

1998

# Enforcing Judgments Abroad: The Global Challenge: Introduction

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## Recommended Citation

24 *Brook. J. Int'l L.* 1 (1998)

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# SYMPOSIUM

## ENFORCING JUDGMENTS ABROAD: THE GLOBAL CHALLENGE

### INTRODUCTION

*Maryellen Fullerton\**

Lawyers and judges know that winning a case in court is only one step in the judicial process. Litigation may continue, and indeed become more complicated, as successful parties attempt to enforce their judgments and unsuccessful parties work to resist the enforcement efforts. The difficulties involved in enforcing judgments increase geometrically when the legal systems of two or more countries are implicated. Different substantive legal rules, different jurisdictional principles, and different remedial schemes are just a few of the issues that can arise when a court in one country is asked to enforce a judgment rendered by a court in another country.

In Europe, in the 1970s and 1980s, many of these issues were addressed in the negotiations that eventually resulted in two Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, the Brussels Convention<sup>1</sup> and the Lugano Convention.<sup>2</sup> Both of these multilateral

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1. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 (for the consolidated,

conventions are premised on the idea that uniform rules on the recognition and enforcement of judgments are facilitated by uniform rules on judicial jurisdiction. As a consequence, nationals of many European states can now rely on reciprocal recognition and enforcement of judgments and can also rely on a uniform scheme of jurisdictional rules.

The United States, in contrast, is not a party to any international agreement governing the recognition and enforcement of judgments. Because parties that have won judgments in U.S. courts have frequently experienced difficulty in enforcing their judgments in other countries, the United States proposed that the Hague Conference on Private International Law draft a new multilateral convention addressing the reciprocal recognition and enforcement of civil and commercial judgments. After several meetings to consider the matter, the Hague Conference formally took up that challenge in the fall of 1996. Negotiations began with a two-week session in The Hague in June 1997 and further sessions are scheduled with an anticipated conclusion in the fall of 2000.

Although negotiations are far from concluded, this is an appropriate time to step back and examine the work of the Hague Conference on the proposed judgments convention. This symposium, co-sponsored by the *Brooklyn Journal of International Law* and the Brooklyn Law School Center for the Study of International Business Law, brings together authors who have been active participants in the negotiations and authors who have observed the process from a more detached perspective.

The first paper, by Peter H. Pfund, sets the context for this symposium. As Senior Adviser for Private International Law at the United States Department of State, Mr. Pfund has been intimately involved for years in discussions concerning the desirability of establishing mechanisms for the effective recognition and enforcement of U.S. judgments in other countries. Mr. Pfund describes the various approaches considered over the last few decades, analyzes the weaknesses and

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current text of this convention, see 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413).

2. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, *reprinted in* 28 I.L.M. 620.

strengths of different approaches, and explains why the United States concluded that it would be most fruitful to proceed by working on a new multilateral convention under the auspices of the Hague Conference on Private International Law. Professor Arthur T. von Mehren's paper follows. It, too, provides a framework for all the discussions that follow. Professor von Mehren, a prolific and influential scholar who has served for four decades as a member of the United States Delegation to the Hague Conference for Private International Law, examines the potential design of the multilateral convention under consideration. He explores the wisdom of proceeding via a one-dimensional approach, a convention that addresses only the recognition and enforcement of foreign judgments, or via a two-dimensional approach that would result in a convention that addresses both adjudicatory authority and recognition and enforcement of judgments. Professor von Mehren concludes that a two dimensional convention would allocate advantage more equally between the parties, and he argues forcefully in his paper that the drafters should seek to achieve a flexible and nuanced structure that takes into consideration both jurisdictional bases and enforceability issues.

The third author, Madame Louise Lussier, serves as Counsel to the Public Law Policy Section of the Department of Justice in Canada. As a bilingual federal state with both civil law and common law traditions, Canada has often acted as a bridge between the common law states and the civil law states that are members of the Hague Conference. In these negotiations, too, Canada plays a special role, with its ability to highlight for many of the participating delegations the common goals that the United States, the European Union, and the "rest of the world" share in developing a multilateral instrument on the enforcement of judgments. Madame Lussier is able in her paper to note Canada's approach to the efforts underway at The Hague and to provide a Canadian perspective on the importance of the undertaking and on some of the difficult issues that need to be addressed. The fourth paper, by Professor Paul R. Beaumont of the University of Aberdeen in Scotland, adds another perspective to the Hague Judgments convention project. Professor Beaumont is a professor of European Union law and private international law, a member of the United Kingdom Advisory Committee for the Hague Judgments Convention, and a member of the U.K. delegation to the

