

Tuesday Afternoon Sessions
May 18, 2004

Another Tuesday afternoon session of The American Law Institute convened in the Colonial Room of The Mayflower, Washington, D.C., and was called to order at 2:13 p.m. by First Vice President Conrad K. Harper.

First Vice President Harper: Thank you very much for coming back. We are going to resume now our discussion. If you will turn to page 28, § 2, on recognition and enforcement generally. Any introductory comments by the Reporters?

Professor Silberman: We are on § 2. I just wanted to point out that it has been revised slightly since the last draft and now separates out taxes, fines, and penalties [§ 2(b)(i)] on the one hand and declaratory judgments and injunctions [§ 2(b)(ii)] on the other.

As I said earlier, we have tried to bring all of these things under the Act so that they will all be subject to a federal standard, but there are differences in treatment for these types of judgments. So we thought that judgments relating to taxes, fines, and penalties should follow international practice generally. Judgments for fines and penalties are generally not enforced, but certain types of tax judgments may be, and the section reflects that difference.

Declaratory judgments and injunctions do not really call for, if you will, direct enforcement, but the Act would allow injunctions to get the same treatment that is given to sister-state injunctions. I will merely invoke the *Baker* case [§ 2, Comment *g* and Reporters' Note 2] to explain what that might mean. As for the statute of limitations, we think there should be —

Professor Lowenfeld: Well, I just want to point out that the most important section, in a way, is § 2(a), “foreign judgment shall be . . . enforced,” so that the criteria apply to everything. That is not new, but that is essentially the basic provision of the Act. And we say, “courts in the United States,” not “United States courts,” to make clear that this applies to both state and federal courts.

Professor Silberman: I should just call attention to Comment *e*, which relates to “foreign judgments and choice of law,” and is new. That is an addition; that is a new Comment from the last time. I think it is straightforward, but we have added that Comment.

Mr. Michael Marks Cohen (N.Y.): I will talk about a less important section, and that is subsection (c). In connection with the statute of limitations, assume for the moment that we were to accept 15 years as the

statute of limitations but that the rendering state's own law provides for the judgment to be enforced only 10 years. Wouldn't we want to have some sort of a borrowing statute to say 15 years or the length of time in the enforcing state, whichever is greater — whichever is less?

Professor Lowenfeld: We have thought about that before, and if that is really what everyone's view is, we don't feel strongly about it.

Professor Silberman: But I think there was a concern that the time limit for foreign enforcement perhaps should be longer than for domestic enforcement because a foreign defendant has litigated elsewhere and may face difficulties with respect to enforcement in the U.S.

Initially, I think we had 10 years, and some people thought that that was too short, and so we have given you the option of 15. But we thought that a single uniform time limit was cleaner.

Mr. Cohen: Yes, it is cleaner, but there is something to be said for borrowing statutes. And, if you had come along with me on that, I was then going to press you as to whether we shouldn't do it where the rendering state has a longer period and just have an overall borrowing statute. What would be the harm in allowing the judgment to be enforced, if it could be enforced — some rendering states have 20 years, 25 years.

Professor Lowenfeld: I tell you, I don't have a lot of experience in international litigation on this score, but within the United States I find borrowing statutes very hard to understand — you have tolling provisions, and when does it begin, because the defendant may or may not have been subject to jurisdiction at different times. I came to the conclusion that I don't like borrowing statutes. That is not much of a policy reason, but it complicates the issue again. Whereas if you see a judgment, here it is, it was rendered, signed by the judge on such-and-such a date, I can count without another element of litigation, controversy, experts, etc.

Mr. Cohen: Yes, but, Andy, I don't think you would really want to have a situation where the judgment could no longer be enforced in the rendering state and people could then take a stale judgment to the United States and enforce it. I think that would just be wrong in principle.

The second part of that is whether we want to burden our courts with foreign judgments beyond a particular period. I can understand that that is a policy statement that people can differ on. But the first one, I think, ought to be a no-brainer, that if the judgment is expired, its force is expired in the rendering state, then why should we be making opportunities for it to be enforced abroad?

Professor Lowenfeld: I think you make a persuasive point, except that the debtor says it expired, the creditor said no, it didn't, because you were out of the jurisdiction and, therefore, the borrowing statute is tolled, and you are off to the races. That's what worries us.

Mr. Cohen: Well, that's why people hire lawyers. (*Laughter*)

Professor Lowenfeld: Well, but they hire Reporters to try to avoid that kind of thing. (*Laughter*)

Mr. Cohen: They hire Reporters to make that clear.

Professor Silberman: At much less pay.

Vice President Harper: Mr. Struve.

Mr. Guy Miller Struve (N.Y.): With apologies, because this is a point that I have made before. I would like to make it again, because it worries me every time I read § 2, and it has to do with the boundary line between § 2(a) and § 2(b). Section 2(a) is the automatic mandatory enforcement; § 2(b) is the discretionary.

What I have suggested the boundary line ought to be is that § 2(a) would be what is covered by present law: the judgments granting or denying a sum of money, and that everything else, the residual — in § 2(b) — would be discretionary. The way you have it set up instead is that § 2(b), which is the discretionary area, is certain discrete things, and whatever residual there is, is back in § 2(a) and is therefore mandatory.

Now you have put it to me: what is this category that doesn't fall within § 2(b) but that really isn't money damages either? My answer is, candidly, I don't know, but I don't think we should take the chance. I think we should limit mandatory enforcement to money damages, and then everything else would be in the residual. And I notice that that is really the distinction that you have drawn between § 9 and § 10.

Professor Lowenfeld: Between § 9 and § 10, we do draw that distinction because we think that § 10, where it is the clerk who makes the initial decision, should have it easy. But here — for example, a judgment for restitution of property, which might be a ship, an example we get from Michael Cohen almost immediately, or a painting, whatever. That is not a judgment for a sum of money, but it is the kind of judgment that ought to be in the mandatory and not in the discretionary area. You're right, we have had this discussion before, but that's our thinking.

Mr. Struve: Okay. Frankly, I would have thought that was an injunction.

But quite aside from that, the worry that I press on you is you are assuming that in § 2(b) you have made an exclusive classification that will

last for all time of all of the kinds of judgments that, once we see them, we will feel ought to be discretionary rather than mandatory. And I'm suggesting to you that it is very difficult for mere human beings to attain that degree of certitude.

Professor Lowenfeld: Well, I don't think we are legislating for all the ages. For example, on the judgment concerning taxes, we had a 2-to-1 decision in the Second Circuit in the *Reynolds* case [§ 2, Reporters' Note 1]; we have a related kind of case going before the Supreme Court. So, of course, that may change. You know, I don't think we are legislating for all time. What we wanted to say, as the Foreign Relations Restatement does, we are not necessarily wedded to Judge Mansfield and the revenue rule.

Mr. Struve: Well, I hear you. I wish I had that degree of confidence that every kind of judgment that would be problematic has been captured in § 2(b). You obviously do.

Professor Mary Coombs (Fla.): Consistent with the concern other people have had that judges may not read the legislative history, which is to say the Comments, I would suggest that the Comment in regard to "[c]riminal penalties and fines will ordinarily not be enforced or recognized" [§ 2, Comment f] should be in the text of (b)(i), just so that there is no doubt that they are not subject to the usual discretion of the judge.

Vice President Harper: Thank you. Ms. Kay.

Professor Herma Hill Kay (Cal.): Since you have rejected the notion of borrowing statutes, it may be that those of us who do conflict of laws are getting a little bit too parochial in our comments, but I was wondering whether, in subsection (c), you also want to exclude the possibility of revival of the judgment in the courts of the rendering state.

Professor Lowenfeld: Another issue I never understood.

Professor Silberman: Well, I would have thought that, if it actually is revived in the rendering state, it would, as the current law is, be enforceable in the enforcing forum.

Professor Kay: That depends on whether you want this 10 or 15 years to be the outer limit or whether you are willing to refer to the law of the rendering state as far as renewal is concerned.

Professor Silberman: Well, it says, "from the time the judgment becomes enforceable in the rendering state. . . ."

Professor Kay: Yes.

Professor Silberman: I take the point. Okay.

Professor John B. Oakley (Cal.): I rise to confirm that I have a correct understanding of the effect of § 2(b)(i) in light of the 68 to 55 vote this morning to retain the reciprocity requirement and, if I do understand it correctly in light of that vote, to suggest a slight modification of the commentary in Comment *f*, being of the opinion that most judges of most federal courts and the great majority of judges of state courts still do regard official commentary on statutes as fair game for interpretation of the statutes, and so the commentary remains quite important.

When I read, without the benefit of attendance this morning, § 2(b)(i), it strikes me as a reader that it quite sensibly is saying that courts can give recognition and enforcement to foreign judgments for taxes, fines, and penalties if they want to. It is phrased permissively.

Professor Lowenfeld: Yes, if they meet the criteria.

Professor Silberman: If they meet the criteria.

Professor Oakley: Right.

Professor Lowenfeld: They may not read the commentary, but you have to read § 7.

Professor Oakley: Right, and I think there needs to be more expressed. There is nothing in Comment *f* that indicates that this discretionary regime is only the discretion to not enforce a qualifying judgment and, if I understand international practice correctly, in almost every case in which a judgment creditor brings a foreign judgment for fines or penalties or taxes, that international practice is going to be that there is no reciprocal enforcement. Therefore, there is going to be no possibility, it is going to be mandatory that recognition be denied and no discretionary possibility in the particular instance for principles of natural justice to go ahead and enforce an order within the terms of § 2(b)(ii).

Professor Lowenfeld: So you are suggesting —

Professor Oakley: In § 2(b)(i).

Professor Lowenfeld: — that when we say “in accordance with this Act” [§ 2(a)], we have to say “and we mean including §§ 5, 6, and 7.” We have.

Professor Oakley: I think in the commentary, if you are trying to persuade judges to get it right who haven’t spent several hours contemplating why a motion to repeal or retract the reciprocity requirement is important, that they are going to understand that, under § 7, almost no foreign judgment within the terms of § 2(b)(i) is going to be eligible under “the criteria of this Act.”

Professor Lowenfeld: Let me say something again that I think I said this morning in a slightly different context. If State X has an agreement with the United States or we have evidence that State X will ordinarily enforce judgments from the United States, we need not establish that it would enforce (b)(i)-type judgments. It is not tit-for-tat. It is just that we are trying to exclude judgments — as the vote went today — from states that simply refuse to enforce American judgments. Do you understand what I'm saying?

Professor Oakley: Comparable judgments.

Professor Lowenfeld: Well, comparable —

Professor Oakley: So the last lines of Comment *f*, “the Act incorporates flexibility by making recognition and enforcement discretionary,” to me don't convey the whole picture of how the Act operates. I just thought I would raise that as a person in the peanut gallery.

Professor Catherine Kessedjian (France): I'm just standing here to make sure, Andy, you think twice about borrowing statutes for limitation. I'm a little bit concerned about your answer to the previous speaker — the earlier previous speaker. I thought the policy behind the work was to allow in F-2, in the recognizing or enforcing state, everything in terms of effect that was possible in the rendering court, not only for the scope of the effect but also for the time in which the judgment could be enforced. If that is the policy behind the work, then there is a strong argument about the borrowing statute.

I give you, again, an example taken from a legal system that I know a little bit of: In France, you can enforce a judgment for 30 years. Would you want to prevent enforcement when it is possible to do that in France for 30 years, and in this country I don't think you would want to do that.

I understand the argument saying you don't want to open your courts to too many things, but why opening it more than if it is closed in the rendering court and not doing that — there is something that I don't understand in your answer to the earlier speaker. So if you could rethink about that, that would be helpful.

Professor Lowenfeld: We certainly can rethink it, but you see there are two separate arguments. One says we will take a uniform period, and a French judgment, an Italian judgment, and an English judgment will all have the same expiration date. That's one way to do it.

Or you do borrowing. Now Michael Marks Cohen said borrow if it is shorter; you say borrow if it is longer.

Professor Kessedjian: No, I say borrow —

Professor Lowenfeld: Either way.

Professor Kessedjian: — in both ways. The policy behind the entire project, at least the way I have discussed that with you earlier, Linda, and you earlier, I thought was you do in F-2 everything that you can do in F-1, apart from things that you don't want to do, in terms of public policy and other things like this. But basically the effects that the judgment will have in the rendering court will be borrowed in F-2, and I think the time limit in which you can enforce a judgment, that's the kind of thing you want to borrow.

Professor Silberman: Well, we will rethink it, but the observation you make about the effects really went to the preclusive effect of the judgment, that it would have the same —

Professor Kessedjian: And the time limit.

Professor Silberman: — preclusive effects, yes. I'm not sure that I agree about the time limits. It seems to me that there is an argument that says we will make a decision about what an appropriate time limit is for enforcement in the United States, and we have taken that position in a couple of places. When we move to the next section on dismissals, you will see that, in certain kinds of situations, we don't care what effect it has in forum number one; we say, in the United States, we are not treating that as a dismissal on the merits regardless of how it is treated in F-1, and I would use that analogy arguably for time limits. But I'm happy — we are happy, I think — to rethink this in light of all of the comments.

