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Message from the Chair

By Jay G. Safer

I have been asked to provide a somewhat different message than is usually given by the Chair of the Section. As you can see from the cover of the *NYLitigator*, this issue is dedicated to the victims of the September 11th terrorist attack. I have been asked on behalf of the Section to express our deep respects and share our views on where, as lawyers, we go from here. No one can truly describe the grief and pain caused by the World Trade Center tragedy. Many of us know someone who perished or lost a family member. Each of us has stories that we will never forget regarding people who were in or adjacent to the World Trade Center Towers.

You and I individually know how our lives have been affected and changed. We all have to make decisions as to what is important. I recently attended a memorial service which was beautiful. If you read The New York Times' continuing memorial to the victims, you sadly glimpse a little of their personalities, but especially appreciate that each was a unique human being with a special life that cannot be replaced.

Some people find it hard to get motivated. Others have jumped into their work with renewed zeal, despite the sadness they feel. As lawyers, we seek to deal with these issues and yet meet our clients' needs, some of which have become especially dire based on the September 11th events. Immediately after the attack, most of the court system in Manhattan became inaccessible. Courthouses were closed. Judges' telephones and fax lines were down. The courts struggled to reopen to demonstrate continuing resolve that our judicial system would meet the requirements of its citizens. The judges with whom I spoke were dedicated to making the system work while recognizing the problems attorneys and clients now face. Security is now more important than ever, and the balancing of security and accessibility has become a delicate issue. The New York State courts are trying to continue to have separate entrances for attorneys while meeting security concerns.

Attorneys throughout the city, bar associations (including, of course, the New York State Bar Association) and specifically our Section, have sought to reach out to people. These include displaced lawyers, but especially the victims and those who have suffered harm. At our Section's Executive Committee meeting, I advised our members of the various telephone and e-mail contacts for lawyers to volunteer their time. Firms across the country, including my own, engaged in successful efforts to contribute to various organizations on behalf of victims.

The response from lawyers was exemplary. Bar associations, groups and individual attorneys volunteered their time, money and assistance. The front page of the recent September/October 2001 *State Bar News* reported on the resources offered after the terrorist attack. It quoted the elegant statement of Steven C. Krane, President of the NYSBA. A toll-free number (1-877-HELP-321) was created by the NYSBA for victims of the attack. The NYSBA also referred victims in need of emergency legal services to a joint task force of The Association of the Bar of the City of New York and the New York County Lawyers' Association. The New York County lawyers took the lead in coordinating involvement in emergency Surrogate Court procedures. Over 400 volunteer attorneys gathered at The Association of the Bar for training to assist victims.

Attorneys throughout Manhattan reached out to fellow attorneys. Office space was offered free of charge to displaced attorneys. The NYSBA also arranged for lawyers displaced from their offices to register with the NYSBA so that clients of these lawyers could connect to the toll-free number for information concerning their attorneys. The September/October 2001 *State Bar News* and the NYSBA's Web site at www.nysba.org also have answers to frequently asked questions including ethics questions for attorneys affected by the attacks.

These only represent some of the efforts by attorneys, bar associations and our Section to deal with this tragedy in a heartwarming and humane manner. I view it as a privilege to have been given this opportunity as Chair of the Section to give you this short message. It represents an effort to convey on behalf of the Section our tremendous and overwhelming feelings for the victims of the September 11th attack and their families.

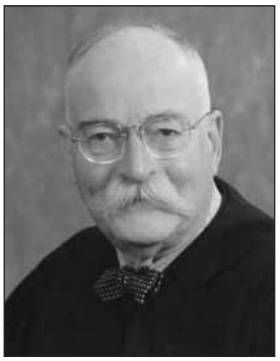
I hope you enjoy the articles in this issue of the *NYLitigator*. I want to thank Jonathan Lupkin, Emily Murphy, the authors and everyone who worked with them.

I also wish to thank the officers, committee chairs and members for your continued hard work and enthusiastic support on behalf of our Section.

Federal Courts: Issue Preclusion and Arbitration

By Charles L. Brieant and Sherene D. Hannon

Introduction



Charles L. Brieant

The perceived benefits of Alternative Dispute Resolution (ADR) may be limited significantly by the extent to which issues decided in arbitration are given issue preclusive effect in subsequent litigation. Arbitral awards that do not articulate any rationale for the decision often leave courts in subsequent actions unable to give the awards preclusive effect.

In light of the popularity of ADR, questions have arisen regarding the collateral estoppel effect of arbitral awards. The Supreme Court has held that collateral estoppel can be predicated on arbitration proceedings.[1] Most courts require that an arbitral award satisfy the same elements as a court judgment in order to be given preclusive effect.[2] In assessing whether an arbitral award should be given preclusive effect in a subsequent litigation, courts face the obstacle of determining which issues were "actually arbitrated" in the prior proceeding. This problem is exacerbated when dealing with arbitral awards in which arbitrators do not issue reasoned opinions or decisions.[3] This article explores some of the contours of this problem.

Collateral Estoppel—The Basics

In the interest of judicial economy and the conclusiveness of judgments, courts use the doctrine of collateral estoppel, or issue preclusion, to prevent an issue from being relitigated if it was actually litigated and necessary to the final judgment in a prior case. Collateral estoppel, "like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue . . . and of promoting judicial economy by preventing needless litigation."[4] Parties may be collaterally estopped from relitigating an issue if a four-part test is met: (1) the identical issue was raised in a previous proceeding; (2) the issue was "actually litigated and decided" in the previous proceeding; (3) the party against whom preclusion is sought had a "full and fair opportunity" to litigate the issue; and (4) the resolution of the issue was "necessary to support a valid and final resolution judgment on the merits." [5] Issue preclusion may be invoked in two key instances: (1) offensively, when a plaintiff seeks to preclude a defendant from relitigating an issue that was decided against that defendant in an earlier action; and (2) defensively, when a defendant seeks to prevent a plaintiff from relitigating an issue that the plaintiff has previously litigated and lost in a prior suit.[6] While early cases held that mutuality, or identity of parties, was necessary to invoke issue preclusion, more recent cases have held that the absence of mutuality is not fatal to the doctrine.[7] As long as the issue was identical in the prior proceeding, the parties need not have been the same.[8]

Sherene D. Hannon

Collateral Estoppel—The Changing Tide of Judicial Skepticism

Several decades ago, before ADR gained such popularity, courts were reluctant to grant preclusive effect to arbitral awards, particularly where statutory rights were at issue. In *Alexander v. Gardner-Denver*,[9] for example, the United States Supreme Court denied preclusive effect to an arbitral award. There, an employee filed a Title VII claim alleging that he was terminated based on racial discrimination but the arbitrator ruled that there was just cause for the termination.[10] Although the collective bargaining agreement between the defendant-employer and the plaintiff's union provided that the decision of the arbitrators was to be final and binding, the Court stated that an arbitrator has no general authority to invoke public laws that conflict with the bargain between the parties.[11] The Court noted a key difference between arbitrators and courts in that an arbitrator's task is to effectuate the intent of the parties rather than the requirement of enacted legislation.[12] The Court further emphasized that in light of the unions' control of individual employees' representation in the grievance process, arbitration in the collective bargaining context is an unreliable means of adjudicating individual rights.[13]

Similarly, in *Barrentine v. Arkansas-Best Freight System*,[14] a case brought pursuant to a collective bargaining agreement and the Federal Labor Standards Act (FLSA), the Court also declined to grant preclusive effect to an arbitral award on the ground that arbitral procedures may be less protective of individual statutory rights than are judicial procedures.[15] The Court noted that arbitrators do not have the authority to award actual

damages, liquidated damages or attorneys' fees under the FLSA.[16] The Court viewed the gap between arbitral and judicial proceedings as too wide to allow for collateral estoppel.

In an effort to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place agreements to arbitrate upon the same footing as other contracts, Congress enacted the Federal Arbitration Act (FAA).[17] The enactment of the FAA facilitated a change in courts' responses to arbitration as an alternative to judicial action. Courts have acknowledged the FAA as manifesting a liberal federal policy favoring arbitration agreements.[18]

While the Supreme Court has not made clear the continuing effect of *Gardner-Denver*, it has overturned *Gardner-Denver* to the extent that it stands for the view that arbitration is inferior to the judicial process for resolving statutory claims.[19] In *Gilmer v. Interstate/Johnson Lane Corporation*, the Court held that statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA.[20] In that case, a registered securities agent brought suit against his former employer alleging that he was terminated in violation of the Age Discrimination in Employment Act of 1967.[21] The Court found that because the plaintiff had agreed to arbitrate statutory claims, he was bound by his agreement unless he could establish, among other possibilities, an inherent conflict between arbitration and the statute's underlying purposes.[22] The plaintiff's assertions that his statutory rights were not protected adequately by arbitration were rejected by the Court on the ground that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[23] The Court also noted that the applicable New York Stock Exchange rules for arbitration required that the arbitration award be written, containing the names of the parties, a summary of the issues in controversy, and a description of the award issued.[24] Because they require detailed documentation of arbitrators' analyses, arbitral rules like those considered in *Gilmer* make it more likely that courts in subsequent litigation will grant preclusive effect to issues decided in arbitration.

As discussed above, over the past several decades, American courts have given increased deference to arbitral awards, even in the context of statutory claims. Individual federal rights claims, however, continue to be an area in which the courts maintain a paternal watch over the arbitral process.[25] In *McDonald v. City of West Branch*,[26] the Supreme Court held that the arbitration of an employee's discharge pursuant to a collective bargaining agreement should not be given *res judicata* or collateral estoppel effect in subsequent actions brought in federal court pursuant to 42 U.S.C. § 1983.[27] The Court there reasoned that (1) an arbitrator's expertise may not encompass the complex legal analysis required by 42 U.S.C. § 1983; (2) an arbitrator's authority to enforce 42 U.S.C. § 1983 is limited by the collective bargaining agreement, if the arbitrator's decision exceeds the scope of his/her authority; (3) tensions between the union's interest in arbitrating a discharge and the employee's individual interest under 42 U.S.C. 1983 may result in a less-than-vigorous assertion of the claim; and (4) arbitral fact-finding is generally not equivalent to judicial fact-finding, therefore, giving collateral estoppel effect to these findings is unfair.[28] Furthermore, no federal statute or judicially fashioned rule permits a federal court to accord *res judicata* or collateral estoppel effect to an unappealed arbitration award in a case brought under 42 U.S.C. § 1983.[29]

"While the Supreme Court has not made clear the continuing effect of Gardner-Denver, *it has overturned* Gardner-Denver *to the extent that it stands for the view that arbitration is inferior to the judicial process for resolving statutory claims."*

Another example of this more paternal approach is *Lynch v. Pathmark Supermarkets*,[30] where the court declined to give preclusive effect to an arbitral award in a Title VII case where the plaintiff alleged that he was terminated from his employment based on religious discrimination.[31] In that case, an arbitrator found "without hesitation" that there was just cause for plaintiff's dismissal due to his prior disciplinary history, and that plaintiff's allegations of harassment were unsubstantiated and incredible.[32] The district court noted that *Lynch* is a persuasive illustration of why *Gardner-Denver* enjoys continuing vitality.[33] Following the *Gardner-Denver* Court's reasoning, the district court emphasized that plaintiff's "long history of mutual antagonism with a great number of fellow employees 'gave rise' to reasonable suspicions that his representation in the arbitration hearing [by the Union] might have been less than vigorous."[34] Furthermore, the court found that the arbitrator's findings on the subject of religious discrimination were conclusory at best and that the record showed that the subject was barely mentioned during the proceeding.[35] The court concluded that these factors counseled against giving the arbitral findings preclusive effect.[36]

Collateral Estoppel in the Arbitral Context

The collateral estoppel effects of an arbitration award depend upon a variety of factors, including what issues were actually arbitrated and decided, how such issues are reflected in the award, the identity of the parties in the later proceedings and the discretion of the judges or arbitrators who are later asked to give preclusive effect to the award.[37] Commentators have suggested several factors for courts to consider in making such a determination, including the overlap in evidence, the law governing the proceedings and any similarities in pretrial preparation and discovery.[38] Some courts have even allowed parties to submit the entire arbitration record in the absence of a reasoned arbitral decision in order to establish that particular issues actually were arbitrated in the prior proceeding.[39]

Unlike participation in judicial actions, recourse to arbitration is consensual and contractual in nature, although the agreement is often made in advance of any dispute and without much forethought. The "bargain" or "meeting of the minds" in arbitration includes the possibility that issues may be precluded from being raised in a subsequent judicial or arbitral proceeding. In arbitration, the parties attempt to "trade the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration."[40] The parties' expectations regarding preclusion are thus "an integral part of the arbitration agreement and should be [a] primary focus of any preclusion analysis."[41]

"Unlike participation in judicial actions, recourse to arbitration is consensual and contractual in nature, although the agreement is often made in advance of any dispute and without much forethought."

Parties to arbitration are free to place express limits on the preclusive effects of an arbitration. An absence of factual findings by an arbitrator does not necessarily require that preclusion be denied in a subsequent proceeding.[42] The absence of factual findings or an explanation of the arbitrators' rationale, however, may render the basis of their decision ambiguous and therefore fatal to an application of the doctrine of collateral estoppel.[43] For example, to obtain summary judgment on collateral estoppel grounds, a party must make a showing so strong that no fair-minded fact-finder could fail to find that the arbitrator necessarily decided the claim for the reason(s) claimed. This is a heavy burden, and it cannot be met with equivocal evidence.[44] When arbitrators fail to make or adopt any findings of fact, courts may not infer the factual basis for the arbitrator's ultimate decision.

Importance of the Arbitral Rules Chosen

One of the perceived benefits of arbitration is that parties have the freedom to choose what rules will govern their proceeding. Arbitral proceedings generally are conducted in accordance with the rules of a supervising institution, such as the American Arbitration Association[45] or the International Chamber of Commerce.[46] The degree of protection which parties to arbitration will enjoy from the doctrine of collateral estoppel depends, in large part, on whether the rules they choose require reasoned arbitral awards.[47] Without reasoned awards, courts or institutions in subsequent proceedings often will be unable to decipher which particular issues were necessarily decided.

The AAA Commercial Arbitration Rules do not require a reasoned arbitral award. The form of the award simply must be in writing and signed by a majority of the arbitrators.[48] Parties who choose the AAA rules must be aware that issue preclusion may not protect them from subsequent duplicative litigation. The AAA Securities Arbitration Rules require a more elaborate award, which is to include the following:

> The award shall contain the names of the parties and representatives, if any, a summary of the issues, including type(s) of any security or product in controversy, the damages and/or other relief requested and awarded, a statement of any other issues resolved, a statement regarding the disposition of any statutory claim, the names of arbitrators, the date when the case was filed, the date of the award, the number and dates of hearings, the location of the hearings. The award shall be signed by the arbitrators concurring in or dissenting from the award.[49]

This type of formulation provides far more information with which courts in subsequent litigations may work. With such an award, courts may determine more readily which issues were actually arbitrated and therefore may give the award preclusive effect. This can result in a significant time and cost savings for all parties involved. If the arbitration agreement contemplated a final resolution of disputes between the parties, a reasoned award is critical to ensure that the intent of the parties is carried out.

The ICC Rules, which are widely used by parties to arbitration, require that the award shall state the reasons upon which it is based.[50] Other institutional rules which are commonly used in international arbitration

include the rules of the London Court of International Arbitration (LCIA)[51] and the International Center for the Settlement of Investment Disputes (ICSID).[52] The LCIA rules require a reasoned arbitral award, unless the parties agree otherwise.[53] The ICSID rules are among the few sets of rules that require a reasoned arbitral award without qualification.[54]

Conclusion

The use of ADR is directly linked to perceived cost savings, confidentiality and the absence of judicial formalities. The doctrine of collateral estoppel, however, places some significant limitations on the extent to which parties to arbitration may be able to enjoy those perceived benefits. In an effort to minimize the so-called judicialization of the arbitral process and to maximize the autonomy of the parties involved, arbitral institutions have left the notion of reasoned awards largely untouched. With this autonomy, however, comes a substantial risk of being forced to relitigate issues that were already arbitrated. Parties to arbitration must be cognizant of these risks in order to maximize the benefits of the ADR process. While a conclusory arbitral award may appear to preserve confidentiality and to be more efficient, it can be disastrous if it leads to duplicative and costly litigation.

Endnotes

1. *See Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985).
2. *See id.*
3. *See, e.g.*, *Guetta v. Raxon Fabrics Corp.*, 123 A.D.2d 40, 510 N.Y.S.2d 576, 578 (1987).
4. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 (1979) (citing *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313, 328-329 (1971). In fact, New York law specifically exempts arbitrators from any obligation to give reasons for their decisions or issue findings to set forth specifically the particular issues decided. As early as 1897 the importance of issue preclusion was described by the first Justice Harlan:

   > The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.

   Southern Pac. R. Co. v. U.S., 168 U.S. 1, 48-49 (1897).
5. *Boguslavsky v. Keplan*, 159 F.3d 715, 719 (2d Cir. 1998) (citing *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 91 (2d Cir. 1997); see also *Ufheil Constr. Co. v. New Windsor*, 478 F. Supp. 766, 768 (S.D.N.Y. 1979), *aff'd*, 636 F.2d 1204 (2d Cir. 1980) (citing *Schwartz v. Public Admin'r of Bronx County*, 24 N.Y.2d 65, 71 (1969)).
6. *See Parklane*, 439 U.S. at 324 (1979).
7. *See, e.g.*, *Parklane*, 439 U.S. 322 (1979); *Blonder-Tongue,* 402 U.S. 313 (1971); *Triplett v. Lowell*, 297 U.S. 638 (1936).
8. *See Norris v. Grosvenor Mktg. Ltd.*, 803 F.2d 1281, 1286 (2d Cir. 1986).
9. 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974).
10. *Gardner-Denver*, 415 U.S. at 42.
11. *Id.* at 53.
12. *See id.*
13. *See id.*
14. 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981).
15. *Barrentine,* 450 U.S. at 744.
16. *See id.* at 745.
17. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); 9 U.S.C. §§ 1, *et. seq.*
18. *See Gilmer*, 500 U.S. at 25.
19. *See id.* at 34 n.5 (citing *Shearson/American Exp., Inc. v. McMahon*, 107 S. Ct. 2332, 2340).
20. *See id.* at 26.
21. *See id.* at 23-24.
22. *See Gilmer,* 500 U.S. at 26.
23. *Id.*, (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628).
24. *See Gilmer*, 500 U.S. at 31, citing 2 N.Y.S.E. Guide ¶¶ 2627(a), (e), at 4321 (Rules 627(a), (e)).
25. *See, e.g.*, *McDonald v. City of West Branch*, 466 U.S. 284 (1984).
26. 466 U.S. 284 (1984).
27. *See id.* at 289-92.
28. *See id.*
29. *See Dean Witter*, 470 U.S. at 222 (citing *McDonald*, 466 U.S. 284).
30. 987 F. Supp. 236 (S.D.N.Y. 1997).
31. *See Lynch*, 987 F. Supp. at 242.
32. *Id.* at 240.
33. *See Id.* at 242.
34. *Id.*
35. See *Lynch,* 987 F. Supp. at 241.
36. *See id.* at 242.
37. *See Dean Witter Reynolds*, 470 U.S. at 223.
38. *See* Michael R. Knoerzer, *Collateral Estoppel and Arbitration: Courts Delegate A New Obligation to Arbitrators*, Mealey's Litigation Reports: Reinsurance, March 12, 1997.
39. *See BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 677 (2d Cir. 1997).
40. *Sacks v. Richardson Greenshield Securities, Inc.*, 781 F. Supp. 1475, 1478 (1991).
41. G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 U.C.L.A. L. Rev. 623, 661 (1988).

42. *See Ufheil*, 478 F. Supp. at 768; *Farkar Co. v. R.A. Hanson Disc., Ltd.*, 441 F. Supp. 841, 844 (S.D.N.Y. 1977), *modified*, 583 F.2d 68 (2d Cir. 1978). For example, even absent factual findings, plaintiffs may not avoid collateral estoppel simply by basing their claims in a subsequent action on legal theories different from those asserted in prior arbitration. *See Norris*, 803 F.2d at 1286. In such a case, a plaintiff would not be shielded from collateral estoppel because liability is premised on the same issues in both proceedings. *See id*.

43. *See Ufheil*, 478 F. Supp. at 768-769 (finding the rationale of the arbitrator's award ambiguous in the absence of factual findings and presence of multiple claims).

44. *See BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 677 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L.Ed 2d 202 (1986)).

45. The AAA is a non-profit organization with headquarters in New York City and regional offices throughout the United States. It supervises the majority of domestic commercial, construction and securities arbitrations.

46. The ICC is the primary arbitral institution for international commercial arbitrations. Its headquarters are in Paris, France. The institution's rules generally provide for: (1) the constitution of the arbitral tribunal; (2) the establishment of the submission or the tribunal's terms of reference; (3) the selection of an arbitral trial procedure; (4) the conduct of the proceedings; (5) the closure of the proceedings; (6) the tribunal's deliberations; and (7) the rendering of an award.

47. Arbitration in an international setting is even more uncertain due to the application of local laws and customs. Parties must contend with local court systems and treaty frameworks applying to cross-border judgments and awards. The case law on issue preclusion and foreign judgments is in conflict. Some American courts have held that the law on issue preclusion of the country that rendered the prior judgment should determine that judgment's preclusive effect in subsequent litigation in the United States. See Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 Iowa L.Rev. 53 (1984). Other courts, however, have found that foreign judgments should be given the same preclusive effect as domestic judgments. See *id.* at 54. Parties to international arbitration must be particularly cognizant of the importance of the rules they choose to govern their proceedings.

48. AAA Commercial Arbitration Rules, s. R-44 (September 1, 2000).

49. AAA Securities Arbitration Rules, s. 6(a) (July 1, 1999).

50. ICC Arbitration Rules, International Court of Arbitration, Article 25(2) (January, 1, 1998).

51. The LCIA is one of the major institutions which administers international arbitrations. LCIA is somewhat similar to and competes with the ICC.

52. The ICSID, like the LCIA, is a major international arbitration administrator. ICSID provides for the most transnational form of arbitration. It handles investment disputes between host states and private investors.

53. Article 26 of the LCIA Rules reads, in pertinent part, as follows: The Tribunal shall make its award in writing and, unless all parties agree otherwise, shall state the reasons upon which the award is based. LCIA Arbitration Rules, Article 26, s. 26.1 (January 1, 1998).

54. ICSID Arbitration Rules, Chapter IX, Article 53(1), at http://www.worldbank.org/icsid (last visited June 8, 2001).

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The Proposed Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments

By Ted G. Semaya

Purpose of this Article and Series

Your client, a company based in the United States, comes to you with a claim against an Italian company. You believe you can obtain jurisdiction here under your state's long-arm statute, but the only place where there are sufficient assets that could satisfy a judgment is in Italy. Even if the size of the judgment warranted the expense, the likelihood of your judgment being recognized and enforced in Italy would be quite low.[1] Now, what if the world were different, and you knew that your federal or state judgment would be recognized and enforced in Italy? You would proceed with your action and your client would continue to do global business with confidence, right?

But what if the trade-off for global enforceability of your judgment were changes in the jurisdictional bases required in international cases? What if, in this new world, your client comes to you for advice about a claim made in a French court against it by a consumer in France who is unhappy with something he purchased online? Your client contemplates exposure in courts around the world and asks you how it can stay in business.

The first scenario is an example of what the United States wanted to fix when it proposed an international convention on the recognition and enforcement of judgments. The latter scenario is one of the nightmares that threatens to derail such a convention. Both, while oversimplified, could take place under the current draft of a convention that the Hague Conference on Private International Law is negotiating.

The proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters would create jurisdictional rules governing international legal actions and would provide for recognition and enforcement of judgments by the courts of Contracting States.

The purpose of this article is to introduce the proposed convention to you as well as the reasons it has been proposed and the issues it has raised. In other articles in this and subsequent issues of the *NY Litigator*, members of the Section's International Litigation Committee examine some of these issues in the interest of informing debate about them and about the proposed convention as a whole.

The Origin of the Proposed Hague Judgments Convention

The United States is not a party to any treaty providing for the recognition and enforcement of United States judgments in other countries or for the recognition and enforcement of foreign judgments in the United States.[2]

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards[3] is well-known and has been used worldwide for some time, as has the 1975 Panama Convention in the Americas.[4] Foreign arbitral awards may now be enforced in the more than 120 states that are parties to the New York Convention. However, a worldwide agreement on a convention for the recognition and enforcement of foreign judgments, predictably, has proved much more difficult to attain. In 1971, the Hague Conference produced a simple, one-dimensional convention that governed only the recognition of judgments, and it relied on bilateral implementation; that is, each country was to specify which other countries' judgments it would enforce under that convention.[5] Few states signed on, however, so it has had no practical effect.

Efforts to reach a bilateral treaty between the United States and the United Kingdom in the 1970s also proved unsuccessful due to the opposition by the United Kingdom insurance and manufacturing industries. This opposition stemmed from concerns about United States product liability laws, what was (and is) perceived as expansive long-arm jurisdiction doctrines, high jury verdicts and punitive damages.

Only Europe has achieved an effective legal framework for the recognition and enforcement of foreign court judgments. This framework consists of the 1968 Brussels Convention,[6] covering European Union member states, and the 1988 Lugano Convention,[7] which extended the Brussels Convention to the European Free Trade Association member states (the European Union plus Iceland, Norway and Switzerland[8]).

The Brussels Convention provides for virtually automatic recognition and enforcement of the judgments of member states (having been inspired by the United States Constitution's Full Faith and Credit Clause). To reach this agreement, the Brussels Convention is a "double" or two-dimensional convention. It

addresses not only the recognition and enforcement of judgments, but also the permissible basis of territorial jurisdiction. Thus, member states can respect each others' judgments because they know the Brussels Convention restricts the jurisdiction of each member state.

Among its progressive features, the Brussels Convention prohibits its members from exercising unduly expansive jurisdiction against domiciliaries of other member states. So, for example, France gave up jurisdiction based solely upon the plaintiff's French nationality. Also, the convention makes mandatory the permissible bases of jurisdiction, so that, for example, when it applies, an English court cannot decline jurisdiction on discretionary grounds.

However, these features of the Brussels Convention have made things worse for the United States. Recognition and enforcement under the Brussels Convention do not extend to judgments of courts in non-signatory countries. Thus, a French court can assert jurisdiction over a New Yorker with no contact with France, for example, who had a car collision in New York with a visiting citizen of France. Moreover, the French judgment would be entitled to recognition and enforcement against the New Yorker's property in England. If the situation were reversed (i.e., the accident occurred in New York), there could be no New York judgment, and, even if there could be a New York judgment, it would not be enforceable in France or England.

Pursuant to *Hilton v. Guyot*,[9] foreign judgments are generally enforced in the United States provided they and the judicial systems that issue them satisfy certain due process requirements. Thirty states and the District of Columbia have adopted the Uniform Foreign Money Judgments Recognition Act,[10] which sets forth similar requirements. Only a few states require reciprocity to enforce a foreign judgment. That is, they will not enforce a foreign judgment unless a judgment of the state court would be enforceable in the foreign jurisdiction. The absence of a reciprocity requirement by a great majority of United States jurisdictions is why it is generally easier to enforce a foreign judgment in the United States than to enforce a judgment of a United States state or federal court in a foreign court.

In light of the failure of previous attempts, and because United States judgments were and are often not accorded the same generous enforcement abroad that foreign judgments enjoy in the United States, the United States proposed to the Hague Conference, in 1992, a project for a multilateral judgments convention. The United States State Department had determined that an inter-governmental institution would offer a forum most likely and most efficiently to lead to a multilateral convention that would be broadly accepted.[11] It chose the Hague Conference based upon the Conference's experience and success in preparing international legal conventions, its broad membership of countries from all parts of the world and the U.S.'s belief that it could successfully prepare such a convention.[12]

In 1996, after several meetings on the subject, the Hague member states[13] included in the agenda for its Nineteenth Session the question of jurisdiction and recognition and enforcement of foreign judgments in civil and commercial matters. Given the asymmetry favoring enforcement of foreign judgments in the United States, one might ask what benefit the other members of the Hague Conference saw in the proposed convention. One United States delegate, Peter Trooboff, expressing a broadly held view, says that their principal objective has been to clarify and, if possible, limit United States' jurisdictional rules.[14] In particular, he says, they wish to prohibit United States courts from asserting jurisdiction over non-United States defendant companies and residents that conduct commercial activities in a state that satisfies United States minimum contacts standards, but do not have the physical presence generally required by civil law rules.[15] (As discussed below, this basic difference over activity-based jurisdiction remains a key sticking point.)

In the Hague Conference's quadrennial process, the Nineteenth Session was scheduled for October, 2000. Due to the great difficulty in negotiating the proposed convention, however, that schedule has been extended at the behest of the United States. The final diplomatic session has been divided into two parts. An informal working session of the Special Commission of the Hague Conference, which had been working on the proposed convention since 1996, took place at the Hague last June. A two-day meeting has been scheduled for January, 2002, to discuss the future course of negotiations. At the time of this writing, a formal diplomatic session to consider adoption of the proposed convention is not expected to take place before late 2002.

There have been several working sessions of the Special Commission, and meetings of subgroups of delegates, on various issues over the past five years. Earlier this year, the Hague countries were engaged in frequent, informal meetings to attempt to narrow their differences and plan the June negotiating session. The United States State Department and the United States delegation have continually sought input from the practicing bar and from businesses and other groups, with the aim of achieving a convention that would actually work and serve the needs of litigants.

Early on, interest was limited largely to government, diplomatic and academic circles. In the past few years, however, as a draft convention was circulated, and as intellectual property and e-commerce issues in international disputes have exploded, interest has picked up dramatically—so much so that now international organizations, business groups, consumer groups

and others have begun to attend special meetings set up by the Special Commission, by other organizations such as the World Intellectual Property Organization, by government agencies such as the United States Copyright Office, the United States Patent and Trademark Office and the Federal Trade Commission, and Congress. Additionally, the American Law Institute has commenced a project to develop the implementation of legislation in the United States.[16]

Most recently, the United States Patent and Trademark Office is taking an additional round of comments on the intellectual property aspects of the draft convention.[17] Also, the European Commission was expected to have a public consultation on the proposed convention on October 24, 2001.[18]

Structure of the Draft Convention

The Special Commission, after meeting for several years and generating several working documents,[19] released a first preliminary text of the convention in October, 1999 (1999 Draft).[20] The October, 1999 draft was modeled, to a large extent, on the Brussels Convention. In fact, one of the main sources of tension among the member states is that most of the civil law members wanted the Hague Judgments Convention to be as much like the Brussels Convention as possible.

The 1999 Draft adopted choices regarding jurisdiction that had great discrepancies with current United States jurisdictional practices, and it was not considered by the United States delegation to be an effective vehicle for achieving a convention to which the United States could become a party.[21] Nevertheless, an important step was taken in that first draft. Most of the civil law countries participating had envisioned a "double" convention, like the Brussels Convention, in which are listed bases of jurisdiction which the courts of treaty states would be directed to apply and as to which enforcement of the resulting judgments based on them is required ("required" or white list), and specifying certain grounds that courts could not apply to entities and individuals from Contracting States and upon which bases judgments could not be enforced ("prohibited" or black list).

The 1999 Draft added a third category (Article 17) besides prohibited (Article 18) and the various required bases of jurisdiction. A Contracting State would be permitted to exercise jurisdiction and to determine whether to enforce judgments under provisions of its national law ("permitted" or grey list). Judgments based upon a grey list basis of jurisdiction would be reviewed for enforcement by the addressed jurisdiction outside of the convention, under its national law.

The addition of the "permitted" list makes the convention a "mixed" convention, rather than a pure double convention. This was the structure advocated by the United States and was necessitated by the goal of controlling jurisdiction, as in the Brussels Convention, while recognizing that consensus as to what bases should be prohibited or mandated would not be possible among a large number of countries with diverse legal systems and cultures. For the same reason, the 1999 Draft also diverges from the Brussels model in that it makes no provision for a final authority comparable to the European Court of Justice.

The most recent, June, 2001, meeting of the Special Commission produced a new document, the 2001 Interim Text.[22] The 2001 Interim Text is a long compilation that documents consensus, as it currently exists, and presents variants, proposals and options where there is no consensus. It contains extensive footnotes throughout describing the state of agreement or disagreement on each clause as well as further considerations and variants and references to competing proposals appended to the end of the text.

One of the primary questions in the continuing negotiations has been which jurisdictional grounds belong on which list. Obviously, the more bases of jurisdiction that are on the required list, the greater a party's ability will be to enforce judgments abroad. If few bases of jurisdiction secure the consensus needed to be placed on the required list, then the utility of the convention may fall into question.

What follows are brief discussions concerning some of the key provisions of the proposed convention that are now being debated, the competing views regarding these provisions and references to more detailed information.

Provisions of the 2001 Interim Text

Scope

The phrase "civil and commercial matters" is, of course, very broad and subject to various interpretations. In its first provision (Chapter on "Substantive Scope," Article 1(1)), the 2001 Interim Text says it does not extend to revenue, customs or other administrative matters. Beyond that, certain subject areas that might be considered to fit within the broad subject matter of the proposed convention are specifically excluded (Article 1(2)). For example, the proposed convention does not apply to wills and succession,[23] family law, insolvency, admiralty and maritime or arbitration and related proceedings. The 2001 Interim Text proposes to add antitrust (but not unfair competition) matters as a general consensus item to the excluded list.[24] (An attempt to limit antitrust jurisdiction in the 1999 Draft was characterized by the United States as "a certain bar to U.S. acceptance of the Convention."[25]) As many of the delegates try to narrow the scope of the proposed convention to increase its prospects for acceptance, other sub-

ject areas have been proposed for exclusion, including provisional remedies. Like the debate over the required jurisdiction list, the "scope" debate expresses the tension between acceptability and utility.

Jurisdiction

The terms "general" and "special" jurisdiction have been used to distinguish between the basic jurisdiction provision applicable to all claims and the various provisions addressed to specific types of claims.

1. General Jurisdiction (Article 3)

As to natural persons, any claim may be brought against a person in the state where the defendant is "habitually resident." There remain some questions about the meaning of that term, and proposals have been made to define it. Generally, it refers to the state in which the defendant maintains his or her sole or principal residence.

As to legal entities, they may be sued in their state of incorporation or formation, or where they have their statutory seat, central administration or principal place of business. In the 1999 Draft, the defendant's appearance without protest also was a ground of general jurisdiction. This provision has now been redrafted (Article 27A) and moved to the chapter of the draft convention dealing with recognition and enforcement, where such appearance precludes the interposition of the defense of lack of jurisdiction in the court of origin in the court being asked to recognize and enforce the judgment.

2. Choice of Forum (Article 4)

Forum selection clauses will confer exclusive jurisdiction where they so provide and will be respected when a non-Contracting State's courts are chosen. The clause is not intended to confer subject matter jurisdiction upon a court where it would not otherwise exist and there remains a question about how the court, faced with such a clause, should determine the substantive validity of the choice of forum agreement.

3. Special Jurisdiction (Articles 6 through 15)

Contracts

There has not yet been a consensus on the jurisdictional bases for contract actions, and the overriding, intertwined issues of intellectual property and electronic commerce have complicated this area even more. The primary flashpoints are: (1) the difference between the civil law focus on the place of performance and the activity-based analysis used, for example, in the "doing business" and minimum contacts concepts applied in United States jurisdictions; and (2) the clash of industry interests in applying contract jurisdiction concepts to electronic commerce cases.

As to the debate between performance-based and activity-based concepts, both are in the 2001 Interim Text. They are presented as alternatives. The 1999 Draft provided only for a place of performance standard, which the United States viewed as a non-starter.[26] The 2001 Interim Text provides two variants for defining the "activity" which the defendant must have conducted in or directed into the forum. "Variant 1" limits the relevant activity to promotion, negotiation and performance. "Variant 2" includes those forms of activity, but is not limited to them.

Some of the alternative standards do not extend jurisdiction to the constitutional limits of minimum contacts. This affects the usefulness and desirability of the convention for certain United States parties, but would not appear to present a serious problem.

On the other hand, the place of performance alternative standard (Alternative B) would permit jurisdiction to be exercised in the plaintiff's home forum, where the defendant supplied goods or services in that state to the plaintiff, or where performance of the contract took place in whole or part. As discussed in the article by Stephen Orel in this issue of the *NYLitigator*, this and other provisions in the 2001 Interim Text could conflict with established Supreme Court interpretation of the Due Process Clause of the Constitution, and of states' interpretations of their respective due process clauses. As Orel observes, the prevailing view is that the adoption of such provisions in the final version of the convention would present an insurmountable obstacle to ratification by the United States. He notes, too, however, there is room for debate at least as to whether some adjustment to United States rules on personal jurisdiction could be made to achieve the benefits of the convention.

Protected Classes

The 1999 Draft contained special provisions for the protection of consumers (Article 7) and employees (Article 8). Though somewhat oversimplified, the consumer contract article provides, essentially, that consumers could sue merchants in the consumer's state of habitual residence, and that a merchant could sue a consumer only in the state where the consumer was habitually resident. Similarly, the employment contract article provides that employees could sue employers in the state where the employee worked, and a claim against an employee by an employer could be made only in the state where the employee was habitually resident or where he worked. The United States opposed both provisions, saying it was excessive to regulate national consumer and employment policy in a worldwide convention—again trying to put too much of the Brussels Convention into the proposed Hague convention.[27] Of course, the provisions, following jurisdictional rules with which Europeans are familiar, could easily support

assertions of jurisdiction that violate due process as it is understood in the United States. Even more, the consumer contract provision has terrorized and outraged Internet retailers. As *The Wall Street Journal* reported last summer, the provision was opposed on the ground that "It would allow every business to be dragged into court everywhere."[28]

The 2001 Interim Text contains changes and proposes alternatives to Article 7, but has not mollified its critics. There is no shortage of proposed permutations. As its drafters explain, the Article "consists of the first four common paragraphs with three different alternative solutions (including two variants of the second alternative)."[29] Among the proposed changes is an attempt to narrow the definition of consumer contracts, a provision denying jurisdiction where the merchant "took reasonable steps to avoid concluding contracts with customers habitually resident in the State,"[30] and allowing some circumstances in which a pre-dispute forum selection agreement could be enforced by the merchant.[31] These proposed alternatives predictably upset consumer advocacy groups. Perhaps the clearest proposal, and the one with adherents from several points of view, is to exclude consumer contracts entirely from the scope of the convention.

4. Branches and Transacting Business Jurisdiction (Article 9)

The 2001 Interim Text provides for jurisdiction over branches, agencies or other establishments of a defendant, with no restriction as to the nature of the claim, but with a requirement that the dispute relate directly to the activity of the subject branch, agency or other establishment. Before the release of the 2001 Interim Text which added activity-based alternatives for general contract jurisdiction (Article 6), discussion of this transacting business provision focused on the bracketed language that added as a jurisdictional basis "where the defendant has carried on regular commercial activity" (by means other than branch, agency or other establishment). It remains important because the fate of general contract jurisdiction and activity-based jurisdiction elsewhere in the draft convention (e.g., Article 10 (Torts)) is unclear, and because this Article would also be useful in tort, quasi-contract and other types of actions in which transacting business jurisdiction is used in United States jurisdictions. The co-reporters have stated there should be no concern that this article could become a basis for the assertion of jurisdiction based upon such activity as maintaining the availability of a Web site, since the provision requires that the activity be carried on in the state, not merely directed to the state.[32] Others commenting on the provision were not so sure.[33]

5. Torts (Article 10)

The basic provision for tort jurisdiction (Article 10(1)) did not change between the 1999 Draft and the 2001 Interim Text. It requires that tort actions be brought in the state (1) in which the act or omission that caused injury occurred or in which the injury arose; or (2) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in the state.

The 2001 Interim Text introduces a proposed provision for activity-based jurisdiction similar to the one proposed in the contract article (Article 6, Alternative A, Part 1), including a requirement echoing our current due process jurisprudence that the overall connection of the defendant to the state makes it reasonable that the defendant be subject to suit in the state.[34] It also provides a proposed protective provision, similar to that in one of the contract variants, denying tort jurisdiction where the defendant "has taken reasonable steps to avoid acting in or directing activity into that State."[35]

Here, again, as with the consumer contract provisions, the greatest concern relates to electronic commerce. As to this provision, however, the primary concern is expressed by content providers and Internet service providers who fear global liability for information-related torts such as defamation and hate speech that might be enforced outside the United States under laws of Contracting States with a narrower view of free speech. They see the threat developing in cases like the ruling of a French court last year that ordered Internet service provider Yahoo!, a corporation organized under the laws of Delaware with its principal place of business in California, to "render impossible" access by persons in France to certain content (posting of Nazi-related propaganda and memorabilia by end-users) on servers based in the United States.[36] Generally, the issue of where the tort occurred is complicated and unresolved in the electronic commerce context.

