Crossroads in the Great Race:
Moving Beyond the International
Race to Judgment in Disputes over Artwork
and Other Chattels

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I. INTRODUCTION

Disputes over the ownership of artwork today tend to lead to litigation
classified by complex fact patterns, multiple parties, and a host of implica-
ted jurisdictions. Consider a case where an Argentine citizen purchases an
antique Italian tapestry in Switzerland, then lends it to a museum in the United
States, and finally is threatened with suit by a Colombian citizen, who
claims the object was stolen while in transit from Belgium. Most litigators
would immediately ask, “What court has jurisdiction?” and then, “Which
jurisdiction is best for my client?”

International litigation related to cross-border purchases of artwork and
other chattels confronts such parties with complex jurisdictional choices.
The differences between the laws of the United States and those of many
other nations often highlight the potentially outcome-determinative nature
of forum selection. Even after the parties find themselves litigating in a
particular forum, that forum may or may not coincide with the present location of the chattel in question. Thus, enforcement of the resulting judgment may become difficult or impracticable.

Consequently, litigants often race to the jurisdiction most likely to apply the law favorable to their position in hopes that other jurisdictions will give res judicata effect to the resulting judgment. This race is also motivated by other procedural, as well as substantive, considerations. For example, while it is generally difficult to expand statutes of limitations periods for prescriptive ownership under equitable doctrines in civil law countries, litigants in U.S. courts generally only are able to get complex time-barred claims dismissed at a high expense. Further, U.S. courts largely ignore the *lex situs* doctrine, which provides that the substantive law of the situs of a chattel applies to disputes regarding its ownership. In contrast, courts in civil law countries widely make use of this and related doctrines.
An almost inevitable consequence of the race to judgment is expensive parallel litigation with a high risk of contradictory judgments. Moreover, litigation over art is particularly “expensive, often requiring testimony of foreign experts on the laws of their respective countries, as well as resolution of ill-defined international legal principles involving choice of law, conflicts of law, international law, laws of transshipment countries, as well as U.S. law and equity.” In light of this dilemma and other complex international litigation, courts around the world have adopted myriad doctrinal approaches to limit the resultant high costs, waste of judicial resources, and risk of embarrassing, conflicting judgments. These approaches include deference to foreign courts under the doctrines of comity, abstention, *lis alibi pendens*, and forum non conveniens.

Despite these efforts to reduce parallel litigation, unique aspects of the U.S. judicial system exacerbate jurisdictional conflicts. There is a widely held view around the world that U.S. courts are overly aggressive in asserting jurisdiction in an unpredictable, often plaintiff-friendly way. Of particular concern are high jury awards, including multiple and punitive damages, the class action mechanism, *quasi-in-rem* jurisdiction, the forum
non conveniens doctrine, and anti-suit injunctions. U.S. courts are further differentiated by the fact that they are considered to be the most liberal in the world in terms of recognizing and enforcing foreign judgments.

As a result of these incongruences, in 1992 the U.S. Department of State initiated multilateral negotiations through the Hague Conference on Private International Law ("Hague Conference") to develop a broad international convention on jurisdiction and judgments. However, the negotiations reached a major stumbling block in late 2001 and now purport to address matters much narrower in scope. Even if the negotiations do not result in a convention that the United States will sign or ratify, change in U.S. courts is quite possible because the American Law Institute ("ALI"), also at the behest of the U.S. Department of State, has undertaken the International Jurisdiction and Judgments Project ("ALI Project"). Those working on the ALI Project initially intended to draft a federal statute that would implement the convention expected to emerge from the Hague Conference. In light of the subsequent narrowing of the Hague negotiations, it is unclear whether the ALI will continue to work toward a federal statute or try to draft a new Restatement or some other principles-based document.

19. E.g., Brand, supra note 13, at 468.
23. E.g., Pfund, supra note 22, at 11.
25. AMERICAN LAW INSTITUTE, INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT (Discussion Draft 2002) [hereinafter ALI DRAFT].
26. Id.
27. Id.
Most scholars would agree that, on a global level, heightened uniformity and liberality in the recognition and enforcement of foreign judgments is desirable in an increasingly international economy. In spite of this view, the ALI proposal is poised to decrease the number of foreign judgments recognized and enforced in the United States. The ALI proposal currently calls for honoring foreign judgments from only those nations that reciprocally honor U.S. judgments. Regardless of the political wisdom of taking a step back in the hope that it will result in taking more steps forward, the ALI, and surely the Department of State, view the draft legislation as a bargaining chip to force foreign nations critical of various U.S. judicial practices to recognize and enforce U.S. judgments more frequently.

In the ongoing attempts to systemize the rules applicable to international jurisdictional conflicts and recognition and enforcement of judgments, the negotiators should not overlook problems uniquely posed by the multi-billion dollar art market. Because of the international nature of the art trade, the risk of competing claims of jurisdiction and incongruent results...
permeates jurisprudence relating to artwork and other chattels. Scholars addressing international conflicts in artwork litigation have often argued in favor of universal adoption of specific rules, such as the *lex loci rei sitae* doctrine, through multilateral treaties.

In contrast to the work of such scholars, this Article, written on the verge of a possible dramatic reworking of the rules governing international jurisdictional conflicts and judgments, posits a simple, common sense theory: courts should defer to the forum exercising in rem jurisdiction over an action for ownership of a chattel. The underlying basis for this proposal is that the forum with in rem jurisdiction will have the most control over the ultimate disposition of the chattel. In addition, if a court defers to the courts of other nations when they exercise in rem jurisdiction, it would decrease the likelihood of embarrassing jurisdictional power struggles, diplomatic confrontations, and conflicting judgments. This is particularly true where art and cultural antiquities are at issue, as both are a common source of diplomatic tension and emotionally charged litigation.

The need for this common sense approach is underscored by the ever-increasing amount of artwork litigation due to the failure of “back room deals” to resolve the rising number of claims ensuing from improved

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34. See generally Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49 (1995) (“[The art trade, legitimate and otherwise, is notable for its internationalism.”).

35. See supra notes 2, 3, 6, 8, and 32.

36. Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc., 180 F.3d 896, 899 (7th Cir. 1999) (declining to exercise jurisdiction over a dispute over helicopters when the High Court of St. Lucia was simultaneously exercising in rem jurisdiction over parallel litigation regarding ownership of the same helicopters). In contrast,

If all States were completely free to decide ownership in their territory of tangible property, the result would tend to anarchy. Before daring to let an object leave the territory of one State, the owner under the law of that jurisdiction would have to examine the municipal laws of every State it could conceivably pass through on its journey to a new destination, and every conceivable permutation of the order in which it could pass through them, and to calculate the effect of each.


37. E.g., Clifford Kraus, *Reclaiming the Stolen Faces of Their Forefathers*, N.Y. TIMES, Sept. 18, 2003 at A4 (stating that a band of Native Canadians “had tried diplomacy for several years to get back a beloved wooden mask stolen from them eighty-two years ago that is now boxed up in a storage room of the’ British Museum). Accord Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 952, 955 (2001) (“The 1990s saw an exponential growth in the number and political sensitivities of claims by original owners of stolen art against good-faith purchasers of that art. These cases have challenged courts, threatened international relations, created public relations nightmares for museums, and generally shaken the art world.”).

38. See, e.g., Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002) (describing claims of a Holocaust survivor being forced to flee while his artwork was Aryanized and the alleged post-trial abuses the Republic of Austria imposed upon survivors seeking return of their artwork, such as forcing donations of artwork to obtain export permits for other pieces). See also infra Part III, discussing the case in more detail.

39. The term “back room deals” is used to refer to informal alternative dispute resolutions, generally executed without the assistance of counsel. The phrase originates from the idea that such deals are brokered in the “back room,” “a physical area usually not visible from the gallery exhibition space where
transparency of governmental and museum archives since World War II ("WWII") and the fall of the Iron Curtain. 40 This problem has been compounded by the increasing number of demands by nations and ethnic groups upon museums for the return of items of cultural significance. 41 As Jessica Darraby asserts, "The reunification of Germany, the balkanization of Europe, the dissolution of the former Soviet republics, and instability elsewhere has brought into the market unprecedented quantity, variety, and quality of national treasures and cultural properties." 42

Moreover, on September 8, 2003, the American Association of Museums launched an internet registry of art showing gaps in provenance during or shortly after WWII. 43 More claims might result from this improved access deals are brokered and sales are closed." Jessica L. Darraby, Is Culture a Justiciable Issue?, 18 PEPP. L. REV. 463, 464 (1991). See also Darraby, supra note 12, § 1:32 ("Whatever one's view of the need to regulate, art law disputes have become art law adjudications at rapidly increasing rates."). See also Wertheimer v. Cirker's Hayes Storage Warehouse, Inc., 2001 N.Y. Slip. Op. 40445(U) (N.Y. Sup. Ct. Sept. 28, 2001) ("This action presents a dispute of a kind increasingly common in the courts of this state: plaintiff claims to be the owner of a stolen or converted work of art and asserts his superior right to ownership over defendant, which claims to be a good faith purchaser.").


41. See supra notes 57, 59. See also The British Museum, Declaration on the Importance and Value of Universal Museums, at http://www.thebritishmuseum.ac.uk/newsroom/current2003/universalmuseums.html (last visited Dec. 3, 2003) (on file with the Harvard International Law Journal) (addressing "the threat to the integrity of universal [large] collections posed by demands for the restitution of objects to their countries of origin"); William G. Pearstein, Claims for the Reparation of Cultural Property: Prospects for a Managed Antiquities Market, 28 LAW & POL’Y INT’L BUS. 123, 123 (1996) ("During the last twenty years, American and European dealers, museums, and private collectors of ancient, oriental, and primitive art have been subjected to an increasing number of ‘patrimony’ claims by artifact-rich ‘source nations’") (internal footnotes omitted).

42. DARRABY, supra note 12, § 6:117.

43. Elizabeth Olson, Web Site Goes Online to Find Nazi-Looted Art, N.Y. TIMES, Sept. 8, 2003, at E4. There is hope that at least some American museums are attempting to deal with WWII issues in a mor-
to increasingly transparent museum archives. Significantly, the U.S. Supreme Court on September 30, 2003 granted a petition for certiorari in Altman v. Republic of Austria, a case concerning ownership of six Gustav Klimt paintings stolen by the Nazis and currently housed in the Austrian National Gallery. It is not yet clear how these two developments will affect future international disputes over artwork.

In order to understand the Hague Conference negotiations and the ALI Project, one must first analyze the standards U.S. courts currently apply in the recognition and enforcement of foreign judgments. This background is supplied in Part II below. Next, Part III discusses the approaches U.S. courts have taken to reduce the high costs and risks posed by parallel litigation in domestic and foreign courts. Parts IV and V present the significance of the Hague Conference and the ALI Project, respectively, to artwork and other chattel ownership litigation. Finally, Part VI concludes that to reduce jurisdictional litigation costs and the risk of embarrassment from conflicting judgments, especially when enforcement of one judgment would preclude the ability to enforce the other, U.S. and foreign courts faced with parallel litigation logically should defer to the jurisdiction of whichever court is exercising in rem jurisdiction over the chattel at issue. The judgment by the court exercising in rem jurisdiction should be accorded full recognition and

ally responsible way:

For the first time, in a very public way, major American institutions are attempting to correct possible improper acquisitions relating to the WWII era and to quell once and for all old claims, by posting on web sites lists of objects that have gaps in provenance. As these sites proliferate, some museums are entering negotiated settlements with litigants or potential litigants in response to ownership claims that otherwise might be defeated by traditional defenses like the statute of limitations. Darraby, supra note 12, § 6:116. See also Howard N. Spiegler, Recovering Nazi-Looted Art: Report from the Front Lines, 16 Conn. J. Int’l L. 297 (2001) (describing American museum’s decision to return stolen artwork to heirs of Holocaust victim without any litigation). “Provenance is a chronological history of a work of art traced to the creator by tracking the chain of transfer of ownership and possession, location, publication, reproduction, and display. An analysis of provenance may reveal ownership, prior status, condition, restoration (hence, possible re-attribute or de-attribute), and authenticity.” Darraby, supra note 12, § 2:62.

44. But see Patty Gerstenblith, Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public, 11 Cardozo J. Int’l & Comp. L. 409, 438 (2003) (“Despite fears that [opening museum archives] would lead to the emptying of museum storerooms and display cases, . . . there have been relatively few restitutions of art works stolen during the Holocaust to their original owners.”).

45. 317 F.3d 954 (9th Cir. 2002), cert granted, 72 U.S.L.W. 3092 (Sept. 30, 2003) (No. 03-13). Part III C addresses the case in detail.

46. Litigation in a forum exercising in rem jurisdiction over the chattel at issue would often take the form of a replevin tort action, particularly where the chattel is unique, such as a work of art or an object of cultural antiquity, wherein the plaintiff seeks return of the object itself, rather than money damages. See generally Darraby, supra note 12, § 6:117; Dan B. Dobbs, Law of Remedies: Damages-Equity-Restitution § 5.13 (2d ed. 1993) (describing development of replevin claims); Petrovich, supra note 31. It would be naïve, however, to assume that all plaintiffs in such litigation would seek return of the actual chattel; some plaintiffs likely would seek a monetary judgment, which could be enforced against the chattel, if direct enforcement against the defendant is not possible, such as through a forced sale. See generally id. §§ 5.10–5.14 (analyzing legal remedies in chattel litigation).
enforcement. The Hague negotiators and the ALI drafters should not overlook this simple idea, which could save individual parties involved in parallel chattel-ownership litigation tens, if not hundreds, of thousands of dollars.

II. DOMESTIC RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

No treaty or federal statute controls when U.S. courts honor foreign judgments or defer to pending foreign proceedings. As is shown below, the relevant case law is far from settled. Nonetheless, in most cases, if a party has filed suit abroad, a U.S. court will stay any subsequently filed domestic action and give full effect to the resulting foreign judgment under the doctrine of res judicata.

Most U.S. courts hold that state law governs the recognition and enforcement of foreign judgments in state cases and federal diversity cases. Although bound by the U.S. Supreme Court’s holding in the seminal international comity case, Hilton v. Guyot, state courts have developed their own rules as to whether to recognize and enforce foreign judgments. However, most states have adopted a variation of the Uniform Foreign Money-Judgments Recognition Act (“Uniform Act”), thereby rendering the dif-

47. Barring applicability of any of the mandatory grounds for non-recognition as they currently stand or as they may be amended in light of the “reciprocity” debate in the Hague Conference and ALI Draft. See infra Parts III, IV, and V.


49. See, e.g., Born & Westin, supra note 52, at 589 n.10 (collecting sources).

50. See, e.g., BORN & WESTIN, supra note 52, at 589 n.10 (collecting sources).
ferences among state laws less dramatic. New York, the situs of most art cases involving parallel foreign litigation, is commonly regarded as being an extremely generous forum with respect to recognizing and enforcing foreign judgments.

Most foreign judgments involve a monetary remedy and thus fall under the Uniform Act. Because the Uniform Act applies only to money judgments, states' versions of it technically would not apply to a declaratory judgment as to ownership of artwork or other chattels. However, the same Uniform Act principles are mirrored by the Restatement (Third) of the Foreign Relations Law of the United States ("Restatement (Third)"). The Restatement (Third) reiterates the comity analysis discussed below and has been construed by courts throughout the country to apply to the determination of property interests, whether they be declaratory or monetary in nature. Despite some minor procedural differences between the Uniform Act and its state counterparts, courts have often looked to the language in § 3 of that Act and interpreted it to mean that foreign country judgments receive the same recognition [as] sister state judgments.

van den Biggelaar v. Wagner, 978 F. Supp. 848, 860 n.15 (N.D. Ind. 1997). See also ALI Draft supra note 25 (adding Maine and North Carolina to the list requiring reciprocity and maintaining that a total of thirty-three states had adopted the Uniform Act by early 2002).

The UFMJ should not be confused with the Uniform Enforcement of Foreign Judgments Act (U.E.F.J.A.), 13 U.L.A. 181 (1948), which by its terms applies only to judgments rendered in a state or territory of the United States. However, in applying the UFMJ to foreign country judgments, courts have often looked to the language in § 3 of that Act and interpreted it to mean that foreign country judgments receive the same recognition as sister state judgments.

van den Biggelaar, 978 F. Supp. at 860 n.13 (citing 13 U.L.A. 261 § 3; Matthew H. Adler, If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments, 26 LAW & POL'Y INT'L BUS. 79 (1994)).


