WHOSE REGULATORY INTERESTS?: OUTSOURCING THE TREATY FUNCTION
New York University Law School, Stephen B. Burbank
(October 25, 2012)
I have been asked to address the question whether the status quo is working for the recognition and enforcement of internationally foreign judgments, which I will refer to as “recognition of foreign judgments” or simply “foreign judgment recognition.” I have been asked to do so, moreover, in such a way as to advance understanding of the issue that unifies the symposium. That issue is “how U.S. courts balance our regulatory interest[s] against the need for international cooperation in the context of transnational litigation.”

In seeking to satisfy this remit, I will first lay out what the status quo is in the area of judgment recognition, with attention to the posited tension between domestic regulatory interests and international cooperation. Precisely because the future of the status quo in this area is in doubt, that endeavor will lead me to consider current proposals for change, particularly the effort to implement the Hague Choice of Court Convention in the United States.

My account draws on prior work, now twenty years old, that saw running throughout the historical record of U.S. lawmaking for international civil litigation four threads that had prevented or hindered the process of dialogue and mutual education necessary for international cooperation: unilateralism, a preference for national over international uniformity, impatience and penuriousness. Such an account is useful both to bring those in the audience who are not conversant with this corner of transnational litigation up to speed, and to lay the groundwork for discussion of normative issues that permeate United States law in this area, whether one is speaking about the past or about the present.

Prominent among the normative questions arising in connection with the recognition of foreign judgments is whose interests in addition to the litigants’ interests – those of the United States, those of the several States, or those of interest groups waving a federal or state flag -- are at stake. A related question is whether, if the uniformity we seek is to be found in state rather than federal law, we can be, and be seen by other countries to be, serious about international cooperation.

Even those of you who are new to the recognition of foreign judgments are likely to know that the Full Faith and Credit Clause of the U.S. Constitution and the federal statute that has implemented it since 1790 govern the credit due to the judicial proceedings of the States of the United States, not those of other countries. You are perhaps less likely to be familiar with the purposes of the constitutional provision. The Founders believed that interstate judgment
recognition was essential to the development of a well-functioning national economy, an insight that almost two hundred years later also animated the Brussels Convention. You are less likely still to be aware of the Founders’ concern that, were the biased treatment that British creditors received from some state courts in the 1780s to continue, it might quickly lead us back into war - - with a different result -- concerns that undergirded Article III’s grant of judicial power in alienage diversity cases.

Presumably everyone in this room knows that the urge to classify law in the United States as state or federal is, as to law that reposes in judicial decisions, a relatively modern phenomenon. Thus, since the Constitution does not speak to the recognition of foreign judgments and neither Congress nor state legislatures sought to regulate such judgments in the 19th century, the issues were committed to the tender mercies of the common law. Accordingly, in federal courts exercising domestic or alienage diversity jurisdiction they became part of the general federal common law associated with Swift v. Tyson.

For much of this period it appears that there was disagreement, within and across federal and state judicial systems, whether foreign judgments were entitled to recognition for purposes of according them preclusive effect as opposed to admissibility in evidence. The Supreme Court’s 1895 decision in Hilton v. Guyot settled that question in favor of very generous recognition standards, but even before the well-known revolution ushered in by Erie Railroad v. Tompkins, Hilton was not everywhere accepted as federal common law binding under the Supremacy Clause, however persuasive its reasoning and rules might be. Hilton was, after all, an alienage diversity case in which, in the absence of preclusion, federal substantive law would not have governed. Moreover, it took a less well-known revolution attributable to Erie to get us thinking about the legitimate lawmaking prerogatives of the federal courts.

Although Hilton lost whatever status as a source of authority it had in 1938, it has continued to be a powerful source of rules, influencing state law, both judge-made and statutory, for more than a century. Indeed, the primary reason why the Uniform Law Commissioners, to whom I will refer collectively as the “ULC,” undertook to draft a Uniform Act in 1962 was not a perception of substantial disuniformity. It was, rather, the desire to promote greater recognition and enforcement of U.S. judgments abroad by easing inquiries into U.S. law that were driven by a requirement of reciprocity and that were conducted by judges accustomed to codified law.

