

every reason to be nervous about whether two very different organizations with different procedures, different systems, could bring the thing through on the same schedule and come to such substantial, really overwhelming agreement, and that's really because the Reporters, all four of them there, have been very flexible, very patient, willing to listen, willing to learn, willing to adjust, so just to repeat Geoff's last words, this is a model for work we have to do. It is going to remain very difficult to do it, but we have to do it, and I just hope that the Reporters who come along doing it in the future will have the same characteristics of, well, character and intelligence and knowledge of their field that the Reporters here have had. We should be very happy about getting this to this moment.

**President Traynor:** Thank you, Bennett.

**Mr. Bennett Boskey (D.C.):** In making what is called the usual motion, I would like to preface it by saying that I remember when this project started, and it took a great deal of imagination to think that it was going to get anywhere, and it is a very great accomplishment for the Institute and a compliment to these Reporters that we've got a project that we're proud of, that maybe is going to do some good in reforming procedural law on a global scale. We don't know for sure that it will, but we hope so, and we think we are making our contribution.

Subject to the usual editorial prerogative and subject to the discussion we have had here today, I move that the Institute approve the Principles and the accompanying Comment in this Proposed Final Draft that we have had before us and accept at face value the Reporters' assurance that the many useful comments today are all going to be seriously considered and some of them will even be adopted. (*Laughter*)

**President Traynor:** The Boskey motion has been moved and seconded. Is there discussion on the motion? We appear to be ready for the question. All those in favor please say aye.

(*There was a chorus of ayes.*)

Those opposed say no.

The motion is carried, it sounds unanimously, and with the thanks of the Institute. (*Applause*)

We will take a brief recess until 4:00, when we will start promptly with International Jurisdiction and Judgments.

(*At 3:50 p.m., a recess was taken until 4:00 p.m. the same day.*)

**Second Vice President Warren:** We're going to start on the International Jurisdiction and Judgments Project. Andy Lowenfeld had a family emergency, so he can't be with us this afternoon. We hope that he will be able to join us tomorrow. But we will go forward with our discussion under

the very able leadership of Linda Silberman, and so I am going to start by calling on her to give a few opening remarks.

**Director Liebman:** No, you're going to call on me first.

**Vice President Warren:** Oh, I'm going to call on Director Liebman to give a few opening remarks.

**Director Liebman:** So this work, which all of you remember began when the United States State Department asked us to work on implementing legislation in the expectation of an agreement at The Hague, we then decided to continue and go forward when the Hague process did not come to a speedy solution and agreement. It has now been a project that has educated a lot of us and been very productive, as everybody has learned a lot about all these issues. We are sorry Andy couldn't be here today, but we hope he will be here tomorrow. In any case, Linda can do the work of 10, much less two is easy for her.

There are two things I want to say. One, when we come into a meeting like this, usually we up here know whether we're going to finish a project this year or not; sometimes yes, sometimes no. We certainly expected that Transnational Civil Procedure would be able to finish, and it was a good discussion, and it is finished.

In this case, the situation is unclear. In other words, if things go quite smoothly and everything seems to be fitting together, we may well tomorrow ask for final approval on this project.

Another possibility is that the tenor of the discussion, the number of issues raised, the amount of work still to be done gives us by tomorrow the conclusion that we should look towards final approval next year, not this year. So at the moment, consider it uncertain.

The second thing is that for sure this will not finish this afternoon with 55 minutes left. Tomorrow, because the ALI is doing so much law reform with so many different projects, we are in a split-session universe, which is not ideal. We would always rather have only one ALI project being discussed at a time so that any members who want to can attend every project if they want, but we can't do that tomorrow. Starting tomorrow morning, Wills and then Restitution will be in this room, and this project will be downstairs in, I think it is called the Colonial Room, but anyway, immediately downstairs. So all of you interested in International Jurisdiction and Judgments, please don't get tricked into Wills or Restitution here tomorrow; find the room downstairs.

The Program says it is upstairs, but it is downstairs. It is one level below this, okay? Downstairs. And come there tomorrow.

The other thing I want to say is this. At least based on motions that were sent in ahead of time, there are two important votes to be held on this project, almost certainly both of them tomorrow, not today. One is the

motion to delete or basically say no to the reciprocity provision, § 7, and Linda will explain the order of proceeding, but it is an order such that the reciprocity matter should come up at a reasonable hour tomorrow morning, so expect to vote yes or no on that.

As you know, last year we took a tentative vote, and there was a majority in the room for the reciprocity provision, which is why you still see it in the draft, but the matter is certainly open such that Mr. Hulbert's motion is perfectly in order to come to a different conclusion than was the majority conclusion last year.

The second thing is that there is the motion by Mr. Struve and Mr. Burnett, which I could regard as a motion to cease, or to table, or to end, or to say no to the project, at least in the sense of the ALI not recommending this statute to the Congress of the United States. There would still be an academic work that would be of value or law-reform work that would be of value as people think of enforcement, jurisdiction of judgments enforcement, but it would be to say no to the project in the structure it is now in.

