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The Impact of Jurisdictional Rules and Recognition Practice on Transactions

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I. Introduction

International business transactions are entered into in the shadow of both substantive and procedural rules. The first two panels of this conference have focused on particular substantive areas -- the nature of the different regulatory regimes within which transactions are structured and the potential difficulties created by multiple and/or conflicting regulations. This panel turns to the procedural framework for the litigation of disputes arising from international transactions and the impact those rules have on both structuring transactions and litigating future disputes.

There are actually two stages at which questions of jurisdiction and recognition of judgment are important. The obvious one is, of course, when the transaction breaks down and litigation is imminent. A potential plaintiff will want to identify the best place for suing the defendant and 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 take matters into his own hands and be the first one to initiate 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 is sued, either by resisting jurisdiction in the plaintiff's forum of choice or 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 or not to contest jurisdiction at the outset or to default and challenge any judgment at the enforcement stage.

The less obvious -- but possibly even more important stage -- for these questions to be considered is at the time the transaction is entered into. That is because some of these matters may be settled on beforehand, for example, by including a forum-selection clause -- either a choice-of-court or arbitration clause -- as part of the contract or transaction, and/or by providing for a choice-of-law clause. Of course, the validity of such clauses will depend whether the particular country that is asked to decide the question will honor such provisions. The use of such clauses is only effective if they will be upheld at the litigation, and later the 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. However, my limited task for today is to provide you with a framework of analysis from the United States side. My full paper will explore these subjects in greater detail,¹ but in the limited time I have to deliver what seems to be a short a course in American jurisdiction and judgments, I will try to do the following:

(1) provide an overview of the rules of judicial jurisdiction in the United States and how they may differ from jurisdictional rules known in Europe. I will also alert you to the kinds of enforcement problems the exercise of jurisdiction by U.S. courts may present, though leaving the details of European enforcement of American judgments to my co-panelist, Willibald Posch.

(2) offer a brief account of the role of *forum non conveniens* and *lis pendens* in international cases, that subject to be explored in greater depth by Professor Stephen Burbank

(3) comment on the U.S. approach to forum-selection clauses, leaving to Professor Kaufmann-Kohler the more extended discussion of arbitration

4) give a short summary about the law on enforcement of judgments in the

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 Comparative Jurisdiction]; Linda 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 158-89 (John J. Barcelo II & Kevin Clermont eds., 2002). For a comparative analysis of these issues, see Andrew Bell, Forum Shopping and Venue in Transnational Litigation (Oxford 2002).

United States at present and say a word about the ongoing project of the American Law Institute that would effect a change in U.S. law.

II. Judicial Jurisdiction in the United States

As I have noted in several other articles,² the rules of American jurisdiction are in many respects actually more restrictive than rules of jurisdiction in Europe. The United States is not a party to any treaty -- like Brussels, Lugano, or the EU Regulation -- and thus the jurisdictional rules in the U.S. are the product of domestic law alone. That said, jurisdictional rules in the United States are more often than not the province of state law in the first instance. Whether by common law or statute, most states will provide for jurisdiction with respect to any claim (i.e. general jurisdiction) either at the residence or domicile of the defendant or with respect to a particular claim (i.e. specific jurisdiction) on the basis of certain acts of the defendant in the forum or effects in the forum caused by acts of the defendant elsewhere. Thus, jurisdiction over a defendant in a commercial case can rest on a range of conduct by a defendant in the forum state -- e.g, negotiations with respect to the contract taking place in the forum state, performance of the contract in the forum state, and possibly even the making of the contract in the forum state. 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. However, a unique feature of the exercise of judicial jurisdiction in the United States is that it is subject to constitutional limitations; and an elaborate and somewhat confusing jurisprudence has emerged from a set of Supreme Court cases defining the "due process" limits on judicial jurisdiction.³ The constitutional restraints on judicial jurisdiction in the United States focus upon the relationship between the individual defendant and the forum state⁴ rather than on the connection between the dispute and

² See Linda Silberman, *Comparative Jurisdiction*, supra note 1 at .