Hague Special Commission on the proposed judgments convention. From his vantage point, Professor Beaumont notes that the Scottish legal system is both rooted in the civil law and profoundly influenced by the common law, and suggests that the Scottish viewpoint may be of particular assistance in shedding light on and clarifying misconceptions that those trained in civil law and those trained in common law have about the other legal tradition. Furthermore, he notes that the United Kingdom is simultaneously considering the Hague multilateral judgments convention project and revisions to the Brussels and Lugano Conventions, which have come into effect in the U.K. during the past decade. In light of the synergy that might develop during these various efforts, his paper identifies specific U.K. proposals for reform to the existing conventions and considers the general impact those proposals might have on the shape of the Hague Conference world-wide judgments convention project.

The symposium papers, after this survey of the history and framework of the proposed judgments convention and of the current Canadian and U.K. perspectives on this work, turn to a critical examination of some of the basic assumptions of the Hague Conference work and of some of the negotiating scenarios that are likely to develop there. Professor Friedrich K. Juenger, a prolific author and noted teacher of international and comparative law, roundly criticizes the search for a multilateral judgments convention under the auspices of the Hague Conference on Private International Law. He argues that in reality few United States litigants have difficulty in enforcing judgments against foreign defendants in the United States and that those few who do can sue abroad. Similarly, he contends that in reality few Americans with assets abroad are subject to exorbitant jurisdictional assertions. Weighing the difficulties of life without a judgments convention against the difficulties of crafting a convention that would fit would both European and American jurisdictional notions, Professor Juenger concludes that the obstacles to success in the Hague are insurmountable. Professor Ronald A. Brand disagrees with Professor Juenger and, though he does not expect the negotiations at the Hague to be easy, his paper provides some support for cautious optimism. The director of the Pittsburgh Center for International Legal Education and a member of the United States Delegation to the Special Commission of the Hague Conference, Pro-

fessor Brand focuses on jurisdictional issues that arise in tort cases and carefully examines the ways in which they are analyzed by courts in the United States and in Europe. He points out that the judicial systems on the opposite sides of the Atlantic Ocean adopt quite different rationales but that there is a significant convergence in terms of results. Thus, there may be more common ground in the jurisdictional thickets than has been realized.

Dean Patrick J. Borchers of Albany Law School, a noted scholar of conflicts of laws, writes that it will be difficult, but not impossible, to negotiate a judgments convention acceptable to the United States and to other members of the Hague Conference. He identifies some of the thorniest issues, such as the extremely unpopular U.S. remedial schemes that include statutory multiple damages and tort punitive damages, and sketches out possible ways to address them. While he acknowledges that the likelihood of negotiating a satisfactory judgments convention is small, he believes that the potential benefits of such a convention are so enormous that this Hague Conference project is well worth the energy expended on it. In the final paper of the symposium, Professor Russell Weintraub of the University of Texas School of Law takes a pragmatic view. Encyclopedic in scope, his paper canvasses the issues that need to be resolved, the issues that will be extremely difficult to resolve, and the issues on which the United States should not compromise. This paper demonstrates why Professor Weintraub has a reputation as one of the scholars in the fields of international litigation and conflicts of laws who truly understands both the legal theory and the real-life problems that lawyers face in practice.

This timely symposium brings together many of the experts and central figures in the current efforts to address the challenge the global economy has triggered in terms of enforcing judgments rendered abroad. These efforts, whether or not successful in the Nineteenth Session of the Hague Conference in October 2000, are significant. They are an important step on the road to a more integrated world-wide legal system. As the global economy expands and increasingly renders international boundaries obsolete, there will be an increased desire for legal mechanisms that render international boundaries obsolete when they impede the access to justice for litigants. The symposium authors agree that improving fairness to litigants is a

worthy goal, but they disagree about almost everything else: the wisdom of the Hague Conference proposal and venue, the obstacles that confront the delegations to the Special Commission at the Hague, the prospects for success, and the price that the United States should be willing to pay for a multilateral agreement. The *Brooklyn Journal of International Law* and the Brooklyn Law School Center for the Study of International Business Law are proud to present these divergent views and hope that they provoke discussion and commentary among members of the business and legal communities in the United States and around the world.