TYING PARALLEL PROCEEDINGS TO JUDGMENT RECOGNITION: HARMONIZING CROSS-BORDER DISPUTE RESOLUTION

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I. Introduction

The purpose of this paper is to honor Linda Silberman's important contributions in the area of recognition and enforcement of foreign judgments—the area where Linda and I first became close colleagues. I have continued to learn from and have been challenged by Linda's work in this area for more than

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thirty years.[1] This is an area which combines Conflicts of Law and transnational procedure, also fields of Linda's expertise. Linda's work in judgments spans several projects in multiple systems, from her work as Co-Reporter with Andreas Lowenfeld on the ALI's federal judgments statute of 2006[2] to her work with the Hague Conference.[3] Her impact on judgments through the Hague Conference is broad—it is not just the work with the civil and commercial judgments from 1992 forward—but includes the important role she played with implementing the 1980 Hague Child Abduction Convention[4] and negotiating the 1996

1. Duke Law School hosted a conference on the Hague Conference in the spring of 1992 at which Arthur von Mehren first discussed the proposal that the Hague Conference undertake work on a convention dealing with the recognition and enforcement of foreign judgments, and Linda Silberman discussed the 1980 Hague Child Abduction Convention which had entered into force for the United States only 4 years earlier. Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, 19 I.L.M. 1501 [hereinafter 1980 Child Abduction Convention]. Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 Law & Contemp. Probs. 271 (1994); Linda J. Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 Law & Contemp. Probs. 209 (1994).

2. Recognition and Enforcement of Judgments: Analysis and Proposed Federal Statute (Am. L. Inst. 2006) [hereinafter ALI Judgments Statute].

3. *See, e.g.*, The Hague Convention on Jurisdiction and Judgments: Records of the Conference held at New York University School of Law on the Proposed Convention (Andreas F. Lowenfeld & Linda J. Silberman eds., 2001) (presenting the proceedings of a conference at New York University School of Law on a proposed convention on jurisdiction and recognition of judgments); Linda J. Silberman, *Some Judgements on Judgments: A View from America*, 19 King's L.J. 235 (2008) (presenting an international perspective on the recognition and enforcement of foreign judgments); Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DePaul L. Rev. 319 (2002) (addressing how jurisdictional regimes differ between the United States and Europe); Linda J. Silberman, *The 2019 Judgments Convention: The Need for Comprehensive Federal Implementing Legislation and a Look Back at the ALI Proposed Federal Statute*, *in* Reflections on International Arbitration: Essays in Honour of Professor George Bermann 613 (Julie Bédard & Patrick W. Pearsall eds., 2022) (discussing the implementation of the 2019 Hague Judgments Convention in the United States).

4. Linda Silberman has written extensively on the 1980 Child Abduction Convention as well as aided in U.S. implementation. Linda J. Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 U.C. Davis L. Rev. 1049, 1051 (2005); Linda J. Silberman, *United States Supreme Court Hague Abduction Decisions: Developing a Global Jurisprudence*, 9 J. Comp. L. 49 (2014); Silberman, *supra* note 1.

Hague Child Protection Convention.[5] One aspect that she was instrumental in including in the 1996 Convention is a mechanism for transfer under Articles 8 and 9 from one country with jurisdiction to another one which would be "better placed in the particular case to assess the best interests of the child."[6] This mechanism of cooperation also reflects elements of discretion by authorities with jurisdiction, concepts analogous to a *forum non conveniens/lis pendens* approach, which Linda also worked to incorporate into the Hague Conference's work on recognition and enforcement of judgments in the late 1990s and early 2000s.[7]

The recognition and enforcement of foreign judgments has a domestic and foreign element (or, one could say, an import and export side) with the two being linked in some systems by the concept of reciprocity. In the United States, we have a "trade imbalance," importing far more foreign judgments than we can successfully export. The incoming judgments are readily recognized under one of three regimes[8] and under

5. The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, *opened for signature* Oct. 19, 1996, 35 I.L.M. 1391 [hereinafter Hague 1996 Convention].

6. Hague 1996 Convention, *supra* note 5, at arts. 8, 9.

7. The 2001 draft of the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, an interim text, was drawn up at Part One of the Nineteenth Diplomatic Session, held June 6-22, 2001. Hague Conference on Private International Law, Interim Text – Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, June 6-22, 2001, arts. 21, 22, https://perma.cc/B7CJ-TLZX [hereinafter 2001 Draft].

8. Enforcement of foreign judgments within the United States is largely a matter of state law and is basically controlled by common law except in those states that have adopted the Uniform Foreign Country Money-Judgments Recognition Act. *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895) (holding that "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"). For general background, *see* Louise Ellen Teitz, Transnational Litigation (Michie, 1996); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation,* 10 Roger Williams U. L. Rev. 1, 5 (2004). Some states also have looked to the Restatement Third of Foreign Relations Law of the United States) (1987), now replaced by the Restatement (Fourth) of Foreign Relations Law of the United States (2019) at §§481–489.

state law, with only seven[9] states requiring reciprocity. To try to enhance outgoing judgment recognition, the United States has participated in (and indeed helped initiate) work for the last thirty years at the Hague Conference on recognition and enforcement of civil and commercial judgments.[10] Much has been written about these efforts to unify/harmonize recognition and enforcement,[11] with the critical points being: (1) the