³ I have written about these issues in other scholarship. See, e.g. Linda 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. (1995); Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard, 28 Tex. Int. L. J. 501 (1993). See also Kevin M. Clermont, Jurisdictional Salvation and the Hague Treaty, 85 Cornell L. Rev. 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).

⁴ See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1986). See generally 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).

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 maintenance of the suit does not offend traditional notions of fair play and substantial justice."⁵ 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 selling or distribution of the goods.⁶ In addition, the leading Supreme Court case, *Asahi Metal Industry Co. v Superior Court*,⁷ 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. The benchmark for commercial contractual disputes is found in the Supreme Court's opinion in *Burger King Corp. v. Rudzewicz*,⁸ 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. 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 European Union Regulation (and the predecessor Brussels Convention), the specific-act statutes in states of the United States have not generally included special jurisdictional provisions with respect to consumers; 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.

There are other examples where the jurisdictional reach of United States courts is often 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.⁹ At the same time,

⁵See *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

⁶See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

⁷480 U.S. 102 (1987)

⁸471 U.S. 462 (1985).

⁹Compare *Chung v. NANA Development Corp.*, 783 F.2d 1124 (4th Cir. 1986) (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 turn unobliging and brusque") with *Mesalic v. Fiberfloat Corp.*, 897 F.2d 696 (3rd Cir. 1990)(Florida boat manufacturer who

there are probably a broader range of connections that a defendant can have with different states that will justify an assertion of judicial jurisdiction in the U.S. system than under the European rules. For example, under the European 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".¹⁰ The solution in the EU 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.¹¹ 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 even where the contract was entered into -- all, of course, subject to the standard of "reasonableness" as interpreted in case law.

There is 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 - and that is the concept of general "doing business" jurisdiction, where jurisdiction is asserted on the basis of defendant's substantial activity, even when the claim is unrelated to those activities.¹² 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. The general "doing business" jurisdiction tends to be used for suits involving disputes unrelated to the defendant's activity in the forum; and the justification for it rests on the extensive and continuous activities of the defendant in the forum state. The early Supreme Court of *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) presented a strong set of facts for the exercise of such jurisdiction. 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

accommodated buyer by delivering boat in New Jersey was subject to jurisdiction in New Jersey).

¹⁰EU Regulation, art. 5(1)(a).

¹¹ 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).

¹² For recent discussion of the general "doing business" jurisdiction, see Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U.Chi. Legal. F. 119; Mary Twitchell, *Why We Keep Doing Business with Doing-Business Jurisdiction*, 2001 U.Chi. Legal F. 171.

courts to exercise jurisdiction if they chose to do so. In effect, the "doing business" jurisdiction adds an additional prong to more internationally established bases of jurisdiction, such as domicile, principal place of business, or central administration. Historically, it also filled gaps in an era when specific jurisdiction had not yet emerged and thus provided for a forum in a place where the defendant, usually a corporation, had a substantial presence.

One difficulty with the doing business jurisdiction is its indeterminacy. State case law has failed to give useful direction as to when a defendant is sufficiently present in a state to be subject to jurisdiction with respect to disputes that do not arise in the forum state; and the United States Supreme Court has not offered much in the way of constitutional guidance. On the constitutional question, the most recent Supreme Court case, *Helicopteros Nacionales de Colombia, S.A. v. Hall*,¹³ held that a Colombian defendant that had purchased four million dollars worth of helicopters and equipment from a Texas company, had sent prospective pilots and other personnel to Texas for training, had 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.

Critics of U.S. doing business jurisdiction point to the 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*. Thus, if neither party to the dispute is resident in the United States, and the dispute is centered abroad, the case is likely to be dismissed on *forum non conveniens* grounds. If the plaintiff is a U.S. resident, a dismissal on *forum non conveniens* grounds is less likely; these situations are ones where suit in the United States may be 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 American point of view, they do have an established presence in the United States. Particularly when American citizens or habitual residents are injured -- even with respect to a claim originating outside the United States -- there does not seem to be great unfairness in allowing the resident plaintiff to sue such a defendant in the plaintiff's home state.¹⁴ These situations are not

¹³466 U.S. 408 (1984)

¹⁴ I elaborate on this proposition elsewhere. See Linda Silberman, Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled? 52 DePaul L. Rev. 319, 340-46 (2002).

altogether different from the recent addition to the Warsaw Convention which 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.¹⁵

One difficulty for foreign defendants in evaluating the rules of American jurisdiction explained above is that clear rules are difficult to extrapolate. 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 for purposes of giving guidance to defendants who might want to structure their conduct accordingly.

