

PROFESSOR LINDA SILBERMAN AS PRIVATE  
INTERNATIONAL LAW DIPLOMAT

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*This article summarizes Professor Silberman's critical role in deploying her diplomatic skills to fashion the reciprocity requirement that is incorporated in the American Law Institute's Proposed Federal Statute on the Recognition and Enforcement of Foreign Judgments. The article describes the background to the debate within the American Law Institute over whether to include such a reciprocity requirement. Relying on the transcripts of the debate within the Institute and the drafts of the Proposed Statute, the article explains how Professor Silberman, despite initial hesitancy shared by the other project Reporter, Professor Andreas Lowenfeld, accepted the majority position of the Institute's membership and fashioned a creative approach for implementing the reciprocity requirement. The article then reviews the rejection without detailed study of a reciprocity requirement by the Uniform Law Commissioners in their revision of the 1962 Uniform Foreign Money Judgments Recognition Act, which became the 2005 Foreign-Country Money Judgments Recognition Act. Finally, the article urges following Professor Silberman's advice about taking steps to enhance enforcement of U.S. judgments in courts of other countries. Those steps include U.S. ratification of the 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments and an addition of a reciprocity requirement to the Uniform Law Commission's 2005 Uniform Act.*

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### I. WHICH OF PROFESSOR SILBERMAN'S TALENTS SHOULD BE EMPHASIZED?

In thinking about my contribution to this celebration of my honored friend's retirement, I asked which of Linda Silberman's many talents I should emphasize. I could talk about her as a remarkable and prodigious scholar. But then everyone participating in this Celebration knows that. Further, the real scholars in this celebration will speak much more authoritatively about her academic successes.

So what if I explained why I also regard Linda as a skilled and creative private international law diplomat? With that emphasis I could also refer to her wise policy advice concerning enforcement of U.S. judgments in the courts of other nations and the steps necessary to follow that advice. In short, I participate in this celebration not to retire Linda but rather to elaborate on her diplomatic skills and then to urge following her thoughtful advice.

To demonstrate the case for viewing Linda as an accomplished diplomat, I will review briefly the evolution of "the sticky issue of reciprocity" in the proposed federal statute of the American Law Institute ("ALI") on recognition and enforcement of foreign judgments.<sup>1</sup> This account of the ALI proceedings necessarily summarizes and therefore omits some of the detail. I then review how the Study Group and Drafting Committee on the Uniform Law Commissioners (ULC) addressed in rather cursory fashion the reciprocity issue in their revision of the 1962 Uniform Act,<sup>2</sup> which became the 2005 Uniform Act.<sup>3</sup> Again, I omit some of the details regarding the ULC's deliberations. And with this background I briefly summarize why I urge that we follow Linda's advice and seek to enhance enforceability of U.S. judgments in the courts of other countries by taking two critical steps—first, ratifying the 2019 Hague Convention on Foreign

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1. Connor A. Cardoso, *Implementing the Hague Judgments Convention*, 97 N.Y.U. L. REV. 1506, 1513 (2022). See also RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE at xiii–xiv (AM. L. INST., PROPOSED OFFICIAL DRAFT 2006) [hereinafter ALI PROPOSED STATUTE] (providing the full text and background on the development of the draft legislation).

2. UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT (UNIF. L. COMM'N 1962).

3. 2005 UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIV. LAW COMM'N 2005).

Judgments<sup>4</sup> and second, approving a reciprocity requirement in the 2005 revisions to the 1962 Uniform Act.

I begin by recalling Linda's successful and remarkable collaboration with her mentor and the other Reporter for the ALI Proposed Federal Statute, the late and greatly missed Andreas Lowenfeld. No one should ever speak in the halls of New York University Law School without recalling the immense contribution that Professor Lowenfeld made not only to thousands of students, to public and private international law through his prodigious scholarship but, most importantly for this moment, to the Academy by mentoring younger scholars including his gifted acolyte, Professor Silberman. Let us recall the landscape that Andy and Linda found when they began their collaboration as co-reporters for the ALI Proposed Statute.<sup>5</sup>

## II. BRIEF SUMMARY OF U.S. LAW ON RECOGNITION AND ENFORCEMENT OF FOREIGN-COUNTRY JUDGMENTS—CASES AND UNIFORM LAWS.

To begin, let us briefly review the existing U.S. law concerning the recognition and enforcement of foreign country judgments to ensure that we are all on the same page. We need to recall the development of our recognition and enforcement law from the international-law and federal-law approach to recognition and enforcement in *Hilton v. Guyot*<sup>6</sup> to the state-law approach adopted by the New York Court of Appeals in *Johnston v. Compagnie Générale Transatlantique*.<sup>7</sup> And after *Erie Railroad Co. v. Tompkins*,<sup>8</sup> “federal courts in diversity actions felt compelled to follow state practice in cases involving foreign judgments.”<sup>9</sup>

4. Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, *opened for signature* July 2, 2019 (not yet in force) [hereinafter Hague Judgments Convention].

5. See Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 99, 101, 106 n.23 (Paul B. Stephan ed., 2014) (recounting Linda's perspective on Andy's and her collaboration, including the problem with differing approaches to reciprocity).