9. As of June 2023, only seven U.S. states conditioned recognition of foreign judgments on "reciprocity"—three make it a mandatory ground (Arizona, Georgia, and Massachusetts) and four make it discretionary (Florida, Ohio, Tennessee, and Texas). In Wisconsin, where there is no statute on enforcement of judgments, courts base their decisions on comity. ARIZ. REV. STAT. ANN. § 12-3252(B)(2) (2015) ("Notwithstanding subsection A of this section, this chapter does not apply to a foreign-country judgment that . . . [o]riginates from a foreign country that has not adopted or enacted a reciprocal law related to foreign-country money judgments that is similar to this chapter."); MASS. GEN. LAWS ANN. Ch. 235, § 23A (West 2022) ("A foreign judgment shall not be recognized if . . . judgments of this state are not recognized in the courts of the foreign state."); FL. STAT. ANN § 55.605(2)(g) (West 2018) ("An out-of-country foreign judgment need not be recognized if . . . The foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state"); GA. CODE ANN. § 9-12-138 (2006) ("This article shall apply to foreign judgments of other states only if those states have adopted the "Uniform Enforcement of Foreign Judgments Act" in substantially the same form as this article."); OHIO REV. CODE ANN. § 2329-92 (West 2011) ("A foreign country judgment rendered in a foreign country that does not have a procedure for recognizing judgments made by courts of other countries and their political subdivisions in its statutes, rules, or common law that is substantially similar to sections 2329.90 to 2329.94 of the Revised Code may be recognized and enforced pursuant to section 2329.91 of the Revised Code in the discretion of the court."); TENN. CODE ANN. § 26-6-204(c)(9) (West 2019) ("The foreign jurisdiction where the judgment was rendered would not give recognition to a similar judgment rendered in this state."); TEX. CIV. PRAC. & REM. CODE ANN. § 36A.004(c)(9) (West 2017) ("it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, would constitute foreign-country judgments to which this chapter would apply under Section 36A.003.").

10. The U.S. State Department encouraged the Hague Conference to address a worldwide judgments convention from 1992. For more detail on the history, see sources *infra* notes 11 & 12 (discussing the need for an international convention on judgment recognition and enforcement).

11. *See generally* Louise Ellen Teitz, *Another Hague Judgments Convention? Bucking the Past to Provide for the Future*, 29 DUKE J. COMP & INT'L L. 491 (2019) (providing background on the negotiations at The Hague Conference); Linda J. Silberman, *Some Judgements on Judgments: A View from America*, 19 K.L.J. 236 (2008) (providing an overview of foreign judgement recognition and enforcement in the United States); Louise Ellen Teitz, *The Hague Choice*

failed diplomatic draft of a comprehensive double convention of 2001 that also sought to cover direct jurisdiction; (2) the 2005 Hague Choice of Court Agreements Convention; and (3) the 2019 Hague Judgments Convention of limited scope and with the use of indirect jurisdictional filters.[12] In conjunction

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of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration, 53 Am. J. Comp. L. 543 (2005) (providing an overview of the Hague Choice of Court Convention and stating that "[i]t will help to provide certainty and predictability in transactional planning, validate party autonomy, facilitate the free movement of judgments, and provide a foundation for further international cooperation and harmonization of law"); Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 Geo. J. Int'l. L. 239 (2004) (examining whether the American Law Institute proposed federal statute on recognition and enforcement of foreign judgement should have a reciprocity provision); Fausto Pocar, *The Drafting of a World-Wide Convention on Jurisdiction and the Enforcement of Judgments: Which Format for the Negotiations in the Hague?*, *in* Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren 191 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002) (examining changes in the European Union since the beginning of the Hague Conference and how the new legal regime affects discussions at the Hague Conference); Linda J. Silberman, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute,* 75 Ind. L.J. 635 (2000) (discussing efforts to standardize judgment and enforcement).

12. There is extensive literature on the negotiations and drafts at The Hague Conference. For general background *see* Samuel P. Baumgartner, The Proposed Hague Convention on Jurisdiction and Foreign Judgments: Trans-Atlantic Lawmaking for Transnational Litigation (2003); Peter Nygh, *Arthur's Baby: The Hague Negotiations for a World-Wide Judgments Convention*, *in* Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren 151 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002); Ronald A. Brand, *Jurisdictional Common Ground: In Search of a Global Convention*, *in* Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren 11 (James A. R. Nafziger & Symeon C. Symeonides eds., 2002); Peter D. Trooboff, *Ten (and Probably More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Initial Lessons*, *in* A Global Law of Jurisdiction and Judgments: Lessons from the Hague 263 (John J. Barceló III & Kevin M. Clermont eds., 2002); David P. Stewart, *The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, 113 Am. J. Int'l L. 772 (2019) Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 Am. J. Compar. L. 543 (2005); Linda J. Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DePaul L. Rev. 319 (2002; Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 Cornell L. Rev. 89 (1999) Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 Brook. J. Int'l L. 17 (1998). *See also* Bibliography of the *Convention*

with the first efforts (started in 1992 and culminating in the 2001 draft),[13] the ALI undertook a project to draft implementing legislation for the United States, with Linda and Andy Lowenfeld as co-reporters. When the Hague work stopped in late 2001–2002, the ALI project continued as a proposed statute to federalize United States recognition of foreign judgments, thereby also hoping to increase the portability of United States judgments. Thus, Linda's work on judgments has not only been inward looking but also outward-looking, and has considered the mechanisms used in other legal systems to address many of the problems of overlapping jurisdiction and multiple proceedings that are an important part of judgment recognition.

II. Foreign Judgments and Concurrent Litigation[14]

I have chosen to focus on the relationship of parallel proceedings to judgments and the ways in which we can limit parallel litigation by tying judgment recognition to it. Parallel litigation is the flip side of judgment recognition and needs to be considered in that context. In this paper, I start with a few earlier projects aimed at harmonizing the treatment of parallel proceedings and *lis pendens* and then proceed to discuss the ALI Judgments Project's treatment and its innovative use of Section 11. I then briefly consider the current work underway at the Hague Conference to deal with parallel litigation and offer some thoughts on how that work might be directed towards discouraging parallel litigation by the reward of judgment recognition and how we might continue to focus on shared values of litigation efficiency not shackled by the difficulties of harmonizing direct jurisdiction requirements.

