.* at 234. Notwithstanding *Hilton*, recognition and enforcement of foreign judgments came to be regarded as a matter of private law and not one of international relations. As a result, state law governed issues of recognition and enforcement; indeed, after the decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), federal courts were required to follow—when state law matters were involved—the recognition practice of the states in which they sat.

87. Eight states that have the Uniform Act have inserted a provision concerning reciprocity. Six states (Florida, Idaho, Maine, North Carolina, Ohio, and Texas) authorize, but do not require, the court to deny recognition on grounds of lack of reciprocity. Two states (Massachusetts and Georgia) include a mandatory provision that reciprocity be established as a condition for recognition or enforcement.

88. For example, the New Hampshire statute requires reciprocity for the enforcement of Canadian judgments. N.H. REV. STAT. ANN. § 524:11 (1957).

non-recognition. The “mandatory” defenses are the failure to provide a system of impartial tribunals or procedures compatible with due process of law and the lack of jurisdiction over the defendant.⁸⁹ Lack of fair tribunals does not present much difficulty in the U.S.-European context. As was made clear in two recent federal Court of Appeals opinions⁹⁰ rejecting challenges to English judgments obtained by Lloyds against various Names, the requirement of fair process is a reference to an international concept and not to the specifics of what might be required in U.S. courts for compliance with Due Process.⁹¹

The second defense requiring non-recognition is when the foreign court did not have a fair basis of jurisdiction over the defendant. The reference is not only to the jurisdiction exercised by the foreign court under its own law but also to a jurisdictional standard that is consistent with U.S. principles. Thus, it is clear that if the foreign proceeding rests on jurisdictional grounds such as personal service on the defendant, domicile, incorporation or legal headquarters of the defendant, voluntary appearance of the defendant, or a choice-of-forum clause, the jurisdictional standard for recognition will be satisfied. In addition, jurisdiction predicated on activities in the forum state out of which the claim arose will also usually satisfy the constitutional due process standard, although it is possible that there may be particular factual situations that would fall short.⁹²

Even more difficult is the question of how courts in the United States will view an exercise of jurisdiction by a foreign court authorized by foreign law but unacceptable as a jurisdictional ground for an action brought in the United States. It would seem clear that jurisdictional bases that have been treated as “exorbitant” under the Brussels and Lugano

89. UNIF. ACT § 4 (a)(1) and (a)(2)

90. Soc’y of Lloyd’s v. Turner, 303 F.3d 325, 330 (5th Cir. 2002); Soc’y of Lloyd’s v. Ashenden, 233 F.3d 473, 479 (7th Cir. 2000).

91. For a critique of the decisions, see Courtland H. Peterson, *Limits on the Enforcement of Foreign Country Judgments and Choice of Law and Forum Clauses*, in LAW AND JUSTICE IN A MULTISTATE WORLD, ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 187-89 (James A.R. Nafziger & Symeon C. Symenoides eds., 2002).

92. For example, a situation where the injury occurs in the forum state, but the defendant has not directed activity to that state. See *supra* text accompanying notes 8–10 (discussing constitutional due process).

Conventions and the E.U. Regulation—such as nationality of the plaintiff (as in Article 14 of the French Civil Code) or unlimited property based jurisdiction (as in Article 23 of the German Procedural Code)—would fall short of the appropriate jurisdictional standard in the context of recognition of such a judgment in the United States. However, what of judgments with jurisdictional predicates that are widely accepted within the European Community but nonetheless would violate U.S. due process norms if exercised by U.S. courts? As explained earlier, often the reason for the “gap” between jurisdictional standards in the United States and those of other countries is that the due process standard in the U.S. Constitution has been interpreted to require a connection with the forum and the *individual defendant* whereas jurisdiction in many European countries is more likely to focus on the forum state’s nexus to the events in question and the parties more generally. Thus, for example, jurisdiction in England is permitted when the contract is governed by English law;⁹³ also, many European countries base jurisdiction on the fact that the tortious injury occurred in the forum state without regard to the defendant’s purposeful activity there; or in cases involving multiple parties the domicile of one defendant in the forum state can provide the basis of jurisdiction over additional or third-party defendants in certain circumstances.⁹⁴

The case law in the United States suggests that courts in the United States will not recognize a judgment where the jurisdiction of the U.S. court would violate due process standards if exercised by a court in the United States.⁹⁵ To this extent, the U.S. constitutional standard applied to direct assertions of jurisdiction is also applicable to “indirect” jurisdiction at the recognition stage. However, usually courts in