6. *Hilton v. Guyot*, 159 U.S. 113, 159–161 (1895).

7. *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 386–87 (1926).

8. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

9. ALI PROPOSED STATUTE, *supra* note 1, at 3.

Enter the Uniform Law Commissioners (ULC), who after *Erie* recognized the virtue of having, whether in state or federal courts, a uniform state law applied to actions for recognition and enforcement of foreign-country judgments. In 1962, the ULC approved the Uniform Foreign Money-Judgments Recognition Act (UFMJRA). Eight states are currently parties only to that statute. In 2005, the Commissioners revised the 1962 statute to fashion the Uniform Foreign-Country Money Judgments Recognition Act, which has now been enacted in thirty states (some of which had previously enacted the 1962 Uniform Act.) At this time, nine states are listed by the Uniform Law Commission as having enacted neither the 1962 nor 2005 Uniform Acts. In general, these uniform acts set out the detailed standards that states apply in cases involving recognition and enforcement of a money judgment rendered by a court in a foreign state.

### III. IS RECIPROCITY REQUIRED FOR ENFORCEMENT OF A FOREIGN-COUNTRY MONEY JUDGMENT?

In *Hilton*, the Supreme Court held that it would not enforce a French judgment on behalf of a French national against a U.S. citizen because in the reverse situation, the courts of France would not enforce against a French citizen a U.S. judgment for a U.S. citizen. State courts did not embrace the Supreme Court's reciprocity requirement. Instead, state courts generally adopted a positive and welcoming approach to recognition and enforcement of foreign-country judgments. When the ALI addressed this issue in the Restatement of Foreign Relations Law, it summarized state law generally as follows:

A judgment otherwise entitled to recognition will not be denied recognition or enforcement because courts in the rendering state might not enforce a judgment of a court in the United States if the circumstances were reversed. . . . Though [*Hilton's*] holding has not been formally overruled, it is no longer followed in the great majority of State and federal courts in the United States.<sup>10</sup>

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10. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §481, cmt. d (AM. L. INST. 1986) [hereinafter RESTATEMENT (THIRD) FOREIGN RELATIONS].

The Reporters add in their Notes to this Section of the Restatement (Third) that “[t]he great majority of courts in the United States have rejected the requirement of reciprocity, both in construing the 1962 Uniform Foreign Money Judgments Recognition Act . . . and apart from the Act.”<sup>11</sup> However, several states decided in adopting one of the versions of the 1962 Uniform Act to follow with some variations the approach to reciprocity that the Supreme Court adopted in *Hilton*. At present, two states appear to include a provision that mandates against enforcement in the absence of reciprocity and four provide that the absence of reciprocity constitutes a discretionary basis for denying recognition and enforcement.<sup>12</sup>

#### IV. THE EVOLUTION OF THE ALI PROJECT

Professors Silberman and Lowenfeld began their collaboration for the ALI with one purpose and ended up fulfilling another. In his Foreword to the ALI Proposed Statute, Professor Lance Liebman, then Executive Director of the Institute, explains the project began while the Hague Conference on Private International Law was negotiating a global convention on international jurisdiction and the recognition and enforcement of foreign country judgments.<sup>13</sup> Professor Liebman adds, “[b]ecause recognition and enforcement of foreign judgments has traditionally been treated as a matter of state law, United States implementation of a treaty—a Hague Convention—on the subject would require federal legislation.”<sup>14</sup>

11. *Id.* at n.1.

12. At present six states have added lack of reciprocity as a ground for non-recognition: Arizona, Florida, Maine, Massachusetts, Ohio, and Texas. See ARIZ. REV. STAT. ANN. § 12-3252 (2015) (mandatory); FLA. STAT. § 55.605(g) (2012) (discretionary); ME. REV. STAT. ANN. tit. 14, § 8505.2(G) (2019) (discretionary); MASS. GEN. LAWS ANN. ch. 235, § 23A(7) (mandatory) (West 2022); OHIO REV. CODE ANN. § 2329.92(B) (West 2011) (discretionary); and 2 TEX. ADMIN. CODE § 36A.004(c)(9) (2017) (discretionary). Prior published reports about such provisions in the statutes of other states—Colorado, Georgia and Idaho—appear to have been overtaken by state-law amendments.

13. For a review of the negotiations on such a global convention and the negotiations that led to approval of the 2019 Hague Convention by the Hague Conference members, see Ronald A. Brand, *The Hague Judgments Convention in the United States: A ‘Game Changer’ or a New Path to the Old Game?*, 82 UNIV. PITT. L. REV. 847 (2021).

