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Robert B. von Mehren

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# Transnational Litigation in American Courts: An Overview of Problems and Issues

## **Cover Page Footnote**

The author wishes to express his appreciation to Margaret Cole of the New York Bar and Solicitor of the Supreme Court of New South Wales and to Jonathan H. Hines and Robert N. Shwartz, both of the New York Bar, for their assistance in preparing this paper.

# Transnational Litigation in American Courts: An Overview of Problems and Issues\*

Robert B. von Mehren\*\*

## I. Introduction

At the outset, it should be emphasized that to be an effective counselor in the area of transnational litigation, one must have some background in comparative law and some understanding of other legal systems. Nothing limits both the preparation and prosecution of transnational litigation more than the reflex conclusion that if one is a plaintiff, one should always seek to litigate in an American jurisdiction. Similarly limiting is the idea that, if one is litigating in an American court, there is little need to understand much or any of the non-American aspects of the case.

As a general rule, it is fair to say that courts of the United States, and perhaps particularly those of New York, have long been favored by American plaintiffs as a forum for transnational litigation. Selection of an American forum, however, should not be automatic. Careful consideration must be given to the choice of a forum, whether the forum is stipulated by the parties before litigation is in prospect or chosen by the plaintiff when he institutes an action. Certain factors which are relevant to the choice of forum include jurisdictional requirements, litigation costs, procedural rules, and whether it will be necessary to prove foreign law.<sup>1</sup> Foreign litigants using United States courts must also consider whether to sue in a state or federal court. In most transnational cases, the latter will

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\*\* Partner, Debevoise & Plimpton, New York City. B.A. 1943, Yale; LL.B. 1946, Harvard; President, Harvard Law Review, Vol. 59; Law Clerk to Judge Learned Hand (October 1946 Term); Law Clerk to Justice Stanley F. Reed (October 1947 Term); President, American Branch of the International Law Association; President, Practising Law Institute; Member, Board of Editors, American Journal of International Law.

The author wishes to express his appreciation to Margaret Cole of the New York Bar and Solicitor of the Supreme Court of New South Wales and to Jonathan H. Hines and Robert N. Shwartz, both of the New York Bar, for their assistance in preparing this paper.

1. For example, a foreign plaintiff suing in a United States court must be prepared to deal with extensive discovery procedures and the possibility of a jury trial.

have jurisdiction on the basis of diversity.

## II. Initial Considerations

### A. Obtaining Jurisdiction

A court has in personam jurisdiction over a defendant if the defendant is personally served within the court's jurisdiction. This is because a court is considered to have power over all persons within its jurisdiction.<sup>2</sup> Domiciliaries are also subject to jurisdiction under this theory.

In the context of transnational litigation, however, domicile is often unavailable as a basis for jurisdiction. Accordingly, the only alternative may be personal service on a defendant who is temporarily present in a particular jurisdiction. This approach not only is subject to criticism,<sup>3</sup> but it may also be subject to some doubt following the Supreme Court decision in *Shaffer v. Heitner*.<sup>4</sup> *Shaffer* applied the minimum contacts analysis of the decision in *International Shoe Co. v. Washington*<sup>5</sup> to in rem cases. If the *Shaffer* rationale is expanded to require minimum contacts in all cases, jurisdiction based on service while "flying over the jurisdiction" may well disappear.<sup>6</sup>

If jurisdiction cannot be based on personal presence, it may still be established by recourse to the "minimum contacts" rule enunciated in *International Shoe*<sup>7</sup> which essentially states that a defendant, although not present, may still be subject to jurisdiction if he has "minimum contacts" with the forum.<sup>8</sup> The minimum contacts test is based on "traditional notions of fair play and substantial justice,"<sup>9</sup> and, consequently, although "minimum contacts" may be liberally interpreted, jurisdiction will not be established by reliance on fortuitous contacts which the defendant did not actually establish.<sup>10</sup>

A recurrent problem of particular importance in transnational

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2. See *Pennoyer v. Neff*, 95 U.S. 714 (1877).

3. See, e.g., Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens*, 65 YALE L.J. 289 (1956).

4. 433 U.S. 186 (1977).

5. 326 U.S. 310 (1945).

6. *But see* *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22 (1980). Here the Georgia Supreme Court held that personal presence, however temporary, is sufficient for minimum contacts. The interesting aspect of this case is that the trial court held that the defendant's temporary presence in Georgia when served with process was not a sufficient contact to establish jurisdiction. Although reversed on appeal, the lower court's decision may be the forerunner of arguments to come.

7. 326 U.S. at 316.

8. For example, conducting business within a jurisdiction establishes minimum contacts.

9. *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

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

litigation concerns assertion of jurisdiction over a parent corporation based on the activities of its subsidiary within the jurisdiction. The validity of such jurisdiction depends on the degree of independence exercised by the subsidiary. If the subsidiary has no individual identity and its corporate status is purely formal, then jurisdiction may be had over the parent.<sup>11</sup>

Although it is impossible to list all the circumstances that constitute minimum contacts with the jurisdiction, a few examples include: Maintenance of an office; employment of salesmen (other than independent contractors); and active solicitation of business. Two additional factors should be considered by a plaintiff in transnational litigation. First, if the cause of action in question arises under a federal statute that contemplates nationwide service of process, minimum contacts are required with the United States, not with the state in which the court is sitting.<sup>12</sup> Second, even if jurisdiction is established, a court may refuse to hear the matter on the basis of *forum non conveniens*.

#### B. Consideration of "Forum Non Conveniens"

United States courts may refuse to hear a case over which they have jurisdiction if the forum is "inconvenient." The factors to be weighed in determining whether a forum is inconvenient were set forth in *Gulf Oil Corp. v. Gilbert*.<sup>13</sup> These factors include ease of access to proof, costs of obtaining willing witnesses, the availability of methods to compel unwilling witnesses, the possibility of visiting any relevant site, and the public interest in avoiding overburdening courts with cases more appropriately heard elsewhere. Convenience and the "interests of substantial justice"<sup>14</sup> are the bases of the doctrine.

Two factors will always weigh heavily in favor of retaining a case. First, the plaintiff has chosen the forum, and this choice, unless blatantly abusive, should not lightly be overridden. Second, a suit will not be dismissed if it cannot be brought elsewhere.<sup>15</sup>

Certain factors, although significant to the litigants, will not be considered in evaluating the appropriateness of the forum. For example, the court will not accept plaintiff's suit merely because the pro-

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11. *TACA Int'l Airlines v. Rolls-Royce*, 15 N.Y.2d 97, 204 N.E.2d 329, 256 N.Y.S.2d 129 (1965). A similar line of reasoning is pursued in *Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322 (E.D. N.Y. 1981).