That, I think, should come up whenever we reach the end tomorrow — mid-morning or late morning, whenever that is — and is really equivalent to the motion whether to approve the project. It is a motion ahead of that that would say no to the project in its current form.

So that is the way we will proceed. I'm sure Linda will have more to say about the exact order in which we will take things up.

**Vice President Warren:** Thank you. We will now start with Professor Silberman, who is both going to make opening remarks and then tell us the structure of how she would like to proceed.

**Professor Linda J. Silberman (N.Y.):** Okay. Thank you very much. Just let me say that Andy is very sorry he is not here today. His wife is in the hospital, and he will try very hard to be here tomorrow, and he says I can go ahead without him. There may have been some doubt about that, but he is okay.

This Tentative Draft is now our third submission to this group, and at the 2002 Annual Meeting we were before you with a Discussion Draft only, and then last year we came with a full first Tentative Draft, and, as Lance indicated, because of time constraints we got only through §§ 1 through 7.

We had comments from this group, both orally at the Meeting and then various written submissions, on §§ 1 to 7, and also some people gave us written comments about §§ 8 through 12, and then we had further meetings with the Council in December and with the Advisers and Members Consultative Group in February, and those meetings actually did look at §§ 8 through 12, and they looked at §§ 8 through 12 as you had them before you last year. We were given very helpful and constructive comments, and

then revised §§ 8 through 12 several times, so that what you have now, at least in §§ 8 through 12, are quite different than what you saw before. So for that reason, what we would like to do is start today with § 8 and go through to the end, and then tomorrow we will start with § 7, which is on reciprocity, or when we get through with these last provisions.

The one other thing I want to add about § 7 is that that has been changed as well. We had a number of comments — both in this group last year and particularly from the Advisers — and some suggestions that we change the burden-of-proof issue on the question of reciprocity. So between now and tomorrow, if you have a chance you might look again at § 7 and those various alternatives, so that, again, is new.

I just want to say another word about background for those of you who may be looking at this project for the first time. It is true that the catalysts for this project were the negotiations that were conducted at The Hague looking to an international Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments, but it was always contemplated that, if those negotiations failed, the Institute would proceed with a proposed draft of a federal statute, and the idea was that that statute would provide for national and uniform law for recognition of foreign-country judgments in the United States. As the Hague negotiations stalled, this project of the Institute has gone forward.

Now I should say a word, that the negotiations at The Hague are back on track in a somewhat reconfigured form. That is, at The Hague they are still considering an international convention dealing with jurisdiction and judgments relating to choice-of-forum clauses in the business-to-business context, and if those negotiations are successful, and I think they seem at least at the moment headed on a more favorable track, there will have to be some minor tinkering with certain provisions of this draft. But on the whole, we think that the approach of this project, which is to create a national federal law on recognition and enforcement of judgments, is consistent with the efforts at The Hague and that this project is, in effect, a complement to those negotiations.

So I just wanted to put that in the larger context, and now we can go, if you will, to § 8.

**Mr. Bennett Boskey (D.C.):** Are you open to an inquiry? Is it your intention never to get back to § 1?

**Professor Silberman:** No, no, we will get back to §§ 1 through 6.

**Mr. Boskey:** Okay.

**Professor Silberman:** That is, what I want to do is go through §§ 8 through 13, then § 7, and then §§ 1 through 6. Okay?

**Vice President Warren:** We are ready to start with any discussion about § 8. The speaker at microphone 6.

**Mr. Steven S. Rosenthal (D.C.):** This is an inquiry to the Reporters. My question with respect to § 8 is, what evidence do the Reporters have that the states vis-à-vis the federal government have been inhospitable to foreign judgments? It seems to me that, if there is a rationale for § 8(a), it has to be based on a factual record that the states are not going to respect a national law with respect to foreign judgments, and I'm curious, genuinely curious, what the factual basis for such an assumption is.

**Professor Silberman:** Well, I don't think that is the assumption. In some sense, many of the cases that are already in the federal courts are there by way of diversity, so I wouldn't say that it was necessarily a view that the state courts would not be hospitable.

I do think there is a concern that, if you want a national law, both the state and the federal courts should be involved in that venture, and that's why we have provided for concurrent jurisdiction. It seems to me like many cases in which you have a federal law the normal rule is to have concurrent jurisdiction. There are exceptions to that. Sometimes it is exclusive jurisdiction in some circumstances, but, by and large, when federal law is involved, we have tended to give concurrent jurisdiction to the state and federal courts.

I think it would be somewhat strange, actually, to have a uniform national law and not to recognize the right of a party to have that law developed in the federal courts.

**Mr. Rosenthal:** Is the Reporter aware that, for almost the first 100 years of the Republic, there was no federal-question jurisdiction in the federal courts and that all federal statutes were enforced through the state courts?