Thus, the state law for the recognition of foreign judgments -- judge-made or statutory -- that federal courts sitting in diversity applied after Erie was substantially uniform and had a federal source. Moreover, ever under the influence, if not the command, of Hilton, it has long been law that refuses to permit American regulatory interests to disrupt international cooperation, latitude that other countries afforded through re-examination of the merits (révision au fond) and a choice of law test. Assuming a foreign court exercised jurisdiction consistently with our notions of due process, essentially the only room that modern American foreign judgment recognition law affords for protecting domestic regulatory interests arises from that
ubiquitous conflict of laws safety valve: public policy. In the area of foreign judgment recognition as elsewhere, however, the room is very small.

One area where there has been an obvious chink in the armor of uniformity concerns whether recognition should turn on reciprocity. This was an aspect of the general federal common law announced in *Hilton*, but it was the subject of a vigorous dissent in that case and had been rejected in the 1962 Uniform Act. Some states nonetheless opted to include a reciprocity requirement in the versions of the uniform act that they adopted, proving that, as often observed, uniform acts are not uniform.

Today, those whose view extends beyond our shores should agree that the law applied by United States courts to determine whether foreign judgments warrant recognition is an aspect of our foreign policy, a perspective that assimilating the phenomenon to judicial cooperation tends to obscure. Whatever our internal lawmaking arrangements, as global economic activity has assumed ever greater prominence in international statecraft, other countries, particularly those whose courts lack institutional independence, are likely to see in a recognition decision only the work of the United States. This is not, or not entirely, a recent perspective. In the period following the Uniform Law Commissioners’ promulgation of the 1962 Act, some took note that, as the dissent in *Hilton v. Guyot* argued, a reciprocity requirement is difficult to divorce from foreign policy. Thus, both the fact that state courts are not obviously appropriate instruments of foreign policy, and the fact that it is therefore a matter upon which the United States should speak with one voice, contributed to occasional articles arguing that the federal courts can and should develop and apply uniform federal law, binding on the States, as part of what their authors saw as a nascent federal common law of foreign relations.

In my view those scholars were wrong, over-reading the Supreme Court’s decisions in *Sabbatino* and *Zschernig v. Miller*, and, particularly following the Supreme Court’s reorientation of *Erie* jurisprudence in its 1965 decision in *Hanna v. Plumer*, failing to give adequate attention to differences attributable to the sources of federal law. That said, however, there cannot be any serious question about the power of Congress comprehensively to legislate the rules for foreign judgment recognition for both the federal and state courts, or the power of the United States to enter into treaties on that subject that are supreme under the Supremacy Clause of Article VI. Prior to 1990, and unlike the countries of Europe, whose practices have been so well chronicled by Professor Baumgartner, the United States had never entered into such a treaty, bilateral or multilateral. Our one sustained effort to do so – with the United Kingdom, presumably our most promising treaty partner – ran aground in the 1970s.

In the 1990s, led by the great scholar, Arthur von Mehren, the United States persuaded the Hague Conference on Private International law, to undertake a project aimed at developing a comprehensive (or global, a word that is in this context ambiguous) convention on jurisdiction and judgments. The impetus for the effort was the perception that, although American courts are very generous in recognizing foreign judgments, the judgments of United States courts are not
similarly treated abroad. The potential for such disparate treatment was highlighted by provisions of the Brussels Convention that permit member states to continue to apply to U.S. litigants grounds for jurisdiction that the Convention barred as to those domiciled in member states, and that require the recognition by other member states of judgments predicated on such exorbitant jurisdictional grounds. Moreover, the scope for such discriminatory treatment expanded with the conclusion of the Lugano Convention, and it has expanded further after the Brussels Convention was absorbed in a European Union regulation for a larger EU community.

The failure to conclude a comprehensive jurisdiction and judgments convention at The Hague can be attributed to a number of causes. One of them surely was the fact that the unilateral generosity of American law on foreign judgment recognition skewed bargaining incentives, ensuring that representatives of other countries, who had little if anything to gain on the recognition side of the equation, sought most of their gains on the jurisdiction side, focusing on jurisdictional grounds that they deemed exorbitant but that American negotiators, influenced by the private sector, were unwilling to give up. From that perspective, the Supreme Court’s decision in the Goodyear Dunlop Tires case, which appears substantially to curtail the constitutionality of general doing business jurisdiction, came ten years too late.