As the world has become smaller, the number of parallel proceedings continues to expand. Increasing globalization of trade has both multiplied the number of parallel proceedings

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of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, HCCH (July 2, 2019), https://perma.cc/PA5D-PKB5 (bibliography related to the Hague judgments project).

13. See Teitz, *Another Hague Judgments*, *supra* note 11. *See also* 2001 Draft, supra note 7.

14. In this article I use the term "parallel proceedings" broadly to cover both parallel and concurrent litigation. As discussed *infra*, the current public draft of the work at The Hague Conference on a new instrument has also been hindered by the lack of definition.

and the number of countries whose courts are facing the challenge of concurrent jurisdiction. The proliferation of multiple proceedings has led to a variety of approaches, especially in U.S. courts, which reflect the doctrinal inconsistencies in analyzing multiple proceedings, often with tools developed for purely domestic use.[15] Thus, one finds analogies to state-state, state-federal, and federal-federal models. These divergent methods highlight the increasing need for U.S. courts to adopt a uniform response to parallel proceedings involving a foreign forum.

At first blush, one might question the relationship between parallel proceedings and enforcement of judgments in the international context. Yet if one views the process of litigation as a chronological timeline, one of the crucial questions driving initial filing considerations is the possibility of, and potential problems with, enforcing any resulting judgment at the end of the suit. Along the way, one may have to reevaluate both the choice of initial forum and potential enforcement several times during the litigation process based on the decisions and actions of the opposing party. Indeed, one factor determining initial filing or subsequent strategy might be the existence of an earlier-filed action in another forum or a subsequently filed defensive action in another forum. Parallel proceedings exist because of concurrent jurisdiction, both adjudicative and prescriptive. Problems of enforcement of foreign judgments arise in part from differing notions of adjudicative and prescriptive jurisdiction.

III. Conflict of Jurisdiction Model Act

An early response by the United States legal community to parallel proceedings, the Conflict of Jurisdiction Model Act (the Model Act),[16] creates a presumption against parallel proceedings

15. I have written about the problem of parallel proceedings in transnational litigation and the inconsistencies in treatment by United States courts for almost 35 years. Twenty years ago, I also focused on the intersection of judgment recognition and parallel proceedings, but the progress has been slow both domestically and internationally. Teitz, *Both Sides*, *supra* note 8; *see also* Maggie Gardner, *Deferring to Foreign Courts*, 169 Univ. Pa. L. Rev. 2291 (2021) (explaining the variation in U.S. federal courts in recognizing foreign relations abstention and assessing foreign parallel proceedings).

16. Am. Bar Ass'n Section on Int'l L. & Prac., The Conflict of Jurisdiction Model Act, *reprinted and discussed in* Louise Ellen Teitz, *Taking Multiple Bites of*

and establishes a basic approach to selecting a single forum. The Model Act, proposed by a subcommittee of the American Bar Association Section on International Law and Practice in 1989,[17] addresses the reverse problem of concurrent jurisdiction—that of subsequent recognition and enforcement of judgments—by tying these ultimately to a prior determination of a single appropriate forum (the "adjudicating forum").[18] The Model Act creates a "supranational" stay of other proceedings in favor of allowing the parties to proceed in the most appropriate forum. In addition to providing some predictability for subsequent actions, the Model Act encourages conformity without challenging sovereign authority. While seeking to accord with multiple legal systems, the Model Act offers a flexible but consistent rule for analyzing the problem, one not inherently biased in favor of the home forum.[19] Convenience, judicial efficiency, and comity are incorporated within the multiple factors used for selecting the appropriate forum.

By extending beyond mere contractual disputes and across geographical lines and legal systems, the Model Act provides a comprehensive approach tied neither to underlying substantive claims nor to underlying substantive law. Equally important is its compatibility with many legal systems and with the approach taken in several then-existing multilateral conventions and now regional regulations that adopt a rule that jurisdiction rests with the court first obtaining jurisdiction or "first seised."[20] The Model Act ultimately amounts to an overarching rule for

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the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings, 26 INT'L LAW. 21 app. I, at 56 (1992).

17. The subcommittee began studying the problem in 1987. The resulting Model Act was drafted in 1988-89. The Committee considered the possible forms that a proposal might take, such as a treaty or uniform act through the National Law Commissioners but determined that the most practical approach would be a Model Act that could be adopted by an individual state or country. One state, Connecticut, adopted the Model Act as part of the Act Concerning International Obligations and Procedures. Conn. Legis. Serv. Public Act No. 91-324, 1991 Gen. Assemb., Reg. Sess. (Conn. 1991).

18. MODEL ACT, *supra* note 16, at 56.

19. One of the major criticisms of resolving concurrent prescriptive jurisdiction through interest analysis is its bias for the forum. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 948–53 (D.C. Cir. 1984) (opining that the court is not equipped or able to balance the interests of two countries with concurrent prescriptive jurisdiction over a claim).

20. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9; Regulation

selecting the appropriate forum and treatment of subsequent parallel proceedings by generally allowing the first forum with jurisdiction over a dispute to determine the appropriate treatment but not necessarily to force the litigation to occur in that first forum.

The Model Act establishes a two-step analysis. The first step is the initial determination of an adjudicating forum by the "first known court of competent jurisdiction" following timely application for designation (Section 2) which involves and requires communication to other courts. This first step of determination based on fourteen factors (Section 3)[21] incorporates convenience and comity, paying due regard to the interests of both the parties and the multiple judicial systems (Section 3(a)): "the interests of justice among the parties and of worldwide justice."[22] Step one specifically includes

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(EU) No. 1215/12 of the European Parliament and of the Council of 12 December 2012, 2012 O.J. (L 351) 1–3 [hereinafter Brussels I Recast].