¹⁵See Convention on the Unification of Certain Rules of International Carriage by Air, May 28, 1999, art. 33(2), ICAO Doc. No. 9740.

III. Dealing with Parallel Litigation in the United States

Unlike many civil law countries which include rules of *lis pendens* in their procedural codes and have made it a formal provision in their international arrangements (Brussels, Lugano, and the EU regulation), American law does not generally feature a formal *lis pendens* doctrine.¹⁶ A typical reaction from a U.S. court faced with 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*."¹⁷ However, that is not to say that U.S. courts 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.¹⁸ Like the related U.S. doctrine of *forum non conveniens*, the standard for this type of "international abstention" is a discretionary one.¹⁹ 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.²⁰

¹⁶See James P. George, International Parallel Litigation -- A Survey of Current Conventions and Model Laws, 37 Tex. Int'l L.J. 499 (2002); James George, Parallel Litigation, 51 Baylor L. Rev. 769 (1999); Stephen B. Burbank, Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law, 49 Am. J. Comp. Law 203 (2001).

¹⁷See *American Cyanamid Co. v. Picaso-Anstalt*, 741 F. Supp. 1150, 1159 (D.N.J. 1990).

¹⁸ See *Turner Entertainment Co. v. Degeto Film Gmbh*, 25 F.3d 1512 (11th Cir. 1994). The same can said to be true 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. 5/2-619(a)(3) (West 1994); N.Y. CPLR 3211 (a)(4), 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. App. Div. 1975) ("Pendency of suit in a foreign [country] jurisdiction does not support a dismissal on grounds of prior action pending."). Compare *Philips Electronics v. New Hampshire*, 295 Ill. App.3d 895 (1st Dist. 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. App. 1988)(in parallel German suit, jurisdiction lies in Germany since service of process was first perfected in the German suit).

¹⁹The courts in the United States often refer to parallel litigation in the international context as "international abstention". See, e.g., *Posner v. Essex Insurance Co., Ltd.*, 178 F.3d 1209, 1222 (11th Cir. 1999).

²⁰ See *AAR International, Inc. v. Nimelias Enterprises*, 250 F.3d 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".²¹

The doctrine of *forum non conveniens* does occupy a central role in international litigation. Thus a plaintiff who establishes jurisdiction under the formal rules of jurisdiction described in section II of the paper cannot be certain that his 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.

The *forum non conveniens* motion is a mainstay of international litigation. If the plaintiff wants the U.S. forum, it is inevitable that the defendant will not and thus will attempt to move the case elsewhere. The federal courts and most state courts apply the doctrine of *forum non conveniens*. According to the Supreme Court of the United States, the doctrine 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.²² Such an interpretation has allowed the state and federal courts to define the doctrine for their own courts, and indeed, for the state courts to limit application of the doctrine when they so choose.

The federal courts generally insist that the plaintiff's initial choice of forum is to be given substantial weight. However, a non-U.S. plaintiff's choice of forum is given less deference than that of a U.S. plaintiff, particularly when the transaction or injury has occurred abroad.²³ The U.S. 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. In an important recent ruling by the Second Circuit Court of Appeals, sitting *en banc*, *Iragorri v. United Technologies Corp.*,²⁴ an additional perspective for evaluating a *forum non conveniens* motion was introduced:

2001); *General Motors Corp. v. Lopez de Arriortua*, 948 F. Supp. 656, 669 (E.D. Mich. 1996)(no stay required because counterclaim in German suit and claim in U.S. suit are not identical).

²¹See *American Cyanamid Co. v. Picaso-Anstalt*, 741 F. Supp. 1150, 1154 (D.N.J. 1990); See also *Reavis v. Gulf Oil Corp.*, 85 F.R.D. 666, 671 n.3 (D.Del. 1980).