57. See, e.g., Hawkins, supra note 54, at 51 (referring to New York as "the art market capital of the world").


59. See, e.g., Hawkins, supra note 54, at 51 (referring to New York as "the art market capital of the world").

60. Compare RESTATEMENT (SECOND), supra note 50, § 102, cmt. g, at 310 ("Existing authority does not warrant the making of any definite statement as to the enforcement of decrees that order the doing of acts [other than the payment of money] or that enjoin the doing of an act") and David Buzard, U.S. Recognition and Enforcement of Foreign Country Injunctive and Specific Performance Decrees, 20 CAL. W. INT'L J. 91, 92 (1989) and Lowenfeld, supra note 32, at 289 (stating without support, "[I]n general, injunctions issued by one court have not been given much respect by other courts, especially if the other courts are located in different states") and Pilkington, 581 F. Supp. 1039 (refusing to enter injunction paralleling that of British court) with the assertion that:

[A] decree rendered in a foreign nation which orders or enjoins the doing of an act will be enforced in this country provided that such enforcement is necessary to effectuate the decree and will not impose an undue burden upon the American court and provided further that in the view of the American court the decree is consistent with fundamental principles of justice and of good morals.

RESTATEMENT (SECOND), supra note 50, § 102, cmt. g, at 310.


and the Restatement (Third), both codify Hilton’s comity analysis. Thus, the distinction between money judgments and non-money judgment cases concerning chattel ownership is minimal under the current formulation of the law. Therefore, unless otherwise noted, the analysis below applies fairly uniformly in state and federal courts, both to monetary judgments and other judgments regarding the ownership of artwork and other chattels.

A. International Comity Analysis

Recognition and enforcement of foreign judgments is ultimately governed by the doctrine of comity. The doctrine of comity was first articulated in Hilton, which held that this principle creates a strong, but not mandatory, presumption in favor of recognition of foreign judgments and is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Although this definition is vague and has been described as a “never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith,” the Hilton court clearly delineated situations in which courts should not enforce foreign judgments, a mandate that courts have latched onto firmly. The Hilton court held that foreign judgments should be recognized, regardless of whether a party asserts that the judgment was erroneous in law or in fact, unless: the foreign judicial proceedings were unfair or biased; the foreign court lacked personal jurisdiction over the defendant; the foreign

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64. See, e.g., Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452 (2d Cir. 1985) (affirming district court decision to grant comity to a Swedish court’s bankruptcy stay).

65. 159 U.S. at 163. Although most courts and scholars use the terms “recognition” and “enforcement” interchangeably, the two terms have separate and distinct meanings. The recognition of a judgment precedes its enforcement. See, e.g., Morkin, supra note 56, at 365 (“Enforcement” presupposes “recognition.” Recognition refers to the res judicata status of a foreign judgment, while ‘enforcement’ refers to the ordering of relief.”).

court lacked subject matter jurisdiction over the dispute; fraud or other irregularities tainted the foreign proceedings; or the foreign court that rendered the judgment would not be willing to enforce U.S. judgments on a reciprocal basis.

It is rare for a defendant seeking to block recognition or enforcement of a foreign judgment to successfully invoke one of the *Hilton* exceptions. The most controversial exception is the last: that U.S. courts should condition enforcement of a foreign judgment on whether the foreign nation's courts reciprocate. Although still applied on occasion and still a part of the versions of Uniform Acts in force in a few states, the reciprocity doctrine has come into general disfavor and has been eliminated from the Uniform Act itself. As is further explained in Part V below, however, the ALI is seriously considering breathing new life into this controversial doctrine.

Courts sometimes evaluate comity considerations when determining whether to allow a suit to go forward even in the absence of a final foreign judgment. This is exactly what occurred in *United States v. Portrait of Wally*. In that case, Judge Mukasey of the Southern District of New York engaged in a comity analysis to determine whether to dismiss the U.S. Government’s attempt to seize in rem the *Portrait of Wally* by Egon Schiele. The painting was allegedly stolen during WWII and imported into the United States in violation of the National Stolen Property Act (“NSPA”). During or before 1938, *Portrait of Wally* came to be housed in the apartment of a Viennese gallery owner, Lea Bondi Jaray, an Austrian Jew. After Germany annexed Austria in the *Anschluss*, Friedrich Welz Aryanized Bondi's gallery

67. This exception is also discussed in Article 28(1)(f) of the 2001 Hague Interim Text, supra note 24.
68. *Hilton*, 159 U.S. at 202–03.
69. See infra notes 112–116, 118, and 128. It is also worth noting that because none of the exceptions were at issue under the facts of *Hilton*, the court issued these now oft-repeated exceptions in dicta.
70. *Hilton*, 159 U.S. at 228.
71. See *Restatement (Third)*, supra note 61, § 481, cmt. d (stating that although the reciprocity requirement articulated in *Hilton* “has not been formally overruled, it is no longer followed in the great majority of State and federal courts . . .”); *Juenger*, supra note 30, at 113. See also *Cunard*, 773 F.2d at 460 (stating that “while reciprocity may be a factor to be considered, it is not required as a condition precedent to the granting of comity”); *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 300 F. 741, 747 (S.D.N.Y. 1924) (limiting *Hilton*, stating that the court “certainly did not mean to hold that an American court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations existing here. That doctrine I am happy to say is not a part of American jurisprudence”). But see *Banque Libanaise pour le Commerce v. Khreich*, 915 F.2d 1000, 1007 (5th Cir. 1990) (refusing under Texas reciprocity provision to recognize judgment rendered in Abu Dhabi); *Gordon & Breach Sci. Publrs. S.A. v. Am. Inst. of Physics*, 905 F. Supp. 169, 179 (S.D.N.Y. 1995) (relying on “lack of reciprocity” as partial basis for refusing to give preclusive effect to Swiss and German judgments in a Lanham Act suit).
73. Id. at *1.
74. Id.
75. “Aryanization” can be loosely defined as the process “whereby Jews were forced to sell their property to ‘Aryans’ at artificially low prices.” *Id.*
and coerced Bondi to give him *Portrait of Wally* as well.76 Bondi gave up the painting and then fled to London with her husband.77 After WWII, when Welz was interned on suspicion of war crimes, the U.S. military took control of his property.78 In accordance with post-war military decrees and policies, the United States returned the property to the country from which it was taken, not the individual.79 Thus, *Portrait of Wally* was returned to the post-war Austrian governmental body authorized to take custody of such property, the Bundesdenkmalamt.80 After the war, *Portrait of Wally* was erroneously believed to have belonged to the estate of Dr. Heinrich Rieger, who, along with his wife, perished in the Holocaust.81 The Rieger heirs were able to recover much of the art stolen from their parents, which they then sold to the Austrian National Gallery, the Österreichische Galerie Belvedere ("the Belvedere").82 Although the Rieger heirs did not claim ownership of *Portrait of Wally*, when the art they sold was shipped from its storage place to the Belvedere, *Portrait of Wally* was mistakenly included in the shipment.83 Bondi subsequently learned of these mistaken circumstances and, after she recovered her art gallery (and, arguably, title to *Portrait of Wally*) in a restitution action against Welz, in 1953 she enlisted the aid of Dr. Rudolph Leopold to recover *Portrait of Wally* from the Belvedere.84 In 1954, unbeknownst to Bondi, Leopold acquired the painting from the Belvedere for himself.85 Bondi discovered Leopold’s betrayal when she saw him listed as the owner of *Portrait of Wally* in an exhibition catalogue in 1957.86 Bondi then hired an Austrian lawyer and another colleague to help her regain possession of *Portrait of Wally*, but to no avail.87 Bondi later died, and the efforts to recover *Portrait of Wally* seem to have remained dormant until her heirs had an opportunity to act in late 1997.88 That year, Leopold, through the Leopold Museum-Privatstiftung ("the Leopold"), lent *Portrait of Wally* to the New York Museum of Modern Art for exhibition.89 By this time, the painting was valued at over $2 million.90 Three days after the exhibition ended, the New York County District Attor-
ney's Office issued a subpoena for the painting, but the subpoena was quashed.91 Nonetheless, a U.S. Magistrate Judge issued a warrant to seize the painting and began a forfeiture action soon thereafter.92 He issued the warrant under the theory that the Leopold had violated the NSPA by transporting the painting in foreign commerce while knowing that it was stolen property.93

In its motion for summary judgment, the Leopold argued that the doctrine of international comity "requires this court to abstain from deciding the case out of deference to Austria's restitution framework."94 The Austrian Government had established programs after the war in an effort to return Aryanized property to its rightful owners pursuant to the Austrian State Treaty of 1955.95 Under Article 26 of the treaty,

> Austria was obligated to restore the legal rights and interests of the true owners of such property where possible . . . [and] if property remains unclaimed or heirless six months after the Treaty comes into force, Austria 'agrees to take under its control all [such] property' and 'transfer such property . . . to the appropriate agencies or organizations . . . to be used for the relief and rehabilitation of victims of persecution.'96

The court, in rejecting the Leopold's comity analysis, noted that Austria's treaty obligations had "never been viewed as the exclusive means for restoring property."97 It also stated that there was no active case in Austria concerning Portrait of Wally to which it could defer.98 The court held that the existence of the purportedly applicable Austrian restitution system did not bar other courts from hearing all claims regarding Holocaust-related property.99 In addition, the court properly noted that "the principle of comity does not operate as a pre-emption doctrine, barring [it] from hearing a valid forfeiture action merely because there are foreign laws that might also apply."100

Nor was the court swayed by the Leopold's additional comity arguments. The Leopold argued that the court should not hear the case because Austria had a greater interest in it as a result of the existence of the restitution sys-

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91. Id. (citing In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art, 93 N.Y.2d 729 (App. Div. 1999)).
92. Id.
93. Id. The National Stolen Property Act, 18 U.S.C. § 2314 (2000) ("NSPA") provides: "Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . [s]hall be fined under this title or imprisoned not more than ten years, or both."
95. Id. at *7.
96. Id.
97. Id. (citing Altmann v. Republic of Austria, 142 F. Supp. 2d 1187, 1208 (C.D. Cal. 2001)).
98. Id. at *10.
99. Id.
100. Id.
tem and the many relevant events that occurred in Austria. The court found that “no formal or purposeful act of the Austrian judiciary, executive or legislature” existed “with respect to the painting rising to a level that would implicate international comity” because there was no action in Austria in the restitution system, legislature, or courts specifically concerning the painting.

The court found that the United States had a much greater interest in trying the case because it sought to enforce the NSPA. Thus, the court viewed the actions in Austria concerning the painting’s ownership as “merely a predicate to the determination of whether there [had] been a violation of United States law.” The United States’ interest in “enforcing its own laws as applied to conduct on its own soil” in pursuit of its “policy to prohibit knowing transportation of stolen or converted goods into the United States” overrode any interest Austria had in resolving the dispute.

This case illustrates the most probable outcome of a comity argument in a stolen art case: “Even where there is true conflict with the laws of a foreign nation, U.S. courts will not yield in the name of comity if doing so conflicts with the law or policy of the United States.” Even though this approach sounds logical, in practice it poses a high risk of jurisdictional conflict in cases such as this one. When the object of the litigation is of cultural significance to a nation, the diplomatic struggle over jurisdictional choice often intensifies. Such tensions illustrate the pressing need for a predictable and uniform approach to forum selection in chattel ownership litigation.

B. Money Judgments and the Uniform Act

The Uniform Act provides that “any foreign [money] judgment that is final and conclusive and enforceable where rendered” is conclusive between the parties to the extent that it grants or denies recovery of a sum of money, regardless of whether an appeal is pending. The Uniform Act attempts to make domestic law on recognition and enforcement of foreign judgments more transparent to foreign courts. Section 1 of the Uniform Act defines a foreign money judgment as “any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.”

101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
106. Id. (citing In re Treco, 240 F.3d 148, 157 (2d Cir. 2001)).
1. Mandatory Exceptions

Under the Uniform Act, the only mandatory exceptions to the enforceability of money judgments exist where the foreign forum lacked impartiality, failed to satisfy minimum requirements of due process, lacked personal jurisdiction over the defendant, or lacked jurisdiction over the subject matter.\endnote{110} These exceptions are very similar to the common law exceptions established by *Hilton*, and they are likewise rarely invoked successfully.\footnote{111} In fact, research revealed no art-related case where any of the mandatory exceptions was successfully invoked.

Most foreign courts are regarded as impartial toward U.S. defendants.\footnote{112} Thus, this exception would not bar enforcement of most foreign judgments absent a showing of strong bias by a court specifically against the U.S. defendant.\footnote{113}

Second, most foreign fora satisfy minimum due process standards, so challenges to foreign judgments based on differences in foreign courts' procedures usually fail.\footnote{114} Minimum due process standards generally require...
that "the parties had the opportunity to present their claims to foreign tribunals following procedures designed to secure a sound administration of justice." Accordingly, common differences in foreign tribunals—such as the lack of jury trial, the absence of live testimony under oath, the unavailability of cross examination, more rigid discovery rules, or restrictive rules of admissibility of evidence—do not vitiate satisfaction of minimum due process standards. However, at least two commentators are of the opinion that "United States courts often take a particularly hard look at the foreign court's jurisdiction, procedural protections, and the like before enforcing a foreign default judgment."

Third, although parties often object to enforcement of foreign judgments on the grounds that the foreign court lacked personal jurisdiction, such objections are rarely successful. As a general rule, courts will recognize and enforce judgments based on personal jurisdiction principles comparable to those in force in the United States. Specifically, Section 5(a) of the Uniform Act provides that where any of the following statements are true, the due process requirements of personal jurisdiction are satisfied: the defendant (1) was served personally in the foreign forum; (2) voluntarily appeared; (3) previously agreed to the foreign forum; (4) was domiciled or incorporated in the foreign forum; (5) maintained an office in the foreign forum and the claim arose from business conducted through the foreign office; or (6) exercised minimal contacts with the forum that satisfy the U.S. concept of due process.

English Mareva injunction procedures despite widespread criticism of the procedure as the "nuclear weapon of the law").

117. Born & Westin, supra note 52, at 577 n.11. See also Siedler v. Jacobson, 383 N.Y.S.2d 833 (App. Term 1976) (refusing to enforce Austrian default judgment based solely on small purchase during one-week visit to Vienna).
118. Compare Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215 (E.D.N.Y. 1990) (enforcing Japanese judgment where jurisdiction was exercised to a similar extent permitted under New York's long-arm statute) and Citadel Mgmt. Inc. v. Hertzog, 703 N.Y.S.2d 670 (Gen. Term 1999) (holding that defendant's voluntary appearance satisfied personal jurisdiction requirement) with Koster v. Automark Indus., Inc., 640 F.2d 77 (7th Cir. 1981) (refusing to enforce Dutch judgment where Illinois corporation's contacts with the Netherlands were limited to exchange of eight letters, a telegram, and a phone call).
119. See, e.g., Restatement (Third), supra note 61, at Reporter's Note 2.
120. Uniform Act, supra note 55, § 5(a). Nonetheless, in determining whether the foreign court has obtained personal jurisdiction over the defendant for enforcement purposes, courts in the United States technically look to American concepts of due process. See, e.g., Restatement (Second), supra note 49, § 117 cmt. c (stating that enforcement must not be "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought"). See also Koster, 640 F.2d 77 (applying U.S. standard); Fairchild, Arabatzis & Smitch, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610 (S.D.N.Y. 1979) (same). But see McRae v. J.D./M.D., Inc., 511 So.2d 540, 542 (Fla. 1987) ("a forum selection clause
For example, if a judgment debtor did not appear in the foreign forum to contest subject matter and personal jurisdiction, it can challenge enforcement of the foreign judgment on personal jurisdiction grounds in the absence of any waiver.\textsuperscript{121} Sprague & Rhodes Commodity Corp. v. Instituto Mexicano del Café,\textsuperscript{122} however, suggests that an unsuccessful jurisdictional challenge actually made in the foreign forum will be treated as res judicata, at least in the Second Circuit.