21. The Model Act states:

> Determining of the adjudicating forum shall be made in consideration of the following factors: (a) the interests of justice among the parties and of worldwide justice; (b) the public policies of the countries having jurisdiction of the dispute, including the interest of the affected courts in having proceedings take place in their respective forums; (c) the place of occurrence, and of any effects, of the transaction or occurrence, and of any effects, of the transaction or occurrence out of which the dispute arose; (d) the nationality of the parties; (e) substantive law likely to be applicable and the relative familiarity of the affected courts with that law; (f) the availability of a remedy and the forum most likely to render the most complete relief; (g) the impact of the litigation on the judicial systems of the courts involved, and the likelihood of prompt adjudication in the court selected; (h) location of witnesses and availability of compulsory process; (i) location of documents and other evidence and ease or difficulty associated with obtaining, reviewing or transporting such evidence; (j) place of first filing and connection of such place to the dispute; (k) the ability of the designated forum to obtain jurisdiction over the person and property that are the subject of the proceeding in adjudicating the dispute; (l) whether designation of an adjudicating forum is a superior method to parallel proceedings in adjudicating the dispute; (m). the nature and extent of litigation that has proceeded over the dispute and whether a designation of an adjudicating forum will unduly delay or prejudice the adjudication of the rights of the original parties; and (n) a realigned plaintiff's choice of forum should rarely be disturbed.

Teitz, *supra* note 16.

22. *Id.* at 56.

consideration of the public policies of the countries that would have jurisdiction.

The second step—the connection to subsequent judgment recognition—is the required enforcement (Section 2(a)) of a resulting judgment from the adjudicating forum, which judgment is to be enforced "pursuant to the ordinary rules for enforcement of judgments" (Section 2(c)).[23] The selection of the adjudicating forum receives "presumptive validity"[24] if the designating court followed all the necessary steps. The Model Act is not simply a tool for parallel litigation but also a statute that enforces judgments since it has two levels of concerns. It focuses initially on the choice of forum and then uses the enforcement of judgment as the carrot and stick for voluntary limitation of multiple proceedings and subsequent enforcement.

The Model Act does not seek to resolve jurisdictional issues, either to adjudicate or prescribe, but assumes that the court making the determination has jurisdiction over the person.[25] Likewise, the Model Act lacks a negative prohibition ousting other courts of jurisdiction. Instead, it discourages other proceedings voluntarily specifically through the reward of the ability to enforce subsequent judgments.

The Model Act changes existing approaches and prior attempts at uniformity, especially in common-law jurisdictions, by beginning with two assumptions. First, parallel proceedings are not a viable or preferred alternative to multiple country litigation. Second, choice of forum, jurisdiction to prescribe, and jurisdiction to adjudicate implicate separate and distinct policy concerns and need not be resolved similarly or simultaneously. The key to limiting concurrent jurisdiction litigation without impinging on a forum's sovereignty is not through enjoining other proceedings. Rather, it is through limiting the subsequent enforceability of judgments. Those secured in conformity with the Model Act will be enforceable. "[T]he threat of discretionary refusal to enforce vexatious judgments so little offends the sovereign jurisdiction of other nations that the courts . . . should be free to determine where in fact a matter should have been adjudicated without fear of encroaching on foreign jurisdiction by applying *forum non conveniens* concerns."[26]

23. *Id.* at 60.
24. *Id.*
25. For further analysis and discussion, see Teitz, *supra* note 16, at 42.
26. *Id.* at 61.

The flexibility of the Model Law is one of its strengths, but that malleability also gives rise to certain problems. Several issues remain unresolved, reflecting the difficulty of creating a universal panacea that can treat totally different systems alike. The Model Act may face obstacles in being integrated into individual systems. For example, the policy of abstention in the United States federal system may not mesh with the Model Act, given that federal courts' discretion to refrain from acting is circumscribed by different doctrines of abstention. Equally problematic is how to accommodate a forum's public policy concerns without sapping the Model Act of its vitality. Undefined phrases also may result in inconsistent interpretation, thus undermining attempts at uniformity and leaving the Model Act open to criticism for not providing consistent rules, as opposed to standards.

The Model Act cannot and does not solve all problems, but it offers an opportunity to establish a policy of single proceedings and a means, through enforcement of judgments, of encouraging participants in international litigation voluntarily to reduce repetitive, unnecessary, and wasteful litigation. In the process, it may help to lessen friction between different sovereigns and legal systems, especially in cases of concurrent overlapping jurisdiction. The Model Act, now almost thirty-five years old, still offers an "architecture" for treating multiple proceedings that respects sovereignty and encourages a single most appropriate forum resolution, similar to one part of the draft work currently underway at the Hague Conference.

IV. Leuven-London Principles

Another effort to address parallel proceedings, the Leuven-London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters were adopted by the International Law Association in 2000 and illustrate another softlaw mechanism for dealing with concurrent jurisdiction through a combination of declining jurisdiction and referring jurisdiction to an alternative forum.[27] It utilizes some of the same approaches as the Model Act, but without as specific a provision for reward

27. *Leuven/London Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters*, Int'l Law Ass'n, 3–4 (2000), https://perma.cc/GHP4-SEF7 [hereinafter Leuven-London Principles].

of recognition or penalty of non-recognition. The Leuven-London Principles do acknowledge the similar approach of the Model Act to recognize a judgment from an alternative court without the possibility of review in the originating or referring court once it referred a matter.[28]

The combination of *forum non conveniens* and *lis pendens* attempts to encourage singular litigation in the most appropriate forum as well, "desiring to promote the proper allocation of cases between courts; to discourage improper forum shopping; and to reduce the unnecessary incidence of concurrent jurisdiction and the risk of irreconcilable judgments."[29] Like the Model Act, the first seized court is given the role of determining which forum should proceed with multiple suits involving the same parties and same subject matter and with "related actions" left as an undefined term. As with *forum non conveniens*, there does not need to be a parallel proceeding pending for the declining of jurisdiction in favor of the "manifestly more appropriate forum for the determination of the merits."[30] The factors for "referral" include in the case of parallel litigation where a *lis pendens* is used, "the desirability of avoiding multiplicity of proceedings or conflicting judgments having regard to the manner of resort to the respective court's jurisdiction and the substantive progress of the respective actions" as well as the "enforceability of any resulting judgment."[31]