**Professor Silberman:** Yes, absolutely, but that was changed in 1875, and it seems to me there is no reason to go back. (*Laughter*)

**Mr. Sheldon H. Elsen (N.Y.):** Putting aside the theory of why the state courts might not be appropriate and the hostility question, which is really not the issue, these are not the things that the state courts are accustomed to deal with. The chaos and confusion in state courts involving questions of foreign law, how you prove foreign law, what you do with foreign judgments is the experience of anybody who is involved with any of these cases, and I don't know how you put that into theory, but in practice it would be a hell of a lot better if they stayed in the federal courts.

**Professor John B. Oakley (Cal.):** In a brief conversation earlier today with the Reporter, I understood that there is recognition that, after approval in principle, there is some work to be done in § 8 to achieve some modest consistency with the work on removal and supplemental jurisdiction that was approved by the Institute and published just a couple of months ago in the Federal Judicial Code Revision Project.

Lance said earlier today that there had been a glitch in the distribution of this draft, and I am one of those who did not have a chance to read this material until I arrived at the Meeting. Let me just say that I have some concerns, maybe even grave concerns, if we were to put this to a vote tomorrow, because I think there are a number of issues of varying seriousness. I have just made a short list.

This is the most minor of points, but following the language of the Arbitration Act and our current removal statutes, the draft provides for removal to the district and division of the place where the action is pending. Divisional venue was repealed by Congress in 1990. We come out in our removal provision just adopted of the Federal Judicial Code Revision Project that all those references to particular divisions should be dropped, so certainly that should be cleaned up.

More importantly, the breadth of removal provided here is staggering. The Institute, in its general work on Title 28, adopted the idea that jurisdiction attaches claim by claim, but removal is action-specific, and that provides for quite a bit of tension in trying to reconcile claim-specific supplemental jurisdiction and action-specific removal, but here a single claim — not only a single claim — but either party can remove the action.

It is true that general federal-question jurisdiction was introduced in 1875. In the Act of March 3, 1875, it provided for removal by either party based on a defense, including a federal defense, but that was removed in 1887. So if we're going to adopt a century of the accumulated wisdom, this is far too broad a removal provision.

It also provides for staggering potential for disaggregation of actions. After a single claim is a predicate for removal, there is provision for essentially standardless remand of all or part of the action.

We have one existing removal statute that has a similar provision, § 1441(c). It is the most problematic, the least worthy of replication of any provision of current law.

Finally, this would bar appellate review —

**Vice President Warren:** I'm going to have to ask you to just finish up, please.

**Professor Oakley:** — a position that the Institute has just rejected as unwarranted in its general removal standards.

**Professor Silberman:** Let me just briefly respond. I did talk to John earlier, and I think, first of all, it is true that we have to bring this into line with the other project, or, if not, because there may be some reasons that you would have specialized jurisdictional and removal provisions for this project, then certainly with an acknowledgment of why we have done that.

With respect to the removal on the basis of a defense, as we say in the Comment, we used the Arbitration Act and the New York Convention as a kind of model here to decide that this was one of those kinds of issues where removal based on a federal defense was appropriate.

I agree with John that the broad removal provisions and then the remand provisions are a somewhat different way of going about this proposal, and certainly this project can go ahead with some refinements to the jurisdiction and the removal provisions.

I will say that this was put to a vote in the Advisers group, and the Advisers suggested that we go ahead; they liked the idea of the broader removal provision. Because those removal provisions are as broad as they are, we thought it necessary to have the kind of remand provisions that are there.

**Professor Oakley:** Yes, I don't express objections in policy. I might have them, but I have tried to highlight those areas that are so different from what the Institute has endorsed that there is sort of a presumptive burden of justification that I don't think has yet been met but certainly can be met.

**Professor Silberman:** Right, I take that point.

**Professor Stephen B. Burbank (Pa.):** One aspect of that, I think, Linda, may be that you at least want to alert the district court to the fact that its discretion will have to be exercised in favor of remand, where, as may happen under a removal provision as broad as this, it would violate Article III for the federal court to entertain the entire case.

**Mr. Michael Marks Cohen (N.Y.):** I may have forgotten, but I don't remember that we discussed in the Advisers removal by either party, and I don't understand why that provision is here, why it was found necessary to have that.

As I recall, what we were talking about was that a defendant could remove if a foreign judgment was raised as a defense to a complaint; plaintiff could remove if a foreign judgment was raised as a defense to a counterclaim, but that's not the same thing as either party having the right to remove.

The second thing is that I think, "after the close of the pleadings," looking at Comment c, is not a graceful way of putting it, because pleadings get amended, and I think the sense of what we were groping for was that somebody ought to have the opportunity to remove when the defense was first raised, not at any particular time. There is no reason to give the plaintiff 180 days to remove and to give the defendant only 30 days to remove, or vice versa. I think that needs to be changed.

**Professor Silberman:** The Arbitration Act, of course, has a longer time to allow for the removal, and we thought that was not desirable. So in

some sense we agree with you that there should be a shorter period of time. We were worried about the fact that here you may have foreign parties and so on, and so that's why we chose the close of pleadings.