²²See *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1998).

²³See *Piper Aircraft Co. v. Ryno*, 454 U.S. 235, 255-56 (1981).

²⁴274 F.3d 65 (2d Cir. 2001)

the strategic motivations of the parties. The Court distinguished plaintiffs who had "legitimate reasons" for choosing a particular forum from those seeking to gain a "tactical advantage. 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. *forum non conveniens* motion) on inconvenience grounds. However, what is "tactical" and what is "legitimate" may be an almost impossible line to draw.²⁵ In another recent decision, *Hyatt International Corp. v. Coco*,²⁶ the Seventh Circuit offered an approach not dissimilar from that of the Second Circuit; that court introduced concerns about forum-shopping through 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".²⁷

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 first will control. Because the United States gives broad recognition to foreign country judgments, this may mean that a foreign judgment -- even if 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 cases 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.²⁸

There are numerous disadvantages to a system which is generous to parallel

²⁵Citations to post-*Iragorri* cases

²⁶302 F.3d 707 (7th Cir.2002)

²⁷*Id.* at 718.

²⁸One of the discretionary grounds for non-recognition under the Uniform Foreign Country Money-Judgments Recognition Act [Uniform Act] and under American law generally is that "the judgment conflicts with another final and conclusive judgment". See Uniform Act §4(b)(4).

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 European Union 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 EU Regulation, but a first-to-file system is less easily transported when there are a range of possible fora.²⁹ Moreover, even in the more closed 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 EU with a slow-moving judiciary.³⁰

Thus, a modified *lis pendens* rule would have more attraction for courts in the United States. As Reporters for the International Jurisdiction and Judgment Projects of the American Law Institute, Andy Lowenfeld and I have proposed a rule of "Declination of Jurisdiction When Prior Action is Pending".³¹ 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," and (1) the foreign court has a fair basis of jurisdiction under U.S. standards and (2) the foreign court can be expected to render a timely judgment that would be recognized under the principles of the Act. But no stay is called for in situations where the first-filed

²⁹See Stephen B. Burbank, Jurisdiction Equilibration, the Proposed Hague Convention and Progress in National Law, 49 Am.J. Com. Law, 203, 233 (2001). See also the Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters (International Law Association Committee on International Civil and Commercial Litigation).

³⁰See 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, (Nafziger and Symeonides, eds. Transnational 2002).

³¹See American Law Institute, International Jurisdiction and Judgments Project (Tentative Draft) §11 (April 14, 2003).

court is not an "appropriate" forum. The foreign proceeding is not appropriate if (i) it operates to preempt the otherwise natural forum, for example by a declaration of nonliability, or (ii) it appears to be a vexatious or frivolous proceeding, or (iii) if there are other compelling reasons for the action to proceed in the United States. The latter exception is to take account of the substantial difference in the procedures and available remedies between litigation in the United States and in other countries.³²

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,³³ have been extremely effective. Both agreements to arbitrate and arbitral awards receive broad enforcement internationally and 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 *Bremen v. Zapata Off-shore Co.*,³⁴ 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. The Supreme Court of the United States 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."³⁵ Though technically the *Zapata* case established a standard only for admiralty cases, the lower federal courts have applied the *Zapata* rule in other contexts.³⁶ The state courts are free to adopt their own standards with respect to how choice-of-forum clauses operate in their own courts,³⁷ but it is fair to say that most state

³²Cf. *Parex Bank v. Russian Saving Bank*, 116 F. Supp. 2d 415 (S.D.N.Y. 2000).

³³The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

³⁴407 U.S. 1 (1972)

³⁵ 407 U.S. at 10. See also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), where the Supreme Court upheld a choice of forum clause as part of a cruise line passenger ticket.

³⁶See, e.g., *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998)(en banc); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953(10th Cir. 1992); *Mitsui & Co. (USA) Inc. v. MIRA M/V*, 111 F.3d 33 (5th Cir. 1997). 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* (ed. James Fawcett 2002) at .