93. Civil Procedure Rules, 1998, SI 1998/3132 Pt. 6 (III) r 6.20(5)(c).

94. See E.U. Regulation, *supra* note 4, at arts. 6(1)-(2).

95. See, e.g., *Koster v. Automark Indus., Inc.*, 640 F.2d 77, 81 (7th Cir. 1981) (finding that Dutch default judgment was not entitled to enforcement where the Netherlands asserted jurisdiction over an Illinois corporation that entered into a contract with a Dutch citizen in Italy to purchase valves to be produced in Switzerland and whose contacts with the Netherlands consisted of only eight letters, a telegram and a transatlantic telephone call).

the United States will look behind the formal basis of jurisdiction *articulated* by the foreign court to determine whether in view of all the facts, the exercise of jurisdiction would nonetheless satisfy the U.S. constitutional standard. For example, in a recent New York case, *CIBC Mellon Trust Co. v. Mora Hotel Corporation*,⁹⁶ the court enforced an English judgment where jurisdiction of the English court over certain non-resident defendants was based on the fact that they were proper parties to an action brought against another defendant domiciled in England.⁹⁷ Although such a basis of jurisdiction would ordinarily be inconsistent with U.S. due process standards, the court, looking at the particular facts of the case and evaluating the evidentiary materials presented to the English court, believed that the situation was comparable to an accepted constitutional jurisdictional theory in New York—asserting jurisdiction over non-resident co-conspirators if the acts in furtherance of the conspiracy take place in New York.⁹⁸ Accordingly, enforcement of the judgment was upheld.

An alternative way of thinking about the *Mora* case—and an approach urged in the ALI International Jurisdiction and Judgments Project⁹⁹—is to take into account the fact that the type of “third-party” jurisdiction exercised by the English court is asserted against domiciliaries of countries party to European Conventions on judicial jurisdiction. Thus, no interest of the United States with respect to these defendants is implicated and the relevant countries with interests in these defendants have agreed among themselves upon a regime of judicial jurisdiction for persons domiciled in the respective States.

B. Discretionary Defenses

Other defenses—which permit but do not mandate non-

96. 743 N.Y.S.2d 408 (N.Y. App. Div. 2002), *aff'd* on other grounds, 100 N.Y.2d 215 (2003).

97. *CIBC Mellon Trust*, 743 N.Y.S.2d at 420-21.

98. See John Fellas, *Lessons on Enforcing Foreign Judgments in the United States*, N.Y.L.J., Sept. 27, 2002, at 4.

99. See INT'L JURISDICTION & JUDGMENTS PROJECT § 6 Reporters' Note 3 (Tentative Draft 2003).

recognition—have not posed serious barriers to enforcement of foreign judgments.¹⁰⁰ The most common of these defenses is that of “public policy,” which is recognized internationally as a basis for non-recognition of a foreign-country judgment. The United States, like most countries of the world, has generally adopted a narrow construction of that exception.¹⁰¹ However, the appropriate scope for the public policy exception has generated substantial controversy with respect to several recent attempts to enforce foreign libel judgments in the United States. In these cases, libel judgments obtained in England were denied enforcement in courts in the United States on the ground that the libel law of England is incompatible with the values reflected in the First Amendment of the U.S. Constitution, and thus enforcement would be contrary to public policy.¹⁰²

Regulation with respect to the internet is likely to present

100. Those defenses include a failure of notice, fraud, conflict with another final and conclusive judgment, violation of a forum-selection clause, serious inconvenience if jurisdiction is based only on personal service, and public policy. Although non-recognition is technically a matter of discretion for the court, courts almost always refuse to recognize the judgment once the defense is established.

101. See, e.g., *General Report, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS* 28 (Gerhard Walter & Samuel P. Baumgartner eds., 2000) (The E.U. Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides in Article 34 that a judgment shall not be recognized “if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought. . . .” E.U. Regulation, *supra* note 4, at art. 34(1). The word “manifestly” was added to the original text taken from the Brussels Convention to emphasize that public policy should only rarely serve as a justification for refusing recognition or enforcement. The same approach is taken even by countries not linked by treaty.

102. See *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997); *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992). The issue is the subject of intense debate. Compare Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1305-06 (1998) (criticizing the implicit holding in *Bachchan* that even minor deviations from American free-speech standards violate public policy and render judgments unenforceable), with Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law*, 16 HASTINGS COMM. & ENT. L.J. 235, 237-59 (1994) (pointing out that American law offers publishers significantly more protection than does British law and thus the *Bachchan* decision was “of little surprise.”). A second perspective on these cases relates to the territorial connection or nexus with United States interests that should be necessary to trigger the public policy exception. See Silberman & Lowenfeld, *A Different Challenge for the ALI*, *supra* note 52, at 643-45.