6. Exclusive Jurisdiction—Intellectual Property

Article 12 of the 2001 Interim Text provides for exclusive jurisdiction to determine certain matters to be vested in a Contracting State with a specific relationship to that matter. For example, it is proposed that exclusive jurisdiction for proceedings regarding rights *in rem* in immovable property or tenancies of immovable property be vested in the courts of the state in which the property is located (Article 12(1)). There is no consensus on this provision; it has also been proposed to exclude this subject from the convention.

The proposals for exclusive jurisdiction regarding intellectual property in Article 12 have attracted as much attention and controversy as any provision of the draft convention. The 1999 Draft addressed proceedings regarding the validity of patents, trademarks, designs and similar rights, providing the courts of the Contracting State in which deposit or registration had been

made or applied for would have exclusive jurisdiction. Alternative language added infringement actions to the exclusive jurisdiction. The provision was heavily criticized and there was strong sentiment to exclude this subject matter from the proposed convention entirely.[37] The United States has said it does not have firm views on the electronic commerce and intellectual property provisions and has sought to ensure all interests would be heard.[38]

The 2001 Interim Text sets forth two alternatives for treating patents, trademarks and, possibly, other types of intellectual property. The main difference between the two is that one provides for exclusive jurisdiction over infringement actions and the other does not. The first alternative creates exclusive jurisdiction for disputes over the grant, registration, validity, abandonment, revocation or infringement of a patent or trademark in the state of registration. In the case of unregistered marks, exclusive jurisdiction would be in the state in which the rights arose. The second alternative would create exclusive jurisdiction for disputes over the grant, registration, validity, abandonment or revocation of a patent or trademark. As to infringement actions, however, any court having "required list" jurisdiction could entertain them.

Article 12 also sets out related provisions proposed for further discussion. The most significant one creates an exception, as the previous draft did, for incidental questions which are defined to arise when "the court is not requested to give judgment on that matter, even if a ruling on it is necessary in arriving at a decision."[39] For example, the validity or infringement of a trademark might have to be determined to adjudicate a claim for breach of contract. It is provided that a determination of such an incidental question should have not binding effect in subsequent proceedings, even between the same parties.

Proposed Paragraph 7 would extend the treatment of Article 12 to other registered intellectual property rights, and includes a further option to include or exclude copyright "or neighboring rights" from such treatment. Copyright and neighboring rights had been excluded from the exclusive jurisdiction provision in the 1999 Draft.

The reaction to date to the current Article 12 proposals has run the gamut among industry and consumer groups, legal scholars and bar associations. Some oppose the convention entirely. Others wish only to exclude intellectual property from it. Others believe the convention is not worth having unless it includes intellectual property law. Marc Hankin, Chair of the American Bar Association Intellectual Property Law Section Ad Hoc Committee on the Proposed Hague Convention, wrote with approval of the proposal as it was discussed during the June 2001 session, to treat infringement and validity together and to provide for exclusive jurisdiction "in the court of the country in which, or for which, the rights are granted or registered or could be registered."[40] He said the proposal "enabled the various IP bar associations and industry groups within the United States to break the logjam and come to a consensus. . . .[41] Hankin believes the convention is a net benefit to intellectual property owners (1) making it easier for United States intellectual property owners to obtain jurisdiction over infringers in other countries, leading to more complete resolutions of disputes; and (2) enabling enforcement of United States judgments in foreign countries "as monetary damages are being awarded more frequently in trademark suits and many patent infringers try to hide behind the cloak of domestic sovereignty."[42]

On the other pole, James Love, director of the Consumer Project on Technology, one of the severest critics of the draft convention, argues that among other evils, it opens the door for cross-border enforcement of a wide range of intellectual property claims, including new and novel rights that do not have broad international acceptance.[43] As *The Economist* put it, "what if your invention (or business model, or software algorithm) is stolen and patented by a rival in a foreign country with a lax patent regime? You could then be sued for patent violations in that country, and the judgments could be enforced against you at home."[44]

Of course, whether and how intellectual property rights should be included in the convention depends on one's interests. Intellectual property rights holders, such as movie and record companies and publishers want to be able to enforce copyright infringement judgments against pirates in countries where it is difficult to obtain such judgments.[45] On the other hand, telecommunications companies want copyright excluded from the convention because they fear they could be sued by copyright owners who claim their material is being illegally distributed over the networks.[46]

The lack of consensus over how to treat intellectual property claims has prompted a proposal for a separate treaty on jurisdiction and recognition of judgments in such matters.[47]

7. Prohibited Bases of Jurisdiction (Article 18)

Article 18 proposes to prohibit jurisdiction (the black list) generally where there is a lack of substantial connection between the forum and the dispute (or, it is proposed, the defendant), and specifically prohibits certain bases of jurisdiction. It does not simply prevent recognition and enforcement of a judgment based upon prohibited grounds. It prohibits the assertion of jurisdiction by one Contracting State over a defendant habitually resident in another Contracting State. Thus, if the United States were a Contracting State, federal and state

courts would be prevented from asserting jurisdiction over certain defendants in certain circumstances where such jurisdiction currently is available.

The two issues that most concern the United States in this area are "doing business" and "tag" jurisdiction. As discussed above, the 2001 Interim Text added proposed alternative bases for specific jurisdiction over contracts and torts, which could come close to the minimum contacts-based "doing business" jurisdiction familiar to attorneys in the United States. Many delegations, primarily from civil law jurisdictions, remain uneasy regarding "doing business" jurisdiction, and it remains as a proposed item on the black list.[48] The inclusion of "doing business," or a business-activity-based general jurisdiction very close to it, remains a pivotal issue for the United States.

The elimination of "tag" jurisdiction by the proposed convention appears likely, and therefore, squarely presents the question of whether its elimination is a price worth paying. Tag jurisdiction is exercised by the personal service of process on a defendant based upon only the defendant's presence, however transient, in the jurisdiction. It is prohibited, not proposed to be prohibited, by the current language of Article 18.[49]

An exception is provided to the prohibition against tag jurisdiction for certain human rights litigation (Article 18.3). This exception was added at the urging of human rights advocates who pointed out the increasing use of tag jurisdiction upon alleged perpetrators of human rights abuses when they travel into common law countries that recognize tag jurisdiction. Tag jurisdiction would still be available for domestic cases.

8. Other Jurisdiction Issues

This summary does not discuss all bases of special jurisdiction set forth or proposed in the 2001 Interim Text. Major provisions not discussed here include claims involving jurisdiction over trusts (Article 11) and provisional and protective measures (Article 13). Article 13 proposes alternative measures authorizing either only a Contracting State with white list jurisdiction, or, alternatively, any Contracting State, to order measures to maintain the status quo, protect the claim, secure assets for a potential judgment or avoid harm. Positions and proposals range from full recognition and enforcement of such measures to exclusion from the scope of the convention.

The Jurisdiction Chapter of the proposed convention also sets out rules for parallel proceedings (Article 21) and for declining jurisdiction in exceptional circumstances (Article 22), the latter being a version of *forum non conveniens*, a concept disfavored by the civil law jurisdictions. Thus, the draft compromises by making the rigid *lis pendens* rule of civil law tradition the default rule while providing for the more flexible common law exercise of judicial discretion to decline jurisdiction in exceptional, prescribed circumstances. The *lis pendens* provision (Article 21) applies to "proceedings based on the same causes of action" and provides a first-to-file rule. That is, the second court seized is to decline jurisdiction when presented with a judgment rendered under the convention from the first court seized. The rule does not apply to actions requesting a finding of non-liability, and can be overridden if the plaintiff has failed to pursue the action in the first court if the first court has not rendered a decision within a reasonable time. The *forum non conveniens* provision (Article 22) permits a court, upon the application of a party, to suspend and ultimately decline jurisdiction if a court of another state has jurisdiction and is clearly more appropriate in the view of the first court (upon consideration of certain enumerated factors). This provision does not apply where the court has exclusive jurisdiction under the Convention.

Recognition and Enforcement—Damages

As noted above, it was, in large part, the issue of recognition and enforcement of punitive and treble damage judgments and perceived high compensatory damage judgments that thwarted the proposed bilateral treaty with the United Kingdom in the 1970s. The 2001 Interim Text addresses these issues in its Article 33 on damages. According to the notes to the text, the article has been approved by consensus.

The article provides that: "A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognized and enforced to the extent that a court in the State addressed could have awarded similar or comparable damages. . . ."[50]

This provision would appear to apply also to multiple damage judgments such as are authorized in United States antitrust, securities and environmental statutes. In a recent survey on foreign recognition of United States money judgments, most of the countries surveyed were found not to enforce United States judgments for multiple or punitive damages.[51] Thus, under the 2001 Interim Text, such United States judgments generally would not be enforced. Few believed a convention could be negotiated that would require enforcement of punitive or multiple damages. It appears that if a final text is adopted, the United States will have to decide whether to ratify a convention that does not provide for such enforcement.

Potentially more problematic is the similar treatment accorded to compensatory damages considered to be "grossly excessive damages." Article 33 provides that the addressed court can hold a hearing and determine that grossly excessive damages have been awarded. Based on such a finding, the addressed court could limit

the judgment to a lesser amount, as low as the amount which could have been awarded in the same circumstances in its jurisdiction (Article 33(2)). The term "grossly excessive damages" is not defined, but the addressed court is directed to consider the circumstances in the state of origin in making the determination, among other circumstances.

A note to the provision says the co-reporters indicated Article 33 would apply to statutory damages, liquidated damages and fixed interest on damage awards, and that the addressed court would determine whether the statutory or contract provision in question was compensatory or punitive.

Concern has been expressed that this could be a back door to a review of the merits by the addressed court, and that such review is prohibited by the draft convention.[52] It has been suggested that if such a device is necessary to address the concerns of other jurisdictions about excessive jury awards, the standard to determine whether a judgment is grossly excessive should be based on the damage standards where the plaintiff is habitually resident. That might or might not be the court of origin.

These provisions restricting punitive and multiple damages and excessive compensatory damages obviously limit the utility of the proposed convention for many United States-based plaintiffs. The question, as always, is whether such limits are a reasonable price to pay for the benefits of the convention. Some say the excessive damages restriction is too high a price.

Bilateralization and Judicial Impartiality

It has been proposed that the convention be "bilateralized," like the 1971 convention. Bilateralization originally was seen as a cure for two major ailments of the proposed convention. First, it would avoid the need for agreement on the more difficult issues, permitting the draft convention to act as a basis for bilateral treaties within which the problem area would be more manageable. The United States, as discussed above, preferred a true multilateral treaty, and the Special Commission, to its credit, tackled the tough issues and has made progress on many of them.[53]

The second problem that bilateralization is intended to cure remains, however. That is, the existence of courts that are corrupt, biased or not independent of the executive function of their state. Looking down the list of Hague Conference member states, or, for that matter, looking at all states to whom the proposed convention would be open for accession, it is not hard to find jurisdictions in which automatic enforcement of the judgments of their courts might give one pause. Being able to pick the states whose judgments you will enforce could eliminate such unpleasantness. Others say it is the bilateralization provision that doomed the 1971 convention and the mistake should not be repeated. In this view, issues of judicial independence should be addressed on a case-by-case basis under the grounds for refusal of recognition or enforcement (Article 28) which should be robust enough to avoid recognition or enforcement in appropriate cases. In such an arrangement, the heavy lift would likely be provided by the public policy exception,[54] which is discussed below.

The 2001 Interim Text includes two alternative proposals in Article 42 to facilitate discussion of bilateralization. Alternative A provides for the deposit of declarations by pairs of Contracting States of their treaty relations under the convention. Alternative B provides the Convention would be open for signature by Hague Conference member states and for accession by any other state. It provides, further, that any state's accession shall have effect only regarding Contracting States that accept the accession, and that such acceptance shall be necessary for any member state ratifying, accepting or approving the Convention after an accession.[55]

Concern about the impartiality of some courts as a basis for bilateralization would be much diminished if a ground for denial of recognition or enforcement currently under challenge is retained. The proposed ground, listed with others in Article 28, is: "the [judgment results from] proceedings [in the State of origin were] incompatible with fundamental principles of procedure of the State addressed, [including the right of each party to be heard by an impartial and independent court]. . ."[56]

The reasons the subparagraph has been proposed to be deleted is that it would encourage attacks on the impartiality and independence of the court of origin by the losing party in an attempt to delay enforcement, and that it runs contrary to the need for mutual trust and confidence among the courts of the Contracting States.[57]

Public Policy

Every treaty provides a public policy exception, and the proposed Hague Judgments Convention does as well. In the context of recognition of foreign judgments in the United States, public policy exceptions are found, for example, in the Recognition Act[58] and in the Restatements of Foreign Relations Law[59] and Conflict of Laws.[60] The key is to provide adequate protection against abusive enforcement or non-enforcement without providing an escape hatch so large as to make the convention useless.

The 2001 Interim Text notes that agreement has been reached on the language of the public policy exception. It appears as one of several grounds for refusal to recognize or enforce a judgment, to wit: "recognition or enforcement would be manifestly incompatible with the public policy of the State addressed."[61] According to the co-reporters, this seemingly broad formulation should be considered to be lim-

ited in several ways. First, special provision is made in the other subparagraphs of Article 28(1) with respect to procedural matters that would support a denial of recognition or enforcement, and courts should be reluctant to give such treatment to other procedural defects.[62] Second, the draft convention deals specifically with non-compensatory and grossly excessive damages in Article 33, so that provision should govern those subjects rather than the general public policy provision.[63] Third, they argue that the effect of the recognition or enforcement in the state addressed must be incompatible with its public policy, not the law on which the judgment is based.[64] Finally, the word "manifestly" has meaning and indicates the "weapon of refusal must be rarely invoked and only as a last resort."[65] Mistakes as to facts or the law applied, the co-reporters say, should be covered by the prohibition of re-examination of the merits in Article 28(7).[66]

Other proposals in the 2001 Interim Text, such as those regarding the independence of the court of origin (Article 28(1)(c)) and bilateralization (Article 42), are further attempts to set specific rules to deal with issues that would otherwise fall into the uncertain realm of the public policy exception.

The scope of application of the public policy exception in the United States, as reflected in the Restatements cited above, appears to be consistent with the intent of the co-reporters of the draft Hague Judgments Convention. For the public policy exception to apply, the Restatements require that the original claim be contrary to fundamental notions of decency and justice, not simply that the claim does not exist or the policy is different in the state addressed. An example of this narrow view, where the public policy defense was rejected, is *McCord v. Jet Spray Int'l Corp*.[67] The public policy at issue in *McCord* was Massachusetts' "at will" employment policy. A Belgian judgment based on an employment contract that conflicted with that policy was enforced by the district court.

By contrast, the defense succeeded in *Telnikoff v. Matusevitch*,[68] in which enforcement of an English libel judgment was refused on public policy grounds. The Maryland Court of Appeals held enforcement of the judgment would deprive the defendant of freedoms of speech and press guaranteed by the First Amendment and Maryland law as interpreted by the courts. The New York State Supreme Court issued a similar decision in *Bachchan v. India Abroad Publications, Inc.*,[69] refusing to enforce an English defamation judgment against media defendants based upon a private person's statements on a public issue—an Indian bribery scandal.

The First Amendment guarantee of free speech is the type of important public policy which differs significantly from policies of other countries, and can be a ground for non-recognition. For example, in the United Kingdom, unlike the United States, the defendant has the burden to prove the truth of allegedly defamatory statements and the plaintiff is not required to prove malice.[70]

One important question that arises regarding the public policy exception is whether courts in the United States will consider the generally stronger protection of intellectual property in the United States to be the type of important public policy requiring the protection of the exception. This safety net is offered by supporters of the inclusion of intellectual property rights in the proposed convention. Another question, of course, is how other countries will apply the exception to the judgments of United States jurisdictions. Will they seek to identify when their national interests are truly at stake? Or will they, despite the urging of the co-reporters, simply apply their national policies to the cause of action underlying the judgment rather than to the application of the judgment in their jurisdiction? In the end, will the enforcement of United States-based judgments in other countries be certain enough to warrant the cost of the proposed convention?

Conclusion

The proposed Hague Judgments Convention, after many years, is clearly still a work in progress. Daunting obstacles remain in the year or so left to make it both useful and acceptable to the many nations negotiating it. Success in achieving consensus on the outstanding issues is hardly assured.

Still, opportunities like this arise only rarely. The effort it has taken to reach this point is not likely to be repeated any time soon, and significant progress has been made. A truly workable judgments convention could have far-reaching impact on global commerce and be a boon to many of our clients.

To be constructive, we should assume the process will result in a convention being proposed for the signature of the United States. This is the critical time in which we can provide our views to the government agencies and our national delegation so that the Hague Judgments Convention will be useful to our clients and worthy of our support.

Endnotes

1. *See* Committee on Foreign and Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, The Record, Vol. 56 No. 3, 380, 386-87 (Association of the Bar of the City of New York, July 31, 2001) (ABCNY Survey).
2. However, some Canadian provinces have reciprocal legislation with a few states in the United States.
3. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (in force in the United States as of December 29, 1970) (The "New York Convention"), reprinted at 9 U.S.C.A. § 201 (1999).

4. Inter-American Convention on International Commercial Arbitration, January 30, 1975, 14 I.L.M. 336, III Y.B. Comm. Arb. 15 (1978); reprinted at 9 U.S.C.A. § 301 (1999).

5. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, February 1, 1971, 1144 U.N.T.S. 249.

6. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, September 27, 1968, 1990 O.J. (C189) 2 (consolidated). Current amended text available at http://europa.eu.int/eur-lex/en/lif/dat/1968/en_468A0927_01.html (last visited October 11, 2001). The Brussels Convention will be replaced on March 1, 2002 by Council Regulation (EC) No. 4412001 (Brussels 1). *See* http://europa.eu.int/eur-lex/en/lif/dat/2001/en_301R044.html (last visited October 11, 2001).

7. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, September 16, 1988, 1988 O.J. (L319) 9, Text of Convention and Protocols available at http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_lug-textes.htm (last visited October 23, 2001).

8. In 1977, Poland also acceded to the Lugano Convention.

9. 159 U.S. 113 (1865).

10. 13 U.L.A. 261-76 (West 1986 and Supp. 2001) (the "Recognition Act," in New York, CPLR Article 53).

11. Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, 24 Brook. J. Int'l L. 7, 10 (1998).

12. *Id*.

13. The total number of member states of the Hague Conference on Private International Law continues to increase and stands at 55 at the time of this writing. *See* http://www.hcch.net/e/members/members.html.

14. Peter D. Trooboff, *The Hague Conference*, The National Law Journal, July 23, 2001, at A19; *See* Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty and an American Statute*, 75 Ind. L.J. 635, 639 (2000), *available at* http://www.law.indiana.edu/ilj/v75/no2/silberman.pdf.

15. *Id*.

16. *See* http://www.ali.org/ali/Intl_Juris_Proj.htm; Silberman and Lowenfeld, *supra* note 14 at 635-38.

17. The comments will be available at the USPTO Web site *at* http://USPTO.gov.

18. *See* http://europa.eu.int/comm/justice_home/unit/civil/audition10_01/index_en.htm (last visited October 11, 2001).

19. The working documents are available on the Hague Conference Web page on the proposed convention at http://www.hcch.net/e/workprog/jdgm.html ("Hague Judgments Web Page").

20. Hague Conference on Private International Law, *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (amended version)*, http://www.hcch.net/e/conventions/draft36e.html (last visited October 23, 2001), *available at* Hague Judgments Web Page at link "revised."

21. *See*, *e.g.*, *Impediments to Digital Trade*, Hearing Before the Subcommittee on Commerce Trade and Consumer Protection of the House Comm. on Energy and Commerce *at* http://energycommerce.house.gov/107/hearings/05222001Hearing231/kovar347print.htm (statement of Jeffrey D. Kovar, Chief U.S. Negotiator Hague Convention and Assistant Legal Advisor for Private International Law, U.S. Department of State).

22. Hague Conference on Private International Law Permanent Bureau and Co-Reporters, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001–Interim Text* ftp://hcch.net/doc/jdgm2001draft_e.doc ("2001 Interim Text") (last visited October 23, 2001), available through the Hague Judgments Web page (http://www.hcch.net/e/workprog/jdgm.html). A copy of the 2001 Interim Text is reprinted as Appendix A to this article.

23. It does apply to trusts, however.

24. Also proposed to be excluded in the 2001 Interim Text are nuclear liability, property rights *in rem* and validity, nullity and dissolution of legal persons.

25. Letter from Jeffrey D. Kovar, Assistant Legal Advisor for Private International Law, United States Department of State, to Alastair Wallace, Head of International and Common Law Services Division, Lord Chancellor's Department, England (September 10, 2000) *at* http://www.cptech.org/ecom/jurisdiction/kovarletter.html (last visited October 23, 2001). *Note*: CPT's page on the Hague Convention on Jurisdiction, http://www.cptech.org/ecom/jurisdiction/hague.html ("CPT Web site"), although focused on particular issues and advocating a specific point of view, maintains one of the best collections on the Web of documents and links related to the proposed convention.

26. Kovar May 22, 2001, statement, *supra*, note 21.

27. Letter from Jeffrey D. Kovar to Alastair Wallace, *supra* note 25.

28. Paul Hofheinz, *Birth Pangs for Web Treaty Seem Endless*, Wall St. J., August 16, 2001 at A11, quoting attorney Marc Pearl of Shaw Pittman.

29. 2001 Interim Text at 7 n.43.

30. 2001 Interim Text at 7 (Art. 7(3)).

31. 2001 Interim Text at 8 (Art. 7(6),(7)).

32. Peter Nygh and Fausto Pocar, *Report of the Special Commission on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments on Civil and Commercial Matters* (Preliminary Document No. 11), ftp://hcch.net/doc/jdmpd11.doc (last visited October 23, 2001) *available at* the Hague Judgments Web page, http://www.hcch.net/e/workprog/jdgm.html.

33. Letter from Thomas N.T. Niles, President, U.S. Counsel on International Business, to Madeleine K. Albright, Secretary of State, United States of America, October 30, 2000. http://www.cptech.org/ecom/hague/uscib.html (last visited October 23, 2001), *available at* CPT Web site.

34. Orel Article.

35. 2001 Interim Text Art. 10(3), similar to Art. 6, Alternative A, Variant 2, Par. 3.

36. *Yahoo! Inc. v. La Ligue Contre Le Racisme et, L'Antisemitisme*, 145 F. Supp. 2d 1168, 1171 (N.D. Cal. 2001).

37. In fact, most private sector comments received by the United States delegation opposed inclusion of intellectual property rights within the scope of the convention. Permanent Bureau of the Hague Conference on Private International Law, *Report of the experts meeting on the intellectual property aspects of the future convention on jurisdiction and foreign judgments in civil and commercial matters* (Preliminary Document No. 13), Geneva, February 2001, ftp://hcch.net/doc/jdgmpd13.doc (last visited October 23, 2001), *available at* Hague Judgments Web page http://www.hcch.net/e/workprog/jdgm.html. *See*, *e.g.*, Committee on Patents of the Association of the Bar of the City of New York, *Comment Paper on Hague Convention on Enforcement of Judgments*, December 19, 2000, *available at* http://www.cptech.org/ecom/jurisdiction/barcomments.pdf (last visited October 23, 2001) (took position patents should be excluded entirely from the scope of the draft convention). On the other hand, experts from many of the European countries meeting on the intellectual property aspects of the draft convention, favored keeping intellectual property rights in the convention because "IP plays an increasingly important role in practice and that, because IP ques-

tions are so closely linked to other questions such as contract law or commercial law, carving them out of the draft Convention would lead to great difficulties in applying the Convention." Preliminary Document. No. 13, *supra* this note, at 9-10.

38. Kovar May 22, 2001 statement, *supra* note 21.
39. 2001 Interim Text, Art. 12(6).
40. Marc E. Hankin, *Proposed Hague Convention would help IP Owners*, Nat'l L. J., July 23, 2001, at C20.
41. *Id*.
42. *Id*.
43. James Love, *As the Hague Conference Diplomatic Conference Ends, the Internet and the Public Domain are at Risk*, http://www.cptech.org/ecom/jurisdiction/badly/html (June 20, 2001). Regarding the other provisions discussed affecting e-commerce and intellectual property issues, Love says:

> In a nutshell, [the proposed Hague Judgments Convention] will strangle the Internet with a suffocating blanket of overlapping jurisdictional claims, expose every web page publisher to liabilities for libel, defamation and other speech offenses from virtually any country, effectively strip Internet Service Providers of protections from litigation over the content they carry, give businesses who sell or distribute goods and services the right to dictate via contracts the countries where disputes will be resolved and rights defended, . . . narrow the ground under which countries can protect individual consumer rights . . . [and] greatly undermine national policies on the "first sale" doctrine.

Id.

44. *The Internet's Legal Conundrum*, The Economist Global Agenda, June 5, 2001, http://economist.com/agenda/displayStory.cfm?Story_id=645750.
45. *See*, *e.g.*, Paul Hofheinz, *supra* note 28.
46. Christopher Stern, *Copyright Holders vs. Telecoms, Interests Clash in Debate on Regulating Global Commerce*, Wash. Post, May 16, 2001 at E04, http://washingtonpost.com/wp-dyn/articles/a30397-2001May15.html (last visited October 23, 2001).
47. Professor Rochelle C. Dreyfuss and Professor Jane C. Ginsburg, Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters. http://www.kentlaw.edu/depts/ipp/intl-courts/docs/treaty10_10.pdf (last visited October 23, 2001). As of this writing, the proposed treaty is scheduled to be presented at a symposium at Chicago-Kent College of Law on October 18-19, 2001. *See* http://www.kentlaw.edu/depts/ipp/intl-courts/(last visited October 23, 2001).
48. Art. 18(2)(e), prohibits jurisdiction based upon "[the carrying on of commercial or other activities by the defendant in that State, [whether or not through a branch, agency, or any other establishment of the defendant,] except where the dispute is directly related to those activities]."

    (Language in brackets is not agreed and is proposed to be either included or deleted).
49. Art. 18(f) provides jurisdiction shall not be based solely upon "the service of a writ upon the defendant in that State."
50. 2001 Interim Text Art. 32(1).
51. ABCNY Survey, *supra* note 1 at 391-93.
52. 2001 Interim Text, Art. 28(2).
53. Nevertheless, opt-out reservations for some of the more contentious provisions, such as special consumer and employment contract jurisdiction, are being considered. *See* 2001 Interim Text, Annex II, Proposals 3 and 4.
54. Unless Art. 28(1)(c) is retained, as discussed below.
55. This proposal follows the language of Articles 37 and 38 of the Hague Convention of 1980 on the Civil Aspects of International Child Abduction. It does not appear to provide a mechanism for a member state that originally signs to declare whether it accepts treaty relations under the convention with any other member state.
56. 2001 Interim Text, Art. 28(1)(c).
57. 2001 Interim Text at 24 n.157.
58. Uniform Foreign Money Judgments Recognition Act § 4, 13 U.L.A. 261, 268 (West 1986 & Supp. 2001).
59. Restatement (Third) of the Foreign Relations Law of the United States § 482(d), § 482 cmt. f (1987).
60. Restatement (Second) of Conflict of Laws 2d § 117 cmt. c (1971).
61. 2001 Interim Text Art. 28(1)(f).
62. Nygh & Pocar, *supra* note 32 at 107-08.
63. *Id*. at 108.
64. *Id*.
65. *Id*.
66. *Id*.
67. 874 F. Supp. 436 (D. Mass 1994).
68. 347 Md. 561, 702 A.2d 230 (1997), *answer to certified question conformed,* 159 F.3d 636 (D.C. Cir. 1998).
69. 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. 1992).
70. *Telnikoff*, 702 A.2d at 249. The *Telnikoff* decision has been criticized. Professors Silberman and Lowenfeld note that a libel judgment had been obtained by one resident of England (Telnikoff) against another resident of England (Matusevitch) based upon a letter later published in an English newspaper. Agreeing with the dissent in *Telnikoff*, Silberman and Lowenfeld find it hard to see how any United States interest was implicated in the case, because there was no American interest in the parties or the transaction. Silberman and Lowenfeld, *supra* note 14, 75 Ind.L.J. at 644. They compare *Telnikoff* with *Bachchan* in which, they allowed, a United States court might well be concerned about an attempt to circumvent constitutional protections granted to United States publications by suing for libel in a foreign forum and seeking to enforce the resulting judgment in the United States. Silberman and Lowenfeld, *supra* note 14, 75 Ind. L.J. at 644.

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Although the series of articles on the proposed Hague Judgments Convention are planned to be integrated into a Committee Report, the views expressed herein are solely those of the author.

Appendix [reprinted from www.hcch.net]

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

COMMISSION II
Jurisdiction and Foreign Judgments in Civil and Commercial Matters

DIX-NEUVIÈME SESSION
NINETEENTH SESSION

Distribution:

Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6 – 20 June 2001

Interim Text

Prepared by the Permanent Bureau and the Co-reporters

For the sake of clarity this summary follows the order of the articles as set out in the preliminary draft Convention of October 1999. It is understood that the structure and form of the Convention awaits final discussion.[*]

CHAPTER * – SUBSTANTIVE SCOPE

Article 1 Substantive scope

1. The Convention applies to civil and commercial matters.[1] It shall not extend in particular to revenue, customs or other[2] administrative matters.[3]

2. The Convention does not apply to –

a) the status and legal capacity of natural persons;

b) maintenance obligations;

c) matrimonial property regimes and other rights and obligations arising out of marriage or similar relationships;

d) wills and succession;

e) insolvency, composition or analogous proceedings;

f) social security;

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[*] Note: proposals have only been included if endorsed by Member State delegations.

[1] It has been proposed to add the words 'before courts of Contracting States' at the end of the first sentence. This proposal has not been discussed. Note the statement in Preliminary Document No 11 (the Nygh/Pocar Report) at p. 31 that there was a consensus in the Special Commission that the application of the Convention should be confined to proceedings before courts. There was no suggestion in the Diplomatic Conference that this consensus should be departed from with the possible exception of authentic instruments (see Art. 35 below). It should be noted, however, that there were proposals to include decisions of certain administrative organs in the scope of Article 12. See footnote 88 below.

[2] It was agreed to add the word 'other' in order to indicate that revenue and customs matters are also of an administrative nature.

[3] A desire was expressed for further clarification of the meaning and scope of 'administrative matters'. An attempt to provide further clarification was made, but this did not achieve consensus. That clarification would also have merged paragraph 3 with paragraph 1.

g)[4] arbitration and proceedings related thereto;[5]

h) admiralty or maritime matters;

[*i)* anti-trust or competition claims;][6]

[*j)* nuclear liability;][7]

k)[8] Alternative A

[provisional and protective measures other than interim payment orders;][9]

Alternative B

[provisional or protective measures [other than those mentioned in Articles 13 and 23A];][10]

[*l)* rights *in rem* in immovable property;][11]

[*m)* validity, nullity, or dissolution of a legal person and decisions related thereto].[12]

[3. This Convention shall not apply to arbitration and proceedings related thereto, nor shall it require a Contracting State to recognise and enforce a judgment if the exercise of jurisdiction by the court of origin was contrary to an arbitration agreement.][13]

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[4] There was general agreement that alternative dispute resolution was also outside the scope of the Convention, except to the extent that it has resulted in a consent judgment or settlement to which the court has given its authority under Article 36, below.

[5] If paragraph 3 (see below) was accepted, this sub-paragraph should be deleted.

[6] There was general agreement towards the proposal's approach, subject to further study, that certain aspects of what is covered in the United States (including the Sherman Act, the Clayton Act and the antitrust portions of the Federal Trade Commission Act) by the term 'anti-trust claims' such as actions against cartels, monopolisation, abuse of market dominance, horizontal or vertical restraints, mergers and acquisitions, price fixing or price discrimination be excluded from the Convention. On the other hand, it was acknowledged that words such as 'unfair competition' (*concurrence déloyale*) went too far since in certain systems it might include matters such as misleading or deceptive practices, passing off and infringement of marks, copyrights and patents. The problem remains of finding the appropriate terminology to define the area to be excluded and which can be understood at the international level.

[7] There is no consensus on this proposed exclusion.

[8] This paragraph would be deleted if Article 13 (Alternative A) was adopted.

[9] The intention of this Alternative (see the discussion of Article 13 below) is to exclude provisional and protective measures from the scope of the Convention but to ensure that jurisdiction to make interim payment orders remains subject to the list of prohibited jurisdictions. The proponents of this version favour the inclusion of a provision in the chapter on recognition and enforcement to clarify that interim payment orders will not be recognised or enforced under the Convention. No consensus exists on this proposal.

[10] This second Alternative is primarily inspired by a wish to exclude provisional and protective measures from the scope of the Convention. It differs from the first Alternative in specifically excluding each of the categories of provisional measures and protective measures by using the word 'or' and by omitting any reference to interim payments. However, the words within the final brackets 'other than those mentioned in Articles 13 and 23A' are put forward as a further option for those who favour a restricted provision for jurisdiction and recognition and enforcement in respect of provisional and protective measures. There is no consensus in respect of any of these options.

[11] The exclusion of this matter from the scope of the Convention has been proposed. See Article 12(1) below.

[12] The exclusion of this matter from the scope of the Convention has been proposed. See Article 12(2) below.

[13] This proposal is designed to meet the desire expressed that a judgment given in breach of an arbitration agreement or contrary to an arbitration award not be recognised or enforced. No consensus exists on this proposal.

4. A dispute is not excluded from the scope of the Convention by the mere fact that a government, a governmental agency or any person acting for the State is a party thereto.

5. Nothing in this Convention affects the privileges and immunities of sovereign States or of entities of sovereign States, or of international organisations.

Article 2 Territorial scope [14]

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State. However, even if all the parties are habitually resident in that State –

a) Article 4 shall apply if they have agreed that a court or courts of another Contracting State have jurisdiction to determine the dispute [provided that dispute is of an international character];[15]

b) Article 12, regarding exclusive jurisdiction shall apply;

c) Articles 21 and 22 shall apply where the court is required to determine whether to decline jurisdiction or suspend its proceedings on the grounds that the dispute ought to be determined in the courts of another Contracting State.

2. The provisions of Chapter III apply to the recognition and enforcement in a Contracting State of a judgment rendered in another Contracting State.

CHAPTER ** – JURISDICTION

Article 3 Defendant's forum [16]

1. Subject to the provisions of the Convention, a defendant may be sued in the courts of [a] [the] State [in which] [where] that defendant is [habitually] resident.

[2. For the purposes of the Convention, a natural person shall be considered to be resident –

a) if that person is resident in only one State, in that State;

b) if that person is resident in more than one State,

i) in the State in which that person has his or her principal residence; or

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[14] Another proposal for the amendment of paragraph 1 of this Article has been reproduced as part of Proposal 4 in Annex I.

[15] Concern has been expressed that sub-paragraph a) as it stands, will have the effect of making the Convention applicable to purely domestic situations involving not only parties who were habitually resident within the same State but also involving a legal relationship and a subject matter entirely confined to that State: see the Report of the co-reporters Prel Doc 11 at p. 41, note 40. The words in brackets were proposed to require an international connection. This proposal was opposed, and it was pointed out that it was difficult to define when a dispute was of an international nature and that this might lead to divergent interpretations. The view was also expressed that this issue should be determined only by the selected court. Other suggestions made were: that paragraph a) be deleted with the result that the Convention, including Article 4, would not apply if all the parties to the choice of forum agreement were habitually resident in the same State, or extending Article 22 in order to allow the selected court in such a situation to decline jurisdiction.

[16] There is agreement on the defendant's forum as a forum of general jurisdiction.

ii) if that person does not have a principal residence in any one State, in each State in which that person is resident.][17]

3. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be [habitually] resident in the State –

a) where it has its statutory seat;

b) under whose law it was incorporated or formed;

c) where it has its central administration; or

d) where it has its principal place of business.[18]

Article 4 Choice of court

1. If the parties have agreed that [a court or] [the][19] courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, [that court or those] [the][20] courts [of that Contracting State][21] shall have jurisdiction[, provided the court has subject matter jurisdiction][22] and that jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates [a court or][the] courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the [court or][23] courts chosen have themselves declined jurisdiction. [Whether such an agreement is invalid for lack of consent (for example, due to fraud or duress) or incapacity shall depend on national law including its rules of private international law.][24]

2. An agreement within the meaning of paragraph 1 shall be valid as to form, if it was entered into –

a) in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;

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[17] The view has been expressed that 'habitual residence' has acquired a too technical meaning in the interpretation of earlier Hague Conventions, particularly the *Convention of 1980 on the Civil Aspects of International Child Abduction*. Another view favoured continuity of the established concept of 'habitual residence' and feared that 'residence' provided too slight a connection. Reference was made to the appearance of 'the temporary residence […] of the defendant' in Article 18(2)(i), as it now stands, as one of the prohibited grounds of jurisdiction. If the proposed paragraph 2 were accepted, consequential amendments to other articles would be necessary. It was also suggested that a separate definitions article be drafted. There is no consensus on these points.

[18] There appears to be agreement on this paragraph, except for the inclusion of the word 'habitual', see note 17 above. A re-numbering would be required if paragraph 2 were inserted.

[19] It has been proposed to delete the reference in paragraph 1 to 'a court' and refer to 'the courts' of the chosen country, to meet the concern that paragraph 1 could allow a court to interpret a choice of forum clause in a contract as conferring jurisdiction on a specific court that it would not otherwise be authorised to exercise under national law. There was a general agreement that a choice of forum clause could only confer jurisdiction over the person of the defendant and not in respect of subject matter outside the competence of the chosen court; see the comments of the Co-reporters in Preliminary Document No 11, at p. 44. However, doubts were expressed whether this proposal was either necessary or appropriate.

[20] See note 19, above.

[21] See note 19, above.

[22] This is an alternative proposal to address the problem referred to in note 19, above.

[23] See note 19, above.

[24] This proposal seeks to confirm that the substantive validity of the choice of forum agreement is governed by the national law of the forum seised, including its choice of law rules. It also seeks to confine substantive validity to questions affecting the consent or capacity of the parties as opposed to questions of reasonableness and public policy. Objections were raised, however, that reasonableness could be an element of consent or capacity. It was also pointed out that general rules of contract validity should apply without limitation to consent or capacity. See also paragraphs 4 and 5 and footnotes 27 and 28. There was no consensus in respect of this proposal.

b) orally and confirmed in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference;

c) in accordance with a usage which is regularly observed by the parties;

d) in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned.[25]

3. Where a defendant expressly accepts jurisdiction before a court of a Contracting State, and that acceptance is [in writing or evidenced in writing], that court shall have jurisdiction.[26]

[4. The substantive validity of an agreement conferring jurisdiction shall be determined in accordance with the applicable law as designated by the choice of law rules of the forum.][27]

5. [The parties cannot be deprived of the right to enter into agreements conferring jurisdiction.][28] [However,] [such agreements and similar clauses in trust instruments shall be without effect, if they conflict with the provisions of Article 7, 8 or 12.][29]

Article 5 Defendant's right to contest jurisdiction[30]

[The defendant shall have the right to contest jurisdiction under Articles [white list] [at least until] [no later than at][31] the time of the first defence on the merits.][32]

Article 6 Contracts [33]

[Alternative A

1. [Subject to the provisions of Articles 7 and 8,][34] a plaintiff may bring an action in contract in the courts of the State –

a) in which the defendant has conducted frequent [and] [or][35] significant activity; [or

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[25] This paragraph as redrafted was accepted by agreement. The redraft removes the words 'or confirmed' from the chapeau to sub-paragraph b) where it is more appropriate.

[26] This paragraph is intended to deal with the situation where a defendant consents to appear and defend in a jurisdiction other than the chosen one. There was agreement as regards the purpose of this provision, but the view was expressed that the reference to 'writing' should be aligned with paragraph 2.

[27] This is an alternative proposal to that discussed in note 24, above. There was no consensus on this proposal.

[28] This proposal seeks to make it clear that national law may not prohibit the entry into choice of forum clauses by express prohibition or the use of public policy, except in the cases which may be provided for in the Convention, such as consumer transactions or employment contracts; see the views expressed by the co-reporters in Preliminary Document No 11, at p. 42. This proposal did not receive consensus.

[29] This is the text as it appeared in the preliminary draft Convention of October 1999. The relationship between the choice of forum provisions and consumer transactions and employment contracts still has to be resolved.

[30] See also Article 27A below.

[31] It has been proposed to delete the words 'no later than at' and substitute the words 'at least until' the time of. The purpose of this proposal is to make clear it was a minimum condition. It did not receive consensus.

[32] It has been proposed that this provision be deleted in its entirety as an intrusion into the proper role of national law. No consensus was reached on this issue.

[33] There was no consensus on the basis for jurisdiction in contractual matters. In the material that follows, two basic options are put forward: one alternative refers to activity (with several sub-options) and the other alternative focuses on the place of performance.