Fortunately, after it became clear in 2001 that the negotiations for a comprehensive convention had stalled, the negotiators sought to salvage something that might be of value on its own merits and, if successful, prove a springboard for another attempt to reach agreement throughout the landscape as a whole. In 2005 their efforts yielded a Choice of Court Convention that is designed to govern the enforcement of choice of court clauses in commercial contracts and the recognition of judgments entered in litigation by parties who have agreed to such a clause. The Hague Choice of Court Convention has the potential to make the market for international dispute resolution more competitive by making litigation a much more attractive alternative to arbitration than it has been since the New York Convention entered into force. In 2009, as he was leaving office as the State Department’s Legal Adviser, Mr. Bellinger signed the Convention on behalf of the United States.

After the effort to reach a comprehensive jurisdiction and judgments convention at The Hague began, the American Law Institute approved a project to draft federal implementing legislation. Professors Lowenfeld and Silberman were Co-Reporters, and I was one of the Advisers. Once it became clear that the effort at The Hague was unlikely to succeed – which had always been recognized as a possibility by the ALI -- the project changed shape to become a draft free-standing federal statute prescribing uniform federal law on most questions of foreign judgment recognition but borrowing state law where appropriate, as for instance when state public policy is implicated as a defense to recognition. The ALI approved the draft statute in 2005, thereby signaling the Institute’s view not only that there was federal legislative power to govern in the area, but that the time had come for Congress to exercise that power. That is apparently a view shared by Mr. Bellinger, who testified at a House Subcommittee hearing on foreign judgments recognition a year ago both that “the business community is concerned about
the potential for abuse in the existing state law framework,” and that “a purely federal statute would have certain advantages.”

The most controversial issue during Institute debates and deliberations that spanned many years was precisely the question of reciprocity. For participants who succeeded in separating the question of what it is appropriate for Congress and the President to do from what is appropriate for courts, let alone state courts, the lesson of the failed negotiations at The Hague was clear. Moreover, the legislation amending the Federal Arbitration Act to implement the New York Convention, which required reciprocity, seemed to signal likely congressional preferences. The ALI’s draft statute includes an explicit reciprocity requirement. The lesson of the costs of unilateralism in this area seems also to have influenced the EU. That is the inference I draw from its action deferring any decision on a proposal to extend the Brussels regime to those domiciled in non-member states, which would eliminate the discriminatory treatment to which I have referred. The deferral seems to be linked to news that the Hague Conference was considering relaunching the project to reach a comprehensive judgments convention, a decision that has now been made, although, at least initially, the convention contemplated by the experts advising the Conference would not directly prescribe acceptable jurisdictional grounds.

In the aftermath of the failed negotiations for a comprehensive jurisdiction and judgments convention at The Hague, the ULC devoted most of their attention in this area to the ALI project, which they recognized as a threat to the 1962 Act and said that they regarded as a threat to the appropriate balance of state and federal law. Their response was two-fold. First, their representatives on the floor of the ALI sought to derail that project by arguing that federal legislation was neither necessary nor appropriate. That effort was not successful. Second, borrowing liberally from ALI drafts, the ULC sought to bolster the case for lack of need by revising the 1962 Act. That effort yielded a 2005 Uniform Act, which, like the 1962 Act, does not include a reciprocity requirement. I said “like the 1962 Act” rather than “like its predecessor,” because although some states that had adopted the 1962 Act replaced it with the 2005 Act, not all states have done so. Moreover, of course, there remain many states where foreign judgment recognition is governed by state common law.