14. ALI PROPOSED STATUTE, *supra* note 1, at xiii.

When it became clear that the delegates to the Hague Conference would not successfully complete negotiation of such a global convention, Professor Liebman recounts that Andy and Linda with the concurrence of the Advisers for the project “decided that the United States would benefit from a federal statute whether or not there was a convention to implement and that the ALI should draft and recommend such a statute.”<sup>15</sup> The rationale for such a statute is succinctly summarized in the following by the Reporters: “For various reasons apparent throughout the draft, it seemed clear that only a federal statute could achieve the goal of uniformity and close the gaps in the American law of foreign judgments that would remain if the solution were left to ad hoc judicial decisions.”<sup>16</sup>

In the finally approved ALI Federal Statute, the Reporters make clear that they rejected the approach of the New York Court of Appeals in *Compagnie Générale Transatlantique*. Instead, they declared that their project “takes as its point of departure the view that recognition and enforcement of foreign judgments is and ought to be a matter of national concern, and it takes up the suggestion of the Court in *Hilton* that ‘[t]he most certain guide . . . for the decision of such questions is a treaty or statute of this country.’”<sup>17</sup> The ALI Proposed Statute is, Silberman and Lowenfeld explained, “such a statute, to be administered, for the most part through concurrent jurisdiction of the state and federal courts, but subject to a single standard and, ultimately, the control of the Supreme Court.”<sup>18</sup>

## V. RECIPROCITY IN THE ALI PROPOSED STATUTE

When the Reporters presented to the ALI Annual Meeting in 2002 their Discussion Draft of the ALI Statute, they recounted that in prior ALI discussions both the Executive Council and membership discussions “reflected reluctance to impose a reciprocity requirement.”<sup>19</sup> However, the strong support for such a requirement from the Advisers and the Members Consulta-

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15. *Id.*

16. ALI PROPOSED STATUTE, *supra* note 1, at 1.

17. *Id.* at 3 (citing *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)).

18. *Id.*

19. Memorandum from Linda Silbermann & Andreas F. Lowenfeld, Int'l Jurisdictions and Judgments Project Reps., American Law Institute, to Members of the Am. L. Inst. at xix (Mar. 29, 2002).

tive Group, possibly because of the broader range of judgments covered by the proposed statute, led the Executive Council to ask the Reporters to see “what such a requirement would look like.”<sup>20</sup> Thus, the Discussion Draft that the Executive Council reviewed in December 2001 included two proposed versions for incorporating a reciprocity requirement in the proposed federal statute. The Executive Council recommended these alternatives be submitted to the ALI membership at the next Annual Meeting in 2002.

As we shall see, Andy expressed his reservations about the proposed reciprocity provision in the Discussion Draft. On the other hand, Linda, displaying her diplomatic prowess, played her hand close to her vest. She made sure that the Discussion Draft included two proposed reciprocity versions that were each well-conceived and well-drafted approaches to imposing such a requirement. She sought, in presenting the issue, to be fair to both those favoring such a provision and those opposed. She also made sure to explain that the Draft could also include no such requirement without tipping her hand on which was her favored approach.

In the draft presented to the ALI membership at the 2002 Annual Meeting for discussion, the Reporters explained that, “in general, U.S. law in the twentieth century followed the dissenting view [in *Hilton v. Guyot*] on this issue, to the effect that private, not public rights are involved, and that the principle of retorsion is for the government, not the courts, to apply.” And they recalled that most state courts (but not all) and federal courts exercising diversity jurisdiction had also not imposed such a requirement.<sup>21</sup>

What briefly was the substance of the two proposals? First, under both versions non-enforcement was discretionary—not mandatory—and required the party resisting enforcement to demonstrate “by clear and convincing evidence” that U.S. court judgments in “comparable circumstances” would not be enforced in the state where the judgment seeking enforcement had been rendered.<sup>22</sup> Under Version A, the party seeking to resist enforcement would bear the burden of demonstrating the absence in comparable circumstances of enforcement of

20. *Id.* at xix–xx.

21. FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 7 cmt. a (AM. L. INST., Discussion Draft 2002).

22. *Id.* § 5(c) (Versions A and B).

U.S. judgments in the court of origin. Parties seeking to make that showing, which could be lengthy and expensive, might be asked to furnish security for the costs involved. Under Version B, the State Department would draw upon the experience of U.S. litigants, and maintain a list of countries that enforced U.S. judgments and a list of those that did not. Judgments from countries on the first list would be recognized absent the broader statutory objections under Section 5(a) or 5(b); judgments from countries on the second list—countries whose courts did not enforce U.S. judgments—would not be recognized or enforced, no exceptions.

What about a judgment from a foreign state not on either list that was presented to a U.S. court for enforcement? Under the proposed provision the U.S. court so requested would make *de novo* a reciprocity determination. Which party had the burden of proof on the reciprocity issue? The Discussion Draft before the ALI members included two alternatives when the state of origin of the judgment was not on either State Department list—the first option imposing the burden of proof on the party resisting enforcement; the second imposing that burden on the party seeking enforcement.

## VI. THE ALI ANNUAL MEETING DEBATES AND VOTE OVER THE RECIPROCITY PROVISION

At the 2002 ALI Annual Meeting, the session on the Discussion Draft was presided over by a Harvard Law School bankruptcy professor in her capacity as a First Vice President of the Institute. In my judgment, her role in ensuring a fair hearing for all sides in the debate was critical to the outcome reported here. So long before her name had become a household word, then-Professor Elizabeth Warren demonstrated her deft management of a large and contentious meeting.