[34] This refers to the provisions on consumer transactions and employment contracts on which no decisions have been taken as yet.

[35] This leaves open the question of whether the requirements of frequency and significance should be cumulative or alternative.

b) into which the defendant has directed frequent [and] [or] significant activity;][36]

provided that the claim is based on a contract directly related to that activity [and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State].[37]

[*Variant 1*[38]

2. For the purposes of the preceding paragraph, 'activity' means one or more of the following –

a) [regular and substantial] promotion of the commercial or professional ventures of the defendant for the conclusion of contracts of this kind;

b) the defendant's regular or extended presence for the purpose of negotiating contracts of this kind, provided that the contract in question was performed at least in part in that State. [Performance in this sub-paragraph refers [only] to non-monetary performance, except in case of loans or of contracts for the purchase and sale of currency];[39]

c) the performance of a contract by supplying goods or services, as a whole or to a significant part.]

[*Variant 2*[40]

2. For the purpose of the preceding paragraph, 'activity' includes, *inter alia*, the promotion, negotiation, and performance of a contract.

[3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid entering into or performing an obligation in that State.][41]]

[Alternative B[42]

A plaintiff may bring an action in contract in the courts of a State in which –

a) in matters relating to the supply of goods, the goods were supplied in whole or in part;

b) in matters relating to the provision of services, the services were provided in whole or in part;

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[36] This leaves open the question of whether the activity of the defendant should take place within the State of the forum or could be directed from outside that State into the State of the forum.

[37] If the words within brackets are accepted, this would be a condition to be satisfied in addition to that of frequent and/or significant activity.

[38] In this variant the scope of 'activity' would be confined to the activities of promotion, negotiation and performance which are further defined in the following sub-paragraphs.

[39] The words in brackets, if accepted, would exclude the payment of the purchase price or fee for services rendered from the scope of 'performance'.

[40] Under this variant the activities of promotion, negotiation and performance would be within the scope of 'activity' but would not define its parameters.

[41] This proposal that would have to be considered whether Variant 1 or 2 was adopted, seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State.

[42] This alternative option consists of the text as it appeared in the preliminary draft Convention of October 1999.

c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.]

[*Article 7 Contracts concluded by consumers* [43]

1. This Article applies to contracts between a natural person acting primarily for personal, family or household purposes, the consumer, and another party acting for the purposes of its trade or profession, [unless the other party demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract primarily for personal, family or household purposes, and would not have entered into the contract if it had known otherwise].[44]

2. Subject to paragraphs [5-7], a consumer may bring [proceedings][an action in contract][45] in the courts of the State in which the consumer is habitually resident if the claim relates to a contract which arises out of activities, including promotion or negotiation of contracts, which the other party conducted in that State, or directed to that State, [unless[46] [that party establishes that][47] –

a) the consumer took the steps necessary for the conclusion of the contract in another State;[and

b) the goods or services were supplied to the consumer while the consumer was present in the other State.][48]]

[3. For the purposes of paragraph 2, activity shall not be regarded as being directed to a State if the other party demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in the State.][49]

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[43] This Article consists of the first four common paragraphs with three different alternative solutions (including two variants of the second alternative) to meet the desire of some delegations to allow a choice of forum clause in consumer contracts in cases where the relevant law permits this, the agreement complies with the requirements of Article 4, paragraphs (1) and (2), and provided the agreement is valid as to substance under the applicable law. A fourth alternative solution has also been suggested: to exclude business to consumer contracts from the scope of the Convention. For that reason the whole of the Article is placed in square brackets. There is no consensus in respect of any of them either that one or more should be omitted or that any one of them should be preferred.

[44] The purpose of this provision within brackets is to give some protection to the business party, especially in a long distance transaction such as in electronic commerce, where the business party cannot easily ascertain with whom it is dealing or the truthfulness of that person's representations. There was opposition to the insertion of this provision on the ground that it would be very difficult for a consumer to rebut an allegation that the business was unaware that the buyer was a consumer.

[45] Not all proceedings brought by consumers are actions in contract. They may be actions for a common law tort or delict, or a civil claim on a ground provided for by a statute enacted for the protection of consumers. Some delegations wanted to confine paragraph 2 to actions in contract. There was no consensus on this point.

[46] This is the so-called 'small shop' exception that seeks to protect a business party who has dealt with a foreign consumer, such as a tourist, entirely in its State of habitual residence. The question was raised whether there was a need to make such a provision that could only be of relevance to small transactions that are unlikely to become the subject of proceedings under the Convention.

[47] This provision would place the burden of establishing that the two conditions in sub-paragraphs (a) and (b) were fulfilled on the business party. The fear was expressed that the burden would be too high for many small businesses. If this issue was not resolved one way or the other, the question of on whom the burden lies, will remain uncertain and would lead to divergent interpretations. There was no consensus on this point.

[48] There was no consensus on whether this condition should be added to that set out in sub-paragraph (a).

[49] This proposal seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State. There is no consensus on this provision.

4. Subject to paragraphs [5-7], the other party to the contract may bring proceedings against a consumer under this Convention only in the courts of the State in which the consumer is habitually resident.[50]

[Alternative A [51]

5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.[52]

6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, the consumer may bring proceedings against the other party in the courts of the State designated in that agreement.[53]

7. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen, Article 4 applies to the agreement to the extent that it is binding on both parties under the law of the State in which the consumer is habitually resident at the time the agreement is entered into.[54]

Add at the beginning of Article 25 the words:

'Subject to Article 25 *bis*'

Insert [*Article 25 bis* [55]

1. A Contracting State may make a declaration that it will not recognise or enforce a judgment under this Chapter, or a declaration specifying the conditions under which it will recognise or enforce a judgment under this Chapter, where -

a) the judgment was rendered by the court of origin under Article 7(2) [or Article 8(2)][56]; and

b) the parties had entered into an agreement which conforms with the requirements of Article 4 designating a court other than the court of origin.[57]

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[50] This is proposed as the general rule to which Alternatives A to C are exceptions.

[51] This Alternative is a revised version of the solution that was presented to the informal discussions held in Edinburgh in April 2001: see Prel Doc 15, Annex III-A. It provides that a choice of forum clause in a consumer contract will be effective if valid under the law of the habitual residence of the consumer and the Contracting State in which recognition and enforcement is sought has made the declaration provided for in the proposed Article 25 bis. For the sake of convenience that proposed Article is reproduced here as part of Alternative A. Several delegations objected to this proposal on the ground of its complexity, but there was no agreement that it should be omitted from the list of alternatives.

[52] This is the provision that appeared as Article 7(3)(a) in the preliminary draft Convention of October 1999. It is not controversial.

[53] This repeats the provision that appeared as Article 7(3)(b) in the preliminary draft Convention of October 1999. It is not controversial in so far as it allows the consumer to bring proceedings in the chosen forum in addition to other fora, including the forum under Article 7(2). The controversial issue is whether the proceedings brought by the consumer could be confined to the chosen forum.

[54] This provision contains a choice of law provision referring to the law of the consumer's habitual residence the issues of whether the choice of forum clause is lawful as regards each party and whether it is substantially valid (including issues of public policy and reasonableness): see Report of the co-reporters, Prel. Doc. No 11 at p. 42.

[55] If accepted, this Article should be placed among the articles dealing with recognition and enforcement.

[56] The reference to Article 8(2) will be relevant if this solution is extended to individual contracts of employment.

[57] Under this provision a State may declare that it will only recognise or enforce judgments under the Convention that are consistent with a choice of court clause. A State making the declaration would not be bound to recognise or enforce a judgment given in accordance with Article 7(2) if this jurisdiction was incompatible with the choice of court clause. On the other hand, a State not making the declaration would be bound to recognise or enforce a judgment rendered in accordance with Article 7(2) in other Contracting States, including a State that had made the declaration. But a non-declaring State would not be bound to recognise or enforce a judgment rendered by the chosen court, including one of a State that had made the declaration. A concern was expressed at this lack of reciprocity and fear of possible complexities that might be introduced if the declaration also specified conditions.

[2. A declaration under this Article may not deny recognition and enforcement of a judgment given under Article 7(2) [or Article 8(2)] if the Contracting State making the declaration would exercise jurisdiction under the relevant Article in a corresponding case.][58]

3. Recognition or enforcement of a judgment may be refused by a Contracting State that has made a declaration contemplated by paragraph 1 in accordance with the terms of that declaration.]]

[Alternative B[59]

[*Variant 1*[60]

5. This provision may be departed from by a jurisdiction agreement provided that it conforms with the requirements of Article 4.

6. A Contracting State may declare that –

a) it will only respect a jurisdiction agreement if it is entered into after the dispute has arisen or to the extent that it allows the consumer to bring proceedings in a court other than a court indicated in this Article or in Article 3; and

b) it will not recognise and enforce a judgment where jurisdiction has been taken in accordance with a jurisdiction agreement that does not fulfil the requirements in sub-paragraph *a)*.]

[*Variant 2*[61]

5. Article 4 applies to an agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen; or to the extent that the agreement permits the consumer to bring proceedings in a court other than the consumer's habitual residence.

6. A Contracting State may declare that in the circumstances specified in that declaration –

a) it will respect a jurisdiction agreement entered into before the dispute has arisen;

b) it will recognise and enforce a judgment in proceedings brought by the other party given by a court under a jurisdiction agreement entered into before the dispute has arisen;

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[58] This provision is intended to prevent States that make a declaration under Article 25 *bis* (1) from denying recognition or enforcement of a judgment when that State does not treat such choice of court provisions as binding on its own consumers.

[59] There are two variants in this Alternative. The basic rule is that stated in paragraph 4 above which limits the business party to the forum of the consumer's habitual residence. Both Variants allow a departure from this rule, but differ in whether departure is allowed unless a declaration is made to the contrary (Variant 1) or whether a departure is not allowed unless a State makes a declaration to the opposite effect (Variant 2).

[60] Variant 1 allows the parties to depart from the basic rule by an agreement that complies with the requirements of Article 4, but this choice of forum will not be regarded as excluding the forum provided for in paragraph 2 nor will a judgment rendered by the chosen forum (unless the consumer commenced the proceedings there or it coincided with the habitual residence of the consumer) be recognised or enforced in a State that makes a declaration to that effect. That State thereby 'opts-in' into the system of restricted jurisdiction over proceedings brought by the business party against the consumer.

[61] Under Variant 2 pre-dispute choice of forum clauses are not binding on consumers except in States that have made a declaration that they will respect such an agreement and that they will recognise and enforce judgments given in pursuance of such agreements. Such States will not recognise and enforce judgments given in breach of choice of forum clauses. Whatever system of declaration is adopted, problems of reciprocity remain.

c) it will not recognise and enforce a judgment given by a court in which proceedings could not be brought consistently with a jurisdiction agreement entered into before the dispute has arisen.]]

[Alternative C[62]

5. Article 4 applies to a jurisdiction agreement between a consumer and the other party if the agreement is entered into after the dispute has arisen.

6. Where a consumer and the other party have entered into an agreement which conforms with the requirements of Article 4(1) and (2) before the dispute has arisen –

a) the consumer may bring proceedings against the other party under the Convention in the courts of the State designated in that agreement;

b) the consumer may not bring proceedings against the other party under this Convention in any other court, unless the agreement permits the proceedings to be brought in that court;

c) the other party may bring proceedings against the consumer under this Convention only if the agreement permits the proceedings to be brought in the courts of the State in which the consumer is habitually resident.]]

Article 8 Individual contracts of employment

This matter was not discussed by Commission II. The Commission agreed that the Working Documents put forward in relation to this subject as well as the draft prepared at the informal discussions in Edinburgh in April 2001 should be reproduced in Annex II to facilitate further discussion. The proposals in Annex II should be viewed in the light of the Alternatives proposed in relation to Article 7 above.

Article 9 Branches [and regular commercial activity][63]

1. A plaintiff may bring an action in the courts of a State in which a branch, agency or any other establishment of the defendant is situated, [, or where the defendant has carried on regular commercial activity by other means,] provided that the dispute relates directly to the activity of that branch, agency or other establishment [or to that regular commercial activity].

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[62] This Alternative limits the 'white list' jurisdiction that may be invoked by each of the parties in cases where a choice of forum agreement has been concluded between the parties. In essence there will only be 'white list' jurisdiction if the consumer brings proceedings in the chosen forum. Conversely, there will only be 'white list' jurisdiction in the chosen forum in relation to an action brought by the business party if the chosen forum coincides with the habitual residence of the consumer. If the consumer brings proceedings in the forum provided for under paragraph 2 or in any other 'white list' forum contrary to a choice of forum clause, that forum will be deprived of its 'white list' status. It will then depend on the national law of the forum to determine whether the consumer will be permitted to rely on that jurisdiction and it will also depend on the national law of the State addressed to determine whether a judgment rendered in a State other than that of the chosen forum will be recognised or enforced, even if, in the absence of a choice of forum clause, the court in the State of origin would have exercised a 'white list' jurisdiction, such as a jurisdiction under paragraph 2.

[63] The matter placed between the brackets has not been discussed pending general discussion of the 'activity jurisdiction' elsewhere. There appears to be general agreement, subject to further clarification (see note 64 below), on the remainder of the paragraph.

[2. For purposes of applying paragraph 1, a legal entity shall not be considered a 'branch, agency or other establishment' by the mere fact that the legal entity is a subsidiary of the defendant.][64]

Article 10 Torts [or delicts] [65]

1. A plaintiff may bring an action in tort [or delict] in the courts of the State –

   a) in which the act or omission that caused injury occurred, or

   b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State.[66]

[2. A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.][67]

[3. The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State.][68]

[4. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.][69]

[5. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.][70]

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[64] It was proposed to delete the term '*nécessairement*' in the French text. It was also proposed to replace the term 'simple' by the term '*seul*' in the French text. There does not appear to be any objection with the interpretation given by the Co-Reporters in Preliminary Document No 11 at p. 56 that a subsidiary, even one that is wholly owned by a parent, will not by that fact alone be regarded as falling within the definition of 'a branch, agency or other establishment'. However, some delegations expressed a fear that the formal incorporation of those comments into the body of the text might be misinterpreted. There is no consensus on this provision.

[65] The deletion of the words 'or delicts' in the title and in the first paragraph has been proposed. The concern was raised that the term includes both civil and criminal offences in some legal systems and may extend the reach of Article 10 or result in other unintended consequences in those systems. There is no consensus on this proposal.

[66] This is the text of the preliminary draft Convention of October 1999. No specific proposals were made to modify this text. However, it was noted that the paragraph would have to remain under consideration in light of e-commerce and intellectual property issues, its relation to activity jurisdiction proposals, and constitutional issues in one State. There was agreement that the material appearing as paragraph 2 in the preliminary draft Convention of October 1999 should be deleted.

[67] This proposal seeks to insert an activity based jurisdiction similar to that proposed in relation to Article 6 Contracts, Alternative A, paragraph 1. There is no consensus on this proposal.

[68] This proposal seeks to protect business parties, including those using electronic commerce, who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State. There is no consensus on this proposal.

[69] The deletion of this paragraph that appeared as Article 10, paragraph 3 of the preliminary draft Convention of October 1999 has been proposed. There is no consensus on its deletion.

[70] The deletion of this paragraph that appeared as Article 10, paragraph 4 of the preliminary draft Convention of October 1999 has been proposed. There is no consensus on its deletion.

Article 11 Trusts

1. In proceedings concerning the validity, construction, effects, administration or variation of a trust created voluntarily and evidenced in writing, the courts of a Contracting State designated in the trust instrument for this purpose shall have jurisdiction, and that jurisdiction shall be exclusive unless the instrument provides otherwise.[71] Where the trust instrument designates a court or courts of a non-Contracting State, courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction. [The validity of such a designation shall be governed by the law[72] applicable to the validity of the trust.][73]

2. In the absence of such [valid][74] designation, proceedings may be brought before the courts of a State –

a) in which is situated the principal place of administration of the trust; or

b) whose law is applicable to the trust; or

c) with which the trust has the closest connection for the purpose of the proceedings, taking into account in particular the principal place where the trust is administered, the place of residence or business of the trustee, the situation of the assets of the trust, and the objects of the trust and the places where they are to be fulfilled; or

d) in which the settlor (if living) and all living beneficiaries are habitually resident, if all such persons are habitually resident in the same State.[75]

[3. This Article shall only apply to disputes among the trustee, settlor and beneficiaries of the trust.][76]

Article 12 Exclusive jurisdiction

[1. In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Contracting State in which the property is situated have exclusive jurisdiction, unless in proceedings which have as their object tenancies of immovable property [concluded for a maximum period of six months][77], the tenant is habitually resident in a different State.][78]

[2. In proceedings which have as their object the validity, nullity, or dissolution of a legal person, or the validity or nullity of the decisions of its organs, the courts of a Contracting State whose law governs the legal person have exclusive jurisdiction.][79]

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[71] There was agreement on the insertion of the last sub-sentence in order to bring the provision in conformity with the similar provision found in Article 4, paragraph 1.

[72] It was noted that the phrase 'national law' should replace the word 'law' if the Convention consistently uses 'national law' in such cases.

[73] The words within brackets were proposed to ensure that the question of the existence and validity of the choice of forum clause would be determined by the law applicable under the choice of law rules of the court seised and not necessarily by any law nominated as the applicable law by the settlor. No consensus was reached on this provision.

[74] See note 73 above.

[75] Subject to the use of the word 'valid' in the chapeau, this paragraph was approved by consensus.

[76] This paragraph did not achieve consensus. It has been proposed that this matter should be left to national law: see the comment of the co-reporters in Preliminary Document No 11, at p. 62 that the disputes covered by this Article are disputes that are internal to the trust.

[77] It has been proposed to limit the exclusion of tenancies of immovable property from the exclusive jurisdiction of the State of situation to a lease for a single period not exceeding 6 months. There was no consensus on this proposal.

[78] It has been proposed to exclude rights *in rem* in immovable property and tenancies of movable property from the scope of the Convention. There was no consensus on this proposal.

[79] It has been proposed to exclude the validity, nullity, or dissolution of a legal person and decisions related thereto from the scope of the Convention. There was no consensus on this proposal.

3. In proceedings concerning the validity of entries in public registers other than those dealing with intellectual property rights, the courts of the Contracting State in which the register is kept shall have exclusive jurisdiction.

Intellectual property [80]

[Alternative A[81]

4. In proceedings in which the relief sought is a judgment on the grant, registration, validity, abandonment, revocation or infringement[82] of a patent or a mark, the courts of the Contracting State of grant or registration shall have exclusive jurisdiction.[83]

5. In proceedings in which the relief sought is a judgment on the validity, abandonment, or infringement of an unregistered mark [or design], the courts of the Contracting State in which rights in the mark [or design] arose shall have exclusive jurisdiction.]

[Alternative B[84]

5A. In relation to proceedings which have as their object the infringement of patents, trademarks, designs or other similar rights, the courts of the Contracting State referred to in the preceding paragraph [or in the provisions of Articles [3 to 16]] have jurisdiction.[85]]

Alternatives A and B

[6. Paragraphs 4 and 5 shall not apply where one of the above matters arises as an incidental question in proceedings before a court not having exclusive jurisdiction under those paragraphs. However, the ruling in that matter shall have no binding effect in subsequent proceedings, even if they are between the same parties. A matter arises as an incidental question if the court is not requested to give a judgment on that matter, even if a ruling on it is necessary in arriving at a decision.][86]

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[80] Three proposals have been made with respect to the treatment of intellectual property in the Convention. The first two appear within general brackets and are each bracketed also (Alternatives A and B). That indicates that there is no consensus on the inclusion of intellectual property within the scope of the Convention or in respect of each of the proposals themselves. For the third proposal, see note 88 below.

[81] The main difference between Alternatives A and B is whether proceedings for the infringement of patents and marks and such other rights as may be covered by this provision should fall within the exclusive jurisdiction or not. In addition, for a number of the delegations that favour an exclusive jurisdiction also for infringement under this provision, a satisfactory final or disconnection clause with respect to existing and future instruments regulating jurisdiction, recognition and enforcement for specific areas such as intellectual property is a precondition for including infringement in this Article on exclusive jurisdiction.

[82] It was pointed out that, when deciding which proceedings (e.g. infringement proceedings based on provisions of an Unfair Competition Act or of a Patent or Trademark Act, or proceedings concerning certain common law torts such as passing off) were to be covered by 'infringement', the solution should be consistent with the possible exclusion of 'antitrust or competition claims' from the scope of the Convention.

[83] This paragraph also covers situations where an application for the grant or registration of a patent or mark has been filed.

[84] This Alternative does not dispute the proposition in Alternative A that there should be exclusive jurisdiction in respect of proceedings that have as their object the registration, validity, nullity or revocation of patents, trade marks, designs or other similar rights. To that extent paragraphs 4 and 5 would remain if paragraph 5A was accepted. Alternative B refers only to proposed paragraph 5A. Paragraphs 6, 7 and 8 are common to both Alternatives.

[85] This provision will have to be excluded from the exceptions stated in Article 17.

[86] The purpose of this paragraph is to maintain non-exclusive jurisdiction where a matter otherwise falling within the scope of paragraphs 4 and 5 arises as an incidental question in proceedings which do not have as their object one or more of the matters described in that paragraph. The intention is that any decision made between the parties on such an incidental question will not have a preclusory effect in another State, in other cases when produced by one of the parties. There is no consensus on this paragraph.

7. [In this Article, other registered industrial property rights [(but not copyright or neighbouring rights, even when registration or deposit is possible)][87] shall be treated in the same way as patents and marks]

[8. For the purpose of this Article, 'court' shall include a Patent Office or similar agency.][88]

Article 13 Provisional and protective measures[89]

[Alternative A][90]

1. A court seised[91] and having jurisdiction under Articles [in the white list] to determine the merits of the case has jurisdiction to order provisional and protective[92] measures.

2. A court of a Contracting State [may] [has jurisdiction to][93], even where it does not have jurisdiction to determine the merits of a claim, order a provisional and protective measure in respect of property in that State or the enforcement of which is limited to the territory of that State, to protect on an interim basis a claim on the merits which is pending or to be brought by the requesting party in a Contracting State which has jurisdiction to determine that claim under Articles [in the white list].[94]

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[87] There is no consensus on the words included within the brackets. Other suggestions are to exclude copyright from the scope of the Convention either in whole or only copyright infringement on-line. Furthermore, the following text was proposed as an alternative: ["*In proceedings concerning the infringement of a copyright or any neighbouring right, the courts of the Contracting State under whose laws the copyright or the neighbouring right is claimed to be infringed shall have exclusive jurisdiction*"]. This proposal seeks to include copyright within the exclusive jurisdiction of the courts of the Contracting State under whose law a copyright is claimed to have been infringed. This is an alternative to the exclusion of proceedings for the infringement of copyright proposed in paragraph 7 above.

[88] This paragraph might be necessary to ensure that decisions of these organs are covered by the chapter on recognition: see the definition of 'judgment' in Article 23.

[89] This Article would be deleted if Alternative A of Article 1(2)(k) was adopted. It would also be deleted if the Alternative B of Article 1(2)(k) was adopted without the reference to Articles 13 and 23A. Some delegations have also suggested that provisional and protective measures should be dealt with in a separate Chapter in the Convention. This would certainly be necessary if no provision were made for the recognition and enforcement of provisional and protective measures.

[90] For another proposal in relation to Article 13, see Article 1(2)(k) which proposes that provisional and protective measures be excluded from the scope of the Convention with certain qualifications.

[91] It has been suggested that it would be sufficient if a court is seised after a provisional and protective measure is made. This would require the addition of the words 'or about to be seised' or similar.

[92] The description 'provisional and protective' is intended to be cumulative, that is to say, the measures must meet with both criteria.

[93] A form of words has also been suggested that would make it clear that Contracting States are obliged to provide this jurisdiction, although it was also stressed that this would not interfere with the discretion of the courts of such States either to make or to refuse to make such orders.

[94] It was noted that some States, especially those in the Commonwealth other than the United Kingdom, did not provide for jurisdiction to make provisional and protective orders unless the court was seised of jurisdiction to determine the merits of the case. This could operate to the detriment of foreign plaintiffs who sought to 'freeze' assets within the jurisdiction in aid of litigation pending elsewhere. The provision is intended to provide such States with jurisdiction to make such orders based on the existence of property in the forum and limited to the territory of the forum. There was no consensus on this provision.

3. Nothing in this Convention shall prevent a court in a Contracting State from ordering a provisional and protective measure for the purpose of protecting on an interim basis a claim on the merits which is pending or to brought by the requesting party in another State.[95]

4. In paragraph 3[96] a reference to a provisional and protective measure means

a) a measure to maintain the status quo pending determination of the issues at trial; or

b) a measure providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or

c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.]

[Alternative B[97]

A court which is or is about to be seised of a claim and which has jurisdiction under Articles [3 to 15] to determine the merits thereof may order provisional and protective measures, intended to preserve the subject-matter of the claim.]

Article 14 Multiple defendants

It was agreed to delete this Article.

Article 15 Counter-claims [98]

[Subject to Article 12,][99] a court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a counter-claim arising out

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[95] This provision is intended to overcome any restrictions imposed on the exercise of jurisdiction by the courts of Contracting States by the list of prohibited jurisdictions (at present found in Article 18). The provision would also allow the exercise of jurisdiction to make provisional and protective orders under national law without the restrictions imposed by the list of prohibited jurisdictions. It is proposed to remove the reference to Article 13 in Article 17 in order to allow the exercise of such jurisdiction under national law. Some delegations took the view that this paragraph was the only provision on provisional and protective measures that should be included in the Convention.

[96] It has been proposed that this definition apply also to paragraphs 1 and 2.

[97] This proposal is linked with the second alternative in Article 1(2)(k) which in itself contains the options either to exclude provisional or protective measures entirely from the scope of the Convention or to permit a limited jurisdiction to make such orders. Alternative B provides for such a limited jurisdiction, if so desired.

[98] There was agreement that there should be provision for a jurisdiction based on a counter-claim and that this jurisdiction should be one that is entitled to recognition and enforcement under Article 25(1). There was some debate on whether this was already obvious or should be further clarified: see the remarks of the co-reporters in Preliminary Document No 11, at p. 95. The language not within brackets was also approved by consensus.

[99] It was agreed that the proposal to add this qualification should remain within brackets pending resolution of the status of Article 12.

of the transaction or occurrence on which the original claim is based [unless the court would be unable to adjudicate such a counter-claim against a local plaintiff under national law].[100]

Article 16 Third party claims

It was agreed to delete this Article.

Article 17 Jurisdiction based on national law [101]

[Subject to Articles 4, 7, 8, 11(1), 12 and 13[102],][103] the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.

[Article 18 Prohibited grounds of jurisdiction [104]

[1. Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and [either] the dispute [or the defendant][105].][106]

2. [In particular,][107] [Where the defendant is habitually resident in a Contracting State,][108] jurisdiction shall not be exercised by the courts of a Contracting State on the basis [solely of one or more][109] of the following –

[*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;][110]

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[100] It was proposed to add the language within brackets to provide for the situation where the counterclaim is outside the subject matter jurisdiction of the court. There was general agreement that a counter-claim could only confer jurisdiction over the person of the defendant and not subject matter jurisdiction (including excess of any monetary limits) which it did not possess under national law. There was some discussion as to whether this was already obvious, or whether the issue which also arises in relation to forum selection clauses, should be dealt with in a general provision, and whether the language proposed within the brackets was adequate for the intended purpose. In relation to the last issue, the following alternative words have been proposed: " […], unless the court seised does not have subject matter jurisdiction to adjudicate the counter-claim".

[101] Subject to the determination of the material in brackets, this Article was approved by agreement.

[102] It has been proposed that the reference to Article 13 be deleted. This will allow the making of provisional and/or protective orders under national law.

[103] The question of the existence or exclusivity of Articles 7, 8, 12 and 13 still remain to be resolved.

[104] There was no consensus on this provision.

[105] It has been proposed to add the words 'either' and 'or the defendant' in order to meet the difficulties in national legal systems where the main emphasis for jurisdictional competence lies on the link between the forum and the defendant, rather than the subject matter of the dispute. There is no consensus on this point.

[106] The deletion of the whole of paragraph 1 has been proposed in order to emphasise the basic concept of the Convention that there be a limited number of required bases of jurisdictions that are generally accepted, a limited number of jurisdictional bases so universally disapproved as exorbitant that they should be listed as prohibited jurisdictions, and that any other jurisdiction not listed in either category should remain open for the exercise of jurisdiction under national law (the 'grey zone'). There was no consensus on the deletion of paragraph 1.

[107] If paragraph 1 is to be deleted, the words in brackets should also be deleted.

[108] If paragraph 1 is to be deleted, the words in brackets should be placed in what is now paragraph 2.

[109] It has been proposed to delete the words within the brackets. No consensus exists on this point.

[110] It has been proposed to delete sub-paragraph a) entirely. There is no consensus on this issue.

b) the nationality of the plaintiff;

c) the nationality of the defendant;

d) the domicile, habitual or temporary residence, or presence of the plaintiff in that State;

[*e)* the carrying on of commercial or other activities by the defendant in that State, [whether or not through a branch, agency or any other establishment of the defendant,][111] except where the dispute is directly related to those activities;][112]

f) the service of a writ upon the defendant in that State;

[*g)* the unilateral designation of the forum by the plaintiff;][113]

h) [proceedings in that State for declaration of enforceability or registration or for the enforcement of a judgment, except where the dispute is directly related to such proceedings][114] [initiation of proceedings in that State by the party against whom jurisdiction is claimed, for the purpose of recognising or enforcing a judgment from another State][115];

[*i)* the temporary residence or presence of the defendant in that State;][116]

[*j)* the signing in that State of the contract from which the dispute arises;][117]

[*k)* the location of a subsidiary or other related entity of the defendant in that State;][118]

[*l)* the existence of a related criminal action in that State].[119]

[3. Nothing in this article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action claiming damages in respect of conduct which constitutes –

[*a)* genocide, a crime against humanity or a war crime];[120] or][121]

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[111] The addition of the words within the brackets is proposed to make it clear that the presence of a branch, agency or other establishment within the forum should not be a basis for the exercise of general jurisdiction under national law: see the view expressed by the co-reporters in Preliminary Document No 11 at p. 57 that 'such a general jurisdiction is inconsistent with the Convention' (the preliminary draft Convention of October 1999). No consensus was reached on this proposal.

[112] It has been proposed to delete sub-paragraph e) entirely. There is no consensus on this issue.

[113] It has been proposed to delete sub-paragraph g) entirely. There is no consensus on this point.

[114] This was the text as it appeared in the preliminary draft Convention of October 1999.

[115] The language within the brackets was proposed as an alternative to the October 1999 text by way of clarification only. However, it was objected that the omission of the words 'except where the dispute is directly limited to such proceedings' had a substantive effect and would deprive the judgment debtor of the opportunity to raise objections directly related to the enforcement, such as part payment of the debt.

[116] It has been proposed to delete this sub-paragraph entirely. There is no consensus on this point.

[117] It has been proposed to delete this sub-paragraph entirely. There is no consensus on this point.

[118] The addition of this item to the list of prohibited jurisdiction has been proposed. There is no consensus on this point.

[119] The addition of this item to the list of prohibited jurisdictions has been proposed. There is no consensus on this point: see the comments of the co-reporters in Preliminary Document No 11, at p. 31, footnote 14 and accompanying text.

[120] It was proposed to include a reference to the definitions contained in the Statute of the International Criminal Court. However, it was pointed out that this Statute had not as yet entered into force.

[121] There was agreement that the material in sub-paragraph a) be placed in separate brackets, because sub-paragraphs a) and b) raised different issues.

b) a serious crime under international law, provided that this State has exercised its criminal jurisdiction over that crime in accordance with an international treaty to which it is a Party and that claim is for civil compensatory damages for death or serious bodily injuries arising from that crime[122].

Sub-paragraph *b)* only applies if the party seeking relief is exposed to a risk of a denial of justice[123] because proceedings in another State are not possible or cannot reasonably be required.][124]]

Article 19 Authority of the court seised

1. Where the defendant does not enter an appearance, the court shall verify whether Article 18 prohibits it from exercising jurisdiction if –

a) national law so requires; or

b) the plaintiff so requests; or

[*c)* the defendant so requests, even after judgment is entered in accordance with procedures established under national law; or]

d) [the document which instituted the proceedings or an equivalent document was served on the defendant in another Contracting State]

or

[it appears from the documents filed by the plaintiff that the defendant's address is in another Contracting State].[125]

[2. When the jurisdiction of the court seised in a Contracting State is based on or is consistent with a ground of jurisdiction provided for in Articles 3 to 16, a party may request the court to declare so in the judgment.][126]

Article 20[127]

1. The court shall stay the proceedings so long as it is not established that the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, or that all necessary steps have been taken to that effect.

[2. Paragraph 1 shall not affect the use of international instruments concerning the service abroad of judicial and extrajudicial documents in civil or commercial matters, in accordance with the law of the forum.]

[3. Paragraph 1 shall not apply, in case of urgency, to any provisional or protective measures.]

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[122] The original proposal had translated the French '*exerce*' as 'established'. Some favourable comments on the proposal were withdrawn when it was pointed out that the intention was not to say 'established' in English but to restrict the article to situations where criminal jurisdiction is 'exercised'.

[123] It was pointed out that the concept of 'denial of justice' was unknown under certain legal systems.

[124] There was no consensus on the proposed paragraph 3. It is included in the text within square brackets to facilitate future discussion.

[125] It was agreed to place the text of Article 19, paragraph 1, as it appeared in the preliminary draft Convention of October 1999 (including any bracketed material) in the present document.

[126] There was no consensus on this proposal.

[127] It was agreed to place the text of Article 20, as it appeared in the preliminary draft Convention of October 1999 (including any bracketed material) in the present document.

Article 21 Lis pendens

1. When the same parties are engaged in proceedings in courts of different Contracting States and when such proceedings are based on the same causes of action, irrespective of the relief sought, the court second seised shall suspend the proceedings if the court first seised has jurisdiction under Articles [white list][128] [or under a rule of national law which is consistent with these articles][129] and is expected to render a judgment capable of being recognised under the Convention in the State of the court second seised, unless the latter has exclusive jurisdiction under Article 4 [, 11][130] or 12.

2. The court second seised shall decline jurisdiction as soon as it is presented with a judgment rendered by the court first seised that complies with the requirements for recognition or enforcement under the Convention.

3. Upon application of a party, the court second seised may proceed with the case if the plaintiff in the court first seised has failed to take the necessary steps to bring the proceedings to a decision on the merits or if that court has not rendered such a decision within a reasonable time.

4. The provisions of the preceding paragraphs apply to the court second seised even in a case where the jurisdiction of that court is based on the national law of that State in accordance with Article 17.

5. For the purpose of this Article, a court shall be deemed to be seised –

a) when the document instituting the proceedings or an equivalent document is lodged with the court; or

b) if such document has to be served before being lodged with the court, when it is received by the authority responsible for service or served on the defendant.

[As appropriate, universal time is applicable.]

6. If in the action before the court first seised the plaintiff seeks a determination that it has no obligation to the defendant, and if an action seeking substantive relief is brought in the court second seised –

a) the provisions of paragraphs 1 to 5 above shall not apply to the court second seised; and

b) the court first seised shall suspend the proceedings at the request of a party if the court second seised is expected to render a decision capable of being recognised under the Convention.

7. This Article shall not apply if the court first seised, on application by a party, determines that the court second seised is clearly more appropriate to resolve the dispute, under the conditions specified in Article 22.

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[128] It was agreed to add the words within brackets in order to make it clear that the *lis pendens* rule only applies when the court first seised exercises jurisdiction under the Convention: see the Report of the co-reporters, Preliminary Document 11, at p. 86.

[129] This proposal sought to make it clear that the *lis pendens* rule will not only apply where the court first seised is exercising 'white list' jurisdiction as such, but also in the case where that court exercises a jurisdiction under national law in a situation that is consistent with 'white list' jurisdiction, such as proceedings against a defendant who is habitually resident in that State: see Report of co-reporters, Preliminary Document 11, at p. 86. There was no consensus on this point.

[130] There was no consensus on the insertion of a reference to Article 11 (trusts).

Article 22 Exceptional circumstances for declining jurisdiction

1. In exceptional circumstances, when the jurisdiction of the court seised is not founded on an exclusive choice of court agreement valid under Article 4, or on Article 7, 8 or 12, the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defence on the merits.

2. The court shall take into account, in particular –

a) any inconvenience to the parties in view of their habitual residence;

b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;

c) applicable limitation or prescription periods;

d) the possibility of obtaining recognition and enforcement of any decision on the merits.

3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.

4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, or if it is in a non-Contracting State,[131] unless the defendant establishes that [the plaintiff's ability to enforce the judgment will not be materially prejudiced if such an order is not made][132] [sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced][133].

5. When the court has suspended its proceedings under paragraph 1,

a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court; or

b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.

6. This Article shall not apply where the court has jurisdiction only under Article 17 [which is not consistent with Articles [white list]].[134] In such a case, national law shall govern the question of declining jurisdiction.[135]

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[131] It was agreed to insert the words "or if it is in a non-Contracting State" in order to fill a gap in the provision, see the Report of the co-reporters, Preliminary Document 11, at pp. 92-93.

[132] The words in the preceding brackets were proposed in substitution of the existing text which were thought to set too high a standard for the defendant to be able to meet on the one hand and still not give the plaintiff the security needed on the other: see the Report of the co-reporters, Preliminary Document 11 at p. 93. There was no consensus on this point.

[133] This is the text of the preliminary draft Convention of October 1999.

[134] This proposal sought to ensure that the preservation of national rules of *forum non conveniens* will not apply both where the court seised is exercising 'white list' jurisdiction as such, and also in the case where that court exercises a jurisdiction under national law in a situation that is consistent with 'white list' jurisdiction, such as proceedings against a defendant who is habitually resident in that State. There was no consensus on this point.

[135] This paragraph makes it clear that Article 22 does not apply where the court is only exercising jurisdiction under national law. In that case, the court can apply its own rules of *forum non conveniens* or similar (if any). This resolves the question raised by the co-reporters in Preliminary Document 11, at p. 89. It was agreed to insert this paragraph.

[7. The court seised and having jurisdiction under Articles 3 to 15 shall not apply the doctrine of *forum non conveniens* or any similar rule for declining jurisdiction.][136]

CHAPTER *** – RECOGNITION AND ENFORCEMENT

Article 23 Definition of 'judgment'

For the purposes of this Chapter, 'judgment' means any decision given by a court, whatever it may be called, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which may be recognised or enforced under the Convention.[137]

[*Article 23A Recognition and enforcement of provisional and protective measures* [138]

[Alternative A

1. A decision ordering a provisional and protective[139] measure, which has been taken by a court seised[140] with the claim on the merits, shall be recognised and enforced in Contracting States in accordance with Articles [25, 27-34].

2. In this article a reference to a provisional or protective measure means –

a) a measure to maintain the status quo pending determination of the issues at trial; or

b) a measure providing a preliminary means of securing assets out of which an ultimate judgment may be satisfied; or

c) a measure to restrain conduct by a defendant to prevent current or imminent future harm.]

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[136] This paragraph was proposed to ensure that national rules of *forum non conveniens* or similar rules would not be used in relation to 'white list' jurisdiction as a means of declining jurisdiction. There was no consensus on this point.

[137] For those delegations that support the complete exclusion of provisional and protective measures from the Convention, no reference to such measures will be necessary in this Article. It has been proposed to include in the Convention provisions both for jurisdiction to take provisional and protective measures and for their recognition and enforcement. As for jurisdiction, it was pointed out that the definition of 'judgment' in Article 23 could be read to include provisional and protective measures. As for recognition and enforcement, proposals are made in Article 23A below.

[138] The two alternatives which do not appear to differ much in substance, provide for the recognition and enforcement of provisional and protective orders made by a court that is seised (or about to be seised) of the substantive dispute. Such a provision is opposed naturally by those delegations that favour exclusion of such measures from the scope of the Convention. But several delegations that favoured the inclusion of a provision relating to such measures in the jurisdictional or procedural part of the Convention, opposed making provision for the recognition and enforcement of provisional and protective orders. Note also that there may be a need to address: the extent to which similar relief is known in the State of the court addressed; and, procedures to safeguard the interests of third parties or of the defendant (e.g. an undertaking to pay damages).

[139] The two descriptions 'provisional' and 'protective' are intended to be cumulative.

[140] It was suggested that it would be sufficient if a court is seised after a provisional and protective measure is made as long as it is already seised by the time of recognition and enforcement of the provisional and protective measure is sought abroad.

[Alternative B

Orders for provisional and protective measures issued in accordance with Article 13[141] shall be recognised and enforced in the other Contracting States in accordance with Articles [25, 27-34].]]

Article 24 Judgments excluded from Chapter III

This Chapter shall not apply to judgments based solely on a ground of jurisdiction provided for by national law in accordance with Article 17, and which is not consistent with any basis of jurisdiction provided for in Articles [white list].[142]

Article 25 Judgments to be recognised or enforced

1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognised or enforced under this Chapter.

