

AMERICAN BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW AND PRACTICE

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association encourages the United States' initiative 1
that the Hague Conference on Private International Law explore the feasibility of formulating 2
a comprehensive multilateral convention on the international recognition and enforcement of 3
judgments. 4

REPORTI. Introduction¹

At present, the United States is not a signatory to a convention governing the recognition and enforcement of foreign money judgments.² And while the United States is a party to the widely accepted New York Convention providing for the recognition and enforcement of foreign arbitration awards³, holders of U.S. court judgments are currently unable to avail themselves of a multilateral treaty which would facilitate the recognition and enforcement of those judgments abroad. The absence of such an international treaty framework has often resulted in confusion, delay and financial hardship for holders of U.S. judgments who may find it necessary to seek recognition and enforcement of such judgments abroad if no assets of the judgment debtor can be found in the United States.

In contrast, holders of foreign money judgments against U.S. debtors encounter minimal difficulty when seeking to enforce those judgments in the United States. Although not entitled to protection under the full faith and credit clause of the U.S. Constitution, foreign judgments which otherwise meet U.S. Constitutional requirements have long been recognized and enforced under principles of comity.⁴ In addition, many jurisdictions in the United States have legislation to facilitate the enforcement procedure for holders of "inbound" foreign money judgments.⁵

¹ This report was written by Gregory S. Paley with the assistance of Lucinda Low. Mr. Paley practices law in Seattle, Washington and he is Chair of the ABA Subcommittee on the International Recognition and Enforcement of Judgments.

² The United States participated in the negotiation of a treaty known as the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, OAS Treaty Ser. No. A/39 ("Inter-American Convention on Foreign Judgments") finalized in 1984 but neither signed nor ratified that treaty.

³ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, came into force for the U.S. on June 7, 1959, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 38.

⁴ See e.g., Hilton v. Guyot, 159 U.S. 113 (1895).

⁵ The primary sources of state law governing the recognition and enforcement of foreign judgments in U.S. courts are the Uniform Foreign Money-Judgments Recognition Act ("UFMJRA") and the Uniform Enforcement of Foreign Judgments Act ("UEFJA"). Twenty-two States have enacted UFMJRA and forty-two states have enacted UEFJA. States adopting neither uniform law apply common-law rules to the recognition and enforcement of foreign judgments. See, Restatement (Third) Foreign Relations Law §§481 et seq. and Restatement (Second) Conflicts of Law §92.

The result is that the holder of a foreign money judgment typically encounters few procedural obstacles when seeking to have that judgment recognized and enforced by U.S. courts while holders of American money judgments may face uncertainties and complex issues when seeking judicial enforcement in a foreign country.⁶

From the American perspective, the absence of a multilateral convention places U.S. litigants (especially smaller businesses and individuals) at a competitive disadvantage when considering litigation which may require recognition or enforcement of an ensuing judgment abroad. With an ever-increasing interdependent global economy, the need to place such U.S. judgment holders on a "level playing field" requires the United States to explore the feasibility of negotiating a multilateral convention on the recognition and enforcement of money judgments. Such a convention, if properly drafted, could be structured to provide a systematic and predictable mechanism for recognizing and enforcing money judgments in foreign jurisdictions.

II. Procedural Background

In June 1992, the Office of the Legal Advisor for the United States Department of State attended a meeting of The Special Commission on General Affairs and Policy at The Hague with a proposal that the Hague Conference on Private International Law ("Hague Conference") seek to prepare a convention on the recognition and enforcement of court judgments.⁷ Members of the U.S. delegation requested that the Permanent Bureau of the Hague Conference resume efforts in the field of recognition and enforcement of judgments in the hope of bringing together Member States of the European Free Trade Area ("EFTA"), the European Community ("EC") and the other members of the Hague Conference to consider preparing and adopting a multilateral convention governing the recognition and enforcement of judgments.

The United States delegation proposed that the Hague Conference should build on the Brussels and the Lugano Conventions (discussed below) with a view towards formulating a new treaty which would have broad appeal to the international community beyond Western Europe. After considering the United States initiative, the Permanent Bureau agreed to convene a special meeting of experts at The Hague in October, 1992 to discuss further the U.S. proposal and to

⁶ In the absence of a multilateral treaty governing the recognition and enforcement of money judgments, a current holder of a U.S. money judgment is confronted with ascertaining the domestic-law requirements of each target jurisdiction to insure that the U.S. judgment can in fact be enforced in that particular country. Those requirements are typically difficult to ascertain without the advice of local counsel, and differ from jurisdiction to jurisdiction.