Were there any other U.S. statutes incorporating a reciprocity requirement? The Reporters cited several, including a 1996 statute authorizing the Secretary of State to designate a “foreign reciprocating country” in connection with duties of support for U.S. residents. They also pointed to reciprocity as a condition to permitting foreign national suits against the United States for damages caused by federal government vessels. Furthermore, they noted that foreign nationals enjoy



access to our Court of Claims only if U.S. citizens are afforded in the foreign national's courts similar access for suits against their governments.<sup>23</sup>

In the Annual Meeting debate in 2002 on the Discussion Draft, Michael Gruson summarized well the arguments against the reciprocity proposed by Section 5. He warned that "if we introduce reciprocity, I would predict other countries do the same in order to give tit for tat."<sup>24</sup> He viewed the test under the Reporters proposal to be "unworkable" on the ground that it was unclear whether the required showing would be for general or specific reciprocity. Mr. Richard Hulbert joined in this opposition by characterizing the proposal as "a very substantial substantive change in American law" and advanced the "hope" that the ALI would "resist the suggestion that we should become even more nationalistic than we already are."<sup>25</sup>

Professor Stephen Burbank captured the responding arguments in favor of reciprocity in his characteristically pungent fashion: "Our history of unilateralism both ways, in terms of aggressively asserting United States authority and then giving away the store hasn't really worked very well. We gave away the store a long time ago in terms of judgment recognition; we are trying to get it back. I don't believe that there's going to be a tit-for-tat process because the tits are already over there. This is a tat."<sup>26</sup>

Jeffrey Kovar, then Assistant Legal Adviser for Private International Law in the Department of State and head of the U.S. delegation in the negotiations at the Hague Conference, reminded the membership, "What we are doing is proposing

23. *Id.* § 7 cmt. 5.

24. *Annual Meeting of the American Law Institute, Proceedings*, 79 A.L.I. PROC. 358 (2002).

25. *Id.* at 362.

26. *Id.* (beginning his remarks by expressing agreement with Mr. Trooboff's intervention referring to a recent study demonstrating the difficulties in enforcing U.S. judgments in other nations, explaining why the proposed provision did not implicate private rights such as in family but rather commercial rights that the United States had always sought to protect through reciprocal treatment and, finally, reporting experience on the U.S. delegation to the Hague Conference for over "the last ten years and [how I had] bent my sword a great deal on trying to convince others that they should give us what we gave them a century ago."). See also Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 173 (2008) (concluding that "on average, U.S. judgments face more obstacles in Europe than do European judgments in the United States.").

additional benefits for foreign-judgment holders.” He added in support of the proposed reciprocity provision that, “[I]f you are going to ask Congress and the Executive to consider federalizing this area of the law, you have to realize that the rights and possibilities for exercising or for enforcing U.S. judgments, for U.S. judgment holders, is also an important federal policy interest.”<sup>27</sup>

Replying to the argument that the proposed system for determining reciprocity was unworkable, Professor Lowenfeld gave as an example a recent German case and illustrated how the condition on enforcement would, indeed, work well in practice.<sup>28</sup> Professor Silberman supplemented by referring to an analogous experience in the family-law field with support obligations and concluded, “So this is not something that is completely novel with no experience.”<sup>29</sup>

Professor Ronald Brand recalled that reciprocity is assumed for a treaty and then submitted, “In a perfect world, I agree reciprocity is not a good thing; I think, in a federal statute, it’s a very, very different matter, and here we need it.”<sup>30</sup>

At the conclusion of the 2002 debate, Professor Warren took a vote through a show of hands on Professor Burbank’s motion to include the Reporters’ proposed reciprocity provision. She concluded that the members “overwhelmingly” favored the reciprocity provision, contrary to the position of the Executive Council that Professor Lowenfeld recalled was also by a show of hands.<sup>31</sup>

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27. *Annual Meeting of the American Law Institute, Proceedings*, 79 A.L.I. PROC. 358 (2002). At the 2004 Annual Meeting debate, Mr. Kovar reminded the membership, “[t]he fact is that those [U.S.] judgments are not as readily enforceable overseas as foreign judgments are in this country. . . . I think the experience of the last hundred years and more is that other countries don’t necessarily respond to U.S. practice that is very forthcoming to foreign projects, to foreign judgments and foreign court proceedings, and it is necessary to give some incentive to do that.” *Annual Meeting of the American Law Institute, Proceedings*, 81 A.L.I. PROC. 118 (2004).

28. *Annual Meeting of the American Law Institute, Proceedings*, 79 A.L.I. PROC. 363 (2002) (referencing what Professor Lowenfeld considers to be sufficient reciprocity as seen through a German case where compensatory awards are acceptable but punitive judgements are not).

29. *Id.*

30. *Id.* at 365.

31. *See id.* at 367 (noting Professor Warren stating, “Are we clear that the ayes had it overwhelmingly? All in agreement? Good.”)