2. [In order to be recognised, a judgment referred to in paragraph 1 must have the effect of *res judicata* in the State of origin.][143]

or

[A judgment referred to in paragraph 1 shall be recognised from the time, and for as long as, it produces its effects in the State of origin.][144]

3. [In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.][145]

or

[A judgment referred to in the preceding paragraphs shall be enforceable from the time, and for as long as, it is enforceable in the State of origin.][146]

4. However, recognition or enforcement may be postponed [or refused][147] if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.

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[141] This refers back to the proposal made as Alternative B in Article 13, above. The order must have been made by a court which is seised or about to be seised of a claim and which has white list jurisdiction to determine the merits thereof.

[142] The addition of the second part of the sentence was accepted by consensus. The additional words make it clear that Chapter III will apply to any judgment based on one or more grounds of jurisdiction, so long as any one of those grounds is consistent with a required basis for jurisdiction under the Convention. For recognition purposes, the application of Article 24 is confined to judgments that can only be based on jurisdiction provided for by national law.

[143] This is the text of paragraph 2 as it appeared in the preliminary draft Convention of October 1999. It was suggested to avoid the use of technical terms such as '*res judicata*' or '*autorité de la chose jugée*' which may not have a uniform meaning in all legal systems.

[144] This text was proposed as an alternative text to paragraph 2 by the Informal Working Group on Article 25. It has been agreed to insert it in the text to facilitate future discussion.

[145] This is the text of paragraph 3 as it appeared in the preliminary draft Convention of October 1999.

[146] This text was proposed as an alternative text to paragraph 3 by the Informal Working Group on Article 25. It has been agreed to insert it in the text for future discussion.

[147] The addition of the words in brackets is proposed in order to ensure that Contracting States are not obliged to recognise or enforce judgments under the circumstances described in this paragraph. The decision whether to postpone or refuse recognition should be left to national law. The proposal has not as yet been discussed.

Article 26 Judgments not to be recognised or enforced [148]

A judgment based on a ground of jurisdiction which conflicts with Article 4, 5, 7, 8 or 12, or whose application is prohibited by virtue of Article 18, shall not be recognised or enforced.[149]

Article 27 Verification of jurisdiction [150]

1. The court addressed shall verify the jurisdiction of the court of origin.

2. In verifying the jurisdiction of the court of origin, the court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

3. Recognition or enforcement of a judgment may not be refused on the ground that the court addressed considers that the court of origin should have declined jurisdiction in accordance with Article 22.

Article 27A Appearance without protest

1. If, in the proceedings before the court of origin, -

   a) the plaintiff claimed that the court had jurisdiction on one of the grounds specified in Articles [white list]; and

   b) the plaintiff did not claim that the court had jurisdiction on any other ground under national law; and

   c) the court did not determine that it had jurisdiction under any other ground under national law; and

   d) the defendant proceeded on the merits without contesting jurisdiction,[151]

the defendant shall, in the court addressed, be precluded from contesting the jurisdiction of the court of origin.

2. This Article shall not apply if the courts of a Contracting State other than the State of the court of origin had exclusive jurisdiction under Article 12.[152]

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[148] Agreement was reached on this Article subject to further identification of the Articles to which it will apply.

[149] Agreement was reached on this paragraph subject to further identification of the Articles to which it will apply.

[150] This Article was agreed to.

[151] The view was expressed that the time limits presently specified in Article 5, above, should be incorporated in sub-paragraph d). There was no consensus on this point.

[152] Apart from the matter noted in note 151, above, there was consensus on this proposed new article. Its purpose is to overcome the difficulty referred to by the co-reporters in relation to the text of Article 5 as it appeared in the preliminary draft Convention of October 1999 (see Preliminary Document No 11, at p. 46) that under the text as it then stood appearance without protest to a jurisdiction exercised pursuant to national law (the 'grey zone') would convert that jurisdiction into required jurisdiction. There was a consensus that this would be an undesirable effect of the previous provision. The effect of the new provision would remove appearance by the defendant from the list of required jurisdictions (the 'white list'), but appearance of the defendant without protest will, if the conditions set out in paragraph 1 are fulfilled, preclude the defendant from contesting the jurisdiction of the court of origin upon the verification of the jurisdiction of that court by the court addressed.

Article 28 Grounds for refusal of recognition or enforcement

1. Recognition or enforcement of a judgment may be refused [only][153] if –

a) proceedings between the same parties and having the same subject matter are pending before a court of the State addressed, if first seised in accordance with Article 21;[154]

b) the judgment is inconsistent with a judgment rendered, either in the State addressed or in another State, provided that in the latter case the judgment is capable of being recognised or enforced in the State addressed;[155]

[*c)* the [judgment results from] proceedings [in the State of origin were][156] incompatible with fundamental principles of procedure of the State addressed, [including the right of each party to be heard by an impartial and independent court];][157]

d) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence [, or was not notified in accordance with [an applicable international convention] [the domestic rules of law of the State where such notification took place]],[158] unless the defendant entered an appearance and presented his case without contesting the matter of notification in the court of origin, provided that the law of that court permits objection to the matter of notification and the defendant did not object.[159]

e) the judgment was obtained by fraud in connection with a matter of procedure;[160]

f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.[161]

2. Without prejudice to such review as is necessary for the purpose of application of the provisions of this Chapter, there shall be no review of the merits of the judgment rendered by the court of origin.[162]

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[153] The insertion of the word 'only' has been proposed to make clear that the following list is an exclusive list of grounds for refusal or enforcement, see Preliminary Document No 11, at p. 102. No consensus was reached on the inclusion of this word in the text.

[154] This sub-paragraph was agreed to.

[155] This sub-paragraph was agreed to.

[156] The deletion of the words 'judgment results from' and the insertion of the words 'in the State of origin' has been proposed. This is intended to clarify the provision. Further discussion depends on the decision of the issue raised in footnote 157.

[157] The deletion of this sub-paragraph has been proposed because it would encourage attacks on the impartiality and independence of the court by the losing party in an attempt to delay enforcement. It would also be contrary to the need for mutual trust and confidence among the courts of Contracting States. It may be that, subject to revision, the first part of the sub-paragraph could be acceptable. No consensus was reached on the continued inclusion of the sub-paragraph in its present form.

[158] No difficulties were raised about the portion of the sub-paragraph not in brackets. The material within the brackets was put forward as containing two options. The option contained within the first set of brackets would permit the requested court to deny recognition in cases where the applicable international convention was violated, such as the *Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. The second option would permit the requested court to deny recognition where service was not effected in accordance with the requirements of the law of the State where notification took place. In most cases, but not all, this would coincide with the State addressed. There was no consensus on the acceptance of either option.

[159] The addition of the words after the last comma was agreed to, subject to drafting.

[160] Agreement was reached on this sub-paragraph.

[161] Agreement was reached on this sub-paragraph.

[162] Agreement was reached on this paragraph.

Article 29 Documents to be produced [163]

1. The party seeking recognition or applying for enforcement shall produce –

a) a complete and certified copy of the judgment;

b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document was notified to the defaulting party;

c) all documents required to establish that the judgment is *res judicata* in the State of origin or, as the case may be, is enforceable in that State;

d) if the court addressed so requires, a translation of the documents referred to above, made by a person [legally][164] qualified to do so.

[2. An application for recognition or enforcement may be accompanied by the form annexed to this Convention[165] and, if the court addressed so requires, a translation of the form made by a person [legally][166] qualified to do so.][167]

3. No legalisation or other formality may be required.

4. If the terms of the judgment do not permit the court addressed to verify whether the conditions of this Chapter have been complied with, that court may require the production of any other necessary documents.

Article 30 Procedure

The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the State addressed so far as the Convention does not provide otherwise. [The law of the State addressed must provide for the possibility to appeal against the declaration of enforceability or registration for enforcement.][168] The court addressed shall act [in accordance with the most rapid procedure available under local law][169] [expeditiously].

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[163] This Article was approved by consensus as it appeared in the preliminary draft Convention of October 1999. It was noted that drafting changes would have to be made if the proposed amendments to Article 25 were accepted.

[164] It was proposed to add the words 'legally'. There was no consensus.

[165] A draft of such a form is attached in Annex III as a basis for further discussion.

[166] It was proposed to add the words 'legally'. There was no consensus.

[167] It was agreed that the nature of the form and whether it should be mandatory, available upon request, or discretionary on the part of the rendering court, required further discussion.

[168] This proposal was put forward in order to ensure that there be at least one possibility of an appeal against a decision either to grant or to refuse *exequatur* or registration. This proposal was opposed on the ground that the provision of a method of challenging or reviewing such a decision should be left to national law. The matter remains unresolved.

[169] The language within the brackets was proposed to replace the word 'expeditiously' in the existing text. Its intention was to give expression in the text of the Convention to the comment of the Reporters in Preliminary Document No 11 at p. 110 that Article 30 'obliges Contracting States to use … the most rapid procedure they possess in their national law'. Concerns were expressed that the proposal would constitute too great an intrusion into national law and that certain rapid procedures that are provided for, for example, in the context of regional arrangements, are not necessarily appropriate in a world wide convention. In a further clarification the Reporters pointed out that such a provision would not oblige a State to use a procedure made available specifically for the purposes of a treaty or arrangement to which that State was a party, but referred to its non-treaty law (*droit commun*). No consensus was reached on this provision.

Article 31 Costs of proceedings

1. No security, bond or deposit, however described, to guarantee the payment of costs or expenses [for the procedure of Article 30][170] shall be required by reason only that the applicant is a national of, or has its habitual residence in, another Contracting State.

[2. An order for payment of costs and expenses of proceedings, made in one of the Contracting States against any person exempt from requirements as to security, bond, or deposit by virtue of paragraph 1 shall, on the application of the person entitled to the benefit of the order, be rendered enforceable without charge in any other Contracting State.][171]

Article 32 Legal aid [172]

[Natural persons habitually resident in a Contracting State shall be entitled, in proceedings for recognition and enforcement, to legal aid under the same conditions as apply to persons habitually resident in the requested State.]

Article 33 Damages

1. A judgment which awards non-compensatory damages, including exemplary or punitive damages, shall be recognised and enforced to the extent that a court in the State addressed could have awarded similar or comparable damages. Nothing in this paragraph shall preclude the court addressed from recognising and enforcing the judgment under its law for an amount up to the full amount of the damages awarded by the court of origin.[173]

2. *a)* Where the debtor, after proceedings in which the creditor has the opportunity to be heard, satisfies the court addressed that in the circumstances, including those existing in the State of origin, grossly excessive damages[174] have been awarded, recognition and enforcement may be limited to a lesser amount.

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[170] This addition was proposed with the intention of clarifying the scope of the Article without changing the substance. The necessity for this provision was questioned and fears were expressed about unintended consequences. Reference was also made to Article 16 of the *Hague Convention of 1973 on the Recognition and Enforcement of Decisions relating to Maintenance Obligations*. Consensus was reached on the substance of this paragraph.

[171] The proposal for this paragraph is based on Article 15 of the Hague Convention of 1980 on International Access to Justice and Article 18 of the Hague Convention of 1954 on Civil Procedure. Its purpose is to secure enforcement of an order made by the requested court for the payment of the costs and expenses borne by the judgment debtor in a case where the requested court has rejected enforcement of the judgment on a ground such as the fraud of the judgment creditor upon the court of origin. There was no consensus on this point.

[172] It was proposed that this provision be deleted from the Convention because it raised constitutional concerns. Some delegations did not consider the provision essential and it could therefore be deleted. But for yet other delegations it was of great importance. It was suggested that the issue could be resolved through an 'opt-in' provision. There was no consensus on these proposals.

[173] The text of paragraph 1 has been approved by consensus and replaces the text of the preliminary draft Convention of October 1999. The working group that produced this text also recommended consideration of reversing the order of paragraphs 1 and 2.

[174] The Reporters explained that the statement at p. 114 of Preliminary Document No 11 to the effect that as a general principle 'grossly excessive' was likely to mean 'grossly excessive by the standards of the court of origin', did not mean that the question of whether the damages were grossly excessive should be judged only by the standards of the court of origin. This would depend on the circumstances of each case, especially on whether the judgment creditor was a resident of the State of origin or of the requested State. In the latter case, obviously the standards of the requested State would assume greater importance.

b) In no event shall the court addressed recognise or enforce[175] the judgment in an amount less than that which could have been awarded in the State addressed in the same circumstances, including those existing in the State of origin.[176]

3. In applying paragraph 1 or 2, the court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.

Article 34 Severability

[Alternative A

If the judgment contains elements which are severable, one or more of them may be separately recognised, declared enforceable, registered for enforcement, or enforced.][177]

[Alternative B

Partial recognition or enforcement

Partial recognition or enforcement of a judgment shall be granted where:

a) partial recognition or enforcement is applied for; or

b) only part of the judgment is capable of being recognised or enforced under this Convention; or

c) the judgment has been satisfied in part.][178]

Article 35 Authentic instruments

[Alternative A

1. Each Contracting State may declare that it will enforce, subject to reciprocity, authentic instruments formally drawn up or registered and enforceable in another Contracting State.][179]

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[175] The addition of the reference to enforcement here and in other parts of the Article was proposed in order to make clear that the Article applies to both recognition and enforcement, see the comments of the Reporters in Preliminary Document No 11, at p. 113. The proposal was accepted by consensus.

[176] It was inquired whether statutory damages (where a statute has determined the amount to be awarded in case of breach), liquidated damages (where a contract has determined the amount to be paid in case of breach) and fixed interest on damages awards would fall within the scope of Article 33 and, if so, whether their character would be compensatory or non-compensatory. The co-reporters indicated that Article 33 would be applicable in such cases and that the classification of such damages as compensatory or punitive would be determined by the requested court. That court would take into account whether the statutory provision in question of the originating forum, or the contractual provision as interpreted according to its governing law, merely sought to estimate what was required to compensate the plaintiff or sought to impose a penalty.

[177] This is the text as it appeared in the preliminary draft Convention of October 1999. It was noted by the co-reporters in Preliminary Document No 11, at p. 115 that this text made no express provision for partial enforcement. Such a provision would allow the court addressed to sever the portion of the judgment which had already been paid or otherwise satisfied.

[178] This is an alternative text which has been included in this document to facilitate future discussion.

[179] This is the text as it appeared in the preliminary draft Convention of October 1999. According to that text States wishing to take advantage of Article 35 should specifically elect to adopt it on the basis of reciprocity with other States making a similar declaration.

[Alternative B

1. Authentic instruments formally drawn up or registered and enforceable in a Contracting State shall, upon request,[180] be declared enforceable in another Contracting State.][181]

2. The authentic instrument must have been authenticated by a public authority or a delegate of a public authority and the authentication must relate to both the signature and the content of the document.[182]

[3. The provisions concerning recognition and enforcement provided for in this Chapter shall apply as appropriate.][183]

[*Article X*[184]

Any Contracting State may, at the time of ratification, acceptance, approval of, or accession to, this Convention, or at any time thereafter, make a declaration that it will not apply Article 35, or that it will apply that Article subject to reciprocity[185].][186]

Article 36 Settlements [187]

Settlements to which a court has given its authority shall be recognised, declared enforceable, registered for enforcement, or enforced in the State addressed under the same conditions as judgments falling within the Convention, so far as those conditions apply to settlements.

CHAPTER **** - GENERAL PROVISIONS

Article 37 Relationship with other Conventions

It was agreed that the proposals made in the Annex to the preliminary draft Convention as well as the Working Documents produced for the purposes of the present Session be reproduced in Annex 1 of this Summary.

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[180] Further discussion will be necessary to clarify what is meant by the words 'upon request' or whether the method and form of making the request (in writing, to a court or other instance) should be left to national law.

[181] According to this alternative text, Article 35 will apply to all Contracting States in the absence of a declaration as envisaged in the proposed Article X below. No consensus was reached on the version of paragraph 1 to be preferred.

[182] This was the text as it appeared in the preliminary draft Convention of October 1999.

[183] It was decided that this paragraph should remain within square brackets.

[184] This provision is part of Alternative 2 to paragraph 1, above. If accepted, it will probably be placed among the General Provisions of the Convention. If accepted, it will give Contracting States the following options:

- not to apply Article 35 under any circumstances;
- to apply Article 35 on condition of reciprocity; or
- to apply Article 35 without requiring reciprocity, that is, where a Contracting State is prepared to give effect to authentic instruments, although it does not provide for that institution under its domestic law.

[185] It remains to be decided whether reciprocity should be required in this proposal.

[186] There is no consensus as regards this provision.

[187] This Article was approved by consensus.

Articles 38 to 40 inclusive Uniform interpretation

This matter has not yet been discussed.

Article 41 Federal clause

This matter has not yet been discussed.

[Article 42 Ratification of and accession to the Convention [188]

[Alternative A

1. This Convention shall become effective between any two Contracting States on the date of entry into force provided that the two States have each deposited a declaration confirming the entry into force between the two States of treaty relations under this Convention.

2. At the time of deposit of its instrument of ratification or accession, or at any time thereafter, each State shall deposit with the depository a copy of its declarations concerning all Contracting States with which the State will enter into treaty relations under the Convention. A Contracting State may withdraw or modify a declaration at any time.

3. The depository shall circulate all declarations received to all Contracting States and to Member States of the Hague Conference.

4. The Hague Conference on Private International Law shall regularly publish information reporting on the declarations that have been deposited pursuant to this Article.]

[Alternative B

1. The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Nineteenth Session.[189]

2. It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

3. Any other State may accede to the Convention.

4. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

5. The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

6. The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign

---

[188] It was agreed that the two following proposals be included in this document in order to facilitate future discussion of this subject. There was no decision on whether there should be a provision dealing with bilateralisation and, if so, what form such a provision should take and how far bilateralisation should extend.

[189] It was requested that consideration be given to a method whereby the European Community could become a party to the Convention.

Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

7. The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.][190]]

[190] This proposal follows the language of Articles 37 and 38 of *the Hague Convention of 1980 on the Civil Aspects of International Child Abduction*.

ANNEX I[191]

Article 37 Relationship with other Conventions

Proposal 1

1. The Convention does not affect any international instrument to which Contracting States are or become Parties and which contains provisions on matters governed by the Convention, unless a contrary declaration is made by the States Parties to such instrument.

2. However, the Convention prevails over such instruments to the extent that they provide for fora not authorised under the provisions of Article 18 of the Convention.

3. The preceding paragraphs also apply to uniform laws based on special ties of a regional or other nature between the States concerned and to instruments adopted by a community of States.

Proposal 2

1. *a)* In this Article, the Brussels Convention [as amended], Regulation […] of the European Union, and the Lugano Convention [as amended] shall be collectively referred to as "the European instruments".

   b) A State Party to either of the above Conventions or a Member State of the European Union to which the above Regulation applies shall be collectively referred to as "European instrument States".

2. Subject to the following provisions [of this Article], a European instrument State shall apply the European instruments, and not the Convention, whenever the European instruments are applicable according to their terms.

3. Except where the provisions of the European instruments on –

   a) exclusive jurisdiction;

   b) prorogation of jurisdiction;

   c) *lis pendens* and related actions;

   d) protective jurisdiction for consumers or employees;

are applicable, a European instrument State shall apply Articles 3, 5 to 11, 14 to 16 and 18 of the Convention whenever the defendant is not domiciled in a European instrument State.

4. Even if the defendant is domiciled in a European instrument State, a court of such a State shall apply –

   a) Article 4 of the Convention whenever the court chosen is not in a European instrument State;

   b) Article 12 of the Convention whenever the court with exclusive jurisdiction under that provision is not in a European instrument State; and

   c) Articles 21 and 22 of this Convention whenever the court in whose favour the proceedings are stayed or jurisdiction is declined is not a court of a European instrument State.

---

[191] Proposals 1-3 were annexed to the preliminary draft Convention of October 1999. Proposal 4 was introduced and discussed at the June 2001 Session.

Note: Another provision will be needed for other conventions and instruments.

Proposal 3

Judgments of courts of a Contracting State to this Convention based on jurisdiction granted under the terms of a different international convention ("other Convention") shall be recognised and enforced in courts of Contracting States to this Convention which are also Contracting States to the other Convention. This provision shall not apply if, by reservation under Article …, a Contracting State chooses –

a) not to be governed by this provision, or

b) not to be governed by this provision as to certain designated other conventions.

Proposal 4[192]

Article 2 Territorial scope

Insert the words shown in brackets in the chapeau of paragraph 1, as follows:

1. The provisions of Chapter II shall apply in the courts of a Contracting State unless all the parties are habitually resident in that State [or in the territory of a regional economic integration organisation that is a Contracting Party under Article [ ]]. However, even if all the parties are habitually resident in that [Contracting] State [or Party] –

[…]

Article 37A Relationship with Conventions in particular matters

This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

Article 37A Relationship with Conventions in particular matters

This Convention shall not affect the application of any other convention to which the Contracting States are or will be parties and which, in relation to particular matters, governs jurisdiction or the recognition or enforcement of judgments, provided that the application of such other convention shall not affect the rights and obligations under this Convention of any State Party that is not a Party to such other convention.

Article X Allocation of jurisdiction under this Convention

Nothing in this Convention shall affect any rule of a Contracting State regarding the internal allocation of jurisdiction among the courts of that State.

[192] It was pointed out to facilitate future discussions that Article 37A and Article X could in principle also be extended to cover regional economic integration organisations.

ANNEX II (Art. 8)

Proposal 1

Article 8 Individual contracts of employment

1. An employee may bring a claim in matters relating to individual contracts of employment against the employer

a) in the courts of the State where the employer has its habitual residence;

b) in the courts of the State in which the employee habitually carries out or carried out his work, [unless it was not reasonably foreseeable by the employer that the employee would habitually carry out his work in that State]; or

c) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the establishment that engaged the employee is or was situated or in the courts of the State in which the employee carried out the work which has given rise to the dispute.

2. An employer may bring a claim in matters relating to individual contracts of employment against the employee only in the courts of the State in which the employee is habitually resident or in which the employee habitually carries out his work.

3. However, proceedings may be brought before the courts referred to in an agreement which conforms with the requirements of Article 4, paragraphs 1 and 2 -

a) if the agreement is entered into after the dispute has arisen;

b) to the extent that the agreement allows the employee to choose whether to bring proceedings in the courts referred to in the agreement or in the courts of the State referred to in paragraph 1; or

c) to the extent that the agreement is binding on both parties under the law of the State in which the employee carried out the work which has given rise to the dispute and provided that it meets the requirements specified in the declaration made by such State as contemplated in Article X.

Proposal 2

Article 8 Individual contracts of employment

1. In matters relating to individual contracts of employment, an employee may bring a claim against the employer,

a) in the courts of the State in which the employee habitually carries out or carried out his work, [unless it was not reasonably foreseeable by the employer that the employee would habitually carry out his work in that State]; or

b) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the establishment that engaged the employee is or was situated.

2. An employer may bring a claim against the employee under this Convention only –

a) in the courts of the State:

i) in which the employee is habitually resident; or

ii) in which the employee habitually carries out his work; or

b) if the employee and the employer have entered into an agreement to which paragraph 4 *b)* or *c)* applies, in the court designated in that agreement.

3. Article 4 applies to an agreement between an employee and an employer only:

a) to the extent that it allows the employee to bring proceedings in the courts of a State other than the State referred to in paragraph 2; or

b) if the agreement is entered into after the dispute has arisen; or

c) to the extent that the agreement is binding on the employee under the law of the State in which the employee is resident at the time the agreement is entered into.

Proposal 3

Article X Reservation in respect of consumer contracts and employment contracts

1. A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 7 or 8 of this Convention.

2. A Contracting State which makes a declaration in accordance with the preceding paragraph may also declare that it will not be bound by Chapter III of this Convention in respect of judgments rendered under Article 7 or 8.

3. A Contracting State which makes a declaration in accordance with the preceding paragraphs is not to be considered a Contracting State of this Convention in respect of matters to which the declaration applies.

Note: This proposal is an alternative to Article 25 *bis* in the Edinburgh Draft Annex III A and Article 8, paragraph 4 *c).* It could also work well with the present wording of Articles 7 and 8 in the 1999 draft Convention. However, some modifications of the rules of jurisdiction will have to be modified in the Edinburgh Draft.

The purpose of this reservation is to make it possible for States that do not accept special rules about consumers or employees, to opt out from the Convention in this respect.

Under the first paragraph a State can opt out from the jurisdictional rules but not the rules on recognition and enforcement under Chapter III. Consequently, such a State is bound to recognise and enforce judgments rendered under Article 7 or 8. However, the State is not obliged to apply Articles 7 and 8 in relation to jurisdiction.

Under the second paragraph, a Contracting State has the possibility to opt out completely in respect of consumer contracts and/or employment contracts. A State can only make a declaration under this paragraph if it has also made a declaration under paragraph 1. A State that has decided to make declarations under paragraphs 1 and 2 will be regarded as having opted out completely in respect of consumer contracts and employment contracts under the Convention. Therefore such a State cannot apply Articles 7 and 8, and judgments rendered in other Contracting States under Articles 7 and 8 will not be recognised under the Convention in the State that has taken this reservation.

Paragraph 3 makes it clear that a State making reservations under paragraphs 1 and 2 is to be considered a non-Contracting State in respect of matters covered by the reservation.

Proposal 4 "Edinburgh Solution"

Article 8 Individual contracts of employment

1. This Article applies in matters relating to individual contracts of employment.

2. An employee may bring a claim against the employer

   a) in the courts of the State in which the employee habitually carries out or carried out his work, [unless it was not reasonably foreseeable by the employer that the employee would habitually carry out his work in that State]; or

   b) if the employee does not or did not habitually carry out his work in any one State, in the courts of the State in which the establishment that engaged the employee is or was situated.

3. An employer may bring a claim against the employee under this Convention only –

   a) in the courts of the State:

      i) in which the employee is habitually resident; or

      ii) in which the employee habitually carries out his work; or

   b) if the employee and the employer have entered into an agreement to which paragraph 4 *b)* or *c)* applies, in the court designated in that agreement.

4. Article 4 applies to an agreement between an employee and an employer only:

   a) to the extent that it allows the employee to bring proceedings in the courts of a State other than the State referred to in paragraph 2; or

   b) if the agreement is entered into after the dispute has arisen; or

   c) to the extent that the agreement is binding on the employee under the law of the State in which the employee is resident at the time the agreement is entered into.

Article 25 Judgments to be recognised or enforced

"Subject to Article 25 *bis* ..."

[*Article 25* bis

1. A Contracting State may make a declaration that it will not recognise or enforce a judgment under this Chapter, or a declaration specifying the conditions under which it will recognise or enforce a judgment under this Chapter, where:

   a) the judgment was rendered by the court of origin under Article 7(2) or Article 8(2); and

   b) the parties had entered into an agreement which conforms with the requirements of Article 4 designating a court other than the court of origin.

2. [A declaration under this Article may not deny recognition and enforcement of a judgment given under Article 7(2) or Article 8(2) if the Contracting State making the declaration would exercise jurisdiction under the relevant Article in a corresponding case.]

3. Recognition or enforcement of a judgment may be refused by a Contracting State that has made a declaration contemplated by paragraph 1 in accordance with the terms of that declaration.]

ANNEX III

Proposal by the Informal Working Group on Forms

Annex to the Convention

Forms

FORM A

CONFIRMATION OF JUDGMENT

(Sample form confirming the issuance of a judgment by the Court of Origin for the purposes of recognition and enforcement under the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the "Convention"))

(THE COURT OF ORIGIN)

(ADDRESS OF THE COURT OF ORIGIN)

(CONTACT PERSON AT THE COURT OF ORIGIN)

(TEL./FAX/EMAIL OF THE COURT OF ORIGIN)

(PLAINTIFF)

Case / Docket Number:

v.

(DEFENDANT)

(THE COURT OF ORIGIN) hereby confirms that it rendered a judgment in the above captioned matter on (DATE) in (CITY, STATE, COUNTRY), which is a Contracting State to the Convention. Attached to this form is a complete and certified copy of the judgment rendered by (THE COURT OF ORIGIN).[193]

1. *Select one or more of the following options:*[194]

A. This Court based its jurisdiction over the defendant(s) on the following article(s) of the Convention, as implemented under the law governing the proceedings of this Court:
……
……

B. This Court based its jurisdiction over the defendant(s) on the following ground of jurisdiction provided for by national law:
……
……..

C. This Court did not identify in the judgment a ground for jurisdiction over the defendant(s):

YES _____ NO _____

[193] Article 29(1)(a).

[194] Article 27 (1) – The court addressed shall verify the jurisdiction of the court of origin.

2. This Court based its jurisdiction over the defendant(s) on the following findings of fact *(If the findings of fact are stated in the judgment or accompanying decision, indicate the relevant passages of the judgment and the decision)*:[195]

……
……
……

3. This Court awarded the following payment of money *(Please indicate any relevant categories of damages):*[196]

……
……
……

4. This Court awarded interest as follows (*Please specify the rate of interest, the portion(s) of the award to which interest applies, and the date from which interest is computed*):

……
……
……

5. This Court included within the judgment the following court costs and expenses (including attorneys fees) related to the proceedings *(Please specify the amounts of any such awards, including where applicable, any amount(s) intended to cover costs and expenses relating to the proceedings within a monetary award)*:[197]

……
……
……

6. This Court awarded, in whole or in part, the following non-monetary remedy *(Please describe the nature of the remedy)*:

……
……
……

7. This judgment was rendered by default:

YES_____ NO_____

(If this judgment was rendered by default, please attach the original or a certified copy of the document verifying notice to the defendant of the proceedings.)[198][199]

8. This judgment (or some part thereof) is currently the subject of review in (COUNTRY OF THE COURT OF ORIGIN):[200]

YES_____ NO_____

9. This judgment (or some part thereof) is presently enforceable in (COUNTRY OF THE COURT OF ORIGIN):[201]

YES_____ NO_____

---

[195] Article 27(2) – The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction.

[196] Refer to Article 33.

[197] Article 33 (3).

[198] Article 27(2) – If the judgment was by default, then the Court being addressed by this form is not bound by the findings of fact on which the court of origin based its jurisdiction.

[199] Article 29(1)(b).

[200] Article 25(4).

[201] Article 25(3).

List of documents:

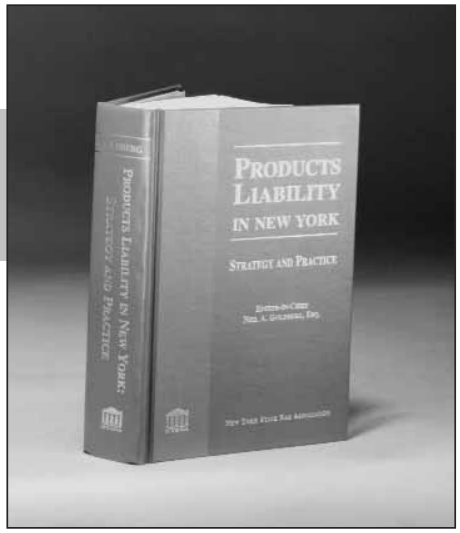
……..
……
……
……
……
……
…..……..

Dated this …….. day of ……, 20…….

…….
Signature and/or stamp by an officer of the Court

Products Liability in New York: Strategy and Practice

Editor
Neil A. Goldberg, Esq.
Goldberg Segalla LLP
Buffalo, NY



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New York State Bar Association

Potential Constitutional Conflicts Between the Hague Convention and the Due Process Clause

By Stephen Orel

The drafted Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the Draft Convention) will, if ratified, supply rules of decision for questions of personal jurisdiction in all participating countries. In particular, the Draft Convention will create a set of rules determining that jurisdiction will be proper in all cases where certain conditions are present. National courts will not have discretion to disregard these rules in favor of elastic tests of "reasonableness" or "minimum contacts."

In the last six decades, the Supreme Court has introduced—and lower federal and state courts have expanded—a jurisprudence filled with concepts that defy the imposition of strict rules of the sort that are the *raison d'etre* of this, as with any convention. As a result, American lawyers have become accustomed to appraising any assertion of personal jurisdiction under the flexibility of the Supreme Court's due process jurisprudence rather than by the rigid application of conditions. One author calls the state of current Supreme Court precedent "to some extent an indefensible muddle."[1]

Several provisions of the Draft Convention clearly have the potential to conflict with established Supreme Court precedent. The most salient of these are the provisions regarding jurisdiction in contract and tort cases. In contract cases, for example, the Draft Convention (in at least one of several present variants) would permit jurisdiction to be exercised in the plaintiff's home forum where the defendant supplied goods or services in that state to the plaintiff, or where performance of the contract took place in whole or in part. This rule in particular would be strictly applied where the plaintiff is a "consumer." In tort cases, jurisdiction will be proper in the state where the injury occurred, so long as the occurrence of such an injury in that state was reasonably foreseeable to the defendant.

Each case raises obvious potential conflicts with existing precedent. In contract cases, for example, the courts have eschewed any formulaic rule that automatically authorizes jurisdiction solely because goods or services were ultimately supplied in the plaintiff's chosen forum. Particularly on the margin are cases in which the defendant did not physically enter the forum state, no negotiations were conducted there and defendant's only arguable conduct in the state was to conclude a contract. In such circumstances, defendants have argued that the totality of circumstances made it unfair to exercise jurisdiction.[2] In tort cases, the Supreme Court has rejected a rule that foreseeability, standing alone, can confer jurisdiction.[3]

The Constitution provides limitations on the assertion of personal jurisdiction in American courts by analyzing characteristics of minimum contacts and reasonableness. As demonstrated below by a number of articles in the Draft Convention, it is likely that conflict with existing U.S. constitutional precedent will arise. Despite constitutional arguments both in favor of and against the validity of those articles of Draft Convention that conflict with established case law, it is likely that the treaty will not be effectual as it conflicts with established Supreme Court precedent.

I. Federal Constitutional Limits on Assertion of Personal Jurisdiction in American Courts

A. Minimum Contacts

The due process clauses of the Fourteenth Amendment limit the power of the state courts to assert personal jurisdiction over nonresident defendants.[4] The Fourteenth Amendment applies only to the states, but the Fifth Amendment's due process clause imposes similar restrictions on the federal government.[5] "The constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process remains whether the defendant purposefully established minimum contacts in the forum State."[6] The necessary "minimum contacts" "must have a basis in some act by which the defendant purposefully avails itself of the privilege of conducting activities in the forum State, thus invoking the benefits and protections of its laws."[7] Added together, these contacts must create a "substantial connection" with the forum state.[8] Merely entering into a contract with a resident of the forum state, or merely signing a contract in a particular state, is not necessarily sufficient minimum contacts to justify an exercise of jurisdiction. "If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot."[9] The Supreme Court has "rejected the notion that personal jurisdiction might turn on mechanical tests or on conceptualistic . . . theories of the place of contracting or of performance."[10]

The Supreme Court has instead instructed courts to evaluate, among other things, prior negotiations, contemplated future consequences, the terms of the contract, and the parties' actual course of dealing in order to determine whether the defendant purposefully established minimum contacts within the forum.[11]

When a controversy is related to the defendant's contacts with the forum, a relationship among the defendant, the forum state and the litigation is the essential foundation of *in personam* jurisdiction.[12] Where the lawsuit does not arise out of the defendants' contacts with the forum, due process requires contacts between the defendant and the forum that are continuous and systematic.[13] This is the distinction between specific and general jurisdiction in U.S. jurisprudence.

The Supreme Court has emphasized that the foreseeability of injury to parties in the forum state is not the sole criterion for jurisdiction. Thus, the Court held in *World-Wide Volkswagen* that while it may have been foreseeable that a car sold by a dealer in upstate New York could make its way to Oklahoma and there be involved in an accident, such a turn of events did not involve relevant purposeful acts by the defendant.[14] The relevant foreseeability is "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there."[15] In *Asahi*, the Court split 4-4 on the question of whether the defendant's insertion of a mere component of a product into the "stream of commerce" was a sufficient constitutional basis for jurisdiction. Four justices would have held that jurisdiction was proper as long as the defendant was aware that the finished product was being marketed in the forum.[16]

B. Reasonableness

Whether the case is a domestic or an international one, considerations other than the conduct of the parties factor into the jurisdictional equation. In every case, the ultimate question is whether exercise of jurisdiction would be consistent with "traditional notions of fair play and substantial justice."[17] The Supreme Court has long held that in domestic cases the interest of the forum state is in providing a remedy for consumers in certain kinds of cases, such as those involving insurers.[18] The *Asahi* Court stated unanimously (8-0) that:

> We have previously explained that the determination of the *reasonableness* of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interests of the several States in furthering fundamental substantive social policies."[19]

In *Asahi*, the Court held that where the defendant is an alien, the court that is asked to exercise jurisdiction must consider "the procedural and substantive interests of other nations."[20] In every case, said the Court,

> those interests, as well as the Federal Government's interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.[21]

Thus, in an international case, *even where minimum contacts exist*, the Supreme Court has held that the due process clause of the Fifth Amendment prohibits an exercise of jurisdiction if it would be unreasonable. In *Asahi*, the Court held that it would be unreasonable for California to assert jurisdiction over a third-party claim against a Japanese manufacturer of a component of a tire valve assembly that was shipped to Taiwan to be incorporated into finished tire tubes by another company, and were ultimately shipped to the United States and installed on the plaintiff's motorcycle.[22] In cases involving intentional torts, such as defamation, the Supreme Court held in *Calder v. Jones* that where a defendant "expressly aimed" his conduct at the forum state, knowing that the plaintiff would suffer the brunt of the injury there, jurisdiction is proper.[23] Lower courts have differed on how far *Calder's* "intentional tort" rule extends to so-called "business torts."[24]

II. Provisions of the Draft Convention that Raise Constitutional Concerns

A. Commercial Contracts: Article 6

1. October 1999 Draft

The October 1999 Draft of the Convention, modeled after comparable provisions in the European Union's Brussels Convention, and now listed as "Alternative B" to the current Draft Convention, provides:

> A plaintiff may bring an action in contract in the courts of a State in which—
>
> (a) in matters relating to the supply of goods, the goods were supplied in whole or in part;

(b) in matters relating to the provision of services, the services were provided in whole or in part;

(c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

This formulation is open to the criticism that it is precisely the kind of "mechanistic" conceptual framework the Supreme Court condemned in *Burger King*. In that case, the Court rejected the notion that jurisdiction could turn on conceptual notions of the place of contracting or of performance.[25] Furthermore, this approach leaves no room for the kind of "reasonableness" analysis that was critical to *Asahi* and others, where jurisdiction was declined even though suit was brought in the jurisdiction where, at least from the plaintiff's standpoint, the goods were supplied. Note also that while *Asahi* was a tort case brought by the plaintiff, under "Alternative B," a third-party claim could easily have been brought on contractual indemnity grounds by the tire tube manufacturer.

2. June 2001 Draft

The June 2001 Draft contains a new formulation of Article 6, noted as "Alternative A." This formulation goes a long way toward adopting American standards of due process:

> A plaintiff may bring an action in contract in the courts of the State—
>
> (a) in which the defendant has conducted frequent [and][or] significant activity; [or provided that the claim is based on a contract directly related to that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.][26]

Certainly, if the bracketed words are made part of the test, it would be hard to find fault under the U.S. Constitution. The test incorporates both the narrow, specific jurisdiction prong of *Helicopteros Nacionales de Columbia, S.A. v. Hall* as well as the reasonableness prong of *Asahi*.[27] The fact that these words are bracketed, however, indicates that the issue is far from settled among the delegates.

The June 2001 draft of Article 6 also contains a "Variant 1," which expands upon paragraph (a) above as follows:

> For the purposes of the preceding paragraph, 'activity' means one or more of the following—
>
> (a) [regular and substantial] promotion of the commercial or professional ventures of the defendant for the conclusion of contracts of this kind;
>
> (b) the defendant's regular or extended presence for the purpose of negotiating contracts of this kind, provided that the contract in question was performed at least in part in that State. [Performance in this sub-paragraph refers [only] to non-monetary performance, except in the case of loans or of contracts for the purchase and sale of currency];
>
> (c) the performance of a contract by supplying goods or services, as a whole or to a significant part.

Again, these provisions bring Article 6 very close to the current U.S. due process standard. Indeed, in some respects they go beyond it, by requiring that defendant's activity be "regular and substantial" even if it is directly related to the plaintiff's cause of action.

B. Consumer Contracts: Article 7

Article 7 of the Draft Convention is entitled "Contracts concluded by consumers." It provides, in essence, that consumers may sue in the state of their domicile "if the claim relates to a contract which arises out of the activities, including promotion or negotiation of contracts, which the other party conducted in that State, or directed to that State."

This provision, among others, raises hackles among Internet companies—a group of enterprises that, in large measure, did not exist when negotiations over the current Convention began. Internet companies worry that they will be subjected to suit in every jurisdiction where their "consumers" reside—i.e., everywhere in the world. To date, U.S. courts have resisted assertions of jurisdiction based solely on maintenance of a Web site accessible in the forum state.[28]

C. Torts: Article 10

The June 2001 draft of Article 10(1) is the same as the October 1999 draft.