Judge Jack Davies (Minn.): On borrowing —

Vice President Harper: Well, Mr. Elsen is really ahead of you, if that would not offend you.

Judge Davies: That's why I said "on borrowing," because I didn't know whether he was going to talk on borrowing, and I thought that was the topic.

Vice President Harper: Well, I think — Mr. Elsen, why don't we hear from you?

Mr. Sheldon H. Elsen (N.Y.): The honorable gentleman may proceed.

Vice President Harper: You have successfully borrowed.

Judge Davies: Thank you. Some decades ago as a state legislator, I repealed the Minnesota borrowing statute to free the Supreme Court of Minnesota to make an appropriate decision that statutes of limitations were substantive. I didn't like the old statute because it was stated wrong.

So the Minnesota Supreme Court decided it was procedural. And so, for several decades, we sat around in Minnesota with a long statute of

limitations, no borrowing statute, and a decision that it was procedural, so we became the target jurisdiction for everybody — every plaintiff who was forum shopping.

Well, this session the legislature finally passed another borrowing statute in effect. So it is not an academic proposition. It is very important that there not be forum shopping, and the only way you can bar forum shopping is with a borrowing statute.

Mr. Sheldon H. Elsen (N.Y.): I wanted to ask you a question about your discussion of the revenue rule, and I guess this is a subject of which you have written, Andy.

Professor Lowenfeld: Yes.

Mr. Elsen: I start with a question whether this statute is intended to deal only with procedure rather than substance. I assume it is; maybe I'm wrong.

Professor Lowenfeld: Say that again, I'm sorry.

Mr. Elsen: Your statute is intended to deal with questions of procedure rather than to change the substantive law — well, maybe not.

Professor Lowenfeld: No, I mean, it —

Mr. Elsen: Well, I just want to flesh out the issue, and then you answer it any way you want.

As you say in the Reporters' Notes [§ 2, Reporters' Note 1], the tobacco-smuggling cases, I'm somewhat familiar with the European Union case that was in New York against the tobacco companies for smuggling cigarettes into Europe to avoid European taxes, and it had a problem in the New York courts on the basis of the revenue rule because the American courts will not enforce it due to the RICO claims and other extravagant uses of our law. But, by and large, it ran against the revenue rule.

Now I see that, under § 2(b)(i), that is discretionary. Suppose the European Union, instead of coming into the Eastern District of New York, had gone into their own courts in France or Spain or wherever the smuggling was taking place, had come in with a judgment. But they get a judgment, then they come into an American court to enforce the judgment, and this statute is on the books, and they say to the judge it is discretionary, we would like you to do it. Now I don't think that is a bad result, but I'm just trying to figure out whether that is what you are doing.

Professor Lowenfeld: We would not want, with this statute, to foreclose the American court from enforcing the judgment of the French court based on some version of the revenue rule; that's correct.

I tried this, as you may remember, 15 years ago in the Foreign Relations Restatement. I tried to repeal the revenue rule, but I couldn't get the votes. But they said all right, leave it discretionary, and we followed that here.

Mr. Elsen: I see. So you are not changing the substantive law from the Restatement, it is just from the other cases.

Professor Lowenfeld: Uh-huh. (*Laughter*)

Mr. Elsen: So that's fair enough. Okay. I just wanted to know what you were doing.

Mr. Peter D. Trooboff (D.C.): Andy, I want to go back to this question of the test of reciprocity as it relates to § 2(b)(i). Take a judgment from a European court that is a revenue-rule judgment, the kind that today some old authors that didn't agree with you said would not be enforceable, and it is brought over here. But its own law is not welcoming for those kinds of judgments; it has not enforced those types of judgments.

Are you starting with an assumption that the test on reciprocity would not be to look at whether the origin court would enforce a comparable judgment on revenue-rule kinds of issues or not? I'm not clear on that.

When you say, in § 7(a), "finds that comparable judgments of courts in the United States would not be recognized or enforced . . .," are you going to, when you go back to that European court, look at what they do with revenue-rule judgments coming out of the United States?

Professor Lowenfeld: Well —

Mr. Trooboff: I don't have a view on this either, I just want to know what you think the rule is.

Professor Lowenfeld: It is a hard question. If I were a judge instead of a Reporter, I would say, well, if, let's say, the French court has abolished or modified the revenue rule or distinguished certain issues of revenue rules, then I could assume that they wouldn't apply to a foreign judgment either since they applied it to a claim and, therefore, I ought to consider the foreign judgment being sought to be enforced here on the same basis.

Now is that fully clear in the text? I don't think it is.

Mr. Trooboff: I don't think it is.

Professor Lowenfeld: I think you point it out. I mean, this goes in a way beyond judgments. And, you're right, that the issue of "comparable," "analogous," "similar" is, by definition, not crystal clear.

Mr. Trooboff: Well I don't want to get too granular on the test, and I take your point about the problem with doing that. On the other hand, it does seem to me, in this area, where we are dealing with discretion, it is at least relevant and possibly dispositive whether or not the court of origin would have, for the same kind of judgment coming from the United States, enforced it or not, and I would say at least that a judge in this country should consider that point. I would be inclined to say that perhaps that's enough to say there is no reciprocity.

But I think we need to talk some more about this. I don't think we have this tied down the way we should, and I think the same issue might come up in other contexts as well, like under § 2(b)(ii).

Professor Lowenfeld: Someone this morning was saying, well, how do you get out of the circle of back and forth? I would have hoped that, if the state of origin rejects the revenue rule for claims in that state, you could at least take the next step and assume — or resolve doubts, if you will — to say, well, they have abolished it. Otherwise you never break out of a rule that neither country wants.

Mr. Trooboff: I think we can break out of the circle, but I think we need to, both in § 2 and § 7, think this through a bit more and more clearly articulate where we come out. And I, at least, would be inclined to say § 2(b)(i) and (ii) is an area where, absent evidence that the same judgment coming from the United States would be enforced in F-1, I've got some problem with saying there is reciprocity apparent. But it is something to be studied further. Thank you.

Mr. K. King Burnett (Md.): The word "criteria" in § 2(b)(i) and in § 2(b)(ii), what criteria are we referring to other than reciprocity?

Professor Silberman: Well, we are talking about all of the defenses under § 5 and the jurisdictional provisions of § 6.

Mr. Burnett: Would those be the only ones?

Professor Silberman: And § 7.

Mr. Burnett: What is troubling me a little — and this may be a theoretical problem — is it is discretionary, and the question is, what is the court to use in the exercise of its discretion? What rule are we giving them?

Professor Lowenfeld: The criteria are not discretionary. The criteria are in the other sections — I mean, to some extent they are, but basically they are fixed. We don't recognize judgments based on fraud, whether they are revenue rule or money judgments or whatever —

Professor Silberman: Or fair procedures or any of them.

Professor Lowenfeld: — fair procedures.

Mr. Burnett: Right. But we are not recognizing any judgments based on those rules in § 5. In other words, it sounds like you are talking about a discretion here, and really, I think, what I guess I'm wondering, sitting here, is whether we need to have the expression that comity is a criteria. We don't have an affirmative rule here for the court to apply in exercising its discretion.

Professor Ronald A. Brand (Pa.): I'd like to stay with § 2(b)(i) for just a moment, because I'm troubled by the fact that, after several years of working with this, this group is confused by that, and I'm worried about what that means about judges and lawyers who then have to apply this if it ever is in a statute.

My understanding at this point is that, number one, of course, the United States has not abandoned the revenue rule. Number two, courts elsewhere have not abandoned it. That means that, in order for this provision to have any effect, number one, a court in the United States would have to be willing to abandon it and would, under § 7, have to also find that the court in the corresponding state from which the judgment originates has abandoned it.

That means to me that, for right now at least and perhaps for a good deal of the time in the foreseeable future, that issue is outside the scope of this Act. It seems to me that it might be much better just to take the words “[j]udgments for taxes, fines, and penalties” [§ 2(b)(i)] and place them in a new § 1(a)(iv) as outside the scope of this Act to continue to be developed outside the scope of this Act, and it might be much better in that context. Then we would create the confusion by putting it in here.

Professor Silberman: Well, the reason I think we didn't do that, Ron, is a comment I made earlier, and that is, if you take things out of the Act you don't have a federal standard anymore. You are back to having things subject to state law. The reason we pulled them in, in the way in which we did, was to make sure that, if there is an evolving standard — let's suppose that the revenue rule does go by the boards in some countries — we didn't want to freeze this to prevent that rule from developing. So what we thought was advisable was to bring them within the scope of the Act and then allow for discretion, and that's why we didn't say “are absolutely not enforceable,” because we wanted to allow room for the common-law development if it so developed.

Professor Lowenfeld: I just want to add that you say for “the foreseeable future.” My impression is that countries are more and more cooperating on tax evasion, for example, and that they will — maybe by

treaty, maybe by informal agreement, and maybe just by growing reciprocity — enforce tax judgments, particularly where sort of offshore havens have been used.

So I can't see as far into the future as you can perhaps. But I think this is coming.

Professor Brand: Well, that aspect of seeing into the future I think we need to provide for, and I think § 7(e) is the place to provide for that. If that is what we want to provide for, to provide specifically that the Secretary of State is authorized to enter into those kinds of agreements and bring them into the scope of this Act, that would be a better way to do it.

Professor Lowenfeld: That's a possibility.

Professor Silberman: You know, I think the intent was to bring them within the scope of the Act so that those things could happen. But, the one difference, the only difference at this point, is that, if it were developed, as Andy said, outside of the notion of an official agreement, we didn't necessarily want to preclude that. But maybe your suggestion is a better alternative.

Vice President Harper: After the next two speakers, we shall move to the next section. Mr. Ristau.

Mr. Bruno A. Ristau (D.C.): Distinguished Reporters, I must tell you, when I first read this, I thought I didn't read right. We are going to open up the doors of our courts for foreign tax authorities, revenue authorities, criminal authorities to come into our courts and to have the Commissioner of Internal Revenue — or Inland Revenue, I believe they call it, from London — showing up with a judgment against somebody in the United States. Perhaps I'm too deeply imbued with the notion of activities *jure imperii* and activities *jure gestionis*, but these are public acts of the highest order that these foreign governments engage in when they collect or try to collect the taxes and their penalties and so on.

Are you really, really, really intent to open up or to even discuss opening up our doors to let them enforce these types of revenue authorities? There is no problem in that area right now, I take it. There are a lot of problems in the enforcement of civil judgments, commercial judgments. Why would you want to even begin opening up this door?

Professor Lowenfeld: Well, I'm surprised, Bruno, at your sudden astonishment. For example, we have *Attorney General of Canada*, a 2-to-1 decision in the Second Circuit [§ 2, Reporters' Note 1], where I think Judge Calabresi's dissent is more persuasive. We have the famous case in *England of India v. Taylor* [Government of India v. Taylor, [1955] A.C.

491], in which the court says we don't really have any good reason to deny this judgment except we have always done it that way.

Why not have some flexibilities? As Sheldon says, I have written about this, and some of my writings are quoted in the Notes. It seems to me an irrational rule that ought to be at least loosened.

And we are only talking about judgments. We are not talking about the Commissioner coming and bringing the original claim here.

Mr. Ristau: No, but he will bring the judgment.

Professor Lowenfeld: That goes again to the question of what do we mean by tribunal. We mean a civil court.

Mr. Ristau: And the taxpayer who has not paid his English judgment, obviously he will have an opportunity to defend, and he will try to reopen that judgment as a defense, and we are going to go through the whole motions here of whether —

Professor Lowenfeld: No, he only has limited defenses, the defenses that are set forth in § 5 essentially.

Mr. Ristau: Oh, limited defenses.

Professor Lowenfeld: Well, §§ 5 and 6.

Mr. Ristau: We are not going to allow him to show that this judgment was obtained through improper means?

Professor Lowenfeld: No, that you get. We will get to § 5, if we haven't already. Improper means would be — if he can really show it — improper procedures, fraud, corruption, all those are defenses. But not the taxes were too high or, you know, they opened my return when they shouldn't have. The defenses are quite limited.

Mr. Ristau: Thank you.

Professor Herbert I. Lazerow (Cal.): Two points: one the question of reciprocity, it seems to me that one has a choice between general reciprocity, specific reciprocity, or very specific reciprocity. (*Laughter*) I don't think that this is an appropriate case for specific reciprocity if only because we don't see a hundred of these cases every year in every jurisdiction. The opportunity to find the precisely equivalent case in the other jurisdiction is really lacking. It is much more like the situation that we have with the foreign tax credit and the federal income tax where the question is asked, weighing all of the aspects of this foreign tax, is it more like an income tax or is it more like some other sort of tax that is not creditable. And I would think that our question on reciprocity would be, in general, does this foreign country tend to enforce American judgments?