Finally, challenges to foreign judgments on the grounds that the foreign court lacked subject matter jurisdiction rarely succeed.\textsuperscript{123} In fact, subject matter jurisdiction of the rendering court is normally presumed.\textsuperscript{124} In light of this presumption, the New York version of the Uniform Act categorizes this factor as a discretionary, rather than mandatory, ground to decline to enforce a foreign judgment.\textsuperscript{125} The Restatement (Third) reflects this conception as well.\textsuperscript{126}

2. Discretionary Exceptions

Section 4(b) of the Uniform Act also permits courts to decline to enforce a foreign judgment in a set of discretionary circumstances where: (1) the defendant did not receive adequate notice of the proceedings in sufficient time to enable him to defend himself; (2) the judgment is a result of fraud; (3) the judgment is contrary to the enforcing state’s public policy; (4) the judgment conflicts with another final and conclusive judgment; (5) the foreign forum conducted proceedings contrary to an arbitration (or similar) agreement; or (6) the foreign forum was a seriously inconvenient forum for the proceedings, where jurisdiction was based solely on personal service.\textsuperscript{127}
Rarely do any of these discretionary exceptions bar enforcement of a foreign judgment because most domestic courts find that foreign courts do not readily contravene the basic principles underlying the exceptions. Most attacks on judgments seem to rest on allegations of lack of jurisdiction or notice, and most fail. In some cases, however, courts have held that service involving foreign parties must comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and have refused to recognize and enforce non-complying judgments.

The two exceptions likely to be implicated in a typical stolen art case are whether the judgment is contrary to the enforcing state’s public policy, and whether the judgment conflicts with another final and conclusive judgment. For example, the importance of the public policy of discouraging the sale of stolen art in New York was firmly established in Solomon R. Guggenheim Foundation v. Lubell. The Guggenheim sought to recover a Chagall gouache stolen from the museum in the late 1960s. The defendant argued for dismissal of the Guggenheim’s claim on statute of limitations grounds because of the Guggenheim’s failure to use reasonable diligence to locate the gouache. The gouache went missing in the late 1960s, but the Guggenheim could not confirm that it had been stolen until the museum completed an inventory of its collection in 1970. The Guggenheim did not inform outside organizations, such as other museums, galleries, Interpol, the FBI, or the New York police because it was concerned that publicizing the loss would only further diminish any chance of recovery.

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129. Linda Silberman, Enforcement and Recognition of Foreign Country Judgments in the United States, 670 PLI/Lit 429 (2002). See also Tahan, 662 F.2d at 862 (holding that notice written in Hebrew from Israeli court was sufficient). But see Koster, 640 F.2d at 81 n.3 (holding that the Dutch statute governing service of process on defendants who reside in foreign countries provided insufficient assurances of actual notice to satisfy American due process requirements).
132. A gouache is a painting made with opaque colors ground in water and mixed with a preparation of gum. Webster’s New World Dictionary 583 (3d ed. 1991). The gouache here at issue is also known as Menageries or Le Marchand de Bestiaux (The Cattle Dealer) and was painted by Chagall in 1912, “in preparation for an oil painting also entitled Le Marchand de Bestiaux.” Guggenheim, 77 N.Y.2d at 315.
133. 77 N.Y.2d at 314–15.
134. Id. at 314–15.
135. Id. at 315.
136. Id. at 315–16.
This case apparently was the first New York decision since 1936 to announce the state rule that, regardless of the efforts of the original owner to locate a stolen chattel, an “action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes a demand for return of the chattel and the person in possession of the chattel refuses to return it.”137 This approach is commonly referred to as the “demand and refusal” rule.138 However, a defendant can nonetheless assert a laches defense.139

The Guggenheim court held that the unique “New York City art market, where masterpieces command extraordinary prices at auction and illicit dealing in stolen merchandise is an industry all its own,” required implementation of the public policy behind a pure demand and refusal rule to counter the black market.140 In reaching this conclusion, the Guggenheim court responded to the U.S. government’s concern141 that the alternative, a stricter discovery rule whereby the statute of limitations would be triggered upon the discovery of the loss, would not provide a reasonable opportunity for individuals or foreign governments to receive notice and make claims before the expiration of the statutory period.142 Similarly, the court did not want New York to become “a haven for cultural property stolen abroad.”143 The rule remains in effect today and is a prime example of the public policy issues raised by art litigation.144

Finally, in light of the international nature of the art market and the need to apply choice of law principles, which vary from nation to nation, one can easily imagine that courts of different countries could enter conflicting judgments concerning the same piece of art.145 In one illustrative case involving heirs to an art collection, the litigation “span[ned] one decade, three

138. Id. at 318.
139. See id. at 321.
140. See id. at 314, 319.
141. The U.S. government’s concern was relayed by Governor Mario Cuomo when he vetoed a bill passed by the New York legislature that called for implementation of the discovery rule in New York, rather than the demand and refusal rule. Id. at 319. See also DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987) (applying discovery rule after assuming that New York state courts would have done the same), rev’d on same grounds by Guggenheim, 77 N.Y.2d at 317–18 (establishing demand and refusal rule as the standard in New York courts).
142. Guggenheim, 77 N.Y.2d at 319.
143. Id.
144. See Songbyrd, Inc. v. Estate of Grossman, 206 F.3d 172 (2d Cir. 2000) (enforcing demand rule in declaratory action proceeding concerning ownership of master recording tapes of jazz musician Henry Roeland Byrd). See also Portrait of Wallly, 2002 WL 553532 (discussing the NSPA); Hoelzer v. City of Stamford, 933 F.2d 1131 (2d Cir. 1991) (enforcing demand rule in action against restorer of early American murals removed during the renovation of a high school).
continents and an array of prior lawsuits. Nonetheless, rarely do courts use exceptions to the Uniform Act to bar recognition and enforcement of foreign judgments. To leniently apply such exceptions would vitiate the finality of foreign judgments, and thereby potentially undermine comity and disturb diplomatic relations among nations.

C. Declaratory Judgments

Assuming all of the above comity enforcement criteria are met, a U.S. court will apply most foreign declaratory judgments as res judicata. The application requires the existence of a final judgment on the merits in an earlier action as well as identical litigants and causes of action in both suits.

Although a declaratory action as to artwork differs from other causes of action, res judicata principles will most likely preclude relitigation concerning ownership of the chattel at issue. A declaratory judgment resolving a dispute over a chattel differs significantly from many other equitable remedies that a foreign court could enter, which could require too much

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147. In U.S. jurisprudence, [u]nder the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

Parklane Hosiery, Inc. v. Shore, 439 U.S. 322, 326 n.5 (1979). Furthermore, in the event a court did not bar a second suit as to ownership of artwork on res judicata grounds, the doctrine of collateral estoppel likely would bar the second suit because ownership would have been decided in the first litigation. See supra note 144. Case law is contradictory on whether state or federal law controls collateral estoppel determinations. The weight of authority supports applying state law to collateral estoppel on state law claims and federal law to collateral estoppel on federal law claims. See Alfaa, 966 F. Supp. at 1326–30 (collecting authorities discussing choice of law and collateral estoppel principles). The Second Circuit has ruled that to collaterally estop a party from raising an issue in New York, a court must determine that (1) the issues are identical and the issues necessarily decided in the prior action are decisive in the present action; and (2) the party to be bound had a full and fair opportunity to contest the determination. See, e.g., Alesayi, 947 F. Supp. at 666 (quoting Conte v. Justice, 996 F.2d 1398, 1400 (2d Cir. 1993)). In evaluating a state law replevin or conversion action, a U.S. court would look to state law to determine whether to subject the claim to collateral estoppel. See, e.g., Alexandre A. Montagu, Recent Cases on the Recovery of Stolen Art—the Tag of War Between Owners and Good Faith Purchasers Continues, 18 Colum.-VLA J.L. & Arts 75, 81 (1993) (replevin); N.Y. Jur. Conversion § 3 at 209 (1982 & 1993 Supp.) (conversion). Additionally, “[the burden is on the party seeking to invoke res judicata to prove that the doctrine bars the second action] and collateral estoppel will not block pursuit of an issue if it was proved in the first action by a lower burden of proof than is required in the second forum. See, e.g., Computer Assocs. Int'l, Inc. v. Altai, Inc., 126 F.3d 365, 369 (2d Cir. 1997). This Article will use the term ‘res judicata principles’ as encompassing the U.S. concepts of res judicata and collateral estoppel.

148. See, e.g., El Ajam, 1993 WL 93051, at *1 (quoting Lee v. City of Peoria, 685 F.2d 196, 199 (7th Cir. 1982) (granting res judicata effect to Swiss money judgment)).
149. Cf. Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc., 180 F.3d 896, 898 (7th Cir. 1999) (noting that “the respective courts have been asked to resolve the same central issue, namely, who owns the helicopters . . . .”); Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 286 n.10 (7th Cir. 1990) (prominent cultural antiquities case finding that the foreign jurisdiction’s replevin-type cause of action was identical “in all relevant respects” to a conversion claim under Indiana law); Erisoty v. Rizik, No. 93-6215, 1995 WL 91406 (E.D. Pa. Feb. 23, 1995) (declaratory judgment action as to ownership of Corrado Giaquinto’s Winter).
judicial oversight for the domestic court to enforce. A foreign court's declaratory judgment on chattel ownership, however, likely would be enforced by a U.S. court, because to do so would “not impose an undue burden.”

Rather, enforcement would relieve the enforcing court of the need to hear duplicative litigation and would likely require no more than a typical seizure warrant, a routine affair in state and federal courts.

III. PARALLEL LITIGATION IN UNITED STATES AND FOREIGN FORA

It is common for disputes concerning great works of art to reach the courts of multiple jurisdictions. Parallel proceedings on the same claims in the courts of different nations pose problems for U.S. courts that are not faced when parallel litigation exists in domestic courts. Parties facing litigation in two or more nations frequently ask U.S. courts to decline to exercise jurisdiction through invocation of one or more of the following doctrines: (A) abstention; (B) *litis alibi pendens*; and (C) forum non conveniens. Conversely, parties may seek an anti-suit injunction to prohibit their opponents from filing or pursuing suits in foreign fora. As will be discussed below, when prior-filed foreign litigation is based on in rem jurisdiction, such as when a work of art subject to dispute is located abroad, U.S. courts usually abstain from exercising jurisdiction. This deference occurs notwithstanding the fact that U.S. courts traditionally tend not to defer to parallel

150. “Existing authority does not warrant the making of any definite statement as to the enforcement of [foreign] decrees that order the doing of . . . acts [other than the payment of money] or that enjoin the doing of an act.” Restatement (Second), supra note 50, § 102, cmt. g at 310.

151. According to the Restatement (Second):

[A] decree rendered in a foreign nation which orders or enjoins the doing of an act will be enforced in this country provided that such enforcement is necessary to effectuate the decree and will not impose an undue burden upon the American court and provided further that in the view of the American court the decree is consistent with fundamental principles of justice and of good morals.

Id.

152. Nonetheless, at least one commentator is of the opinion that because “granting equitable remedies is discretionary—enforcement requires judicial supervision which the court may perceive as 'onerous'—recognition and enforcement of foreign country equitable decrees is subject to closer scrutiny than monetary judgments.” Buzard, supra note 60, at 92. This logic, however, would not seem to apply to the types of judgments one could anticipate in artwork litigation, as opposed to, for example, the need for court supervision to enforce a judgment providing for payments on a monthly basis.

153. E.g., Fed. R. Civ. P. 64 (seizure of person or property).

154. See, e.g., Winkworth, [1980] Ch. 496 (concerning a dispute over the application of either English or Italian law).

155. For example,

United States courts and legal commentators have long wrestled with problems of judicial jurisdiction in disputes between parties from different states of the Union. Far less attention has been devoted to questions of jurisdiction in international controversies. This inattention has produced considerable confusion among lower courts, resulting in a variety of inconsistent approaches...


156. See generally Treviño de Coale, supra note 5, at 79 (providing general overview of the doctrines).

157. See generally John Fellas, Important Doctrines and Tools of International Litigation, 624 PLI/Lit 121 (2000).
litigation. Before final judgment has been rendered by a foreign tribunal, U.S. courts generally will relinquish jurisdiction only in the face of “exceptional circumstances.” Such rules set the stage for a race to judgment, which can then be pleaded as res judicata in the parallel proceedings.

When the foreign forum exercises in rem jurisdiction, however, the unsettled case law reveals a preference for U.S. deference. Conversely, when a U.S. court is exercising in rem jurisdiction, particularly under the NSPA, it is not likely to back down in deference to foreign interests. For example, in Portrait of Wally, the Southern District of New York maintained jurisdiction over the painting despite the Austrian government-owned museum’s arguments that the court should decline to exercise jurisdiction. The museum asserted that the claim should be resolved under “the Austrian restitution system, which was enacted with the approval of the allies and is thus consistent with both U.S. and international policy.” The court noted that there was no pending action in Austria and that “[t]he mere existence of the Austrian restitution system does not vest exclusive jurisdiction in Austrian courts to hear all issues touching upon Holocaust-related property.”

U.S. courts also exercised in rem jurisdiction over objects of cultural significance under the NSPA in United States v. One Lucite Ball Containing Lunar Material and United States v. An Antique Platter of Gold. In these cases, the countries of origin fully supported the U.S. action to seize the objects at issue because they sought their return, whereas in Portrait of Wally, Austria asked the U.S. court to back down. In contrast, as will be shown below, where foreign courts exercise in rem jurisdiction, U.S. courts faced with a parallel claim take a deferential approach.

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160. E.g., Trevino de Coale, supra note 5, at 80–81.

161. Cf. Pecora, supra note 8, at 6. See infra Part III.A.

162. Portrait of Wally, 2002 WL 553532, at *9. See also discussion of case in Part II above.

163. Id. at *10. See also supra notes 95–106 and accompanying text.


166. Lucite Ball, 252 F. Supp. 2d at 1369, 1372 (noting letter from Acting Vice-Secretary of State of Honduras to U.S. Customs Commissioner Raymond Kelly seeking return of the moon rock and plaque, which was a gift from President Nixon to “the government and people of the Republic of Honduras”); Antique Platter of Gold, 991 F. Supp. at 226 (noting Letters Rogatory Request from Italian Government to United States seeking return of the phaler pursuant to the Treaty on Mutual Legal Assistance in Criminal Matters); Portrait of Wally, 2002 WL 553532, at *6 (referring to Austria’s amicus brief arguing for U.S. court to decline jurisdiction).
A. Abstention in Light of In Rem Jurisdiction in Foreign Forum

In rem jurisdiction in the United States has recently undergone some significant constitutional limitations. Arguably, in rem jurisdiction is now subject to the same *International Shoe* “minimum contacts” analysis used in personal, or in personam, jurisdiction cases. To predict how U.S. courts will act in such cases, one might examine a parallel situation: how domestic courts act when another domestic court is exercising in rem jurisdiction over the same res. In the domestic arena, “A common-law rule of long standing prohibits a court, whether state or federal, from assuming in rem jurisdiction over a res that is already under the in rem jurisdiction of another court.” This rule aims to maintain comity between domestic courts and to prevent a second action from threatening the first court’s basis for jurisdiction. Because the doctrine arose in U.S. courts in the context of federal-state court relationships in the case of *Princess Lida of Thurn & Taxis v. Thompson*, it is referred to as the “Princess Lida doctrine.”

U.S. courts have declined to assert jurisdiction in the few instances where a foreign forum has already exercised in rem jurisdiction. Notably, the Second Circuit has expressly deemed the *Princess Lida* doctrine “equally applicable to requested interference by American courts with a res under the juris-

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169. In personam jurisdiction can be distinguished from in rem jurisdiction as follows: “Actions in personam and actions in rem differ in that the former are directed against specific persons and seek personal judgments, while the latter are directed against the thing or property or status of a person and seek judgments with respect thereto as against the world.” 1A C.J.S. ACTIONS § 69 (1985). Furthermore, it is true that, in a strict sense, a proceeding in rem is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants. But, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. *Black’s Law Dictionary* 857 (7th ed. 1999) (citing *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877)).

170. See Shaffer v. Heitner, 433 U.S. 186, 208 (1977) (holding that in rem jurisdiction must nonetheless satisfy *International Shoe* minimum contacts standards). But see id. at 208 (“It appears . . . that jurisdiction over many types of actions which now or might be brought in rem would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the *International Shoe* standard.”); *Burnham v. Superior Court of California*, 495 U.S. 604, 621 (1990) (“The logic of Shaffer’s holding—which places all suits against absent nonresidents on the same constitutional footing, regardless of whether a separate Latin label is attached to one particular basis of contact—does not compel the conclusion that physically present defendants must be treated identically to absent ones.”)


172. *Chesley*, 927 F.2d at 66.

173. *China Trade*, 837 F.2d at 36.

The doctrine applies where (1) "both actions are in rem or quasi in rem in nature", and (2) "the relief sought requires the second court to exercise control over the property already under the jurisdiction of the first court." Although no other circuit court has clearly interpreted how the Princess Lida doctrine applies internationally, the Seventh Circuit stayed a suit where a St. Lucian court exercised in rem jurisdiction in a parallel suit. In that case, Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc., a U.S. corporation and a St. Lucian corporation filed rival declaratory actions for ownership of helicopters under a lease-to-own contract in U.S. and St. Lucian courts. The U.S. corporation filed a declaratory action in the U.S. District Court for the Northern District of Illinois four months after the St. Lucian declaratory action was filed. The Finova court found that "the principal matter of contention [was] identical, the granting of relief in one forum would dispose of the claims raised in the other." 

