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# Transnational Litigation: Is There A “Field”? A Tribute to Hal Maier

Linda Silberman\*

I was pleased to be asked to offer a few words in honor of my friend, Professor Hal Maier, on the occasion of his retirement from Vanderbilt University Law School. I owe a particular debt of gratitude to Hal, not only because he has been a wonderful friend and colleague over the years, but also because he sparked my interest in a field to which I had only recently turned when we first met and one that now absorbs much of my time and attention. The “field”—if it can be characterized as such—is “international litigation” or “transnational litigation,”<sup>1</sup> and that reference itself raises the interesting question whether international civil litigation does in fact occupy a distinct field. I was recently asked to participate in a panel discussion on that question next spring at the American Society of International Law and was instantly reminded of early conversations that I had with Hal Maier in the mid-1980s on that subject.

I first met Hal around 1984. At the time, I was primarily a teacher of civil procedure and conflict of laws; Hal taught not only conflict of laws but also public international law, foreign relations law, and a course entitled “International Civil Litigation.” He was among the first to develop such a course, and he had assembled materials out of which to teach it since at the time there was no casebook on the subject. His materials, which he shared with me when I taught a course in International Litigation for the University of San Diego’s 1988 summer program in London, covered judicial jurisdiction, choice of law, choice of forum, enforcement of judgments, sovereign immunity, act of state, and transnational discovery. And although at the time, those materials did not include overarching themes or linkages, even at that early stage Hal viewed this material as more than a mere assembling of topics. Rather, he had a vision of transnational litigation as a discrete field that blurred the traditional lines between public and private international law,<sup>2</sup> that looked comparatively at how various countries dealt with cross-border litigation, and that gave definition to the increasingly global perspective from which a transnational litigator views a case.

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1. Though one might find nuances between those concepts, see Raymond Michael Ripple, *Review of Louise Ellen Teitz’s Transnational Litigation*, 73 NOTRE DAME L. REV. 419 (1998), I use the terms interchangeably.

2. See Harold G. Maier, *Extraterritorial Jurisdiction at A Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280 (1982).

Within a few years, casebooks with "International Litigation" in their titles came onto the scene. The first of these was Gary Born's *International Civil Litigation in United States Courts* (originally Born & Westin and now in its third edition),<sup>3</sup> followed later by my NYU colleague Andy Lowenfeld's *International Litigation and Arbitration* (also now in its third edition)<sup>4</sup> and thereafter by Russell Weintraub's *International Litigation and Arbitration: Practice and Planning* (now in its second edition).<sup>5</sup> Other books and treatises followed.<sup>6</sup> In addition, the American Law Institute's 1987 revision of the Restatement of the Foreign Relations Law of the United States (1965) offered in Part IV a conceptual framework for the "field" of transnational litigation.<sup>7</sup> The Introductory Note to Part IV refers to its objective as concern with "the reach and application of domestic law in circumstances implicating the interests of other states, and with cooperation and conflict of states in the application of domestic law."<sup>8</sup> Jurisdiction to prescribe and jurisdiction to enforce, along with jurisdictional immunities and the act of state doctrine, had been dealt with in the earlier Restatement, but the new Restatement Third not only added specific topics such as jurisdiction to adjudicate, enforcement of foreign judgments and arbitral awards, and

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3. GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* (3d ed. 1996). A fourth edition is forthcoming.

4. ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* (3d ed. 2006).

5. RUSSELL J. WEINTRAUB, *INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING* (2d ed. 1997).

6. Other American casebooks include CHARLES S. BALDWIN IV ET AL., *INTERNATIONAL CIVIL DISPUTE RESOLUTION: A PROBLEM ORIENTED COURSEBOOK* (2004); THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON INTERNATIONAL LITIGATION AND ARBITRATION* (2005); RALPH G. STEINHARDT, *INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW* (2002). Treatises in the United States include LAWRENCE W. NEWMAN & DAVID ZASLOWSKY, *LITIGATING INTERNATIONAL COMMERCIAL DISPUTES* (1996); LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* (1996); *INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS* (David J. Levy ed., 2003). Even a "nutshell" has appeared. See GEORGE A. BERMANN, *TRANSNATIONAL LITIGATION* (2003). Transnational litigation is not necessarily U.S.-centric. See, e.g., JOSEPH LOOKOFSKY & KETILBJORN HERTZ, *TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION: AN ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW* (2d ed. 2004).

7. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987). The architect of these sections was Professor Andreas Lowenfeld in his capacity as Associate Reporter for the Restatement Third. Professor Lowenfeld's 1979 Hague lectures, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction*, 63 *RECUEIL DES COURS* 31, significantly influenced the provisions on jurisdiction to prescribe, particularly § 403. Subsequently, in his 1994 Hague general lectures, Professor Lowenfeld sought to identify a unifying principle in the field of international litigation. See ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS* (1996).

8. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* 230 (1987).

international judicial assistance, but also perceived the topics as connected and provided links to their interrelationships. The Restatement Third has primarily a United States perspective on these matters, but the Comments and Reporters' Notes situate the "black letter" rules within a larger transnational and comparative context.

Although these developments suggested an emerging field of transnational litigation, Professor Steve Burbank, in an early review of the first edition of the Born & Westin text, posited that international civil litigation was less a discrete field than it was part of a "process of cross-fertilization."<sup>9</sup> He suggested that doctrine developed in domestic cases was brought to bear in international cases, and variations and alterations necessitated by the international context were then transferred back to domestic cases. If one proceeds topic by topic, there is much to what Burbank claims. But his observation, accurate to a point, fails to capture a larger picture. Since his comments almost fifteen years ago, much has happened. The enhancement of free trade in a global economy coincident with technological advances has created a transnational legal order for corporations, individuals, and their lawyers. Professor Samuel Baumgartner, in a recent article, "Is Transnational Litigation Different?,"<sup>10</sup> answers his own question with a definitive "Yes." Because there is important interplay between transnational actors and lawmakers in different countries when litigation is cross-border, he argues that systemic attention needs to be directed to the subject. I would agree. My own experience teaching, writing, and litigating in this area convinces me that international/transnational litigation is an interconnected whole and a field that, when studied and analyzed as such, merits autonomous treatment.

The characterization of transnational litigation as a field has no quarrel with the observation that much of its content is derived from the domestic law of civil procedure, conflict of laws, international sales, economic and trade law, and public international law. Nor does it deny the influence of domestic law on international cases and vice-versa. Moreover, a "field" is not necessarily in need of a "big think" unifying theory. A pragmatic definition of field is marked by the efforts of lawyers, academics, and judges who view the landscape of litigation as extending beyond their own borders and in relation to rules and values elsewhere.<sup>11</sup> And the sense of field is enhanced by

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9. Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1459 (1991).

10. Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT. ECON. L. 1297 (2004).

11. In addition to the Restatement (Third) of The Foreign Relations Law of the United States, the American Law Institute has undertaken a variety of transnational

recent Supreme Court decisions on issues of transnational litigation informed by an awareness of the rules, interests, and values of other countries.<sup>12</sup> In sum, transnational litigation has become a field because the discrete pieces can only be understood in relation to each other and to the whole and because international and comparative perspectives shape and influence the development of rules at the national and regional level.<sup>13</sup>

On a less abstract level, lawyers who handle transnational cases certainly see themselves as operating in a distinct field. They give advice to clients about options in various legal systems, and they have an understanding about the comparative advantages and disadvantages of various systems. They understand how a case will be shaped in any one of a number of fora and consider strategic steps available to them to ensure that litigation proceeds in the forum of their choice. They assess whether particular treaties, such as the Hague Service Convention<sup>14</sup> and the Hague Evidence Convention,<sup>15</sup> affect how process is to be served and whether they will be able to obtain evidence for discovery and/or at trial. They need familiarity with the rules of adjudicatory jurisdiction in other countries as well as in the United States and an understanding of the consequences of

litigation projects: *See, e.g.*, ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2006); RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006); TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES (2003); INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (2003).