I do believe that we talked about whether just the defendant or both parties should have the right of removal, and again, the sentiment of the Advisers, at least as I recall it, was to leave in the notion of allowing either party to remove.

The argument is that, if either party wants a federal judgment, maybe that is the wrong word here, but wants federal-court consideration of the issue of recognition, that either of them ought to have the ability to have it, that this is a federal law and that the federal courts ought to be able to weigh in on this subject.

Again, it is different, and, if it is thought that those provisions of removal are too broad, I don't think either of the Reporters have an objection to narrowing them back.

**Mr. Cohen:** I think I've got your point, then. I think what you are saying is that the plaintiff won't know that the defendant is raising an issue about the foreign judgment till the defendant raises it in the answer, and then, at that point, both the plaintiff and the defendant should have a choice. All right, I think I've got that.

The other thing, just on the appeal, my recollection about the appeal was that the concern was that, if the remand was because the court decided the judgment was invalid and not enforceable, if you didn't allow an appeal that decision would be insulated from appeal. So what you have done I agree with, it enables that issue to have appellate review.

**Professor Silberman:** Yes, that was exactly the concern. We had not had that provision in the earlier draft, and all of a sudden the question was put, how are you going to have a state court now reviewing the federal judgment. So that is why that provision is there.

**Mr. Cohen:** All right.

**Vice President Warren:** Do we have any additional comments on § 8?

**Mr. George W. Liebmann (Md.):** I share the concern with a very broad removal statute based on federal defenses that, with the expansion of multinational corporations, it becomes rather easy for any such corporation to invoke some unfamiliar judgment somewhere as a possible defense to an essentially local claim, whether it is a tort claim or a commercial claim, and to then have removal and jurisdictional controversies on motions to remand.

The threshold of any case involving such a corporation is to make incursions on the ordinary administration of justice in this country that I don't think you intend, because there is a gamesmanship that will invari-

ably operate once you provide removal on the basis of this defense, and your strategy is one of an extremely broad removal statute followed by motions to remand. The whole thing then becomes discretionary, and the tendency is to try to remove in every case where you can conjure up a colorable argument for removal, which I don't think is a good thing for the efficient operation of the justice system or for a regime in which most ordinary cases in this country are still adjudicated in the state courts.

**Professor David J. Aronofsky (Mont.):** I've got a nonsubstantive question. Has any analysis been done of what kind of increased workload impact this could have on federal courts? I raise it because I am in a state that has a bad case of docket congestion all over our federal court system within the federal district of Montana, and I don't see our judges being particularly eager to expand jurisdiction right now. I don't know if we are unique or whether this is a problem in the federal district courts around the country, but are there data that you have been able to find about what this could do to the workload?

**Professor Silberman:** No, we have not looked at that. As we say in the Comments, the concern of overload on the federal courts was something we were worried about, and it is the reason that we have included these remand provisions. As I said, at an earlier date we had these provisions in, if you will, as alternatives, because this project, as I said, I think would work perfectly well with a narrower form of federal-court adjudication.

In response to the very first question that was asked, I said this did not turn on hostility to the state courts. That is, there is concurrent jurisdiction. We thought both the state and federal courts were players in the development of a national and uniform standard. At the same time, however, we thought it desirable to have the federal courts involved in developing that federal standard, and so the choice was actually put to a vote in the Advisers, and this is the way we decided it.

I am really somewhat agnostic about the question of how much federal-court jurisdiction is necessary here. You have heard, from Mr. Elsen and others, concerns about what happens in the state courts and arguably the comparative expertise of the federal courts in international commercial litigation. That may have fueled the decision to go this way.

**Professor John B. Oakley (Cal.):** Congress enacted, in November of 2002, the Multiparty, Multiforum Trial Jurisdiction Act, which used Article III's capacity to grant federal courts jurisdiction based on minimal diversity to provide extraordinarily broad removal by any plaintiff or any defendant in certain mass-tort actions involving 75 or more wrongful deaths at a single location. I didn't think it showed much respect for state courts, and the Conference of Chief Justices didn't either. It was enacted by slipping it into a conference committee report after no hearings in that session.

Many of us have feared that a similar intrusion into state courts would happen with the passage of something that has been pending for several years as the Class Action Fairness Act. I rise to ask whether it is a reasonable concern that this could be sort of a Trojan horse for the Class Action Fairness Act. As I read § 8, if a consumer class action is brought against a national manufacturer, and a state court is still able to hear it because the Class Action Fairness Act has yet to be passed, the manufacturer need only uncover a judgment that might or might not be preclusive of liability against any member of the class, and bang, it is in federal court, subject only to whether the district court feels on the day that state courts do a good job or not litigating class actions. Is that a valid concern?

**Professor Silberman:** We have our own problems with this statute. I can't worry about the problems of the Class Action Fairness Act at the moment, though it certainly suggests that there are other analogies. We and the Advisers thought that this was the right model for foreign judgments, so I am not trying to solve the Class Action Fairness Act problem or the removal provisions there. As I said, we are looking to find the right balance for dealing with the recognition and enforcement of foreign judgments.