³⁷See 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.

courts appear to have adopted the *Zapata* standard³⁸ despite a few outliers.³⁹ However, the possible differences among the states may mean that a particular state court⁴⁰ in the United States may in fact refuse to honor a forum selection clause, either in the conferring of jurisdiction on the particular court (prorogation)⁴¹ or in refusing to dismiss a case on the basis of a chosen forum elsewhere (derogation).⁴²

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.⁴³ Of course, explicit language that the choice of forum clause is an exclusive one will solve this problem.

Int. L.J. 501 (1993).

³⁸See, e.g., *Paradise Enterprises, Ltd. v. Sapir* 2002 N.J. Super. LEXIS 499 (Dec. 2002); *Union Bancaire Privee v. Nasser*, 751 N.Y.S.2d 440 (App.Div. 1st Dep't 2002); *IDV North America, Inc. v. Saronno*, 1999 WL 773961 (Conn. Super. 1999). See generally Ronald A. Brand, *Forum Selection and Forum Rejection in US Courts: One Rationale For a Global Choice of Court Convention*, in *Essays in Honour of Sir Peter North* (ed. James Fawcett, Oxford 2002) at 60.

³⁹ See, e.g., *Holiday Inns Franchising, Inc. v. Branstad*, 537 N.W.2d 724, 730 (Ia. 1995)(treating forum selection clause as invalid but considering it a factor in a motion to dismiss for *forum non conveniens*)[this is not an international case]

⁴⁰ 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 America*, 858 F.2d 509, 512-513 (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 Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 Colum J. Transnat'l L. 663 (1997).

⁴¹ Citations

⁴² See, e.g., *Morgan Trailer MFG Co. v. Hydraroll, Ltd.*, 759 A.2d 926, 931 (Pa. Super. 2000)(England unreasonable forum because evidence and witnesses were located in Pennsylvania).

⁴³See, e.g., *K & V Scientific Co. v. BMW*, 314 F.3d 494 (10th Cir. 2002); *John Boutari and Son, Wines, and Spritis v. Attiki Importers and Distributors, 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"). See also Ronald A. Brand, *Forum Selection*, supra note , at 78; Gary B. Born, *International Civil Litigation in United States Courts* at 454 (3d ed. 1998).

For the most part, choice-of-forum clauses, if mandatory, also dispose of the court's discretion to dismiss the case on *forum non conveniens* grounds.⁴⁴ Finally, a choice-of-forum clause generally provides an internationally accepted basis of jurisdiction such that a resulting judgment will be recognized and enforced everywhere. For these reasons, the use of a choice-of-forum clause in the transactional setting offers an alternative to arbitration. To ensure greater uniformity and consensus in the use of such clauses, the 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.⁴⁵

[Short description to follow in final draft of paper].

V. Enforcement of Judgments

As noted in my 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* that I describe 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 -- even if favorable to a party seeking to litigate in the United States -- will be of little value. A lawsuit suit in the United States may not be worth pursuing if an eventual judgment cannot be enforced abroad where the defendant has assets.

[Insert section on Enforcement of U.S. Judgments Abroad].

Of course, in the converse situation -- where one is considering pursuing litigation in a foreign court -- how the U.S. treats foreign country judgments is the important question. That then leads to an examination of how courts in the United States treat judgments of foreign courts when enforcement (or recognition) is attempted in the United States. In general, recognition and enforcement of foreign country judgments in the United States has tended to be very generous. Foreign country judgments, unlike sister state judgment, do not fall within the Full Faith and Credit Clause of the U.S. Constitution -- but quite early on they were generally held to be entitled to recognition on grounds of comity.⁴⁶ Somewhat surprisingly, enforcement and

⁴⁴See, e.g., *Northwestern National Insurance v. Donovan*, 916 F.2d 372, 378 (7th Cir. 1990). Compare *Royal Bed & Spring Co., Inc. v. Famossul Industria e Comercia de Moveis Ltda.*, 906 F.2d 45, 51 (1st Cir. 199) ("forum selection provision is simply one of the factor that should be considered and balanced by the court 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).

⁴⁵See Hague Conference on Private International Law, Prel. Doc. No. 8, Preliminary Result of the Work of the Informal Working Group on the Judgments Project (March 2003).