12. A number of recent cases in the Supreme Court might be described as involving transnational litigation: *Pasquantino v. United States*, 544 U.S. 349 (2005) (revenue rule); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (jurisdiction to prescribe); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (discovery under 28 U.S.C. § 1782); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Société Nationale des Chemins de Fer Français v. Abrams*, 542 U.S. 901 (2004) (foreign sovereign immunity); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (alien tort statute); *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003) (foreign-affairs preemption); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) (foreign sovereign immunity).

13. *See* Baumgartner, *supra* note 10. Professor Maier wrote about a number of these issues. *See, e.g.*, *A Hague Conference Judgments Convention and United States Courts: A Problem and Possibility*, 61 ALB. L. REV. 1207 (1998) [hereinafter Maier, *Hague Conference Judgments Convention*]; *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 VAND. J. TRANSNAT'L L. 239 (1986); *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579 (1983); *The U.S. Supreme Court and the "User-Friendly" Forum Selection Clause: The Effect of Carnival Cruise Lines on International Contracts*, in INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION CLAUSES 53 (Jack L. Goldsmith ed., 1997).

14. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

15. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

having parallel proceedings in courts here and abroad. Before litigation is even commenced, they consider where the defendant's assets are or might be in the future in order to assess whether foreign enforcement of the judgment is likely to be required and, if so, how a particular country will treat a foreign judgment. These questions are all interrelated pieces of a large litigation puzzle which is the field of transnational litigation.

As a teacher of international civil litigation, I am confident I am teaching in a discrete field. The study of transnational litigation contains interrelated elements that must be brought together in order to understand and appreciate any one of them. For example, it is difficult to capture the importance of the "jurisdiction to prescribe" cases<sup>16</sup> without a full understanding of regulatory regimes in other parts of the world and sensitivity to competing sovereign interests.<sup>17</sup> Jurisdiction to adjudicate in transnational cases is best understood in a comparative perspective. In the context of international litigation, judicial jurisdiction of courts in the United States can best be appreciated when compared to national jurisdictional systems in Europe and to the EU Regulation. Jurisdiction to prescribe and jurisdiction to adjudicate are inextricably interconnected; and the complexity and uncertainty of their operation increases a desire for greater party autonomy—in the form of choice of law, choice of court, and arbitration clauses. Per its title, transnational litigation often proceeds in multiple theaters involving multiple actors, necessitating rules to deal with parallel proceedings, and depending upon the particular legal system, looks to principles such as *forum non conveniens* and *lis pendens* or remedies like anti-suit injunctions. Increasingly, states act like private parties and accordingly find themselves party to litigation in national courts. Topics traditionally considered the domain of public international law—such as sovereign immunity and the act of state doctrine—have become necessary tools for the international commercial lawyer. And in the United States, as well as elsewhere, broader principles of public international law are being viewed as behavioral norms, violations of which may subject private parties as well as states to liability.<sup>18</sup> Critical for the teacher and student in this context is seeing these issues in the context of the interconnected whole.

Finally, scholars writing on various issues of transnational litigation understand them best when viewed in relation to one

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16. See, e.g., *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

17. See Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251 (2006).

18. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

another. The point is illustrated by the American Law Institute's recent Project—Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute—for which my colleague Andy Lowenfeld and I served as Reporters.

The American Law Institute embarked on this Project seven years ago to develop a proposed federal statute for the recognition and enforcement of foreign judgments in the United States.<sup>19</sup> That there are important differences between enforcement of interstate judgments within the United States (subject to the full faith and credit obligation) and enforcement of foreign-country judgments (subject to comity) is readily apparent. As to the particulars of such a regime of recognition and enforcement, the issues were more complicated, but one objective was clear: that the law on the recognition and enforcement of foreign-country judgments should be committed to a national federal solution.<sup>20</sup> As Reporters for this Project, we found a number of sources upon which to draw in developing appropriate standards for such a uniform federal law. An obvious one was the Uniform Foreign Money-Judgments Recognition Act<sup>21</sup>—the Uniform Act adopted in thirty-two states and territories—which generally reflects the law on this subject in the United States.<sup>22</sup> But our sense was that it was necessary to look more broadly in developing a federal standard for foreign judgment recognition and enforcement as well as to assess how U.S. practice affected other national and transnational actors. We drew on comparative law, looking to the experience of other countries with respect to their recognition and enforcement practices. We looked not only at national solutions, such as those in Germany and Canada and

19. ALI Project, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, Introduction: National Law in the International Arena (2006) (hereinafter ALI, Proposed Foreign Judgments Act) (on file with author).