When the Reporters presented their revised Tentative Draft No. 1 to the ALI membership in 2003, they recorded that their draft had received two reviews from the Executive Council. Yet, they added, “The Council remains divided, but with the majority favoring a reciprocity provision.” They explained if there was to be such a provision in the ALI Proposed Statute, the Council favored the revised reciprocity proposal that now appeared in Section 7. Its purpose, they emphasized, “is not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States.”<sup>32</sup>

In introducing the revised draft of Section 7 at the 2003 Annual Meeting, Professor Lowenfeld said: “I just want to say, as some of you may know, I was not enthusiastic about this at first. But the object is not to reduce enforcement of foreign judgments but to give incentives to foreign courts to be more open in recognizing an enforcement to American judgments.” Drawing on his experience as a State Department lawyer in the Office of the Legal Adviser, Professor Lowenfeld added that the agreement that the United States made with other nations would “not be a massive treaty . . . but it might be a simple Memorandum of Understanding or exchange of notes, and we give a fair number of incentives to foreign states to enter into such agreements.”<sup>33</sup> At that meeting, William J. Williams argued against reciprocity on the ground that “if the judgment is worthy of enforcement, it should be enforced, that the United States should lead by example and not by a stick.”<sup>34</sup>

And then in the 2003 debate, Professor Burbank supplemented his argument during the prior year’s debate by reminding the membership, again in his typically sharp-edged style, that “a, if not the primary, motivation for the creation” of the 1962 Uniform Act was to assist the courts of other nations by presenting the favorable U.S. approach to foreign country judgments. They would not have to read cases to understand our law.” Yet, Professor Burbank added, “I think it probably is

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32. FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 7 cmt. b (AM. L. INST., Tentative Draft No. 1 2003). This explanation carried over into the final version of the ALI Proposed Statute.

33. *Annual Meeting of the American Law Institute, Proceedings*, 80 A.L.I. PROC. 147 (2003).

34. *Id.*

fair to say that, since 1962, disuniformity, rather than uniformity, has grown.”<sup>35</sup>

At the conclusion of the 2003 debate, Professor Silberman strongly defended the Reporters’ approach of drafting a federal statute—not a Restatement—because having a uniform national law required resolving the difficult issues raised by their draft. Such resolution could not be accomplished in a Restatement.<sup>36</sup>

At the 2004 Annual Meeting, Professor Silberman reminded the membership of the dual approach of the reciprocity provision:

Some of you will recall that § 7, which deals with reciprocity, includes a provision that authorizes the Secretary of State to enter into these agreements with other states. In some sense, that is tied to reciprocity because we have viewed reciprocity and these agreements as both carrots and sticks, *i.e.*, making recognition turn on reciprocity, at the same time trying to encourage countries to enter into agreements and to enforce foreign judgments in other countries.<sup>37</sup>

Assistant Legal Adviser Kovar added, “I think the experience of the last 100 years and more is that other countries don’t necessarily respond to U.S. practice that is very forthcoming to foreign projects, to foreign judgments and foreign court proceedings, and it is necessary to give some incentive to do that.”<sup>38</sup>

During the debate, Professor Silberman summarized the arguments for the pending reciprocity proposal as follows:

The hope is that the reciprocity provision and the burden issue will disappear because the Act will be a real incentive to have agreements under § 7(e). So it is pro-enforcement. It is just not pro-enforcement only of U.S. judgments. It is pro-enforcement of judgments

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35. *Id.* at 154 (adding, “I have from the beginning thought that the reciprocity provision [§ 7] is perhaps the most important part of this statute. Somebody earlier referred to the United States leading by example . . . we have been leading by example in the area of the recognition of internationally foreign judgments for more than 75 years, and nobody has followed.”).

36. *Id.* at 159–60.

37. *Annual Meeting of the American Law Institute, Proceedings*, 81 A.L.I. PROC. 88 (2004).

38. *Id.* at 118.

globally and internationally, and the best way to do that, in our view, is to have a provision like § 7(e), which is in some sense the incentive. Reciprocity, you are quite right, operates a bit as a stick to encourage agreements under § 7(e).<sup>39</sup>

In addition to requiring the affirmative defense be pleaded with specificity, Professor Silberman explained the reason for adopting the “substantial doubt” burden for the party resisting enforcement:

[W]e would gut the reciprocity provision by imposing a burden on the party resisting enforcement to have to prove a negative by preponderance of the evidence. We have formulated this in the version that you have before you as substantial doubt, so as not to gut the reciprocity provision and to have a defendant who is resisting enforcement be able to show that there was doubt and, therefore, make the lack of reciprocity a meaningful concept.<sup>40</sup>

In response to a motion by Richard Hulbert to excise the parts of the reciprocity provision not tied to the agreements negotiated by the Department of State, Mr. Struve presented what was the key counter-argument: “And what experience has taught us is that relying on our being generous and then they will be generous has not been a sufficient incentive to accomplish what § 7(e) is looking for [with agreements negotiated by the Department of State].” As he put it, “[t]he idea that we will build it and they will come has not worked.”<sup>41</sup> In a show of hands, the motion was defeated fifty-eight to sixty-six.

By the time of the 2005 Annual Meeting, the ALI membership had no interest in debating the reciprocity issue again. With respect to Section 7, the Reporters explained in their Memorandum to the membership that:

Section 7 on reciprocity reflects the vote taken at each of the earlier Meetings, approving the reciprocity provision in conjunction with other provisions authorizing bilateral arrangements for enforcement of judgments (§ 7(e)) and alternative methods for

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39. *Id.* at 121.