Once the ULC had responded directly to the ALI effort with the 2005 Uniform Act, they turned their attention to opportunities that the impending Choice of Court Convention might afford both to advance the program of what they aptly call their International Legal Development Committee and, as a side benefit, to seize the normative high ground from the ALI. Accordingly, a ULC representative joined the U.S. delegation for part of a Diplomatic Conference at The Hague just before the Choice of Court Convention was concluded. Discussions during that brief sojourn and other communications between the ULC and representatives of the State Department were apparently enough to persuade the State Department to invite or permit the ULC to participate in drafting the implementing legislation. Which party initiated those communications, their precise nature, the extent of any commitments they contained, and who was speaking with authority for the government remain unclear.
Here is what I know: representatives of the ULC have asserted on many occasions that the State Department requested the ULC to undertake the work or that there is a commitment in writing; ULC Guidelines for the establishment of a drafting committee for legislation implementing treaties require the written support of an appropriate official in the State Department, and in a March 2012 memorandum to a committee of the Judicial Conference of the United States, ULC representatives asserted that “[t]he ULC undertook the drafting of a uniform law to implement the Convention with the written agreement of the U.S. State Department Office of Private International Law that the Convention would be implemented through cooperative federalism if possible.” The person who presumably made that commitment was David Stewart, who, after he left office, has been listed as a consultant to the ULC on the project. One does not have to be interested in the enforcement of federal revolving-door legislation to believe that the “written agreement” to which the ULC referred should be made public.

As noted, there were personnel changes in the State Department as in the White House, and the new head of PIL distanced himself and the office from a strong commitment of the sort asserted by the ULC. When he convened a group to advise PIL on implementation strategies, a number of such strategies were on the table, including implementation through a federal statute that would be binding in federal and state courts alike, and implementation through “cooperative federalism.” Various influences converged to ensure that, although there has never been a State Department or U.S. Government decision on which implementing strategy to adopt, cooperative federalism has received the lion’s share of attention in the intervening three years.

First, in a political climate that historically has rarely been, and is not today, friendly to international commitments, the State Department’s long-standing normative posture that private international law treaties are domestically viable only if they satisfy private interests sufficiently to yield a consensus presented an immediate problem. Ironically, however, it was not a problem attributable to private interests. Indeed, the State Department can be criticized for insufficient attention to the preferences of U.S. international lawyers and their clients who are concerned about foreign judgments, those whom a representative of the ULC referred to as “self-interested litigators.” No, the domestic interests that the ULC has invoked and deployed are, first, those of the Conference of State Chief Justices, whose correspondence strongly suggests ULC draftsmanship, second, those of the Committee on Federal-State Jurisdiction of the Judicial Conference, which is usually a reliable opponent of any change in the law that would increase federal court subject matter jurisdiction, and third but only when cornered, the ULC’s own interests. Ultimately, of course, the ULC could and did hint that any approach other than “cooperative federalism” would doom the Choice of Court Convention in the Senate.

Second, the ULC was more than willing to do the not insubstantial work required to draft implementing legislation. I have previously described and decried the penuriousness of the United States Government in the area of private international lawmakers. The PIL office in State is understaffed and underfunded and can accomplish the impressive amount of work it does only because others, usually those in the private sector, are willing to devote their time and resources
to the tasks at hand. The extent of the reliance thereby necessitated has caused me to question whether the normative posture described above, which appears to deny any interest of the United States that is greater than or different from the collective preferences of the private sector, is a cover for our unwillingness to spend more money on this increasingly important function. In this case, again, the assistance came not from the private sector directly, but from a domestic NGO. There is a joke that I cannot repeat in polite company, the punch line of which has Winston Churchill saying to Clement Attlee, “God damn it, Clement, every time you see something big, you want to take it over.” The ULC evidently had that ambition for the legislation implementing the Choice of Court Convention, where the workload was unusually heavy because the enterprise of cooperative federalism required two statutes rather than one, and keeping an appropriate division of labor required (and received) a firm hand by the State Department.

Third, the ULC has been remarkably successful in leading its various audiences, even those who are not hard-wired to follow its party line and who are otherwise legally sophisticated, to believe that an implementation regime relying exclusively on a federal statute would inevitably sacrifice legitimate state lawmaking prerogatives. They have obscured in a fog of misleading rhetoric the fact that “there is no necessary connection between the process used to implement the treaty and the source of the rules to which resort is made for that purpose.” It is true that the Choice of Court Convention is different for these purposes from a simple judgment recognition treaty, both because it prescribes jurisdictional rules and, more to the point, because those rules implicate issues of contract law that have traditionally been governed by the States. Although my personal view is that some of those issues warrant a federal solution in this context, since early in the process of drafting implementing legislation, it has been clear that all of them would be addressed by borrowing or incorporating state law in the federal statute.