20. In general, the recognition and enforcement of foreign-country judgments is presently governed by state law. The move to a national federal law is one that has Professor Maier's support. See Maier, *Hague Conference Judgments Convention*, *supra* note 13, at 1219-20; Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133 (1971); Harold G. Maier, *The United States Constitution In Its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Preemption of State Law: A Recommended Analysis*, 83 AM. J. INT'L L. 832 (1989).

21. 13 U.L.A. 39 (2002 ed. and Supp. 2006). In 2005, the National Conference of Commissioners on Uniform State Laws adopted a revised version of this Act, the UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT. No state has yet considered the revised Uniform Act.

22. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1987). Descriptive accounts of existing law can be found in Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253 (1991); Linda Silberman, *Enforcement and Recognition of Foreign Country Judgments in the United States*, 16 INT. Q. 534 (2004).

Australia, but also to regional arrangements, such as the EU Regulation adopted for Member States of the European Union. As for how the United States' treatment of foreign judgments impacts other countries and other transnational actors, the negotiations at the Hague Conference on Private International Law to develop a worldwide jurisdiction and judgments convention were a continuing reminder.

In some instances, the ALI Project borrowed or adapted from the Uniform Act; in others the Project looked to approaches of other countries or other systems, and in still others it proffered new and different solutions in search of the appropriate ingredients for a national federal law on recognition and enforcement of foreign judgments. But one very important realization for us about this enterprise was that it was impossible to think about recognition and enforcement of foreign judgments without taking into account related aspects of international litigation, both in the United States and abroad. Let me highlight a few examples.

Although many of the provisions in the proposed ALI statute cover traditional issues in U.S. law with respect to foreign judgment recognition and enforcement, the solutions are the result of a more systemic approach. As to basic questions, the proposed statute addresses the kinds of judgments to which recognition and enforcement shall be given, defenses that justify a refusal to recognize or enforce foreign judgments, and the jurisdictional bases under foreign law that support recognition and enforcement.

Judicial jurisdiction is generally an integral part of judgment recognition/enforcement practice. In the United States, the Uniform Act, as well as case law in states that have not adopted the Act, conditions recognition and enforcement on consideration of the jurisdictional basis of the foreign judgment. Within the European Union, the Brussels/Lugano Convention, and now the EU Regulation, tie together jurisdiction and recognition/enforcement of judgments even more closely for purposes of the common internal market. Not only does Article 33 of the Regulation require that a judgment rendered in a Member State be recognized by other Member States, but also the Regulation creates a set of agreed-upon bases of direct jurisdiction over persons domiciled in Member States.

For purposes of a proposed federal statute, it was clear that appropriate and/or inappropriate bases of judicial jurisdiction for purposes of the recognition and enforcement of foreign judgments would need to be identified. In contrast, the Uniform Act, both in its present incarnation and in its revised form, lists particular bases of jurisdiction that will support a judgment and then provides that "other bases" of jurisdiction may also be appropriate. Looking more broadly to such models as the EU Regulation and the Proposed Hague Judgments Convention, the ALI design was to identify certain