**Professor Oakley:** I understand. So I am correct that, in group litigation, this extraordinarily broad language about "a partial or complete defense, set-off, counterclaim," or other claim [§ 8(c)] might well allow the entire class action to be removed based on the defendant's assertion of a foreign judgment as a defense against a claim by some member of the class.

**Professor Silberman:** Oh, I see. I'm sorry, I misunderstood your question. If the Class Action Fairness Act is approved, they won't have to use this as a stalking horse, they will be able to do that in any event.

**Professor Oakley:** Right. I'm concerned that, if the Act is not enacted and this were, it would have the same effect.

**Professor Silberman:** Well, let's see what happens there.

**Mr. Houston Putnam Lowry (Ct.):** At the risk of being whimsical, since we have talked about the need to promote uniformity, perhaps we could do a removal provision to the Court of International Trade, which is a true Article III court. It would concentrate everything nationally in one court. Their process runs nationally so they would develop expertise, and I understand their docket load is not particularly crushing at the moment, so that might be a possible way to proceed.

**Professor Henry D. Gabriel (La.):** Thank you. I am a bit concerned about much of § 8, because what we are talking about in this draft is enforcement of a foreign judgment, we are not talking about creating a judgment, so the role of the court would be fairly limited anyway. So the arguments that federal courts have more expertise than state courts have been very unconvincing in this context, because we are not trying cases,

we are enforcing a judgment from some other jurisdiction that we deem to be valid.

Given that, the problem I have with the removal and the remand and everything is that all of a sudden we are creating levels of procedural complexity that I think we don't want in here. What we want is a simple streamlined process where a valid judgment from another jurisdiction can come in and be enforced in one of our courts, and to have all this removal process seems to me now we're going to have all sorts of procedural gamesmanship and stuff at this end that seems to me totally irrelevant for the real goal we want, which is a nice, streamlined, reasonable process. Thank you.

**Professor Silberman:** Well, just to say that, on either enforcement or recognition, there are a set of important issues that get raised as defenses here: the fairness of the procedures, the validity of a forum-selection clause, so on and so forth. I grant you that they are procedural issues in the context of the judgment, but they are important issues that have to be decided by a court, and there is a concern, I think, that you get federal consideration of that national standard and that it be interpreted in an appropriate way.

**Professor Gabriel:** Linda, I appreciate that. I still think that we can get it right in Claiborne Parish, Louisiana.

**Vice President Warren:** Are there any additional comments on § 8?

**Professor Douglas Laycock (Tex.):** I just want to balance the tone of this conversation a little bit. I don't think it is at all surprising that, if you enact a federal statute that creates a cause of action to enforce foreign judgments that may touch on international affairs, may touch on foreign commerce, there would be federal jurisdiction over those provisions, over those causes of action. I think some technical issues have been raised that you need to take a look at, but it would be bizarre to enact this statute and leave exclusive jurisdiction in the state courts. The thrust of § 8 is right, and you should not be dissuaded from maintaining it. I would be astonished if the opinion in the body is as lopsided as the opinion among those that have chosen to speak.

**Vice President Warren:** Any additional comments on § 8? (*Pause*) Hearing none, how about if we move to § 9?

**Professor Silberman:** All right, I want to talk generally about §§ 9 and 10 to some extent together, and then I will pick them up separately.

Sections 9 and 10 deal with two methods for the enforcement of foreign judgments. The first, which § 9 deals with directly, is an ordinary action to enforce the judgment, and § 10 deals with a streamlined procedure, a registration procedure for certain kinds of judgments, which basically are for sums of money, not other kinds of judgments. Section 10 excludes judgments rendered by default. Section 9 also deals with the problem of what

happens when there are multiple actions for enforcement of the judgment in different states. We set out a system of priorities so that you have basically one determination as to whether or not this is a valid foreign judgment, which would then be binding in all courts. That is a change in the result that you may have now, which is to have some multiple actions under the laws of the different states. There is some sense that maybe the Uniform Act is not altogether uniform, and, as many of you know, we have such differences as reciprocity in the different states. So that's really the thrust of § 9. Then I'll get to § 10, which deals with the method of registration.

**Vice President Warren:** Would anyone like to comment on § 9?

**Mr. Peter D. Trooboff (D.C.):** Linda, my question goes to this concept of the “main enforcement action” and the “main enforcement court” [§ 9(d)(ii)]. I can see some reason for trying to say that, when the defendant has its domicile or its principal establishment in a given state, you try to center the decisionmaking there. That much order seems right; but I think it is a bridge too far when you then go on to say, well, if you don't have a domicile or principal establishment, let's look at where the judgment debtor's principal assets in the United States are located. That, I think, might not work.