12. *Marc Rich & Co. v. United States*, 707 F.2d 663 (2d Cir. 1983), *cert. denied*, 103 S.Ct. 3555 (1984).

13. 330 U.S. 501, 508 (1947).

14. See 28 U.S.C. § 1404(a) (1982). However, Congress empowered district court judges to transfer the action to another district where the action might have been brought. *Id.*

15. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 comment c (1971).

cedural law to be applied in another jurisdiction will be more or less favorable.<sup>16</sup> Moreover, the policy of evenhandedness as reflected in statutes such as Rule 327 of the New York Civil Law Practice and Rules<sup>17</sup> makes it clear that an earlier New York practice of refusing to dismiss a case for *forum non conveniens* when the plaintiff was a New York resident should not be followed.

Thus, although United States courts, particularly those in New York, have traditionally been receptive to suits having minimal contacts with their jurisdiction, careful consideration should be given to instituting an action in those courts if they are in reality an "inconvenient forum."

### C. *Service of Summons*

Once a plaintiff has decided that jurisdiction is both available and likely to be maintained in the forum, very pragmatic considerations of the procedural mechanics of the litigation must be reviewed.

1. *Federal*.—Service of summons under the Federal Rules of Civil Procedure is governed by Rule 4. Pursuant to Rule 4, if the party to be served is not an inhabitant of or found within the state where the court is sitting, service may be made under the rules of the state in which the court is sitting or, if there is a United States statute authorizing service, pursuant to that federal statute.<sup>18</sup> Alternative provisions for service in a foreign country are found in Rule 4(i), which provides for service either in the manner provided by the law of the foreign country, as directed by the foreign authority in response to letters rogatory, or by personal service.

2. *States*.—The New York Civil Practice Law and Rules provides a typical example of state rules that authorize extraterritorial service. Rule 313<sup>19</sup> authorizes service outside New York if the defendant is a New York domiciliary or if a basis for jurisdiction exists under either Rule 301,<sup>20</sup> regarding doing business within the state, or Rule 302,<sup>21</sup> regarding contractual submission to jurisdiction. Statutes such as 301 and 302 are referred to as "long arm statutes" and have been widely adopted in the United States. They give broad au-

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16. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

17. When the court finds that in the interests of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action. N.Y. CIV. PRAC. R. 327 (McKinney 1972).

18. FED. R. CIV. P. 4(e).

19. N.Y. CIV. PRAC. R. 313 (McKinney 1972).

20. *Id.* R. 301.

21. *Id.* R. 302.

thority for service of process.<sup>22</sup> Such latitude can be of great value to the plaintiff in a transnational dispute if the defendant is difficult to locate.

#### D. Other Considerations

While most often considered only when a case is in litigation, private international law issues should not be overlooked when selecting a forum. There are significant advantages to having a case tried in the forum whose law will govern. Thorny problems involving proof of foreign law will thereby be avoided. Trial in such a forum not only contributes to a more accurate application of controlling law, but also saves time in the trial itself.<sup>23</sup> These comments are of particular force if the law to be applied is in a foreign language or is from a civil law jurisdiction.

Other factors to be considered include speed and cost. In the United States, many federal and state courts are congested. Although the "explosion" of litigation may be overstated,<sup>24</sup> in 1981 the duration of federal civil cases averaged 1.16 years,<sup>25</sup> and delays of more than five years were "all too common."<sup>26</sup> The more complex the litigation, the longer this period is likely to be. If problems of gathering evidence from abroad, proving foreign law, and other common aspects of transnational litigation must be addressed, the duration of a case may be significantly longer.

Some considerations relate particularly to procedure in United States courts. Pretrial discovery is widely available in the United States and the scope of such discovery is very broad.<sup>27</sup> A proponent may require all information which "appears reasonably calculated to lead to the discovery of admissible evidence."<sup>28</sup> In contrast, discovery in the United Kingdom is more restrictive insofar as it does not allow

22. Authority for service of process under long arm statutes usually is limited only by due process.

23. The relationship between the forum chosen and controlling law is also a factor to be weighed in considering *forum non conveniens*:

There is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

330 U.S. at 509. (The statement quoted above was made in the context of federal diversity of citizenship cases, but would be even more appropriate in transnational litigation.)

24. See Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983); Trubeck, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72 (1983).

25. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 80 (1981).

26. Hufstedler & Nejelski, *ABA Action Committee Challenges Litigation Cost and Delay*, 66 A.B.A.J. 965, 966 (1980).

27. See FED. R. CIV. P. 26-37. See also *infra* pp. 48-50.

28. FED. R. CIV. P. 26(b)(1).

“a party to ‘fish’ for witnesses or for a new case.”<sup>29</sup>

Availability of a jury trial is also an important factor. Even in commercial disputes in the United States, juries are the rule rather than the exception. This is not the case in the United Kingdom. Additionally, United States courts keep no separate commercial causes list as do courts in the United Kingdom.<sup>30</sup> In civil law countries, juries are not available at all.

Finally, the enforceability in one jurisdiction of a judgment obtained in another jurisdiction may affect choice of forum.<sup>31</sup> A favorable judgment is a Pyrrhic victory indeed if the jurisdiction in which assets are found refuses to aid in enforcement. Since the United States is not party to any reciprocal enforcement arrangements, resort must be made to the internal law of a foreign jurisdiction to enforce an American judgment abroad. Enforcement may be precluded in those cases in which United States laws are considered to be against public policy or *ordre publique*.<sup>32</sup>

### III. Preparing the Case for Trial—Discovery

Once a transnational case has been commenced in an American court and, if necessary, has successfully withstood any motions addressed to jurisdiction, *forum non conveniens*, service of process, and sufficiency of pleadings, the parties face the expensive and time consuming prospect of pretrial discovery—“American style.” Many American judges and lawyers join their foreign colleagues in criticizing American discovery practices as excessive.<sup>33</sup> Whatever one’s view may be, it is clear that in transnational litigation pretrial discovery often presents some of the most difficult and challenging aspects of the litigation.

#### A. *The American Approach*

The scope of pretrial discovery in American courts is defined in the Federal Rules of Civil Procedure.<sup>34</sup> In the United States, the pace and scope of pretrial discovery are set, at least in the first in-

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29. 13 HALSBURY’S LAWS OF ENGLAND ¶ 38 (Butterworths 4th ed. 1975).

30. See Administration of Justice Act, 1970, ch. 31, § 3(1) (U.K.).

31. See *infra* pp. 64-66.

32. *Ordre publique* is the term given in civil law countries to the concept known in the United States as “public policy.”