> Article 10(1) provides:
>
> A plaintiff may bring an action in tort [or delict] in the courts of the State—

(a) in which the act or omission that caused the injury occurred, or

(b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably foresee that the act or omission could result in an injury of the same nature in that State.

Immediately, one can see the provision's reliance on tests the Supreme Court would likely label "mechanical." In particular, any test that automatically validates personal jurisdiction where the injury occurred, so long as it was foreseeable to the defendant that an injury of that nature might occur in that location, contravenes the express holding of *World-Wide Volkswagen*.

A new subsection 2 to Article 10, inserted as an alternative in the June 2001 draft, provides:

> A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.

A new subparagraph 3 further provides: "The preceding paragraphs do not apply to situations where the defendant has taken reasonable steps to avoid acting in or directing activity into that State."

Taken together, new paragraphs 2 and 3 of the June 2001 draft Article 10 closely track the Supreme Court's pronouncements on both minimum contacts and reasonableness, and are unlikely to raise serious constitutional issues. The new provisions do not, however, precisely mimic the *Asahi* plurality's solicitousness for the needs of the international legal system or of the countries involved. Those considerations, standing alone, however, are rarely if ever a ground for dismissal, and presumably if the defendant's country has acceded to the Convention, it would be difficult to argue that application of the Convention's standards offended that country's interests.

D. Multiple Defendants: Article 14 of the October 1999 Draft

Article 14 of the October 1999 draft provided that where claims against one defendant "habitually resident" in the forum state "are so closely connected [to the claims against the nonresident defendant] that they should be adjudicated together," and "there is a substantial connection between [the forum State] and the dispute involving [the nonresident] defendant," the claim against the nonresident defendant may also proceed in the same state as claims against the resident defendant.

On its face, this provision appears to contradict the reasoning of *Asahi*, which involved a third-party defendant not resident in the forum state, but where it could be argued that there was a substantial connection between the forum state and the "dispute." Due process looks first to the relationship among the *defendant*, the forum, and the litigation as the essential foundation of *in personam* jurisdiction.[29]

Article 14 also appears to contradict the teaching of the Supreme Court that "[e]ach defendant's contacts with the forum State must be assessed individually."[30]

Article 14 has been deleted from the June 2001 draft of the Convention, perhaps in response to heavy criticism that it did not comport with U.S. standards of minimum contacts or fair play and substantial justice.[31]

E. Third-Party Defendants: Article 16 of the October 1999 Draft

Article 16 of the October 1999 draft provided for jurisdiction over third-party defendants in a manner similar to that laid out for co-defendants in Article 14:

> A court which has jurisdiction to determine a claim under the provisions of the Convention shall also have jurisdiction to determine a claim by a defendant against a third party for indemnity or contribution in respect of the claim against that defendant to the extent that such an action is permitted by national law, provided that there is a substantial connection between that State and the dispute involving the third party.

This provision runs into the same difficulties as Article 14. It is contrary to the holding and the reasoning of *Asahi*.[32] Like Article 14, Article 16 has been deleted from the June 2001 draft of the Convention.[33]

III. Can the United States Sign a Jurisdictional Convention that Differs from the Constitution? Views Pro and Con

Scholars are divided on the basic question of whether the United States can, consistent with the United States Constitution, enter into a jurisdictional convention that enshrines standards that differ from the current teachings of the Supreme Court under the due process clauses of the Fifth and Fourteenth Amendments.

A. The Argument Against

The argument against the United States' power to enter into a jurisdictional convention that would enshrine standards differing from current constitutional learning, and thus potentially permit assertions of jurisdiction in some cases where the Supreme Court would find jurisdiction prohibited by the due process clause, is simple: the Constitution controls.

Professor Ronald Brand of the University of Pittsburgh Law School has put the argument bluntly. He starts with the proposition that due process, while "amorphous and sometimes misunderstood . . . is a fundamental concept in the United States' legal system."[34] He notes that the due process clauses of the state and federal constitutions "exist to protect individuals from excessive exercises of governmental authority."[35] This is clearly correct.[36] Professor Brand argues that because the due process clauses "restrict the extent to which courts may exercise jurisdiction over a defendant," they "place similar limitations on the ability of the United States government to agree to rules of jurisdiction that might result in the denial of due process to a defendant in specific litigation."[37] "Any treaty to which the United States becomes a party is subject to the U.S. Constitution, and a court may refuse to apply a treaty provision if to do otherwise would deny a right granted by the Constitution."[38] Professor Brand concludes: "Thus, the United States cannot become a party to a multilateral treaty with jurisdictional provisions that might allow the exercise of jurisdiction beyond the limits of due process."[39]

Professor Brand's view seems to be that of the majority. Professor Stanley E. Cox of the New England School of Law argues that "constitutional protections are necessary to protect against unreasonable assertions of personal jurisdiction," and that "the [American] judiciary is peculiarly empowered to protect against these unreasonable assertions of personal jurisdiction."[40] Professor Cox acknowledges that the current state of the case law interpreting the due process clause's limitations on personal jurisdiction is "an indefensible muddle," but he concludes nonetheless "some assertions of personal jurisdiction are indeed unreasonable and should be held to be such as matters of constitutional law."[41] In Professor Cox's view, personal jurisdiction limitations "are derived from principles of limited sovereignty imbedded in our Constitution."[42] These principles, in brief, protect against enforcement of judgments obtained "either without a defendant's meaningful voluntary affiliation with the forum or without the defendant's purposefully directed actions towards the forum."[43]

Professor Cox rejects the notion that the exigencies of foreign policy can justify accepting enforcement of judgments against U.S. citizens in foreign courts under circumstances that would not meet current due process tests here: "We should give such conclusive effect only to judgments coming from sovereigns which had a legitimate right to render the decisions."[44] Professor Cox's position derives from his view that jurisdiction is "concomitant with legitimate regulatory authority."[45]

Professor Cox's specific concerns, however, may be more theoretical than real given the current shape of the Draft Convention. The "unreasonable bases of jurisdiction" that concern him are "basically of three types: (1) using unrelated property to support *unlimited* jurisdiction; (2) using plaintiff's connection, *standing alone*, to support jurisdiction over the defendant; and (3) basing jurisdiction on the defendant's transient presence accompanied by receipt of litigation papers."[46] At least in the latest draft of the Convention, none of these three assertedly "unreasonable bases of jurisdiction" are allowed. Thus, recent changes in the draft appear to have directly addressed the concerns of U.S. negotiators that constitutional concerns might derail acceptance of the treaty.

Several commentators opine that the Supreme Court has already ruled that treaties cannot trump the Constitution, citing *Reid v. Covert*.[47] In *Reid*, the Court struck down as unconstitutional a provision of the Uniform Code of Military Justice (UCMJ) that purported to exercise court martial jurisdiction over civilian dependents accused of capital offenses while accompanying members of the armed forces overseas in peacetime. The statute provided that such persons were subject to jurisdiction under the UCMJ if such jurisdiction were authorized under "any treaty or agreement to which the United States is or may be a party."[48] The United States had, pursuant to the UCMJ, entered into such agreements with the United Kingdom and Japan. The Court, in a plurality opinion authored by Justice Black, held that this provision of the UCMJ violated a number of provisions of the Constitution, including Article III's requirement of indictment by grand jury for capital offenses. The Court rejected the argument that these constitutional provisions did not apply when the government acts abroad.[49] Furthermore, the Court rejected the argument that the treaty power trumped the Constitution: "This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty."[50]

Professor Russell J. Weintraub, of the University of Texas School of Law, agrees that "[t]he controversy over whether a treaty could trump the Constitution should have been given its quietus by *Reid v. Covert*."[51] Focusing mainly on *Asahi's* reasonableness test, Professor Weintraub states that "[u]nless the Court overrules *Asahi* or adopts a more flexible standard when appraising the jurisdiction of foreign courts, treaty provisions extending jurisdiction beyond *Asahi's* limits will not be enforceable in United States courts."[52]

B. The Argument For

The leading published proponent of the argument for the power of Congress to enter into a treaty that limits certain due process arguments in the personal jurisdiction field is Professor Patrick J. Borchers of Albany Law School.[53] He argues that the Constitution is far more flexible in matters of international affairs than domestic; that somewhat similar arrangements have been upheld in the past (indeed, the Supreme Court has never declared a treaty unconstitutional); and that several features of the minimum contacts/reasonableness tests themselves would support the proposed treaty.[54] In particular, he notes that while *Asahi* does call for courts to consider the interests of other nations, it is presumed that if the defendant's home country has acceded to the Convention it will have no objection to an assertion of jurisdiction by another nation consistent with the Convention.[55]

Professor Borchers does not in fact argue that a treaty can "trump" the Constitution, nor does he take issue with *Reid v. Covert*. Indeed, he does not even discuss *Reid*; he states that it is not his contention "that any provision in any treaty or convention will automatically withstand constitutional challenge."[56] He argues in contrast that "the special nature of foreign affairs" means that the Supreme Court will not necessarily look askance at "modest adjustments to our jurisdictional regime."[57] It is safe to say that Professor Borchers would not agree that *Reid* is not controlling in a case challenging a provision of the Convention that went beyond current due process case law.[58]

Rather, Professor Borchers finds guidance in *Dames & Moore v. Regan*.[59] There, the Supreme Court upheld an executive agreement creating the Iran-United States Claims Tribunal with authority to arbitrate finally, without judicial review, any claims by U.S. parties against the Iranian government or state-run enterprises not settled within six months.[60] The Court noted the long history of nations settling between themselves the claims of their subjects, and concluded that Congress had acquiesced in the President's authority in the instant matter.[61] Professor Borchers acknowledges that *Dames & Moore* is "not a perfect fit with the issues likely to be presented by a judgments convention;"[62] he cites it as a case where the Supreme Court has upheld international agreements that affect the forum choices of private parties,[63] and suggests that it is not such a leap, first from that scenario to the various treaties that have created new types of panels such as NAFTA, and then to a proposed judgments convention.[64]

C. The United States' Negotiating Position

The United States has made clear its inability to accede to any treaty that ignores fundamental tenets of due process jurisprudence. Jeffrey Kovar, the State Department's Assistant Legal Advisor for Private International Law, testified before Congress in June, 2000 that:

> [b]ecause the Due Process Clause puts limits on the extension of jurisdiction over defendants without a substantial link to the forum, the United States is unable to accept certain grounds of jurisdiction as they are applied in Europe under the Brussels and Lugano Conventions. For example, we cannot, consistent with the Constitution, accept tort jurisdiction based *solely* on the place of the injury, or contract jurisdiction based *solely* on place of performance stated in the contract.[65]

Mr. Kovar did not say, however, that the United States could only adhere to a treaty that was inflexibly bound to every nook and cranny of both existing and future Supreme Court precedent.

Conclusion

Thus far, the majority view appears to be that a treaty will not be effectual if it infringes upon Supreme Court holdings regarding due process, regardless of how "muddled" those holdings admittedly are. The State Department has recognized these sentiments and has managed to significantly change the draft convention in ways that ameliorate, but do not totally eliminate, potential conflicts with current constitutional jurisprudence. Unless these conflicts are resolved, ratification of any draft convention may face strong and perhaps insuperable opposition, and would probably engender strong court challenges. Nonetheless, despite what appears to be a clear majority view, the minority view as espoused by Professor Borchers should not be dismissed out of hand, due to the unique nature of the foreign policy interests at stake.

Endnotes

1. Stanley E. Cox, *Symposium: "Could A Treaty Trump Supreme Court Jurisdictional Doctrine?" Why Properly Construed Due Process Limits On Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 Alb. L. Rev. 1177, 1178 (1998).
2. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). *Compare Doe v. Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001) (negotiations in state that were not critical to conclusion of contract did not justify assertion of personal jurisdiction) *with Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1361 (7th Cir. 1996), collecting cases and quoting *Nucor Corp. v. Aceros Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 581 (7th Cir. 1991) ("a defendant's participation in substantial negotiations in the forum state leading to the contract at issue is a significant basis for personal jurisdiction").
3. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-97 (1980).
4. *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102, 108 (1987).

5. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). *See also Submersible Systems, Inc. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413, 420 (5th Cir. 2001); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 944 (11th Cir. 1997); *Aerogroup Int'l, Inc. v. Marlboro Footworks Ltd.*, 956 F. Supp. 427, 439 n.16 (S.D.N.Y. 1996).
6. *Id*. at 108-09, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).
7. *Burger King*, 471 U.S. at 475.
8. *Id*., quoting *McGee v. Int'l Life Ins. Co*., 355 U.S. 220, 223 (1957).
9. *Burger King*, 471 U.S. at 478.
10. *Id*., quoting *International Shoe at 316*; and quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316 (1943).
11. *See Burger King*, 471 U.S. at 479.
12. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984), quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).
13. *See Id*. at 414-15.
14. 440 U.S. at 295-97.
15. *Id*. at 297.
16. 480 U.S. at 117.
17. *International Shoe*, 326 U.S. at 316, quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).
18. *See McGee*, 355 U.S. at 223.
19. *Asahi,* 480 U.S. at 113 (emphasis added) quoting *World-Wide Volkswagon Corp. v. Woodson,* 444 U.S. 286, 292 (1982).
20. *Id*. at 115 (emphasis added).
21. *Id.* at 109.
22. *Asahi,* 480 U.S. at 102.
23. *Calder v. Jones*, 465 U.S. 783, 788-90 (1984).
24. *See generally IMO Indus., Inc. v. Kiekert AG,* 155 F.3d 254, 265 (3rd Cir. 1998) (surveying cases, and concluding that Calder did not change the traditional minimum contacts analysis and due process requires more than a finding that the harm caused by the defendant's intentional tort is primarily felt within the forum).
25. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).
26. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 295-97 (1980). The Supreme Court reasoned that for due process purposes, forseeability is not the likelihood a product will find its way into the forum, but rather "the defendants' conduct and connection with the forum state are such that he should reasonably anticipate being hauled into court there." *Id.* at 297.
27. *See Asahi*, 480 U.S. at 102; *Helicopteros*, 466 U.S. 408.
28. *See Edberg v. Neogen Corp.*, 17 F. Supp.2d 104, 115 (D.Conn. 1998) (holding that the minimum contacts requirements of due process are not met through the maintenance of a Web site); *ESAB Group v. Centricut*, 34 F. Supp.2d 323, 334 (D.S.C. 1999) (holding that without other substantial acts, maintenance of a Web site does not meet minimum contact requirements of due process). *See generally* Annot., *Internet Web Site Activities Of Nonresident Person Or Corporation As Conferring Personal Jurisdiction Under Long-Arm Statute And The Due Process Clause*, 81 A.L.R. 5th 41.
29. *See Helicopteros*, 466 U.S. at 414, citing *Shaffer* 433 U.S. at 204.
30. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984).
31. Heavy criticism resulted in response to the USPTO's call for public comment. For example, The International Trademark Association wrote: "We share the concerns voiced by others that the Article would permit a court to exercise jurisdiction over a defendant without the "minimum contacts" our Constitution has been held to require." *See* http://www.cptech.org/ecom/jurisdiction/hague.html#usg, December 1, 2000.
32. *See Asahi,* 480 U.S. at 102.
33. *See supra*, note 30.
34. Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. Pitt. L. Rev. 661, 662 (1999). Professor Brand was a member of the U.S. negotiating team at the Hague sessions leading to the recent revised Draft Convention.
35. *Id*. at 663.
36. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).
37. *See supra*, note 33.
38. *Id*.
39. *Id*. at 704.
40. *See* Cox, 1177, 1178 (1998).
41. *Id*. at 1179.
42. *Id*. at 1180.
43. *Id*.
44. *Id*. at 1193-94.
45. See *supra*, note 39 at 1198.
46. *Id*.
47. 354 U.S. 1 (1957).
48. 64 Stat. at 109, codified at 10 U.S.C. § 802(11).
49. 354 U.S. at 13-15.
50. *Id*. at 17 (citing *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)).
51. Russell J. Weintraub, *Symposium: "Could A Treaty Trump Supreme Court Jurisdictional Doctrine?": Negotiating The Tort Long-Arm Provisions Of The Judgments Convention*, 61 Alb. L. Rev. 1269, 1276 (1998).
52. *Id*. at 1281.
53. *See* Patrick J. Borchers, *Symposium: "Could A Treaty Trump Supreme Court Jurisdictional Doctrine?": Judgments Conventions And Minimum Contacts*, 61 Alb. L. Rev. 1161 (1998) (hereinafter, "Borchers").
54. *Id.* at 1167, 1173.
55. *Id*. at 1174.
56. *Id*. at 1172.
57. *Id*. at 1173.
58. *Id.* at 1175.
59. 453 U.S. 654 (1981).
60. *Id.* at 685-90.
61. *Id*. at 679-80, 688.
62. Borchers, 61 Alb. L. Rev. at 1169.
63. *Id*. at 1168.
64. *Id*. at 1171-74.
65. *The Internet And Federal Courts: Issues And Obstacles—Hearings Before The Subcommittee On Courts And Intellectual Property Of The Committee On The Judiciary Of The House Of Representatives*, 106th Cong., June 29, 2000 (Statement of Jeffrey D. Kovar), *available at* http://commdocs.house.gov/committees/judiciary/hju66042.000/hju66042-0f.htm, at p. 49 (emphasis added).

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Taxability of Damages in Employment Discrimination Actions

Introduction

Under the current tax laws, victims of employment discrimination are treated differently from other victims of personal injuries because plaintiffs in employment cases are taxed on their personal injury awards. Contrary to the intent of the employment discrimination laws, which seek to make victims whole, the current tax laws deprive victims of such relief. Unlike personal injury awards, which provide tax-free compensation for both lost wages and emotional distress, awards or settlements for compensatory damages in employment discrimination cases, which often lack a demonstrable physical injury, are fully taxable.

For example, in a slip-and-fall case at the supermarket, a victim may receive $50,000 for a broken arm for a month of lost wages and emotional distress suffered. No taxes are assessed on any part of this award. On the other hand, when the same individual is sexually assaulted on her job and receives $50,000 for lost wages and emotional distress, she is taxed on the entire amount.

Prior to 1996, any monetary recovery for emotional pain and suffering or other personal injuries awarded to a plaintiff in employment discrimination cases by way of court order or settlement was excludable from income and thus not taxable. This tax structure changed with the passage of the Small Business Job Protection Act of 1996, which amended section 104 of the Internal Revenue Code.[1] The new Law provides that damages that are not based on "physical injuries or physical sickness" are fully taxable, except for the amount of damages paid for medical care attributable to emotional distress.

The Employment and Labor Relations Committee of the Commercial and Federal Litigation Section of the New York State Bar Association has reviewed the history of the tax status of money received from employment discrimination claims. It has reviewed the current state of the law and has considered views of employment law attorneys, mediators and arbitrators of employment disputes. The Commercial and Federal Litigation Section has concluded that the Small Business Job Protection Act of 1996 is against public policy reasoning, unfair to victims of employment discrimination, contrary to the legislative purposes of the Civil Rights Act of 1991 and strains judicial resources by hindering settlement of employment discrimination claims. Accordingly, this Section recommends that Congress pass the proposed Civil Rights Tax Fairness Act which provides that: (1) compensatory damage awards are excluded from taxable income; (2) income received from lump sum back pay and front pay payments is averaged; and (3) attorney's fees are excluded from taxable income to the plaintiff.[2]

"Unlike personal injury awards, which provide tax-free compensation for both lost wages and emotional distress, awards or settlements for compensatory damages in employment discrimination cases, which often lack a demonstrable physical injury, are fully taxable."

The Small Business Job Protection Act of 1996

Internal Revenue Code § 61 (I.R.C.) provides that all income received by an individual is taxable regardless of the source from which it was derived, unless it is specifically excluded from gross income. In the case of compensation for injuries and sickness, what is excludable is provided in I.R.C. § 104(a).

Prior to August 1996, most courts and commentators considered compensatory awards and monetary settlements in employment discrimination matters excludable from gross income in reliance upon the then-existing language of I.R.C. § 104(a). The pre-August 1996 section 104(a) provided in pertinent part:

> (a) In general—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—
>
> (1) amounts received under workman's compensation acts as compensation for personal injuries and sickness;
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness

The consensus was that the phrase "on account of personal injuries and sickness" in I.R.C. § 104(a)(2)

included both physical and non-physical injuries, so that damages for emotional distress and other non-tangible, compensatory damages were excluded from gross income.

In 1996, Congress enacted the Small Business Job Protection Act of 1996 (1996 Tax Act), which added the following language to I.R.C. § 104(a): "For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding sentence shall not apply to an amount of damages not in excess of the amount paid for medical care . . . attributable to emotional distress."[3] Based upon this amendment and Internal Revenue Service rulings, all awards or monetary settlements resulting from claims for employment discrimination other than those received on account of a physical injury, sickness or the cost of medical care attributable to the treatment of emotional distress are includable in gross income.

"As a matter of public policy, recovery for pain and suffering is not considered income because it is compensation for a past loss, e.g., loss of enjoyment of life."

The various provisions of the 1996 Tax Act became effective on August 20, 1996. The 1996 Tax Act applies to awards or settlements received after the date it was enacted. It does not apply to any amount received pursuant to a written agreement, court decree or mediation award in effect on, or issued before, September 13, 1995.[4]

Congress enacted the 1996 Tax Act to eliminate the confusion as to the issue of the taxability of damages, as evidenced by two Supreme Court decisions and various IRS rulings and notices.[5] The legislative history of the amendment makes it clear that Congress did not intend for emotional distress to be considered a physical injury and therefore it is not excludable.[6] In its joint report, Congress noted that "the exclusion from gross income does not apply to any damages received (other than for medical expenses . . .) based on a claim of employment discrimination or injury to reputation accompanied by a claim of emotional distress."[7] Emotional distress awards now may be excludable only if the award or settlement is attributable to a physical injury or emotional sickness.

In light of the 1996 Tax Act, the IRS released Revenue Ruling 96-65, which states explicitly that a back pay award in satisfaction of a disparate treatment employment discrimination claim is not excludable from gross income. Additionally, the IRS ruled that damages for emotional distress are not excludable, except to the extent that they are damages for actual medical care attributable to emotional distress.

The 1996 Tax Act Is Against Public Policy

A. The 1996 Tax Act Frustrates the Purposes of the Civil Rights Act and Prevents Victims of Discrimination from Being Made Whole

Currently, victims of discrimination are taxed on the entire amount of any award or settlement of their employment discrimination claim. As a matter of public policy, recovery for pain and suffering is not considered income because it is compensation for a past loss, e.g., loss of enjoyment of life. The 1996 Tax Act was passed without debate and therefore has no legislative history that would provide any justification for treating awards for pain and suffering as a result of a personal injury differently from awards for pain and suffering as a result of employment discrimination.[8]

In contrast, the Civil Rights Act was enacted specifically to compensate victims of employment discrimination fully for the pain and suffering that they experience. The legislative debate surrounding the passage of the Civil Rights Act demonstrates that compensatory damages were added so that a victim of discrimination would be placed in the same position that he or she would have been in the absence of discrimination.[9] Congress explicitly recognized that Title VII needed to be amended because it was "unfair" in that it did not fully permit victims of discrimination to "recover the full cost of the losses they suffered because of the discrimination exercised against them."[10] Certainly, the taxation of such damages frustrates this congressional purpose because the injured party is not made whole.

Under current law, discrimination complainants also are not made whole because they are taxed not only on lost wages and compensatory damages, but also on that part of the award or settlement that goes toward attorneys' fees. Payment of attorneys' fees by the employer is imputed as income to the complainant. Effective after December 31, 1997, defendants who make payments to plaintiffs that include amounts for attorneys' fees are required to issue a Form 1099 to the plaintiff regardless of whether the defendant issues one check made jointly to the plaintiff and her or his attorney or whether a separate check is written to the attorney.[11] Although a plaintiff is allowed to deduct the legal fees incurred, it is what is called a "below the line" deduction, meaning that it is not a dollar deduction. Rather, only that amount of the fees and other miscellaneous deductions which equal over 2% of the adjusted gross income of the taxpayer is tax deductible.

Further, the taxpayer can lose an even greater portion of his or her attorneys' fee deduction through operation of the Alternative Minimum Tax (AMT). There is,

however, some authority supporting a contrary result if the fee arrangement between the plaintiff and his attorney is a contingent fee arrangement.[12]

For example, in *Kenseth*, the U.S. Tax Court ruled that an employee who received a settlement in an age discrimination action must pay income tax on the contingent fees his attorney received, thereby reducing the plaintiff's award to 36% of the settlement.[13] The plaintiff in *Kenseth* recovered $229,501 in a class-action settlement of which $91,800 went directly to his attorneys. The court ruled that the entire amount was taxable even though some of it went directly to the attorney, and a substantial part was allocated to emotional distress damages. Although the plaintiff was permitted to deduct his attorneys' fees as miscellaneous deductions, such deduction was subject to the 2% floor on itemized deductions. Accordingly, the allowable deduction was reduced by $5,298, which then was further reduced by $4,654 for the overall limitation on such deductions. Ultimately, the plaintiff had to pay $55,037 in taxes, which included $17,198 arising from the disallowance of the attorneys' fees deductions subject to the AMT. Thus, after paying taxes and attorneys' fees, the plaintiff was left with only $82,664 from a settlement of $229,501.

Other tax problems that prevent civil rights complainants from being made whole and frustrate the legislative purpose of the Civil Rights Act and Title VII is the elimination of income averaging. The presumptive remedy under Title VII is back pay and such remedy was provided in order to restore victims of employment discrimination to the positions they would have been in absent discrimination.[14] The 1996 Tax Act frustrates this legislative purpose because employees who receive lump sum payments for lost wages are often thrust into new and substantially higher tax brackets than that which would have applied had they not been discriminated against and received wages over a number of years. This may well deny the discrimination victim as much as 15% to 20% of their award and puts them in a worse position than they would have been absent the discrimination.

To address these inequities that work an unfair hardship on victims of discrimination, both the Senate and House of Representatives have introduced bills to eliminate unfair taxation of damage awards in employment discrimination cases. The legislation, which applies to all types of discrimination cases, seeks to eliminate the three major tax barriers which prevent discrimination victims from being made whole through court awards or settlements of meritorious claims. The Senate bill, entitled the Civil Rights Tax Fairness Act of 2000, is sponsored by Chuck Grassley, (R-IA) who sits on the Judiciary Committee, the Finance Committee and the Budget Committee, and is co-sponsored by Charles Robb (D-VA) and Thomas Daschle (D-SD), the current majority leader. In the House of Representatives, Deborah Pryce (R-OH) introduced H.R. 4570, also entitled the Civil Rights Tax Fairness Act of 2000, and many representatives now have joined Representative Pryce in supporting the new legislation.

The House and Senate versions of the legislation are substantially similar. Both bills have two important components. First, all compensation awarded, except amounts designated for back pay, front pay and punitive damages, are excluded from taxable income. This excludes from taxable income attorneys' fees as well as compensatory damages, and all ancillary costs and fringe benefits. Second, in cases where lump-sum payments are made, the taxpayer may average income for back pay and front pay awards under a formula that permits individuals recovering wage awards to be taxed over the number of years for which the award was designed to compensate.

To better understand the unfair tax implications of the Small Business Protection Act, set forth below are several demonstrative examples that were taken from actual cases:

Example 1

Plaintiff, Mr. X, is 38 years old, married and has one child. His tax status is married and he is filing jointly. He earned $25,000 per annum in a management position as electrical foreman for a mining company. He developed severe back problems and was medically restricted from lifting or bending and had several back surgeries. He subsequently was terminated and, thereafter, filed a lawsuit claiming disability discrimination. The parties settled the suit with defendant paying $50,000 to plaintiff and allocating $25,000 to back pay and $25,000 to compensatory damages. The court awarded counsel $75,000 as attorneys' fees.

Under current law, Mr. X must include as part of his gross income $125,000 (his award plus the fees paid directly to his attorney). Only so much of the $75,000 in fees that went to his attorney and are in excess of 2% of his income can be deducted. Under state law (Ohio), itemized deductions are not allowed, so none of the attorneys' fees could be deducted. Under the AMT, the deductible attorneys' fees and other items are added back to income, then a flat 26% is paid on the income in addition to the taxpayer's regular tax. In this case, Mr. X must pay $13,169 additional tax as a result of the AMT. He also pays additional taxes as a result of receiving a lump sum in one year. Without the settlement, his marginal tax rate is 15%, which is increased by the lump sum settlement to 31%. Under the Civil Rights Tax Fairness Act, Mr. X would have remained at the 15% marginal rate. Currently, Mr. X's net award after state and local taxes is $16,707, or 13.4%, of the $50,000

award. Under the Civil Rights Tax Fairness Act, he would receive $44,624, or 89%, of the $50,000 award.

Example 2

Ms. Y was among the first wave of female police officers on the New York City police force, being hired only after a court order in a class action. In about 1985, the Department attempted to terminate her employment, claiming that she was psychologically unsuited, although there were no incidents of inappropriate behavior. Ms. Y filed a federal court action claiming sex discrimination and requesting a preliminary and permanent injunction against her termination. As a result of the federal complaint, the Department agreed voluntarily to refrain from termination until the case was decided. Officer Y's major concern was to save her job. After a two-week trial before a Judge (this was prior to the jury trial provision of the Civil Rights Act), the Police Department was found liable for sex discrimination and a permanent injunction was issued. The Judge awarded $2,500 for pain and suffering and $250,000 to her attorney for fees and costs. Officer Y's rights were totally vindicated and, as the law provided, there was no cost to her as a private attorney general vindicating the purpose of the law. Under current law (which was not in effect at the time), the $250,000 for attorney's fees would have been income imputed to Officer Y and she would have been required to pay at least $65,000 in taxes (close to two years of police officer salary) on that income, plus be elevated to a higher tax bracket.

Example 3

Ms. Z is a single mother of one. She files as head of household and earns $20,000. She filed an internal race discrimination charge against the IRS for failure to promote her. The case was settled with a promise to put her on a priority list for promotion. Despite this commitment, she was subsequently denied a promotion that was given to a white employee with less than a year of IRS service. Ms. Z filed a lawsuit which settled in 1999 for $100,000, equally divided between back pay and emotional distress. Under her retainer agreement, her attorneys received one-third ($33,333) of the award. As a result of the current law, she had to pay an additional $4,005 under the AMT. Baldwin's marginal tax rate went from 15% to 31% and she had to pay full taxes on the $50,000 designated for claims of emotional pain and suffering. Baldwin's $100,000 award after payment of her attorney's fees and federal and state taxes netted her approximately $37,414, or 37% of the total award. Under the Civil Rights Tax Fairness Act, the net after fees and taxes would be $58,133.

Example 4

Ms. J is 42 years old and a single mother of two children who pays taxes as head of household. She earns $35,000 per year. For more than a year, Ms. J was sexually harassed by her supervisor, including sexual solicitation, sexually explicit comments about her body and other women's bodies in front of other employees, offensive sexual jokes and comments and threats of retaliation if she refused a sexual relationship. Ultimately, Ms. J quit because of the intolerable conditions. In 1999, Ms. J's lawsuit for discrimination and constructive discharge was settled for $450,000 and $250,000 of this was allocated to lost wages and $200,000 to emotional distress. Ms. J's attorney received one-third of the award or $150,000. Under the current law, as a result of application of the AMT alone, Ms. J had to pay an additional $16,120 in taxes and her marginal tax rate increased from 15% to 30%. Under the current law, Ms. J must pay $169,228 in state (Ohio) and federal taxes and her net, after taxes and payment of attorney's fees, is $130,772, or 29.1% of the total award. Under the Civil Rights Tax Fairness Act, Ms. J's bill would be $47,344 and her net would be $252,656, 56.1% of the total award or 86.7% of the post-attorney's fee award.

The current tax burdens have made settlements of civil rights cases extremely difficult since it now costs employers substantially more to provide a settlement that approximates the employee's actual losses. Under the current law, it costs a defendant $107,000 to settle a case that would net the complainant the same amount that would be netted with a $50,000 settlement under the proposed legislation. For that reason, the Civil Rights Tax Fairness Act is supported by a broad range of organizations representing both civil rights groups and business and management associations.

B. The 1996 Tax Act Frustrates Resolution of Employment Discrimination Matters

Attorneys from both the plaintiff and defense bars generally agree that the current tax laws have resulted in confusion about how to properly allocate damages under most discrimination statutes, thereby hindering settlement negotiations in employment discrimination actions. The 1996 Tax Act departs substantially from the previous statutory framework, including its treatment of what is taxable and what is excluded from gross income, and it has caused practitioners difficulty in determining tax status of monetary settlements and damages awards. Parties now spend an inordinate amount of time and resources to properly allocate settlement monies between taxable back pay and non-taxable physical injury claims as well as determining how to handle attorneys' fees. In addition, attorneys representing both plaintiffs and defendants find that the allocation of damages and the resulting tax consequences have increased plaintiffs' settlement demands. A further concern for many attorneys is their inability to predict how the Internal Revenue Service will rule with respect to the allocation of damages and attorneys' fees in their carefully crafted settlement agreements. Many employ-

ment law practitioners now seek costly advice from tax attorneys and accountants to clarify taxability issues.

As currently drafted, the 1996 Tax Act seems to have narrowed many of the benefits of alternative dispute resolution, pre-litigation settlement negotiations and last minute pretrial settlements. The proposed Civil Rights Tax Fairness Act would significantly reduce the number and types of issues that are confronted by employment law practitioners when attempting to resolve employment discrimination actions. Attorneys from both the plaintiff and defense bars have concluded that this bill will have beneficial consequences that will enhance the ability of practitioners to properly allocate settlement monies between taxable back pay, front pay and punitive damages and non-taxable claims. Settlement agreements will be simpler to negotiate and damage awards will be easier to administer.

"Now that a plaintiff is required to pay taxes on the fees paid to their counsel, the plaintiff's net recovery is reduced to such an extent that many offers that otherwise would have been accepted are rejected, purely because of the tax consequences."

This Section conducted an informal survey of professional mediators and arbitrators whose practices involve employment discrimination cases to learn their views on the taxability issues. The mediators were largely of the view that although employment cases still settle, the increased tax burden on the plaintiffs caused cases to settle for higher figures than they had under the prior tax regime. That change naturally costs employers more money without resulting in greater net compensation to injured plaintiffs.

Mediators also reported that the taxability of an employer's payment of the plaintiff's attorney's fees was a significant obstacle to settlement of cases. Now that a plaintiff is required to pay taxes on the fees paid to their counsel, the plaintiff's net recovery is reduced to such an extent that many offers that otherwise would have been accepted are rejected, purely because of the tax consequences. To the extent that there is a congressional mandate in favor of alternative dispute resolution of employment discrimination cases, the 1996 Tax Act is against public policy for that reason as well.[15]

In sum, the current tax status of employment discrimination damage awards frustrates and often prevents settlements. One purpose of enacting the Civil Rights Act is to provide victims of discrimination with the ability to receive compensatory and punitive damages and to encourage settlement.[16] Accordingly, to the extent that the 1996 Tax Act prevents settlement, it further flies in the face of the purposes behind the enactment of the Civil Rights Act.

Moreover, as employment discrimination cases comprise a significant portion of the federal docket, any hindrance on the parties' ability to resolve such cases necessarily impairs the speedy resolution of all federal cases.[17] Accordingly, as a matter of public policy, the 1996 Tax Act should be repealed.

Conclusion

For the reasons set forth above, the Employment and Labor Relations Committee of the Commercial and Federal Litigation Section of the New York State Bar Association proposes that the New York State Bar Association support the Civil Rights Tax Fairness Act.

Endnotes

1. Pub. L. No. 104-188, § 1605(a) (1996) amends 26 U.S.C. § 104 of the I.R.C. so that most punitive damages are explicitly excepted from the exclusion provided by § 104(a)(2). *See O'Gilvie v. United States*, 519 U.S. 79 (1996).
2. The Labor and Employment Section of the New York State Bar Association previously has voiced its support for the Civil Rights Tax Fairness Act. *See* letters to the Honorable Deborah Pryce, Honorable Patrick D. Moynihan, Honorable Charles Rangel and Honorable Amory Houghton, Jr., from the Section Chair, Section Chair-Elect and Section immediate Past Chair of the Labor and Employment Section of the New York State Bar Association, dated August 20, 1999. The Committee on Labor and Employment Law of The Association of the Bar of the City of New York also supports the Civil Rights Tax Fairness Act and encouraged Congress to expand the legislation to direct the IRS to promulgate certain rules and regulations. *See* Report of the Committee on Labor and Employment Law, *Taxability of Payments on Account of Employment Discrimination Claims*, The Record of the Association of the Bar of the City of New York, Vol. 55, No. 4 at 542-51 (July-Aug. 2000).
3. 26 I.R.C. § 104(a), as amended by Pub. L. No. 104-188 § 1605(c).
4. Pub. L. No. 104-188 § 1605(d)(2).
5. *See* General Explanation of Tax Legislation Enacted in the 104th Congress, Part Four: Revenue Provisions of the Small Business Job Protection Act of 1996, JCS-12-9 (Dec. 18, 1996). For the majority of the past century, both the IRS and the federal courts had interpreted the phrase "personal injuries" to include both physical and non-physical injuries. This interpretation, however, changed commencing in the early 1990s. In *United States v. Burke*, 504 U.S. 229 (1992), the Supreme Court ruled that an employment discrimination settlement (or award) made prior to the enactment of the Civil Rights Act of 1991 ("Civil Rights Act") was taxable or not excludable from gross income and that an award after the Civil Rights Act was excludable and therefore not taxable. The Supreme Court found that a remedial scheme that provides for damages for traditional harm associated with personal injuries, such as pain and suffering, emotional distress or damage to reputation constitutes a tort-type cause of action or claim. The Court thus held that the additional remedies promulgated by the Civil Rights Act, e.g., a jury trial and the imposition of compensatory and punitive damages, are traditional tort-type remedies. Accordingly, the Court ruled that all awards or settlements in Title VII cases that were paid after the

Civil Rights Act may be excluded from gross income for federal tax purposes.

In 1993, the IRS issued IRS Revenue Ruling 93-88, which adopted the Supreme Court's holding in *Burke*. Pursuant to the IRS Ruling, the broad range of traditional tort remedies allowable under the Civil Rights Act were excluded from gross taxable income as compensation for personal injuries, even where damages were awarded only for back pay.

The validity of IRS Revenue Ruling 93-88 was placed in doubt in 1995 by the Supreme Court's holding in *Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323 (1995). In *Schleier*, the plaintiffs settled a discrimination suit brought under the Age Discrimination in Employment Act (the ADEA). Unlike the Civil Rights Act and the Americans with Disabilities Act, the ADEA does not include compensatory or punitive damages. Instead, the ADEA incorporates the remedial scheme of the Fair Labor Standards Act, which provides for equitable relief and if the violation is willful, liquidated damages.

The Court in *Schleier* held that settlements or awards under the ADEA were not excludable under I.R.C. § 104(a) because liquidated damages did "not satisfy the critical requirement of being 'on account of personal injury or sickness.'" 515 U.S. at 330 (quoting I.R.C. § 104(a)(2)). The Court reasoned that liquidated damages were punitive in nature and not designed to compensate victims of discrimination. Plaintiffs argued that under the Court's decision in *Burke*, liquidated damages were analogous to punitive damages, which were tort-like damages. For that reason, plaintiffs urged that ADEA damages should be excluded from taxable income as damages for personal injury. The Court rejected this argument, stating that a tort-like remedial scheme's main characteristic was compensatory relief, the very remedy the ADEA did not provide. *Id.* at 334.

The Court noted that the IRS Revenue Ruling 93-88 supported the plaintiffs' contentions, but declined to adhere to the Ruling, holding that revenue rulings "do not have the force and effect of regulations . . . and they may not be used to overturn the plain language of a statute." *Id.* at 336 n.8 (citations omitted). Reacting to the Supreme Court's rebuke of Revenue Ruling 93-88 in *Schleier*, the IRS suspended Revenue Ruling 93-88 by IRS Notice 95-45, issued on August 3, 1995. The IRS then requested public comments on I.R.C. § 104(a)(2) and asserted it would not issue any determinations of rulings on said provision until a final determination was made. A final determination was not necessary because Congress intervened and passed the Small Business Job Protection Act.