Professor Lowenfeld: We agree with you completely thus far.

Professor Lazerow: My second point has to do with the nature of criminal and revenue judgments. They cover a vast variety of areas: for instance, there is a provision of the United States Internal Revenue Code that denies a deduction for penalties.

There was a Pennsylvania case where a motel was prosecuted for environmental pollution; the motel was found guilty, and it was sentenced to pay what would be a reasonable charge to the state until it was connected to the local sewage system. It took a deduction, the Revenue Service denied that deduction, and the court held that, although this was the form of a criminal prosecution, in fact, from the evidence and the nature of the sentence, it was quite clear it was in the nature of compensatory damages to the local government.

Now that might be classified as a penalty, or it might be viewed as an ordinary judgment. That is the sort of thing where I think the judge ought to be able to exercise discretion as to whether to enforce it or not.

Vice President Harper: Mr. Burbank, before you stood up —

Professor Lowenfeld: Section 3.

Vice President Harper: Ah, excellent. We are now at § 3. Thank you for reading my mind. Before I ask you to comment, did the Reporters wish to say anything?

Professor Silberman: No, I think by and large this section is very much like the section that was on the floor last year. The general principle is in subsection (a); subsection (b) just extends that principle to default judgments, and then subsection (c), as I said a moment ago, sets forth certain situations where dismissals by a foreign court will not be treated as a merits judgment for the defendant.

So in response to Professor Kessedjian a moment ago, this is one of those areas where it is F-2's law that is going to determine what the effect of the foreign judgment is. Contrast that, if you will, with § 4 that basically takes the effects of F-1 and adopts that in F-2.

Vice President Harper: Mr. Burbank.

Professor Stephen B. Burbank (Pa.): Thank you. I have one comment on the black letter of § 3 and one on the Comments.

On the black letter, I believe it is the case that, if the black letter in subsection (b) is to be precise, you need to add some language. It may be that the language is sufficiently complicated that that is the reason that you didn't add it.

“A foreign judgment rendered in default of appearance of the defendant is entitled to recognition and enforcement, provided that,” and I think the language you need to add if this is going to be totally accurate is something like the following: “in an uncontested case, and when the defendant appears and challenges the jurisdiction of or notice in the rendering court, the party seeking recognition satisfies the court. . . .”

If a defendant appears and does not challenge the jurisdiction of or notice in the rendering court, then there is no duty on the party seeking recognition to do what the section says that party has to do. The game may not be deemed by you to be worth the candle, but I believe that, if you are going to capture all of the situations and all of the burdens, you should add language like that.

As to the Comment, I simply would point out that the last sentence of Comment *c* takes a monolithic view of issue preclusion that seems to me inappropriate in a document of this sort. To be sure, if the courts of another state were to give collateral-estoppel or issue-preclusion effect when there had been no contested adjudication, it is highly unlikely that we would recognize that judgment for that purpose.

But you do not, I think, in an internationally oriented document like this, want to take an American view of issue preclusion and foreclose the possibility that some other jurisdiction might take a different view of issue preclusion.

Mr. Michael Marks Cohen (N.Y.): I have a stylistic point. In § 3(a), the fourth and fifth lines, you say, “the liability or nonliability of the defendant. . . .” I think it should read, “the liability or nonliability of a party.”

Professor Silberman: Yes, that’s right. Of a party, yes. Thank you.

Professor Janet Walker (Canada): I count three places in § 3 where you call for the application of foreign law. First, in subsection (b)(i), “the rendering court had jurisdiction over the defendant in accordance with the law of the state where the judgment was issued,” possibly in (b)(iii), “that the defendant was duly served in the proceeding in the state of origin,” and possibly in (c)(ii), “that the claim is extinguished under the law applied to the claim by the rendering court.”

I think this will potentially render enforcement actions very cumbersome. But there is an added effect of this, and that is when the person comes to their attorney in the United States and asks for advice: I have got a notice of a foreign proceeding, what should I do, will this come back as an enforceable judgment? Or when they come with some sort of indication that a judgment has been issued against them, they will then need

advice from an American attorney about the foreign law, and that can be very difficult.

If I could, I'd like to make suggestions about each of those. First, on subsection (b) (i), I don't know why you have it; I don't think you need it. Who cares whether the foreign court thought it had jurisdiction?

Professor Silberman: It is a default judgment.

Professor Walker: Yes, but many courts on default matters will not inquire as to jurisdiction very carefully, and it really is whether it meets the standard of this Act and whether, under this statute, there was jurisdiction in the eyes of American law in the foreign court.

Professor Lowenfeld: We want both.

Professor Silberman: Yes, we want both.

Professor Walker: The second point, with regard to the notice, I think that that is a matter of serious concern. It seems to me that the person served should not only be served in accordance with the law of the place where the judgment was issued but should be served — if they were served, in fact, in the United States — in a way that made that service understandable and meaningful to them. So, in other words, they should be duly apprised not only of the existence of a foreign proceeding, but of the potential peril they face if they do not defend and of the steps that they need to take to defend. If they are not advised in terms that are understandable and comprehensible to a lawyer in the United States to whom they might take that notice of proceeding, they may be at grave peril. That's in subsection (b) (iii).

Professor Lowenfeld: If you notice, on the question of notice —

Professor Walker: Yes.

Professor Lowenfeld: — that comes up in § 5(a) [§ 5(a)(iv)].

Professor Walker: That's right. And when it comes up in § 5, it refers to meaningful notice, and I agree that it makes much more sense in § 5. But some sort of indication should be here that it is not just in accordance with the standards of the country issuing the notice.

Professor Lowenfeld: It is both. Section 4 relates to the foreign country's criteria, and § 5 —

Professor Silberman: Section 3.

Professor Lowenfeld: — is the basic defense. I'm sorry, § 3 and § 5.

Professor Walker: That's right. It should be very clear though, I think, in § 3, once again, for the sake of the attorney who is being asked to advise on the notice of the foreign proceeding and what should be done about it.

Professor Silberman: We have the reference in § 3(b) of the statute to “[t]he party resisting . . . may raise the defenses” as “set out in §§ 5 and 7,” and they look at § 5, and there is the requirement of notice. I mean, there is a kind of clarity of putting this together. I actually think that maybe we should reverse (b)(ii) and (b)(iii) because, as you point out, both (b)(i) and (b)(iii) do deal with the jurisdiction and service in the original proceeding. But we also wanted to make it clear that, with respect to (b)(ii), it also had to meet the jurisdictional requirements under the Act.

Professor Walker: Right. Yes. If I could just take a minute to look at subsection (c)(ii), I’m a bit puzzled by that, the reference to whether “the claim” was “extinguished under the law applied . . . by the . . .” — that sounds to me like *renvoi*. I tried not to use that word today.

But I think it is terribly cumbersome. If the matter is substantive, then either the claim would be barred — time barred under the applicable law, period. If it is procedural, then surely you are just looking at the time bar applicable here; I mean, could you sue here or not? But asking a judgment creditor or a judgment debtor to go through those hoops, to look at the law that was applied by the —

Professor Lowenfeld: I think we are trying to avoid that. We don’t care if it is substantive or procedural in F-1. We say, if there hasn’t been an adjudication on the merits, there is no bar.

Professor Walker: Unless it was extinguished under the law applied to the claim by the rendering court. Now to use a borrowing statute for a choice of law is, I think, you know, inordinately cumbersome. Either it was a default dismissal and the claim is barred here so you are out of time, or it was a default dismissal and the claim is barred under the applicable law as determined by F-2. Why go through borrowing statutes and proof of foreign law? That is enormously cumbersome. But I can write you a note on that, if you like.

Professor Lowenfeld: But remember, though, § 3(c) is not —

Professor Silberman: It is not about defaults.

Professor Lowenfeld: — about defaults. Section 3(b) is about default.

Professor Walker: Right. But even if it is not about defaults, the fact that it is about a borrowing statute, about the law applied by F-1, I think is hugely cumbersome.

Professor Silberman: The attempt at this, I think, was to assume that oftentimes the statute of limitations would be, if you will, procedural or forum-related, to use another term. But that there might be situations

where the underlying claim had a built-in limitation period. That is really all that this was attempting to capture; that is, if the built-in limitation of the substantive-law claim barred the claim, we thought that that was a time in which we could treat and honor the preclusive effect of F-1. Otherwise, there is a kind of blanket assumption that most time limits are, in fact, forum-related and don't necessarily carry preclusive weight.

Professor Stephen B. Burbank (Pa.): It wasn't clear to me from the facial reactions of the Reporters what their reaction was to Janet's — I think her first — comment. But if there is any thought on backsliding on requiring a person seeking to have recognized and enforced a default judgment to establish that there was jurisdiction of the rendering court, I urge you not to backslide.

We've got to remember here that we are talking about a system that does not permit any defense on the merits, that does not permit any choice-of-law test, and Arthur von Mehren taught us that jurisdiction therefore becomes very, very important. And I think the distinction that is drawn here is not only elegant but right. If the court, the rendering court, did not have jurisdiction by its own standards, I don't really give a damn whether it has jurisdiction by ours, its judgment cannot be trusted.

Professor Lowenfeld: I don't know about my face, but I wasn't trying to backslide. (*Laughter*)

Mr. David B. Wilson (Col.): I wanted to comment on § 3(a), and specifically the language about “enforcement by a court in the United States with respect to the . . . nonliability of the defendant. . . .” I assume it is your intention in that context that this is something that a U.S. litigant would be able to raise as a defense when a foreign plaintiff comes in and tries to relitigate an issue that was adjudicated abroad in the United States.

Okay. I think then there really is a conundrum created by § 7 and the vote that took place this morning that I would submit that we need to take into account or at least try to think a way around the problem, and that is the problem of a U.S. company who is sued, let's say, hypothetically in Ecuador, is forced to litigate in that country, and wins. Then the Ecuadorian plaintiff or group of plaintiffs comes to the United States and wants to relitigate the same issues on which they lost in Ecuador.

I understand what our discussion was on § 7, I understand the carrot-and-stick paradigm and that we want to get these reciprocal treaties, but I submit to you that, contrary to what somebody said this morning, by the time Congress passes this statute, we will have dozens of treaties in place. I'm exaggerating a little bit, but we will have lots of treaties in place.

I think that the history of our efforts to negotiate treaties with other countries, even our friends like Canada and the United Kingdom, suggest that, even with § 7 in place, it is going to take us some time. So the question is, what happens in the interim to American defendants who essentially become the victim of our inability to negotiate treaties?

I suggest there are two ways to fix this: One would be in § 7 to add some language that would allow an exception to the reciprocity requirement if justice requires otherwise. The other way to fix it, and I think you will probably be less receptive to this, would be to delete from § 7 the reciprocity requirement as to the recognition of a judgment as opposed to the enforcement of a judgment.

But I think that the two-bites-at-the-apple problem is a real one, and I think that there really are unintended consequences as a result of the groups to retain § 7. Thank you.

Professor Lowenfeld: You are suggesting a different standard for bar than you are for enforcement, that is, where the first judgment is in favor of the defendant — that is what you are suggesting?

Mr. Wilson: I'm saying that is one way to solve the problem. I think it is a problem that touches on § 3, § 4, and § 7. I think the problem is that an American litigant who is essentially forced to defend proceedings in a foreign country should not essentially become the unintended victim of the reciprocity requirement in § 7. And I'm suggesting that two ways to fix that would be to create, as justice requires otherwise, an exception to § 7, or, as you point out, Professor, to have a different standard for recognition as applies to bar than one would if a plaintiff were trying to enforce a money judgment.

Professor Lowenfeld: Food for thought.

Mr. Wilson: That's all I can offer.

Mr. Sheldon H. Elsen (N.Y.): Well, we are getting into the realm here of mathematical games, but the interaction between the default judgment and reciprocity is the issue I wanted to raise with you.

As I understand it, I think this is based on one of your earlier sessions. Civil-law countries basically are not willing to recognize either tag jurisdiction or long arm. Well, that is my recollection; if I'm wrong, I'm wrong.

Professor Silberman: Certain aspects of long arm, let me put it that way.

Mr. Elsen: So you have the American court that reaches out and gets the European defendant, and there is a judgment, there is a default, based on the long-arm statute. Now, § 6 deals with tag jurisdiction. Tag

jurisdiction is no good anywhere, but now you have a perfectly valid American judgment. You come into France or some other country, and they say, “Well, we are not going to enforce this.” I don’t know whether they will say that or not because long-arm jurisdiction we don’t recognize, and we have to satisfy our jurisdiction requirements, as well as the American. So we are not going to enforce it. So do we have a lack of reciprocity then?

Professor Silberman: No. I think it is quite clear that the reason we talked about comparable judgments and didn’t use other criteria on which reciprocity turned was that we were not going to use reciprocity of jurisdictional grounds as a criteria for recognition. It really is the nature of the judgments as we have been discussing commercial judgments, tort judgments, categories of judgments, and not the criteria on jurisdiction.