similar difficulties, and the *Yahoo* case—*Yahoo! Inc. v. La Ligue Contre le Racisme et L'Anti-semitisme*¹⁰³—presented one such example. In that case, a French court issued an order pursuant to French law purporting to restrain an internet service provider based in the United States from making accessible to users in France an auction site for the purchase of Nazi texts and memorabilia. Rather than waiting for the French plaintiffs to try to enforce the order in the United States, Yahoo—the U.S.-based provider—brought suit in federal court in the United States for a declaratory judgment that enforcement of the French order would impermissibly infringe on its First Amendment rights protected by the U.S. Constitution. The federal court held that the order could not be enforced because it was inconsistent with U.S. constitutional values. But the court did not suggest that France had acted inconsistently with principles of private international law, either in exercising jurisdiction over Yahoo or in applying French law to determine what forms of speech and conduct are acceptable within its borders.

The *Yahoo* case is unusual in that it acknowledges the interest of France with respect to French jurisdiction to prescribe and adjudicate and at the same time rejects enforcement in the United States on the basis of U.S. interests. This dichotomy is likely to surface in other internet contexts, as it did in the recent decision by the highest court in Australia. In *Dow Jones & Co., Inc. v. Gutnick*,¹⁰⁴ the High Court of Australia (its Supreme Court) upheld the assertion of judicial jurisdiction over the U.S. company, Dow Jones, which operated a subscription news site on the web that had carried an allegedly defamatory article about the plaintiff, a South African living in Victoria, Australia. Interestingly, the plaintiff had limited his claim to damage caused to his reputation in Victoria resulting from publication there. One of the opinions by the Court—that of Justice Kirby—underscored the practical difficulty that remained even once the court determined that Australia was not an “inappropriate” forum and that Australian law was properly

103. 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (appeal pending).

104. *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575.

applied to plaintiff's claim of defamation. He observed that a foreign publisher with no assets in the jurisdiction could wait until an attempt was made to enforce the judgment in its own courts where the judgment could be regarded "as unconstitutional or otherwise offensive to a different culture."¹⁰⁵ Accordingly, Justice Kirby suggested that national and international attention to these issues is warranted.

Thus, although the public policy defense has not in the past posed a significant barrier to enforcement of foreign country judgments in the United States, internet transactions—even outside of the First Amendment area—are likely to open up questions of public policy in the context of recognition and enforcement.¹⁰⁶

VI. A NOTE ON THE PROJECT OF THE AMERICAN LAW INSTITUTE

In the wake of the impasse at the Hague Conference in reaching a Draft Convention on Jurisdiction and the Recognition and Enforcement of Judgments, the American Law Institute has proceeded with a project to develop a proposed statute to create national law for the United States to govern the recognition and enforcement of foreign-country judgments. The project, which is now at the Tentative Draft stage, would alter U.S. law in several respects.¹⁰⁷ But any formal change in that direction would have to come from the Congress of the United States, and for that reason the ALI project takes the form of a proposed statute. Of course, the ALI project is only that of a "proposed Act;" it would be left for Congress to enact any such legislation, and it is not likely that such changes will come any time soon. But it is worth identifying just a few of the provisions because they revisit some of the issues that this overview of U.S. law has emphasized.

The most significant aspect of the proposed Act is its creation of national and uniform law for the recognition and

105. *Id.* at ¶ 165.

106. *See, e.g.*, 47 U.S.C. § 230 (2000) (protecting internet providers from liability).

107. For discussions of earlier incarnations of the ALI project, see Silberman & Lowenfeld, *The Hague Judgments Convention—And Perhaps Beyond*, *supra* note 52; Silberman & Lowenfeld, *A Different Challenge for the ALI*, *supra* note 52, at 636-38. For a more detailed discussion of the 2003 Tentative Draft, see Silberman, *A Proposed Lis Pendens Rule*, *supra* note 33.

enforcement of judgments, with the interpretation of those standards then subject to review by the U.S. Supreme Court. As part of that national standard, the Act would also impose a reciprocity requirement—a provision intended to offer an incentive for recognition and enforcement on a world-wide scale; recognition of the judgment of a foreign country in the United States is conditioned on that country's willingness to recognize and enforce a similar kind of U.S. judgment in its courts.¹⁰⁸

Because the proposed Act is directed solely at recognition and enforcement, the statute would not contain provisions to regulate direct assertions of judicial jurisdiction and thus does not alter the rules of jurisdiction for U.S. courts described in Section II. However, a principle ground for declining to recognize or enforce a judgment would be the lack of an acceptable basis of jurisdiction in the foreign court,¹⁰⁹ similar to the present provision in the Uniform Act. But the approach offered by the proposed ALI Act differs from the Uniform Act in particular ways.¹¹⁰ It identifies jurisdictional grounds that would not support recognition of a judgment, and includes a provision that is more receptive to recognition and enforcement of judgments based on jurisdictional theories not part of U.S. law.¹¹¹