40. *Id.* at 126.

41. *Id.* at 131.

establishing reciprocity (§ 7(b)). Subsection (b) also reflects the choice of the membership at the last Meeting to impose the burden of showing lack of reciprocity on the party resisting recognition or enforcement.<sup>42</sup>

President Traynor explained that the reciprocity provision had been much debated in this Institute. He noted that at the Annual Meeting in 2004, a vote was taken and a majority favored retaining the Section on reciprocity. He said that it would not be out of order to debate the provision again, but it comes with, in a sense, a kind of presumption in favor of what the Reporters have done. There was a show of hands expressing “fundamental agreement” in support of the reporters’ provision on reciprocity and against any further extensive debate or vote.<sup>43</sup>

## VI. RECIPROCITY AND THE UNIFORM LAW COMMISSION

During the ALI debate in 2004 on the reciprocity provision and in response to concerns raised about uniformity in U.S. law, Mr. Kovar had noted that “the Uniform Law Commissioners have begun a process for looking again at the [1962] Uniform Act.” He went on to say that “the basis for this project has always been reciprocity.” And he reiterated that “[t]he only way to [ensure enforcement judgments of U.S. courts in other countries] is to create a system of agreements, and I think it is an admirable initiative to incorporate in this Act a reciprocity provision.”<sup>44</sup>

In fact, the ULC Reporter for considering whether to amend the 1962 Uniform Act, Professor Kathleen Patchel, acknowledged the work in progress of the American Law Institute: “Initial research reveals little change in the consensus position against reciprocity requirements, other than the ALI Draft Statute and law review articles written in support of that Statute and the now-stalled Hague Convention.”<sup>45</sup> She also submitted

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42. Memorandum from Linda Silbermann & Andreas F. Lowenfeld, Int’l Jurisdictions and Judgments Project Reps., American Law Institute, to Members of the Am. L. Inst. at xix (Apr. 11, 2005).

43. *Annual Meeting of the American Law Institute, Proceedings*, 82 A.L.I. PROC. 159 (2005).

44. *Id.* 136–37 (2004).

45. KATHLEEN PATCHEL, STUDY REPORT ON POSSIBLE AMEND. OF THE UNIF. FOREIGN MONEYJUDGMENTS RECOGNITION ACT TO THE UNIF. L. COMM’N STUDY COMM. ON RECOGNITION OF FOREIGN JUDGMENTS 38 (2003) [hereinafter “2003

that one commentator had attributed the reciprocity requirement in the laws of other nations to the reciprocity holding in *Hilton*.<sup>46</sup>

Discussing the issue in the context of the public policy exception, the Reporter stated, “The underlying theory of the Recognition Act is that this certainty ultimately benefits U.S. citizens because it will encourage recognition of U.S. judgments abroad by satisfying those foreign countries that have a reciprocity requirement.”<sup>47</sup> She asked whether the Drafting Committee might want to reconsider the balance struck by the ALI provisions between certainty and fairness in individual cases. She suggested that perhaps the public policy exception could become an “escape valve” by broadening the exception’s limited focus on the cause of action in the ALI Draft Statute—“a role that public policy exceptions often play.”<sup>48</sup>

As a result, the Drafting Committee reported as follows on the issue of reciprocity to the 2004 ULC Annual Meeting:

There was little, if any, support on the Drafting Committee at the April [2004] drafting committee meeting for adding a reciprocity requirement to the UFMJRA. The primary purpose of the UFMJRA was to establish

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ULC STUDY REPORT”] (citing for this conclusion J. Noelle Hicks, *Facilitating International Trade: The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 BROOK. J. INT’L L. 1f55, 163 (2002) (Recognition Act codified common law, making it more likely U.S. judgments would be recognized in countries with reciprocity requirements)).

46. 2003 ULC STUDY REPORT, *supra* note 45, at 39 n.193 (citing Nadelmann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184, 1188–1189 n.16 (1952) (in fact, Nadelmann states that reciprocity is “not now the law of the land” in France and explains that *Hilton* has been “severely criticized by leading authors” and not been endorsed by the American Law Institute in its Restatement (First) of Conflict of Laws so that French academics and “[f]oreign publications appear incorrect in stating that in the United States the requirement of reciprocity is the law of the land”). Professor Patchel also explained that if two countries have reciprocity requirements a so-called *double renvoi* can be presented with each country mirroring the other with a resulting “analytical circle” from which there is “no easy exit.” 2003 ULC STUDY REPORT, *supra* note 45.

47. *Id.* at 35.