In the first place, we are dealing with a judgment for a certain amount of money. If there is enough money in any one jurisdiction or it is spread out for different reasons, there are lots of reasons why you would bring actions in multiple places, and yes, it will be a little disorderly if we don't have this additional rule. But I suggest, in the spirit of the point that was made a little earlier about complexity, that this is just trying to put too much order on things and trying to centralize the decisionmaking a little more than may be appropriate. Some may object to the concept as a whole, but even if they don't, I think this is a bit more than we may need.

**Professor Silberman:** Okay, I take that point, Peter. I think what we were somewhat worried about was an attempt, for example, to go into a court where there were very limited assets and then trying to get the sort of binding judgment there in a court that one might worry about. This was really an attempt to try to deal with some of the strategic gaming that goes on. You may be right that the game isn't worth the candle, but that was the concern.

**Mr. Trooboff:** And I share some of your Co-Reporter's notions of ordering the universe, but there may just be some disorder left after this project is completed, and I think we are going to have to live with that, and I must say, in this instance, it seems to me we are trying to do too much.

**Mr. Guy Miller Struve (N.Y.):** I have a concern about subsection (d)(ii) of § 9, at the top of page 101, that to some extent goes in the opposite direction from the concern that Peter Trooboff just expressed, and it really is focused particularly on individuals.

The way that you have phrased subsection (d)(ii) it is really discretionary with the judgment creditor whether or not they even sue where the individual is domiciled. It does seem to me that, at least in the case of individuals, if they have a domicile in the United States that should not only be the main enforcement action if the creditor feels like suing there, but the creditor should have to sue there, and not, for example, be able to sue somebody, whose domicile is in San Francisco, in Boston because they happen to have a Fidelity account there.

**Professor Silberman:** Well, I think we were concerned, Guy, that the party may want to sue where the money is, that is, where the assets are, particularly where the main assets are, and we wanted to leave the judgment creditor with the choice. It seemed odd to us to tell him he couldn't go to the state where the assets are and where he might be able to get some kind of security or something to protect those assets, so that's the reason for including that.

**Mr. Struve:** Linda, I think there is a solution that meets both of our concerns. I was not suggesting that the only place that the individual can be sued be the place of his or her domicile. If there is some principal asset that you want to tie up, you can sue there simultaneously; you can even sue there the day before and get an attachment. What I'm saying is, you should also have to sue the individual at his or her domicile. Give them a chance to defend in a place where they live.

I bring you back to this idea about the lady who lives in San Francisco. She is unlucky enough to have a Polish judgment against her. She has assets in New York, in Boston, you name it. I have nothing against letting them sue in New York and Boston. I do think they should also have to sue her in San Francisco and let her defend there.

**Professor Silberman:** I'm not sure I want to encourage multiple actions. There doesn't seem to me any reason why the judgment creditor should have to sue her in both places. If the assets are in Boston and the creditors want to go after them, that is what they can do now. It seems to me perfectly appropriate to say, "Look, I want to get my money, and I'm going to sue where the assets are, and that's the end of the matter."

**Mr. Struve:** This comes back to the difference that you yourself have pointed out many times. That is perfectly good reasoning in the case of a domestic judgment, which is entitled to full faith and credit, with very narrow exceptions, and it is presumptively valid.

These foreign judgments are not in that same category. There are a lot more defenses that can legitimately be asserted. All I'm suggesting is that the debtors should be given that chance. In most cases, creditors are going to be thinking about suing in multiple jurisdictions if there are multiple accounts. All this does is add one jurisdiction and some element of fairness.

**Professor Patricia Brumfield Fry (Mo.):** This may be a relatively mechanical question, but in your § 9(e), on page 101, you say that “[t]he court may . . . require the person resisting enforcement to post security,” and yet nowhere here in the black letter or in the Comment do you describe what it is security for. Is it the costs of defending enforcement, is it security against payment of the judgment, is it security against dissipation of assets? Something needs to be said about what this is.

**Professor Silberman:** Okay.

**Mr. Alan B. Morrison (D.C.):** Going back to this venue point, I think you should try to eliminate all this complexity and mandatory shall sue here, shall sue there. Often you don’t know what it is. I suggest that you put in a transfer provision. I don’t think § 1404(a) will work on its own because it doesn’t relate to presence of assets, but if you make the assets a basis for venue, then it incorporates the “might have been brought,” and I think you can eliminate a lot of this complexity and leave it up to the trial judge to move this case around.

**Mr. Sheldon H. Elsen (N.Y.):** I would like to question the point that Guy Struve made. What you have here is a poor creditor who has a judgment and who has to retain American counsel somewhere. So the creditor comes here, and finds the assets in Boston. The creditor retains a Boston lawyer, and he goes after the assets, and the question that has to be adjudicated has nothing to do with the testimony of the defendant, it has to do with whether there is reciprocity in foreign judgments and that type of technical issue. It could be litigated in any jurisdiction in the United States, and why in the world a creditor should have to incur a second lawyer’s expenses and have to sue them in Montana, which I gather is a good place to sue these days, or maybe not a good place to sue, why they should have to do that twice is beyond me. I think you’ve got it right.