Finova set forth the Seventh Circuit's abstention test, but without emphasizing the in rem jurisdiction of the St. Lucia court over the chattels in question:

In assessing the propriety of abstention, our first task is to determine whether the federal and foreign proceedings are in fact parallel . . . . Our next task is to balance considerations that weigh in favor of, and against, abstention, bearing in mind the exceptional nature of the measure. Relying on the guidance of the Supreme Court, we have previously considered a long list of factors: (1) the identity of the court
that first assumed jurisdiction over the property; (2) the relative inconvenience of the federal forum; (3) the need to avoid piecemeal litigation; (4) the order in which the respective proceedings were filed; (5) whether federal or foreign law provides the rule of decision; (6) whether the foreign action protects the [United States] plaintiff’s rights; (7) the relative progress of the federal and foreign proceedings; and (8) the vexatious or contrived nature of the federal claim.184

The Finova court analyzed this list of factors, quickly indicated that the St. Lucian court may have been exercising in rem jurisdiction, and noted that the members of the court “do think it significant that the helicopters—the subject matter of the dispute—are located on the Island of St. Lucia.”185 Accordingly, “[a]s long as the helicopters remain in St. Lucia, they fall within the exclusive jurisdiction of the High Court of St. Lucia for all practical purposes.”186

In light of this decision, U.S. courts faced with a second-filed declaratory action parallel to one in a foreign court will likely treat the parallel foreign judgment as res judicata, assuming satisfaction of the previously discussed comity enforcement criteria.187 That is not to say, however, that courts familiar with the in rem jurisdictional requirement of Finova’s “international abstention” doctrine will not carefully scrutinize whether both courts are truly exercising in rem or quasi in rem jurisdiction.188

For example, in Madanes v. Madanes, a trust beneficiary sued her brothers, the trustees, in the Southern District of New York, alleging conversion, fraud, breach of fiduciary duty, and RICO violations in relation to the trustees’ management of their father’s estate.189 Each child was to receive, in relevant part, "a one-quarter undivided interest in the Madanes family’s art

184. Id. at 898–99 (internal quotations and citations omitted).
185. Id. at 899.
186. Id.
188. Some foreign courts, such as Japan, offer declaratory judgments of non-liability. See generally Andreas F. Lowenfeld, Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation, 91 Am. J. Int’l L. 314 (1997). No reported case has rendered a judgment as to the res judicata effect of a negative declaratory judgment, i.e., a declaration of non-liability. But see id. at 318 (discussing Japanese entry of negative declaratory judgment effectively preempting enforcement in Japan of any contrary U.S. judgment). It is advisable, therefore, for a party to seek a positive declaration of ownership of the chattel from the foreign court to better insure the judgment’s enforceability.
189. 981 F. Supp. 241, 249 (2d Cir. 1997).
collection, then worth several million dollars.” The brothers allegedly transported the art collection from the family home in Argentina to Switzerland without the sister’s knowledge or consent “in an effort to falsely and fraudulently hide their ownership interest in the [artworks].” The sister brought a successful action against only one of her brothers in Switzerland “to obtain confirmation of her ownership interests in the [artworks].” Thereafter, she asserted another contractual claim for money damages under Argentine law in Switzerland against the same brother on a theory of abuse of mutual power of attorney. Finally, believing she had found a link to assets in New York, she filed suit in the Southern District of New York.

The trustees argued that the New York court should abstain in deference to the parallel Swiss proceeding. The court declined to do so on the grounds that both the New York suit and pending Swiss suit were in personam, not in rem, in nature. Because the pending cases in New York and Switzerland were in personam and significantly differed in nature, abstention was not warranted.

Madanes demonstrates that a U.S. court familiar with the in rem requirement under the Princess Lida doctrine will likely exercise abstention in deference to a foreign court only if the foreign court is truly exercising in rem jurisdiction.

B. Lis Alibi Pendens or Stays and Dismissals Under the Doctrine of Comity

In contrast to the in rem abstention doctrine, U.S. courts tend to exercise broader discretion under the doctrine of lis alibi pendens. Under that doc-

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190. Id. at 248.
191. Id.
192. Id.
193. Id. at 249.
194. Id.
195. Id.
196. Id. at 262.
197. Id.
198. Similarly, in Al-Abood v. El-Shamari, the Fourth Circuit held:

Even if the Monacan case does concern a trust res, the jurisdiction of the federal courts in this suit does not depend on or involve exercising jurisdiction over that res. This action is strictly for money damages, and does not involve any particular property or res. This case is not, in label or in fact, either in rem or quasi in rem. Therefore, the Princess Lida doctrine does not apply.

217 F.3d 225, 232 (4th Cir. 2000). Also of note, in United States v. Sinclair, 347 F. Supp. 1129 (D. Del. 1972), the Delaware district court held that abstention was not appropriate where the United States was seeking taxes owed on that portion of a Canadian probated estate consisting of local assets, namely shares in a Delaware corporation, U.S. Steel. Id. at 1133. The court noted, “where a decedent’s property is located in different states, competing local interests may render the doctrine inapplicable.” Id.

199. “Lis alibi pendens” literally means “a suit pending elsewhere.” BLACK’S LAW DICTIONARY 931 (6th ed. 1990). “The fact that proceedings are pending between a plaintiff and defendant in one court in respect to a given matter is a ground for preventing the plaintiff from taking proceedings in another court against the same defendant for the same object arising out of the same cause of action.” Id. The term is infrequently used in U.S. case law, but one could argue that the doctrine differs, if only slightly, from the “international abstention” doctrine discussed supra Part III.A, in that the lis alibi pendens doctrine does not impose an in rem jurisdictional requirement. Furthermore, although most authorities
trine, a court may elect to stay proceedings pending the outcome of a similar non-in rem action in a foreign tribunal. The court retains the right “to revive the domestic case should the foreign judgment prove not to merit res judicata effect and enforcement in the United States.” A judge may resort to granting a stay under the *lis alibi pendens* doctrine as an alternative to declining to exert jurisdiction altogether. This common law doctrine originates from the principle that every court has the power to control the cases on its docket based on economy and efficiency concerns. The decision of whether to grant a stay is highly discretionary, and it is considered to indicate the same level of refusal to exercise jurisdiction as does a complete dismissal of a suit. Appellate courts more readily defer to lower courts’ decisions to grant stays, as opposed to dismissals, in the face of parallel litigation. This preference reflects a desire to protect “the substantial rights of the parties while permitting the district court to manage its time effectively.”

Nonetheless, U.S. courts generally undertake an analysis that differs only very slightly from the *Finova* in rem analysis to determine whether to stay or dismiss a suit in light of a foreign proceeding. First, the court must determine whether the concurrent foreign and federal actions are truly parallel. Next, the court balances the following non-dispositive factors:

1. whether the foreign forum has assumed jurisdiction over property.

opine that the doctrine applies internationally, some cases and commentators have stated that the doctrine is inapplicable in international cases. *Compare, e.g.*, Chesley, 927 F.2d at 60 (applying *lis alibi pendens* in international case), *with Compagnie des Bauxites*, 651 F.2d at 887 n.10 (indicating doctrine is inapplicable internationally). The 2001 Hague Interim Text, supra note 24, adopts parallel principles in art. 21(1)-(3), although it maintains specific provisions for negative declarations at Article 21(6).


201. *See, e.g.*, id. at 556. Further, federal law controls whether a federal court should grant a stay in light of parallel foreign proceedings. *See Ingersoll*, 833 F.2d at 685 n.1 (citing Faherty v. Fender, 572 F. Supp. 142, 144 (S.D.N.Y. 1983)). Some courts, however, have questioned whether a court could dismiss a case, as opposed to staying it, in deference to foreign proceedings under any type of abstention-like doctrine. *See, e.g.*, Goldhammer v. Dunkin’ Donuts, Inc.

Still open is the question whether the federal courts have the power to dismiss an action for damages because of parallel foreign litigation. In the abstention context involving parallel state proceedings, federal courts have power to dismiss or remand cases only where relief being sought is equitable or otherwise discretionary, but they may not do so in common law actions for damages.


204. *See Ingersoll*, 833 F.2d at 686 (citing *Lumen Constr., Inc.*, 780 F.2d at 698).

205. *See, e.g.*, Ludgate, 906 F. Supp. at 1242 (citing Caminiti and Iatarola, Ltd. v. Behnke Warehousing, Inc., 962 F.2d 698, 700 (7th Cir. 1992)).

206. The Second Circuit has declared that when a res is located in a foreign forum at the time suit is filed and the U.S. court seeks to exercise quasi in rem jurisdiction, then the U.S. court must abstain in deference to the foreign court. *See supra* Part III.B.1.
(2) similarity of the parties and cases; 207
(3) the inconvenience of the U.S. forum; 208
(4) the desirability of avoiding piecemeal litigation and promoting judicial efficiency and economy; 209
(5) the order in which jurisdiction was obtained by the concurrent fora; 210
(6) the source of governing law, United States or foreign; 211
(7) the adequacy of the foreign court action in protecting the U.S. plaintiff’s rights; 212
(8) the relative progress of the U.S. and foreign proceedings; 213
(9) the presence or absence of concurrent jurisdiction; 214
(10) “the vexatious or contrived nature of the federal claim”; 215 and
(11) possible prejudice to one party. 216

In practice, the analysis does not differ substantively from the international abstention analysis. Both tests weigh essentially the same factors in determining whether to defer to the foreign proceedings. Nonetheless, U.S.
courts are fairly uniform in adhering to the principle that only “the clearest of justifications will warrant dismissal.”)

C. Doctrine of Forum Non Conveniens

Under the doctrine of forum non conveniens, courts can decline to exercise jurisdiction if bringing the case in another forum would be more convenient for the parties and better serve the interest of justice. Unlike the international abstention doctrine, the application of forum non conveniens does not depend on the pendency of a parallel proceeding. All U.S. courts, state and federal, consider the following factors before ruling on a forum non conveniens motion: the availability of an adequate alternative forum; the appropriate deference to the plaintiff’s choice of forum; so-called “private interest” factors; and “public interest” factors.

The defendant bears the burden of showing that these factors weigh strongly in favor of the purported alternative forum. In addition, it is possible that a U.S. court applying the forum non conveniens doctrine to an art case would condition dismissal upon a waiver of defendant-friendly foreign limitations and laches defenses pertaining to stolen art, such as those available in Switzerland, Germany, France, and Italy. Nevertheless, “[w]hile

217. E.g., Euromarket, 96 F. Supp. 2d at 842 (quoting Colorado River, 424 U.S. at 818–19 (quoting Moses H. Cone, 460 U.S. at 15)).

218. Allan Jay Stevenson, Forum Non Conveniens and Equal Access Under Friendship, Commerce, and Navigation Treaties: A Foreign Plaintiff’s Rights, 13 HASTINGS INT’L & COMP. L. REV. 267, 267 (1990) (citing, e.g., Gulf Oil Corp. v. Gillett, 330 U.S. 501, 507 (1947)). The version of this doctrine adopted by the 2001 Hague Interim Text requires that a court decline jurisdiction if another forum is “clearly more appropriate.” 2001 Hague Interim Text, supra note 24, art. 22(1). However, a proposal to amend that document suggests limiting the application of a forum non conveniens doctrine to cases not addressed by other jurisdictional provisions. Id. art. 22(7).

219. It is unclear whether courts will apply state or federal law to international forum non conveniens motions. See, e.g., Am. Home Assurance Co. v. Ins. Corp. of Ir. Ltd., 603 F. Supp. 636, 640 n.4 (S.D.N.Y. 1984) (“The question of whether New York or federal law applies in forum non conveniens cases has never been decided since the congruity of New York and federal law has made it unnecessary to decide the matter.”) (collecting Second Circuit and Supreme Court cases). Foreign law did not even enter into that court’s consideration of this choice of law issue. See, e.g., id. An analysis of all potential differences between federal and state application of the forum non conveniens doctrine is beyond the scope of this Article, but the author encountered no case in which any such difference was dispositive.

220. John Fellas, Important Doctrines and Tools of International Litigation, 648 PLI/LIT 9, 70 (2001). Also, the sequence of filing of the parallel suits has no explicit role in the forum non conveniens analysis. Id. at 71.


223. See generally Steven F. Grover, The Need for Civil Law Nations to Adopt Discovery Rules in Art Replevin Actions: A Comparative Study, 70 TEX. L. REV. 1431, 1432 (1992) (discussing European laws that “compromise the interests of the original owner of stolen art while unduly protecting the interest of[a
the dismissal of a suit on forum non conveniens grounds is supposed to be the exception rather than the rule, the current trend in the reported cases indicates there is a growing willingness to grant such motions.224

First, a foreign forum is generally adequate when all defendants are subject to, or consent to, the jurisdiction of that forum.225 The mere presence of minimal inconvenience or the lack of beneficial litigation procedures in the alternate forum is not enough to render that forum inadequate.226 Almost all attempts to convince a U.S. court that the substantive law, procedures, or political and social circumstances render the alternate forum inadequate fail.227 For example, the illegality of contingent fee arrangements in a foreign forum does not render the alternative forum inadequate.228
Secondly, because U.S. courts adhere to the principle that a plaintiff’s choice of forum rarely should be disturbed, they will dismiss the action on forum non conveniens grounds only when a trial in the United States would be "unjust, oppressive, or vexatious." Nonetheless, even if this standard is met, a stay of the domestic action pending the outcome of the foreign action is more likely than a full dismissal.

One point of particular contention during the Hague Conference negotiations was the different way U.S. courts treat domestic plaintiffs versus foreign plaintiffs under the forum non conveniens analysis. The U.S. Supreme Court has expressly held that a foreign plaintiff’s choice of forum is subject to less deference than that of a domestic plaintiff. The Court held:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.

In addition, many U.S. courts afford an individual plaintiff’s choice of forum more deference than they do that of a corporate plaintiff. Courts are also less deferential to a plaintiff’s forum choice when the plaintiff brings a suit in a representative capacity, such as in class action suits.
Third, the private interest factors that courts typically balance include: the interest of the litigants in having the case tried in a particular forum; the convenience of accessing witnesses and documents; and the availability of compulsory process over unwilling witnesses. Other practical concerns for a court include the complexity of the litigation and the benefits or problems of the foreign forum, such as the possibility of consolidation with the foreign action and impleading all necessary parties in the foreign forum. Aside from the consistent interest any litigant in an art dispute would have in filing a suit where the artwork is located, the application of these factors is intensely fact-sensitive and will vary greatly from case to case.

Fourth, courts will balance the following public interest factors: the local interest in having controversies decided at home; the administrative difficulties stemming from court congestion; the avoidance of unnecessary problems in conflict of laws or in the application of foreign law; and the interest in having the trial in a forum familiar with the law governing the action. Like the particular interest a local forum might have in adjudicating a dispute concerning a work of art of particular importance to the forum’s

it is axiomatic that a plaintiff’s choice of forum is entitled to great consideration, the adage has little weight in stockholder class actions.


238. One commentator has collected U.S. cases relying on 28 U.S.C. § 1782 to downplay the importance of an alternate forum’s less aggressive compulsory process and discovery procedures. Fellas, supra note 220, at 51–52. The statute, “which permits a party to a foreign litigation to obtain discovery of material located in the U.S., has been relied upon to meet an objection to a motion [to] dismiss that U.S. documents or witnesses are beyond the reach of the foreign court.” Id. (citing PT, 138 F.3d at 69; Potomac Capital Inv. Corp. v. Koninklijke Luchtvaart Maatschappj N.V., No. 97 Civ. 8141, 1998 WL 92416, 49 (S.D.N.Y. Mar. 4, 1998); Pyrene, Ltd. v. Wocom Commodities Ltd., 984 F. Supp. 1148, 1162 (N.D. Ill. 1997)). But cf. Slight v. E.I. Du Pont de Nemours & Co., 979 F. Supp. 433, 440 (E.D. W. Va. 1997) (observing that while § 1782 would provide access to needed documents, the ‘frequent shut-tling of documents and attorneys’ of such requests would entail would be too costly)).

239. For example, in In re Union Carbide, 809 F.2d at 195, the court granted a forum non conveniens motion, in part, because of the complexities surrounding the causation and damages issues in the complex wrongful death litigation concerning a disaster at a Union Carbide plant in Bhopal, India.