⁴⁶See *Hilton v. Guyot*, 159 U.S. 113 (1895).

recognition of foreign country judgments is not treated as a matter of national/federal law 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 Country Money Judgments Recognition Act⁴⁷, adopted by more than thirty states, and in common law decisions which reflect the principles of the Uniform Act. 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 or not 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*⁴⁸ imposed a reciprocity requirement, it was the dissenting view in that case -- no reciprocity -- which became the dominant position in the United States. The Uniform Act does not have such a requirement, although several states have inserted a reciprocity requirement into their versions of the Uniform Act⁴⁹ or adopted a separate provision on reciprocity.⁵⁰

A. Mandatory Defenses to Recognition/Enforcement

There are both mandatory and discretionary defenses under the Uniform Act. The mandatory defenses are (1) the failure to provide a system of impartial tribunals or procedures compatible with due process of law and (2) the lack of jurisdiction over the defendant. Lack of fair tribunals does not present much difficulty in the U.S.-European context. As was made clear in a recent federal Court of Appeals opinion,⁵¹ rejecting a

⁴⁷13 ULA 263 (1986 and 2002 Supp.)

⁴⁸ 159 U.S. 113 (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 enforcement the judgment of an American court against French citizens.

⁴⁹Eight states that have the Uniform Act 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; and two states (Massachusetts and Georgia) include a mandatory provision that reciprocity be established as a condition for recognition or enforcement. .

⁵⁰For example, the New Hampshire statute requires reciprocity for the enforcement of Canadian judgments. See N.H.Rev. Stat. §524 (1957).

⁵¹See *The Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000).

challenge to English judgment obtained by Lloyds against rendered 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.⁵²

The second mandatory defense -- that the foreign court have a proper basis of jurisdiction over the defendant -- is a reference not only to the jurisdiction exercised by the foreign court under its own law but also to a jurisdictional standard that is consistent with United States 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 that is predicated on activities in the forum state out of which the claim arose will also usually satisfy the standard, although it is possible that there may be particular factual situations that would fall short.⁵³

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/Lugano Conventions and the EU 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 U.S. 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 U.S. 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 law⁵⁴; 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

⁵²For a critique of the decision, 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, supra note , at 173.

⁵³For example, a situation where the injury occurs in the forum state, but the defendant has not directed activity to that state.

⁵⁴United Kingdom: The Civil Procedure (Amendment) Rules 2000, 6.20(5)(c).

of one defendant in the forum state can provide the basis of jurisdiction over additional or third-party defendants.

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.⁵⁵ 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 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*⁵⁶, 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. 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.⁵⁷ Accordingly, enforcement of the judgment was upheld.

An alternative way of thinking about the *Mora* case -- and an approach urged by the ALI proposed Act⁵⁸ --- 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 the Brussels/Lugano Conventions. 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.

⁵⁵See, e.g., *Koster v. Automark Indus., Inc.*, 640 F.2d 77 (7th Cir. 1981)(Dutch default judgment not entitled to enforcement where the Netherlands asserted jurisdiction over an Illinois corporation, which 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).

⁵⁶743 N.Y.S.2d 408 (App.Div. 1st Dep't. 2002)

⁵⁷See John Fellas, "Lessons on Enforcing Foreign Judgments in the United States", N.Y.Law Journal, Sept. 26, 2002.

⁵⁸See American Law Institute, International Jurisdiction and Judgments Project, Tentative Draft (April 14, 2003), Reporters' Note 3 at 72-73.

2. Discretionary Defenses

Other defenses -- usually discretionary -- have not posed serious barriers to enforcement of foreign judgments.⁵⁹ 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.⁶⁰ However, the appropriate scope for the public policy exception has generated substantial controversy in several recent libel cases 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.⁶¹

Regulation with respect to the internet is likely to present similar difficulties, and the *Yahoo* case -- *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Anti-semitisme*⁶² -- 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. values. But the court did not suggest that France had acted inconsistently with principles of private international law, either in exercising jurisdiction

⁵⁹Those 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.