Mr. Elsen: So this is just one of those that falls by the wayside. You can’t enforce it in France, but that does not affect the macro question.

Professor Silberman: That’s right. It’s the general —

Mr. Elsen: Reciprocity is a macro issue, and this is a micro issue.

Professor Silberman: It is not a tit-for-tat reciprocity requirement. We don’t look at the specific judgment and say, would they, if the tables were turned, have enforced this particular judgment? And one of the reasons we did not adopt that kind of rule was that we didn’t want to have to look at the specifics of the jurisdictional provision. So the answer is that that is not an aspect of reciprocity.

Mr. Elsen: That answers it.

Professor Lowenfeld: When they joined the European Union and the Brussels Convention, the UK was required to repeal jurisdiction based on personal service because the Convention regarded “tag” jurisdiction as exorbitant.

Vice President Harper: We now turn to § 4, on page 39, on claim and issue preclusion. Are there comments from the Reporters?

Professor Silberman: Just a general one. The preclusive effect to be given to a foreign judgment is the same as it would have in the rendering forum. So basically we are adopting the rule in the foreign-judgment context that we have domestically with respect to sister-state judgments.

We do have an exception, and in comparison with the draft from last year, we have narrowed that exception. We also note that, if there is a determination of jurisdiction in the rendering court, that determination of jurisdiction under F-1’s law will be binding, but the foreign judgment must still meet the criteria of § 6 on American standards of jurisdiction.

So the judgment must meet the standards of fairness of jurisdiction as set forth in § 6.

Professor Stephen B. Burbank (Pa.): I think that the material in the first part of Comment *d* of § 4 probably belongs in black letter.

Professor Silberman: Comment *d*?

Professor Burbank: Comment *d*, as in dog, probably belongs in black letter. “As in interstate cases in the United States, if the judgment debtor has appeared in the foreign action without challenging the court’s jurisdiction, a jurisdictional challenge under the law of the rendering state may not be raised in defense. . . .” I think that probably should go into the black letter even in a system where Justice Scalia’s views on statutory interpretation are not dominant.

More generally, I’m of course more pleased to see what has happened to this section. I have fought hard to get it tightened up. I continue to be worried about the Comments, particularly in the second paragraph of page 41 [§ 4, Comment *b*]. There are too many free-floating factors there, in my view.

I would point out that the group of articles that you cite on the top of page 46 [§ 4, Reporters’ Note 3], you have Lena Horne and Sheriff Clark dancing cheek-to-cheek. You can look in Hans Smit and get one view, and look at Courtland Peterson and get a completely different view. I would urge deleting Smit and giving more prominence to Peterson. But this simply reflects, I think, the fact that there is some tension between the Reporters on this, and I am, in general, pleased that at least most of the black letter requires that, if you are to depart from the standards in F-1, the preclusion would have to be manifestly incompatible with the superior interest in the United States. That’s fine. I urge you to consider bringing the Comments a little bit more in line with the black letter.

Professor Mary Coombs (Fla.): Just a question, I think. In § 4, you did not refer at all to the fact that it is a foreign judgment that meets the standards set out in this Act. I assume that, at least as to (a), you in fact want to limit it to those sorts of things. Since you said it in § 3, you should probably say it in § 4. But I’m not clear whether in § 4(b) you want to limit the question of jurisdiction and recognition to those judgments that are in fact enforceable or to other foreign judgments.

Professor Lowenfeld: Everything is covered.

Professor Silberman: Everything is covered.

Professor Lowenfeld: Everything depends on a judgment being entitled to enforcement under the Act. So it must pass the test of §§ 5, 6, and 7.

Vice President Harper: We now turn to § 5, on page 47, on non-recognition of a foreign judgment. Are there some comments from the Reporters?

Professor Lowenfeld: We have been through § 5 a number of times. One issue that we moved from discretionary to mandatory was the question of fraud. We had previously said, as the Foreign Relations Restatement does, that there is a distinction between extrinsic and intrinsic fraud, and we finally moved fraud into the mandatory category because nobody is going to recognize a judgment anyway that is tainted by fraud. But then we defined it to say that it has the effect of depriving the defendant of an adequate opportunity to present its case. This, of course, is in addition to the point about notice that we were making a moment ago.

The other question that has been puzzling some people — it has come up in several discussions — is what is now (b) (i). If people still have questions about it, we will explain it. We make it discretionary, but again, the assumption, as Mr. Burbank points out, is that you need both subject-matter and personal jurisdiction by F-2 — the U.S. standard — for a judgment to be entitled to recognition.

We do want to get away from, though, the details of, let's say, whether the F-1 judgment should have been brought in the civil court or the commercial court. But a judgment relating to title and land in the United States, rendered by an Italian court, would ordinarily not meet the requirement of § 5(b) (i).

Professor Silberman: We also made another change in § 5(a) (v), which deals with a judgment rendered in contravention of a forum-selection clause. You see that, in general, the penalty for refusing to adhere to a forum-selection clause is nonrecognition, and in this case it is the judgment creditor that has the burden of showing that the clause is invalid and that the judgment should be respected.

Thus, we reverse the general presumption in favor of the judgment when that judgment is rendered in contravention of a forum-selection clause. We also note, however, that if a party failed to raise the forum-selection objection in the first proceeding in which the party participated, that would result in a waiver of the right to insist on the clause. So that is new.

Professor Lowenfeld: One other point I mentioned briefly this morning is, if you look at § 5(b) (iii), which is the *lis pendens* provision, that is the counterpart of what we talked about this morning. As a discretionary matter, we say you don't have to recognize a judgment if the other court should have stayed the action because the American court was first.

Professor Stephen B. Burbank (Pa.): On § 5(a)(v), I think again you probably should put in the black letter the other situation that is now referred to in Comment *f*, and that is where the person resisting recognition or enforcement challenged the forum-selection clause in F-1 and lost. In that situation, also, the person cannot raise it again.

Professor Silberman: We can just move that into the statute.

Professor Burbank: I would move it into the black letter, yes. The only other point that I would bring to your attention is that, in what was then — and I'm not sure what the current version is — the Hague Business-to-Business Forum-Selection Convention, Article 5(f), they make an exception in situations where the parties are habitually resident in the state of the court seized, and the relationship of the parties and all other elements relevant to the dispute other than the agreement are connected with that state.

In other words, you might want to carve out an exception to the exception in a situation like that, dealt with in the Hague draft. It seems to me to make some sense that, if the other court disregarded a forum-selection clause entered into by two people who are habitually resident in that state concerning a transaction that concerned only that state, I'm not so sure that that judgment shouldn't be recognized.

Professor Silberman: I think, actually, just in relationship to what is going on at The Hague, we will take another look at the latest draft. I did that only very quickly, and we may still tinker with § 5(a)(v) given what is going on at The Hague. We certainly want to be consistent with what they are doing on that project.

Professor Bernard H. Oxman (Fla.): I am troubled by the fact that the only reference to international law is in the affirmative sense, in § 6, of a situation in which the plaintiff is suing abroad to vindicate a human-rights claim under international law [§ 6(a)(iv)(b)] and that there is no express reference to the reverse problem of a judgment being rendered that constitutes a violation of a treaty or other rule of international law.

Now in saying this, I recognize that you could deal with most of those problems under the jurisdictional or public-policy provisions anyway. My objection, which I suspect, Andy, at least, perhaps you Linda, would recognize is that I don't like relegating the status of treaties and international law in American statutes and before American courts to a mere question of "repugnant to . . . public policy . . ." [§ 5(a)(vii)].

There are three kinds of cases that bother me. First, foreign judgments against the United States or a state of the United States, or an officer or an employee of the United States or a state of the United States.

As a political matter, if you don't deal with this question one way or another, you are going to run into trouble in Congress. One way to deal with it, but not the only way, is to throw in an appropriate reference to treaties and international law.

The second is a judgment, which in and of itself, violates international human-rights law or analogous rules. One that comes to mind is, of course, the one that ultimately went to the ICJ, which was the use of a defamation action in Malaysia to attempt to suppress the activities of a rapporteur of a UN human-rights investigation. Again, I do not think our courts should be compelled — I'm not arguing that the public-policy defense wouldn't be available; I'm arguing that the ALI should make this more explicit.

The third is frankly the expropriation cases. We have two statutes, one on jurisdiction, the other on acts of state by Congress saying they want the case to go forward here if the property shows up in the United States. And yet, as I read this text, if someone actually exhausted local remedies in the foreign court, they could conceivably be stuck with an enforceable judgment and would have to again rely only on the public-policy exception.

I would urge the two of you to figure out whether you want to put in somewhere a reference to treaties and international law. How is something we need not get into in the overall debate. Thank you.

Vice President Harper: Mr. Freedman, you have a previously submitted motion.² Do you wish to address that now?

Professor Eric M. Freedman (N.Y.): Yes, I do wish to address that, although it is not my intention — in light of the fact that we will have a year to work on this and have already begun to engage in productive discussions with the Reporters — to push it to a vote. I do want to share with the group the trend of the thinking so that we can all work on it together.

The problem arises in the same context of repugnant public policy of the United States [§ 5(a)(vii)] with particular reference to libel judgments obtained abroad that are a special problem because the U.S. media has worldwide influence, and particularly because it is globally available over the Internet. U.S. media are affluent organizations, and U.S. libel law is the most restrictive in the world because of strong American First Amendment interests in freedom of expression.

² For text of amendment, see Appendix 2(A.2).

In that sort of special context, the approach of the Reporters is to take a fairly conventional conflict-of-laws approach and to carve off at the one end cases that have no nexus to the United States at all. Two residents of New Delhi get into a dispute over something in the New Delhi newspaper. One of them gets a judgment against the other, and that person happens to have a mutual fund in Boston, so enforcement is sought in Boston. That is a case that implicates no U.S. interests and is at the one end of the spectrum. At the other end of the spectrum, the foreign country punishes all expression, and we wouldn't recognize a judgment coming from their courts in this context any which way, any which how. Those are sort of extreme cases on which I think there is substantial agreement, and we can surely work out language that will capture those thoughts.

The problems arise in the middle level of cases, something like the one that is in my memo involving the United Nations employee who was assertedly libeled in Kenya by an article that appeared in *The Washington Post* quoting a bunch of other people having no connection to the United States about his misconduct in Africa. When he eventually moved to Canada and found a lawyer, who accessed the article on *The Washington Post* website, lo and behold a libel action went forward in Canada. Supposing that it were to reach a judgment with enforcement sought here, under the Reporters' framework that's kind of a middle-level case. It is not at either of the extremes, and we are going to have to weigh and balance the degree to which Canadian libel law is or is not like American law and the extent of the controversy, the extent to which it relates to American interests, and the extent to which it doesn't, and what I call a "nebulous multifactor test," but a whole bunch of considerations. And that, in the First Amendment context and in this context, raises a practical and a philosophical problem. The practical problem is that, whenever you engage in a complex multifactor test, the special interest loses because that is going to have to be fought out, and the game may not be worth the candle because, after all, the ultimate conclusion is almost surely going to be "no." Canadian libel law does not correspond to American law in significant respects, and therefore, you are mandating an inquiry that will be burdensome and is not likely to get you anywhere, and that is the practical problem. So the basic philosophical problem is that the point of the public-policy exception is exactly that we are not going to do that, because we have decided that this is so important to us that we are not going to enforce those kinds of judgments without a sort of nuanced and fine-grained discussion of how close it may or may not be.

So if push really comes to shove about this and some black-letter rule is needed, that would be an example of U.S. public policies as this can't be enforced. So that is where we are with the problems with this

mid-level thing, and, as I said, the wisdom of the group is very much solicited so that as we do, as I expect, work productively together over the next year and we exchange language, we can try to come to something that will satisfy all concerned.

Mr. Michael Marks Cohen (N.Y.): Turning to § 5(a)(v), the forum-selection part, there are a number of grounds on which courts will decline to enforce forum-selection clauses, and the area particularly where this has become very controversial today has to do with international transportation agreements, not only carriage of goods by sea, but passengers by air and passengers by sea. There has been talk about the rail convention, that sort of thing.

The first suggestion I would have for you to deal with these problems would be first to add the word “exclusively” in § 5(a)(v), so that it reads, “under which the dispute giving rise to the judgment was to be determined exclusively in a forum (whether court or arbitration) other than the rendering court. . . .”

Professor Lowenfeld: Section 5(a)(v)?

Mr. Cohen: Section 5(a)(v). And then turn to § 5(c) and put at the end that “the party seeking recognition or enforcement shall have the burden of establishing the invalidity or nonexclusivity of the clause,” and that would then allow, you see, anti-*Sky Reefer* legislation [Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995)] to be brought in.

Professor Silberman: Invalidity or nonexclusivity.

Mr. Cohen: Or nonexclusivity, yes.