The attempt to utilize the civil law concept of the automatic *lis pendens* based on the first filed action with the common-law option of declining jurisdiction in favor of a more appropriate forum in the context of judgment recognition is also found in several of the early drafts of the First Hague Judgments Convention from 1998, 1999, and 2001. In fact, the "third interim report" of the Leuven-London Principles committee specifically mentions the direct impact of the committee's principles and

28. *Third Interim Report: Declining & Referring Jurisdiction in International Litigation*, INT'L LAW ASS'N 1, 28 ¶ 77 (2000), https://perma.cc/3TXE-RGQT [hereinafter London Conference] ("It would be wholly illogical if, having referred the matter, it would still be open to a judgment debtor to contest the validity of the assumption of jurisdiction by the alternative court in the originating court.").

29. Leuven-London Principles, *supra* note 27, at 1.

30. *Id.* at 3–4 § 4.3.

31. *Id.* at 4, § 4.3(d)–(e).

members on the Hague Conference drafts.[32] And the Principles have had a forward impact on the ALI's Judgment Project with its unique inclusion of the concept of *lis pendens*.

V. The American Law Institute's International Jurisdiction and Judgments Project

The American Law Institute (ALI) undertook a project to federalize the enforcement of judgments with a proposed statute containing a modified *lis pendens* provision, tied to subsequent enforceability of a judgment. Although the International Jurisdiction and Judgments Project was begun originally to produce implementing legislation for a Hague comprehensive jurisdiction and judgments convention, when the Hague project stalled in 2001 the ALI's work continued forward as a proposed federal statute, the Foreign Judgments Recognition and Enforcement Act.[33] The ALI Judgments Statute builds on and perfects concepts like those in the International Law Association's project covering both *forum non conveniens* and parallel proceedings [34] and the early drafts of the 2001 Hague Judgments Convention.[35]

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32. The report stated:

> The Committee's Principles on Declining and Referring Jurisdiction have influenced the formulation of Articles 21-2 of the draft Hague Convention. Proposals on these issues, which draw in part upon the ideas propounded in the Committee's Principles, were introduced by eight states at a drafting meeting of the Special Commission appointed by the Hague Conference on International Jurisdiction and the Effect of Foreign Judgments in Civil and Commercial Matters on 18 November 1998. This meeting followed the Leuven meeting of the Committee on 7-8 November 1998 at which the Principles were substantially drafted. A number of Committee members have served as delegates to, or officers of, the Hague Conference Special Commission.

London Conference, *supra* note 28, at 14 ¶ 35.

33. *See* ALI Judgments Statute, *supra* note 2.

34. *See* Leuven-London Principles, *supra* note 27; Model Act, *supra* note 16.

35. Professor Silberman remarked:

> In considering an appropriate lis pendens type rule, Professor Lowenfeld and I were influenced by the proposed provision in the Preliminary Draft Convention of Jurisdiction and Foreign Judgments developed by the co-rapporteurs of that Special Commission, Fausto Pocar, and Peter Nygh. The provision which appears as Article 21 in both the October 1999 and June 2001 Drafts was, in the words of Professor Pocar, "largely due to the experience and good sense of Peter Nygh." The Hague Draft provision departs from the rigid first-in-time

The ALI Statute makes clear the inherent connection of judgments and parallel litigation through its innovative inclusion of a *lis pendens* designed to discourage multiple proceedings in Article 11.[36] Professor Silberman described the situation: "As Reporters for the ALI Project, Professor Lowenfeld and I believed that concerns about parallel proceedings in transnational cases were sufficiently related to the subject of recognition of judgments that the matter should be addressed in the proposed federal statute being developed in that project."[37]

Section 11 of the draft, "Declination of Jurisdiction When Prior Action is Pending," adopts a basic *lis pendens* principle that presumes the first-filed matter, either here or abroad, should proceed, if that judgment would be entitled to recognition under the Act, which includes a reciprocity provision under Section 7.[38] The United States court would stay or dismiss the second-filed United States action, unless the foreign action was

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rule of Brussels/Lugano and borrows from common law traditions to offer greater flexibility.

Linda Silberman, *A Proposed Lis Pendens Rule for Courts in the United States: The International Judgments Project of the American Law Institute, in* INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E. NYGH 341, 354 (Talia Einhorn & Kurt Siehr eds., 2004).

36. The statute states:

> Comment: a. Parallel litigation and recognition of judgments. Declination of jurisdiction—whether via lis pendens or via forum non conveniens—is closely related to recognition and enforcement of foreign judgments. Both declination of jurisdiction and recognition of judgments depend on the conclusion that the exercise of jurisdiction by the foreign court is founded on an acceptable basis. Moreover, parallel litigation in different fora inevitably leads to the danger of inconsistent judgments. This Act offers a comprehensive solution to the problems of parallel litigation by including a direct lis pendens rule when proceedings are pending both in a court in the United States and in a foreign court.

ALI Judgments Statute, *supra* note 2, at art.11.

