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INTERNATIONAL LAW

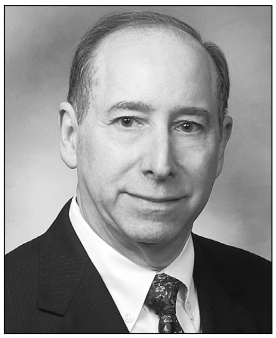
Foreign Judgments

By Peter D. Trooboff

Pending projects of the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) include important proposals for enactment of a federal statute and amendments of the uniform state law governing recognition and enforcement in the United States of judgments rendered by foreign courts. The research supporting these proposals already provides valuable analysis for any practitioner facing a question on this subject. Both projects raise complex policy issues, including whether this field is best governed by federal or state legislation, and whether U.S. recognition of foreign-country judgments should be conditioned on reciprocal recognition of U.S. judgments in other countries' courts.

ALI project envisions a new federal statute

For the past five years, the ALI has been drafting a proposed new federal statute that would establish uniform rules for the recognition and enforcement of foreign-country judgments throughout the United States. Under the leadership of the co-reporters from New York University School of Law, Andreas Lowenfeld and Linda Silberman, the ALI project began as an effort to draft implementing legislation for the anticipated convention resulting from the international jurisdiction project of the Hague Conference on Private International Law. That project encountered difficulties and now appears likely to result in a narrower convention focused on judgments resulting from exclusive choice of-court agreements. See www.hcch.net.



The ALI decided to continue that part of the project devoted to the recognition of foreign judgments, hoping to accomplish indirectly the goals of the failed international convention. Its statute would not only clarify U.S. law but also attempt to encourage other countries to enter into reciprocal agreements with the United States, achieving on a country-by-country basis what the Hague Conference failed to do multilaterally. A final vote on ALI adoption of the proposal is likely at its meeting in May 2005. For the history and background of the ALI project and to order a copy, see www.ali.org.

In January, the NCCUSL executive committee established a new drafting committee to amend the Uniform Foreign Money-Judgments Recognition Act that 30 states, the District of Columbia and the U.S. Virgin Islands have adopted. Under the leadership of Professor H. Kathleen Patchel of Indiana University School of Law, the drafting committee has prepared a draft of amendments to the uniform act with reporter's notes. In June the committee submitted a memorandum to the uniform law commissioners raising issues to be resolved as the draft progresses. For a copy of the act, state adoptions and the drafting committee's work, see www.nccusl.org.

Achieving greater uniformity is not merely of theoretical significance. In a marketplace that seeks to encourage the free flow of investment and trade, the ability to enforce rights effectively—the free flow of judgments—becomes an important element of commercial security and success.

Although the NCCUSL would continue to have state law govern recognition of foreign-country judgments, the ALI proposes a federal statute, binding on all courts in the United States, that would pre-empt the uniform act. The ALI draft would grant concurrent original jurisdiction to U.S. district courts together with state courts in proceedings for the recognition or enforcement of a final foreign-country judgment, including not only those granting or denying a sum of money but also those determining a legal controversy. The NCCUSL drafting committee has not proposed extending the uniform act beyond its present scope: judgments granting or denying a sum of money. The ALI proposal would also allow removal of proceedings to federal court under 28 U.S.C. 1446(b) with-

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out regard to the citizenship or residence of the parties or the amount in controversy.

The core principle of the ALI-proposed statute is that foreign-country judgments within its scope are entitled to recognition (and, when appropriate, enforcement) unless the resisting party establishes one of several grounds for nonrecognition. These include the familiar grounds developed in *Hilton v. Guyot*, 159 U.S. 113 (1895).

Neither the uniform act nor the ALI proposal applies to judgments in domestic relations matters (including divorce, custody and adoption). The ALI also excludes bankruptcy judgments, arbitral awards and court orders in respect of arbitral agreements, but judgments enforcing arbitral awards would be included. Unlike the uniform act, the ALI would allow discretionary enforcement of judgments for taxes, fines and penalties that meet the statute's criteria. Lack of integrity of the court rendering the judgment would also justify nonrecognition under both proposals.