bases of jurisdiction as *unacceptable* for purposes of recognition/enforcement. Moreover, the unacceptable bases were not taken strictly from U.S. law but rather reflected a broader consensus about jurisdiction within the international community and include: presence of property of the defendant when the claim does not assert an interest in or is otherwise unrelated to the property; nationality of the plaintiff; domicile, habitual residence, or place of incorporation of the plaintiff; and transitory presence of the defendant unless no other appropriate forum is available.<sup>23</sup> Under Section 6 of the proposed ALI statute, the final basis of “unacceptable jurisdiction” with respect to a foreign judgment is “any other basis that is unreasonable or unfair given the nature of the claim and the identity of the parties.”<sup>24</sup> This provision in particular reflects an attempt to accommodate other regimes in the transnational order. For example, within the European Union, domiciliaries of Member States are subject to suit in a forum where any one of a number of defendants is domiciled if the claims are closely connected.<sup>25</sup> Under American due process standards, jurisdiction over a defendant without contacts in the forum state would be unconstitutional, and under existing standards of recognition practice in the United States, such a judgment would generally not be recognized or enforced. The language in the proposed ALI provision—“unreasonable or unfair *given the nature of the claim and the identity of the parties*”—would allow for recognition of such a judgment because the “multiple defendant” provision is an appropriate basis of jurisdiction for defendants who were subject to jurisdiction in the foreign court pursuant to the EU Regulation.

A second—and controversial—provision in the proposed ALI statute is its inclusion of reciprocity as a defense to recognition or enforcement of a foreign judgment.<sup>26</sup> In addition to identifying criteria to determine whether a “comparable judgment” from a court in the United States would be recognized or enforced in that country, the proposed statute authorizes the Secretary of State to negotiate agreements with foreign states or groups of states for reciprocal practices, thereby dispensing with the need to make a showing of reciprocity in an individual case. As the Comment to that provision explains, the objective of the reciprocity provision in the Act is not to make it more difficult to secure recognition and enforcement of

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23. ALI, Proposed Foreign Judgments Act, *supra* note 19, § 6.

24. *Id.* § 6(a)(v).

25. Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 6(1), 2001 O.J. (L 12).

26. ALI, Proposed Foreign Judgments Act, *supra* note 19, § 7(a) provides: “A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.”

foreign judgments, but rather to create an incentive for foreign countries to commit to recognition and enforcement of judgments rendered in the United States.

Whether one agrees or disagrees with the particular provision, it must be assessed with an understanding and appreciation of transnational litigation more generally. Many countries are quite restrictive when it comes to respecting foreign judgments, and some countries are particularly hostile to recognition or enforcement of U.S. judgments.<sup>27</sup> If the issue of reciprocity is viewed only as to whether it is the “right” or the “wrong” rule for a recognition/enforcement regime in the abstract, the inquiry is too narrow. The “field” question is substantially broader: how would adoption of a reciprocity requirement for foreign judgment recognition and enforcement in the United States affect transnational litigation? It could be urged—as the proponents of the rule do—that it will lead to more liberal recognition/enforcement practice in the international order, either because other countries will be more receptive to U.S. judgments, or because it will encourage the type of reciprocal agreements envisioned by the Act. But the critics, too, should respond with respect to the larger field as well. They might say that the United States should “lead” by adopting a rule that rejects reciprocity in the hope that other countries will follow and thereby establish an international consensus that reciprocity should not be a condition of judgment enforcement. However, in the present state of affairs, often when the United States leads, no one appears to follow. Moreover, if one needs a reminder that the shaping of a federal law on recognition and enforcement of foreign judgments for the United States has ramifications for other transnational actors, one can look to the failed attempt to negotiate a world-wide treaty on recognition and enforcement of judgments at the Hague Conference.<sup>28</sup>

The inclusion in the ALI proposed federal statute of mechanisms to address the problem of parallel proceedings is another indication of its field approach. As noted earlier, recognition and enforcement of judgments is inextricably tied to appropriate jurisdiction in the rendering forum; an additional variable with respect to “appropriate jurisdiction” arises when there are parallel proceedings in the United States as well as elsewhere. Moreover, if recognition or enforcement

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27. See RECOGNITION AND ENFORCEMENT OF JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS (Gerhard Walter & Samuel P. Baumgartner eds., 2000).