241. E.g., Piper Aircraft, 454 U.S. at 241 n.6.


243. See Gilbert, 330 U.S. at 509; Aljadaa, 159 F.3d at 46. See also supra note 211 and accompanying text regarding conflicts of laws issues.

244. Application of law foreign to the forum, without more, is not dispositive. See, e.g., Gibbons, 549 F. Supp. at 1123.
The application of these factors concerning art ownership is driven principally by the facts of the case. No reported U.S. case to date, however, has addressed this first public interest factor in the context of art litigation.

The caseload of the U.S. District Court for the Southern District of New York illustrates the second public interest factor, namely the possible administrative difficulties which arise out of court congestion. This district court also is the site of most art litigation in the United States because of New York City’s preeminence as the “art market capital of the world.” Courts hearing international cases are frequently forced to apply complicated doctrines, which further consume their already limited time and resources.

For example, in Federal Republic of Germany v. Elicofon, the court dealt with an action to recover two portraits by the renowned fifteenth-century German artist Albrecht Dürer. During the American occupation of Weimar at the end of WWII, they were stolen from a local museum. They were later seen in the Brooklyn home of Mr. Elicofon, who had purchased the paintings from an American soldier. Upon learning of the paintings’ location, West Germany filed suit in New York in 1969, although the Weimar museum was located in East Germany. The Grand Duchess of Saxony-Weimar intervened as a plaintiff, claiming that she owned the Dürers by assignment from her former husband, Grand Duke Carl August. The Weimar museum also moved to intervene, claiming exclusive title, although the court forbade its intervention until the United States extended formal recognition to East Germany.

In deciding the case, the court was forced to interpret a host of complicated foreign laws, including German dynastic law dating back to 1868, as
well as a 1921 settlement agreement about the paintings’ disposition between the Grand Duke and the Weimar government. The court also had to determine whether the Grand Duke lost all rights to the paintings upon his abdication of sovereignty in November 1918. Further, the court needed to evaluate whether Weimar had succeeded to the rights possessed by the Grand Duke, and, in turn, whether East Germany now possessed those rights. Finally, the court had to interpret orders from German courts in related litigation. Consequently, there was an extensive “battle of the experts” to resolve these complex issues of foreign law. After a lengthy description of the complicated law and facts, the court dismissed some of the claims under the Act of State doctrine. Such complex international cases only compound the level of congestion in local courts.

The third public interest factor, the avoidance of conflicts and the need to apply foreign law, is likewise often relevant to art litigation because of its internationalism. This factor can be seen in Elicofon, as well as in a variety of other international art cases. State of Romania v. Former King Michael provides an example. In that case, the New York Appellate Division First Department employed the doctrine of forum non conveniens to dismiss claims that arose out of the 1899 will of the first King of Romania, Carol I. The court noted that Romania had filed parallel litigation in Switzerland and that hearing the merits of the case “would necessitate review of transactions and events which took place abroad, and require interpretation of constitutional, property and testamentary law not only in present-day

257. Id. at 815–18.
258. Id. at 817.
259. Id. at 815–18.
260. Id. at 820.
261. Id. at 816–18. See also Richard Bernstein, Reunion for Dürrer Works, Some Stolen Long Ago, N.Y. Times, Sept. 24, 2003, at E1 (noting that “the world of big museums depends on an informal statute of limitations for paintings; otherwise nobody would lend anything”).
263. See, e.g., Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 18 (S.D.N.Y. 1976) (dismissing under Act of State doctrine claim by descendent of Count Alexander Sergevitch Stroganoff, the owner of two works of art held in either the Stroganoff Collection or the Imperial Hermitage Museum appropriated by the Soviet Government pursuant to decrees of the Council of People’s Commissars and re-auctioned by the government in Berlin shortly after World War I). Accord Princess Paley Olga v. Weisz, [1929] 1 K.B. 718 (rejecting claim by Russian refugee noble to recover certain furniture and art objects taken by the Soviet government from the Paley Palace near St. Petersburg pursuant to decrees of the Council of People’s Commissars and the All Russian Central Executive Committee and subsequently re-sold at auction).
264. See, e.g., Automatic Greek-Orthodox Church of Cyprus, 917 F.2d 278 (applying Indiana law after seeming inability to resolve choice of law issues concerning Church of Cyprus claims to mosaics taken from portion of Cyprus under Turkish, not Greek, control and purchased by Indiana art dealer in the “free port” area of the Geneva airport from a Munich seller in a sale arranged in the Netherlands by a Dutch art dealer and a California lawyer where the contract of sale had an Indiana choice of law (but not forum selection) clause).
265. E.g., id.
267. Id. at 422.
Romania, but during the Hohenzollern monarchy as well, going back to the 19th century.\textsuperscript{268}

The fourth and final public interest factor, favoring jurisdiction by courts familiar with the applicable law, also frequently arises in complex international litigation. It is logical to assume that because art litigation potentially implicates the laws of so many fora, the risk of mistake would decrease if the court most familiar with the applicable law applied it.

\textit{Altmann v. Republic of Austria}, currently pending before the U.S. Supreme Court,\textsuperscript{269} best demonstrates the forum non conveniens doctrine in action. \textit{Altmann} concerns six Gustav Klimt paintings that were stolen by Nazis during WWII and currently are housed in the Austrian National Gallery.\textsuperscript{270} Near the turn of the century, a wealthy Czech sugar magnate living in Vienna, Ferdinand Bloch, commissioned Gustav Klimt to paint portraits of his wife, Adele Bloch-Bauer.\textsuperscript{271} By the time Adele died in 1925, she owned the two portraits, \textit{Adele Bloch-Bauer I} \& \textit{II}, a portrait of a close friend, Amalie Zuckermandl, as well as three landscapes, \textit{Apple Tree I}, \textit{Beechwood}, and \textit{Houses in Unterach am Attersee}.\textsuperscript{272} Her will, drafted long before the Nazis came to Austria, “kindly” requested that Ferdinand donate the paintings to the Austrian National Gallery upon his death.\textsuperscript{273}

When the Nazis invaded and annexed Austria, Ferdinand fled to Switzerland to avoid persecution.\textsuperscript{274} He left behind all of his possessions, including his paintings.\textsuperscript{275} The Nazi lawyer liquidating his estate, Dr. Erich Fuerher, chose a few paintings for his personal collection. Claiming to fulfill the terms of Adele’s last will and testament, he gave \textit{Adele Bloch-Bauer I} \& \textit{Apple Tree I} to the Austrian National Gallery in 1941 in exchange for a painting donated by Ferdinand in 1936.\textsuperscript{276} Two years later, Dr. Fuerher sold \textit{Adele Bloch-Bauer II} back to the gallery and sold \textit{Beechwood} to the Museum of the City of Vienna.\textsuperscript{277} \textit{Houses in Unterach am Attersee} remained in his personal collection.\textsuperscript{278} Despite these circumstances, when Ferdinand died in Switzer-

\begin{footnotes}
\item[268] Id. at 423.
\item[269] 317 F.3d 954 (9th Cir. 2002), cert. granted, 124 S. Ct. 46 (2003). At issue are the jurisdictional grounds of the case, not the merits. The Supreme Court, presumably, granted the writ for certiorari because there is a seeming circuit split developing concerning the retroactive applicability of the Foreign Sovereign Immunities Act. Compare id. (holding that the Foreign Sovereign Immunities Act applies retroactively so as to allow jurisdiction over Holocaust-era art case) with Garb v. Republic of Poland, 72 Fed. Appx. 850 (2d Cir. 2003), vacating in part 207 F. Supp. 2d 16 (E.D.N.Y. 2002), petition for cert. filed, (U.S. Oct. 3, 2003) (No. 03-517) (remanding case to determine whether the Foreign Sovereign Immunities Act could be applied retroactively to allow jurisdiction over Holocaust-era expropriation claims).
\item[270] Id., 317 F.3d at 958.
\item[271] Id.
\item[272] Id. at 959.
\item[273] Id.
\item[274] Id.
\item[275] Id.
\item[276] Id.
\item[277] Id.
\item[278] Id. at 959–60.
\end{footnotes}
land in 1945, he bequeathed title to the paintings with the rest of his estate to one nephew and two nieces, including Maria Altmann.279

Following the war, the Second Republic of Austria declared that "all transactions motivated by the Nazis were void."280 Despite this declaration, the Altmann family only succeeded in retrieving one Klimt painting, *Houses in Unterach am Attersee* from Fuehrer’s private collection.281 In 1947, the Museum of the City of Vienna offered to return *Beechwood* only if the family reimbursed the museum for its purchase price.282 The Austrian National Gallery likewise refused to return the three Klimts in its collection that previously belonged to Ferdinand, claiming that it held valid title under Adele’s will.283 The Gallery made this assertion despite its purported knowledge that its claim under Adele’s will had been a mere legal fiction devised by Dr. Fuehrer.284

Moreover, in 1948, an agent of the Austrian Federal Monument Agency informed the family that “it would grant export permits on some of the family’s other recovered artworks in exchange for a ‘donation’ of the Klimt paintings.”285 Although the practice was later declared illegal by the Austrian government,286 the family had little hope of retrieving its inherited property without acquiescing to such demands.287 Thus, the heirs acknowledged Adele’s will and allowed the Austrian museum to keep all of the Klimt paintings mentioned in the will.288

The case was dormant until the aftermath of *Portrait of Wally*, when the U.S. government seized two Egon Schiele paintings loaned by the Austrian National Gallery to the Museum of Modern Art in New York.289 In response to that case, which alleged that the Austrian National Gallery possessed stolen art, "the Austrian Minister for Education and Culture for the first time opened up the Ministry’s archives to permit research into the provenance of the national collection."290 As a result of this new access to the Gallery’s archives, Ms. Altmann concluded that the Gallery’s claim to the

279. *Id.* at 960.

280. *Id.* See also *id.* at 965 n.3 (stating that a provision of the *Convention Respecting the Laws and Customs of War on Land*, art. 56, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, which was signed by Germany and Austria, forbids “[a]ll seizure of . . . works of art.”).

281. *Id.* at 960.

282. *Id.*

283. *Id.*

284. *Id.* at 960 n.1.

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 961 (referring implicitly to *Portrait of Wally*, 2002 WL 553532 at *1). See also supra Part II.A for a discussion of *Portrait of Wally*.

290. *Altmann*, 317 F.3d at 961.
paintings based on Adele’s will was “questionable at best.” Notwithstanding this conclusion, the Gallery decided not to return the paintings.

Ms. Altmann first attempted to sue the Gallery in 1999 in Austria, where the paintings were located. As the paintings by then were worth approximately $135 million and under Austrian law one must pay a 1.2% filing fee to sue, it would have cost Ms. Altmann approximately $1.6 million just to file the suit there. She petitioned for a reduction in the filing fee and was granted a partial waiver, but she still would have had to pay $135,000 to file the suit. Ms. Altmann, a U.S. citizen, concluded that she would be better off filing suit in California, where she resides.

Austria filed a motion to dismiss the suit in the Central District of California on a number of grounds, including forum non conveniens. Although the district court found that the high filing fees in Austria rendered it an inadequate alternate forum, the Ninth Circuit Court of Appeals disagreed. The court reversed, holding that the “mere existence of filing fees, which are required in many civil law countries, does not render a forum inadequate as a matter of law.” In particular, the Ninth Circuit based its ruling on the fact that the lower court did not take Ms. Altmann’s net worth into consideration and that she did not seek an additional reduction in the fees. The court also rejected the contention that the Austrian statute of limitations would bar her claims. Austria passed the 1998 Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections, which authorizes the Minister of Finance to return artwork in special circumstances, even if the statute of limitations has expired.

The court did not grant the motion for dismissal on forum non conveniens grounds, basing its denial on the balancing of the aforementioned factors. Although the evidence, the witnesses, and the paintings at issue were all located in Austria, and a U.S. district court would be required to apply

291. Id.
292. Id.
293. Id.
294. Id.
295. Id.
296. Id.
297. Id.
298. Id. at 972–75.
299. Id. at 972.
300. Id. at 972–75 (citing Nai-Chao v. Boeing Co., 555 F. Supp. 9, 16 (N.D. Cal. 1982) (holding that despite filing fees amounting to one percent of claim and an additional one-half percent for each appeal, Taiwan was an adequate forum), aff’d sub nom. Cheng v. Boeing Co., 708 F.2d 1406 (9th Cir. 1983); Murray v. BBC, 81 F.3d 287, 292–93 (2d Cir. 1996) (holding that England was an adequate forum despite the plaintiff’s claim that the American contingency fee system was the only way he could afford a lawyer); Mercer v. Sheraton Int’l, Inc., 981 F.2d 1345, 1355 (1st Cir. 1992) (holding that fifteen percent Turkish bond would not prohibit court from finding Turkey adequate forum).
301. Id.
302. Id. at 975.
303. Id.
Austrian law, the court still deferred to Ms. Altmann’s choice of forum. It noted that Ms. Altmann is an elderly United States citizen, who has resided in this country for over sixty years. The requisite foreign travel, coupled with the significant costs of litigating this case in Austria, weigh heavily in favor of retaining jurisdiction in the United States. Because of the discrete issues presented, this case alone is unlikely to cause much congestion in the courts. Finally, Austria has not set forth any potential conflicts of law beyond the statute of limitations, which it concedes is tolled for fraudulent concealment, as in the United States.

Thus, the Ninth Circuit has effectively set the stage for a judgment that Austrian courts, which possess in rem jurisdiction over the paintings, might be reluctant to enforce. Should the U.S. Supreme Court affirm the Ninth Circuit’s holding, the decision could heighten the existing risk of jurisdictional and diplomatic confrontation, especially if Austria decides to file a parallel action in its own courts. To avoid such risks and decrease the potential for unenforceable judgments, courts should be especially willing to dismiss a case under the forum non conveniens doctrine when the foreign court is seised with in rem jurisdiction.

D. Anti-Suit Injunctions

Although the tests courts employ to determine whether to grant an anti-suit injunction differ semantically, it is unlikely that the differences are ever outcome determinative. Courts are unlikely to grant an anti-suit injunction against pursuit of a parallel judgment, declaratory or otherwise, in a foreign forum. Conversely, as shown above, courts are likely to dismiss or stay domestic declaratory actions when the alternate forum is exercising in rem jurisdiction. Such deference to foreign in rem jurisdiction is appropriate and the wisest course to decrease costs for courts and litigants in-

304. Id.
305. Id. at 973–74.
306. See Philips Med. Sys. Int’l B.V. v. Bruetman, 8 F.3d 600, at 605 (7th Cir. 1993) (declining to decide “whether the differences between the standards are more than verbal, that is, whether they ever dictate different outcomes”).
307. E.g., 21 C.J.S. Courts § 227 (2002) (“This power of a court [to grant an anti-suit injunction] should be exercised sparingly, not capriciously, and not unless a clear equity is presented requiring the interposition of the court to prevent manifest wrong and injustice.”) (internal footnotes omitted). But see 42 Am. Jur. 2d Injunctions § 207 (2002) (“When the action is one in rem, or quasi-in-rem, that court—whether state or federal—which first acquires jurisdiction has the exclusive authority to control and dispose of the res, and that court may protect its jurisdiction by enjoining a proceeding in another court.”) (internal footnotes omitted).
involved in parallel international litigation. Furthermore, limited use of the
anti-suit injunction helps prevent embarrassing tugs-of-war between the
courts of two or more nations.

The Fifth, Seventh, and Ninth Circuits, as well as one district court in the
Eighth Circuit, have expressed a preference for the purported “liberal” stan-
dard for granting anti-suit injunctions. These courts prefer to grant an
injunction where allowing both suits to go forward would be gratuitously
duplicative, or “vexatious and oppressive.” The liberal standard requires
weighing the following non-dispositive factors to determine whether to is-
sue an anti-suit injunction: (1) possible frustration of a policy in the enjoin-
ing forum; (2) whether the foreign action is vexatious; (3) whether the par-
allel action threatens the issuing court’s in rem or quasi in rem jurisdiction;
(4) whether parallel proceedings prejudice other equitable considerations; and
(5) whether adjudication of the same issue in separate actions would result in
delay, inconvenience, expense, inconsistency, or a race to judgment. These
factors focus on the “vexatiousness” of the foreign litigation rather than on comity.

In contrast, the Second, Third, Sixth, and D.C. Circuits, as well as one
district court in the Eleventh Circuit, purport to employ the “strict” anti-
suit injunction standard. The strict cases “have rejected the use of the five-
factor approach used by the liberal circuits and have pointed out that concerns
about vexatiousness, race to judgment, or additional expenses are likely to exist in
every case involving parallel proceedings.”