48. *Id.* at 35 and n.178 (stating that “[t]his is the role that public policy apparently is intended to play under the ALI Draft Statute” without elaborating on the discussion in the ALI draft of the narrowing of the exception by imposing precise and carefully crafted requirements for the parties to demonstrate and the court to find in determining the application of the ALI reciprocity provision).

minimum standards for recognition of foreign country judgments in the hope that clear U.S. standards for recognition of foreign country judgments would encourage foreign courts, and particularly those in countries with reciprocity requirements, to recognize U.S. judgments. Placing a reciprocity requirement on the recognition of foreign country judgments would run counter to this goal by making it more difficult, if not impossible, for a foreign country court to determine whether its own reciprocity requirement was satisfied.<sup>49</sup>

The Committee also cited the reasoning against a reciprocity requirement voiced by Judge Higginbotham in *Hunt v. BP Exploration Co. (Libya) Ltd.*:

[R]equiring reciprocity would arbitrarily penalize individuals for positions taken by foreign governments and such a rule has little if any constructive effect, but tends instead to a general breakdown of recognition practice. Reciprocity also would reduce predictability in recognition of foreign judgments: a reciprocity rule is difficult to apply both because of uncertainty as to just how much foreign recognition of American judgments should be considered adequate and because courts are ill-equipped to determine foreign law.<sup>50</sup>

To its credit, the Drafting Committee added to its report that “[n]evertheless, given the number of states that have non-uniform amendments to the UFMJRA adopting reciprocity requirements, the Drafting Committee felt that it would be useful to obtain comment from the Commissioners on the reciprocity issue.”<sup>51</sup>

Following the 2004 Annual Meeting, which did not lead to any change in the Committee’s approach, the ULC Drafting Committee included nothing on reciprocity in the October 2004 Committee draft. However, in the draft for the December 2004 Committee meeting the Reporter included for the first

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49. ULC DRAFTING COMM. TO AMEND THE UNIF. FOREIGN MONEYJUDGMENTS RECOGNITION ACT, ISSUES FOR CONF. CONSIDERATION AT THE 2004 ANNUAL MEETING 8–9 (June 2004) [hereinafter “2004 ULC DRAFTING COMM. REPORT”].

50. *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 899 (N.D. Tex. 1980).

51. 2004 ULC DRAFTING COMM. REPORT, *supra* note 49, at 9.



time the following Note explaining new Section 14, which appeared in brackets:

Note: The Committee currently is considering whether the Uniform Foreign-Country Money Judgments Recognition Act should contain a reciprocity requirement, either as a mandatory or discretionary ground for denial of recognition to a foreign-country judgment. The Committee feels that this is an important issue, and one with regard to which it would like to receive as much comment as possible. The draft of the Uniform Foreign-Country Money Judgments Recognition Act currently does not contain a reciprocity provision.

The Note then provided the full text of the reciprocity proposal from the April 2004 Tentative Draft No. 2 of the American Law Institute Proposed Statute as an example of how such a provision might be included in the Uniform Act.<sup>52</sup> The Note did not mention the tentative approval that the ALI membership had given to that provision or report on the lengthy 2002 and 2003 debates within the ALI.

In the draft presented to the ULC Drafting Committee meeting in March 2005, the brackets were taken off of Section 14 but the language remained unchanged. I attended that meeting as an observer. Despite its importance and the ALI precedent, the reciprocity issue enjoyed an extremely brief discussion in the ULC Committee. There was no detailed review of the ALI draft and the reasons for its approval by the ALI membership. Nor was there any systematic consideration of the refinement to the ALI reciprocity proposal by Professors Lowenfeld and Silberman as a result of several years of ALI study and debate. It was clear that the ULC Drafting Committee remained steadfastly against any comprehensive reconsideration of the issue or any careful review of the well-advanced ALI draft and the lengthy arguments in support of its terms.

As a result, the text in the July 2005 draft submitted by the Drafting Committee to the ULC Annual Meeting for final approval omitted Section 14 and instead the following appeared in a Prefatory Note:

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52. ULC DRAFTING COMM. TO AMEND THE UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT, DRAFT UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 14 (Nov. 2004).

In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act not to require reciprocity as a condition to recognition of the foreign-country money judgments covered by the Act. After much discussion [sic], the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue. While recognition of U.S. judgments continues to be problematic in a number of foreign countries, there was insufficient evidence to establish that a reciprocity requirement would have a greater effect on encouraging foreign recognition of U.S. judgments than does the approach taken by the Act. At the same time, the certainty and uniformity provided by the approach of the 1962 Act, and continued in this Act, creates a stability in this area that facilitates international commercial transactions.<sup>53</sup>

That same Note stated the following: “The hope was that codification by a state of its rules on the recognition of foreign-country money judgments, by satisfying reciprocity concerns of foreign courts, would make it more likely that money judgments rendered in that state would be recognized in other countries.”<sup>54</sup> The Note did not review or cite the forceful rejection of this very reasoning that had been presented during the ALI debate on what became Section 7 of the Proposed Statute.

## VII. RECIPROCITY—IMPLEMENTING THE 2019 HAGUE JUDGMENTS CONVENTION AND AMENDING THE 2005 UNIFORM ACT

Because of her extensive scholarship on the issues and, in particular, her role in developing the ALI’s proposal, Linda has also been a wise and respected participant in lengthy discussions of whether the United States should ratify the 2019 Hague Judgments Convention and, if so, how that treaty should be implemented by the United States. In particular, she has served as a member of the Secretary of State’s Advisory Committee on

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53. ULC DRAFTING COMM. TO AMEND THE UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT, DRAFT UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT 1 (July 2005).