⁷ The United States, together with approximately 37 other countries, is a member of the Hague Conference on International Law. Edwin D. Williamson, Esq. of the U.S. Department of State outlined the proposal presented in this Report in a letter dated May 5, 1992 to George Droz, Esq., Secretary General to the Hague. See, L.c. No. 15 dated May 6, 1992 and L.c. No 14, dated April 29, 1992.

det
cor

III.

the

cu:

co:

be:

thr:
ju
W
a
m
prC
"i
tc
st

5.

N

at
D

determine whether a Hague Conference judgments convention should become a priority item for consideration during the 17th session of the Hague Conference scheduled for May, 1993.

III. Issues

In considering the merits of the treaty initiative being advanced by the U.S. Government, the following questions arise:

(1) Are there any existing multilateral treaty regimes that the United States could currently join, thereby avoiding the need to negotiate a new treaty?

(2) Is a broad-based multilateral convention preferable to multiple bilateral conventions?

(3) Assuming a multilateral approach is to be preferred, is the Hague Conference the best forum in which to seek the preparation of such a convention?

1. Existing Multilateral "Money Judgment" Treaties

In addition to the Inter-American Convention referred to earlier⁸, there are currently three other multilateral conventions concerning the recognition and enforcement of money judgments - the Hague Convention, the Brussels Convention and the Lugano Convention. While a detailed examination of each convention is beyond the scope of this Report, there are a number of generally perceived shortcomings of each Convention which should be briefly mentioned to understand more fully some of the reasons and motivations behind the current U.S. proposal.⁹

A. The Hague Convention. The first multilateral Convention, the 1971 Hague Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the "Hague Convention") is not worthy of consideration. Only three countries have become parties to the Convention, which is generally perceived as being too complex, and has been largely superseded by the Lugano Convention.¹⁰

⁸ See footnote 1 *infra*.

⁹ See Minor, The Lugano Convention: Some Problems of Interpretation, 27 Common Market Law Review 507-519 (1990).

¹⁰ See 35 N.I.L.R. 196, 214 (1988). The only Contracting States to the 1971 Hague Convention are the Netherlands, Portugal and Cyprus.

B. The Brussels Convention. In 1973, the EC ratified the first of two treaties governing the recognition and enforcement of judgments. The first agreement was the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, commonly referred to as the Brussels Convention.¹¹ First adopted by the original six EC Member States, each new EC Member State is required to be a party and has subsequently acceded to the Convention.

The Brussels Convention is only open to Member States of the European Community ("EC"). It has long been subject to criticism because of its discrimination between EC and non-EC countries in the area of jurisdiction. It is a "convention double" (or traite double) meaning it provides directly for the grounds of judicial jurisdiction which constitute the sole bases for recognition and enforcement of subsequent judgments.¹² As between Member States the Brussels Convention then goes on to eliminate grounds of so-called "exorbitant jurisdiction" found in the domestic laws of the Member States, but allows for those States to make use of such bases of jurisdiction in the adjudication of actions against non-Member-State domiciliaries and does not prohibit the recognition and enforcement of a judgment based on such grounds.¹³ Although there have apparently been no cases brought under one of these bases of jurisdiction since the Brussels Convention came into force, the troublesome potential for discrimination against non-EC domiciliaries remains, and is likely someday to become a reality.

C. The Lugano Convention. In 1988, Member States of the EC and the Member States of EFTA adopted the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Lugano Convention").¹⁴

The Lugano Convention extends the jurisdictional concepts of the Brussels Convention to EFTA Member States. Thus, while EFTA countries and Member States of the European Community agree not to recognize and enforce judgments based on grounds of exorbitant

¹¹ A consolidated and updated version of the Brussels Convention, including a 1971 Protocol (following the accession of Spain and Portugal), is published at 29 I.L.M. 1413 (1990).

¹² This is in contrast to a convention simple (or traite simple), which deals with jurisdictional principles only indirectly by specifying the bases that qualify a judgment for recognition in the other Contracting States.