6. *See* JCS-12-9.
7. *See Id.*
8. Interestingly, personal injury victims are not taxed on money they receive for lost wages, while in employment discrimination cases there is no debate that lost wages are taxable.
9. *See* 137 Cong. Rec. S 15336 (daily ed. Oct. 19, 1991).
10. *Id.*
11. I.R.C. § 6045(f)(2)(A), as amended by the Taxpayer Relief Act of 1997 § 102(a).
12. *See Davis v. Commissioner of Internal Revenue*, 210 F.3d 1346 (111th Cir. 2000) and *Estate of Clarks*, 202 F.3d 854 (6th Cir. 2000) (both holding that attorneys' fees paid directly to an attorney pursuant to a contingent fee arrangement are not taxable to the plaintiff); *but see Baylin v. United States*, 43 F.3d 1451 (Fed. Cir. 1995) and *Kenseth v. Commissioner of Internal Revenue*, No. 2385-98, 2000 U.S. Tax. Ct. LEXIS 32 (May 24, 2000) (holding to the contrary).
13. 2000 U.S. Tax Ct. LEXIS 32.
14. *See Ablemarle Paper Co. v. Moody*, 422 U.S. 405, 420-22 (1975) (back pay fulfills congressional purpose of Title VII to make victims of employment discrimination whole).
15. *See* section 118 of Pub. L. No. 102-166.
16. *See* Cong. Rec. S 15336 (daily ed. Oct. 29, 1991).
17. *See* Federal Judicial Caseload: A Five Year Retrospective at 16 showing a 16% increase in civil rights cases filed in U.S. District Courts from 1993 to 1997 excluding prisoner petitions.

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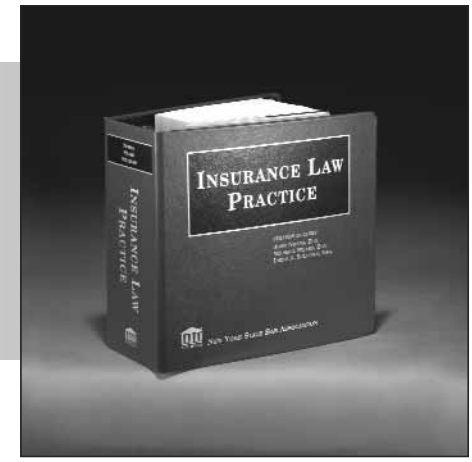

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Contents

Contribution and Confusion in Settling Commercial Litigation in New York—Some Background and Pointers for Practitioners Concerned with General Obligations Law § 15-108

By James A. Beha II

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Modern commercial litigation frequently involves multiple parties with multiple asserted (and sometimes latent) claims, counterclaims, and cross-claims, mixing statutory, contract, and business tort theories. Frequently all claims are consolidated in one court proceeding, but often related cases will be proceeding in multiple venues, and, not infrequently, some significant part of the litigation will involve bankruptcy proceedings, including perhaps, adversary proceedings brought by the bankrupt estate. Few indeed are the multi-party commercial cases which are not settled, at least in part, and few indeed are the complex commercial cases where no one has asserted any cause of action sounding in tort—no negligence, no fraud, no breach of fiduciary duty, no conversion, no nothing!

In most complex commercial cases, then, the New York practitioner must be attentive to (indeed, wary of) the provisions of General Obligations Law § 15-108, which address the effect of a "release or covenant not to sue or to enforce judgment" given to an alleged tortfeasor. Some aspects of the application of this statute to settlements in multi-party tort cases are by now resolved by clear precedent, but quite a few areas of uncertainty seem to remain, and some precedent reviewed in this article may strike the reader as, at the least, unexpected given the statutory language.

I. Overview and Introduction of Practical Concerns

GOL § 15-108

GOL § 15-108 (Appendix A) has four effective provisions. First, it puts aside the ancient rule that a release of one tortfeasor could effect a release of other joint tortfeasors. It also contains two intertwined, but not quite reciprocal, provisions as to how the release of one tortfeasor affects rights to contribution under CPLR Article 14 (Appendix A). The statute grants the released (alleged) tortfeasor immunity from contribution claims by others allegedly liable for the "same injury" (GOL § 15-108(b)), but the statute also strips the settling (alleged) tortfeasor of its contribution claims against others (GOL § 15-108(c)). To balance these provisions, the current version of the statute provides a three-prong mechanism concerning how plaintiff's tort "claim" against any remaining defendants for the "same injury" is to be adjusted to take account of a settlement with another who was, or was claimed to be, liable in tort for that injury.

These provisions are the outgrowth of four steps in the history of New York law concerning contribution among joint tortfeasors: (i) denial of contribution under common law; (ii) allowing pursuit of contribution against a codefendant, on an equitably *pro rata* basis, after paying a judgment (enacted in old Civil Practice Act § 211-a); (iii) judicial adoption of a theory of contribution among joint tortfeasors based on "equitable shares" in the much-discussed case of *Dole v. Dow*;[1] and (iv) the adoption of an expansive scheme of potential claims among those liable in tort for the "same injury," as codified in the current version of CPLR Article 14.

New York's first attempt at allowing contribution among tortfeasors used a *pro rata*, head count approach among judgment debtors.[2] One who settled prior to verdict thus still could not be liable for (or seek) contribution, because it was not a judgment co-debtor. New York common law would, in all events, have precluded the plaintiff from collecting more than one full recovery, at least in the typical "joint tortfeasor" case, allowing defendant to reduce a potential verdict *pro tanto* for amounts already collected in settlement.[3] The initial, 1972 version of GOL § 15-108 was based on this state of the law, and in essence codified the *pro tanto* credit allowed the litigating defendant for pre-judgment settlements by others.[4]

For reasons that are not clear, however, the initial version of GOL § 15-108 did not rest with the *pro tanto* rule. It also provided an alternate set-off for "any amount stipulated by the release or the covenant" if greater than the consideration paid, thereby introducing the possibility of reducing plaintiff's claims by amounts never actually collected.[5]

This statute was enacted as *Dole* was still working its way toward the Court of Appeal's historic decision. Measured under the "relative fault" standards thereafter emerging from *Dole*, this form of set-off left the litigating defendant potentially holding the bag for more than its equitable share. Courts responded by allowing the litigating defendant to seek contribution from the settled defendant—and thus all incentive to settle evaporated.[6] GOL § 15-108 was soon amended to address some implications of *Dole*, both to incorporate the "equitable share" apportionment being codified into CPLR Article 14 and to add the constraints on contribution claims by or against a settling party, now found in subsections (b) and (c).[7]

Since 1974, GOL § 15-108 has provided that insofar as the nonsettling tortfeasor is found liable for the "same injury" for which the settling party from whom contribution could have been sought was alleged to be liable, plaintiff's "claim" is reduced:

> to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfea-

> sor's equitable share of the damages under article fourteen of the civil practice law and rules, *whichever is the greatest.* [emphasis added][8]

If there has been no settlement with any tortfeasor, a plaintiff is able to pursue recovery of its full measure of damages from each defendant after a favorable verdict, leaving to that defendant the risks (and burdens) of recovering from the others through contribution. Upon a tort settlement to which GOL § 15-108 applies, however, it then is the *plaintiff* that bears the risk that the "equitable share" of the settling party will turn out to be at variance with the settlement. In setting up the "set-off" mechanism of GOL § 15-108(a) quoted above, New York adopted a deliberate, hybrid policy, in which defendant gets the better of the approaches generally known as the *pro tanto* (dollar set-off) and "apportionment."

Many states use some sort of set-off approach to account for settled defendants, but many follow an apportionment approach, removing the *pro tanto* floor the common law might set. The reasoning is that if a plaintiff is penalized for a settlement that turns out to be "cheap" when compared to later findings of relative fault, likewise, plaintiff should also reap the reward of a relatively favorable settlement. New York, however, gives plaintiffs the risk *without* the reward.[9] This no doubt can be traced to the state's longtime commitment to the one-satisfaction rule, compounded by its rigorous adherence to the "out-of-pocket" measure of economic tort damages.[10] Defendant, in turn, has a potentially valuable trial strategy of seeking to apportion maximum blame to a party no longer seeking to defend itself, even if the "equitable share" set-off amount that results was far beyond the settling party's ability to pay.

Indeed, the New York mechanism shifts another burden to plaintiff upon settlement via GOL § 15-108's reference to "any amount stipulated by the release or the covenant." Typically, releases themselves only mention "good and valuable consideration," and perhaps a nominal amount. New York cases, however, look to the entire settlement documents for the "amount stipulated." *Collection* of that amount becomes plaintiff's risk—the nonsettling defendant gets credit for the full amount. Thus, for example, where payments are to be made over time, the full amount stipulated is credited even if collection has become uncertain or even dubious.[11]

The Burden of the Bankrupt Tortfeasor

This shift of risk adds a complication to any evaluation of a tort settlement, and it adds headaches to a common concern in multi-defendant tort cases known as "the problem of the bankrupt defendant."[12] For example, in *In re E. & S. Dist. Asbestos Litig.*, Judge Weinstein gave the parties "wide latitude to introduce evidence to establish who substantially contributed to the alleged injuries," and provided a verdict sheet that included all possible asbestos-supplying tortfeasors, whether or not settled, and if not settled, whether or not parties to the proceeding.[13] After verdict, Judge Weinstein then reallocated the "shares" of absent, nonsettled tortfeasors to the remaining defendants in the action, *pro-rata* to their equitable shares.[14] The Second Circuit expressly approved this approach in *Asbestos I*:

> Holding nonsettling defendants jointly and severally liable for the share of responsibility attributed to bankrupts and nonparties works some unfairness to the defendants who are thus held accountable for more than their fair share of fault. The policy of affording plaintiffs full compensation does not always mesh neatly with the policy of protecting defendants from paying more than their equitable share. In weighing these competing interests, we look to New York law, which, as noted above, does not provide any basis for deviating in this situation from the traditional rule of joint and several liability.
>
> * * *
>
> This does not necessarily mean that the non-settling defendants will bear the entire brunt of the reallocation. Under article 14 of the C.P.L.R., non-settling defendants who pay more than their equitable share retain the right to pursue reimbursement from bankrupt or absent joint tortfeasors.[15]

At the time, this ruling was in conflict with the approach taken by New York State trial courts in their own asbestos cases.[16] However, New York's appellate courts eventually agreed with the federal approach.[17]

This allocation of collection ("reimbursement") risk to the present, solvent defendants is radically changed if the plaintiff has reached any agreement with impecunious, or simply absent, alleged joint tortfeasors triggering GOL § 15-108. Indeed, even if the plaintiff received no payment at all for the release of such a tortfeasor, but only nonmonetary consideration such as cooperation, the release triggers GOL § 15-108, entitling other defendants to "reduction in [plaintiff's] damages . . . measured by [the releasee's] equitable share of plaintiff's damages."[18]

For this reason, and for other reasons discussed later, plaintiffs must be extremely careful about potential settlements with tortfeasors whose "fault" may be

relatively substantial but whose resources to fund a settlement are limited. The equitable share set-off that may be assessed to this party by the jury (when all remaining defendants blame the one who isn't there) can make such a settlement very costly.

Relation to CPLR Article 14

In general, a tortfeasor's right of contribution is triggered *only* when actually required to pay more than its "equitable share" of a tort judgment, and only to that extent.[19] Because only payment gives rise to a contribution claim, the statute of limitations commences to run only upon such payment, and a separate post-verdict action for contribution is possible. Nonetheless, the practice is to assert contribution cross-claims against co-defendants, and to implead potential additional targets of contributions claims wherever possible, in order (i) to avoid duplicative trials (with potentially inconsistent verdicts) and (ii) to have one fact-finder determine the "equitable share" of all relevant parties. This practice is expressly authorized by CPLR 1403.

GOL § 15-108 twice cross-references CPLR Article 14, and these provisions must be carefully read together. Generally, if a claim-over by the litigating defendant against the now-settled party would *not* fall within Article 14, none of the provisions of GOL § 15-108 will apply.[20] Thus, when parties are potentially liable only for "distinct" injuries to the plaintiff, rather than for the "same injury," there is no viable contribution claim under Article 14, and GOL § 15-108 will not apply (subsections (b) and (c) thereof being logically superfluous).[21] As we shall see, therefore, contribution is sometimes *not* available among those who caused overlapping or identical damages, if the "injuries" are separate. This can prove a *very* hard line to draw in practice!

The practitioner should not assume that a claim sounding in "indemnity" under common law is, or is not, within the scope of Article 14; the answer may require research and careful analysis. (Claims by predecessor tortfeasors against successors who aggravated an injury, for example, were classified as indemnification claims under common law, but now fall within Article 14.) Article 14 also does not deal with common law or contractual indemnity. As we shall see, how to apply this statute in cases premised on vicarious liability, which can support claims for indemnification and "implied indemnity," becomes a touchy subject.

Cases under Article 14 also will guide any trial of the settling party's equitable share of the damages if the remaining case proceeds to trial. It is Article 14 that supplies the standard of "relative culpable conduct," thus introducing consideration not only of the relative causative role of the settling party, but also of the blame-worthiness of its conduct (intent, extent of negligence, etc.).

Some Ground Rules for the Set-Off Process

(a) Picking the Set-Off Method

The existence of a release must be pleaded as an affirmative defense (CPLR 3018), and the effect of a release of another tortfeasor must also be pleaded as an affirmative defense.[22] Since plaintiff is aware of which parties it has released, wide latitude is given defendants in adding such a defense late in the proceeding.[23]

A defendant may elect not to put the equitable fault of a settling entity at issue at trial and still take advantage of the two other set-offs available under GOL § 15-108(a) [amount paid or amount stipulated], so long as defendant has timely pled this defense.[24] In that instance, if the comparative fault rules of CPLR 14-A are also implicated, *Whalen v. Kawasaki Motor Corp.* holds that the settlement payment should be deducted from the gross verdict "off the top" with any finding of comparative fault then applied to the net. Thus, a plaintiff with a $25 settlement from A, a $100 verdict against B and a 50% allocation of comparative fault, would recover $37.50 from B where B elects not to put the fault of A at issue at trial. In *Whalen* defendant had argued, in effect, that the verdict should first be reduced by 50% and the credit be applied to the net, reducing defendant's hypothetical liability to $25.

Prior to 1993, some courts, citing what they considered a statutory mandate in the use of the singular throughout GOL § 15-108(a), had allowed a defendant to choose either the equitable share or another alternative set-off separately for each party that had settled. In multi-defendant cases this compromised the plaintiff's recovery and provided substantial benefits to the non-settling defendant. In 1993, the Court of Appeals confronted this head-on in one of the asbestos cases, *Didner v. Keene Corp.*, and established a rule that the trial court will aggregate the settlement amounts for all settling parties and also aggregate the "equitable share" findings and give defendant the higher *total* set-off.[25] However, complications certainly can arise in appellate review of apportionments that were made at the trial level, such as where the jury had been asked to consider the "share" of some settling parties but not others. This situation had been considered by the Court of Appeals in a case decided shortly before *Didner*, *Williams v. Niske*.[26]

In *Williams*, four parties settled with plaintiff prior to trial, and the jury was not asked to determine the "equitable shares" of those parties.[27] Two more defendants settled during trial, and the jury apportioned liability 65% to them and 35% to the nonsettling defendant. The courts were presented with at least three

scenarios as to how the GOL § 15-108(a) set-off should then be implemented (Appendix B).

The Appellate Division, First Department, concluded that the verdict should be reduced by the pre-trial settlements and then by the 65% apportioned liability (which exceeded the payments by the defendants settling during trial), yielding plaintiff $595,000 (23% of his $2,600,000 verdict).[28] This approach certainly was more favorable to plaintiff than the mechanism that had been adopted by the trial court, which had applied the 65% haircut *first*, and then subtracted the pretrial settlements, thereby reducing the remaining defendant' s liability to a nominal amount, just $10,000. Nonetheless, the Appellate Division had declined to adopt plaintiff's proposed approach, under which the verdict would be reduced by the greater of either (a) the combined equitable share of all settling defendants (with a zero where defendant had not put the share at issue at trial) or (b) the combined settlement amounts (as shown in Appendix B, this combination approach would have increased plaintiff's recovery to $910,000, 35% of the verdict). The Court of Appeals affirmed the approach taken by the Appellate Division, and rejected outright plaintiff's argument for a "combined" approach, calling it "a false comparison."[29]

The question to be addressed in looking back at *Williams* in light of the later Court of Appeals cases is whether plaintiff or defendant should bear the economic risk of putting *all* equitable share issues before the jury.[30] The Court of Appeals had sharply noted in *Williams* that "the parties do not raise, and we therefore do not consider where the burden for pleading and proving the equitable fault for settling defendants lies." The burden issues then noted by the Court have since apparently been resolved as putting the burdens of both pleading and proof on *defendant.* If the defendant puts at issue the equitable share of a settling party but fails to prove such share, its aggregate "share" set-off is limited to the shares it does prove, and all settlement dollars collectively are measured against that collective share.[31] With that as the premise, the *Williams* result would no longer seem appropriate: a defendant's ducking of its burden of proof with respect to some settling parties, by never putting their shares at issue at all, becomes just another disfavored "pick and choose" tactic.

Certainly a defendant should be allowed the tactical choice of not putting the fault of settled defendants before a jury. But where there are multiple settled parties (as in *Williams*, and unlike *Whalen*), it seems fair to put the burden on the defendant to decide to put the fault of *all or none* at issue and bear the consequence if it does not do so.

(b) The Jury's Role and the CPLR 4533-b Proceeding

The jury is asked to apportion "equitable share" among the relevant persons, a group that is *not* limited to parties of record or settling parties. The result is that a plaintiff may well want to add other possible tortfeasors to the jury's list as part of minimizing what the jury may allocate to settling entities.[32] After the verdict, the court makes the comparison to the settlement amounts in a CPLR 4533-b (Appendix A) proceeding.[33]

If the defendant fails to raise the question of apportionment or to provide sufficient evidence to support a jury finding on the equitable share of settling parties, then the defendant will be deemed to have waived that branch of the set-off provisions. Nevertheless, the litigating defendant still can claim a set-off of the amount paid or stipulated.[34] Presumably, however, it will be the plaintiff that bears the burden of establishing any equitable shares of *nonsettling* absent parties, further assuming that the plaintiff has chosen that tactical route in an effort to minimize the "shares" that the jury will attribute to settling parties.[35]

(c) How to Measure an "Equitable Share"

The guidelines for determining "equitable shares" for purposes of GOL § 15-108(a) are the same as for apportionment under Article 14. Significantly, this means that the jury should assess not merely the extent to which absent tortfeasors (including settling tortfeasors) proximately caused the injury for which remaining defendants are liable, but also the blameworthiness of the absentee's conduct, since CPLR 1402 specifically speaks in terms of "culpable conduct."[36] Again, this can put plaintiff in the awkward position of either defending the absent tortfeasor or risking a major reduction in plaintiff's recovery.

It is crucial for plaintiff that the jury become aware of any legal distinction between the totality of the damage suffered by plaintiff and the claim against the litigating defendant, if the latter is more limited in scope. Consider the paradigmatic accident followed by medical malpractice, and assume that that plaintiff has settled with the initial tortfeasor (the cause of the accident, say "Driver") and proceeds to trial against the subsequent tortfeasor (accused of medical malpractice, say "Doctor"). Since in the typical case, Doctor is only liable for "aggravation" damages, the plaintiff will want the jury to separate Driver's responsibility for the *initial* injuries caused by the accident (assumedly 100%) from Driver's equitable fault for the effects of the malpractice, even though the law may deem the latter a foreseeable consequence of causing the accident. Having settled with Driver, plaintiff would like the jury to focus on equitably allocating the causes of the *aggravation injuries* specifically, and thereby to focus on the responsibility of Doctor, not Driver, for *those* injuries. The commercial parallels are apparent (e.g., the victim of an ini-

tial business fraud wanting the jury to focus on the subsequent audit that failed to detect the fraud, and thereby permitted still worse things to happen).

Not completely clear is how tortfeasors should be grouped for purposes of measuring "shares" of such fault. It appears that where a party's liability is *entirely* derivative (e.g., an otherwise uninvolved employer liable for an employee's conduct, or in some instances, a landlord liable for a condition created by a tenant), the tortfeasor and the party with derivative liability should be treated as a "unit."[37] However (and this *does* become complicated), the effect of a settlement with one party in a unit may not prove intuitively obvious.

When releasing a corporate defendant, the practitioner will no doubt be careful to exclude from the release's usual boilerplate about "past and present" officers and agents any parties against which plaintiff still expects to proceed. Nonetheless, to the extent a remaining defendant is sued for conduct within the scope of his position as a corporate officer, plaintiff should be prepared for "equitable share" arguments that overlap or even obviate the recovery sought. A motor vehicle case makes the procedural point: Plaintiff (P), injured in a car accident, has sued the other driver (D), plus the driver's employer (and owner of the car) (E) and a repair shop (R) which negligently repaired the brakes on E's car. Plaintiff settled with employer E, but *not* with the employee. At trial, the judge instructed the jury to fix the equitable share of both D and E on a collective basis, since the alleged basis for E's liability was vicarious only. The jury did, and P found its verdict against R reduced by the 75% combined share found for D and E, *even though D had not settled*. The Fourth Department affirmed this result in *Mead v. Bloom*, specifically approving the treatment of "these parties [D and E] as one unit for the purpose of contribution, since they were responsible for but a single wrong."[38] In any case where individual employees are significant targets for potential recovery, *Mead* and its attendant procedural woes should be kept in mind.[39]

When the settlement is made with the *employee*, this does not release the vicariously liable employer or give that employer an argument for a "100% set-off," because the employer's claim against its employee is for indemnification, not contribution.[40] Nonetheless, plaintiff's counsel should be wary of how the "equitable share" set-off will play out under such circumstances too. Does the earlier treatment of employer and employee as a single unit[41] survive more recent case law dealing with suits against employers and related indemnification and contribution issues? What if an employer is potentially liable for a fraud committed by several employees, only one of which has settled? Isn't corporate liability always "vicarious" because it is based on the conduct of employees? Can there be "direct" or "active" corporate liability making the corporate employer a co-tortfeasor with specific employees?

Settling Defendant: Have You Got Protection?

In assessing whether and how GOL § 15-108 impacts resolution of a portion of a multi-party business dispute, different questions will be posed for plaintiff, settling party, and still-litigating defendants.[42] In a complex case, such questions may have no clear answers, thus complicating settlement negotiations and leaving the value of plaintiff's verdict far from certain. Also, the perspective from which the Court is asked to consider the question likely will shape the analysis and affect the eventual result.

From the outset, the practitioner must be keenly aware that, although the phrase "release or covenant not to sue or not to enforce a judgment" may seem both carefully limited in scope and unlimited as to timing, the courts have construed it as neither. GOL § 15-108 will *not* apply to waivers or releases given *before* the tortious conduct, even if denominated a "release" by the parties—such as contractual limitations on liability or waivers of claims. In addition, although the statute speaks of a covenant "not to enforce a judgment," if a party settles after a verdict on damages has been returned against it (not merely a verdict on liability but one setting damages), then, under Court of Appeals precedent, such party neither loses its contribution claim *nor* is immunized from contribution claims. Nonetheless, with respect to agreements reached after the incident and before a verdict on damages, GOL § 15-108 will apply to *any* permanent surrender of a tort claim, in whatever form, even if no formal release or covenant is given.[43] The case law and rationale for each of these three judicial adjustments to the apparent scope of the statute are discussed in later sections of this article.

Even if a surrender of claim falls within GOL § 15-108, this is not necessarily the end of the matter for a settling party. Assuming that "good faith" is not an issue and that the settling tortfeasor is protected from any and all claims cognizable under Article 14, what dangers remain despite the release? As discussed below, the courts routinely hold that GOL § 15-108 does not affect indemnity claims—but, at other times, some cross-claims traditionally classified as indemnity claims are found to fall within Article 14, and hence to be barred by GOL § 15-108.

Litigating Defendant: Can You Get an "Equitable Share" Set-Off?

Turning to the interests of the nonsettling defendants, it does not follow that because one *possible* tortfeasor has been released, the courts will necessarily give litigating defendants a GOL § 15-108 "equitable share"

set-off. Although the releasee may feel that it negotiated a release of all claims, asserted or not, relating to the incident, if the trial court is unpersuaded that the released party was "claimed to be liable" in tort by the releasor, then the court may prevent an alleged tortfeasor from arguing that such tort liability nonetheless existed and would have supported a contribution claim. Even if the releasee *was* claimed to be liable in tort, the court may be persuaded that the releasee's purported liability does not relate to the "same injury" for which the remaining defendant is now pursued, so that no contribution claim would have been available and no equitable share allocation is warranted.

Finally, if a plaintiff grants releases to parties against whom it concludes it had no valid tort cause of action, plaintiff in turn must realize that, even if it never asserted such a claim, it may well wind up facing an "equitable share" allocation at trial if a defendant that *is* sued in tort had a valid claim-over against that released party for contribution for that "same injury."

Basic Hypothetical

These differing concerns for different parties in the litigation may become clearer as I discuss some of the case law about when and how GOL § 15-108 will have effect, but let me illustrate them here with a fairly straightforward series of business hypotheticals.

Suppose in a failed loan situation, a lender has sued a guarantor on its guaranty, asserting no other cause of action against the guarantor. The lender has also sued the company's accountants for negligence (but not fraud) and has sued the majority shareholder for fraudulently inducing the loan. The guarantor makes a payment in exchange for dismissal of the action against it. The accountant now seeks to implead the guarantor, claiming the guarantor made misrepresentations both to the lender and to the accounting firm. Does the guarantor have a GOL § 15-108(b) defense to a contribution claim on the basis of alleged misrepresentations to the lender? Moreover, did the settlement with the lender give the guarantor any defense to the accountant's direct claim for misrepresentation?

(a) Misrepresentations to Plaintiff

Although the guarantor was not "claimed to be liable in tort" by the lender, that is not determinative of whether such liability existed, or of whether an Article 14 contribution claim would have been sound on that theory. For this contribution claim to be viable, though, the guarantor would, in fact, have to *be* liable in tort for the injury to the lender—in which case shouldn't subsection (b) protect the guarantor from suit? While the answer seems to be yes, as we shall see, if this identical fact pattern is presented in a context where the *accountant* asserts that, by reason of the release, it should get the benefit of an "equitable share" reduction to the extent the accountant can prove the guarantor's tortious conduct towards the lender contributed to the injury, the accountant may never get this horse out of the starting gate.

(b) Misrepresentations to Co-Defendant

The accountant is also asserting that the guarantor has liability to the accounting firm for misrepresentations to the accounting firm itself. Will the *lender's* release insulate the guarantor from that claim too? The answer may depend on how the court assesses the "injury" at issue. Since the accountant's primary damages flow from the *lender's* injury, isn't this indeed a form of contribution claim, at least as Article 14 expands that concept? If so, at least as to that "same injury" for which the accountant is held liable to the lender (as opposed perhaps to consequential damages unique to the accountant) should subsection (b) again be a defense? Or is this claim-over really one for indemnity?[44]

(c) Variation

Finally, let me tweak the hypothetical to illustrate a different question. Suppose the lender's negligence claim against the accountant is dismissed because of a lack of privity under New York law. After the dismissal, lender extracts a modest payment from the accountant for dropping its appeal. Now the majority shareholder, who (in my hypothetical) *was* in privity with the accountant, seeks to implead the accountant. Does the accountant have a defense by operation of GOL § 15-108(b)? Is lack of privity a "special defense" which bars a direct suit but not a contribution claim, or is privity an essential element of plaintiff's claim which could not be proved?

Alternatively, what if the majority shareholder moves to add an affirmative defense seeking an "equitable share" set-off for the accountant's role in causing the injury. Can an "equitable share" be assigned to the accountant for proximately causing injury even though, as a matter of law, the lender could not sue the accountant for the loss? Would the result be different if, recognizing its lack of privity, the lender had never sued the accountant but instead reached a pre-litigation settlement in which no "claims" were asserted?

Issues of privity for the lender aside, will the duty of the accountant to the *shareholder* (which *would* have supported a contribution claim) now come back to haunt the lender (i.e., to reduce the recovery by the lender, that most haunting of business results)?

Other Unsettling Questions

While some questions may appear more or less resolved, answers to several other important sets of questions about the set-off process remain undeveloped. For example, exactly what is the "claim" being

reduced, and by what? As to the first part of the question, what if the verdict against the litigating defendant is, for one reason or another, for less than the *claim* of the plaintiff against that defendant? Is there any significance to the statute's use of the phrase "claim of the releasor against" as opposed to a phrase like "any verdict in favor of releasor against?"

As to the second, is the "claim of the releasor against the other tortfeasors" necessarily reduced by the totality of what the releasee paid? Claims against other parties may well have embraced other theories not premised on tort (such as contract claims or federal statutory claims like RICO) or sought relief for "injuries" other than that for which the still-litigating defendant is ultimately found liable. Is the dollar reduction the amount paid for "it" (the release) or for the *portion* of the release attributable to claimed liability "in tort for the same injury?" And what if the releasor succeeds at trial against the litigating defendant on some "claims" but not others?

In assessing "consideration" for purposes of GOL § 15-108(a), how is the court to assess (if at all) the value of non-monetary consideration? (What if the defendant has surrendered a counterclaim? What if the settling defendant has agreed to provide cooperation during the remainder of the case? Or what if the settlement includes business arrangements for the future?) Moreover, how, if at all, should interest factors be recognized to reflect receipt of settlement proceeds?

II. When Is GOL § 15-108 Triggered?

(a) "Release or Covenant" Construed as Surrender of Claim

On its face, GOL § 15-108(a) seems to focus narrowly on the granting of a "release or covenant not to sue or not to enforce a judgment."[45] Although many settlements involve one of these protections for the settling party, pre-litigation resolutions often involve agreements that do not fall neatly into these categories. Settlements in the heat of trial, moreover, often rely on a dismissal of the claim with prejudice, without further documentation.

New York courts have concluded that specific release (or covenant) language is not required to trigger GOL § 15-108, so long as the agreement reflects an intent to end a dispute by unequivocally surrendering a claim. In *Barrett v. United States*,[46] dismissal with prejudice sufficed to "surrender any cause of action" and trigger GOL § 15-108. In *Perno v. For-Med Medical Group, P.C.*,[47] a plaintiff agreed to waive its claim against a defendant in bankruptcy in exchange for that defendant's cooperation in pending litigation. No release was provided, but the court found GOL § 15-108 was triggered. Indeed, in the course of deciding other issues in one of the 1993 asbestos cases,[48] the New York Court of Appeals commented that all that was necessary to trigger GOL § 15-108 was some "indicia" of settlement, including among such "indicia" an announcement on the record in open court.[49]

Practitioners should also be acutely conscious that an agreement can trigger GOL § 15-108 even if its impact is postponed or depends on the outcome of trial through verdict, so long as the agreement limits liability. In *Gonzalez v. Armac Industries*,[50] defendant entered into an agreement setting its liability at 2% of an eventual verdict. Although there was no release, the amount was not specific, and the case against that defendant was not formally dismissed, the Court of Appeals found that GOL § 15-108 had indeed been triggered. Analogously, "high-low" agreements have been held to trigger GOL § 15-108, giving the litigating defendants "equitable share" set-off rights and sufficing to support immediate dismissal of the settling defendant's contribution claim against remaining parties.[51]

On the other hand, it seems clear enough that merely allowing a claim to lapse by failing to commence an action within the applicable limitations period does not trigger GOL § 15-108, no matter how strong the claim or what the motive. Indeed, several New York cases have concluded that GOL § 15-108 is not triggered when a plaintiff *does* commence an action but then dismisses the case without prejudice. In *DeSano v. Tower*,[52] plaintiff discontinued an action against one defendant without monetary consideration but upon the condition that the defendant "would not delay the trial by filing for bankruptcy." The Fourth Department held that this did not "discharge" the defendant in a manner triggering GOL § 15-108, since the action apparently was not discontinued with prejudice and hence plaintiff "could have recommenced another action at any time during which the statute of limitations had not run."[53]

In some circumstances a factual inquiry might be necessary to ascertain whether a claim merely had lapsed or whether in fact there was a "covenant not to sue," e.g., in exchange for cooperation against other defendants with greater resources to pay a judgment. Judge McKenna of the Southern District recently addressed an argument that a pattern of a tortfeasor's cooperation, paralleled by plaintiff's not bringing suit against that tortfeasor, implied an agreement not to sue that brought the situation with GOL § 15-108.[54] Judge McKenna rejected the argument, concluding that "the only reasonable inference . . . is that it was not worth the cost of getting a judgment . . . . There [was] no basis on which a reasonable finder of fact could find that there was an agreement within the meaning of GOL § 15-108 between plaintiffs and [the additional tortfeasor]."[55] Even if a course of mutual forbearance and cooperation were apparent, I would argue that, absent a

mutually binding resolution of the claim that would give the tortfeasor a defense of release to later prosecution of the claim, nothing has occurred that triggers GOL § 15-108, other tortfeasors may assert contribution claims against this tortfeasor, and no "equitable share" set-off can be invoked against the plaintiff.

It is instructive that Judge McKenna employed the standard of a "reasonable finder of fact" in the case cited, suggesting that in some circumstances an evidentiary inquiry might well be necessary. In what circumstances the parties will be considered to have actually reached a covenant not to sue,[56] and what evidentiary inquiry is warranted (and whether by judge or jury) are all questions for which the author has located no immediate precedent.

(b) A Tort Claim

Let us return to the guarantor/accountant hypothetical. In the action brought by the lender, the accountant now asserts as an affirmative defense that it has a right to a set-off under GOL § 15-108 because of plaintiff/lender's settlement with the guarantor. By this, the accountant is not merely asserting that out-of-pocket damages must be reduced by the guarantor's payment, but attempting to insert into its defensive case the asserted tortious conduct of the guarantor and seek a potential "equitable share" reduction.

Certainly, if the lender's counsel had thrown tort theories into his client's guaranty case (a common enough approach) then the accountant would seem to be on sound ground. But our hypothetical counsel was more cautious: however much counsel thought the guarantor was a liar and a scoundrel, the only claim the lender *pleaded* was for collection on the guaranty. Thus, while the guarantor was never "claimed to be liable" in tort by the releasor, the *accountant* is now claiming just that, and CPLR 1401 expressly permits pursuit of contribution from a third party "whether or not an action has been brought" by the plaintiff against that party.

Instructive here is a Tenth Circuit case which sought to apply GOL § 15-108, *Bankers Trust Co. v. Lee Keeling & Associates, Inc.*[57] There the lender settled its claim on the debt against the obligor and its corporate parents (Scandrill); apparently no tort claim had been asserted against these parties, but tort claims had been asserted in a related action against other defendants (Keeling), which then sought to pursue an "equitable share" set-off. The Tenth Circuit opinion notes both that the Keeling defendants had not asserted a claim for contribution against Scandrill prior to the settlement and the absence of a direct tort claim in plaintiff's pleading, and concluded that Scandrill and Keeling "are not joint tortfeasors within the meaning of the statute."[58] But the statute is not limited to *joint* tortfeasors, and Scandrill would most surely expect that its settlement provided it with a defense to any later tort claim by the plaintiff. It would seem, then, that what the Tenth Circuit was addressing was not the question of release, but the merits of the claim.

In ruling that Keeling *could not* invoke GOL § 15-108, the court seemed to be concluding, without an evidentiary record, that Keeling could not, as a matter of law, state a contribution claim against Scandrill. One cannot help but wonder whether the result would have been different if Keeling had pleaded a contribution claim against Scandrill before Scandrill settled. And what if this hypothetical third-party claim had survived a motion to dismiss—as contribution claims almost always do? Would GOL § 15-108(b) then give Scandrill grounds for dismissal of the contribution claim or not? But if Scandrill could obtain such a dismissal—which surely it could—how could Keeling be precluded from even *pleading* a set-off under GOL § 15-108(a)?

Such a case can be contrasted to a Second Circuit case in which there *were* tort claims and there *was* a settlement, but where the court concluded that whatever tort claims the plaintiff might have had against the settling party were *not* the subject of a release or covenant. This was the conclusion in *Whitney v. Citibank, N.A.* (wherein plaintiff compromised an accounting action against his partners, apparently releasing specifically those accounting claims only).[59]

In *Whitney*, the partners (other than plaintiff) were accused of selling partnership property at an inadequate price in collusion with Citibank as lender, receiving $200,000 for their consent to a sale in lieu of foreclosure when the surplus value was at least $500,000 and then pocketing for themselves the $200,000 received rather than distributing to Whitney her *pro rata* share (approximately 80%). Plaintiff sued Citibank for tortiously inducing the breach of fiduciary duty, and a verdict was entered against Citibank on that claim. The lower court opinion tells us that by "pretrial agreement, plaintiff has brought only a claim for an accounting against "the partners with stipulated maximum liability of $200,000" (which seems to be the amount they personally received).[60] But we know precious little about this "pretrial agreement." The trial court had granted Whitney an award of the $200,000 against the partners as reimbursement of legal expenses incurred in pursuing a partnership accounting. The Second Circuit agreed that this award was not "duplicative" of the damages awarded against Citibank, which were premised on the lost value of Whitney's partnership interest; hence there were no grounds to reduce the award against Citibank on a dollar basis. The Second Circuit went on to say that "since the stipulated limit on the liability of [the other partners] was restricted to the accounting and did not apply to claims for which Citibank could be found to be a joint tortfeasor, New

York General Obligations Law, § 15-108(a), does not apply."[61]

The opinion seems quite correct as far as the recited facts go—if truly all that was "stipulated" was that the other partners would return the entirety of the funds for which they were held to account as having been wrongfully removed from the partnership. The claim involved to that extent was based on partnership law, and agreeing to a stipulated maximum of $200,000 on that claim does not necessarily imply any release of tort claims. Nonetheless, surely the other partners *must* have committed a breach of fiduciary duty (a tort) that resulted in a collusive, low-ball sale, since Citibank was held liable for fraudulently inducing such breach. It is not at all clear what actually happened to *these* claims against the other partners. Were the tort claims released in exchange for the "stipulated" return of the $200,000? Then GOL § 15-108 certainly should have been triggered. Or were they left extant without prejudice to later assertion? Then GOL § 15-108(a) would not apply, because plaintiff still had her tort claims (subject to the statute of limitations) and Citibank would still have its right of contribution.[62]

In the *BBL* cases already mentioned, Judge McKenna was also called upon to assess an argument that plaintiffs' unasserted tort claim had been surrendered in a manner that triggered GOL § 15-108, with the added complication that the agreement at issue was the plaintiff lenders' settlement agreement with its borrower's bankrupt estate wherein no release had been given by the lenders.[63] The lenders had filed claims in the bankruptcy based solely on the debt, and neither in that claim nor in pending litigations with the bankruptcy trustee had the lenders asserted tort claims against the borrower, even though each plainly had potential tort claims (two senior officers of the borrower having been convicted of bank fraud). In the settlement agreement, the lenders did not provide a release or actually surrender *any* claims on the debt or otherwise; rather, in resolution of the trustee's fraudulent transfer and preference litigation claims, each lender subordinated its existing bankruptcy claim on the debt to the claims of general creditors. While there was no release by the lenders, the settlement agreement did end several pending litigations. Since the litigations were dismissed and the bankruptcy bar date for claims expired, it apparently was thereupon procedurally impossible for the lenders to assert the tort claims, which had become time-barred.[64]

The litigating defendant *BBL* argued for a set-off based on the "equitable share" of the culpable conduct of the collapsed company. Recognizing the absence of a release, defendant analogized to *Perno v. For-Med Medical Group, P.C.*,[65] where plaintiff had reached a settlement with a bankrupt defendant, waiving its distributions in exchange for "cooperation" but not providing a release, which was held sufficient to trigger GOL § 15-108.

In *Perno*, however, the asserted claim *was* a tort claim. Judge McKenna found this bankruptcy settlement to be more like what had happened in *Whitney v. Citibank, N.A.* Although the *BBL* case lender plainly *had* potential tort claims, the tort claims were never formally asserted against the bankrupt company, and were never formally waived or released. Moreover, the claim that *was* formally asserted (the claim on the debt) was not released (or waived, as had been the case in *Perno*), but was subordinated, a formally different outcome than *Perno*, even if financially indistinguishable in its effect. Judge McKenna concluded that under these circumstances, there had been no agreement "relating to a tort claim" by lender against the company. Rather, the lender had merely allowed its tort claims to expire, which did not suffice to trigger GOL § 15-108. This meant that the litigating defendant's contribution rights against the bankrupt company, however valueless, had not been extinguished by the agreement between the lender and the bankrupt company, and conversely, defendant could not resort to GOL § 15-108(a) for an "equitable share" reduction.

As I have said, sometimes the answer to a question may be influenced by the perspective from which it arises. One wonders how the result in the *BBL* case might have been affected if the identical issue had been decided from a different angle—such as by the Bankruptcy Court—if the litigating defendant had attempted to assert a contribution claim against the bankrupt estate.

(c) A Claim for the Same Injury

A more common distinction turns on whether plaintiff's tort claim against the released party was premised on the "same injury" for which the nonsettling tortfeasor is held liable in damages. If not, the litigating defendant would have had no meritorious claim for contribution under Article 14, and GOL § 15-108 would be inapplicable.