37. Silberman, *A Proposed Lis Pendens Rule, supra* note 35, at 354.

38. *See* ALI Judgments Statute, *supra* note 2 at §§ 7, 11 (discussing when foreign judgements should not be recognized in United States courts and when courts should decline jurisdiction where prior actions are pending in foreign courts). A reciprocity requirement has been controversial. Scholars have criticized this reciprocity requirement that was included in *Hilton v. Guyot*, 159 U.S. 113 (1895). *See, e.g.*, Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 128 (1997) ("The Supreme Court in *Hilton v. Guyot* was wrong in insisting on reciprocity."); Richard H.M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at* Hilton v. Guyot*;*

based on jurisdictional grounds not recognized under the Act or was subject to certain defenses. These defenses generally follow those enumerated in the earlier Uniform Foreign Money-Judgments Recognition Act[39] and in *Hilton v. Guyot*.[40]

Section 11 also provides grounds for a court to decline to defer to another first-filed foreign action. A United States court could decide not to defer to a foreign action although first-filed where: (1) the United States forum was the "more appropriate forum"; (2) the foreign action was vexatious or frivolous; or (3) for "other compelling reasons." Section 11 works in tandem with the nonrecognition provisions by providing for discretionary nonrecognition of a foreign judgment when a prior action is pending in the United States. Article 11 is designed "to create an incentive for a foreign court to decline jurisdiction in favor of a prior U.S. proceeding."[41] In addition, Section 5 also provides for discretionary nonrecognition of antisuit injunctions.[42] Thus, the ALI statute would bring coherence to this area of jurisprudence and provide a rule that encouraged suit in the most appropriate forum by offering a *lis pendens*.[43] This *lis pendens* would also encourage parties to avoid vexatious litigation or litigation filed to frustrate suit in the most appropriate forum by allowing a court to refuse to enforce a foreign judgment obtained in a later filed foreign action, or one that was designed to preempt litigation in the more appropriate United States forum, such as through an antisuit injunction or negative declaration.[44]

We Think It Needs Repairing, 5 J. Int'l Legal Stud. 1, 2 (1999) (arguing that the Supreme Court should reject reciprocity for enforcing foreign judgments).

39. Uniform Foreign Money-Judgments Recognition Act § 4 (Nat'l Conf. of Comm's on Unif. State Laws 1962).

40. 159 U.S. 113, 205–06 (1895).

41. ALI Judgments Statute *supra* note 2, at § 11 cmt. k.

42. *Id.* at § 5.

43. *See, e.g.*, Andreas F. Lowenfeld, *Forum Shopping, Anti-suit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 Am. J. Int'l L. 314, 319-20 (1997).

44. Professor Silberman explains:

> Unlike an international treaty or a model law, a federal law cannot require foreign courts to defer to prior proceedings brought in a court in the United States. To compensate for that lack of symmetry, the proposed ALI statute uses the mechanism of non-recognition. Thus, the proposed Act includes, as additional grounds for non-recognition, situations where the foreign proceeding was commenced subsequent to a suit in the United States, or where the proceeding in the foreign court was undertaken to frustrate a claimant's right to sue

The ALI Judgments Project is a concrete means to reduce multiple proceedings, encouraging parties to sue once and in the most appropriate forum by both offering the carrot of a *lis pendens* and using the stick of denial of recognition of a judgment resulting from a violation. Indeed, as with the 2001 Hague Judgments draft, the ALI project also recognizes the need to address both parallel litigation and inappropriate forum in any coherent effort to codify recognition and enforcement.

The combination of a *lis pendens* to restrict multiple related actions but allowing a discretionary decline of jurisdiction in favor of a more appropriate forum—*forum non conveniens* (with or without the mechanism for a transfer, as in the Hague 1996 Convention)[45]—has frequently been viewed as exemplifying the harmonizing of civil and common-law traditions to a workable compromise. And although it is considered at the beginning of litigation, the focus is also on the potential for recognition of any resulting judgment. One sees this emphasis in the Model Act and to a lesser degree in the Leuven-London Principles; in the First Judgments work at the Hague; and also very explicitly in the ALI Judgments Statute.

VI. Parallel Proceedings and Work Underway

Having looked at three earlier approaches to handling multiple proceedings, what emerges is the natural connection of judgments and parallel litigation and the potential role that *lis pendens* can play when tied to litigating in the most appropriate forum. The effort to encourage parties to litigate in the most appropriate forum (analogous to declining jurisdiction under *forum non conveniens*) is rewarded with the carrots of *lis pendens* and judgment recognition—and filing multiple proceedings is discouraged with the stick of non-recognition.[46]

One of the initial steps is to agree on a definition of what equals parallel or multiple litigation. One has to acknowledge that different systems have different restrictions on joinder of parties

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in a more appropriate forum, such as the case of an anti-suit injunction or negative declaration. These provisions on non-recognition may also operate as incentives for foreign courts to decline jurisdiction in such circumstances.

Silberman, *A Proposed Lis Pendens Rule, supra* note 35.

45. Hague 1996 Convention, *supra* note 5, at arts. 8, 9.

46. 2001 Draft, *supra* note 7, at arts. 21, 22.

and claims (and that goes to what can be included for remedies). The European Union's definition as illustrated by the Brussels I Recast[47] is indeed very narrow. In contrast, in the United States, our joinder of claims and parties allows broad transactional analysis and sweeps within parallel litigation much of what is "related litigation" in other systems. And equally significant is whether one looks at all parallel litigation, not just that in some subset such as those involving litigation occurring in treaty members.

The problem inherent in creating an acceptable structure to determine the most appropriate forum for parallel litigation is not only the lack of consensus on the important factors for such determination, especially those concerning timing, but also the different treatment of the underlying adjudicative jurisdiction.[48] In addition, there are different attitudes about whether parallel litigation is ever acceptable, and the crucial question of whether first in time should be a race to the courthouse or one to judgment. One solution is to use the first filed factor to determine which forum will proceed to decide the most appropriate forum. What factors are important in determining the "more appropriate forum" to proceed: convenience; location of evidence and witnesses; how far along proceedings are in any forum; connecting factors similar to those used to find the law to apply under a "most significant relationship" test[49] or "manifestly more closely connected" with a country?[50] Of course, the more factors considered, arguably the less predictable the court's determination. Examples such as the Model Act's 14 categories of connecting factors and practical consideration of actual litigation and enforcement have also been criticized for being an unweighted balancing test and too malleable.[51]

47. Brussels I Recast, *supra* note 20, at art. 29. The Brussels I Recast also looks at "related" proceedings under article 30, as well as parallel and related actions involving non-EU countries—third countries—under articles 33 and 34.