¹³ Brussels Convention, Article 4. "Exorbitant jurisdiction" is a term of convenience generally used to describe "unreasonable" bases of jurisdiction not recognized as adhering to due process notions of fair play as described in the fifth and fourteenth amendments to the U.S. Constitution.

¹⁴ See 28 I.L.M. 620 (1989). Only Switzerland has ratified the Lugano Convention.

jurisdiction in each other's domestic laws, those jurisdictional bases still apply to non-domiciliaries of the EC and EFTA countries.¹⁵

Unlike Brussels, the Lugano Convention is technically open to third party signatories provided that (1) the prospective member be invited by a Contracting State to participate, and (2) that all Member States unanimously approve the applicant's accession. Even if invited, however, the United States would likely have difficulty acceding to the Lugano Convention. First, the jurisdictional bases prescribed therein as permissible, which are drawn from the civil-law regimes of the participating countries, would most likely require substantial changes to U.S. law. Second, Brussels/Lugano countries would probably seek to have certain bases of jurisdiction under U.S. law, most notably long-arm jurisdiction, declared exorbitant. This would be a very high, and likely unacceptable, price of admission.

In short, existing multilateral treaties are not viable options for the United States.

2. Why a Multilateral Convention?

A multilateral judgments convention, by its very definition, represents a single document with identical terms that would be in force in all states party thereto. Such a convention, if ratified by the United States, could facilitate recognition and enforcement proceedings in multiple jurisdictions and, if properly structured, could remove many of the perceived inequities of the present system.

On the other hand, there are some valid objections should the U.S. commit to negotiating a multilateral judgments convention. One objection to a multilateral convention, asserted by some, is its "least common denominator" tendency. Rather than permitting market forces to define the relative negotiating power between foreign states vis-a-vis their actual or perceived political or economic strength, a multilateral treaty is based upon principles of disproportionate representation (*i.e.*, one country one vote). The result is that the bargaining power of traditionally dominant interests may be diffused in a multilateral negotiation setting.

Another objection to the multilateral approach is that the contracting states cannot be as selective in countries participating in such a regime as is possible with a bilateral convention. For example, if a country with a comparatively undeveloped and unpredictable legal system decides to join the multilateral regime, there may be no effective way to preclude it from doing so.¹⁶

¹⁵ Lugano Convention, Articles 3, 4.

¹⁶ With respect to the participation of "undesirable" countries in a multilateral convention to which the U.S. may become a contracting state, the problem is probably more apparent than real. As discussed earlier, a number of U.S. states already have laws which permit judgment holders from such countries to seek recognition and

Although there are shortcomings in the multilateral convention approach, the deficiencies are negligible when analyzed in the context of the benefits that could accrue to U.S. litigants and their legal counsel from such a convention. With the internationalization of global commercial interests, there is a very real and immediate need for a new multilateral convention which will appeal to a wider audience than the present system. Thus, a multilateral treaty could (1) establish a new regime for enforcing U.S. money judgments abroad, (2) reduce current barriers facing U.S. judgment creditors, and (3) remove the problematic patchwork of rules and procedures inherent in a bilateral convention approach.¹⁷

In short, the arguments for a multilateral approach are ultimately most convincing.

3. Why the Hague Conference?

Would the Hague Conference provide a better negotiating forum than other possible organizations such as the United Nations International Law Commission? Certainly the Hague Conference is not the most representative existing international organization. Nor does the Hague Conference, viewed from the U.S. perspective, consistently produce successful international agreements.¹⁸

Notwithstanding such concerns, there are good reasons why the Hague Conference may be the best organization to receive the U.S. proposal. The Conference includes among its

enforcement of their judgments in U.S. courts. The kinds of defenses which enable U.S. courts currently to decline to recognize and enforce such judgments-- fraud, improper procedure or a discriminatory tribunal-- will almost certainly be available under a convention. Thus, it seems unlikely that the U.S. will be worse off in this regard with a convention than without.

¹⁷ If the United States were to now pursue bilateral treaty negotiations with selected trading partners, those efforts would most likely require a negotiation and ratification timetable which could last decades. Furthermore, there is no guarantee that bilateral negotiations would be any more successful than multilateral ones. The only example of a recent U.S. attempt to negotiate a purely bilateral "money judgments" convention was in the 1970's with the United Kingdom. One would expect, given the common legal system of the two countries, that agreement on a treaty regime would be attainable. Yet after years of planning and effort, those negotiations produced no agreement. See Hay & Walker, The Proposed Recognition of Judgments Convention Between the United States and the United Kingdom, 11 Tex. Int'l L.J. 421 (1976), and 18 Va. J. Int'l L. 753 (1978).