108. To that end, the proposed Act would authorize the Secretary of State to negotiate agreements with foreign states or groups of states setting forth reciprocal practices concerning recognition and enforcement of judgments rendered in the United States; and the existence of such an agreement establishes the necessary reciprocity. INT'L JURISDICTION & JUDGMENTS PROJECT § 7(e) (Tentative Draft 2003). In the absence of such agreement, if the defense of reciprocity is raised by the defendant, the judgment creditor has the burden of showing that the courts of the state of origin do grant recognition and enforcement to U.S. judgments in comparable circumstances. Such a showing may be made through expert testimony, or by judicial notice. *Id.* § 7(b).

109. *Id.* § 5(a)(iii).

110. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 5(a)–(b), 13 U.L.A. (Part II) 73 (2002) (enumerating a number of limited bases of jurisdiction that satisfy the requirement of an acceptable basis of jurisdiction and then providing that a court “may recognize other bases of jurisdiction”).

111. The Act includes a list of prohibited grounds of jurisdiction. *See* INT'L JURISDICTION & JUDGMENTS PROJECT § 6(a). A residuary provision states that a judgment shall not be recognized or enforced in the United States if the basis of jurisdiction “is regarded as unreasonable or unfair given the nature of the claim and the identity of the parties.” *Id.* § 6(a)(v). The provision also states that a “basis of jurisdiction is not to be regarded as unreasonable or unfair solely because it would not be accepted if exercised by courts in the United States.” *Id.*

The Act also includes the traditional defenses to recognition and enforcement in U.S. law, including that of public policy. Moreover, in light of continuing concerns about corruption in the judiciaries of certain countries, the proposal introduces an additional ground for non-recognition—that of corruption on the part of the rendering court.¹¹²

As noted earlier, the Act also attempts to address the problem of parallel litigation in two ways. One provision requires a court in the United States to stay an action in favor of a parallel foreign proceeding when certain conditions are satisfied.¹¹³ A related provision introduces additional grounds for non-recognition by providing that a foreign judgment need not be recognized or enforced in a court in the United States if the foreign proceeding was commenced subsequent to a suit in the United States and the U.S. proceeding was not stayed or dismissed,¹¹⁴ or if the proceeding in the foreign court was undertaken with a view to frustrating a claimant's right to have the claim adjudicated in a more appropriate court in the United States.¹¹⁵ Finally, the proposed Act addresses a number of issues not presently within the scope of the Uniform Act, including preclusive effects to be given to judgments, authorization for provisional relief, and procedures for enforcement of judgments, including registration.¹¹⁶

VII. CONCLUSION

In structuring international business transactions, it is important to take account of the law on jurisdiction and enforcement of judgments in the relevant states. From the U.S. perspective, choice-of-forum clauses have important advantages in numerous respects. As a basis of jurisdiction in the international context, they are usually honored for purposes of both prorogation and derogation and thus are useful in ensuring a particular forum. Moreover, a judgment rendered on the basis

112. *Id.* § 5(a)(ii).

113. *See id.* § 11. See discussion at text accompanying Notes 52-61, *supra*.

114. INT'L JURISDICTION & JUDGMENTS PROJECT § 5(b)(iv)

115. *Id.* § 5(b)(v)

116. *See* Silberman, *A Proposed Lis Pendens Rule*, *supra* note 33.

of a choice-of-forum clause is usually recognized and enforced.

Other situations are more difficult to predict. On the jurisdictional side, a U.S. court may seem to offer—in addition to plaintiff-friendly juries, discovery, and contingent fees—favorable rules of judicial jurisdiction. But the difficulties of enforcement of U.S. judgments in foreign courts, particularly on the basis of the general doing business jurisdiction, must be kept in mind. On the other hand, when assets are located in the United States, the broad “doing business” jurisdiction may attract plaintiffs to a U.S. forum, even when the events in question have occurred abroad.

With respect to litigation in other countries, courts in the United States—despite the generally liberal policy toward enforcement and recognition—will not recognize a foreign judgment when the judgment rests on a basis of jurisdiction inconsistent with U.S. due process principles; and that may negate enforcement of some judgments rendered on certain jurisdictional provisions accepted internationally in Brussels, Lugano, and the E.U. Regulation.

As this account indicates, lawyers engaged in the planning and structuring of international business transactions cannot function without an understanding of the procedural world of international litigation. The background rules on judicial jurisdiction and enforcement of judgments will inevitably have a significant impact on how these transactions are put together and how subsequent disputes are litigated. Knowing the rules is of critical importance but predicting results remains uncertain.