The ULC’s allergy to the concept of borrowed state law apparently explains its representative’s strange references to “indigenous” law when championing the supposed interests of the States. Of course, such references appear passing strange when one considers the origins of any uniform act, and even more so when one attends to the vanishingly slight degree of lawmaking autonomy that States would possess in the regime of cooperative federalism that has evolved in the drafting process.

Fourth, the meaning of “cooperative federalism” has changed over time as it has become convenient for the ULC to turn what was initially acknowledged to be an experiment to determine whether a domestic regulatory approach could be transplanted to the international stage into an attack on a well-defined concept in which are embedded a host of subsidiary propositions that it does not obviously entail. It has been fascinating, albeit exasperating, to witness the use of this idea, for which the ULC typically invokes the Supreme Court’s 1992 decision in New York v. United States as the bible, in implementation discussions. In hindsight, insufficient attention was given at the outset to the fundamental question whether the particular species of cooperative federalism advocated by the ULC, conditional preemption, can be transplanted to this particular international context -- whether, as the ULC’s basic document on
cooperative federalism asserts, it “would work equally well when the federal policy was the international policy embodied in a treaty.”

According to this approach, states have a choice between accepting direct federal regulation or themselves regulating under (that is, subject to possible preemption by) federal standards. Passing the point that, as I have discussed, direct federal regulation in this instance would incorporate state law on issues of contract formation and validity, among others, my question is intended to focus attention not just on the existence of a treaty but on the fact that this treaty is so filled with provisions demanding autonomous interpretation that, if domestic politics would permit, it might well be regarded as self-implementing. The former inconvenience undoubtedly explains the ULC’s incorrect refrain that the existence of a treaty does not provide an independent federal interest, while the latter shows just how silly that proposition is with respect to the Hague Choice of Court Convention. Yet, the ULC insistently sought to preserve leeway for state law departures from language that carries an autonomous interpretation, and they failed as long as they could get away with it to acknowledge that materially variant state court interpretations are, with materially variant statutory language, ripe for federal preemption. Moreover, in remarks to the Secretary of State’s Advisory Committee on Private International Law just the other day, a ULC representative simply ignored the extent to which the treaty itself must dictate domestic lawmaking if we wish to honor our international commitments.

Of course, the State Department understands this, which is why the Department has repeatedly rejected ULC’s remarkable proposal that the uniform act, as promulgated by the ULC, should be the standard for assessing federal preemption, a proposal that seems no less remarkable because it was endorsed by the Conference of State Chief Justices. It is also why the drafting process became what I have elsewhere called an exercise in cooperative redundancy, one that would yield an implementation regime so complex that it “would drive transactional lawyers to arbitration, and drive litigators to drink.”

Apart from the impossibility of squaring such a regime with basic goals of the Choice of Court Convention – transparency and predictability come to mind -- one who has read New York v. United States might well wonder why giving States a choice between a federal implementing statute and a state version of a uniform act that is in every material respect identical is different from the coercion on which a majority of the Court relied in that case to invalidate one of three means by which Congress sought to encourage state regulation of low-level radioactive waste. I will not pursue the question other than to note that Justice O’Connor’s opinion for the Court is at least consistently wooden when discussing how and why courts are different from the other branches of state government for purposes of coercion or commandeering analysis. At the least, the situation is far removed from that described in what I have called the ULC’s “basic document on cooperative federalism,” which tells us that “[w]here Congress encourages state regulation rather than compelling it, state government remains responsive to the local electorate’s preferences: state officials remain accountable to the people.”
One whose interests are more practical might wonder why any State would bother spending the time and money necessary to enact a uniform act that was materially identical to the federal statute that would otherwise govern. That consideration, I believe, helps to explain a good deal of behavior in the negotiations, including the ULC’s retreat into idiosyncratic essentialism about the concept of cooperative federalism.