⁶⁰For example, the EU 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." (Emphasis added). 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. See Gerhard Walter & Samuel P. Baumgartner, General Report, in *Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions*, pp. 1-45 (Kluwer Law Int'l 2000).

⁶¹See *Telnikoff v. Matusevitch*, 702 A. 2d 230 (Md. 1997); *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S. 2d 661 (Sup.Ct. N.Y.Cty. 1992);

⁶²169 F. Supp. 2d 1181 (N.D. Cal. 2001), appeal pending

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 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*⁶³, 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 Australia law was properly 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".

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.⁶⁴

VI. The American Law Institute Project

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 governing 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.⁶⁵ Such changes would have to be implemented by Congress

⁶³[2002] HCA 56 (2002).

⁶⁴See, e.g., 47 U.S.C. §230 (2002), protecting internet providers from liability.

⁶⁵For discussions of earlier incarnations of the ALI project, see Linda J. Silberman & Andreas F. Lowenfeld, *The Hague Judgments Convention -- And Perhaps Beyond*, in *Law and Justice in a Multistate World*, supra note , at 121-35; 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.* 635-38, 643-44 (2000).

through enactment of the proposal, and I do not suggest 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 my overview of U.S. law has emphasized. Perhaps the most important change is that the Act would create national and uniform law for recognition and enforcement of judgments, and the interpretation of those standards would be subject to review by the United States Supreme Court. In addition, the Act would impose a reciprocity requirement -- a provision intended to offer an incentive for recognition and enforcement on a world-wide scale -- which includes recognition and enforcement of judgments of American courts elsewhere.⁶⁶

Because the Act is directed solely at recognition and enforcement, the statute would not contain provisions to regulate direct assertions of judicial jurisdiction and thus would not affect the rules of jurisdiction for U.S. courts that I outlined in Section II above. But a principle ground for declining to recognize or enforce a judgment is the lack of an acceptable basis of jurisdiction in the foreign court,⁶⁷ similar to the present provision in the Uniform Act. However, the Act offers greater clarity as to jurisdictional grounds that would not support recognition of a judgment and is more receptive to recognition and enforcement of judgments resting on jurisdictional theories not part of U.S. law.⁶⁸

The Act also includes the traditional defenses to recognition and enforcement in U.S. law, including that of public policy. It would also make "corruption on the part of the rendering court an additional defense to recognition and enforcement."⁶⁹

The Act also attempts to address the problem of parallel litigation in two ways.

⁶⁶To that end, the 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. See Tentative Draft §7(e) at 76. 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. See Tentative Draft §7(b) at 75.

⁶⁷See Tentative Draft, §5(a)(iii).

⁶⁸The Act includes a list of prohibited grounds of jurisdiction. See Tentative Draft §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." 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." See Tentative Draft §(6)(a)(v).

⁶⁹See Tentative Draft §5(a)(ii).

One provision, discussed earlier in the paper, would require a court in the United States to stay an action in favor of a parallel foreign proceeding when certain conditions were satisfied.⁷⁰ Related provisions would introduce additional grounds for non-recognition by providing that a foreign judgment need not be recognized or enforced in a court in the United States (a) if the foreign proceeding was commenced subsequent to a suit in the U.S. and the U.S. proceeding was not stayed or dismissed;⁷¹ or (b) 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.⁷² [Consider whether to discuss any of the other provisions of the ALI Draft].

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 will usually be honored for purposes of both prorogation and derogation so they are useful in ensuring a particular forum. Moreover, a judgment rendered on the basis of a choice-of-forum clause will usually be 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 their general liberal policy towards enforcement and recognition -- will not recognize foreign judgments when the judgments rests on bases of jurisdiction inconsistent with U.S. due process principles; and that may include a number of jurisdictional rules accepted internationally in Brussels, Lugano, and the EU regulation.

As this account indicates, lawyers engaged in the planning and structuring of

⁷⁰Tentative Draft §8. See discussion at text accompanying notes , supra.

⁷¹See Tentative Draft, §5(b)(iv)

⁷²See Tentative Draft §5(b)(v)

international business transactions cannot function in isolation. 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.