48. *See* ALI Judgments Statute, *supra* note 2, at § 6 (listing different bases of jurisdiction which do not receive enforcement or recognition in the United States).

49. *See generally* Restatement (Second) of Conflict of Laws (1971) §§ 145, 187 (Am. L. Inst. 1971) (laying out factors to be used in determining the state which has the most significant relationship to the occurrence and parties involved).

50. *See generally* Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, 2008 O.J. (L 177) (Rome I) art. 4(3) (providing the specific language of the "manifestly more closely connected" test).

51. Teitz, *supra* note 16, at § 3.

One of the difficult issues is how to incorporate a mechanism that would allow for a determination of the most appropriate forum and also a subsequent transfer to that forum. One suggestion is to incorporate a transfer process like that included in the 1996 Hague Convention, in Articles 8 and 9, where if one forum is considered "better placed" to assess the best interests of the child, the other forum can transfer the matter.[52]

Another crucial element of any mechanism for handling parallel litigation is attempting to ensure that a judgment received from the most appropriate forum (the chosen forum) will be recognized by other countries (and judgments not from the most appropriate forum will not be recognized). But how does one know in advance the possibility for recognition of a judgment from one jurisdiction in another while not tying this to being a contracting state in a judgments convention? One could set up a certification procedure that would help provide predictability early on. That system could attempt to incorporate an "advance determination" utilizing a process such as that incorporated in the 1980 Hague Abduction Convention Article 15.[53] On the other hand, one could try to create a list of categories of foreign judgments that would presumptively be recognized such as the carefully crafted reciprocity provision in Article 7 of the ALI Judgments Statute.[54]

VII. Current Work at The Hague

I want to turn to the current work underway at the Hague Conference on parallel proceedings. The work followed from the Experts' Group on Jurisdiction connected with the 2019 Judgments Convention.[55] The Working Group was charged by

52. Federal procedure also has several domestic models, from transfer under 28 U.S.C. § 1404 to multidistrict consolidation under 28 U.S.C. §1407.

53. *See* 1980 Child Abduction Convention art. 15 (providing a mechanism for contracting states to receive advance determinations from the country of the child's "habitual residence" whether the "removal or retention was wrongful").

54. ALI Judgments Statute, *supra* note 2, at § 7.

55. Council on General Affairs and Policy of the Hague Conference on Private International Law [HCCH], *Conclusions & Decisions*, (Mar. 2021) ¶ 9, https://perma.cc/6ZK5-DKGJ.

> 7 CGAP welcomed the report of the Experts' Group. With the conclusion of the work of the Group, CGAP expressed its gratitude to the Chair, Professor Keisuke Takeshita (Japan), and to the members of the Group.

the Council on General Affairs and Policy to work in a "holistic manner" with "an initial focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims), and acknowledging the primary role of both jurisdictional rules and the doctrine of *forum non conveniens*, notwithstanding other possible factors, in developing such rules."[56] This charge in itself reflects a continued recognition of the importance of concepts of declining jurisdiction but also emphasizes the continued efforts to prioritize jurisdictional rules in addressing parallel proceedings. The Working Group has met six times, most recently at the end of January 2024,[57]

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8 CGAP mandated the establishment of a Working Group on matters related to jurisdiction in transnational civil or commercial litigation, and invited Professor Keisuke Takeshita (Japan) to chair the Working Group.

9 In continuation of the mandate on the basis of which the Experts' Group had worked, CGAP mandated:

a. The Working Group to develop draft provisions on matters related to jurisdiction in civil or commercial matters, including rules for concurrent proceedings, to further inform policy considerations and decisions in relation to the scope and type of any new instrument;

b. The Working Group to proceed in an inclusive and holistic manner, with an initial focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims), and acknowledging the primary role of both jurisdictional rules and the doctrine of forum non conveniens, notwithstanding other possible factors, in developing such rules;

c. The Working Group to explore how flexible mechanisms for judicial coordination and cooperation can support the operation of any future instrument on concurrent proceedings and jurisdiction in transnational civil or commercial litigation…

56. *Id.* ¶ 9(b).

57. Since this article was first written, the Working Group has met two additional times, in September 2023 and in the end of January 2024 in advance of the March 2024 Council on General Affairs and Policy meeting which will consider the project. Unfortunately, the fifth and sixth meeting drafts and discussions are not public so that the article reflects only the version of the Working Group from February 2023 and the version considered by the Council in March 2023. Council on General Affairs and Policy of the Hague Conference on Private International Law [HCCH], *Conclusions & Decisions,* (Mar. 2023) ¶ 9, https://perma.cc/4Q6B-7Z9N [hereinafter WG Report Feb. 2023].

9 CGAP took note of the Report of the Chair of the Working Group on matters related to jurisdiction in transnational civil or commercial litigation and the progress made by the Working Group to further develop provisions for a draft Convention. CGAP recalled the Working

but the deliberations and drafts from these last two meetings in September 2023 and January 2024 are not available publicly. The discussion below reflects the version following the fourth meeting and considered by the Council in March 2023.

One of the primary difficulties with the current approach of the Working Group appears to be in its efforts to connect the parallel proceedings instrument to the system of priority based on indirect jurisdictional filters in the 2019 Judgments Convention.[58] In addition to limiting the scope of any potential hardlaw instrument on parallel proceedings, this structure restricts some of the benefits of a new instrument to those States that might not currently be ready to join the 2019 Convention.[59] An approach that instead suggests unacceptable grounds, such as that used in the ALI Statute, might be more productive and acknowledge the difficulties in attempting to unify direct jurisdiction. Indeed, one problem is that the "jurisdictional filters" superimposed from the 2019 Convention are also driven in part by the Brussels Regime and the constant efforts to coordinate with the major Brussels Regulations. In addition, the approach does not lend itself to the practical realities of multiple proceedings and even vexatious litigation. Thus, although a *lis pendens* is available under Article 3, it connects to the jurisdictional filters in Article 9.