Professor Lowenfeld: As you probably know, I don’t like *Carnival Cruise* [Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991)], I don’t like any of these kinds of cases with some small print in tickets and consumer law. The Europeans, by and large, exclude the consumer-type case, as will the Hague Convention, as I understand it, whatever draft I last looked at. But that hasn’t been the U.S. law, has it?

Mr. Cohen: No it has not. It has not been the U.S. law.

Professor Lowenfeld: Maybe we can change it with drafting.

Mr. Cohen: But the movement, in international carriage for example, has been to set up five different alternative fora, one of which could be a forum clause, say, in the bill of lading, but the fact that the forum clause in the bill of lading is designated as exclusive doesn’t mean that, say, a party with a cargo claim couldn’t go to any one of the other four jurisdictions. In Canada, New Zealand, and South Africa, they already have anti-*Sky Reefer* legislation, which accomplishes the same thing. My

recollection, and you may be up on this more than I, is that the Montreal Convention now has a similar —

Professor Lowenfeld: Fifth forum, that's correct.

Mr. Cohen: A fifth forum. But even if it says it is exclusive, it is not exclusive because the Convention says you can go to any one of the five.

Professor Lowenfeld: But not the sixth.

Mr. Cohen: I'm sorry?

Professor Lowenfeld: Not number six, only one through five. It used to be four. Now the fifth is added, which is the domicile and the passenger.

Mr. Cohen: I'm sorry. I was thinking that the —

Professor Lowenfeld: What they have added was the most important one where the previous Warsaw Convention cases used to exclude the widow, let's say, at her own forum. But it is still exclusive; five are exclusive. But I don't know. I think the issue is somehow different. I think *Sky Reefer* is correctly decided among cargo and carrier.

I'm not offended by that. I'm somewhat offended by the passenger with the small print on the ticket, whether it is air or sea. I'm not quite sure I know what to do about that. I always like to give the example I give in my class, the *Carnival Cruise* case: the couple from suburban Seattle is required to sue in Florida. What if they were required to sue in Piraiévs? Would their case come out the same way?

Mr. Cohen: There are cases like that.

Professor Lowenfeld: Yes, I know.

Mr. Cohen: And those cases go both ways.

Professor Lowenfeld: Are we doing the wrong thing here?

Professor Silberman: No.

Mr. Cohen: I'm suggesting you are doing the right thing, except that you are not taking into account that Congress may disagree with you as to whether or not, in international transportation cases, the party should be bound by the exclusive-forum clause in a printed bill of lading to which the consignee of the cargo had no input whatsoever and simply got it as his document of title in an international transaction. The law seems to be moving, globally, to give passengers and cargo owners a choice of fora for things like cargo-damage claims and personal-injury claims, which would enable them to overcome an exclusive-forum clause.

Professor Lowenfeld: Maybe we should do what the Brussels Convention did and just eliminate transportation cases.

Mr. Cohen: I have discussed this with Jeff Kovar in connection with the Hague Convention. The problem with that is that there are an awful lot of maritime contracts out there, like ship mortgages and supply contracts and charter parties, which provide for exclusive fora, and there isn't any reason why you shouldn't enforce the judgments of courts entered in those types of transactions just because you have an international transportation agreement or cargo-damage claims or personal-injury claims, in which the governments and the treaties are moving in the direction of relieving claimants from the burden of having to proceed only in a single exclusive forum.

Professor Silberman: But haven't we handled that to some degree in Comment *f* of § 5, on the bottom of page 52? We say, if "the forum-selection agreement has been submitted to the rendering court and that court has held it to be invalid or inapplicable after contest, that determination is not open to reexamination. . . ." So if you are right about this, and you leave it to the forum in which the forum-selection clause is tested, we will honor that determination, and we say, "unless," and the "unless" clause says, unless the forum says, in effect, we are not honoring any forum-selection clauses, or something like that. Then we take a different view. But I think what we are trying to do is not solve all problems. Not having a treaty, we have left it to the rendering court to make that determination of the validity of the forum-selection clause, and, by and large, in a judgment context, will honor it, unless in some sense there is a sort of manifest error or unfairness.

Mr. Cohen: Then you are saying that it is necessary to raise that objection even if the party against whom the claim is proceeding doesn't raise that objection, then the party who is pressing the claim must affirmatively raise that issue in the rendering court to be sure that they are not going to have an exclusive-forum-clause issue in the enforcing state. There is an incentive on the defendant in the first forum not to raise the exclusive-forum clause because he says, there is no point, there is anti-*Sky Reefer* legislation in Canada, what is the point of my raising this issue when I know it is going to be knocked down? You would say, okay, that issue is now open in the second forum in the United States, which may also have an anti-*Sky Reefer* provision in its law at some point. You would then require that, in the suit going forward in Canada, the plaintiff raise the issue that there is a forum clause in the bill of lading, or a forum clause in the passenger ticket, but it is unenforceable, in order to make sure that the court would then make a preclusive finding on that. I think that is going a bit far, Madam Reporter.

Professor Silberman: We will think about this, okay?

Judge Evan J. Wallach (N.Y.): I just want to speak briefly to Mr. Freedman's memo. It has been a while since I have looked at the law in the UK, but I used to look at it closely, and I'm not sure what the effects of the European Convention are, but, up until that time, much of the law was devoted to what we would call chilling effects on the press, and that was both criminal and civil. Their whole system of official secrets, which were under the Official Secrets Act, the revelation of information obtained in the course of government employment or requesting a government employee to give you that information was a felony. And, in order to avoid being charged under that, the government very kindly issued what they called D-Note defense notices to the press to tell you, well, if it is in this area, you can't talk about it with an official, but other than that, you are home free. At the same time, they had on the books, something called, for example, seditious blasphemy, which made it a crime to question the divinity of our Lord and Savior, Jesus Christ, which in *Whitehouse v. Lemon* [[1979] A.C. 617] was enforced as criminal law. All of that goes to the point that when the British courts, at least in the past, enforced the defamation law of England, the standard being —

(The proceedings were interrupted by a fire alarm; an intermission was taken from 3:40 p.m. until 3:50 p.m.)

Vice President Harper: We are back in session, and indeed we are back at mid-sentence.

Judge Wallach: Turning then to the civil law of the UK dealing with libel, again the standards are different, and, while facially they may be acceptable in a U.S. court, their application is such that again it is used very often to obtain a chilling effect. I would simply urge that, in looking at those particular issues, you look behind the facial nature of the law, what the claims are, what the defenses are, and how it is applied as a matter of policy. The UK is an awfully good example, if you want to see cases coming out of it. I would be very leery of importing that law, especially — just to wrap up — given that we are a Philadelphia-based organization. Andrew Hamilton was the original Philadelphia lawyer who defended John Peter Zenger in New York, and who convinced an American jury to split off from the British doctrine of the greater the truth, the greater the libel; hence, the origins of our nation.

Professor Ronald A. Brand (Pa.): My comments go to § 5(a)(v), the last clause there. I agree with Steve Burbank that the material from the Comment should be moved to the black letter; when the party has appeared and contested the choice-of-court agreement but lost in that contest, that should be binding [See § 4, Comment *d*, and § 5, Comment *f*]. I agree with that, but I would suggest that you consider deleting what

is now the last phrase there. We did this at The Hague because there is a problem here, and, if you put that together with § 5(a)(iii), you have the possibility, in a court, where a party appears and does not contest jurisdiction. But that may not be simply because they agree that jurisdiction is proper; it may be because there is another basis of jurisdiction on which they know they would lose if they contest it, and so it is logical for them not to contest jurisdiction. So you may have a situation where, in the other court, the party doesn't contest based upon the choice-of-court agreement, because they know they are going to lose on that, perhaps, but they know there is another basis of jurisdiction that is unacceptable under § 6 that they could have used here to prevent enforcement of the judgment. There is this leveraging-up effect that they are caught in a bind. It is a catch-22. If they contest it, they may lose anyway in that court. They may know there is another basis of jurisdiction that is good in that court, but it is not a basis of jurisdiction that we would respect here and that in § 6 is not allowed. So you can have a case where they would in fact, through this rule, be trapped into leveraging up into a judgment that would be enforceable under this Act that I think should not be enforceable under this Act.

Professor Silberman: I have to say I'm not quite sure what to do. In § 6(c), we dealt with that problem in a different context, that is, where the usual rule is that when a defendant appears in the action, it is usually a waiver of jurisdiction, and in the international context we said it was not. Partially because we were worried that, if France has Article 14 jurisdiction, the nationality of the plaintiff, what good does it do you to come in and raise that objection? It is good under French law. So we changed what is again the domestic rule here by saying that an appearance by the defendant is not a waiver of jurisdiction and does not deprive you of the right to resist recognition, under the standards of § 6. So it is not an appearance, which otherwise would be a fair basis of jurisdiction.

When it came to the forum-selection clause, numerous people raised with us the problem of waiver and noted that it is possible for parties to waive the forum-selection clause and to participate. So that is at least the explanation of why we did what we did. So I don't know if you have a solution for us.

Professor Brand: I don't immediately have a solution. I just think there is still a problem.

Professor Silberman: But I know you will think of one.

Professor Brand: I will give it further thought.

Professor Jill Fisch (N.Y.): My comment is directed to § 5(b)(iii), in which you authorize but do not require the court to ignore a judgment

that has been rendered in a parallel proceeding where the action in the United States was filed first. I know there is a reference to § 11(a) [§ 5, Comment *k*], in which you adopt the first-filing rule or the race to the courthouse, rather than the race to judgment, in the international area. Obviously, if you referenced domestic proceedings, you know there is fairly healthy literature on the tradeoffs between the race to the courthouse, the race to judgment, and so forth. It seems to me that authorizing the court to dismiss on the basis that a foreign court hasn't adopted the first-to-file rule is a little harsh. I mean there are a lot of circumstances, policy reasons for the court or the legislature. The court may, itself, not have the power to stay based on a legislative determination that the first filing isn't the best rule, or in fact the parties may not have asked for a stay in the other jurisdiction because they recognized it would be more expeditious to resolve it there. Then you have the loser in that proceeding coming into the court in the United States and saying, "Well, see, you should stick to this first-to-file rule, and you shouldn't recognize that judgment, and I get a second bite at the apple." So I'm just wondering whether that could be taken into account a little more in the Comments perhaps.

Professor Silberman: Possibly. I mean it is of course in the discretionary section under § 5, which says, "need not be recognized" [§ 5(b)], and the factors that you refer to are precisely the kinds of factors that might well be relevant. But obviously we wanted to put in the declination of jurisdiction in § 11.

There is no way, as we said in the discussion then, that we can impose that kind of rule on a foreign court, but we certainly can decide, if they go ahead without deference to an ongoing U.S. proceeding. We at least take away the requirement that we have to recognize that judgment in the mandatory section. So if we can add those factors to the Comment, we can try to think about that.

Professor Fisch: I just think that would be helpful, because I guess it is not clear how a court here is supposed to weigh those factors against sort of the general principle that we want to encourage the other court to adopt the first-filing rule, which in a way might penalize the court or that particular decision.

Vice President Harper: We have two more speakers on this section. The first one is at microphone 1. I see, just as I said that, two persons more magically appeared. Okay, we have four more, and then we shall move on.

Professor Mary Coombs (Fla.): I have two separate points. One, we were just talking about: the problem of § 5(a)(iii) and problems that arise because there may be other legitimate bases for jurisdiction. Section 5(a)(iii) seems to me to simply incorporate § 6. If the judgment was rendered on a basis unacceptable under § 6, then you could get it not enforced under § 6 itself. Section 6(b) incorporates the notion that, if there is another acceptable basis of jurisdiction that exists, even if not the one cited, then you can still enforce it. So I'm wondering whether we can just eliminate § 5(a)(iii) and let § 6 do all the work on jurisdiction.

Professor Lowenfeld: Well, I think that is a drafting point, and our view was, you ought to find out what kinds of judgment shall not be recognized, and one of them is, for lack of jurisdiction, and that gets you to § 6. I don't think we have a substantive difference.

Professor Coombs: No, probably not. The other one I think we do have a substantive difference. Section 5(b)(ii) has two parts. The second part, that you need not enforce a judgment that is "irreconcilable with . . . a judgment rendered in a foreign state . . . entitled to recognition . . .," is clearly right. You have two foreign judgments, each entitled to recognition, you can't enforce both of them, the U.S. court has the discretion to pick.

But the first part, "the judgment is irreconcilable with another judgment rendered between the same parties in the United States," I don't understand how you get any exception to the Full Faith and Credit Clause that comes under (b) rather than (a). It must enforce the U.S. court judgment, even if the U.S. court should have deferred. If it didn't defer if that was an appeal, a second U.S. court can't come in and say, we will enforce this judgment, which in effect says, we will not enforce the judgment of a sister state because we think they should have deferred to the foreign judgment.

Vice President Harper: Our Reporters will consider your point. Thank you. Mr. Calkins.

Mr. Hugh Calkins (Ohio): My comment is not directed to the particular section under discussion but is of a procedural nature and may indeed be partly somewhat moot if, as I inferred from some of the discussion earlier, it has been determined that this project is not really up for approval today, but the approval is to be deferred for another year or more. Basically, I want to comment in opposition to the motion of Messrs. Struve and Burnett.