¹⁸ The U.S. is a party to the following conventions prepared and adopted by the Hague Conference: the 1961 Convention on Abolishing the Requirement of Legalization for Foreign Public Documents; the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; the 1970 Convention on the Taking of Evidence Abroad; and the 1980 Convention on the Civil Aspects of International Child Abduction. Of these four conventions the last two have been the least controversial. The first two have been the subject of extensive litigation in the U.S., often spurred by U.S. litigants searching for ways to avoid using the procedures they prescribe.

mem
to eli
Conv
outs

with
disp
likel

IV.

of t
the
new
Cor

mer
its
cor

of
wo

Pro
pro
Se;
to

Ve:

ca:
ad:
ass

abr:
De:

members the EC and EFTA Member States, thereby allowing the U.S. to negotiate with them to eliminate the potential discrimination discussed above with respect to the Brussels and Lugano Conventions. The Hague Conference also includes many significant U.S. trading partners outside Western Europe such as Canada, Mexico and Japan.

The member states of the Hague Conference additionally include many of the countries with the most substantial investments in the United States at present. Thus, to the extent disputes follow business activity, a convention with the members of the Hague Conference would likely cover a substantial percentage of U.S. commercial disputes with foreign parties.

IV. Elements of the Current U.S. Proposal ¹⁹

What is the American proposal and how will it differ from the current Conventions?

In late October 1992, the United States delegation will meet with the Permanent Bureau of the Hague Conference and experts from selected Hague Conference Member States to discuss the American proposal.²⁰ The goal of that meeting is to explore the feasibility of preparing a new international judgments treaty which would be open to the Member States of the Hague Conference including Member States of the EC and EFTA.

In its simplest form, the American approach offers an attractive solution to the limited membership and the "exorbitant" jurisdiction provisions of Brussels and Lugano. While still in its preliminary form, the American proposal suggests that The Hague prepare a "mixed" convention rather than following the convention double format of Lugano and Brussels.

The American delegation will propose that any judgments convention combine elements of a traite simple with a traite double.²¹ Like the convention double, the "mixed convention" would deal directly with both grounds of judicial jurisdiction and grounds for recognition and

¹⁹ The brief summary of the current U.S. proposal described herein is an outgrowth of an article prepared by Professor Arthur von Mehren of Harvard University. Professor von Mehren is the author of the current U.S. proposal distributed and discussed at a State Department Study Group meeting conducted in Washington, D.C. on September 2, 1992, which was attended by the author of this Report. He is also a member of the U.S. delegation to the Hague Conference.

²⁰ The study group scheduled to attend the October, 1992 meeting will consist of experts from Argentina (or Venezuela), China, Egypt, France, Finland, Hungary, the United Kingdom and the United States.

²¹ Traditionally conventions governing the recognition and enforcement of judgments have been classified in two categories: a convention simple (traite simple), and a convention double (traite double). A convention simple addresses only issues of recognizing and enforcing a judgment, while a convention double regulates both the assumption of jurisdiction to prescribe and the recognition and enforcement of the resulting judgment.

enforcement of judgments. Judgments rendered or based on one of the enumerated (*i.e.*, permissible) jurisdictional grounds (the "white list") would be entitled to recognition and enforcement absent other grounds for non-recognition. Likewise, the mixed convention would enumerate grounds of exorbitant jurisdiction which could not alone be grounds upon which litigation is based (the "black list"). Unlike the convention double, however, the "white list" grounds would not be the exclusive basis on which a state party could recognize and enforce a foreign judgment. Rather, as with a convention simple, a state party would be free to recognize and enforce judgments based on other jurisdictional grounds permitted under their domestic laws.

There is considerable debate over the merits of such an approach. Some contend the U.S. should take the convention double approach; others argue that a convention simple is the only realistic way to proceed. Yet, in spite of such debate and without delving into all the detail on those issues, this much can be said about the chosen approach: while ambitious, it is closer to the approach of existing regimes (Brussels/Lugano) than a convention simple would be, and therefore possibly more palatable to potential treaty partners. It is also an approach that could be modified if negotiations over jurisdictional bases prove too difficult. Furthermore, a treaty embodying the "mixed" convention approach would likely benefit U.S. litigants. Having a "white list" would enable them to predict whether a potential judgment could be recognized and to plan their cases ab initio with greater certainty.²² At the same time, the "mixed" convention approach offers the U.S. a possible means of avoiding lengthy discussions over whether U.S. "long-arm" statutes are exorbitant or not.