The key word is "claim," because if the settling party was *claimed* to be liable for the same injuries, then the dollar reductions of GOL § 15-108(a) will apply, even if, at the subsequent trial, the "equitable share" of such alleged tortfeasor is set at zero. *Pollicina v. Misericordia Hosp. Ctr.* held that claim reduction had to count the payment from a settling defendant, even though the jury had found that defendant had no liability.[66] While this may seem a straightforward application of prior law concerning tort damages, the Appellate Division had held otherwise, expressing frustration with a "pick and choose" approach. This approach appeared to mean that a significantly liable tortfeasor was going to

escape without being held liable for substantial damages, despite the fact that plaintiff had collected far less than the jury verdict. But because the Court of Appeals rejected the "pick and choose" approach in other cases decided concurrently with *Pollicina*, this was no longer a concern.[67]

This brings us back to the hypothetical with which I introduced *Keeling*. What if the settling defendant plainly *could* have been "claimed to be liable in tort" to plaintiff, but plaintiff never made such a claim? Plaintiff has given that party a general release, and the litigating defendant *has* claimed that the guarantor is liable in tort for the same injury, initially by cross-claim for contribution and now by seeking a GOL § 15-108 set-off. The settling party has its release, and GOL § 15-108(b) entitles it to dismissal of the cross-claim. On this hypothetical, the court, contrary to the situation in *Keeling*, cannot dismiss out of hand the merits of the allegation that the settling party would have been liable in contribution under Article 14. I have found no case directly on point, but if either plaintiff or the litigating defendant could legitimately have claimed the settling party was "liable in tort for the same injury" and the release given by plaintiff now bars that claim, then it seems that the litigating defendant must be entitled to invoke GOL § 15-108(a).

Of course, damages and "injury" are not the same thing—although in an economic loss case it may be very hard to indeed tell them apart. When there has been a settlement, the nature of the injury covered in the compromised claim and the nature of the injury for which the remaining defendant is allegedly liable may have to be carefully scrutinized, because if the (alleged) "injuries" were not the same, then GOL § 15-108 does not apply *at all*, i.e., no finding of equitable shares is warranted, and it may be that there will be no dollar offset to the verdict at all.

Contribution may be claimed, as noted above, from concurrent, successive, independent, or alternative tortfeasors; the relevant question is whether some tortious conduct by the settling party "had a part in causing or augmenting the injury for which contribution is sought."[68] Often, of course, this cannot be sorted out until the jury determines the nature of the injury and the parties' roles in proximately causing it. However, there may be times where the court can sort this out in advance, particularly where the plaintiff has been careful and clear in defining the injury for which recovery is sought.

I have already discussed *Whitney*, which apparently held that the released claim was not one for liability in tort at all, and I mentioned cases addressing whether the injury for which a successor tortfeasor is sued is "separable or divisible" from the injury caused by the original tortfeasor. In addition, several classic cases have addressed contribution claims or GOL § 15-108 prior to trial based on analysis of the injury for which recovery was sought.

Italian Econ. Corp. v. Community Engineers, Inc.[69] offers us an easy introductory example. In that case a building owner sued his architect, structural engineer, and mechanical engineer for negligence, eventually settling with both engineers. When the architect sought a set-off, the court first held that the failures by the mechanical engineer (relating to the HVAC system and certain other work), "although relating to the same building" were not the injuries for which the architect was being sued, so that the architect was not entitled to even a common law *pro tanto* reduction for the mechanical engineer's settlement.[70] However, because the architect was being sued for negligent approval of the structural engineer's plans for the building structure, the architect *was* entitled to a set-off for the fault of the settling structural engineer.[71]

By far the most well-known "same injury" case is *Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Dev. Corp.*,[72] which takes us far past facts like those of *Italian Econ. Corp.* to focus on the expressed distinction between "injury" and "damages." When a roof failed, a consultant advised the owner to replace it. The roofer sued by the owner commenced an action against one of its suppliers, alleging that the supplier's defective insulation caused the problem with the roof. The supplier, in turn, commenced a third-party action seeking contribution from the consultant for the alleged negligence of the consultant in advising the owner to replace the roof, which the supplier asserted was not defective at all.

Although the measure of the *damages* alleged to have been caused by the supplier and those alleged to have been caused by the consultant were the same (the cost of replacing the roof), this could not support a claim of contribution unless the *injuries* alleged were also the same, and the court found that here they were not, stating:

> The injury suffered by [owner] for which [supplier] is being sued and for which it seeks contribution . . . is a bad roof which had to be replaced. But [consultant]—which had nothing to do with the installation of the roof—did not cause or contribute to this injury. If [consultant] caused any injury to [owner] it was the financial damage [owner] sustained from being negligently advised to replace a good roof, not the loss [owner] incurred from having a bad roof. Needlessly replacing a sound roof is obviously not the same as having a defective roof; it is an entirely separate and distinct injury.[73]

In the end the owner had only one measurable damage—the cost of a new roof.[74] Nonetheless, because the *injuries* were "distinct," the roofer's supplier did not have a contribution claim against the consultant. Logically then (assuming logic applies), if the owner settled with the consultant, then the roofer could get no relief at all under GOL § 15-108, and in the end the owner might well recover from all sources *more* than its cost of replacing the roof—although perhaps actual settlement proceeds could be deducted under common law or as collateral source recoveries.[75]

Nassau Roofing should be contrasted with *Johnson City Central School District v. Fidelity and Deposit Co. of Maryland*.[76] In the latter case, the School District sued the builder after a roof collapsed under heavy snow. The builder brought a contribution claim against the Village, whose firefighters had worked on the roof in an effort to "flush" away snow and ice, claiming that this activity added weight to the roof and contributed to its collapse. The Third Department concluded that "although defendant and the Village are allegedly liable under different theories," it was plausible that both the builder and the Village did contribute to the *same* injury—the collapse of the roof of the building. The analytic distinction to be made, it appears, is between combined causes of the roof's failure (*Johnson City*) and separate injury caused by the decision to replace the roof (*Nassau Roofing*).

Judge Keenan wrestled with the "same injury" test in a rather different context in *Assicurazioni Generali, s.p.a. v. Terranova.*[77] When the owner's insurer disclaimed coverage for the economic loss of the death of a race horse, asserting that a misrepresentation invalidated the policy, the owner then added an action against the broker who procured the policy, claiming that it was his negligence in procuring the policy that caused it to be invalid (if it was). The broker then added to the mix by bringing in the treating veterinarian, pleading that the veterinarian had negligently poisoned and killed the horse. If the broker were held liable to the owner for the loss of the horse, said the broker, then the veterinarian should contribute, because the veterinarian's negligence was what gave rise to the loss in the first instance.

Here again it might well be said that the owner had only one quantifiable damage—a dead horse for which he wanted the compensation his insurance policy would have provided. Nonetheless, Judge Keenan dismissed the claim for contribution, holding that loss of insurance coverage due to the broker's alleged negligence was not the "same injury" as the loss of the horse due to the veterinarian's alleged malpractice. The court reasoned:

> Parties seeking contribution must be liable on the same injury. In this case, the injuries, though related, are distinct and separate for purposes of contribution. [Broker's] alleged wrongs involve negligent acquisition of an insurance policy and breach of his contract to obtain the policy. The injury [broker] allegedly caused was [the owner's] inability to collect on the policy. . . . . The injury [veterinarian] allegedly committed is the destruction of [owner's] property. The fact that the insurance policy [broker] procured covered the horse [veterinarian] was treating does not, without more, somehow transform [the broker and the veterinarian] into joint tortfeasors.[78]

Another important "same injury" case, *Ackerman v. Price Waterhouse*, directly involved GOL § 15-108.[79] Plaintiffs there brought claims relating to their investments in tax-driven limited partnerships. In a related federal action, the plaintiffs had pleaded claims alleging fraud in the sale of the partnership interests to them. That action was settled. In this state proceeding, plaintiffs sued the accountants, Price Waterhouse (PW) for negligent tax advice regarding deductions generated by their investments in these "shelters."[80]

The First Department concluded that "PW is not a successive tortfeasor here because the Ackerman and [federal] actions do not seek recovery for the same injury." According to the opinion, the federal action "related solely to initial investment, basically a fraud in the inducement claim. In contrast, the Ackerman plaintiffs' amended complaint raised no fraudulent inducement claim; rather it relates solely to PW's post-investment actions."[81]

I have to note the panel's acknowledgement that PW had initially been a party to the federal action for federal inducement (a party dismissed without prejudice when other defendants settled) and the careful reference to which claims the amended complaint actually *raised*. It is highly likely that the federal claim mentioned consequential damages including "bad" tax results; it is even more likely that the fraudulent inducement claim sought a *full* recovery that, if obtained, would have rendered moot the tax advice claim.[82] Nonetheless, although the damages may have overlapped, in this case the *injuries* were deemed separate, ruling out application of GOL § 15-108 altogether, again indicating not merely that an "equitable share" apportionment was not available, but, depending on how it was measured, plaintiffs' verdict might not be reduced by the settlement amount either.

This is the point to take note of the series of legal malpractice cases addressing the "same injury" test under Article 14, such as *Edouard v. Ginsberg & Broome,*

P.C. (dismissing law firm's contribution claim because "[h]ere . . . the injury allegedly caused by [defendant law firm], i.e., the loss of certain legal rights, is not the 'same' injury as the one allegedly caused by the medical malpractice, *although the damages might be identical*." (emphasis added)).[83] The discussion in *Alexander v. Callanen* is worth recording:

> The third party did not contribute to the injuries to the plaintiff caused by the lawyers. The lawyers did not contribute to the injuries allegedly caused by the doctors. Neither is entitled to contribution from the other.
>
> One is a cause of action for damages for a personal injury. The other is for damages occasioned by a loss of a legal right. Albeit the damages might be identical, only one is for a personal injury.[84]

While there is logic to these cases, the Court of Appeals has clearly said that Article 14 applied to "independent" and to "alternative" tortfeasors. If this is true, then the line between "same injury" and "same damages" may indeed by hard to draw at times. If GOL § 15-108 does not apply, the litigating tortfeasor will have to struggle in a CPLR 4533-b hearing to obtain a common law credit for settlement collections from independent tortfeasors that have the effect of reducing out-of-pocket losses for "damages [which] might be identical."

In any case, these malpractice cases should be distinguished from those where the defendant claims over against its counsel from the incident in question, claiming that defendant's allegedly tortious conduct was based on counsel's advice. An example of these "concurrent" malpractice cases is *Comi v. Breslin & Breslin*, where the buyer of a company sued his lawyer for negligence in connection with allegedly false representations by the seller.[85] The law firm there was permitted to seek contribution from the seller which made the representations. Where the claim-over is by the client against his own lawyer, or *vice versa*, the issue of whether such a claim is for contribution or "implied indemnification," or some combination of both, has to be addressed.[86]

Negotiating the distinction between "same injury" and overlapping (or even identical) damages may prove *very* difficult in some commercial cases. Plaintiff's counsel will want to consider these complications carefully in negotiating settlements; counsel for the remaining defendants will look at the questions very differently. Although the implications for "equitable share" set-offs may be apparent, plaintiff's counsel will want to be especially wary of potential dollar set-offs for the settlement and will want to consider drafting techniques (such as allocations between injuries in the settlement agreement) which are reasonable enough to be defended in debates during the CPLR 4533-b hearing.

(d) Advance Waivers

Although a release of a tort claim given after the incident but before any litigation is governed by GOL § 15-108 (*Westwood Chemical Co., Inc. v. Kulich)*,[87] practitioners need to be aware that courts treat "advance" releases or covenants not to sue (such as contractual exculpation clauses by which one party releases the other from future claims based on negligence short of gross negligence) as falling outside GOL § 15-108. Such clauses are permitted by public policy, but counsel in a workout or litigation should be acutely aware that the protection they provide against direct claims may not affect third-party claims for contribution.

For example, in *Sommer v. Federal Signal Corp.*, the defendant, sued for causing fire damage, was allowed to assert an Article 14 contribution claim against the alarm company, even though the alarm company's contract with the owner contained an exculpation clause.[88] In *Fireman's Fund Insurance v. New York Mech. Gen., Inc.*, a lease agreement purported to "release" a landlord for any fire loss sustained by tenant.[89] A defendant sued by the tenant in connection with a fire argued that this "release" gave the defendant a right to an "equitable share" set-off under GOL § 15-108(a). The court held that this advance "release," even if valid between landlord and tenant, would not immunize the landlord from contribution claims by other tortfeasors and would not trigger GOL § 15-108(a). Finally, *Franzek v. Calspan Corp.*, was to similar effect, holding that GOL § 15-108's protection does not extend to tortfeasors "who had extracted a release prior to a negligent act."[90]

The rationale for these cases appears to be that it would be unfair for the advance negotiations between, for example, landlord and tenant, to restrict the rights of third parties to contribution. In principle, that rationale appears no more or less valid to an agreement negotiated in advance of an incident than to an agreement negotiated after an incident (and recognized as within GOL § 15-108). In both instances, applying GOL § 15-108 does not prejudice the third party, which would have had to actually *pay* more than its proportionate share in order to collect on a contribution claim, and would now be relieved of that possibility by operation of the "equitable share" set-off.

It might be argued that what fairness warrants is keeping parties in the position they bargained for, whether or not a second tortfeasor happens to be involved. This would mean giving the "exculpated" party the limitation on liability it bargained for and making the complaining party accept the full conse-

quences of the limitation to which it agreed. In any case, the Court of Appeals decision in *Sommer* would appear to finish this argument, and counsel with business clients sued for negligence or breach of duty, which are happily pointing to their contractual exculpation clauses, must burst the balloon with news about potential liability for contribution.

(e) Effect of a Damage Verdict

Suppose plaintiff has obtained a judgment for which defendants are jointly liable, and defendants have contribution judgments each against the other. If plaintiff settles with one defendant, is the *other* defendant's contribution judgment now uncollectible? If plaintiff "nails" the assets of one judgment debtor, may it make a deal with plaintiff without losing its rights to recoup from the other defendant? How so? Although not at all apparent from the statute, a clear rule has developed that GOL § 15-108 will *not* apply insofar as the contribution rights or liabilities at issue are those of a defendant against which judgment has actually entered on the injured party's claim.

In *Rock v. Reed-Prentice Division of Package Mach. Co.*, an injured employee (Rock) brought an action against Reed-Prentice (Prentice) which impleaded Rock's employer (Westbury).[91] After a verdict which awarded Rock $400,000 on the claim against Prentice and gave Prentice a $50,000 contribution verdict against Westbury, Rock settled with Prentice for $250,000 (which, we note, was considerably less than the $400,000 verdict, minus the $50,000 in contribution). Westbury argued that this should extinguish Prentice's claim against Westbury, particularly because Prentice would now never be required to pay more than what the jury found to be its equitable share, i.e., what CPLR 1402 defines as the amount subject to a contribution claim.

The Court of Appeals expressed confusion as to why subsection (c) of GOL § 15-108 had been enacted at all, but opined:

> The overall scheme and purpose of the section is to promote settlements in multiple-party tort cases by clearly defining the effect the settlement will have on collateral rights and liabilities in future litigation. There is nothing at all to suggest that this statute was ever intended to nullify a pre-existing judgment.[92]

The rationale apparently being worked through in *Rock* reaches back to the concept that one who "volunteers" a payment beyond what is legally required should not be able to pursue reimbursement, arguing that an accused party volunteers an amount with which it is comfortable when settling, but the judgment debtor is no longer such a "volunteer."[93] An intertwined argument is that after judgment the settling party is not obtaining a "release" or covenant at all, but *satisfying* a judgment.[94]

One of the odd implications of *Rock* became apparent in *Astor Cover v. Cohen*, where plaintiff had a judgment after trial against two tortfeasors, defendants A and B, and then entered into a settlement with defendant B, which had been granted a new trial.[95] The Appellate Division concluded that the judgment debtor could not get relief under GOL § 15-108(a) because the statute should not apply "to nullify a pre-existing judgment."[96] The First Department thus extended the logic of *Rock* (where the settlement was with a defendant against whom judgment had been entered) to a case where the judgment was against a nonsettling defendant. The court concluded that defendant A, as a judgment debtor, would not have the benefit of reducing the judgment by some equitable share, but it also followed that, despite GOL § 15-108(b), settling defendant B was *not* protected from liability for contribution to defendant A.[97] No doubt this result surprised the hell out of the settling defendant B, leaving it to wonder what relief from liability its settlement did actually buy.[98]

The line drawn in *Rock* was moved a step further back by the Second Circuit in *Orsini v. Kugel*, where two defendants settled with plaintiff after verdict, but before judgment. Judgment was then entered in the full amount, but a stipulated satisfaction was immediately filed premised on the agreement for a lesser sum, most of which was provided by one defendant.[99] The Second Circuit read the message of *Rock* to be that once the defendant has become legally liable for the full amount without regard to the fault of others, the defendant was then not a "volunteer" but was satisfying its legal liability. To the Second Circuit, this logic did not require that an actual judgment for the plaintiff precede the settlement: once there was a verdict for damages (though not yet a judgment), defendants "were anything but volunteers when they agreed to settle."[100] The Second Circuit therefore allowed the first defendant's judgment against its co-defendant on a cross-claim for contribution to stand.[101] Practitioners should be aware of precisely where this wiggly line is drawn: settlement after verdict on *liability* but before a verdict on *damages* has been held to trigger GOL § 15-108.[102]

Bear in mind that this is a two-way street—these settling defendants also are not protected from contribution claims. If the plaintiff separately sues other tortfeasors, those tortfeasors will have the right to assert contribution claims, but not the benefit of GOL § 15-108 set-offs for equitable shares. Consider the situation in which a tortfeasor is absent from the trial for jurisdictional reasons and is later separately sued both by plaintiff, *and* by the first judgment debtor, seeking contribution. If *Rock* governs, then that later-sued tortfeasor

must have contribution rights against the judgment debtor and must have them whether or not it now settles with plaintiff, since apparently *its* own later settlement would not cut off the judgment debtor's pursuit of contribution from it.

It must be confessed that none of this is apparent either from the statute (which deals as well with those "liable" in tort, not merely with those "claimed to be" so) or from the public policy pseudo-logic about encouraging settlement which is found in many GOL § 15-108 opinions.[103] Indeed, who would have thought that a covenant "not to enforce a judgment" meant only a covenant not to enforce a judgment that does not yet exist, and not a covenant not to enforce an *existing* judgment? Why should the effect of a release on a releasee be different if judgment has been entered elsewhere against another tortfeasor? If the goal is promoting settlements, why shouldn't a defendant considering a settlement be able to *decide* whether it is willing to remain liable in contribution in order to preserve its right to contribution from others? Is a deep-pocket defendant *ever* a "volunteer" in settling for more than its equitable share?

These rules may bring some comfort to a "deep pocket" that is eager to cap its liability when pursued vigorously for collection of an entire judgment. One can see how the rule in *Rock* would encourage parties in that particular defendant's shoes to settle post-trial, because surviving contribution claims would run only in its favor, but in *Astor Cover* the shoe is on the other foot. A defendant with whom plaintiff is willing to settle post-trial for less than its proportional share of the *total* verdict is not necessarily buying peace. It may have a contribution claim against others, but if others make payments, they have a contribution claim against it. If GOL § 15-108(b) is unavailable to this settling tortfeasor, then his settlement buys him neither finality nor peace, and his incentive to settle with the plaintiff is sharply reduced.

Practitioners should also know that the Court of Appeals did not look kindly on a creative effort to qualify pre-verdict agreements as *Rock* settlements in an effort to preserve the settling defendant's contribution claim. In *Lettiere v. Martin Electric Co.*, plaintiff and defendant reached agreement on a settlement amount that was to be entered as a judgment but agreed to delay entry of this judgment until after trial.[104] Their goal was to bring their arrangement within the *Rock* precedent and preserve defendant's contribution claim against plaintiff's employer. The contribution claim was nonetheless dismissed, with the court characterizing the arrangement as a pre-judgment settlement, the effect of which was postponed, and holding that this settlement agreement triggered G.O.L § 15-108.

(f) Drafting Around GOL § 15-108

From the foregoing, the practitioner can see that, unless subsection (c) can be read as more narrow in scope than subsection (a) (which does not appear to be the case),[105] a defendant's contribution claims against others will be lost upon virtually *any* consensual resolution of a tort claim prior to a verdict on damages. Any time either side perceives an imbalance between a defendant's "equitable share of the damages" and the amount proposed to be paid in settlement, this can complicate negotiations (perhaps, indeed, making settlement impossible). The deep-pocket defendant on a "fast track" calendar may be very reluctant to lose rights of contribution against other solvent parties potentially liable for the same injury. A plaintiff, moreover, must be extremely cautious about settlements with empty-pocket defendants to whom a large measure of "equitable share" for the damages might later be attributed. An interesting question, therefore, is whether a plaintiff could avoid the "equitable share" set-off mechanism and/or the settling party could preserve its contribution rights if the settling party agrees to waive the protection of subsection (b).

Mitchell v. New York Hospital presents one circumstance where the parties successfully drafted their way out of GOL § 15-108 in a multi-party agreement.[106] There, the third-party defendants also settling with the plaintiff expressly waived their GOL § 15-108 defense to a contribution claim by the settling hospital, which provided all the funds for the settlement. In effect the hospital had capped the entire group's liability and removed the plaintiff from the equation, but, by agreement of *all* sides, had preserved for another day the dispute among the (alleged) tortfeasors as to how the cost of settlement should be shared.

While the intent of the agreement in *Mitchell* seems to have been plain to all (including those which then tried to wiggle out of it), a litigating defendant should be wary of requests that it be a party to another's settlement agreement in their case and be very clear about the import of all terms.[107] A case that may be a cautionary tale in this regard is *Nat'l Enterprises Corp. v. Dechert, Prices & Rhoads*, where a defendant in a federal securities action, Enterprises, had asserted third-party claims against the law firm.[108] By agreement, these third-party claims were dismissed but could be recommenced after the federal action was resolved. The federal action then settled, and when Enterprises brought a new suit against the law firm, the law firm argued that GOL § 15-108 barred a contribution claim. The Appellate Division, however, affirmed a decision that a "fair and reasonable" interpretation of the agreement was that the parties meant to postpone *and preserve* the contribution action, making GOL § 15-108(c) inapplicable.

It might be argued that allowing a settling defendant to opt out of subsections (b) and (c) without consent of other alleged tortfeasors would be consistent with the balancing policy interests of GOL § 15-108 (on the one hand, "to encourage settlements" but at the same time "to ensure that nonsettling tortfeasors are not required to bear more than their equitable share of liability"[109]), *so long as* the litigating tortfeasor retained the protection and the replacement relief of subsection (a). Nonetheless, the fact that the Legislature enacted subsection (c) at all, not resting with protecting the nonsettling defendant with the "set-off" provisions of subsection (a), strongly suggests that subsection (c) cannot be avoided unless the other tortfeasor(s) consent. I have not located any reported cases directly addressing an attempt to opt out of GOL § 15-108 where the agreement to this effect is only between the releasor and the releasee. Certainly the Court of Appeals reacted very negatively in *Lettiere* to the pre-verdict attempt by a plaintiff and settling party to structure a settlement so that the settling party would preserve its contribution claim.[110]

If the defendant settling pre-judgment likely cannot preserve its contribution rights without consent of the other alleged tortfeasors, it seems even more likely that the plaintiff cannot avoid an "equitable shares" apportionment by negotiating with its releasee to waive the protection of GOL § 15-108(b). An impecunious tort defendant may well feel that some peace is better than none, and that its modest funds are better spent compensating the party it injured rather than litigating. Nonetheless, if plaintiff reaches any agreement with that defendant, nonsettling defendants will insist that GOL § 15-108 means that they no longer must pick up the tab for that tortfeasor's equitable share! Allowing plaintiff to avoid an "equitable share" reduction by having the releasee expressly waive subsection (c) protection would merely put the other defendants in the same position as before the settlement; they are not prejudiced.[111] The Courts of Appeal's hostility in *Lettiere* to an attempt to evade GOL § 15-108 to preserve contribution claims, however, seems a strong indication that plaintiff would not avoid the "equitable share" reduction via this route.[112]

(g) GOL § 15-108(b)—the "Good Faith" Predicate

Before leaving this area, I must take note of the "good faith" test of GOL § 15-108(b) which is not present in the other subsections of the statute. In most circumstances, a litigating defendant will be pleased to have the "equitable share" defense of GOL § 15-108. But what if the defendant tactically prefers to go after the released tortfeasor (or tactically has no choice, because the earlier release of a tortfeasor was not known at the time verdict was rendered against this defendant, or GOL § 15-108(a) was for some other reason not invoked there)? The relevant case law is summarized in *Rotter v. Leahy*:

> Section 15-108(b) requires that the release be given "in good faith" by the injured party in order for the tortfeasor to be relieved from contribution liability. "The good faith requirement . . . is to assure that the injured party will not collusively release one wrongdoer for a small amount in return for the promise of that wrongdoer to cooperate improperly with the injured person in an attempt to extract from the remaining wrongdoers more than the equitable share of the damages attributable to them. The requirement permits the Court to determine whether the transaction was collusive." *Friend v. Dibble*, 124 Misc. 2d 151, 153, 475 N.Y.S.2d 765, 766 (Sup. Ct. 1884); *see Torres v. State*, 67 A.D.2d 814, 814, 413 N.Y.S.2d 262, 263 (4th Dep't 1979). "The good-faith requirement depends upon all the facts alleged, not just upon the amount of the settlement. A release even for nominal damages will not be evidence of collusion or bad faith if the record otherwise supports allegations of good faith." *Ades v. Deloitte & Touche*, Nos. 90 Civ. 4959 & 5056(RWS), 1993 WL 362364, at *18 (S.D.N.Y. Sept. 17, 1993) *496 (*citing Friend v. Dibble*, 124 Misc. 2d 151, 475 N.Y.S.2d 765).[113]

This envelope might be pushed a step further. If a release was "collusive" as between releasor and releasee, that does not necessarily mean that it is not enforceable as between them. Whether for this reason or by happenstance, GOL § 15-108(a)'s set-off mechanism does not contain the "good faith" language; neither is it expressly limited to circumstances where a release qualifies under subsection (b).[114] Accordingly, one can at least wonder whether in the case of a collusive release the litigating defendant can *both* pursue a claim for contribution *and* assert a set-off defense, leaving it all to wash out when verdict is finally rendered.

III. Scope of GOL § 15-108 as Measured by CPLR Article 14 "Contribution"

It would appear that GOL § 15-108 is intended to be co-extensive with the right of contribution allowed under CPLR Article 14, and to apply to "all persons who possess a right to contribution under Article 14 of the CPLR."[115] To comprehend the scope of GOL § 15-108, then, we must explore the limits of Article 14.

(a) Theories of Contribution

Contribution claims can be available where the parties were not both tortfeasors *vis à vis* the plaintiff. Thus, a defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar (Workers' Compensation always springs to mind) or a substantive legal rule (such as the common law "firefighters rule" and related statutory exceptions).[116] Similarly, party A might have a contractual exoneration from negligence claims (typical in alarm company contracts for example). As already discussed, that will not insulate party A from liability in contribution to a third party sued by the injured person, even though contribution depends on the duty of the exonerated party to the injured party.

With that in mind, it bears noting that GOL § 15-108 governs a release of "persons liable or claimed to be liable in tort for the same injury"; it does *not* posit that the releasee have been liable to the *releasor* in particular. This nuance may explain the temporary confusion about whether, where the employee's remedy was "exclusive" to Workers' Compensation, an employee's release of an employer should affect the contribution claim of a third party sued by the employee for the same injury (or give that third party a GOL § 15-108 set-off for the employer's "equitable share"). A controversial Fourth Department case had indicated that GOL § 15-108 would not apply in such circumstances, because the employee *had* no tort claim against the employer.[117] More recently the Fourth Department has concluded that GOL § 15-108 *does* apply in such circumstances, so long as the release of the employer covered the "same injury" for which the third party has been sued.[118]

Article 14 rights of contribution can reach even further; a contribution claim can be made even when the contributor has *no* duty to the injured plaintiff (not merely a duty pre-empted, in effect, by statute or contract). Contribution may also be sought where there has been a breach of a duty that runs from the contributor to the defendant potentially liable to plaintiff.[119] The test is whether the contributor's breach of duty "had a part in causing or augmenting the injury for which contribution is sought."[120]

The business law situations that are impacted by this extension of Article 14 (and therefore which apparently would trigger GOL § 15-108) are myriad. Let me just mention one for illustration:

> In a contest between secured parties that lent funds to a company now bankrupt, lender A claims that it had a senior security interest and that lender B converted proceeds of its collateral in repayment of B's loans; lender B claims over against its attorneys for malpractice in structuring B's loans. Can the attorneys settle with lender A and eliminate the contribution claim because their advice was the reason lender B caused the injury to lender A? Or is the claim over not really a contribution claim at all, because if lender A recovers from lender B, the "injury" for which the attorneys are liable is not the conversion of A's collateral but the injury to lender B from bad legal advice prompting B to make a loan it thought was secured when it was not (the damages for which are that B is now unpaid on *its* loans as result of the disgorgement to lender A).

It is clear that this question takes us right back to those difficult "same injury" cases.[121] Perhaps the answer will be that one can *both* contribute to the same injury *and* cause an additional, separate, and distinct injury in one tortious swoop.

(b) What About Contracts?

Although GOL § 15-108 is fairly clear in restricting its scope to settling and remaining "tortfeasors" and although in New York contribution is not available between contract defendants, there still remains some question as to whether there may be circumstances where a *contract* defendant might have a contribution claim against a *tortfeasor* with respect to the "same injury," or alternatively a GOL § 15-108(a) set-off if plaintiff has settled with the tortfeasor. The Judicial Conference Report includes this provocative statement:

> While it is expected that in the usual situation in which this Article will be applied, each of the wrongdoers will be charged with the commission of a tort, the Article is not so limited. It is the fact of liability to the same person for the same harm rather than the legal theory upon which tort liability is based with controls.
>
> For instance, this Article applies in those factual situations in which one or more of the wrongdoers is charged with a breach of warranty.[122]

It seems clear from the cases that contribution cannot be *sought* from one liable only in contract.[123] What is not entirely clear is whether if a third party breached a duty owing to a *plaintiff* that contributed to the injury for which that plaintiff is suing another in contract, the contract defendant has a right of contribution against that third-party tortfeasor. One case so holds and con-

cludes that if the plaintiff has settled with that third party, then GOL § 15-108 will apply.[124]

Although not common, a contract defendant might also have a claim against a third party that owed the *defendant* a duty that went beyond simple contract (just as a tort defendant may have a claim-over on such grounds).[125] One might question whether this claim-over should be styled a "contribution" claim at all, or whether the label creates unnecessary problems. For example, what should be the result if the plaintiff, which did *not* have a tort claim against that party, has released that party?

Another twist on the contract/tort mix can be found in *Monaghan v. SXS 33 Associates, L.P.*[126] There the owner, Port Authority (PATH), and a security service (McLane) might all have been liable to an injured plaintiff. PATH and McLane, however, had *indemnification* arrangements with the owner that were governed by contract. The Second Circuit found that GOL § 15-108 nonetheless applied to the owner's indemnification claim against PATH, entitling PATH to a set-off for the owner's settlement with McLane, because McLane and PATH were liable in tort to the injured party, even if their liability to the owner was based on contract.

Assuming (and it *is* generally assumed) that a contract defendant cannot seek contribution or claim a GOL § 15-108(a) set-off, it is sometimes necessary to parse the causes of action quite precisely. Thus in *LNC Investment, Inc. v. First Fidelity Bank, N.A.*, Judge Mukasey painstakingly analyzed the nature of an indenture trustee's duties under New York law.[127] He concluded that such duties were matters of contract prior to a default, but that New York law added common law fiduciary duties upon default; in consequence, with respect to alleged post-default breaches of duty, the indenture trustee *would* have a contribution claim against others allegedly tortiously causing the same injury, and GOL § 15-108 would then necessarily also come into play.

(c) What About "Indemnification"?

GOL § 15-108 does not reach claims for indemnity.[128] When pushing this general rule, though, one must be careful that the theory of recovery that is at issue truly is one for indemnity—and even then "indemnity" may not always be what it seems. In *Hill v. St. Clare's Hospital*, the Court of Appeals pointed out that the claim of an initial tortfeasor against those who later aggravate the injury "arises by way to subrogation to the rights of the injured party, and is a right to complete indemnity, rather than contribution, for the aggravation damages."[129] Nonetheless, the Court of Appeals held that GOL § 15-108 *did* apply to the released tortfeasor's right of subrogation because the focus of "equitable share" analysis is not upon "the wrongful acts committed by each" but upon "the damage inflicted by each."

In *Riviello v. Waldron*, the Court of Appeals addressed the situation of a vicariously liable employer whose employee tortfeasor has been released by the plaintiff.[130] While most vicarious liability cases are personal injury cases, many business tort cases are premised on vicarious liability, and so the principles developed in the personal injury cases are worth exploring. Since employer and employee are effectively one "unit" because the employer's liability is vicarious, should the employer be able to get a 100% equitable share set-off based on the settlement with its employee, effectively precluding the action?

In *Riviello*, the Court of Appeals carefully noted that the employer's claim against the employee where liability is vicarious is based on common law indemnification, not Article 14 contribution. After discussing various public policy considerations, the Court ruled that GOL § 15-108 does not "foreclose" an injured plaintiff from suing an employer on theory of vicarious liability where the employee tortfeasor has been released. Thus, the suit is allowed *and* the employer gets no "equitable share" adjustment at all! However, if (as is often the case) the suit against the employer includes *direct* theories of tort liability like negligent supervision (for which as a joint tortfeasor, it *was* entitled to contribution from the employee), the analysis of where and how GOL § 15-108 applies is going to get *very* muddy![131]

(d) When Indemnification and Contribution Collide

Whether there is direct liability or only vicarious liability (in which case a claim over "implied indemnification" arises) depends on whether A completely delegated responsibility to B or retained discretion and control over the conduct.[132] This principle of law brings us to one of the tough questions of third-party practice: If indemnification assumes that liability is passive only, how are CPLR Article 14 and GOL § 15-108 to operate where liability is *not exclusively* passive?

In *Ott v. Barash*, an injured plaintiff first sued New York State *both* for direct wrongs and for vicarious responsibility for the negligence of its employee.[133] The employee had a statutory right to indemnification by the state (Public Officers Law § 17), but the settlement agreement with the state did not release the employee, whom the plaintiff thereafter sued for negligence. The Second Department held that GOL § 15-108 did not bar the action against the employee and that the settlement between plaintiff and the state could not interfere with the employee's right to indemnification: "the release given by plaintiff to the state, which may have relieved the State from any liability for contribution, did not similarly relieve the State of its duty to indemnify the

[its] employee."[134] That seems right—but then what *was* the point of the state's settlement?

One question *Ott* raises, but does not answer, is whether the "equitable share" branch of GOL § 15-108(a) should also apply in the action against the employee *insofar as* the state was directly, not merely vicariously, liable. Why should the employee-defendant not get the benefit of an "equitable share" set-off for the state's direct fault? Since only negligence claims were pleaded against the employee in this case, the employee perhaps may not really care about equitable shares (because the state will be covering him), but the state, having already settled that claim once, *should* care. And what if the employee had been sued for intentional misconduct (which does not support indemnification under Public Law 17)? And even if, on these claims, the state is paying both ends of the bill, why does this plaintiff not have to reckon with the full range of set-off consequences for the settlement made?

I harp on such cases, despite facts falling well outside the commercial law context, because the question of whether the dichotomy between contribution and indemnification can really be sustained given GOL § 15-108 will have profound implications for business disputes involving agents and/or well-heeled principal officers. The separation of contribution from indemnity may be straightforward or murky, but if these claims are mutually exclusive, then the results for all parties are drastic. The applicability or inapplicability of GOL § 15-108 is a proverbial two-way street. If one defendant has settled with plaintiff, it is immune from a cross-claim for the same injury *if* the claim is for contribution, but it remains exposed to an indemnification claim by the litigating defendant. Thus a trial verdict as to whether a litigating defendant's negligence was "active" or merely "passive" (direct or vicarious) may determine whether another's settlement bought peace or left a gaping hole for further exposure.[135]

Cases wrestling with this question typically assumed a bright line in which the nonsettling defendant's claim must be *either* for indemnification (passive liability) *or* for contribution (shared, active liability).[136] This was consistent with New York law, but with cases in the GOL § 15-108 context it has been harder to maintain the dichotomy: When it comes to apportionment and barring claims it may be necessary to separate out the strands of active and vicarious liability—and treat both separately. Despite such earlier precedent, for example, in *Monaghan v. SZS33 Associates, L.P.*, the Second Circuit allowed a settling building owner to proceed against the subway authority for contractual indemnification in a complex calculation which separated out the owner's liability for *direct* negligence.[137] Thus indemnification was in that instance allowed despite the owner's "active" fault.

The New York Court of Appeals has wrestled with indemnification versus contribution (and the so-called "passive/active" distinction) in a series of real estate cases over the years, culminating for now in *Mas v. Two Bridges Assocs*.[138] In a decision with some parallels to the Second Circuit's *Monaghan* case, the Court of Appeals was there addressing the indemnification claim of a defendant found 10% directly at fault and 85% vicariously at fault for a failure delegated to a co-defendant owing it indemnity.[139] After reviewing numerous precedents, the Court declared:

> Implied indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other.
>
> * * *
>
> We see no reason why equitable principles should prevent a defendant from recovering a loss occasioned by imputation of law, notwithstanding its sole liability for another part of the damages based upon an act of primary negligence.
>
> * * *
>
> These considerations are hardly precise, nor do they supplant our well-settled rules on the subject, but they illustrate that indemnification of this Owner's claim for its loss on the negligent maintenance theory is appropriate.[140]

Since "well-settled rules" are not supplanted, we may be unsure what *Mas* will come to mean for GOL § 15-108, but it certainly means that contribution and indemnification are no longer necessarily mutually exclusive.

IV. The Dollar-Denominated Set-Offs

GOL § 15-108 gives the defendant the benefit of the best of three alternate set-offs. In the simple case, all is simple. But when cases present multiple claims on multiple theories, each branch of the set-off structure has its own complications. I turn now to the "dollar" set-off options (the "consideration paid" and the "amount stipulated"), showing that counting the relevant dollars is not as straightforward as one might first expect.

The Consideration Paid

Prevailing law has long been, as to *joint* tortfeasors, that "where A and B are jointly liable in tort to P, it is elementary that a payment by A will reduce *pro tanto* the damages which P may recover in an action against B."[141] Under current New York law this *pro tanto* reduction is made by the Court, after verdict, rather than by

proof to the jury.[142] Although *pro tanto* reduction based on settlement with joint tortfeasors may have been long-standing and "elementary," GOL § 15-108 legislatively cast a wider net, a net at least as wide as contribution claims might reach, and picked up settlements with successive, independent, and alternate tortfeasors.

If there is going to be such a CPLR 4533-b calculation, whether by operation of common law or because of GOL § 15-108, it is imperative that the jury be asked to measure the full damages which plaintiff suffered, notwithstanding the absence in the litigation of other parties who may have contributed to the injury suffered; if the jury instead reaches a number it believes should fairly be attributed to only the defendant actually present, then plaintiff may see its recovery reduced or eliminated in the post-trial procedure under CPLR 4533-b.

In the discussion which follows, I will assume that the settlement proceeds are being dealt with under GOL § 15-108. As discussed above, this assumes that contribution law applies and that the "same injury" was to some extent at issue with the settled party. I make this assumption explicit because a related question of which one should not lose sight is whether, even if GOL § 15-108 does not itself apply to reduce a verdict against the litigating defendant, some other rule (like "out-of-pocket" limitations on damages) will require reduction of the verdict *pro tanto* for amounts collected in settlement where the verdict overlaps with *damages* alleged under the non-tort claims or where claims for different "injuries" result in the *same* damages.[143]

(a) Allocation of Consideration Between Injuries

Literally, GOL § 15-108 requires reduction for the "amount of consideration paid for it," with the "it" being "a release or covenant not to sue . . . given to one of two or more persons liable or claimed to be liable in tort for the same injury." Thus, while one result may obtain if the released claims do not overlap at all with the litigated claims, if there *is* overlap, then there is a textual argument to be made that, no matter what else the release covered, the entirety of the settlement consideration for the release reduces the verdict.[144]

Such a textual argument has not succeeded in practice, and New York courts will allow the plaintiff to argue for an allocation of the settlement payment to other claims or injuries, putting the burden on the plaintiff to so persuade the court or have "all of the monies paid for the release . . . be applied to reduce the damages."[145]

The Second Department's brief opinion in an action for assault by police officers, false arrest and violation of 42 U.S.C. § 1983, *Budimlic v. New York Hous. Auth.*, supports allocation of the settlement consideration:

> We also find no error in the trial court's refusal to instruct the jury to consider the fault of a defendant against whom the action had been discontinued in apportioning fault, or to reduce the award by the amount of the pretrial settlement with that defendant. Since there was no prima facie case of battery or excessive force made out against that defendant, it could not be held responsible for any portion of the damages (see, *Widman v. Horwitz*, 189 A.D.2d 812, 592 N.Y.S.2d 463; General Obligation Law § 15-108 [a]).[146]

According to the trial record, the settling defendant City of New York was a defendant on all causes of action and received a general release. However, on the record, plaintiffs and the city had attributed the settlement payments entirely to plaintiffs' claims under section 1983. One would think the remaining defendant should not be bound by a stipulation to which it was not a party; perhaps the trial court had found the allocation sound after conducting more investigation than the record reveals.[147]

To put this in a business context, suppose defendant B is sued for aiding and abetting a fraud by defendant A, which fraud had commenced a year before B became involved. Defendant A settles. Left to assess damages for out-of-pocket loss only against the remaining defendant B, the jury might well conclude that a portion of the loss had been irremediably caused prior to the involvement of defendant B, and award less than the plaintiff's total out-of-pocket loss. Will the court then *have* to reduce the verdict by the amount received from defendant A because the "same injury" was involved? Does reducing plaintiff's "claim" (the GOL § 15-108 term) require reducing plaintiff's verdict? Does the court have authority under CPLR 4533-b to apportion some of the settlement to apparent earlier phases of the injury even though the jury has made no finding that the "injury" was *in toto* something different than its verdict?