33. For comparative analysis of American and foreign discovery procedures and other comments on discovery abroad, see R. von Mehren, *Discovery of Documentary and Other Evidence in a Foreign Country: Perspective of the U.S. Private Practitioner*, reprinted in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO 194 (C. Olmstead ed. 1985); R. von Mehren, *Discovery of Documentary and Other Evidence in a Foreign Country*, 77 AM. J. INT’L L. 896 (1983); R. von Mehren, *Discovery Abroad: The Perspective of the U.S. Private Practitioner*, 16 N.Y.U. J. INT’L L. & POL. 985 (1984).

34. See FED. R. CIV. P. 26. Because of its greater importance and current developments in the area, this discussion is limited to party discovery.



stance, by the parties, not the court. Resort to judicial supervision of pretrial discovery occurs only when a dispute arises between counsel. The scope of permissible discovery in American litigation is deliberately broad. The scope of discovery in the United States is, in fact, much broader than in any other jurisdiction. For instance, discovery of documentary evidence in some European countries is limited to documents that, when drafted, were intended to be evidence of the underlying transaction. Under Rule 26(b)(1) of the Federal Rules of Civil Procedure “[p]arties may obtain discovery regarding the matter . . . which is relevant to the subject matter involved in the pending action.”<sup>35</sup> Inadmissible information may be sought through discovery “if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>36</sup>

From the European perspective, the scope of American pretrial discovery is almost without limit. Understandably, European lawmakers and courts have reacted with some hostility when confronted with such unparalleled discovery demands from the United States. The promulgation of so-called “blocking statutes”<sup>37</sup> by most European countries is perhaps the most prominent manifestation of this hostility.

In response to what they perceive as over-broad American pretrial discovery procedures, many foreign governments have enacted legislation designed to prevent the release of certain evidence sought from abroad. For example, section two of the Protection of Trading Interests Act of 1980<sup>38</sup> (PTIA) empowers the British Secretary of State for Trade and Industry to give directions prohibiting compliance with an order of an overseas court requiring production of information if the order “infringes the jurisdiction of the United Kingdom or is otherwise prejudicial to the sovereignty of the United Kingdom.”<sup>39</sup>

A blocking statute such as the Protection of Trading Interests Act of 1980 can be a two-edged sword. While they may be used to prevent an American court from compelling production of documents and other information sought from abroad, they can just as often leave a European national who is doing business in the United

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35. FED. R. CIV. P. 26(b)(1).

36. *Id.*

37. See generally, O’Kane & O’Kane, *Taking Depositions Abroad: The Problems Still Remain*, 31 FED’N INS. COUNSEL Q. 343 (1981); Myrick & Love, *Obtaining Evidence Abroad For Use In United States Litigation*, 35 SW. L.J. 585 (1981); Batista, *Confronting Foreign “Blocking” Legislation: A Guide to Securing Disclosure from Non-Resident Parties to American Litigation*, 17 INT’L LAW. 61 (1983); Light, *Discovery Abroad and the Consequences When Discovery is Not Possible*, 50 ANTITRUST L.J. 577 (1982); Stein, *Depositions in Foreign Jurisdictions: “Innocence Abroad”*, 7 LITIGATION 14 (Spring 1981).

38. Reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 959, at F-1 (Apr. 10, 1980).

39. *Id.*

States unable to defend himself effectively. When a European company doing business in the United States becomes embroiled in litigation in this country, it may need information or documents located in its home office. Some blocking statutes may impede the company's ability to obtain such information.

### *B. Changing American Attitudes*

The American legal community has recently begun to reflect upon the legitimacy of "Discovery American Style" as applied to transnational litigation pending in American courts. This movement, while still not fully developed, promises a potential working solution to the conflict between America's unusually broad pretrial discovery and foreign states' reaction to what is perceived as an unwarranted intrusion into their sovereign affairs. Signs of this new response are evident in several different contexts: Section 420 of the Restatement (Revised) of Foreign Relations Law of the United States (Tentative Draft No. 3, March 15, 1982), "Requests for Disclosure and Foreign Government Compulsion" (the Restatement);<sup>40</sup> the August 1, 1983 amendment to Rule 26 of the Federal Rules of Civil Procedure;<sup>41</sup> and recent interpretations by the American courts of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (the Convention).<sup>42</sup>

1. *The Restatement.*—The tentative draft of the Restatement of Foreign Relations Law of the United States suggests a new American approach to taking discovery abroad. Section 420 addresses difficulties involved in seeking discovery in the face of blocking statutes or other foreign government restrictions on production of such discovery. The Restatement recognizes that seeking discovery abroad necessarily involves sovereign interests of jurisdictions other than the United States. From this premise, the Restatement seeks to modify application of the Federal Rules of Civil Procedure to conform more fully with general principles of international law. The recognition that discovery in transnational litigation involves competing interests not present in domestic litigation is an important first step toward reducing the friction that United States discovery demands abroad have often created in the past.

Section 420 states that a party to an American lawsuit may be requested to produce documents or information located outside the

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40. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 420 (Tent. Draft No. 3, 1982) [hereinafter cited as RESTATEMENT]; see also *infra* notes 43-49 and accompanying text.

41. FED. R. CIV. P. 26 (as amended).

42. See *infra* notes 51-64 and accompanying text.

United States. The Restatement, however, goes on to impose two important limitations on the scope of foreign discovery that would not normally apply in a domestic context. First, it would require a court order *before* discovery abroad is authorized. Second, it would limit discovery of documents and other information to that which is "directly relevant, necessary, and material to an action or investigation."<sup>43</sup>

The first limitation which ensures prior review by a neutral judicial officer of all discovery demands seeking foreign documents or information does not necessarily change the scope of American pre-trial discovery. It does, however, emphasize the difference between transnational and domestic litigation. Implicitly it imposes an added element of self-restraint upon any American litigant seeking discovery abroad. In addition, this limitation serves notice on the courts that circumstances surrounding foreign discovery requests merit special attention. Hopefully courts entrusted with such responsibility will insist that demands for discovery abroad be narrowed and clarified wherever possible.

The second limitation imposes a more stringent test of relevance than is required under Federal Rule of Civil Procedure 26(b)(1) by requiring a party to limit his demands for discovery abroad to those materials essential to the proof of his case. This restriction does have a significant effect on the scope of discovery abroad.

In addition to limiting discovery abroad, Section 420 of the Restatement recognizes that there will be circumstances when it is nonetheless appropriate for an American court to order production of documents or other information located outside the United States. In these circumstances, the Restatement addresses the question of what sanctions are appropriate when the party to whom the discovery order was directed has failed to comply. In American domestic litigation, Rule 37 of the Federal Rules of Civil Procedure defines the appropriate range of sanctions, including adverse findings of fact, contempt, or dismissal of a plaintiff's action, or a defendant's counterclaims or defenses.<sup>44</sup> The Restatement recognizes that the same range of possible sanctions exists in transnational litigation, although it would not impose certain sanctions when the party has made a good faith effort to comply with the court's order but nevertheless failed to produce the information. The Restatement would thus bar imposition of "contempt, dismissal or default on the party that has failed to comply . . . except in cases of deliberate concealment or removal of information or a failure to make a good faith effort

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43. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 420(1)(a) (Tent. Draft No. 3, 1982).