54. *Id.*

Private International Law and of the Study Committee of the Uniform Law Commissioners who are addressing the difficult issues that have arisen in considering such implementation. In those discussions on implementing the 2019 treaty, Linda has time and again reminded the participants that from the perspective of the United States and its litigants, the purpose of any treaty on recognition and enforcement of judgments should be first and foremost to enhance the enforceability of judgments of judgments of U.S. courts—state and federal—in the courts of other nations. She also repeatedly counseled that in view of the post-*Hilton* jurisprudence in this country, the principal objective of the new treaty should be facilitating the enforcement of U.S. judgments in foreign courts. Yes, such implementation may also achieve other purposes for non-U.S. litigants including providing clearer guidance to those seeking to enforce foreign judgments in the United States. That said, Linda’s point must remain our lodestar—ratification of the 2019 Convention and enactment of implementing legislation should receive support if and only if the result benefits U.S. judgments when presented for enforcement in courts of other nations.

As we have seen during the debate over the reciprocity provision of both the ALI Proposed Statute and the 2005 Uniform Act, the reverse is not true—U.S. judgments do not generally receive the same ease of enforcement in other nations that the judgments of their courts receive in the United States. The 2019 Hague Judgments Convention would achieve reciprocity for U.S. judgments in the courts of those states that become parties to the treaty.

What would be the situation for U.S. judgments in the courts of nations that do not become parties to the 2019 Hague Convention? As Connor Cardoso has warned, “if foreign states know that many U.S. state regimes will recognize judgments falling within the scope of the Convention, regardless of whether they ratify the Convention, then they will have less incentive to join it.”<sup>55</sup>

Cardoso’s solution to this problem is straight-forward: “A federal implementing statute that imposes a reciprocity requirement for at least judgments falling within the scope of the Convention is necessary to avoid this freeriding problem.”<sup>56</sup> While

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55. Cardoso, *supra* note 1, at 1528.

56. *Id.*

recommending this solution, Cardoso recognizes the delicate issue of having Congress “federalize judgments recognition at least partly beyond the scope of what the Convention requires.” In addition to the compelling arguments in favor of reciprocity that arise from the ALI and ULC debates, the key concern is that, failing such Congressional action on reciprocity, “we will be left with a bizarre situation in which judgments falling outside the scope of the Convention receive more generous treatment—because most states do not currently require reciprocity as a matter of state law as a precondition for recognition—than judgments falling within the scope of the Convention.”<sup>57</sup>

There is a less drastic solution that would possibly, at least on an interim basis, resolve the concern that Cardoso and others have wisely raised. This alternative approach would again require Linda’s diplomatic skills because the assignment requires working with and convincing the Uniform Law Commissioners, the Judiciary, the Bar, and the academic community. Specifically, the ULC could and—as many advocated to the ULC Drafting Committee in 2005—*should* amend the 2005 Uniform Act to include a reciprocity provision along the lines that appear in Section 7 of the ALI Proposed Statute.

To be sure, there are problems with this proposal that need to be worked out. In particular, the ULC would bear the burden of persuading thirty states to amend their enactment of the 2005 Uniform Act to include such a reciprocity provision. Further, there would be a problem with respect to those other states that have not yet enacted the 2005 Act and would need to do so with the reciprocity provision included for the requirement to become national in scope. In the six states that have reciprocity requirements, it would be necessary to persuade them to adopt the ULC model reciprocity provision. It would also be necessary to examine how to promote uniformity in the interpretation of such a state-law provision.

In short, it may well be necessary to reexamine in a much narrower context adoption of the kind of federal-state approach to implementation that some proposed but others regarded as unworkable for implementing, for example, the Hague Convention on Choice of Court Agreements.<sup>58</sup> In this instance,

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57. *Id.* at 1528 n.106.

58. Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (entered into force October 1, 2015; signed by the United States Jan. 19, 2009). For a discussion of some of the issues and complications of

however, the ULC could be the pace-setter given the lengthy process that remains in order to have the Executive submit the 2019 Hague Convention to the Senate for advice and consent. ULC could promptly begin to develop a reciprocity provision for the 2005 Uniform Act drawing on the experience of the six states that currently have such a provision in their laws as well as the ALI provision. Such a ULC undertaking would perhaps begin to send a message to other nations regarding their treatment of the judgments of U.S. courts.

I submit that the very process of ULC consideration of such an amendment to the 2005 Uniform Act would be following Linda's advice by potentially enhancing the prospects for the enforcement of U.S. judgments in the courts of other nations. Experts in other nations would quickly see the trend in U.S. treatment of judgments from other nations. Let us be clear: it will take all of Linda's diplomatic skills and more to achieve such action by the ULC that would, I believe, ultimately help to promote United States ratification of the 2019 Hague Convention. To be sure, Linda might not endorse this initial state-law approach for beginning to impose a reciprocity requirement in courts of the United States. Given the skill that she demonstrated in crafting Section 7 of the ALI Proposed Statute, perhaps she would reject anything short of the national-law approach to reciprocity that, as we have seen, she and Professor Lowenfeld so ably persuaded the ALI membership to approve.

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implementing in the United States see Ronald Brand, *U.S. Implementation vel non of the 2005 Hague Convention on Choice of Court Agreements*, 12 Y.B. PRIV. INT'L L. 107 (2010).