Vice President Harper: Let me interrupt you. We are going to get to that motion for discussion purposes but will do that after we finish discussing § 6, so if you would hold your comments, that would be great.

Mr. Calkins: I will wait.

Professor Thomas D. Rowe, Jr. (N.C.): My comment begins with § 5(b) (i), on page 48, reading the words, “did not have jurisdiction to prescribe or jurisdiction to adjudicate. . . .” As I do mainly domestic stuff, I’m not that familiar with the term, “jurisdiction to prescribe,” a term of art in other circles than those in which I generally move. I take it it refers to some kind of legislative jurisdiction, so I went looking for enlightenment, and I got to Comment *i*, on pages 54 and 55, beginning on the bottom of page 54, and there is a reference to “jurisdiction to prescribe in the international sense” with a reference to the Restatement of Foreign Relations Law of the United States.

I started thinking about being a court trying to interpret the term “jurisdiction to prescribe,” and with the problems we have seen referred to in connection with how much goes into the black letter; these are terms that are not defined in the black letter. The court may have method problems, looking to the legislative history in the first place. It gets to the legislative history, it finds yet a reference to something else, it finds a variant use of the term, not just jurisdiction to prescribe, but jurisdiction to prescribe in the international sense.

Well, back in § 5(b)(i), it is not “jurisdiction to prescribe in the international sense,” it is “jurisdiction to prescribe.” So is that jurisdiction to prescribe in both the international sense and the domestic sense? I’m not sure.

Then finally, you get into the Reporters’ Notes over on page 60; the heading for Reporters’ Note 4 is “Defense of lack of judicial jurisdiction . . .,” yet another somewhat variant term. Anyway, my bottom line is that I see problems here with both clarity and consistency in the terminology, and I urge you to think about clearing them up.

Vice President Harper: Finally, the speaker at microphone 1.

Mr. Michael Marks Cohen (N.Y.): I address Comment *j* of § 5, on page 55. The first sentence of Comment *j* is constitutionally mandated, as you have indicated in the second sentence of Comment *j*. But I think you must be a little careful, because when you are not dealing with a prior inconsistent judgment of a sister-state court, but you are dealing with a prior inconsistent judgment of the same state court, that is not constitutionally mandated, that is an issue of state law, as to whether or not the state wants to apply the general rule, which you have outlined in the black letter, or whether it wants to apply its own prior judgment. So I think you should change the Comment to read, “the judgment is irreconcilable with a judgment rendered by a court of another state in the United States.”

Professor Lowenfeld: If you are right about that, then my willingness to modify § 5(b)(ii) was too quick; § 5(b)(ii) has a point.

Mr. Cohen: Yes, but in a very limited sense, and it only has a point where the third forum and the first forum are in the same U.S. state.

Vice President Harper: Okay, we are now at § 6, on page 72, the title being, “Bases of Jurisdiction Not Recognized or Enforced.” In order to assure that we have adequate time to address the overarching motion of Messrs. Struve and Burnett, I’m going to give 15 minutes of discussion to § 6, commencing right now. Do the Reporters have a comment?

Professor Lowenfeld: I don’t think we need an initial comment on § 6. We have been over it a number of times. There have been some discussions about, for example, tag jurisdiction. But, by and large, we say you need to have jurisdiction in F-1, both under F-1’s law and under F-2’s law, and we also say § 6(b) is of interest and was referred to before.

Suppose, for instance, you have an automobile accident in France: an American driver and a French pedestrian. If the French action is brought under Article 14, which we regard as exorbitant, but we wouldn’t regard it as exorbitant to have an accident in Paris, adjudicated in France, § 6(b) says okay, that resultant judgment is enforceable. Otherwise, nationality, domicile, habitual residence, all of those criteria, looking to the plaintiff, we reject.

Vice President Harper: Mr. Burbank?

Professor Stephen B. Burbank (Pa.): Section 6(a)(i). Maybe I’m missing something, Linda and Andy. We have been over this numerous times. You have been beaten around the head and shoulders, and you continue to say, “does not involve a direct right to the property,” which is far too narrow.

The Comments say, “is unrelated to the property” [§ 6, Comment *b*], which it seems to me probably gets it just right: “except in admiralty and maritime actions, the presence or seizure of property belonging to the defendant in the forum state, when the claim is unrelated to the property.” The *Dubin* case [Dubin v. Philadelphia, 34 Pa. D. & C. 61 (1938)], suggests that just because a jurisdiction hasn’t adopted a long-arm statute, that shouldn’t make any difference. “[D]oes not involve a direct right to the property” is far too narrow.

If you want a slightly more fulsome formulation, “does not assert an interest in, or is not otherwise related to the rights and duties growing out of ownership of the property.” But this “does not involve a direct right to the property” is simply far too narrow.

Professor Silberman: The only problem with *Dubin* I think is, if you look at *Shaffer* [§ 6, Comment *b*], one could have said that that claim was related; nonetheless, the Supreme Court held that kind of attachment was unconstitutional, notwithstanding the Brennan dissent. So I'm not quite sure.

Professor Burbank: They did not treat it as a related claim.

Professor Silberman: But they could have. And so I don't know what —

Professor Burbank: But it “does not involve a direct right to the property” is simply too narrow.

Professor Silberman: I'm not completely comfortable with —

Professor Burbank: Why do you say, “is unrelated to the property,” in the Comment if you are not comfortable with it?

Professor Silberman: Maybe we should change the Comment. (*Laughter*)

Professor Burbank: No, you should change the black letter. You should definitely change the black letter. This is much too narrow. David Shapiro said the same thing. You agree that the exercise of jurisdiction in *Dubin* should not lead to nonrecognition if it had happened in another country, right?

Professor Silberman: I'm not sure.

Professor Burbank: Really not sure?

Professor Silberman: Yes.

Professor Burbank: Somebody slips and falls on your sidewalk and sues you under a statute that just doesn't happen to be put into modern terms?

Professor Silberman: Well, one could do that because it would be a basis of jurisdiction. It would be another basis of jurisdiction that would satisfy the standard.

Professor Burbank: Section 6(b)?

Professor Silberman: Yes.

Professor Burbank: Well.

Professor Silberman: I don't worry so much about that, but I'm worried about how broadly someone will understand “related” here. We really were dealing with situations that were more classically direct rights to property, to use the quasi in rem I term; that's really what we were talking about there. That's why we haven't changed it.

Professor John B. Oakley (Cal.): Like Professor Burbank on a previous occasion, I rise to praise rather than bury the Reporters. (*Laughter*) With respect to § 6(a)(v), which reserves the right to deny enforcement to a judgment when jurisdiction has been exercised on an “unreasonable or unfair” basis “given the nature of the claim and the identity of the parties” — and I think it is properly hedged as a last-resort provision — I would call attention to the Comment on pages 76 and 77. Page 76 [§ 6, Comment c] declares that, in light of this reservation, “any given assertion of jurisdiction could be subject to challenge as ‘unreasonable or unfair’ . . .”

Near the bottom of page 77 and continuing to the top of page 78 [§ 6, Comment d], it says, “a defendant who unsuccessfully challenges the jurisdiction of the rendering court under the law of the state of origin should not be held to have given up the right to challenge the rendering court’s jurisdiction by the standards of this Act. However, factual determinations made after contest, such as whether a person established in the forum state was the agent of the defendant or whether title in a sales transaction passed in the forum state, will generally be given effect in a court in the United States,” and so should it be. But if we turn to page 40, and we look at the terms of § 4(b)(i) and (ii), we find that because “findings of fact” are segregated out in (b)(i), they are not subject to the caveat, but oh, yes, this is subject to the check of § 6 in the way that legal determinations are.

To point out the problem, take a look at § 4, Comment d. It says, “the party resisting recognition or enforcement is entitled to show that the basis of jurisdiction asserted in the foreign court does not meet U.S. standards. . . .” And in the accompanying Reporters’ Note 4, on page 46, the next-to-last paragraph, it concludes: “For instance, a determination by the foreign court in a products-liability case that the claim arose out of defendant’s activity in the forum state would be subject to a reasonableness check . . . under § 6(a)(v). . . .”

Well, what if the foreign court has made a factual finding of reasonableness? Or what if the only reason why jurisdiction would be unreasonable is that it was preposterous to find, as a matter of fact, that the claim arose out of the defendant’s conduct in the forum state? I think that the remedy is to redraft § 4(b) to combine (i) and (ii) into a single provision, both subject to the exception of § 6, and I will provide language to the Reporters that will do just that.

Professor Silberman: Let me just see, it is to combine (i) and (ii) in § 4(b)?

Professor Oakley: Yes, and I will be happy to read it into the record. On page 40, § 4(b), as changed, would read: “If an issue was raised and contested in the foreign court concerning the judicial jurisdiction of that court, findings of fact and legal determinations pertinent to that issue,” and then we resume with the language after “legal determinations” in former prong (ii). So “findings of fact and legal determinations pertinent to that issue are conclusive as to the jurisdiction of the rendering court under its own law, but the party resisting recognition or enforcement may show that such jurisdiction is unacceptable under § 6.”

Professor Silberman: Okay.

Professor Malvina Halberstam (N.Y.): I’m addressing § 6(a)(iv)(b), and I approve of it. I assume what you have in mind there are things like the *Filartiga* case [*Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)], the *Kadic* case [*Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)], what happens in some of the terrorism cases.

My problem with it is the second part of it. You say, “the claim on which the judgment was given was based on gross violation of human rights under international law. . . .” I think perhaps we should stop there, or otherwise make the rest of the language a little clearer. Because when you say, “and the defendant could not have been sued on such a claim in a forum more closely linked to the events on which the claim is based,” I think you can get into a lot of issues as to whether he could or couldn’t have been sued in whatever country it was and what other forum there might be that is closer than the forum in which it actually happened and so on.

I don’t think we would lose very much if we simply stopped after “international law.” If it is a gross violation of human rights, and those are very few types of things, and he was sued on it, and all the other requirements for a judgment apply, the fact that jurisdiction was based on his presence in the forum state, maybe should be enough.

Professor Ronald A. Brand (Pa.): My comment is on § 6(a)(v), the second sentence. It says, “A basis of jurisdiction is not unreasonable or unfair solely because it is not an acceptable basis of jurisdiction for courts in the United States.”

I have the same concerns about this that I have about the issues raised by Mr. Freedman in the Comments in § 5, where it appears that what we are doing is trying to elevate the policy behind this Act above constitutional policies found in the First Amendment and the Due

Process Clauses. I'm troubled by that, and the forum shopping that that can create, because you have somebody who would not be able to get jurisdiction in the U.S. court to get a judgment either in defamation or their basis of jurisdiction would violate due process.

They choose a foreign court, they get the judgment that they could not have gotten in the U.S., and then can enforce the judgment here under this Act where they could not have even gotten the judgment to be enforced under the Full Faith and Credit Clause. So I simply would suggest that that sentence creates some problems.

Professor Silberman: The purpose of that section, I think we made clear in the Comments, was to deal with situations where you might be talking about an English person being sued in France under one of the provisions of the Brussels Regulation that is not recognized in the United States. In a situation where the parties have no connection with the United States and the countries in which the parties are domiciled have agreed among themselves that this is an appropriate basis of jurisdiction within the European Union, there is no reason to think that the American Due Process Clause has any relationship to the jurisdiction asserted in those circumstances. And that is really the purpose of this. That is why the beginning of § 6(a)(v) says, "given the nature of the claim and the identity of the parties." So, if in fact they try to take jurisdiction over an American defendant, that would be unreasonable. But if they used one of those provisions to take jurisdiction over another member of the European Union, it seems to us that that is appropriate and there is not really a place for the United States Due Process Clause to operate.

Professor Brand: But the black letter is much broader than that, and I am concerned about the fact that a judgment you could not get in the United States because of constitutional limitations, you could get somewhere else and enforce in the United States.

Vice President Harper: We have now come to that point mentioned earlier where it will be appropriate for Messrs. Struve and Burnett to tender their motion.³ It has been previously submitted. The context for this discussion, I think, is that we are prepared, as long as we have, to address the merits of the motion, but it is not my intention to bring it to a vote.

As you have heard, this project will in fact be before us next year. So I think it would be useful for us to have the sentiment from those gathered as to their views on the proposed motion. Therefore, I ask either Mr. Struve or Mr. Burnett to step to a microphone, or both.

³ For text of amendment, see Appendix 2(A.3).

Mr. Guy Miller Struve (N.Y.): At the outset, let me say that, in addition to the considerations mentioned by the Chair, I think there are a couple of other considerations that make it appropriate for us to actually take a vote on this motion, not this afternoon but next year. One was suggested to me by Steve Burbank. Steve's point was that the Reporters are obviously going to do a good deal of work on this project between now and next year. So it will be fairer to make an ultimate judgment as to what is the most appropriate form for the project, not now but when we have the semifinished product in front of us.