44. FED. R. CIV. P. 37.

...<sup>45</sup>

It is reasonable to expect that courts will give consideration to a number of factors in fashioning the appropriate sanction for a party who has failed to comply with a discovery order. Such factors would include the importance of the particular material sought, the specificity of the request for documents or information, the interests another jurisdiction has in the specific information sought, and the possibility of obtaining the same information by alternative techniques.

Requiring American courts to consider and balance the interests of other jurisdictions before issuing a discovery order or imposing any sanctions for noncompliance in a transnational lawsuit is a logical extension of the "balancing of interests" test used to determine whether courts should exercise jurisdiction in the first instance.<sup>46</sup> Indeed, it seems proper for our courts to give even greater weight to foreign interests in the context of discovery demands than such foreign interests receive in the jurisdictional context.<sup>47</sup>

The Restatement recognizes that the preferred sanction for failure to comply with a discovery order will be "findings of fact adverse" to the party that has failed to comply with the court's order.<sup>48</sup> The Comment to the Restatement states that an adverse finding of fact is appropriate:

only if there is reason to believe that the information, if disclosed, would be adverse to the non-complying party, and if the court is satisfied that the request was made in good faith, not in the hope that the opposing party's non-compliance would enable the requesting party to establish a fact that it could not establish if all the information were available.<sup>49</sup>

Although this approach makes a good deal of sense, it may be difficult to apply. It would certainly be inequitable to permit any party to secure a judgment based on a judicially imposed determination of "fact" that could not have been established by relevant evidence. An adverse finding of fact against a noncomplying party should be imposed *only* when the court has reason to believe that the document or information ordered to be produced would have sup-

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45. RESTATEMENT, *supra* note 40, at § 420(2)(b).

46. See *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597 (9th Cir. 1976).

47. In *Schroeder v. Lufthansa German Airlines*, the district court articulated a similar view:

Also, as has been mentioned previously, while this Court gains jurisdiction over defendant because of its frequency of business here, it is other factors, such as the recognition of defendant's foreign residency and the principles of international comity, which govern the decision of the Court to utilize the discovery procedures outlined in the Convention.

*Schroeder v. Lufthansa German Airlines*, 3 Av. L. REP. (CCH) (18 Av. Cas.) 17,222, 17,233-24 (N.D. Ill. Sept. 15, 1983).

48. RESTATEMENT, *supra* note 40, at § 420(2)(c).

49. *Id.* at § 420(1)(a) or 2(c).

ported the requesting party's factual contention. Otherwise, a party whose defense was dependent on materials located outside the United States would be at a severe disadvantage. Such a foreign litigant could be caught between the conflicting demand of an American court to produce materials and its own sovereign's order to withhold such information.

2. *Recent Amendments to the Federal Rules of Civil Procedure.*—The scope of American pretrial discovery is undergoing a more general transformation. This transformation has special implications for American discovery abroad. The Advisory Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, appointed by the Chief Justice of the United States Supreme Court, has proposed numerous amendments to the Federal Rules of Civil Procedure. One such amendment to Rule 26 became effective on August 1, 1983. This amendment clearly places American discovery under greater judicial supervision.

Rule 26(b)(1), as amended, provides that the trial court, upon its own initiative, may limit both domestic and foreign discovery if: (i) it is cumulative or duplicative; (ii) some other source of information is more convenient; (iii) the party seeking discovery has already had ample opportunity to obtain the information sought; or (iv) the discovery sought is unduly burdensome or expensive, given the nature of the case and the limits on the parties' resources.<sup>50</sup> These revisions, which invite wider judicial supervision of American litigants' discovery efforts, promise to restrain efforts at discovery abroad in a fashion consistent with Section 420 of the Restatement.

3. *The Hague Convention.*—The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters<sup>51</sup> (the Convention) is a relatively untested device designed to harmonize foreign discovery with principles of international comity. The precise purpose of the Convention was to minimize conflict between sovereigns when discovery is sought abroad.<sup>52</sup> The Convention intended to establish a method of gathering evidence " 'tolerable' to the authorities of the State where it is taken and at the same time 'utilizable' in the forum where the action will be tried."<sup>53</sup>

The effectiveness of the Convention in resolving conflicts between American and foreign courts has not yet been fully tested.

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50. FED. R. CIV. P. 26(b)(1) (as amended).

51. Hague Convention on Taking Evidence Abroad, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

52. *Id.* at preamble and art. 1.

53. *Report of the United States Delegation to the Hague Conference*, 8 INT'L LEGAL MATERIALS 785, 806 (1969).

Although the Convention has been available to litigants in American courts since October 7, 1972, when it became effective in the United States, it has not been extensively used. As a result there are relatively few American judicial opinions interpreting the Convention. Recently, however, a few judicial decisions have been handed down which suggest that the utility of the Convention is beginning to be recognized.<sup>54</sup>

These decisions have addressed the question of whether an American litigant must seek discovery abroad pursuant to the provisions of the Convention *before* attempting to use the federal or local rules. This question was first addressed in *Volkswagenwerk A.G. v. Superior Court*.<sup>55</sup> The trial court in this case ordered Volkswagenwerk (VW), pursuant to the local California rules, to permit inspection of its plant, documents, and records and to give other discovery in Wolfsburg, West Germany. VW sought review of the trial court's order arguing, *inter alia*, that compliance with the discovery order would require it to violate West German law. The California court of appeals reversed the trial court and vacated the discovery order. In so doing, the court of appeals reviewed federal precedent in this area and noted that federal courts "generally apply the 'balancing approach' only when the responding party has failed to give full discovery and seeks to avoid *sanctions* by asserting the conflict of sovereign demands upon it."<sup>56</sup> The court of appeals went on to extend this balancing approach by applying it at an earlier stage when discovery is sought, rather than only after compliance with a discovery order has been refused. This approach is in harmony with Section 420 of the Restatement. The court of appeals ultimately held that the "trial court, in the exercise of judicial restraint based on international comity, should have declined to proceed other than under the Hague Convention at this stage."<sup>57</sup>

The *Volkswagenwerk* case is a step toward resolution of the conflict existing between American and foreign discovery practices. It is, however, not without remaining difficulties. Article 23 of the Convention permits a contracting state to declare that it will not execute letters of request issued for the specific purpose of obtaining pretrial discovery as known in the common-law nations.<sup>58</sup> With the exception of the United States, all contracting states, including West Germany, have made such declarations. In view of West Germany's

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54. See *infra* notes 55-63 and accompanying text.