The current draft does recognize the importance of incorporating provisions to deal with forum selection clauses (Art. 7), but again seems to be tied to language from the 2005 and 2019 conventions. Another issue still to be resolved is the definition of parallel proceeding and how broadly it might be construed (Art. 1). As suggested earlier, many of the civil law traditions have narrow definitions of parallel litigation and the narrower the scope, the more room for tactical maneuvering and vexatious

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Group's mandate as established in 2021 (C&D No 9 of CGAP 2021). CGAP invited the PB to convene two further Working Group meetings before CGAP 2024, the first in the second half of 2023 and the second preferably in January 2024, with intersessional work as required . . . .

58. *See* Council on General Affairs and Policy of the Hague Conference on Private International Law [HCCH], *Working Group on Jurisdiction: Report*, Prel. Doc. No. 2, Annex 1 art. 9, https://perma.cc/7JB9-NZPY [hereinafter "Feb. 2023 Draft"]. For a discussion and criticism of the Working Group's drafts and process *see* Paul Herrup & Ronald A. Brand, *A Hague Parallel Proceeding Convention: Architecture and Features,* 2 CHI. J. INT'L L. ONLINE (2023), https://perma.cc/89JG-G5ZA.

59. For example, the current drafts of Article 10 include in the determination of the better forum, the likelihood of recognition of a judgment under the 2019 Judgment's Convention. Feb 2023 Draft, *supra* note 58, at art. 10(h).

litigation. Adding a claim or parties could remove a lawsuit from the scope of any hardlaw instrument. Another concern is how to treat and when to include non-Contracting States, as realistically the litigation could involve concurrent proceedings in more than two countries and one could be a non-Contracting State. Perhaps a broader view when considering the appropriate forum would include non-Contracting States.[60]

The current draft appears to be two different structures put into one document that would in effect create two different approaches—(1) those tied to priority of jurisdiction under the filters of Article 9; and (2) the "more appropriate forum" approach of Article 10, which while still tied to jurisdiction, focuses on factors relating to the practical realities of the litigation, burdens of litigation, and reflects the concerns seen in the earlier Model Law, Leuven-London Principles, and the forum non conveniens/lis pendens compromise of the 2001 Hague draft. The rigidity of the jurisdictional filters is in contrast to the call for flexibility in the determination of the more appropriate forum (this being limited to when courts of more than one Contracting State have jurisdiction/connection and when they don't have jurisdiction). One sees in the Working Group's draft of February 2023 several attempts to create a process to determine the more appropriate or better forum. In reality, many of these factors are flexible and are softlaw guidelines. One can see the tension in the Chair's Report:

> The WG members exchanged views on their preferences of having an "exhaustive" or a "non-exhaustive" list of factors in the appropriate forum determination. Providing clarity (having an exhaustive list) *versus* flexibility (having a non-exhaustive list, serving as a guidance) for the courts was discussed.[61]

That statement brings me to Professor Silberman's recent Hague Academy Lectures which address the question of rules or standards, within a broad range of topics, from family law to extraterritorial application of law. I would suggest that those

60. The inclusion of non-Contracting countries was an issue in the 2001 Hague Judgments draft and Arthur von Mehren was in favor of including these in the provisions to broaden the impact.

61. Council on General Affairs and Policy of the Hague Conference on Private International Law [HCCH], *Working Group on Jurisdiction: Report*, Prel. Doc. No. 2, Annex 1 ¶18. (Mar. 2023), https://perma.cc/V48D-SLF4.

who want to have a non-exhaustive list of factors and use them to focus on the most appropriate forum are content to have standards or guidelines as opposed to rules of jurisdictional filters and rules of priority.

The real question it seems is whether the first part of the instrument strives to be hardlaw and the second part, primarily Article 10 dealing with the most appropriate/better forum, is ultimately better as softlaw, as with the Hague Principles on Choice of Law in International Commercial Contracts.[62] We can combine the hardlaw and softlaw in some areas, by providing mechanisms for cooperation—the transfer of jurisdiction as the Hague 1996 Convention does; incorporating direct judicial communication as is encouraged with the 1980 Abduction Convention; or an advance determination of foreign law as in the Hague 1980 Convention art.15 (which could be used for advance determination of enforceability of a judgment). But this division in approaches, like civil law and common-law, may suggest that we are not yet ready for a binding instrument but might settle for something still less than a convention—perhaps, viscous law—while waiting for more harmonization to occur.

Global forum shopping with parallel proceedings has become a worldwide problem, requiring more than unilateral actions. The last decades have shown the increasing need for a consistent jurisprudence in the United States and elsewhere to deal with multiple proceedings, antisuit injunctions and deference to other courts. The work at the Hague Conference on the 2001 Judgments draft and the ALI Judgments Statute with an explicit *lis pendens* reflect attempts to address aspects of multiple proceedings within the context of judgments. These varied and multiple approaches to transnational litigation offer the promise of harmonization in several areas, and thus hope for the attendant reduction in the amount of concurrent litigation and friction it generates. The global efforts on many fronts to harmonize approaches to parallel proceedings from a procedural standpoint could lead to a more consistent and predictable method of handling parallel proceedings, as well as less abrasive, and help reduce the costs to parties and to judicial systems.

62. Hague Conference on Private International Law [HCCH], *The Principles on Choice of Law in International Commercial Contracts* (March 19, 2015), https://perma.cc/N7QL-Z4SC.