**Vice President Warren:** Are there additional comments on § 9? Anyone have another comment on § 9?

In that case, Professor Silberman, would you like to make comments about § 10?

**Professor Silberman:** All right, § 10 is this procedure that we have thought about for foreign-country judgments, which is a registration procedure, which in some sense takes its concept from 28 U.S.C. § 1963, which is limited to domestic judgments and to state judgments, and also the Uniform Enforcement of Foreign Judgments Act, not the recognition Act that we have been talking about but the enforcement Act, another Uniform Act passed in 1962.

You will see, and this is a change from last time, that there are brackets in § 10(a) that would limit the use of the registration procedure to those judgments coming from a country that has entered into an agreement with

the United States for reciprocal recognition of judgments under § 7(e). Some of you will recall that § 7, which deals with reciprocity, includes a provision that authorizes the Secretary of State to enter into these agreements with other states.

In some sense, that is tied to reciprocity because we have viewed reciprocity and these agreements as both carrots and sticks, i.e., making recognition turn on reciprocity, at the same time trying to encourage countries to enter into agreements and to enforce foreign judgments in other countries. So we have put this link in brackets for your consideration. The registration procedure is limited to money judgments, and it is not appropriate, we thought, for default judgments.

**Professor Stephen B. Burbank (Pa.):** Linda, maybe you answered this when we spent that day talking about this, but I can't remember the answer. I'm looking at the last four lines of § 10(e), where you have this "unless within that time the judgment debtor files with the clerk a motion addressed to the court to vacate the judgment or the registration." Which judgment is going to be vacated? The foreign judgment? And how could an American court vacate a foreign judgment?

**Professor Silberman:** Well, that is the motion that one makes if one has defenses, that is, the registration is designed to deal with those situations where basically the defendant hasn't paid, and there are not really, in the end, going to be serious defenses to the foreign judgment. It may be that, at that point, that language should be "to vacate the registration."

**Professor Burbank:** I think it should be "to vacate the registration." Just strike "the judgment or."

**Professor Silberman:** I think that's probably just a glitch because, if you look at subsection (f), it says, "motion to vacate the registration. . . ."

**Professor Burbank:** Yes. And in the top half of the next page, obviously a word is missing, namely "enforcement"; "in which registration or enforcement has been sought," I guess. There is a word missing there. See, in the second line?

**Professor Silberman:** Of subsection (f), motion to vacate?

**Professor Burbank:** On the top of page 111, the second line.

**Professor Silberman:** All right, in which registration — yes.

**Professor Burbank:** Okay. But substantively is it clear that the basis for the motion to vacate the registration in Court 1 would automatically be applicable in any other covered action? And if not, you might want to add language, "and no execution shall issue in any court while the motion to vacate is pending," language that would say, "in any court to the proceedings in which the same ground for vacation" — you see my point?

**Professor Silberman:** Yes, I do.

**Professor Burbank:** Because there are particular defenses that might be applicable in one action —

**Professor Silberman:** Yes.

**Professor Burbank:** — and not in another.

**Professor Silberman:** Not in another, yes.

**Professor Burbank:** And I don't think it ought to be automatic.

**Professor Silberman:** We have provisions for notice to various courts. Again, we are dealing with this potential problem of multiple registrations because the defendant has assets located in numerous states, and I will take a look at that.

**Professor Burbank:** Thank you.

**Mr. Guy Miller Struve (N.Y.):** I would like to urge you, radical as it might seem, either to get rid of § 10 altogether or at the very least take out the brackets around the reciprocity provision, and the reason why I would like to urge that is very simple.

This is very powerful stuff. This is not like § 9, where all you are saying is that they can bring an enforcement action and then a judge will look at it; this is you have registered and now it is a judgment. It is a judicial lien. It has the same effect as a judgment that was actually gotten in the United States, and take this thought experiment because, unless we do one of the two things I have suggested, this is a perfectly permissible application of § 10.

I have a hundred-million-dollar judgment purportedly issued by a court in North Korea. I pick North Korea as emblematic of a state that is quite unlikely to ever have their judgments enforced under the criteria of this Act. And yet I could register that hundred-million-dollar North Korean judgment in every one of the 50 states plus the District of Columbia, and it would be a judicial lien under § 10 the way it is now written. To me, that says that either we should get rid of § 10 altogether — this is something that is not present in any comparable statute — or, at the very least, it should be limited by this reciprocity provision. I say that without regard to how the house comes out on Dick Hulbert's motion to get rid of § 7 because, even if you decide that you ought to get rid of reciprocity as a general requirement, there are good reasons to make this particular atomic bomb available only to those states who have been able to negotiate satisfactory agreements with the State Department and therefore are presumptively going to get enforced at the end of the day.

**Professor Silberman:** Yes, Guy, I think we have talked about this before. I think it depends on where you sit in terms of what kinds of rules you want. That is, if you think of the judgment creditor who has got a judgment and the defendant as hiding assets, then you want a very strong enforce-

ment mechanism. If you take the situation you pose, which is somebody who has gotten a questionable foreign-country judgment and then trying to come and enforce it in the United States, you worry about these kinds of provisions.