It was not clear to me why the ULC worked so hard -- against the preferences of the great majority of lawyers who actually practice in this area -- to prevent implementing legislation from following the New York Convention model of court jurisdiction, particularly when it was agreed early on that federal question jurisdiction would extend only to judgment recognition and not to enforcement of choice of court agreements – the latter one of a series of compromises virtually all of which favored the ULC. Nor, with attention focused on cases in federal court because of diversity jurisdiction, was it clear to me why the ULC opposed having the federal statute include a limitations period identical to that proposed for the uniform act. My confusion in that regard was no doubt compounded by legal analysis from the ULC that ignores precedent in the FAA for prescribing federal law without extending federal question jurisdiction, and treats Erie as a supra-constitutional brooding omnipresence that survived the Supreme Court’s 1965 reorientation in Hanna v. Plumer.

The ULC’s ulterior motives only became clear in February of this year, in connection with a discussion of the limitations issue, when ULC representatives announced for the first time their arresting view that the law to be applied in federal court in a state that has adopted the uniform act should be the uniform act, not the federal statute, and represented that this view was an irrefragable element of cooperative federalism. Obviously, the ULC was worried about a disincentive to state enactment additional to the fundamental disincentive presented by a regime of cooperative redundancy.

It is public knowledge that this Spring, after unprecedented efforts to broker a compromise on implementing legislation that followed a cooperative federalism approach, the State Department proposed a package of compromises, again almost entirely in favor of positions taken by the ULC. It is also public knowledge that the ULC rejected that proposal because the State Department did not wholly capitulate and in particular proposed to preserve the power of a federal court to apply the federal statute instead of the materially identical uniform act. I encourage you to read the State Department’s White Paper and the correspondence between the Legal Adviser and the ULC. Judge for yourselves who has the better of the legal analysis, who is attentive to the goals of the Hague Choice of Court Convention, and who is seeking to advance the interests of the United States. It is regrettable that individual Uniform Commissioners could not make such judgments before they voted to adopt the uniform act in July of this year, because they were not given copies of the White Paper or the existing correspondence.

One matter that becomes clear in the correspondence between the ULC and the Legal Adviser is that, as some had previously suggested, at the end of the day the ULC is concerned
about, well, the ULC and its program of international legal development. I have referred to the ULC as an NGO that, like Clement Atlee, has takeover plans. The ULC’s invocation of problems that compromise might present for their other treaty implementation projects is specious. The key insight here, however, is that the ULC privileges its own interests over both those of the States and those of the United States, to say nothing of the interests of “self-interested litigators” and their clients. Consider also in that regard the following provision in the ULC Guidelines to which I have referred, a provision that led one of my colleagues in the negotiations to label those Guidelines a “manifesto” and led me to refer in these remarks to the ULC’s “party line.”

A ULC Commissioner who is appointed to participate in the negotiation of [a] private international law convention, and a ULC Commissioner who is selected to work with the State Department in connection with the negotiation of a private international law convention, will be committed to the ULC policy concerning the implementation of conventions and to the ULC’s objective to advocate for provisions in conventions that will result in the least disruption possible to state law if the convention were to be implemented in the U.S. Those Commissioners will regularly report back to the ULC concerning convention negotiations and whether it will be feasible to implement the convention by uniform state law.

Prior to the ULC’s recent actions, I found its performance in this exercise sufficiently out of the mainstream of modern American federalism to summon images of the Tea Party. In assessing the ULC’s subsequent refusal to compromise, we may profit from columnist David Brooks’ blunt conclusion when writing about the Republicans’ rejection of a budget deal offered by President Obama that has been characterized as “far more favorable than even the various bipartisan agreements wafting around the Capitol.” We may conclude that the ULC is, in his words, “not fit to govern.” Regardless, if the ULC were successful in taking over the negotiation or implementation of private international law treaties, international cooperation would be if not a fortuity, then not a priority, because we would have regressed to a position of privileging not just federal but state law uniformity over international uniformity. And the state law we privileged would be anything but “indigenous.”