The strict courts, like the liberal courts, first determine whether the par-
ties are the same in both matters and whether resolution of the case before
the enjoining court would be dispositive of the action to be enjoined. Next, the strict courts focus on whether the foreign action threatens to
usurp U.S. jurisdiction or undermines the public policy of the U.S. forum. These public policies of U.S. fora include enforcing U.S. antitrust, patent,
trademark, and securities laws, giving effect to forum selection clauses, and
resisting foreign blocking statutes designed to usurp U.S. jurisdiction in these areas or prevent U.S.-style discovery practices.
Despite the purported liberality of the "liberal" standard, most of the liberal cases rely upon *Laker Airways Ltd. v. Sabena Belgian World Airlines*, a seminal case outlining the "strict" standard. Furthermore, one recent district court case in the Seventh Circuit follows the more stringent standard despite that circuit's purported adoption of the liberal standard. In explaining the difference between the two standards, the Seventh Circuit explained that the "strict" cases tend to presume that whenever an anti-suit injunction is sought, there is a potential threat to international comity, whereas the "liberal" cases require a more substantial showing that comity would actually be impaired by an injunction. That is, the liberal courts demand some indication that issuing an injunction could possibly impact U.S. foreign relations. One way to meet this standard would be via a State Department or foreign government representation.

To date, there is no reported art case where a litigant has requested an anti-suit injunction. In general, there is no strong U.S. (or state) public policy interest implicated by the vast majority of domestic actions related to chattels. However, policy concerns arise when there is evidence of abuse of U.S. laws, such as where a domestic forum is being used as a hub for transporting stolen art in violation of the NSPA.

In conclusion, when a court exercises in rem jurisdiction in the face of parallel litigation on the same issue, it potentially could be persuaded to


321. Id.
322. *Allendale*, 10 F.3d at 431. *Allendale* partly relied on the lack of assurance that any French tribunal would accord a U.S. judgment res judicata effect in its decision to issue a preliminary anti-suit injunction against reviving a dormant parallel French insurance coverage suit before the Commercial Court of Lille, which the court characterized as a part-time arbitration panel. See id.
323. 18 U.S.C. § 2314. *See Portrait of Wally*, 2002 WL 535532 (exercising jurisdiction over Schiele painting on loan to the New York Museum of Modern Art under the NSPA despite colorful comity arguments). *See also Kamtschatkawe*, 536 F. Supp. at 846 (noting that New York’s "rule that a purchaser cannot acquire good title from a thief" promotes the public policy of preventing New York "from becoming a marketplace for stolen goods").
enter an anti-suit injunction if necessary to protect its jurisdiction. Anti-suit injunctions remain as a tool that could be used in the increasing amount of art ownership litigation likely to result from improved access to museum archives and increased demands by nations and ethnic groups for the return of objects of cultural significance.324

IV. THE HAGUE CONFERENCE NEGOTIATIONS

The Hague Conference325 currently has sixty-two member states and "is an intergovernmental organization the purpose of which is 'to work for the progressive unification of the rules of private international law.'"326 In 1992, the United States was the driving force behind the Hague Conference’s multilateral discussions on the possibility of a judgments and jurisdiction convention.327 Most scholars would likely agree that international unification in this area is desirable.328

324. See supra notes 37–44.

The first session of the Hague Conference was convened in 1893 by the Government of the Netherlands and was followed by five additional sessions before 1928. The first post-World War II session in 1951 set the organization on a new course marked by the preparation of a new Statute making the Conference a permanent intergovernmental organization. The United States participated as an observer in the 1956 and 1960 sessions. After joining the organization in 1964, the United States participated fully at the 1964 session and thereafter at the regular sessions every four years, including the most recent in 1988 and May 1993.

The traditional accomplishments of the Hague Conference have been multilateral treaties or conventions setting out rules for determining applicable law. Since the 1950s these conventions have dealt with diverse fields, including product liability, maintenance obligations, protection of minors, relations between spouses, trusts, and succession. The greatest interest and benefit to the United States so far, however, comes from the conventions of a largely procedural nature to which the United States has become a party, dealing with the service of process abroad, the taking of evidence abroad, abolishing the requirement of legislation for documents intended for use abroad, and providing for the return of children wrongfully removed or retained abroad.


The principal method used to achieve the purpose of the Conference consists in the negotiation and drafting of multilateral treaties or Conventions . . . . After preparatory research has been done by the secretariat, preliminary drafts of the Conventions are drawn up by the Special Commissions made up of governmental experts. The drafts are then discussed and adopted at a Plenary Session of the Hague Conference, which is a diplomatic conference.


328. See, e.g., Reed, supra note 63, at 252 (describing current state of this area of law as "hopelessly
The Hague Conference established an informal “Working Group” in 1992 and a “Special Commission” in 1993 to study the issue.\textsuperscript{329} In November 1998, the Special Commission Drafting Committee for the first time issued language for provisions concerning issues of convention scope, required bases of jurisdiction, provisional and protective measures, prohibited grounds of jurisdiction, \textit{lis pendens}, declining jurisdiction (forum non conveniens), rules of recognition, legal aid, and damages.\textsuperscript{330} The Preliminary Draft Convention, which incorporated some of these provisions, was completed in October 1999 (“1999 Hague Draft Convention”).\textsuperscript{331} Further discussions about this draft occurred at the June 2001 meeting of the Special Commission, resulting in an interim text of the anticipated convention (“2001 Hague Interim Text”).\textsuperscript{332}

\textbf{A. Progress of Negotiations}

Reaching agreement on the draft provisions proved incredibly difficult. This was partly due to the clash between the U.S. practice of commonly relying on judges’ jurisdictional discretion\textsuperscript{333} and the civil law concerns about courts surrendering jurisdiction and exercising discretion.\textsuperscript{334} With the unquestionable exception of the United States, most nations generally maintain that in the face of parallel litigation, the court first seised must retain jurisdiction and the court second seised must decline jurisdiction.\textsuperscript{335} Many other nations are strongly opposed to allowing courts to exercise discretion to determine which forum is the most “appropriate” or which court “should” exercise jurisdiction.\textsuperscript{336} The rationale behind the more rigid approach is anachronistic” and “ethnocentric”).

\begin{itemize}
  \item \textsuperscript{329} E.g., id. at 584 and nn.14–15 (citing Hague Conference, \textit{Conclusions of the Working Group Meeting on Enforcement of Judgments}, Doc. L.C. ON No. 2 (93), at 3 (Jan. 4, 1993); Hague Conference, Seventeenth Session Final Act (1993)).
  \item \textsuperscript{330} See, e.g., Brand, supra note 327, at 585 (citing Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Hague Conference, Work. Doc. No. 144 E (Nov. 20, 1998)).
  \item \textsuperscript{332} 2001 Hague Interim Text, supra note 24.
  \item \textsuperscript{333} See supra Part III, discussing the doctrines of comity, abstention, \textit{lis alibi pendens}, and forum non conveniens.
  \item \textsuperscript{334} Burbank, supra note 201, at 218.
  \item \textsuperscript{335} E.g., George, supra note 13, at 501 (describing various approaches from around the world, including regional agreements).
\end{itemize}
multi-faceted, but strongly reflects concerns about comity, predictability, distrust of judicial discretion, and litigation costs.337

The negotiators spent much time comparing U.S. practices with those of the European Union outlined in the Brussels and Lugano Conventions,338 which govern the scope of jurisdiction for courts in the European Union faced with parallel litigation.339

The Hague Conference negotiations came to focus on the costs of litigating which court is the proper forum.340 Article 12(5) of the 2001 Hague Interim Text provides one exception to the general rule of deferring to the court first seised. The article "refrains from treating a court hearing a declaratory case as the court first seised for purposes of the lis pendens doctrine."341 This combats preemptive negative declaration suits, such as the so-called "Italian torpedo." In that instance, a declaratory filing is made in Italian courts, which frequently have slow-moving dockets, in order to block adjudication in more efficient fora.342

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337. E.g., George, supra note 13, at 501.
339. See generally Ronald A. Brand, Enforcement of Judgments in the United States and Europe, 13 J.L. & Com. 193 (1994). For the purposes of this Article, it is sufficient to understand that the Brussels Convention generally provides strict deference to the court first seised when both actions involve the same cause of action between the same parties. Article 21 of the Brussels Convention provides:
Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion decline jurisdiction in favor of that court.
A court which would be required to decline jurisdiction may stay its proceedings if the jurisdiction of the other court is contested.

As a corollary, Article 23 provides:
Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favor of that court.

Further, Article 22 provides:
Where related actions are brought in the courts of different Contracting States, any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings. A court other than the court first seised may also, on application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.
For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.
342. Id.
B. The October 1999 Hague Draft Convention and Beyond

The structure of the 1999 Hague Draft Convention is a "convention mixte," as demanded by the United States. A convention mixte provides for three different categories of jurisdiction: "white," "black," and "gray." The "white list" enumerates approved grounds of jurisdiction, and judgments rendered in a contracting state that rest on one of these grounds are per se entitled to recognition and enforcement. In contrast, judgments rendered in a contracting state that rest on a jurisdictional ground in the "grey area" are not guaranteed recognition under the convention. Finally, jurisdiction premised on any ground listed on the "black list" is deemed exorbitant, and a judgment based on such jurisdiction would not be honored in another state. However, the question of which types of jurisdiction should be included on each list continues to generate controversy. For example, the nature and location of evidence, which includes both documents and witnesses, as well as the procedures for obtaining such evidence are factors pertaining to the gray area. Consideration of these factors in the gray area highlights important differences between civil law nations and the United States; civil law courts generally adhere to firm rules favoring the court first seised, whereas U.S. jurisprudence allows for substantial judicial discretion based in part on these factors.

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As to the structure of the future Convention, although some delegations stressed that the proceedings would probably result in a mixed convention, most of the delegations which expressed a position preferred to negotiate a double convention, which should be the premise underlying the reasoning and the negotiations conducted by the Special Commission.
For more information regarding negotiations as to whether the 2001 Hague Interim Text would be a simple, double, or mixed convention, see id. at n.1. See also 2001 Hague Interim Text, supra note 24.
345. von Mehren, supra note 32, at 272.
346. Id. at 283.
347. Id.
348. Id. at 283–84.
349. See id. at 283 ("[C]ontracting states would be required to forego exercise of jurisdiction on these bases.").
351. 2001 Hague Interim Text, supra note 24, art. 22.
352. See Burbank, supra note 201, at 219 ("[A]lthough the lis pendens provisions in Article 21 of the Brussels Convention may appear ‘rigid, mechanical and crude’ to common law eyes, in recent years the costs of discretionary justice within the highly entrepreneurial adversarial system have become apparent.” (quoting Neste Chems. SA v. DK Line SA, [1994] 3 All E.R. 180, 184 (Eng. C.A. 1994) (internal footnotes omitted))).
Despite continued negotiations, several issues are preventing further progress. As stated by Jeffrey Kovar, an Assistant Legal Advisor at the U.S. Department of State and head of the U.S. delegation:

[T]he project as currently embodied in the October 1999 preliminary draft convention stands no chance of being accepted in the United States. Moreover, our assessment is that the negotiating process so far demonstrates no foreseeable possibility for correcting what for us are fatal defects in the approach, structure, and details of the text. In our view there has not been adequate progress toward creation of a draft convention that would represent a worldwide compromise among extremely different legal systems . . . .

Issues of U.S. jurisprudence that contributed to the stalemate include high jury awards, including multiple and punitive damages, the class action mechanism, quasi in rem jurisdiction, “tag” jurisdiction, and anti-suit injunctions.

That is not to say, however, that no other states have jurisdictional and judgment practices objectionable to other nations. For example, Article 14 of the French Civil Code provides that “a foreigner, even not residing in France, . . . may be brought before the courts of France for obligations contracted by him in a foreign country towards Frenchmen.” This provision could potentially violate most nations’ conceptions of minimal due process norms if it were used to exert jurisdiction over a defendant with no practical contacts with France. Another example, even more exorbitant than U.S.


534. See Borchers, supra note 17, at 162 (internal footnotes and citations omitted): There can be little doubt that the propensity of the U.S. legal system to award damages considerably in excess of those usually awarded by other systems is now, and will be, the source of much concern in the negotiations. Moreover, certain types of damages—notably tort punitive damages and statutory multiple damages such as those provided for by the anti-trust laws—are enormously unpopular abroad.

535. See, e.g., supra note 17.


537. See, e.g., id. See also Burnham, 495 U.S. 604 (holding that tag jurisdiction—based on temporary physical presence of the defendant in the jurisdiction alone—comported with traditional notions of fair play and justice under the facts at hand). See generally C.G.J. Morse, Not in the Public Interest? Lubbe v. Cape PLC, 37 Tex. Int’l L.J. 541, 542 (2002) (noting that tag jurisdiction is considered by many to be an “exorbitant” stretch of jurisdictional grounds).


539. In fact, at least two commentators maintain that “[i]t is a common but incorrect assumption that judicial jurisdiction of United States courts is more expansive than that of other countries.” Silberman & Lowenfeld, supra note 28, at n.22.


541. See also Ronald A. Brand, Due Process, Jurisdiction and a Hague Judgments Convention, 60 U. Pitt. L. Rev. 661, 698 (1999) (“The same rule is found in Article 15 of the Belgian Civil Code and Article 15 of
tag jurisdiction, exists under Section 23 of the German Civil Procedure Code, which provides for seemingly unfettered quasi in rem jurisdiction: “[A] court shall have jurisdiction over complaints . . . against a person with no domestic residence, within the district of which property of the latter or the property claimed in the complaint is located.” Unlike quasi in rem jurisdiction as exercised at the state level in the United States, Friedrich Juenger finds that the German practice “does not limit jurisdiction to the value of the German assets and is therefore yet more blatantly unfair than the quasi in rem jurisdiction outlawed by Shaffer.” The drafters of the Brussels Convention outlawed the use of these French and German articles, and their progeny in other European civil law countries, against other E.U. members. Nonetheless, such provisions remain applicable to non-European defendants.

1. The Article 18 “Black List”—Exorbitant Grounds of Jurisdiction

Draft Article 18 of the Hague Convention, the “black list,” is of particular interest to international jurisdictional issues pertaining to artwork and other chattels. Section 1 provides that judgments are not to be enforced in the Civil Code of Luxembourg.

362. “Quasi-in-rem proceedings is generally defined as affecting only interest of particular persons in specific property and is distinguished from proceedings in rem which determine interests in specific property as against the whole world.” Black’s Law Dictionary 797 (6th ed. 1990) (citation omitted).

363. German Commercial Code & Code of Civil Procedure in English 195 (Charles E. Steward, trans., 1st ed. 2001). This provision conflicts with Restatement (Third), supra note 61, § 421 cmt. 1 sub. 2(k), which provides, in summary, that “a state may not exercise general jurisdiction over a person on the ground that the defendant owns property in the state.” Epstein & Snyder, supra note 49, § 3.05.

364. Friedrich Juenger, Judicial Jurisdiction in the United States and in the European Communities: A Comparison, 82 Mich. L. Rev. 1195, 1204 (1984) (internal footnote omitted); Shaffer, 433 U.S. 186 (1977), held that the use of quasi in rem jurisdiction can only be premised where there is a connection involving minimum contact (in the sense of International Shoe) between the property and the subject matter of the action.

365. See generally Juenger, supra note 364, at 1206.

366. Id. at 1204.

other countries when their underlying jurisdiction is based solely on "the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property."\textsuperscript{368}

Significantly, the apparent goal of Article 18(2)(a) is to prohibit recognition and enforcement of judgments based on quasi in rem jurisdiction, but the exception laid out in the second half of the clause seems to provide for in rem jurisdiction.\textsuperscript{369} Establishing new, approved grounds for jurisdiction within the "black list" turns traditional notions of statutory interpretation on their head.\textsuperscript{370} If the drafters intend to create solid ground for in rem jurisdiction under the treaty, they should include in rem jurisdiction on the "white list" as well.