The second consideration, if the officers will permit my making this observation, I think that the issue that we are now going to be addressing, which is what is the most appropriate form for this project, is one that, if it is at all possible, if the format and program for next year's Annual Meeting permit it, should be addressed not in a divided session of the Institute, where only a certain number of the people there can be there, but in a plenary session of the whole Annual Meeting. Because this issue, in particular, is one that addresses issues of federalism, issues that are not uniquely, or in any specialized sense, issues of the recognition of foreign judgments.

So with those preliminary comments, let me just make one other preliminary comment, and that's this. For most of the day today, we have been looking at this project from a thousand feet up, from a hundred feet up, from, in some cases, 10 feet up. In one case — and one case only really — we got up to 10,000 feet, and that was the reciprocity provision.

This really is a 30,000-feet-up question. It is a question of looking at the entire project. Is it most appropriate for the Institute to propose it as a statute for enactment by Congress, or is some other form more appropriate?

For a number of reasons, I think that the answer should not be a congressional statute. First of all, the reason why we originally started down the road of a federal statute was we thought there was going to be a treaty at The Hague. Now we know that there is not going to be one in the foreseeable future, and, if there is one, there is no reason to think that this would not require a lot of reworking before it could become an implementation statute for that to-be-hoped-for treaty.

A second consideration, which I think is not unimportant, is that the chances that Congress would actually enact this statute as a federal statute, whether we propose it or not, are essentially nonexistent. I have had it put to me, so what? The Institute should do what's right, regardless of whether or not Congress is going to do what's right.

There is a certain motherhood-and-apple-pie appeal to those sentiments until you think about them. But when you think about them, you realize that there is something self-defeating about putting what we obviously think are a lot of good ideas into a format, namely a statute, which in order to have any real-world impact or validity requires enactment.

When there isn't going to be enactment, it is a little bit like writing a very terrific, broad, forceful dissent in a case where you know the majority of your court has gone the wrong way. There is a sense in which all you do is make it all the more likely that you will have little practical impact because any of our ideas that anyone cites, if we have cast them in the form of a statute, the crushing response by the opponent in the court in question is, "Well, they thought it took a statute to accomplish that, but it wasn't enacted."

Now let me go to what I think is the §64 question here, which is the question of federalism. I think that, at heart, what this motion really asks us all to think about is, how serious are we about federalism? Because there is no question that there is a federal interest in the enforcement of foreign judgments.

That doesn't answer the question. There are a lot of cases in which Congress would have the constitutional power to enact the federal statute and in which it hasn't been done. Think, for example, of the Uniform Commercial Code. Under the same theory that is being urged here, we could have replaced that by an interstate commercial code, and boy would that have been uniform. And if we were really concerned about making that uniformly interpreted throughout the nation, we could have made it concurrent jurisdiction in the federal courts and the state courts, too.

To bring the example a little closer to home, consider domestic judgments. Unlike foreign judgments, they actually have a provision of their own in the Constitution — the Full Faith and Credit Clause — and yet, Congress has never thought it necessary to enact a federal statute about the enforcement of sister-state judgments.

So the question is, why is it that this problem has risen to the fore as the one that calls for a federal statute? When I think about that question, the thought I come back to is what Jeff Kovar said this morning: that the states are doing an excellent job of enforcing foreign judgments and that, as far as he can see, the argument for a federal statute, if any, would be that it would enact reciprocity.

Now I must tell you, this sort of tempts and tests my commitment to the idea of federalism, because I was part of the majority that this morning voted to reaffirm the requirement of reciprocity. So I am tempt-

ed by what Jeff says, but, at bottom, if you really believe in federalism, then I suppose you want to assume that the Commissioners on Uniform State Laws, who are going to revisit their Act in light of all the work that we have been doing, and the states will do the right thing about reciprocity, rather than, because we are so sure we have the right answer on it by 68 to 55, giving them a federal statute that would preempt that.

I would suggest that no more than in the case of the Uniform Commercial Code is there the strong justification that should be needed, not merely a theoretical justification, to replace a system of state law that works by a federal law. And that's the heart of this motion.

Vice President Harper: Mr. Perkins.

Mr. Roswell B. Perkins (N.Y.): In an effort to top Mr. Struve, I shall start from an altitude of 31,000 feet. (*Laughter*)

With the greatest respect for the proponents of the motion, I rise to oppose it. The first alternative that is proposed by the motion is to put the project on hold until such time as the Hague Convention is concluded and signed by the U.S. I say that it should not be put on hold and that we should, on the other hand, put it over the goal line.

Not only is it virtually a finished product, but it is an excellent articulation of concepts that have been embodied in successive drafts, and debated and approved in full in accordance with our established procedures. It is a culmination of nearly five years of effort, and the failure of the Hague negotiations does not constitute a show-stopper in my view. The importance of the work that we have done transcends the fate of the Hague Conference. Moreover, the Institute has crossed this bridge before, it seems to me. We have known for three years or so that the Hague Conference had bogged down and might never be adopted as a convention, but we agreed to continue, and I think the Institute has already rejected the notion of the adoption of the Hague Convention as being a precondition.

Now the second alternative of the motion calls for relegating this project to the status of a Reporters' Study, and this would, in my view, constitute a repudiation of the commitment of literally thousands of hours of the time of distinguished practicing lawyers, judges, and academics who have debated this project over a five-year period on the floor, in Advisers' meetings, meetings of the Members Consultative Group, and to say nothing of extensive correspondence. And this project is totally different from a Reporters' Study. A Reporters' Study is reviewed only to determine that it justifies publication, and this project, on the other hand, has the benefit of exhaustive consideration, and most of the sections have already been approved.

So now, just briefly to try to address the four subpoints that were set forth in the Struve/Burnett Memorandum, and I don't think they are very persuasive. The first is the argument that the Institute would have to revisit its draft if and when a Convention is concluded. It doesn't seem to me that that's correct, because we can always decide at the time whether we want to revisit it. We don't have to. We don't have to bind ourselves now to do so.

Secondly, I don't understand the second argument, which is to the effect that our action would make success at the Hague Conference less likely. I simply don't think it's true, nor do I believe, as suggested in the Memorandum, that our approving the draft would signal to the Institute that it "has given up hope that an acceptable Convention can be concluded. . . ." Is that zero?

Vice President Harper: You may continue.

Mr. Perkins: Regarding the third point in the Memorandum, it seems to me that, if Congress did not adopt our draft, this would lower the Institute's legislative batting average, and I'm not a bit concerned about that. For example, we could say that the Federal Securities Code was never enacted, but the fact is that the intellectual effort in the drafting has been reflected in numerous amendments to the Federal Securities Laws and in extensive SEC regulations.

The fourth subpoint of the Memorandum is that there should be no federal statute in the absence of a Hague Convention. I don't think that is correct, that the final policy judgment as to whether there should be a federal statute would depend on circumstances at the time Congress actually considers the issue. We have all heard and endorsed some strong arguments for a federal statute, and putting forth a draft will contribute constructively to the final choice by Congress. Incidentally, the Struve/Burnett Memorandum notes that the drafters for the Uniform Act are drafting amendments based in part on our work, and I don't think our promulgation of this draft will in any way preempt or prevent work on the Uniform Act or any other project. Thank you.

Vice President Harper: Mr. Burnett.

Mr. K. King Burnett (Md.): We have heard, at some length, that the law in the United States is pretty much uniform. Actually, it is as uniform as the Uniform Commercial Code. There probably are less differences in this area of the law than almost any other area of the law, particularly given the number of courts involved in it.

There is very little criticism. As a matter of fact, there is no criticism of the cases by the Reporters and an acknowledgment that they want to capture, in this statute, a lot of that law.

Our courts, primarily state courts, have had tremendous experience in this area, starting with the Full Faith and Credit Clause. They have had more experience than any courts anywhere else in the world.

As Mr. Perkins says, this project has had five years of effort, and it is not from want of talent, but it is not really written as a statute, and it is forced, because of the federalization of this, to go into all kinds of areas of law, from *lis pendens* to foreign orders, subjects that are not really covered by statutes anywhere, to provisional remedies. All of these kinds of issues the Reporters feel are necessary to pull in because we want to be sure you federalize the entire possible area relating to foreign judgments. This complicates the matter greatly, and it also complicates its insertion into the existing state laws that govern these areas — *res judicata*, preclusion by judgment — all of these different areas are ones that our courts have handled in a very good manner through the years.

The need to await a treaty, those of you I know, and not all of you here, have seen the latest draft of the treaty on forum clauses, but it is nothing like this statute. If you are going to have a statute to implement that, it would be a completely different statute. We have no idea what a statute would need to include, to implement any future treaty. You are drafting something without anything on the background in the way of a treaty.

Ironically, we actually already enforce all the judgments that all these treaties have been drafted to cover, including forum clauses. That's the thing that's ironic, and I know very frustrating for all of us sitting here in this country, is that we have developed this uniform, efficient, effective system, and the rest of the world doesn't like our jury verdicts, our long-arm statute, and a few other things.

Now these are problems that we aren't going to solve with any federal statute. So we are going to take this system, we are going to throw it away, and then punt it to Congress.

Now anybody here who has dealt with Congress and thinks of the complicated statute that this is, written the way it is, even with the great improvements that I'm sure the Reporters will make, to think of this going to Congress and wondering what is going to come out when the special-interest groups, particularly in the intellectual-property area, who are very fearful of foreign judgments, want to put in their exceptions and other exceptions, I don't know what we are going to have come out.

We have already discussed, and I won't go into it again, a little bit about whether The American Law Institute should get into the position of trying to give a little bit of a bargaining chip to our negotiators. But I think it is important to note that, before doing something like that, you've got to have a really good fundamental reason. You've got to be sure that that bargaining chip is worth what you are giving up, the complexities that you are going to get into. Why would we want to do that? I don't think it would be effective to start with, but that is a question of judgment, and I respect the fact that many people who are very knowledgeable here feel that it might have some effect on some negotiations with some countries, somewhere.

I'm not going to discuss the federalism issue. I think Mr. Struve has discussed it very eloquently. But this is an area of state law, and if you imagine we take this precedent on this basis, this flimsy basis of the problems that we have heard here in this, and turn over all of this area, what will be next?

We can think of no organization in this country that has been so supportive of our federal system than The American Law Institute. The Restatements have made this system work, and I think that we ought to give pause when we think of those issues. Thank you.

Professor Barry E. Carter (D.C.): I don't think I can reach the 31,000 feet of Mr. Perkins, but I will try to reach some high level. I speak against the motion and agree with Mr. Perkins.

I don't think that we should stop. I don't think we should recommit or the like but should move forward with all deliberate speed and faster than that, (*laughter*) for a couple of reasons. First, I just want to take a step back for a second. Unlike Mr. Perkins, I speak as a relatively new member, and this is the first time I have sat through the full session on a subject I know something about; not a lot, but something. I want to first commend the Reporters for their tremendous scholarship and thought on the subject. This is a major work.

Secondly, I was very impressed, and I think the debate today was extraordinary, particularly on the issue of reciprocity. This is what the ALI should be all about: serious discussion of the law and policy. I think, as reflected in the work the Reporters have already done and the discussion by the membership, the result here is going to be an impressive document. It is going to be a document worth trying to do something with, not putting it on the shelf as a study but trying to pass it as a law.

I think there are benefits to it as a federal law. Number one, there is the efficiency argument. I don't think our system works as well. I teach my students about this, I struggle with this occasionally with private

lawyers, and trying to find out what 50 different states do, even if it is very similar, takes a lot of work and effort. And by the way, if you expect foreign countries to start showing reciprocity toward us, realize what they have to do to find out about our law. It might be just as difficult as we talk about their law. So I think there is efficiency.

Secondly, I think there is a benefit in trying to get reciprocity as the statute would propose, by tying our recognition to reciprocity. That was an important vote today. I would ask that two subjects might be addressed by the Reporters and others next year, which I think would be helpful for the debate.

One, I would love to hear a little bit more about this trend by other countries against reciprocity or, more accurately, against recognition of U.S. court judgments. I think that it is important to realize there is a trend out there that we ought to worry about, and I heard some of our Hague representatives like Ron Brand mention it. I would like to hear more about it, because I think that is a powerful argument for the law.

Secondly, I would hope that maybe we could talk to Congress informally, to the extent we are trying to have an impact. There has been a debate out there. I think, like Mr. Perkins, we ought to go forward. But the extent that some members are concerned about whether Congress is even going to listen, maybe we should have a little discussion with Congress now, if only to soften them up to the idea that there might be proposals coming along.

Because I think there will be some interest in Congress when they hear about the trends by foreign governments. So I would encourage that maybe a little work be done in the next year, as I know our Reporters are going to do, both on these foreign trends and Congress, and I would hope that we do move forward as fast as we can.