As the U.S. proposal is scheduled for initial discussion at the Hague Conference in late October 1992, it is too early for the ABA to endorse the merits of any particular approach at this time. Neither, however, do we suggest that the ABA should oppose the U.S. proposal. Rather, the merits of a "mixed convention" approach can be best debated as the details of such an approach emerge. The Section of International Law and Practice is committed to monitoring these negotiations and reporting back to the Association on the progress of the U.S. initiative.

²² Obviously the degree of benefit which would accrue depends on the scope of the "white list", and conversely, that of the "black list." It would be hoped that the "white list" could be sufficiently broad to provide a basis for securing jurisdiction in a substantial number of cases, and that the "black list" would not include jurisdictional bases which are important to a substantial number of U.S. litigants. The residual bases, the so called "grey area" (which would not actually be a list but a residual category) would presumably encompass bases of jurisdiction which are important to individual countries, but likely to be controversial internationally.

V. Benefits of a Judgments Treaty to American Lawyers and Their Clients

A multilateral "judgments" treaty, whether grounded in the "mixed" convention form discussed herein or taking the form of a convention simple, could be of tremendous benefit to U.S. lawyers and their clients. Some of those benefits could include:

- (1) Facilitating the subsequent enforcement of "outbound" judgments rendered in American courts against judgment debtors with assets located abroad;
- (2) Enhancing the ability of U.S. litigants to plan and execute strategy in transnational litigation, thereby reducing the uncertainty and cost, with particular benefit to smaller businesses and individuals;
- (3) Lessening the perceived unfairness imposed by the current EC-Brussels Convention system which permits exorbitant bases of jurisdiction to be invoked against U.S. parties both in the adjudication and enforcement stages;
- (4) Establishing a more "level playing field" in the international judgments arena; and
- (5) Avoiding the duplication of effort inherent in a series of bilateral treaty negotiations.

VI. Conclusion

The time has arrived to commence negotiations and to formulate proposals for a multilateral convention addressing the recognition and enforcement of court judgments. The American proposal is a creative initiative designed to reduce the difficulties inherent in the present international system, while at the same time creating a uniform and predicable set of transnational litigation rules.

The Section of International Law and Practice believes that the ABA should support the spirit and purpose of the American initiative. Because discussions concerning a multilateral convention are in their incipient stages, support by the ABA at this critical juncture would send a strong signal that this issue is important to its constituency.

Respectfully submitted,

Louis B. Sohn
Chair, Section of International Law and Practice

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law and Practice.

Submitted By: Louis B. Sohn, Chair

1. Summary of Recommendation.

The recommendation urges that the American Bar Association formally adopt a resolution supporting the United States initiative to explore with the Hague Conference on Private International Law the feasibility of preparing a multilateral convention on the recognition and enforcement of judgments.

2. Approval by Submitting Entities.

Approved by the Council of the Section of International Law and Practice on October 24, 1992.

3. Previous submission to the House or relevant Association position.

This resolution has not been previously submitted to the ABA.

4. Existing Association Policies Relevant to this Recommendation:

None

5. Need for Action at this Meeting.

The Permanent Bureau of the Hague Conference on Private International Law is meeting in late October 1992 to specifically consider the U.S. initiative. If the Permanent Bureau agrees to place the U.S. proposal on the Hague agenda, the matter will be formally addressed in May, 1993 at the Seventeenth Session of the Hague Conference.

6. Status of Legislation.

None.

7. Cost to the Association.

None.

8. Disclosure of Interest.

None.

9. Referrals.

This Report and Recommendation was referred to all ABA Sections and entities on November 20, 1992.

10. Contact Person

Gregory S. Paley, Esq.
1001 Fourth Avenue, Suite 3200
Seattle, Washington 98154
(206) 622-4700

11. Contact Person at Meeting:

Charles N. Brower
White & Case
1747 Pennsylvania Avenue, N.W.
Suite 500
Washington, DC 20006
(202) 872-0013