Further, the provision does not expressly specify whether it contemplates in rem jurisdiction solely as to real property, or also as to chattels. The 2001 Hague Interim Text and its preliminary documents seem to suggest that Article 18(2)(a) contemplates in rem jurisdiction solely as to real property. In rem jurisdiction as to chattels is only tangentially discussed in preliminary documents, whereas in rem jurisdiction as to real property is expressly mentioned in the 2001 Hague Interim Text itself. In fact, some negotiators have proposed that actions concerning rights in rem in immovable property be excluded from the Convention altogether, presumably because Article 12 contemplates that courts exercising in rem jurisdiction as to immovable property shall have exclusive jurisdiction.\textsuperscript{371} The language of the 2001 Hague Interim Text does not specifically discuss in rem jurisdiction as to chattels. Nonetheless, the negotiators, at least superficially, contemplated...
the issue during their discussion of the appropriate use of provisional and protective measures\textsuperscript{372} as to in personam versus in rem actions.\textsuperscript{373}

In regard to in rem chattel actions, one working group noted that the effects of such actions "will be felt chiefly on the thing or asset which has been seized or sequestered."\textsuperscript{374} The negotiators even noted an English procedure with potential to clash head-on with in rem jurisdiction of foreign courts pertaining to the same res. English courts sometimes use repatriation orders, known as \textit{Mareva} injunctions, to require debtors to bring assets held abroad back to the country.\textsuperscript{375} \textit{Mareva} injunctions potentially infringe on the in rem jurisdiction of a foreign forum.\textsuperscript{376} However, such deleterious effects could be avoided through international deference to in rem jurisdiction.

In drafting the Hague Convention, negotiators may have overlooked problems that arise when two nations attempt to exercise control over the same moveable res. Clashes of jurisdiction are particularly acute when the res is subject to an in rem action in a court exercising parallel jurisdiction. The 1999 Hague Draft Convention does not provide that a court entertaining parallel litigation should defer to the foreign court when it is exercising true in rem jurisdiction over a chattel.\textsuperscript{377} Indeed, one commentator, noting "[h]uge


\textsuperscript{373} Hague Conference, Prel. Doc. No. 10, supra note 372, at 3.

\textsuperscript{374} Id.


\textsuperscript{376} Hague Conference, Prel. Doc. No. 10, supra note 372, at 9, 53. In contrast, under Swiss procedure, only those assets of a debtor "permanently in Switzerland," as opposed to transiently, may be subject to a sequestration order. \textit{Id.} at 38. Adding another wrinkle, Articles 24 of the Brussels Convention and the Lugano Convention provide for jurisdiction of any state to award provisional or protective measures under its own laws "even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter." Judicial attempts to honor Articles 24 have lead to conflicting judgments throughout Europe. See Hague Conference, Prel. Doc. No. 10, supra note 372, at 48.

gaps" in the 1999 Hague Draft Convention, has maintained that "the U.S. team has not pushed strongly enough to preserve the useful aspects of *in rem* and *quasi-in-rem* jurisdiction that permit the adjudication of interests in a thing where the thing is located."378

In any event, if Article 18(2)(a) were to apply to *in rem* chattel litigation, the court seised with *in rem* jurisdiction over a chattel could secure exclusive jurisdiction. Although this method of achieving exclusive jurisdiction would require application of some of the odd statutory construction previously discussed, it would also require the least amount of change to the language of the 2001 Hague Interim Text. If some form of the 1999 Hague Draft Convention is ever adopted, incorporating this seemingly simple idea could save litigants in chattel litigation thousands of dollars, as well as much frustration, on preliminary jurisdictional squabbles.

2. Future of Hague Negotiations

At the conclusion of the most recent negotiations in March 2003, "the ambitious goal of an international convention on the recognition and enforcement of foreign judgments was [at least temporarily] scrapped for a much narrower treaty covering choice of forum clauses in business-to-business contracts."379 Even the Hague Conference's more narrowly focused efforts have the potential to decrease litigation costs for businesses involved in preliminary jurisdictional litigation by unifying courts' enforcement of forum selection clauses. Particularly noteworthy is the International Chamber of Commerce's ("ICC") recent survey showing that "many companies forego entering into international contracts because of concerns over which country's courts would hear any disputes."380 Of the 100 companies who responded to the survey, 40 reported that they made important business decisions based on which court would adjudicate disputes and which nation's

that the Association's "advisor to the U.S. delegation" to the Hague and another Maritime Law Association committee member submitted a proposal to the Hague negotiators on *in rem* and *quasi-in-rem* jurisdiction. It seems likely that the art lobby will likewise seek input before a final Hague or ALI Draft emerges. See *supra* note 33.

378. Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 *Cornell L. Rev.* 89, 117 (1999). It appears that this concept, although contemplated early in the negotiations, subsequently has been forgotten. See also *Hague Conference, Prel. Doc. No. 8, supra* note 344, art. 13 (noting the need for specific jurisdiction with respect to "things").


law would apply to the contract. Moreover, Michael Hancock, an international business lawyer who represented the ICC at the Working Group meeting, reportedly stated, "[t]his is far from an academic issue for business," and the results of the ICC survey "show that millions of jobs could be affected by the lack of predictability and certainty in international contracts." Finally, he reportedly said that "[t]he business community wants the convention restricted to [business to business], choice of forum provisions."

Although even such a narrow mandate seems to be generating controversy in the United States, the United States has communicated its intent to continue with the negotiations on the narrower issue. Other member states have done the same. The Working Group was scheduled to reconvene December 1–9, 2003. As of this Article's finalization, no documentation concerning the December negotiations is available, but reportedly, negotiations "will proceed with an eye toward finishing the treaty by June 2004 . . . ."

In the words of Arthur von Mehren, a leading international law scholar and a member of the U.S. delegation to the Special Commission, "no one can be sure what the fate of the Special Commission's Draft Convention will ultimately be." One must also remember that in 2000, the United States

382. Id.
383. Id.
385. Letter from Hans van Loon, Secretary General of the Hague Conference, Re: Convocation Special Commission on Judgments, 1–9 December 2003, L.c. ON No. 35(03), at 1–2 (Aug. 19, 2003) (Annex contains letters from member states). At least one source reported that the member states’ decisions to pursue the narrower negotiations was not easily made. Warren’s Washington Internet Daily, U.S. to Decide Whether to Pursue Hague Talks as Concerns Linger, supra note 384, reported that:

Hague Conference members are far from agreed on whether to proceed with the narrower approach or revisit the broader language, said negotiator Peter Trooboff of Covington & Burling. Kovar said that in fact most would prefer the earlier document. But Trooboff said he would consider it a mistake not to try to reach consensus on a narrower convention. However, he said, negotiators need to know whether the issues can be worked out in a way that serves—and doesn’t interfere with—U.S. interests.
386. van Loon, supra note 385.
387. Id.
389. von Mehren, supra note 353, at 193. See also Juenger, supra note 30, at 121 (“I, for one, would not be surprised if the obstacles to reaching agreement were to prove insurmountable.”); von Mehren, supra note 353, at 193 (providing more procedural detail on the upcoming negotiations); Weintraub, supra note 48, at 220 (“I suspect that, after much time and effort, drafting will reach an impasse or that few
had recommended suspension of the pursuit of a convention if no workable
draft emerged soon. It hoped that such suspension would allow the conflicting
views to be resolved over time so that a viable Hague Convention would
ultimately be feasible.390

Furthermore, the Working Group has noted that in the event negotia-
tions continue toward a business-to-business forum selection treaty, such
progress “shall not preclude any subsequent work on the remaining issues,
with regard to jurisdiction, recognition and enforcement of foreign judg-
ments in civil and commercial matters.”391 Moreover, some negotiators sug-
gested drafting a Model Law in order to incorporate all of the significant
ideas that were generated during the project.392

Perhaps the issue of jurisdictional deference to courts exercising in rem
jurisdiction over chattels could jump start the negotiations on a broader
convention or principles-based document.393 It is also possible that broad
negotiations could build on the “significant progress” purportedly “made in
reconciling the lex rei sitae and contract law approaches to conflict of laws
rules in the context of current securities holding practices.”394

Narrowing the focus of the negotiations to less controversial principles
was intended to satisfy some negotiating nations’ call “for a scaled-back con-
vention that might provide limited relief while not addressing some of the
controversial areas . . . .”395 Nonetheless, the narrower draft convention still
seems to implicate controversial areas.396 Therefore, one can only wait and
see what the future will bring to The Hague Conference.

390. von Mehren, supra note 353, at 192.
392. Id.
393. Some believe that “the main U.S. bargaining chip is to offer more predictable and narrow juris-
ctional grounds . . . . It remains to be seen, however, whether this is a big enough carrot to entice other
member nations.” Borchers, supra note 367, at 159.
394. See generally Hague Conference, Convention on the Law Applicable to Certain Rights in Respect of
Securities Held with an Intermediary, available at http://www.hcch.net/e/conventions/text36e.html#pd
(last visited Dec. 3, 2003) (on file with the Harvard International Law Journal); Hague Conference on Interna-
tional Law Permanent Bureau, Explanatory Note on Article 9 of the Preliminary Draft Convention on the Law
Applicable to Certain Rights in Respect of Securities Held with an Intermediary, Prel. Doc. No. 11 (Apr. 2002),
International Law Journal).
395. Wilmore & Teitz, supra note 309, at 423 (noting difficult areas as being jurisdictional treatment of
consumers, electronic commerce and intellectual property).
396. See supra note 385.
V. THE ALI INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT

Regardless of whether a multilateral convention agreeable to the United States emerges from the Hague Conference, the ALI is making waves for legislative reform regarding U.S. courts’ exercise of parallel jurisdiction, as well as recognition and enforcement of foreign judgments, in international litigation.397 The ALI Jurisdiction and Judgments Project, at the request of Peter Trooboff, a member of the U.S. Hague delegation,398 has worked since 1999 to formulate draft legislation to complement the work of the Hague Conference in pursuit of a convention.399 In fact, a number of scholars view the re-thinking of domestic jurisdictional principles as the main benefit of the Hague Conference negotiations.400 As stated by ALI Director Lance Liebman, 

After the project began, chances diminished for agreement at the Hague on a broad treaty. But beginning with the first meeting of the Advisers on November of 1999, American experts voiced enthusiasm for a United States statute, and for federalization of this area of law, whether or not the United States agreed in a treaty to change and federalize its policies.401

A. Key Provisions of the ALI Draft

The ALI Discussion Draft (“ALI Draft”) incorporates ideas from both the 1999 Hague Draft Convention and the domestic jurisprudence discussed in Parts II and III above. For example, structurally, the ALI Draft reflects the convention mixte organization of the 1999 Hague Draft Convention.402 Further, in a provision almost identical to the oddly drafted Article 18(2)(a) of the 2001 Hague Interim Text, the ALI Draft seemingly provides the same deference to judgments premised on true in rem jurisdictional grounds

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397. See generally Silberman & Lowenfeld, supra note 28, at 646; Burbank, supra note 201, at 207. The ALI is also active in attempting to unify the rules of civil procedure internationally. See Rolf Sturner, Some European Remarks on a New Joint Project of the American Law Institute and UNIDROIT, 34 INT’L LAW 1071 (2000).
398. Mr. Trooboff and Mr. Kovar, the head of the U.S. delegation to the Hague Conference, both appear to be at least somewhat involved with the ALI Project, which is desirable so as to keep the domestic progress informed of the work being done on the diplomatic front. See ALI, Report to the Annual Meeting: International Jurisdiction and Judgments Project (Apr. 14, 2000) (describing Mr. Kovar as a liason and Mr. Trooboff as a full member of the ALI committee working on the project).
399. ALI Draft, supra note 25.
400. For example, In fact, the true benefit that the United States could derive from such negotiations is the opportunity to rethink our strange and wondrous law of jurisdiction, and to craft jurisdictional bases appropriate for an international regime in clear and concise terms that are acceptable abroad. It would be a major achievement if we were to rid ourselves, at long last, of the mishmash of state long-arm statutes and ever-vacillating Supreme Court jurisprudence. Juenger, supra note 30, at 122.
401. ALI Draft, supra note 25, at xi.
402. Id. at passim. See also supra note 344 and accompanying text.
within its “black list,” again turning principles of statutory interpretation on their head. 403 Thus, the same recommendations made in this Article for the 2001 Hague Interim Text likewise apply to the ALI Draft; the ALI Draft should expressly provide that its provision mirroring Hague Article 18(2)(a) secures exclusive jurisdiction in any court exercising in rem jurisdiction as to real or personal property. The language of the 2001 Hague Interim Text and the ALI Draft on this point are printed side-by-side below for comparison:

<table>
<thead>
<tr>
<th>2001 Hague Interim Text Article 18—Prohibited Grounds of Jurisdiction404</th>
<th>ALI Draft § 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. [In particular,]405 [Where the defendant is habitually resident in a Contracting State,]406 jurisdiction shall not be exercised by the courts of a Contracting State on the basis [solely of one or more]407 of the following—</td>
<td>A foreign judgment rendered on any of the following bases of jurisdiction shall not be recognized or enforced in the Untied States:</td>
</tr>
<tr>
<td>(a) the presence or the seizure in that State of property belonging to the defendant, except where the dispute is directly related to that property;408</td>
<td>(a) except in admiralty and maritime actions, the presence or seizure of property belonging to the defendant in the forum state, when the claim does not involve a direct right to the property;</td>
</tr>
</tbody>
</table>

Although the language differs, it is apparent that the ALI Draft attempts to mirror the 2001 Hague Interim Text on this issue to the point of adopting an odd structure that belies traditional notions of statutory drafting and interpretation.

ALI Draft Section 3(c)(ii) is of particular significance for litigation pertaining to ownership of artwork or other chattels. It provides:

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403.  Id. § 6(a). See also supra Part IV.A.
404. The 2001 Hague Interim Text, supra note 24, at n.104 (“There was no consensus on this provision.”).
405.  Id. at n.107 (“If paragraph 1 is to be deleted, the words in brackets should also be deleted.”).
406.  Id. at n.108 (“If paragraph 1 is to be deleted, the words in brackets should be placed in what is now paragraph 2.”).
407.  Id. at n.109 (“It has been proposed to delete the words within the brackets. No consensus exists on this point.”).
408.  Id. at n.110 (“It has been proposed to delete sub-paragraph a) entirely. There was no consensus on this issue.”).
A judgment of dismissal rendered by a foreign court, if otherwise entitled to recognition, shall be treated in the same way as a judgment for the defendant, except

(ii) if the ground for dismissal was that the action was time-barred, unless the party seeking to rely on the judgment of dismissal establishes that the claim is governed by the law of the state of origin or the law of another state and that under that law the claim is extinguished.

Section 3(c)(ii) could have profound effects for statute of limitations issues in art litigation. It puts the burden squarely on a defendant seeking to bar a parallel claim to convince the court which nation’s law applies and that the plaintiff’s claims are time-barred under that law. Section 3(c)(ii) does not address how the court should go about the choice of law analysis required by the provision. Presumably, the choice of law rules of the forum in which the court sits, which could vary greatly, would apply.409 Further, the individual U.S. states also apply widely varying statutes of limitations as well as “discovery rule” and “demand and refusal” principles in regard to works of art.410 These in turn are vastly different from the limitations rules applied in civil law countries, such as Switzerland, Germany, France, and Italy.411 The potential for judicial confusion is apparent. Moreover, the Reporters’ Note following the provision indicates that the drafters did not contemplate the potential impact of Section 3(c)(ii) on art and moveable res litigation.412

The most alarming, but perhaps diplomatically necessary, provision in the ALI Draft is its version of the “grey area”413 found in Section 5. Although it arguably incorporates ideas from the 2001 Hague Interim Text, it can best be described as reflecting the comity principles discussed in Part II above. Most significantly, it contains three alternative proposals to adopt the reciprocity doctrine for all courts in the United States.414

410. See, e.g., supra notes 139, 141, 142 and accompanying text.
411. See, e.g., supra note 223 and accompanying text.
412. The Reporters’ Note cites the following three cases regarding “dismissals for lapse of time”: Semtek Int’l, Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) (involving corporate claims of inducement of breach of contract and tort claims); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (libel action); Warner v. Buffalo Drydock Co., 67 F.2d 540 (2d Cir. 1933) (holding that personal injury action was not barred although the Ohio court previously dismissed an identical suit, but noting that “[i]f the Ohio statute had extinguished the plaintiffs’ rights, as in case of adverse possession of real property beyond the statutory period of limitation, the situation would be different”). See generally RESTATEMENT (SECOND), supra note 50, § 142; Stephen B. Burbank, Semtek, Forum Shopping, and Federal Common Law, 77 NOTRE DAME L. REV. 1027 (2002).
413. See supra note 348.
414. ALI DRAFT, supra note 25, at 46. “Version A would authorize the court in the United States to deny recognition or enforcement if the party resisting recognition or enforcement demonstrates that the courts of the state of origin would deny recognition or enforcement to judgments rendered by courts in the United States in comparable circumstances, with the burden on the judgment debtor or other person resisting recognition or enforcement.” Id. at 55. See also id. at 46. “Version B would direct the Secretary of
term Text contains no such corollary, probably because most scholars believe that the reciprocity doctrine “exacts a toll from international commerce.” At the ALI, “opinion has been divided on the question whether the proposed statute should contain a reciprocity requirement.”