28. I have written about those negotiations elsewhere. See Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319 (2002). A more limited convention on choice of court agreements and the enforcement of resulting judgments was concluded in 2005. See *Convention on Choice of Court Agreements*, June 30, 2005, 44 I.L.M. 1294 (2005).

is to be accorded to a judgment resulting from a foreign proceeding, it makes little sense to permit a duplicative proceeding in a court in the United States. To counter the inevitable “race to judgment,” the ALI proposal introduces a modified *lis pendens* principle for courts in the United States.<sup>29</sup> Under this provision, a court in the United States is instructed to stay or dismiss an action if it is shown that a proceeding concerning the same subject matter and including the same or related parties as adversaries, has previously been brought and is pending in the courts of a foreign state when the foreign court has an acceptable basis of jurisdiction and the foreign court can be expected to render a timely judgment entitled to recognition under the principles of the proposed statute. However, no stay is called for in situations where the first-filed court is not an “appropriate” forum; and the foreign proceeding is not appropriate if it operates to frustrate the otherwise “natural forum,” for example, if the action is a declaration of nonliability, if the proceeding appears to be vexatious or frivolous, or if there are other persuasive reasons for accepting the burdens of parallel litigation.<sup>30</sup> This specially designed rule avoids the rigidity of a strict first-seised rule, such as that adopted in the Brussels Convention and the EU Regulation. In *Gasser GmbH v. MISAT Srl*,<sup>31</sup> the European Court of Justice held that even though the second-seised court had been chosen by the parties in an exclusive forum-selection clause in the contract, the second-seised court must stay its proceedings until the first-seised court declared that it had no jurisdiction. Under the provisions of the proposed ALI statute, a first-seised court in the face of a forum-selection clause pointing elsewhere would not be an appropriate forum, and thus, the second-seised court need not stay or dismiss the claim. The flexibility of the rule also takes account of the substantial differences in the procedures and available remedies between litigation in the United States and in other countries.

Unlike an international treaty or model law, the proposed ALI statute could not impose on a foreign court a similar obligation to decline jurisdiction. To compensate for that lack of symmetry, the proposal adopts the mechanism of non-recognition of a foreign judgment. To that end, the proposed Act includes, as additional grounds for non-recognition, situations when the foreign proceeding

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29. For a general discussion of existing law on this subject in the United States, see Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1 (2004).

30. See Linda Silberman, *A Proposed Lis Pendens Rule for Courts in the United States: The International Judgments Project of the American Law Institute*, in INTERNATIONAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF PETER E. NYGH 341 (Talia Einhorn & Kurt Siehr eds., 2004).

31. Case C-116/02, 2003 E.C.R. I-14693.

was initiated subsequent to a suit in a court in the United States and the proceeding in the United States was not dismissed or stayed, or where the proceeding in the foreign court was undertaken to frustrate a claimant's right to suit in a more appropriate forum, such as in the case of an anti-suit injunction or a negative declaration.<sup>32</sup>

The ALI Project also considered such issues as *forum non conveniens*, claim and issue preclusion, anti-suit injunctions, provisional measures, methods of enforcement, registration, and cooperation among courts. In some instances, specific provisions were adopted to deal with these matters, whereas in other instances Comments and Reporters' Notes were used as a means of providing background and context.

The final product is a comprehensive federal statute on the recognition and enforcement of foreign judgments accompanied by a detailed analysis—an effort that reflects an approach to transnational litigation that Professor Maier first envisioned over twenty years ago. Professor Maier was a pioneer in this field, and he helped to shape it in a variety of ways. His course materials in international civil litigation were a precursor for much of what was to come later. His insights about the blending of public and private international law helped shape the contours of the field. His articles on forum-selection clauses, extraterritorial discovery, enforcement of foreign judgments, jurisdiction to prescribe, and the impact of private international treaties made important intellectual contributions to the field, and his work is recognized and admired around the globe. His affection for his students and his dedication to them is well-known. I know Hal as both a colleague and a friend; what makes him special is his generosity of spirit and willingness to share—materials, experiences, and ideas. When he introduced me to this field, he also gave me a piece of himself and a long-lasting friendship; and that is what I treasure most of all.

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32. ALI, Proposed Foreign Judgments Act, *supra* note 19, § 11.

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