55. 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1982).

56. *Id.* at 857-858, 176 Cal. Rptr. at 884 (emphasis in original); cf. *Societe Internationale v. Rogers*, 357 U.S. 197, 211-12 (1958).

57. *Id.* at 859, 176 Cal. Rptr. at 885; accord *Pierburg GmbH & Co. v. Superior Court*, 137 Cal. App. 3d 228, 186 Cal. Rptr. 876 (1982).

58. *Supra* note 51, at art. 23.

reservation under Article 23 of the Convention, it is clear that a German court could refuse to execute the letter of request that the *Volkswagenwerk* court anticipated would be filed by plaintiff in seeking its pretrial discovery of VW in West Germany.

This need not, however, prove to be an insurmountable problem. There is already some basis to believe that foreign authorities will adopt a flexible approach in responding to discovery requests made pursuant to the Convention despite reservations taken under Article 23. For example, in *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*,<sup>59</sup> the House of Lords held that the United Kingdom's reservation under Article 23 of the Convention was inapplicable where the requesting court stated that the evidence sought was for the purpose of trial as well as pretrial discovery. Where the foreign court is able to consider particularized requests for documents and information, it may be more inclined to authorize production than when confronted with an omnibus demand for marginally relevant material. A working compromise could be developed in which American courts restrict the scope of discovery abroad and foreign jurisdictions authorize production of material that is clearly relevant to the issues at trial.

The California approach embodied in *Volkswagenwerk* has been followed and strengthened by a district court in Illinois in *Schroeder v. Lufthansa German Airlines*.<sup>60</sup> In that case, Lufthansa sought a protective order to enjoin plaintiff's discovery efforts for failure to make an initial application under the Hague Convention. The district court adopted the reasoning of the California court in *Volkswagenwerk* and suggested in a footnote that "[i]t may be that the Hague Convention does more than suggest a means of procedure whereby important international goals can be effectuated. If, as defendant postures, the Convention is a preemptive and exhaustive rule of evidence gathering, then it is binding on this Court . . . ."<sup>61</sup> Although the district court declined to rule that the Hague Convention is preemptive, it clearly recognized the trend toward greater use of the Convention.

In its decision, the district court relied, in part, on the opinion of Justice O'Connor, sitting as Circuit Justice, in *Volkswagenwerk A.G. v. Falzon*.<sup>62</sup> In that case, Justice O'Connor granted a stay of a Michigan court's order to depose German nationals residing in Germany. The stay was granted pursuant to Supreme Court Rule 44.4. VW had argued that such depositions could not be taken absent use

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59. 1978 A.C. 547.

60. 3 Av. L. REP. (CCH) (18 Av. Cas.) 17,222 (N.D. Ill. Sept. 15, 1983).

61. *Id.* at 17,224 n.1.

62. 461 U.S. 1303 (O'Connor, Circuit Justice, 1983).

of the methods provided under the Hague Convention. Justice O'Connor agreed and noted that "there was a significant chance that the applicant [VW] would prevail" in its appeal to the Michigan Supreme Court.<sup>63</sup>

There is, of course, a diversity of views among trial courts as to the role the Hague Convention should play in transnational discovery in American litigation.<sup>64</sup> The sound of change is, however, in the air. Hopefully, satisfactory accommodations of competing national interests will be possible.

#### IV. Recognition and Enforcement of Judgments

##### *A. Recognition and Enforcement of United States Judgments Abroad*

A plaintiff who has secured a judgment from an American court against a foreign defendant has good reason to be pleased but may face problems in attempting to satisfy the judgment. If the defendant is unwilling to comply with the judgment and has insufficient assets in the United States against which the judgment can be enforced, it will be necessary for the plaintiff to initiate proceedings abroad for the recognition and enforcement of the American judgment. Indeed, there may even be obstacles to enforcement of an American judgment within the United States.

*1. International Conventions.*—There is no settled customary rule of international law regarding transnational recognition and enforcement of judgments.<sup>65</sup> Courts of each nation have traditionally applied that nation's own rules in determining whether to honor a judgment rendered in another nation.<sup>66</sup> The standards applied by dif-

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63. *Id.* at 1304.

64. *Compare* Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503 (N.D.Ill. 1984) with the cases herein discussed. *See* R. von Mehren, *supra* note 33.

65. The terms "recognition" and "enforcement" have distinct meanings, although sometimes used interchangeably by courts. A foreign judgment is recognized when a court concludes that a certain matter has already been decided by the judgment and therefore need not be litigated further. A foreign judgment is enforced when a party is accorded the relief to which the judgment entitles him.

66. In the United States, the recognition and enforcement of foreign judgments has developed almost entirely as a matter of common law, rather than statutory law. It is generally recognized that until such time as the federal government preempts the area by treaty or statute—which it has not yet done—state rather than federal law governs the treatment of such judgments. *See* Annot., 13 A.L.R.4th 1109 (1982).

The opinion of the Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895), involving a French judgment, remains a reasonably accurate statement of United States law. A foreign judgment is eligible for recognition and enforcement, under general principles of international comity, where the rendering court had jurisdiction over the parties and property in question in a manner consonant with American concepts of due process and judicial power; adequate notice of the foreign proceedings and opportunity to be heard was given; the judgment was not obtained by fraud; the rendering jurisdiction has impartial tribunals and proceedings; and rec-



ferent nations are essentially similar, particularly with regard to common-law nations. Real certainty in this area, however, has only been achieved through conclusion of bilateral or multilateral conventions.<sup>67</sup> Such international agreements currently govern recognition and enforcement of judgments among many nations of Europe and the British Commonwealth. Unfortunately, the United States is not party to any of these agreements.

Bilateral agreements between European nations governing reciprocal recognition and enforcement of judgments have existed for many years. In 1966 the Hague Conference in Private International Law adopted a Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.<sup>68</sup> The United States and most European nations participated in the preparation of, and ultimately approved, the draft Hague Convention. While this draft Hague Convention reflects essentially unanimous expert opinion in the Western world concerning transnational recognition and enforcement of money judgments, it never entered into force. Alternatively, the six original member States of the European Economic Community<sup>69</sup> subscribed to the Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.<sup>70</sup> New member States are obliged to accede to this Convention.<sup>71</sup>

Scholars in this country have long advocated conclusion of treaties governing judgment recognition. From 1973 until 1980, the United States and the United Kingdom negotiated unsuccessfully for a bilateral convention on foreign judgments.<sup>72</sup> Besides harmonizing

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ognition and enforcement would not contravene local public policy. However, the requirement of reciprocity in recognition practice with other nations, embraced by the *Hilton* Court as an element of comity, has since lost favor in this country. A foreign-country judgment entitled to recognition is usually enforceable in the same or similar manner as the judgment of a sister state which is entitled to full faith and credit. See generally R. von Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 L. & POL'Y INT'L BUS. 37 (1974).