The ALI’s consideration of a federally mandated reciprocity requirement can best be understood as an attempt to increase the United States’ bargaining position at the Hague and with other nations, who do not seem to recognize and enforce U.S. judgments at the same rate as U.S. courts recognize theirs. The proponents of the reciprocity provision maintain that the incentives that it would create could result in more liberal enforcement of U.S. judgments by other countries. Although extension of the reciprocity requirement may seem counterproductive, it is possible that the United States’ potential to re-introduce the requirement nationwide might generate pressure on other nations to recognize and enforce U.S. judgments more often.

Finally, it is worthwhile to note that the ALI Draft’s provisions on lis pendens, forum non conveniens, abstention, provisional and protective measures, and anti-suit injunctions, which require varying degrees of judicial discretion, differ from the parallel provisions in the 2001 Hague Interim Text. The ALI Draft’s provisions concerning these doctrines mirror the standards U.S. courts currently utilize, whereas the parallel provisions in the 2001 Hague Interim Text represent tremendous compromise among the member states, whose laws contain great variations in the implementation of these doctrines. Even if these two draft documents are to survive in some form, they both will certainly continue to undergo significant change.

B. Future of the ALI Project

Understandably, in light of the now narrow focus of the Hague Conference, there seems to be some disagreement among ALI members over the
best way to proceed. Some members feel that drafting a federal statute would be ill-advised, at least in the short term. Other members believe that federal uniformity in this area is desirable. Still others believe that the goal of congressional adoption of a draft statute should be replaced with the goal of creating a principles-based document, such as a Restatement.

ALI member Guy Miller Struve of the New York office of Davis Polk & Wardwell, while encouraging the ALI to pursue a rules-based document, made a strong political argument for abandoning the statute. He contended that the United States would not be well served by a federal law that creates a commitment to recognize and enforce foreign judgments with no parallel commitment from other countries. On the other hand, ALI member and University of Pennsylvania Professor Stephen Burbank made the case for continued pursuit of the statute, albeit with a reciprocity requirement. He argued that because the Hague Conference negotiations had stalled, it would be appropriate for the United States to "take back a little bit," given that the United States has been a leader in recognizing international foreign judgments.

Although it is premature to say how the ALI Project will evolve, most scholars would agree that the ALI’s work has been valuable and has raised important points to consider. Such considerations include whether the United States should demand equal treatment abroad for judgments from U.S. courts, or whether doing so would negatively impact U.S. business interests abroad.

Therefore, even if the ALI facilitates the unification of domestic law controlling the recognition and enforcement of foreign judgments, it is unlikely that the ALI at this point will attempt to implement dramatic changes (with the possible exception of reviving the reciprocity doctrine). Such changes would presuppose an analogous shift in the international community’s jurisprudence, which seems improbable at this point. It is similarly implausible that the ALI will attempt to bring the courts’ practices more in line with the initial compromises reached at the Hague Conference in light of the narrowing of the negotiations, which some have described as having “collapse[d].”

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423. Id.
424. Id.
425. Id.
426. Id.
427. Id.
428. See id.
429. See supra note 24.
VI. Conclusion

Disputes concerning artwork ownership often result in parallel litigation in U.S. and foreign courts because of the highly international nature of the art market. Furthermore, courts around the world are generally unpredictable in deciding when they should defer to parallel proceedings. The Hague Conference and the ALI Project have been actively considering how to alleviate this problem and unify the relevant laws regarding jurisdiction, as well as the recognition and enforcement of judgments.

Deference to courts exercising in rem jurisdiction over artwork and other chattels is a principle that can and should be followed globally. As in *Finova*, where the Seventh Circuit applied the *Princess Lida* abstention doctrine internationally, courts should defer to parallel litigation premised on in rem jurisdiction. This common sense approach has widespread appeal. There are three principle reasons strongly supporting adoption of this rule.

First, adherence to the in rem rule would alleviate the high risk of embarrassing conflicting judgments posed by the art market’s unique characteristics. Reducing this risk is particularly important in light of the diplomatic and emotional issues commonly implicated when dealing with objects of cultural significance to a nation. Nations and ethnic groups are demanding return of objects at increasing rates, and museums have sent a strong signal that they will be less willing to settle such claims in “back room deals” in the future. This, in combination with the increasing transparency of museum holdings with gaps in provenance during and after WWII, sets the stage for more art ownership litigation. Without an in rem deference rule, it is likely that litigants will continue to race to a court sympathetic to their cause to obtain a monetary or declaratory judgment, even though that court may not have a strong jurisdictional claim over the dispute. Where a sympathetic court’s jurisdictional link is weak, it is possible that a parallel court exercising in rem jurisdiction would refuse to enforce the first court’s judgment. Adherence to the in rem deference rule narrows the playing field where such litigation can and should take place to the court exercising true power over the res at issue, thereby reducing the risk of embarrassing conflicting judgments.

430. The European Court of Justice in the *Denilauler* case explained that: “The courts of the place or, in any event, of the Contracting State, where the assets subject to the measures sought are located, are those best able to assess the circumstances which may lead to the grant or refusal of [provisional] measures . . . .” Case C-125/79, Bernard Denilauler v. SNC Couchet Freres, [1980] ECR 1533, [1981] 1 CMLR 62 (1981).
431. See supra notes 37, 39.
432. See supra note 41 (regarding the British Museum-sponsored Universal Museum Statement).
433. See supra note 39.
434. See supra Part IV.
435. Article 13(2) of the 2001 Hague Interim Text, supra note 24, discusses provisional and protective measures that a court can use when a claim before it concerns property in that jurisdiction.
Second, such a rule would allow courts to cut down on the number of parallel proceedings concerning the same res, which would reduce congestion in courts and potentially save litigants tens, if not hundreds, of thousands of dollars spent on preliminary jurisdictional squabbles. At the beginning of this Article, the reader was asked to imagine that an Argentine citizen purchased an antique Italian tapestry in Switzerland, lent the object to a U.S. museum and was threatened with suit by a Colombian citizen who claimed the object was stolen while in transit in Belgium. A simple rule requiring deference to the court exercising in rem jurisdiction, a U.S. court in this instance, would drive down the cost of preliminary jurisdictional contests on multiple fronts, in this case potentially in Argentina, Belgium, Colombia, Italy, Switzerland, and the United States. The simple rule also would allow courts not seised with in rem jurisdiction to clear their dockets of the parallel litigation and decrease unnecessary duplicative congestion.

Third, this rule makes common sense because, as recognized by Finova, the court exercising in rem jurisdiction over the res is the court with the ultimate discretion to determine whether or not to recognize and enforce a parallel final judgment as to that res. Even if a court hearing a parallel suit enters judgment affecting possession rights in the res, it is inescapable that recognition and enforcement of that judgment depends completely upon the willingness of the court exercising in rem jurisdiction to honor it. The inevitability of this result is further underscored by the indisputable ability of a court seised with in rem jurisdiction to enter an injunction prohibiting the possessor of the res from moving it beyond that court’s jurisdiction.\footnote{See, e.g., Fed. R. Civ. P. 64. The rule states in relevant part: \textit{At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held . . . .}}

\footnote{Id.}

\footnote{See supra Part III.A.}

\footnote{Portrait of Wally, 2002 WL 553532, at *30; In re Grand Jury Subpoena, 93 N.Y.2d 729.}

Nonetheless, these three main reasons supporting the in rem deference rule do not eliminate the need for any special exceptions. At times, other principles should trump in rem deference. Even Finova provided a laundry list of facts to consider before implementing the rule.\footnote{437.} Now that both the Hague Conference and the ALI Project are considering unifying jurisdictional principles, the exceptions should be refined and simplified. The in rem deference rule should give way in at least the following two circumstances: (1) seizure of the object by the court seised with in rem jurisdiction is prohibited under law; and (2) enforcing a particular in rem judgment would violate public policy of the enforcing forum.

The first exception—that the seizure of the object is prohibited under law—was at issue in \textit{Portrait of Wally}.\footnote{438.} Despite the issuance by two separate judges of seizure warrants for the Schiele painting while it was on loan
to the New York Museum of Modern Art, it was immune from seizure under New York’s Arts and Cultural Affairs Law. This New York law at the time prohibited any seizure of any work of fine art on loan to any museum or other non-profit exhibitor of art in the state of New York. Similar anti-seizure laws currently are in force in a number of foreign jurisdictions.

In the federal proceedings in Portrait of Wally, the NSPA preempted the New York statutory prohibition against seizure. Preemption in such a case seems logical because it is almost axiomatic in U.S. jurisprudence that federal law preempts conflicting state law. Conversely, when national law prohibits the seizure of a res, no court should exercise in rem jurisdiction over it. As demonstrated by the New York Court of Appeals’ reversal of the New York trial court judge’s seizure of Portrait of Wally, the same is true of a state court when state law prohibits the seizure. Failure of courts to honor seizure prohibitions will have a chilling effect on international art lending. Thus, this exception should be deemed mandatory, not discretionary, in any official legislation, convention, or principles documents that may eventually be issued by the Hague Conference or the ALI.

Second, no court is required to enforce a foreign judgment that is repugnant to its nation’s public policy. The judges who issued the warrants for Portrait of Wally decided that the federal public policy of prohibiting trade in stolen goods in the United States under the NSPA trumped the New York statutory prohibition of the seizure. Simply reading Guggenheim

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440. Id. At the time, the law provided in full:
   No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is enroute to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise. Id. After Portrait of Wally was decided, the New York legislature eliminated the protection against seizure in criminal forfeiture proceedings, at least temporarily. See Collins, supra note 40, at 139. The amendment eliminating the protection against criminal forfeiture proceedings as written was “deemed repealed on June 1, 2002.” N.Y. Art & Cult. Aff. § 12.03 Historical and Statutory Note L.2000, c. 39. Research indicates that the amendment expired quietly on that date.
442. If the ALI achieves nationalization of jurisdiction and judgments jurisprudence, which would greatly improve the transparency of U.S. law in this area, then the federal-state distinction will be unnecessary.
443. In re Grand Jury Subpoena, 93 N.Y.2d at 742.
444. See generally Collins, supra note 40; Popp, supra note 441, at 213 (“The Schiele controversy has made it clear, however, that loaned art is in a precarious position.”); Ronen Sarraf, The Value of Borrowed Art, 25 BROOK. J. INT’L L. 729 (1999).
445. Article 28(1)(f) of the 2001 Hague Interim Text, supra note 24, also mentions that no court should be required to recognize or enforce a judgment that would be incompatible with its public policy.
446. See discussion of the case in supra Part II.A. See generally Susan E. Brabenec, The Art of Determining
demonstrates that it is indisputable that preventing a jurisdiction from becoming a hub for transporting stolen art, particularly art stolen during the Holocaust, is an important public policy, especially in New York.\textsuperscript{447}

Despite the importance of the public policy exception, policy choices should not trump statutory protections against seizure because international art lending hinges on such protections.\textsuperscript{448} The Federal Immunity from Seizure Act ("FISA") mirrors the New York Arts and Cultural Affairs law, but has additional requirements for immunity to apply.\textsuperscript{449} Unless the U.S. Supreme Court or Congress unequivocally pronounces the priority of the FISA over the NSPA, foreign lenders will likely think twice before lending art with dubious provenance to museums in the United States. If lenders conform with all requirements of the FISA, they should be able to expect that a U.S. court will decline to exercise re them jurisdiction over the object on loan.\textsuperscript{450} FISA priority over the NSPA would allow the United States to achieve a healthy balance between the public policy of countering the stolen art trade and the need to secure guarantees against seizure for the art lending community. This balance is achieved because, under the FISA, the State Department Assistant Secretary of Educational and Cultural Affairs decides whether to grant immunity from seizure, presumably after considering the provenance of the object and diplomatic issues potentially raised by its exhibition.\textsuperscript{451} Some lenders may nonetheless conclude that without a firm pro-


\textsuperscript{448} See, e.g., \textit{Popp}, supra note 441, at 225.


Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition, assembly, activity, or festival administered, operated, or sponsored, without profit, by any such cultural or educational institution, no court of the United States, any State, the District of Columbia, or any territory or possession of the United States may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose of depriving such institution, or any carrier engaged in transporting such work or object within the United States, of custody or control of such object if before the importation of such object the President or his designee has determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register.

\textsuperscript{450} See \textit{Manness v. Russian Federation}, 84 F. Supp. 2d 1357 (S.D. Ala. 2000) (holding that the FISA prohibited the court from seizing items from the Nicholas and Alexandra exhibit to satisfy default judgment against Russian Federation for expropriation of property because the Russian Federation obtained immunity in full conformity with the FISA). It is notable that the default judgment was subsequently vacated because it violated the Foreign Sovereign Immunity Act. \textit{Manness v. Russian Federation}, 247 F.3d 609 (5th Cir. 2001).

\textsuperscript{451} See Delegation Order No. 236-1, 64 Fed. Reg. 63,840 (Nov. 22, 1999). Originally, the State Department would only consult with the General Counsel of the United States Information Agency as to
nouncement from the U.S. Supreme Court or Congress of the priority of the FISA over the NSPA, efforts to conform in all respects with the FISA requirements to secure seizure protections do not adequately protect the works they are considering lending.

Hopefully the Hague Conference can help the United States and other nations strike the balance between unequivocally exercising in rem jurisdiction whenever it is possible to do so and declining to do so when national law or public policy dictates against it. In sum, a “firm guarantee against judicial seizure is an ‘essential factor’ in the decision to lend.” Thus, the public policy exception should be deemed a discretionary exception, as it currently is under the Uniform Act, and should not trump federally granted immunity from seizure.

These two exceptions to the proposed in rem deference rule could be implicated fairly often in litigation over artwork and other chattels. Provision for limited exceptions to the rule could alleviate the risk of unfairness that could result from unbending deference to in rem jurisdiction. Other discretionary factors under the _lis alibi pendens_ and forum non conveniens analyses, and their foreign counterparts, such as considering the need to apply complex foreign law, could assist courts in determining whether to exercise jurisdiction in certain circumstances. The negotiators at the Hague Conference and the drafters at the ALI should consider these factors as well as the exceptions discussed above in structuring an appropriate in rem deference doctrine for artwork and other chattels.

Moreover, in deferring to in rem jurisdiction in a foreign forum, the deferring court could utilize numerous creative compromises, such as requiring the parties to consent to the foreign jurisdiction or waiving statute of limitations defenses. A court could also enter a stay and condition its deference upon the foreign court hearing the case within a certain period of time. Such a condition would prevent parties from taking advantage of weaknesses in certain tribunals, such as occurs when a party launches an “Italian torpedo.” Thus, if the dispute is time sensitive, and the foreign court seised with in rem jurisdiction unreasonably delays hearing the case, a court first

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<td>452. Popp, supra note 441, at 225.</td>
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<td>454. See supra note 341. Article 22 of the 2001 Hague Interim Text also provides courts with room for creative measures. Supra note 24, art. 22(5).</td>
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seised with non-in rem jurisdiction could allow a party to revive the litigation before it.

Thus, assuming that the hard work of the Hague Conference negotiators and the ALI members is not “scrapped,” the negotiators, practitioners, and scholars postulating on these issues should promote a uniform rule, domestically and internationally. That is, with limited exceptions, courts faced with parallel litigation concerning a res located in a foreign jurisdiction should defer to the foreign court when the foreign court is exercising true in rem jurisdiction over the res. Such a rule would greatly reduce the risk of conflicting judgments in art ownership litigation. Moreover, the ALI should consider whether to carve out an exception for foreign in rem jurisdiction from any formulation of the reciprocity requirement it may adopt because the risk of unenforceable judgments in chattel ownership litigation is already quite high.

The common sense of in rem deference could potentially jump-start the negotiations at the Hague Conference and invigorate the parallel drafting in the ALI. Regardless of differences of opinion between common law and civil law practitioners as to the appropriate amount of discretion individual courts should have in deciding whether to defer to foreign courts, most would agree that deferring to the court exercising in rem jurisdiction is practical and wise. Starting from that baseline, perhaps the negotiators at the Hague Conference and the drafters at the ALI could reach a compromise as to the remaining subtleties of a viable doctrine.

455. See supra note 380.