Both proposals would simplify the recognition and enforcement of foreign judgments in a number of significant respects. The ALI proposal would clarify that an action for recognition or enforcement may be brought not only where the judgment debtor is subject to personal jurisdiction, but also where the judgment debtor's assets are situated. Further, the proposed federal statute would establish a registration procedure for contested judgments for a sum of money under which the registered judgment would have the same effect as a judgment of the recognizing or enforcing court, subject only to the defenses allowed under the statute.

The NCCUSL drafting committee rejected such a registration procedure and will probably require filing an action on the judgment. Finally, the ALI- proposed statute includes ambitious provisions relating to lis pendens, provisional measures in aid of foreign proceedings and anti-suit injunctions. None of these subjects is treated in the uniform act or in the amendments under consideration by the NCCUSL drafting committee. Although provisions on these subjects may not be required for the statute to be effective, the ALI reporters have urged attention to them because they arise so frequently in litigation involving actual or prospective judgments in more than one jurisdiction.

At its May 2004 meeting, the ALI debated but did not vote on whether a federal statute is the best way to proceed if the United States has not successfully negotiated a multilateral treaty at the Hague Conference or elsewhere. Opponents argued that this field should not be federalized in the absence of an international convention and pointed to the success of the uniform act. They questioned the wisdom of federal action even if there is constitutional authority for such legislation and expressed concern about burdening the federal courts under the ALI proposal. They also contended that proposing a federal statute could make successfully negotiating a treaty less likely.

This position was sharply challenged by ALI members who argued that nearly five years of ALI effort should not be held up awaiting further action in the Hague. Supporters of the ALI project argued that the proposal would resolve important national policy issues that should not be left to courts, e.g., whether to have a uniform reciprocity requirement in enforcing foreign judgments in the United States. Only a federal statute could ensure the uniformity that this field requiresin today's global economy.

Two pending projects raise policy issues, including whether enforcing foreign judgments is best governed by a federal statute.

Debate over reciprocity was heated at meeting

At its May 2004 meeting, after a lengthy and vigorous debate, the ALI voted to include a reciprocity requirement in the proposed statute. As drafted, the ALI statute provides that a court of the United States is prohibited from recognizing or enforcing a foreign judgment if the court finds that the foreign country's courts would not recognize or enforce a comparable U.S. judgment. The proposed statute specifies that refusal of a foreign court to grant enforcement of judgments for punitive, exemplary or multiple damages does not establish an absence of reciprocity. Most important, the ALI draft seeks to balance this reciprocity requirement by authorizing the secretary of state to negotiate agreements, bilateral or multilateral, under which judgments would be reciprocally recognized and enforced.

Proponents of this provision acknowledged that it would change U.S. practice as it has evolved in state and federal courts since the decision in *Hilton*. They argued that reciprocity is needed to ensure fair treatment of U.S. litigants seeking recognition and enforcement of U.S. judgments in the courts of other nations. With more than 100 years of experience under *Hilton*, it seems clear that the courts of many countries will not enforce U.S. judgments absent such an incentive.

In a June 2004 report, the NCCUSL drafting committee reported that there was "little, if any support" for adding a reciprocity requirement to the uniform act. Opponents argue that such a provision would make it more difficult for U.S. litigants to satisfy the reciprocity requirement of other nations, penalize individuals for the actions of foreign governments, undermine predictability and not accomplish its objective of encouraging bilateral and multilateral agreements. Opponents in the ALI also contended that U.S. judgments are more favorably treated at present than many realize and that a reciprocity requirement would spawn wasteful collateral litigation. The ALI margin in favor of the reciprocity was not great, but the issue is unlikely to be reopened.

Other important, highly contentious issues remain unresolved in the ALI project. For example, debate continues over how the proposal should address the public policy defense as applied to foreign judgments that U.S. courts could not render under First Amendment principles (e.g., libel judgments against publications reporting on public figures).