There are few state statutes dealing directly with foreign-country judgments, except for the Uniform Foreign Money-Judgments Recognition Act of 1962 (Uniform Recognition Act), which has been adopted to date by twelve states—Alaska, California, Colorado, Illinois, Maryland, Massachusetts, Michigan, New York, Oklahoma, Oregon, Texas, and Washington. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 417 (1962). This Act, applicable only to money judgments, was not intended to enact new principles of recognition but merely to codify the common law. *Id.*

67. The general United Kingdom practice, which has been subject to various codifications over the years, is essentially the same as that in the United States. See Zaphiriou, *Transnational Recognition and Enforcement of Civil Judgments*, 53 NOTRE DAME LAW. 734, 749-58 (1978).

68. *Opened for signature* Mar. 17, 1969, in 15 AM. J. COMP. L. 362, 369 (1967). See also Supplementary Protocol of October 15, 1966. *Id.* at 369.

69. Belgium, West Germany, France, Italy, Luxembourg, and The Netherlands.

70. 15 J.O. COMM. EUR. (No. L 299) 32 (1972), translated in 2 COMMON MKT. REP. (CCH) ¶ 6003 (updated).

71. *Id.* at ¶ 6067.

72. Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil

the already similar practices of these two nations, this treaty was expected to be the first in a network of agreements designed to regularize recognition practice in the United States and improve prospects for recognition and enforcement of United States judgments abroad. The project foundered largely because of the objections of insurance interests and others on the British side concerning the very high damages available in American courts.

2. *General Principles of Comity.*—In the absence of treaties, reciprocal recognition practices of the United States and other nations are governed by general principles of international comity. These principles are embodied in national or local statutory and case law.

*Hilton v. Guyot*<sup>73</sup> provides the foundation of modern United States practice in this area. In *Hilton*, the Supreme Court noted that no nation is required to give effect to laws or decrees of another nation. The Court stated, however, that the principle of “comity of nations” suggests that American courts should accord conclusive effect to foreign judgments, subject to certain conditions and exceptions. The Court defined this principle as follows:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>74</sup>

Despite its ruling that foreign judgments should generally be given conclusive effect if they meet specified conditions, the Court denied conclusive effect to the French judgment in question. This was because under French law—as under the law of most other nations—an American judgment would not be given conclusive effect, and the merits of the controversy would be examined anew by French courts. The Court held that reciprocity and mutuality are part of the comity of nations. Therefore the judgments of a nation that does not accord conclusive effect to American judgments are entitled only to a lesser, *prima facie* effect.

While the requirements of reciprocity and mutuality as elements of comity in this area have since lost favor in American

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Matters, *initialed* Oct. 26, 1976, United States-United Kingdom, *reprinted in* 16 INT'L LEGAL MATERIALS 71 (1977). Further drafts were produced in response to problems raised on the British side, but negotiations were suspended in 1980.

73. 159 U.S. 113 (1895).

74. *Id.* at 163-64.

courts,<sup>75</sup> they have retained their importance in civil-law nations. Thus, courts of many European and Latin American nations will not, as a matter of course, give conclusive effect to an American money judgment even when it is clear that the American court rendering the judgment had jurisdiction and that the proceedings were fundamentally fair. In the absence of a treaty these foreign courts must additionally be satisfied that the American court would grant reciprocal recognition to that country's judgment. Moreover, while American common law has probably placed fewer obstacles before enforcement of European judgments than European courts have placed before enforcement of American judgments, it is often difficult for a proponent of an American judgment to establish reciprocity because of the absence of statutory authority and the dearth of case law in many American jurisdictions.<sup>76</sup>

For example, the Federal Republic of Germany will recognize and enforce judgments of other countries with which they have no treaty relationship (e.g., the United States) only when none of the grounds for refusal of recognition set forth in Section 328 I of the German Code of Civil Procedure are present. These grounds relate to propriety of the foreign court's jurisdiction, adequacy of service of process, whether the judgment is consistent with "good morals or the purpose of a German law," and, finally, the existence of reciprocity.<sup>77</sup>

German courts have traditionally interpreted the reciprocity requirement quite strictly. This is illustrated by *Rhein and Mosel*,<sup>78</sup> a 1909 decision of the German Supreme Court arising out of the San Francisco earthquake. In that case a California judgment against a German fire insurance company was denied recognition and enforcement even though the then current California statute provided for reciprocal recognition of foreign courts' judgments if the foreign court rendering the judgment had jurisdiction under the law of the foreign country. The German court reasoned that reciprocity was not assured because a California court could examine the German court's competency to pass on the subject matter, because the fraud defense reached further under California law than under German

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75. See, e.g., UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 417 (1962) (reciprocity not a precondition for recognition and enforcement of foreign-country judgments); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 comment e (1971) (questioning whether considerations of reciprocity are material).

76. See generally Zaphiriou, *Transnational Recognition and Enforcement of Civil Judgments*, 53 NOTRE DAME LAW. 734 (1978).

77. ZIVILPROZESSORDNUNG [ZPO] 328 I (W. Ger.), reprinted in H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 804 (2d ed. 1976). The following discussion is based upon this text and upon Brenscheidt, *The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 11 INT'L LAW. 261, 264 (1977).

78. Judgment of Mar. 26, 1909, Reichsgericht in Zivilsachen [RGZ], W. Ger., 1909 RGZ 70,434.

law, and because California law allowed certain equitable defenses unknown in German law to enforcement of final judgments.

Recent decisions of the German Supreme Court have been considerably more liberal in interpreting the reciprocity provision. Currently, reciprocity will be assumed by German courts where recognition and enforcement of German judgments abroad encounter obstacles that are no greater than the ones imposed by Germany. Partial reciprocity, defined as reciprocity for the particular class of judgment at issue, is held to be sufficient. It is also now settled that foreign rules need not be identical to German provisions. The only requirement is that the rules must be essentially equivalent.