I should say, though, that there are some states that have interpreted their Uniform Act to allow registration of foreign judgments, and we have talked about those in the Comments and the Reporters' Notes.

The reason the brackets are there is because tying this registration provision to these agreements with other countries might make this a very, very attractive incentive for other countries to enter into agreements with the United States. It is with that in mind that we have added the brackets for the consideration of this body.

**Mr. Struve:** I know my time has expired, but can I take two sentences

**Professor Silberman:** Of course.

**Mr. Struve:** — to address the philosophical question that Linda has put her finger on, which is a very important one? I don't think we should think of this as either a pro-creditor or a pro-debtor statute, we should think of it as a balanced statute, and it is particularly in that context of balance that one worries about § 10 in its present unlimited form.

**Professor Silberman:** I agree with that.

**Mr. Michael Marks Cohen (N.Y.):** First, I want to say just my gut feeling is that registration is not a good thing in this context, so I share Guy's concern about it. On the other hand, I do see where the Reporters are coming from on it, but I feel it is much too easy to misuse the system the way that this has been established, and I would just as soon get rid of it.

However, if we are going to keep it, in § 9(b) it says, "An action to recognize or enforce a judgment under this Act may be brought in the appropriate state or federal court . . . where the judgment debtor is subject to personal jurisdiction. . . ."

Madam Reporter, does that mean that you could register the judgment in a state where the judgment debtor is subject to personal jurisdiction?

**Professor Silberman:** No. The provision of § 10, and we thought about this, says it can be registered in accordance with this section in any United States court for a district in which the debtor has property.

I should just underscore, this is a provision for the federal courts only. This is one of those provisions that applies to federal courts and not to state courts. The notion for registration was that you get a lien, as Guy says, on the property, and that's why the party may choose to use the registration provision.

**Mr. Cohen:** I have the same question for you that an earlier commentator made. I don't understand what the security on page 112, in § 10(i), is intended to secure. What we are talking about here is someone who has registered a judgment, the trial court has vacated the judgment, and the person appeals.

**Professor Silberman:** Vacated the registration, as you pointed out.

**Mr. Cohen:** Vacated the registration, and the person seeking registration appeals. As I understand it, you can't have an execution, you said something about no writ of execution for 60 days.

**Professor Silberman:** Right.

**Mr. Cohen:** So I don't quite understand. What claim would the debtor have against the party seeking registration in those circumstances? You may recall that I sent you a case in which this exact problem came up in the Ninth Circuit, and they fooled around with it through three opinions and a remand from the Supreme Court before they decided that there wasn't any claim and therefore there shouldn't be any security required in a situation like this.

**Professor Silberman:** All right, I will take another look. I just referred to appropriate cases for security furnished by the person seeking enforcement [§ 10(i)].

**Mr. Cohen:** Right, so what is the damage suffered by the debtor that needs to be secured? If there is no writ of execution for 60 days, I don't quite get it.

**Professor Silberman:** All right. I'll take another look.

**Vice President Warren:** Let me caution. I want to be able to end promptly at 5:00, and we will start again in the morning with the discussion here. Right now we have speakers at various places. The speaker at microphone 4 is next, but I don't think we're going to get beyond one more question. The speaker at microphone 4.

**Professor Eric M. Freedman (N.Y.):** This is in the nature of a point of order, —

**Vice President Warren:** I recognize the speaker at microphone 4.

**Professor Freedman:** — which is that, at the beginning of this discussion, Director Liebman said, well, it may be that we get to put this to a final approval tomorrow, and then again it may not be. During the intervening hour, I have heard at least four or five significant substantive issues: the class-action hypothetical that Professor Oakley raised, the business about domicile with respect to individual creditors, this whole question about whether we should delete or substantially rewrite § 10.

Those are things that I cannot conceive of being left to the discretion of the Reporter under a Boskey motion, nor can I conceive of any mem-

ber of this house ever voting against a Boskey motion, and for those reasons I would very much appreciate some reassurance that, given that we have taken no votes on any of the substance of any of those things, there is not going to be a request for final approval tomorrow.

**Director Liebman:** I would say things head in that direction, based on the last hour. *(Laughter)*

**Vice President Warren:** I don't think we have time for other speakers. I would like to remind you that we will start promptly tomorrow morning at 9:00. We will be —

**Director Liebman:** Downstairs.

**Vice President Warren:** — one level down. Please don't be fooled because some of your materials describe the room where we will be as on the second floor. That's wrong. This discussion will take place in the Colonial Room, which is one level down.

I also remind you that we have a reception tonight at 6:30, and between 6:00 and 6:30 there will be buses leaving, so I hope to see you there.

This session is adjourned.

*(At 5:02 p.m., a recess was taken until 9:00 a.m. the following day, May 18, 2004.)*