Vice President Harper: In light of our approaching hour of adjournment, the six people now standing will be recognized but no others. I'm sorry, Mr. Elsen, almost you slipped in, but not quite. (*Laughter*) Mr. Calkins.

Mr. Hugh Calkins (Ohio): I wish to make two points, both explanatory of why I'm going to vote against the Struve motion. Point one, we should distinguish between pushing a statute on Congress on the one hand, and approving a project on the other hand. The American Law Institute has never pushed a project statute or anything else on Congress. In fact, we are prohibited to do so by our Bylaws, which we are contemplating changing, but that won't alter the principle that it almost never happens, and, if any of you are under the impression that the approval of this project constitutes an implied instruction to the officers to hurry

down Pennsylvania Avenue and buttonhole some Senators, you are quite wrong. It does not.

The question of what should be done to implement an approved project is something that the Council considers long after the membership has approved the project. If you want, I can assure you that, especially after the discussion here this afternoon, the Council isn't about to suggest to the officers next December that they should do something to talk to Senators about this project. But if you want to be doubly sure of that, send a communication to the Council saying that you don't think that is the right thing to do. It won't happen, but, if you want to be sure of it, send a communication.

My second point, somewhat repeating a little bit of what Rod Perkins said, there is a greater difference between a Reporters' Study and an approved project. Everybody knows that The American Law Institute has a very complex procedure for approving things. We have these Advisory Committees and Advisers and so on, and nothing becomes an approved project until the Council has approved it and until the membership has approved it. But that approval is simply the approval of the project as a substantive matter that we think is pretty good, and, when there are important issues, of which the federal issue is clearly one, they are dealt with by a vote of the membership, and there ought to be a vote of the membership on that issue whenever this comes back to the membership, like a year from now.

There is another issue that a gentleman up there raised with me, which is the enforcement of foreign tax decrees, about which he feels very strongly. That also is an appropriate subject for a vote of the membership, and, when the membership has voted, that then becomes a part of the project. But the way to deal with important dissatisfactions, like federalism and enforcement of tax laws, is to raise them, write out a motion and get it filed, so it gets good consideration in an Annual Meeting. And I agree, with whoever suggested it, that next year, in view of the discussion we are having now, this ought to be in the plenary session and not in a split session, and I'm sure the management will try to arrange that.

Well those are my two points. Don't worry about somebody going to Congress and trying to sell this statute. It won't happen. Second point, think about the fact that, if this is a good work of scholarship, the way to tell the world that we think it is, is to approve it and not to treat it as a Reporters' Study. That is what we do when we aren't so sure about whether we like the merits of the document. This does not merit a Reporters' Study treatment. It merits approval, and I hope that, a year from now, we will finally give it the approval it deserves.

Professor Eric M. Freedman (N.Y.): I certainly agree that the ultimate product should be approved by the membership. I just don't think the ultimate product should be in the form of a statute. The reason for that is not because I particularly think that the fact that we propose a statute that has no chance of enactment is a bad thing. If that is the best way to state our views, that's fine.

The reason is that putting it in the form of a statute seems to be having the effect of distorting our substantive views, as the reciprocity debate showed this morning. The discussion was, well, you know, reciprocity may or may not be right, but since this is a statute being proposed to Congress and since the purpose of it is to gain this political advantage internationally, therefore you should vote for the reciprocity provision; otherwise there is no point in having this statute.

That may very well be true. That may be a very good reason not to have it as a statute, but rather, as what other commentators here have pointed out, as a Restatement with black letter and Comment and discussion. Its merit is its intellectual influence, and its intellectual influence, which is not going to be felt in Congress, for sure, is plainly best directed on the practical level to the National Conference of Commissioners on Uniform State Laws and to those courts that might cite it and use it and be influenced by it, which is surely more likely to happen in some approved product, whether you call it a statement of principles or a Restatement or something other than a proposed unenacted statute, particularly where, again, the statutory format is having a negative effect on the intellectual content.

For those reasons, I think the motion is well taken, and the project will be improved by taking it out of the statutory straitjacket in which it now finds itself.

Mr. Michael Greenwald (Pa.): I've spent the last several years working on a manual for the benefit of ALI Reporters, and one of the things that I've spent some time on was trying to distinguish the kind of writing one does for a Restatement, the kind one does for the kinds of projects we call principles, and the kind that one does for statutory projects. So I'm sympathetic to Mr. Struve in some sense because there are differences, significant differences, in form that Reporters ought to be aware of when they are undertaking these particular kinds of projects.

But, on the other hand, the differences can be somewhat exaggerated because in all of these projects we have the same kind of approach to the material, the same kind of focus on black letter, Comment, and Reporters' Notes, and the difference is really not all that great and need not excite all that much concern whether Congress is interested in it or

not. I think Professor Freedman's concerns, for example, about the importance of getting the form right are probably a bit exaggerated now that all this effort has been put into drafting it as a statute.

Let me just give you some quick quotations, just to make my point, and I'm going to subside. The 1923 report that led to the founding of the Institute talked about what a Restatement should be, and it talked about it as a "statement of principles" and observed that this statement should be made with "the care and precision of a well-drawn statute." (*Laughter*) So there really isn't all that much difference in form. Much more recently, Herb Wechsler, in his farewell address as Director said — this was after the Federal Securities Code effort went down to defeat; there had been great hope that it would be enacted but that didn't happen for a variety of reasons — and Professor Wechsler said that even though an Institute legislative project is never enacted, it can still serve as a "modern restatement, describing present law in the context of an exploration of its difficulties and proposals for its possible improvement."

We have a similar effort now. Even if it never becomes an enacted statute, it can still be a valuable effort in its present form, which I don't think we need to be so worried about. The important question, as Mr. Calkins says, is whether it deserves to be approved as a work of the Institute.

Professor Stephen B. Burbank (Pa.): The framers of our Constitution in Article IV recognized that judgment-recognition practice could be a powerful weapon of economic warfare, and, almost 200 years later, the members of the European Community recognized the same thing when they concluded the Brussels Convention.

We have heard, and I agree with Mr. Carter, that it would be useful if these reports were elaborated. We have heard that, if anything, American judgments are likely to encounter greater and greater difficulty in enforcement abroad. Those facts, if they are that, are important to me in thinking that this motion, when it comes up for a vote next year, should be defeated.

I'm not at all worried about Congress's reaction, nor am I at all convinced that Congress may not, in fact, very quickly become interested in a statute like this, at least one that contains a reciprocity provision, given the discussion, and a very good discussion, that we had today of reciprocity.

As to federalism, Mr. Burnett told us that the Uniform Act is as uniform as the Uniform Commercial Code. I'm perfectly willing to accept that. I don't remember whether it was Judge Patricia Wald or then Judge Ruth Ginsburg who said that the Uniform Commercial Code is not uniform.

Moreover, if it is the case that judgment-recognition practice becomes more political, and more obviously involves political and foreign-relations considerations, one, I don't think we want courts making basic policy decisions like reciprocity or no reciprocity, and I'm quite sure that we do not want state courts making such decisions.

Finally, I think it was Mr. Burnett who suggested that the extremely innovative and interesting and I think very important provisions in the current draft on *lis pendens*, on provisional remedies and the like, complicated matters. They are simply one other reason why there should be a federal statute. Thank you.

Professor John B. Oakley (Cal.): Some of the debate seems to be a covert way of addressing the merits of the Reporters' proposal, and I would suggest that those who oppose the merits of the proposal vote against it, and those who support it vote for it. But they should be voting for a statute.

Although I have been accused from time to time of having my head in the clouds, I'm not going to put myself on the same level as Rod Perkins. But having just finished 10 years of work from start-up to publication on a statutory project, I have had some occasion to think about what the Institute ought to be doing and actually flying around the country at about 31,000 feet trying to look to the future, as well as look down on what the Federal Judicial Code Revision Project confronted and accomplished. What I have decided is that this is an area of work in which the Institute needs to be vitally engaged, and it would be a tremendous step backwards to decide that the prospects of enactment are too dim to justify preparing work product of a draft statutory nature.

The challenges are daunting. It is very difficult to draft statutes, but it is a great discipline that I think engages the kind of debate that we have had today. If you think about the nature of law, we have moved from the era of the common law well into the age of statutes, and, if the Institute wants to be relevant, it has to produce statutory work product.

Moreover, the fact that it is unlikely that a statute will be enacted verbatim, from first to last section and clause, doesn't mean a statute won't have enduring significance. That certainly has been true of the Study, published in 1969, of the Division of Jurisdiction Between State and Federal Courts.

Specifically in the federal arena, where Congress tends to enact statutes in an ad hoc way in response to some sudden crisis that generates support from key constituents, it is essential to have on the shelf a template of what a studied process of legislative drafting, subject to gen-

uine peer review, will produce. It not only gives committee draftspeople a template, but it gives critics a benchmark of comparison.

So let's keep debating vigorously the merits of how to deal with the recognition of foreign judgments, but by all means let's do it in a statutory format.

Dean Mary Kay Kane (Cal.): Just two brief points. I'm speaking against the motion. I think that the arguments that are being made by the makers of the motion sort of prove too much, if you will.

It starts from a premise that one of the reasons we got into this was because of an attempt to do implementing legislation in conjunction with the Hague Convention possibilities, and then suddenly we find ourselves in federal-statute land. I guess my sense of that beginning is a little different. It is true, and I remember very clearly when the proposal was brought to us, that it would be a good idea for the ALI to embark on this project because of the Hague Convention, and it was an opportunity to be helpful. But that wasn't all, because in fact, as a member of the Council and some of you on the Council may remember, if that was a sole argument for doing this project, that is, if because the State Department would have found it useful to have us drafting implementing legislation, that to me would not have been a persuasive argument alone, because we don't draft at the behest of a given department, for we might come to conclusions they might not like. We should be making an independent judgment about what the best model is we think should go forward.

What persuaded me that, indeed, this was an important project, given the vagaries of the whole Hague Convention process, is the fact that I do believe we need a federal statute. I think actually my academic side makes me correct Mr. Struve, we do have federal statutes implementing the Full Faith and Credit Clauses, 28 U.S.C. § 1738 and § 1738A, B, and C, for the states, for interstate recognition.

This is clearly an area of national interest, that is, international relations. It is an area where there has not been a statute, and I'm not suggesting that the states have done bad things, or certainly I'm not suggesting that the Uniform Law that is out there now has not done a lot of good things and given us a lot of good models to build on. That is not the issue.

The issue with the federal statute and the opportunity is that at one time you can have a coherent view. We have our body put together an entire statute, which they may not buy all of. They may pick it apart.

But as John just said, they can think about it coherently. In the Uniform Commissioners setting, the Commissioners may do a fine job of

putting together a model statute, but then you have to go to all 50 states, and they will do what they are going to do in their different states.

So I would encourage us to stick with the project that we started with, which did have a federal statutory component, and we have always had it in there, and to recognize it will be of value, whether enacted or not as has been said, and will help bring more coherence to the area, and perhaps give us some future vision of the way the area could develop. Thank you.

Vice President Harper: This was an opportunity for several of us to speak on the subject. I'm going to defer asking the Reporters to respond, in part because they are going to have a year to prepare their rebuttal. *(Laughter)*

Professor Lowenfeld: But you can guess how we felt.

Vice President Harper: I can indeed. Let me mention as well that, as I understand it, there are some dinner tickets for tonight starting 8:00 p.m. as the start time. As you probably have seen from the bulletin board, that is an error. The reception will begin at 7:00, followed by dinner at 7:30. And with that predicate, I now turn to Mr. Boskey.

Mr. Bennett Boskey (D.C.): You know, Conrad, sometimes the best motion is no motion at all, but we have, I think, reached a consensus. The consensus is that, with the high level of discussion that we have had here today, there is a lot of work still to be done by the Reporters.

We would hope, and we would expect, that next year they will come back with a Proposed Final Draft of the statute. When they do, they will have taken into account the two, I think, pretty decisive votes that we had today dealing with the reciprocity matter and the burden of proof.

They will know that they are going to have a debate next year on whether the project should be finally approved as a statute or not. That is a perfectly healthy and wholesome debate, and we will see where we get next year. But in the meantime, there is a good deal of work to be done. The Reporters should be encouraged to do it, and all of us should be encouraged to give to the Reporters what it is we can contribute to their efforts.

Vice President Harper: With that, I think we can give a hand to the Reporters. *(Applause)* And I turn to the President to inquire whether there is anything else we should address this afternoon.

President Traynor: Nothing other than to thank you, Conrad, for your wonderful job of presiding, not only today, but on many other occasions for the Institute. I'm very sad that we will not have you back in an

official capacity to do this. I'm very tempted, given what you have done today, to invite you back for a special appearance. (*Laughter*)

We were planning on a plenary session, but we will have to do that tomorrow with regard to the reports on Wills and on Restitution, the drafts that were approved in both cases. Thank you.

Vice President Harper: Thank you. We're adjourned.

(At 5:00 p.m., a recess was taken until 9:00 a.m. the following day, May 19, 2004.)