In the absence of a uniform American law regarding treatment of foreign judgments, no determination can be made as to whether reciprocity exists between Germany—or any other nation—and the United States. In this connection, one commentator has compared the Uniform Foreign Money-Judgments Recognition Act (Uniform Recognition Act) to the German provisions governing recognition and enforcement of foreign judgments.<sup>79</sup> His conclusion is that the laws are almost completely equivalent. Therefore, at least with respect to money judgments, reciprocity would exist with those American states that have adopted the Uniform Recognition Act.<sup>80</sup>

It appears that American states following pure common-law requirements for according conclusive effect to foreign judgments—jurisdiction, proper notice, opportunity to be heard, absence of fraud, finality, and consistency with public policy<sup>81</sup>—should be recognized and enforced in Germany because these common-law requirements are similar to the conditions set forth in the German Code of Civil Procedure. Similarly, French courts, while not requiring reciprocity, do require conditions similar to the common-law requirements noted above before they will grant conclusive effect to a foreign judgment.<sup>82</sup> Nevertheless, despite the similarity between the

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79. U. DROBNIG, *AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW* 354-57 (2d ed. 1972).

80. Indeed, the Commissioners' Prefatory Note to the Uniform Recognition Act states:

In most states of the Union, the law on recognition of judgments from foreign countries is not codified. In a large number of civil law countries, grant of conclusive effect to money-judgments from foreign courts is made dependent upon reciprocity. Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.

UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 417 (1962).

81. See *supra* note 66.

82. See COUNCIL OF EUROPE, *PRACTICAL GUIDE TO THE RECOGNITION AND ENFORCE-*

laws of the United States, Germany, and France, reciprocity cannot be assured.

3. *Foreign Hostility to Some Categories of American Judgments.*—In addition to the general problems outlined above, litigants in the United States must be aware of the special hostility in other nations to certain classes of American judgments. These classes include judgments resulting from American laws that have extraterritorial application and that provide for “punitive” treble damages (*i.e.*, antitrust laws) and those judgments which have “excessive” damages.

(a) *Antitrust.*—Differing concepts of competition and free trade as well as foreign hostility to the jurisdictional “effects doctrine” applied in American law<sup>83</sup> have evoked a good deal of reaction abroad to American antitrust litigation. This adverse reaction has included both legislative and judicial counter-measures in several countries.<sup>84</sup> For example, the United Kingdom and other Commonwealth nations have adopted or are considering, as part as their blocking legislation, so-called “clawback” and related provisions aimed at American antitrust judgments.<sup>85</sup>

The English Protection of Trading Interests Act provides in section 5 that no judgments for multiple damages of any foreign court may be enforced in the United Kingdom.<sup>86</sup> A judgment for multiple damages is defined as a judgment for an amount determined by multiplying a figure assessed as compensation for the loss or damage sustained by a plaintiff.<sup>87</sup> The prohibition against enforcement concerns the whole judgment debt. Even that part which is compensatory cannot be enforced if the judgment falls within this definition. While this provision was designed with treble damage judgments under section 4 of the Clayton Act in mind, the United Kingdom Secretary of State is empowered to extend its coverage to judgments based on other foreign laws relating to business competition, regardless of the existence of multiple damages.<sup>88</sup>

Section 6 of the PTIA, the clawback provision, goes even further to counteract treble damage judgments. A “qualifying defendant” may proceed against a person not within the jurisdiction of the courts of the United Kingdom to recover the amount of any damages

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MENT OF FOREIGN JUDICIAL DECISIONS IN CIVIL & COMMERCIAL LAW 57 (1975).

83. See *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

84. See *infra* notes 86-98 and accompanying text.

85. *Id.*

86. Protection of Trading Interests Act, 1980, § 5(1)-(2), reprinted in ANTITRUST & TRADE REG. REP. (BNA) No. 959, at F-1 (Apr. 10, 1980).

87. *Id.* § 5(3).

88. *Id.* § 5 (2)(b), (4).

paid by the "qualifying defendant" that exceed compensation for actual injury.<sup>89</sup> Qualified defendants are citizens of the United Kingdom and those companies incorporated or doing business in the United Kingdom.<sup>90</sup> The only exceptions are for defendants residing or incorporated in the rendering country (e.g., United States nationals and companies),<sup>91</sup> and defendants doing business in the rendering country if the overseas proceeding concerned activities exclusively carried on in that country.<sup>92</sup>

Section 7 of the PTIA enables the Secretary of State to provide for enforcement in the United Kingdom of clawback judgments rendered by foreign countries, if the foreign country will recognize and enforce British clawback judgments.<sup>93</sup> A situation is thus envisaged in which a number of countries join together to allow defendants who have paid sums on account of multiple damage judgments to recover most of those sums through their own courts.

The Australian Antitrust Judgments (Restriction of Enforcement) Act of 1979, as amended in 1981, is similar to the PTIA.<sup>94</sup> Under this law, the Attorney General is authorized to restrict or prevent enforcement of an antitrust judgment rendered by a foreign court when he is satisfied that the foreign court exercised jurisdiction or powers of a kind inconsistent with international law, and recognition or enforcement of the judgment in Australia might adversely affect Australian trading interests.<sup>95</sup> The 1981 amendment added a clawback provision similar to that available in the United Kingdom.<sup>96</sup> This legislation was further strengthened last year.<sup>97</sup>

Canada has considered but has not yet enacted similar legislation as an adjunct to its existing blocking law.<sup>98</sup> Moreover, it has been suggested that courts in other nations having no clawback law may also refuse to recognize or enforce an American treble damages award in accordance with comity-based recognition practice.

(b) *Excessive damage awards*.—There is unhappiness overseas not only with antitrust treble damages but with all forms of civil

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89. *Id.* § 6(2).

90. *Id.* § 6(1).

91. *Id.* § 6(3).

92. *Id.* § 6(4).

93. *Id.* § 7.

94. Antitrust Judgments (Restriction of Enforcement) Act, 1979 (amended 1981) (Australia).

95. *Id.*

96. *Id.*

97. Foreign Proceedings (Excess of Jurisdiction) Act, 1984, *assented to* 21 March 1984 (Australia).

98. On December 13, 1984, the Canadian House of Commons unanimously passed the Foreign Extraterritorial Measures Act, which strengthens the former Canadian blocking law and contains clawback provisions.

judgments from United States courts for damages that are viewed as excessive. Indeed, foreign countries dislike our whole system of civil litigation which breeds such results. Lord Denning gave elaborate expression to these feelings recently in the opening lines of a landmark decision of the United Kingdom Court of Appeal enjoining a British national from pursuing a breach-of-contract action in the United States:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will conduct the case 'on spec' as we say—or on a 'contingency fee' as they say. The lawyers will charge the litigant nothing for their services but instead they will take 40 percent of the damages—if they win the case in court—or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40 percent before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.<sup>99</sup>

More to the point, in 1980 the Attorney General of the United Kingdom explained to Parliament the suspension of negotiations with the United States on a reciprocal recognition and enforcement treaty as follows:

A substantial proportion of the bodies which commented on the consultative paper felt that a convention might be harmful in view of the very high damages awarded by American juries, especially in personal injury and product liability cases; and that it would not be possible to devise any means of mitigating the enforcement of such judgments which would not be excessively difficult to operate in practice. Taking these and other views into consideration, Her Majesty's Government have decided not to pursue negotiations on a draft convention, and have so informed the United States authorities.<sup>100</sup>

In short, an American judgment creditor should expect to encounter special difficulties in attempting to obtain foreign recognition and enforcement of a substantial award of damages in many types of cases.

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99. *Smith Kline & French Laboratories v. Bloch*, [1983] 1 W.L.R. 730 (Q.B. 1983).  
100. 987 PARL. DEB. H.C. (5th ser.) 267 (1980). See *supra* pp. 56-58.

## B. *Enforcement within the United States*

A prospective judgment creditor may also have occasion to seek enforcement and execution of an American judgment against a foreign entity within this country if the foreign entity has United States based assets. In so doing, one should have in mind the general principles and special problems involved if the defendant is, or is controlled by, a foreign sovereign.

1. *General Principles.*—When enforcement is sought within the state whose court has rendered the judgment the plaintiff need only be concerned with execution procedures and practices of that state. Various states also provide numerous provisional and final remedies to which a judgment creditor may resort pending judgment or in aid of judgment. These generally include attachment and sale of real or personal property, discovery procedures to locate such property, receiverships, penalties for contempt of court orders, and, in some cases, arrest of the judgment debtor.<sup>101</sup> These are all available against a foreign defendant, subject to the considerations discussed below.

It may be necessary to seek enforcement of a judgment of one state in another state, in which event the normal rules governing enforcement of sister-state judgments will apply. Traditionally, a sister-state judgment would have had to have been transformed into a judgment of a local court and then could have been enforced by all means available under local law. Consistent with the full faith and credit clause of the Constitution, however, expedited procedures for action on such judgments are available. At the very least, summary judgment may be granted for the plaintiff absent extraordinary circumstances. Moreover, about half the states have adopted the Uniform Enforcement of Foreign Judgments Act (Uniform Enforcement Act)<sup>102</sup> which provides that duly authenticated sister-state judgments may simply be filed in the county clerk's office of the enforcing state. The judgment will then be treated as a judgment of a court of that state for purposes of enforcement or satisfaction.<sup>103</sup>

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101. In accordance with the Federal Rules of Civil Procedure, the federal courts generally grant the provisional and final remedies, and follow the procedures and practices on execution of the state in which they sit. FED. R. CIV. P. 64-71. See generally 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶¶ 64.01-10 (2d ed. 1983).

102. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT, 13 U.L.A. 176 (1964 & Supp. 1984).

103. Although the Uniform Enforcement Act does not by its terms apply to foreign-country money judgments, the Uniform Foreign Money-Judgments Recognition Act provides that a judgment entitled to recognition is enforceable "in the same manner as the judgment of a sister state which is entitled to full faith and credit." UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3, 13 U.L.A. 417, 420 (1962). Thus, the direct enforcement procedure for foreign-country money judgments should be available in states that have adopted both uniform acts.



2. *The Foreign Sovereign Immunities Act.*—Claimants against foreign entities must be particularly sensitive to the potential applicability of the Foreign Sovereign Immunities Act of 1976 (FSIA),<sup>104</sup> with respect to both jurisdiction and execution upon judgment. The FSIA applies to litigation in any court of this country against a “foreign state.” Foreign state is defined to include any agency or instrumentality of the foreign nation that is “a separate legal person, corporate or otherwise, and . . . which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof . . . .”<sup>105</sup>

The provisions of the FSIA are intricate and will not be reviewed in depth here.<sup>106</sup> Basically, the FSIA adopts the “restrictive theory” of sovereign immunity under which foreign States are entitled to immunity from liability arising out of their governmental acts but are not entitled to immunity from claims concerning their commercial conduct.<sup>107</sup> With respect to immunity from execution, the following general statements can be made: If the defendant is a commercial enterprise or agency that is majority owned or controlled by a foreign state, and jurisdiction exists by virtue of that entity’s commercial activities, execution (or attachment in aid of execution) upon judgment may be had against any property owned by that entity in the United States. If the defendant is a foreign state or political subdivision thereof and jurisdiction exists because of the defendant’s commercial activity, attachment or execution may be had only against the property that is or was used for the commercial activity upon which the claim is based.<sup>108</sup>

There is an additional provision allowing execution in certain circumstances against property that has been “taken in violation of international law” or that has been exchanged for property so taken. Another provision allows execution when the foreign state or state-controlled entity has waived immunity from execution.<sup>109</sup> Prejudgment attachments against property of foreign states are prohibited unless there is an explicit waiver of such immunity and the attachments are in aid of a prospective judgment and are not being used to obtain jurisdiction. Finally, there is absolute or near absolute immunity from attachment or execution on a foreign state’s property that

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104. 28 U.S.C. §§ 1602-1611 (1982).

105. 28 U.S.C. § 1603(b).

106. See R. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, reprinted in SOUTHWEST LEGAL FOUNDATION SYMPOSIUM ON PRIVATE INVESTORS ABROAD (1977).

107. See 28 U.S.C. § 1605.

108. *Id.* § 1610.

109. *Id.* Such waivers are commonly included in commercial contracts or friendship, commerce and navigation treaties to which the United States is a partner.

is closely associated with the state's exercise of sovereign functions.<sup>110</sup> Obviously, a close analysis of the FSIA, pertinent treaties, and case law must be made in each individual case.

## V. Conclusion

A few propositions may be stated for careful consideration by American counsel in determining whether an American jurisdiction should be selected for transnational litigation in preference to an alternative foreign jurisdiction. First, the choice of an American jurisdiction should not be automatic. Second, depending upon the type of case, trial of the matter to a judge, as would be true of most commercial cases tried in jurisdictions other than the United States, may well lead to a more effective and less costly judicial proceeding than would a trial by jury. Third, with respect to preparation for and trial of certain types of cases, it may be advantageous to choose a civil-law country in which the judge will play a leading role in development of evidence and the trial itself. Fourth, when the governing law is that of a foreign jurisdiction, it may be beneficial to try the case in that jurisdiction. Fifth, if the location of the defendant and his assets makes it likely that the only jurisdiction in which one would wish to execute on any judgment is the defendant's jurisdiction, that jurisdiction should be carefully considered as the place of trial. Sixth, if the plaintiff does not need wide-ranging discovery, the advantages of avoiding such discovery by litigating in an alternative foreign forum should be considered.

The interplay of these six factors and many others in any particular case may be very complex. Each particular situation should be analyzed carefully to select the best available forum.

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110. See 28 U.S.C. §§ 1609-1611.