Hill v. Saint Clare's Hospital supports the argument that the releasee's consideration can be allocated among the claims plaintiff has released to arrive at an amount to be attributed to the "same injury" for which the litigating defendant is later held liable.[148] The released predecessor tortfeasors had caused plaintiff both injuries to portions of his body "not involved in the present action" as well as injuries subsequently aggravated by the successor tort defendants.[149] The Court of Appeals ordered a CPLR 4533-b hearing at which the trial judge would allocate the settlement payment between the "original injuries" and the specific injuries the nonsettling defendants caused—"aggravation

injuries"—with the burden being on plaintiff to prove an allocation. If there were an allocation in the settlement documents, and given the relative gravity of the injuries, the stipulated allocation appeared to have been "arrived at in good faith," apparently that would govern.[150]

A hypothetical extending the *Ackerman* case can take us a step further. Suppose plaintiff has a total loss of $2,000,000 on an investment partnership. Defendant A is sued for fraudulent inducement *and* for negligent management of the partnership. Defendant B, however, is sued solely for the latter, later injury, that of mismanagement. Plaintiff settles with Defendant A for $500,000. Plaintiff proceeds to trial against Defendant B. The jury is asked to find the equitable share of Defendant A's responsibility on the mismanagement claim. The jury finds Defendant B liable and exonerates Defendant A; it awards damages on the mismanagement claim of $1,000,000, but holds that Plaintiff was 25% himself at fault.

Since there is now a jury finding that Defendant A was *not* liable for mismanagement (although he was certainly "claimed to be liable") should Defendant B have the benefit of *any* dollar set-off from the settlement? Could the court allocate the $500,000 settlement to the claim on which only Defendant A was sued, as happened in *Budimlic*?[151] Should the court hold that the $500,000 applies entirely against the *claim* of the releasor (the statutory language) and, since the damage award is for far less than the loss for which claim was made, decide that there is no dollar set-off? (I've found no case taking quite such an approach, but in the statute "claim" is the exact term used, *not* "verdict" or "damage award." Some cases do try to reach a comparable result by treating the verdict as limited to the portion of the total damages attributable to the nonsettling defendant).[152]

A similar question is presented if instead of exonerating Defendant A, the jury has found Defendant A to have an "equitable share" of responsibility for the mismanagement liability.[153] The court must first decide whether it *can* allocate the settlement payment between different injuries; assuming it does so, it must then make one calculation deducting the allocated settlement amount and then the 25% comparative fault (the *Whalen* method). Next, the court must compare the result of this calculation to plaintiff's recovery after reduction for the equitable shares of both plaintiff and the settled party. Since such determinations would be made in a post-verdict proceeding (CPLR 4533-b), in a complex case plaintiff and litigating defendant may have to wait until after trial to learn the extent to which the settlement amount will diminish the verdict.

Let me close this discussion of allocation of settlement consideration with *Getty Petroleum v. Island Transportation Corp.*[154] There the trial court had denied the litigating defendant *any* credit for settlements by other defendants on the theory that *defendant* had failed to prove how much of the settlements should be allocated to the Lanham Act trademark infringement claim for which defendant was held liable, i.e., a claim for selling non-Getty gas to Getty stations. Since these claims appear to have been asserted against such defendants, and to have been covered by their releases, the trial court's placing the burden on defendants to prove an allocation of the settlement proceeds appears contrary to New York law.[155]

The Second Circuit did not evaluate the trial court's burden of proof rationale, but rather interpreted the jury verdict as being "intended to remedy [plaintiff's] injury stemming solely from appellants' contributory infringement," holding that GOL § 15-108 did not apply because "the jury's compensatory award did not take into account plaintiff's injuries attributable to the settling defendants."[156] If that were true, the court's affirmance would be sensible enough. But while the jury had been asked to calculate plaintiff's lost profits "as a result of the activities of" defendants, the jury certainly had not been asked to calculate lost profits attributable *solely* to such defendants. Every sale of gasoline by defendants involved a settling party as purchaser; and the jury verdict was "compensatory," not merely the disgorgement of defendants' actual profits (a potential Lanham Act remedy). Under such circumstances, the reader of the opinion may find it unlikely that the lost profits award against the remaining defendants was for an injury distinct from that covered by the settlements—particularly when it also appears that the jury simultaneously had fixed the defendants' "share of liability" at 50%.[157] In *Getty Petroleum*, the Second Circuit panel appeared understandably concerned that a case involving actual damages of $43,000 not be sent back for what would have been a third jury trial. Nonetheless, on the stated facts, it seems difficult to reconcile this appellate result with *Hill* and other New York precedent.

A few years ago Professor Siegel aptly observed (in discussing the *Whalen* decision) that "almost every case that involves § 15-108 of the General Obligations Law is a mouthful."[158] It might fairly be added that some, at least, are also hard to swallow!

(b) Factoring in Claims Not Based on Tort

The cases allocating consideration among different injuries should be distinguished from cases where the "injury" may indeed be the same (or at least the damages would be overlapping), but GOL § 15-108 is not available at all because the grounds for relief on the claim settled were not based on tort. In addition to cases already discussed, an example can be found in *Bauman v. Garfinkle*,[159] wherein a defendant could not

claim the benefit of GOL § 15-108 in a tort action where the settled action was for breach of contract and violations of federal law.

Although GOL § 15-108 set-offs will not be available to a defendant in such cases, the tort defendant may still be able to argue that plaintiff's damages must be reduced by any other recoveries, including some or all of the settlement amounts, insofar as damages against the remaining defendant must be measured on an "out-of-pocket" basis. Given CPLR 4533-b, it would appear that this calculation should be made by the court in a post-verdict hearing after the jury measures damages, rather than as part of plaintiff's damage presentation at trial. Again, if this is a possibility, plaintiffs will want to make sure the jury verdict includes figures for total damages and not merely those attributable to the litigating defendant.

(c) Interest or Discounts

The statute refers only to the "amount stipulated" and the "consideration paid" as potential alternate set-offs, it makes no statement about adding interest from collection to the verdict date, which may be years after the settlement. The various state court cases I have reviewed use similar language, and I do not believe I have located any state case which added interest (or discounted the payment) in computing a *pro tanto* set-off.[160]

The Second Circuit appears to be convinced that pre-judgment interest gets added to the settlement for offset purposes, and that court discusses the mechanics of doing so in yet another case relating to the Navy Yard asbestos injuries.[161]

In the asbestos cases, the wrongful death verdicts did not themselves include pre-judgment interest. To subtract the settlements from verdicts *before* calculating pre-judgment interest would prejudice plaintiffs by ignoring the many years that passed between the deaths and the settlements. But to calculate pre-judgment interest on the verdict for all the years from death to judgment and then subtract the settlement amount would ignore interest earnable on the settlement since receipt.

With that in mind, and after reviewing the intervening New York Court of Appeals *Didner* decision, the Second Circuit decided in *Asbestos II* to modify its earlier pronouncement that "interest must be added to the award before settlements are taken into account."[162]

The Second Circuit concluded that while this should still be done, the set-off should then be computed by adding interest at the same rate to settlement proceeds once actually received. The Second Circuit opined that this method best carried out the statute's multiple purposes, and offered numerical examples to illustrate the panel's reasoning that converting settlement amounts into "judgment-time dollars" was the best approach.

I must confess that I remain thoroughly muddled about the procedural import of this Second Circuit opinion. First, although the opinion discusses *Didner*, it does not discuss another asbestos case decided by the Court of Appeals the same day, *Dudick v. Keene Corp.*,[163] which had affirmed a complex Appellate Division opinion.[164] The Appellate Division opinion in that case appears to endorse a mechanism that deducted the full settlement amount from the date-of-death verdict *before* adding interest.[165] This is precisely the method rejected by the Second Circuit!

Compounding the confusion is a Southern District opinion, *In re New York Asbestos Litigation (Consorti, et al)*,[166] which was decided and reargued just weeks before the opinion in *Asbestos II*. In this opinion, Judge Sweet followed *Dudick*, and therefore expressly declined to follow the initial Second Circuit rules enunciated in *Asbestos I*. There is no indication that this decision was modified after *Asbestos II*, with which it is also squarely inconsistent![167]

Under New York law, in most cases where pre-judgment interest is mandatory, plaintiff may elect to have the jury calculate pre-judgment interest (not an option in wrongful death cases), but the more common practice is to have the jury render a verdict cast in terms of the date of damages and have the court calculate interest, following CPLR 5001(c).[168] The two interest rules on the table—both *Dudick* and *Asbestos II*—obviously could lead to wildly different results for the set-off. It seems fair to mention in this regard that GOL § 15-108(a) does not use the term "verdict" at all. It refers to plaintiff's "claim." Since that "claim" most certainly includes pre-judgment interest, *why* do any calculation based on a verdict to which such interest has not yet been added (the *Dudick* method)? And why not treat the omission of an interest factor as a *deliberate* policy choice accompanying the preservation of the *pro tanto* floor? Why assume the Legislature needs help in this regard (as the Second Circuit assumed)? After all, any time the consideration is being deducted it is because the litigating defendant is *already* doing better than it would under an "equitable share" allocation (or else that would be the method chosen for the set-off calculation)!

Who *is* on first? For myself, neither approach seems quite in keeping with the statute, and I would suggest that the "consideration" set-off should be applied as literally written in the statute. At the time when plaintiff sued, his "claim" no doubt included a demand for pre-judgment interest. In all events, by the time of the CPLR 4533-b hearing, the plaintiff's "claim" surely constitutes the verdict *plus* any applicable interest (since this is now

the potential judgment amount). I suggest that the set-off available against this total "claim" should be the actual amount of settlement consideration allocated by the court to this claim, *without* any addition of imputed interest by the court. In other words, adhering to the statutory text, it should be precisely the "amount of consideration paid for" release of the claim by the settling tortfeasor which is set off against the current, total claim of plaintiff, which now includes both verdict and interest. To me, this formulation is part of the statutory trade-off which allows the defendant alternate dollar-based set-offs where such prove more favorable to defendant than what the jury found were the releasees' equitable shares.

The defendant would not be prejudiced by my formulation, because the defendant *always* has the option of using the settled party's equitable share as the measure for reduction of plaintiff's claim. Conversely, the "one recovery" rule is not violated either, because plaintiff never recovers more than the dollar amount of his *total* "claim."

Although this is my view, it is not likely that this is how a federal court would handle interest, given *Asbestos II*, and it is probably not how New York state courts would proceed either!

(d) Other Measurement Issues

In the simple case, "consideration paid" is the money that changes hands. But we are not concerned with simple cases. Suppose the defendant provided nonmonetary consideration related to the case, such as cooperation. Such cooperation may have proved quite valuable. If this was the only settling defendant, perhaps assessing his "equitable share" is sufficient in practice so long as that share is not itself nominal. But what if other defendants also settle, and the court must apply the "aggregation" rule—then such cooperation may have to be valued. In addition, commercial settlements occasionally involve business terms—the granting of a license, an agreement to supply (or buy) goods or services in the future at a price favorable to one side or the other, perhaps even a covenant not to compete in some area for some period. How are these to be valued?

The situations I hypothesize so far may be unusual, but in commercial cases the pleading of counterclaims (and contribution or other cross-claims against additional parties in which plaintiff has a financial or other interest) is not unusual at all. What is the "consideration paid" when, as part of a settlement, the defendant surrenders a counterclaim (or even just gives a mutual release when unasserted counterclaims lurk in the background)? Indeed, in some complex cases might not the *plaintiff* wind up paying the defendant, and yet the plaintiff had received substantial consideration for its release?

I have found no cases where such an issue has been addressed, but surely in some circumstances a defendant will insist that these forms of consideration be valued when the court adjusts the verdict after trial pursuant to CPLR 4533-b.

Without belaboring this point, which I consider a serious concern in complex cases that is exacerbated by the apparent total lack of authority anywhere close to the point, I am reminded of a case in a different context. In *Walker v. Telex Corp.*,[169] Telex had been represented on a contingent-fee basis by plaintiff as counsel in an antitrust suit against IBM. As part of a settlement of the case while on appeal, IBM had surrendered its judgment on a counterclaim against Telex, which was also part of the appeal. Counsel sought to recover a fee from his client based on the value of the counterclaim surrendered, and the court held that surrender of the counterclaim was indeed a "benefit" for his client for which counsel was entitled to his percentage compensation. A jury trial was required to value the "benefit" to Telex of avoiding the counterclaim.[170] Why shouldn't the same logic be pursued by a creative, still-litigating defendant?

The "Stipulated" Consideration Alternative

While the set-off alternative based upon the "stipulated" consideration may not often come into play, it becomes a factor when the action against a defendant is discontinued based on a settlement, and the settling party then fails to pay—e.g., when it goes bankrupt before paying in full. Some unfortunate "asbestos" plaintiffs got caught in that very predicament. They settled with Johns Manville in exchange for a series of payments over time, only to have Johns Manville default and its "trust" go into bankruptcy. In that case, Judge McLaughlin, sitting in the District Court by designation, held that each such plaintiff's claim against the nonsettling defendants was to be reduced by the full "stipulated" amount, even though it had become unlikely to be collected.[171]

By contrast, in another asbestos case, Judge Weinstein was prepared to take the tack of valuing the *likely* recovery from Mansville and ignoring the *stipulated* amount, expressly recognizing that this was in conflict with Judge McLaughlin's approach. In the end, however, he seems to have decided that "for purposes of [GOL § 15-108] plaintiffs have not settled with the Mansville Trust." Plaintiffs then voluntarily assigned their Mansville reorganization claims to the *Asbestos I* judgment defendants, which consequently received *no* set-off at all as to Mansville.[172] The Second Circuit affirmed in this regard.[173]

Finally, under this overall heading I should mention the case of *Reynolds v. Morka Enterprises*,[174] where one defendant settled with plaintiff for $100,000 and agreed

to pay a further $50,000 to the extent necessary to insure plaintiff a minimum total recovery of $150,000. The Third Department approved the trial court decision to give the nonsettling defendant a set-off for the *full* $150,000 as the amount stipulated, even though part of that amount was contingent. What, then, would the plaintiff actually collect if the jury rendered a $200,000 verdict against the remaining defendant? Methinks only $150,000. Defendant is entitled to a $150,000 set-off and hence pays only $50,000. Plaintiff adds this to the $100,000 previous paid in settlement and has reached the $150,000 minimum; accordingly the settling defendant owes nothing further. Could anyone have intended that result?

Where settlements call for future payments, plaintiffs should carefully weigh the consequences. And if the future payments are not fully secured, plaintiff's counsel should insist that discontinuance of the action with prejudice and delivery of a release should be postponed until, and be made contingent upon, full payment under the agreement and that in the absence of full, timely payment, plaintiff has the right to elect to rescind the agreement.

The "stipulated amount" alternative was part of GOL § 15-108 when first introduced in 1972 and remained part of the statute after the addition of the "equitable share" alternative. Its application seems particularly harsh given that amendment, because the "stipulated amount" will *only* come into play as the most advantageous alternative for defendants where it saves defendants from paying the adjudged equitable share of nonsettling parties collectively; accordingly this alternative will *always* leave plaintiff with an incomplete recovery and *always* leave defendant better off than the equitable share of the settling parties would warrant. A fairer result would be to require the trial defendant to pay the full remaining equitable share and then to assign to such defendant plaintiffs' claim for the uncollected "stipulated" settlement balance. However, that is *not* the way this law works.

V. Conclusion

We have spent too much time in the many nooks and crannies of GOL § 15-108 and related case law to reach sweeping conclusions. It seems safe to say that there are several aspects of the statute warranting clarification, and certainly some aspects that I would like to see changed. A quarter-century ago the Legislature was unmoved by vociferous arguments seeking changes in the statute. Seeking changes now would be quite a battle, since every adjustment "gores" clients of one side of the bar or the other.

In all events, I can conclude by observing that the commercial lawyer in a multi-party, multi-claim case will not want to rely on instinct alone when anticipating the impact on his case and his client of a proposed settlement. Danger lurks!

Endnotes

1. 30 N.Y.2d 143, 331 N.Y.S.2d 382 (1972) (superseded by statute as stated in *In re E. and S. Asbestos Litig.*, 772 F. Supp. 1380 (E.D.N.Y. 1991)).
2. This was the provision of CPA § 411-a and then the initial, pre-*Dole* version of CPLR 1411. For a review of the pre-*Dole* situation, see M.E. Occhialino, "'Contribution' in Judicial Conference," *Nineteenth Annual Report*, Legislative Doc. No. 90 at 217-59 (1974).
3. *See Livant v. Livant*, 18 A.D.2d 383, 239 N.Y.S.2d 608 (1963)(proving other recoveries). *Cf.* Restatement (Second) of Torts § 885(3) (stating a rule that payment "in compensation of a claim for harm for which others are liable as tortfeasors" will diminish the claim against the other tortfeasor "at least to the extent of the payment made" (generally referred to as a *pro tanto* reduction)).
4. Because parties settling pre-judgment could not bring or be subject to contribution claims as CPLR 1411 then stood, at that time there was no reason for GOL § 15-108 to include a separate bar for such claims.
5. *See* discussion *infra* of "Stipulated Consideration" alternative.
6. For example, after *Dole* allowed contribution based on "equitable shares," the Fourth Department held that a contribution claim could be asserted against a co-tortfeasor that had settled with the injured party. *Blass v. Hennessey*, 44 A.D.2d 405, 355 N.Y.S.2d 506 (1974) (superseded by statute as stated in *LeFevre v. State*, 176 Misc. 2d 666, 673 N.Y.S.2d 855 (N.Y. Ct. Cl. 1998)); s*ee also Occhialino* at 218-19.
7. *See* Act of Sept. 1, 1974 Ch. 742, 1974 N.Y. Laws at 1153-54, approved June 7, 1974, effective September 1, 1974. *See also Williams v. Niske*, 81 N.Y.2d 437 (1993), (reviewing the history of GOL § 15-108).
8. Because I will be returning to each of these elements, the reader should note that what is reduced is the plaintiff's "claim," that if there is an "equitable share" reduction that reduction applies to "damages," and that there is no reference to calculating interest on either dollar-based alternative. In addition—and contrary to the case law I will discuss below—the statute makes no distinctions based on when the release or covenant is obtained. Finally, the statute (like Article 14) also does not expressly require that the settling party be "liable or claimed to be liable" *to the injured party* (i.e., that the injured party be able to state a claim against the settling party).
9. The initial report commissioned by the Judicial Conference had recommended either allowing the plaintiff the benefit of the "windfall" to balance plaintiff's risks or allowing the settling party a limited right of contribution—but, either way, not giving the litigating defendant this "windfall" at the risk of under-compensating the injured plaintiff. *Occhialino* at 219. The Judicial Conference did not, however, advocate this approach (*see infra*, n. 45) and the Legislature did not adopt it (the Legislative report makes no mention of these alternatives—see Report on Right of Contribution, 1974 N.Y.S. Legis. Ann. at 15-17). Various New York commentators subsequently urged repeal of the *pro tanto* floor. *See, e.g.*, Samuel L. Green, *General Obligations Law Section 15-108: An Unsettling Law*, 55 N.Y. St. B.J. 28 (1983), after apportionment was added to GOL § 15-108. Nonetheless, the statute has remained unchanged in this regard for over a quarter-century. In the first of its 1993 decisions concerning GOL § 15-108, *Williams*, 81 N.Y.2d 437, 443, 599 N.Y.S.2d 519 (1993), the Court of Appeals specifically noted this effect of the set-off mechanism; the weight given by the Legislature "to ensure that plaintiffs do not in effect have a double recovery," the Court conclud-

ed, explains preserving a *pro tanto* floor when adopting "equitable share" apportionment.

10. As to New York's "out-of-pocket" approach, *see, e.g.*, *Reno v. Bull*, 226 N.Y. 546, 124 N.E. 144 (1919); *Lama Holding Co. v. Smith Barney, Inc.*, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 80 (1996); *Ostano Commerzalt v. Telewide Systems, Inc.*, 794 F.2d 763, 766 (2d Cir. 1986).

11. *See* discussion *infra* of the "Stipulated Consideration" alternative.

12. *See In re E. & S. Dist. Asbestos Litig.*, 772 F. Supp. at 1402-03 (E.D.N.Y. 1991), noting the weight of authority from a variety of jurisdictions that the shares of relative fault attributed to insolvent or otherwise unavailable parties which have not settled with plaintiff should be absorbed by the nonsettling defendants.

13. *Id.*, 772 F. Supp. at 1399; *see also In re New York Asbestos Litig.*, 847 F. Supp. 1086, 1111(S.D.N.Y. 1994), applying these rules.

14. *Id.*, 772 F. Supp. at 1412.

15. *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 845 (2d Cir. 1992)(*Asbestos I*).

16. *See In re N.Y.C. Asbestos Litig.*, 151 Misc. 2d 1, 10, 572 N.Y.S.2d 1006, 1010 (Sup. Ct., N.Y. Co. 1991).

17. *See In re N.Y.C. Asbestos Litig.*, 188 A.D.2d 214, 224, 593 N.Y.S.2d 43, 49 (noting that ''nothing in General Obligations Law § 15-108 suggests that it was intended to compromise the principle of joint and several liability in tort"), *aff'd*, 82 N.Y.2d 821, 605 N.Y.S.2d 3 (1993). While I agree that under New York law the plaintiff can collect his judgment from any tortfeasor defendant without regard to its "relative" fault (subject to Article 16, which is outside the scope of this article), the result in *Asbestos I* goes further and seems to imply that defendants have a right of contribution amongst themselves with respect to such "shares" of absentee defendants, since Judge Weinstein "reallocated" such shares, as found by the jury, to the trial defendants. While this seems fair in its way (lest the judgment debtor nailed first by plaintiff wind up holding the bag for all absent/impecunious defendants), it seems squarely contrary to the language of CPLR 1402 that in an action for contribution, "no person be required to contribute an amount greater than his equitable share."

18. *Hyosung America Inc. v. Sumagh Textile Co.*, 25 F. Supp.2d 376, 387 (S.D.N.Y. 1998), *aff'd*, 189 F.3d 461 (2d Cir. 1999).

19. *See* CPLR 1402. Contribution is available for "the excess paid by him over and above his equitable share of the judgment recovered by the injured party." Thus, a defendant found 50% culpable has no redress upon paying 50% of the judgment, even if his co-defendant has paid nothing. *See* J. McLaughlin, McKinney Practice Commentary to CPLR 1402 (1997). For convenience, I will drop the term "alleged" hereafter unless the context requires it, and use the terms "litigating defendant" to refer to an alleged tortfeasor who continues to defend against a claim and "settling party" or "settling tortfeasor" to refer to a party alleged to be liable in tort which has settled with the injured party. Finally, "plaintiff" and "injured party" will be used interchangeably.

20. Although GOL § 15-108 may not apply in a particular case, common law principles of damage calculation may still require that a verdict against the litigating defendant be reduced by amounts actually collected from settling parties.

21. In such instance, moreover, there is no room for an "equitable share" set-off, because the alleged "injuries" do not overlap. For example, a subsequent tortfeasor B will typically *not* have a contribution claim against the original tortfeasor A because the "aggravation" award against B should not include the original injury—unless original and later injuries cannot be separated and are deemed "indivisible" (like a wrongful death). McLaughlin, McKinney Practice Commentary 5 to CPLR 1401 (1997).

22. McLaughlin, McKinney Practice Commentary to GOL § 15-108 (1989).

23. *See Whalen v. Kawasaki Motor Corp.*, 92 N.Y.2d 288, 680 N.Y.S.2d 435 (1998). In *Granieri v. Ryder Truck Rental, Inc.*, 112 A.D.2d 189, 491 N.Y.S.2d 412 (1985), the Appellate Division reversed the trial court's denial of leave to amend to add this defense, premised on a settlement plaintiff had entered into years earlier but *after* defendants had answered. The Court stated: "[p]laintiff, having full knowledge of the release, cannot successfully claim surprise of prejudice . . . [c]onsequently, it was an abuse of discretion to deny leave to amend the answer." *Id*. at 413-14. *See also Ward v. City of Schenectady*, 204 A.D.2d 779, 611 N.Y.S.2d 932 (1994) (denying of defendant's oral motion made at the close of plaintiff's case to amend its answer to add GOL § 15-108 was an abuse of discretion because plaintiff knew defendant claimed fault lay with others).

24. 92 N.Y.2d at 293. Although *Whalen* reinforces the rule that the set-off must be pleaded as an affirmative defense, and although in a CPLR 4533-b proceeding the initial burden does appear to be on defendant, one Southern District case holds that because a plaintiff may only collect "out-of-pocket" damages, the burden is on plaintiff to establish any recoveries reducing its economic injury. *Minpeco, S.A. v. Conticommodity Services, Inc.*, 676 F. Supp. 486, 490 (S.D.N.Y. 1987).

25. *In re N.Y.C. Asbestos Litig. (Brooklyn Naval Ship Yards) [Didner v. Keene]*, 82 N.Y.2d 342, 604 N.Y.S.2d 879 (1993). The "pick and choose" approach is illustrated by the trial court rulings in *Didner* and by *Killeen v. Reinhardt*, 71 A.D.2d 851, 419 N.Y.S.2d 175 (1979), where the nonsettling defendant A was given a dollar credit for settlements by one group of defendants B. The action against another defendant C had been "discontinued" prior to trial, "receiving no monetary consideration for the discontinuance." As to that defendant C, the trial defendant A was allowed a set-off based on his equitable share as found by the jury. Assuming that this discontinuance triggered GOL § 15-108 at all (the opinion does not indicate whether the discontinuance was with prejudice, but the Second Department held that "under the circumstances at bar" the discontinuance did trigger the statute), this "pick and choose" result should not prevail under current case law.

26. 81 N.Y.2d 437, 599 N.Y.S.2d 519 (1993).

27. *See Williams v. Niske*, 181 A.D.2d 307, 586 N.Y.S.2d 942 (1992).

28. *Id*. at 311.

29. The Appellate Division had said that such an aggregation method "might very well be appropriate in other circumstances." *Id*. at 312. The Court of Appeals did not make a similar comment.

30. Apparently the plaintiff in *Williams* in effect consented to this procedure at the time of trial. If plaintiff did consent, then the Court of Appeals' concern that plaintiff was maneuvering on appeal for a windfall becomes more understandable. Certainly the precedential value and language of *Williams* are such, however, that a plaintiff should address this issue openly pre-trial and force defendant to put the aggregate "equitable share" of all settling parties at issue.

31. *See*, *e.g.*, *Pollicina v. Misericordia Hosp. Ctr.*, 82 N.Y.2d 332, 340-41, 604 N.Y.S.2d 879, 883 (1993). *See also Coty v. Steigerwald*, 262 A.D.2d 946, 692 N.Y.S.2d 556 (4th Dep't 1999) (opining that CPLR 1411 would apply in breach of fiduciary duty case but finding the defense factually inapplicable there).

32. In this process the jury may also be weighing the "comparative fault" of the plaintiff under CPLR Article 14-A, a subject beyond the scope of this article but of great potential significance in business tort litigation, *especially* while it remains unsettled whether Article 14-A applies to intentional torts. Since many practitioners, and courts, assume that "comparative fault" does not apply in intentional tort cases, the reader is urged to consult

the series of decisions in *Bank Brussels Lambert v. The Chase Manhattan Bank, N.A.*, 1999 WL 71778 (S.D.N.Y., Sept. 10, 1999), and *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 2000 WL 1364272 (S.D.N.Y. Sept. 20, 2000), reconsideration granted and original determination adhered to, 2000 WL 1694308 (S.D.N.Y. Nov. 13, 2000), in which Judge McKenna concluded that a comparative fault defense under Article 14-A is available in suits based on intentional torts, except perhaps as to torts implicating public policy (like bribery).

33. For simplicity throughout this article the finder of fact at trial will be referred to as "the jury," although many commercial cases are tried by the court. References made to the trial "court" or "judge" are meant to identify matters entrusted to the trial court even if the case is tried by a jury, such as the CPLR 4533-b hearing. Note that the CPLR 4533-b hearing deals with any payment by another tortfeasor, not merely a settlement payment *per se*.

34. *See*, *e.g.*, *Hamilton v. Garlock, Inc.*, 96 F. Supp. 2d 352, 356-57 (S.D.N.Y. 2000); *Bigelow v. Acands*, 196 A.D.2d 436, 601 N.Y.S.2d 478 (1st Dep't 1993). Although this allocation to defendant of the burden of proof as to settling parties now seems settled, we will see that in at least one earlier case a trial court had held that this was plaintiff's burden. See discussion of *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 16 (2d Cir. 1988), *infra*, pp. 57-58. *See also* McLaughlin, McKinney Practice Commentary to GOL § 15-108 (1989) at 701.

35. Actually, although the inclusion of absent, non-settled parties appears common and consistent with, e.g., *Asbestos I*, it seems questionable whether this is consistent with CPLR 1406's provision that "equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution" (emphasis added). Can an absent party be treated as one "liable for" contribution? (Please note that I do not discuss here the complications in proving equitable shares of absent parties that are introduced by CPLR Article 16, since its effect is limited to liability for "noneconomic loss.")

36. *See Kreppein v. Celotex Corp.*, 969 F.2d 1424, 1426-27 (2d Cir. 1992) (*citing Garrett v. Holiday Inns, Inc*. 58 N.Y.2d 253, 258, 447 N.E.2d 717, 719 460 N.Y.S.2d 774, 777 (1983)) (relative degrees of "fault" for the injury may include not only strength of the causal link but also the magnitude of the fault).

37. There has been relatively little reported discussion of this issue under current Article 14, but the question arose with some frequency under section 211-a of the Civil Practice Act (and then the initial version of CPLR 1401), which varied the common law rule denying contribution among tortfeasors to the extent of allowing a joint tortfeasor to seek contribution from others against whom *judgment* also had entered, to the extent this judgment debtor had paid more than his *pro rata* share. In multi-defendant cases questions sometimes arose about how many heads to count for purposes of the *pro rata* computation. It was held that a party whose liability was strictly vicarious (such as an employer or the owner of a car held liable, not for any direct breach of duty, but only based on the conduct of an employee or the driver) should be counted together with the direct tortfeasor for which it was vicariously responsible as one entity, not as two, for purposes of dividing damage shares *pro rata* with other defendants. *See, e.g., Martindale v. Griffin*, 233 App. Div. 510, 253 N.Y.S. 578 (4th Dep't 1931), *aff'd*, 259 N.Y. 530, 182 N.E. 167 (1932) (grouping separate driver and owner of one car together in comparison to the single owner/driver of other car); s*ee also McCabe v. Century Theatres Inc.*, 25 A.D.2d 154, 268 N.Y.S.2d 48 (2d Dep't 1966) (tenant and owner having identical duties treated as one "distinct cause" of injury); *Wold v. Grozalsky*, 277 N.Y. 364, 14 N.E. 2d 437 (1938)(the two half-owners of one house grouped together for contribution calculation); *Benjamin v. Faro*, 1 A.D.2d 948, 150 N.Y.S.2d 620 (1st Dep't 1956) (grouping defendants with a "consolidated or unified" liability based on the "portion of the judgment allocable to the entity they comprise"); *Lyons v. Provencial*, 20 A.D.2d 875, 248 N.Y.S.2d 663 (1st Dep't 1964) (liability of city and traffic light maintenance company should be treated as a consolidated one for purposes of determination of a "substantially equitable" *pro rata* contribution), *aff'd*, 15 N.Y.2d 1006, 260 N.Y.S.2d 19 (1965). In *Bundy v. City of New York*, 23 A.D.2d 392, 261 N.Y.S.2d 221 (1st Dep't 1965), four defendants were held to have separate and distinct duties. Nonetheless the injury was held to stem from two sets of circumstances, and three of the four defendants were therefore grouped together for *pro rata* contribution purposes.

38. 94 A.D.2d 423, 425, 464 N.Y.S.2d 904, 905 (4th Dep't 1983). The opinion does not expressly discuss what portion of the verdict nonsettling defendant D was required to pay. However, since D has no contribution right against its employer when E's liability is strictly vicarious, D presumably was liable for 75% of the verdict. Since GOL § 15-108(a) does not apply as between D and E because D had no contribution claim, does the actual amount paid by E get deducted from the 75%? Or does this happen only after R has actually paid its share? Or something else? This article does not address the many nuances of such vehicle cases, but readers should attend to *Mowczan v. Bacon*, 92 N.Y.2d 281, 680 N.Y.S. 431 (1998), for the most recent Court of Appeals pronouncement on contribution and apportionment in this area.

39. In fact, the confusion that follows from a result like this was documented in Comment, "Repealing New York's Post-Settlement Equitable Share Reduction Scheme: An Idea Whose Time Has Come." 49 N.Y.U.L. Rev. 856, 876 (1985) (noting that "[a]fter affirmance by the court of appeals, the appellate division was compelled to modify its judgment three times before reaching an acceptable result.")

40. *See* discussion of indemnification, *infra*.

41. *Compare Estate of Canale v. Binghampton Amusement Co.*, 45 A.D.2d 424, 357 N.Y.S.2d 931 (3d Dep't 1974) (in *Dole v. Dow* apportionment, defendants' employee and vicariously liable employer should be treated as one unit, and trial court should *not* make an apportionment between employer and employee).

42. A fascinating theoretical discussion of the tactical considerations in negotiating settlements in multi-defendant cases can be found in Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, 68 N.Y.U. L. Rev. 427 (1993).

43. Hereafter "releasee" and "releasor" will generally be used to refer to the parties to an agreement terminating possible claims, whether in the form of a release or otherwise.

44. If the answer to this question turns on whether the guarantor had some liability to the accountant for contractual or "implied" indemnity, then the answer may hinge on the further question of whether such indemnity will be recognized when the accountant is itself at fault.

45. Later subsections are arguably even more narrow, mentioning only a "release" and not "covenants not to sue or enforce."

46. 651 F. Supp. 611, 613 (S.D.N.Y. 1986).

47. 176 Misc. 2d 655, 673 N.Y.S.2d 849 (Sup. Ct., N.Y. Co. 1998).

48. *Didner*, 82 N.Y.2d at 349-50, 604 N.Y.S. 2d at 888.

49. Although many types of claims' settlements have been held to fall within GOL § 15-108, one technical variation should be noted. It apparently is common in construction disputes for owner and general contractor to enter into a "liquidating agreement" in order to give the owner a direct claim against the allegedly negligent subcontractors. In such cases, the general contractor makes some payment and admits liability but only *to the extent* of whatever the owner can then recover from the subcontractors, with the owner agreeing that its claims against the general contractor are fixed at those amounts. Where such an agreement expressly preserves the claims against the general contractor and does not release them, such an agreement has been found to fall outside GOL § 15-108 even though the agreement *is* an affirmative defense to further suit against the general

contractor and operates to limit that party's liability. Because GOL § 15-108 does not apply, the subcontractors retain their contribution claim against the general contractor and do not get an equitable share set-off. *Lambert House Redevelopment Co. v. HRH Equity Corp.*, 117 A.D.2d 227, 502 N.Y.S.2d 433 (1st Dep't 1986). Subcontractors may still argue that the claims against them should be reduced by what their general contractor paid, invoking not GOL § 15-108 but the common law principle of "partial payment." *Id.* One can conceive of commercial settlements which could be structured in this fashion.

50. 81 N.Y.2d 1, 595 N.Y.S.2d 360 (1993).

51. *See, e.g.*, *Baca v. HRH Constr. Corp.*, 200 A.D.2d 538, 607 N.Y.S.2d 21 (1st Dep't 1994) (defendant entering into "high-low" agreement with plaintiff lost contribution claim against another tortfeasor; even though claim proceeds to trial, limitation on liability treated as a "release" [covenant not to enforce judgment] within meaning of GOL § 15-108. Note that as events turned out in this case, the "high" limit was below the party's equitable share as determined by the jury; hence no contribution claims would have been viable.

52. 129 A.D.2d 976, 977, 514 N.Y.S.2d 153, 154 (4th Dep't 1987).

53. *Id. See also Frost v. County of Rensselaer*, 220 A.D.2d 969, 971, 632 N.Y.S.2d 702 (3d Dep't 1995) (discontinuance without prejudice does not insulate discontinued defendant from contribution claim). Query whether it should matter if the claim was "discontinued without prejudice" at a time when the relevant statute of limitations *had* run on plaintiff's claim. A discontinuance "without prejudice" in such circumstances is no different than one "with prejudice." While the running of plaintiff's statute does not preclude a contribution claim, any discontinuance in such circumstances does amount to permanent surrender of plaintiff's claims, which in other circumstances has been said to be the test for applying GOL § 15-108.

54. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 2001 WL 492356 (S.D.N.Y. May 9, 2001). The various cases consolidated before Judge McKenna in 93 Civ. 5928, 93 Civ. 6876 and 94 Civ. 2713 are hereinafter referred to as the "*BBL* Cases." A number of decisions by Judge McKenna in those consolidated cases, in which the author was involved, addressed GOL § 15-108 and are further discussed below.

55. 2001 WL 492356 at *2.

56. While an oral covenant not to sue might be unenforceable under the statute of frauds, a tortfeasor who has since cooperated in various ways might well be able to invoke the exception for "part performance," a topic beyond the scope of this article.

57. 20 F.3d 1097, 1099 (10th Cir. 1994).

58. *Id.*

59. 782 F.2d 1106 (2d Cir. 1986).

60. *Whitney v. Citibank, N.A.*, 1984 WL 1225 at *10 (S.D.N.Y. 1984).

61. 782 F.2d at 1118.

62. We must assume from the opinion that since the Second Circuit felt GOL § 15-108 did not apply, Citibank retained its right of contribution against the partners.

63. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 2001 WL 492356 (S.D.N.Y. May 9, 2001).

64. *Id.* at *3. Apparently, the lenders might still have been able to move for leave to amend their bankruptcy claims, although it seems unlikely that such leave would have been granted. Judge McKenna's opinion did not turn on this issue.

65. 176 Misc. 2d 655, 673 N.Y.S.2d 849 (Sup. Ct., N.Y. Co. 1998).

66. 82 N.Y.2d 332, 340-41, 604 N.Y.S.2d 879, 883 (1993). The Court of Appeals faced a situation where the equitable share of a settling defendant having paid $50,000 was found by the jury to be zero. The Court held that the $50,000 had to be included in the aggregation of settlement dollars, since the settled defendant had been "claimed to be liable" for the same injury, but applied a full aggregation method (all equitable shares versus all settlement proceeds).

67. In *Pollicina*, the settling party was sued only on a tort theory, and only for the same injury as that caused by the litigating defendant. As I will discuss below, if other claims were asserted against the settling party, in applying GOL § 15-108 the court may be persuaded to allocate some or all of the settlement payment away from the claim on which a verdict is entered.

68. *Raquet*, 90 N.Y.2d at 183.

69. 135 Misc. 2d 209, 514 N.Y.S.2d 630 (Sup. Ct., N.Y. Co. 1987).

70. *Italian Econ. Corp. v. Community Engineers, Inc.*, 135 Misc. 2d 209, 214, 514 N.Y.S.2d 630 (Sup. Ct. N.Y. Co. 1987) "For a defendant to be entitled to credit for the settlement amount it must be legally possible that a defendant and the settling party can be held jointly or severally liable to the plaintiff for the same damages."

71. *Id*. This case also includes some discussion premised on the "pick and choose" approach to set-offs which would no longer be accurate given the Court of Appeals adoption in 1993 of the "aggregation" method.

72. 71 N.Y.2d 599, 528 N.Y.S.2d 516 (1988).

73. 71 N.Y.2d at 603-04, 528 N.Y.S.2d at 518.

74. There is no mention of consequential damages, such as water damage to building or contents.

75. See CPLR 4545. *But see In re New York County Data Entry Worker Prod. Liab. Litig.*, 162 Misc. 2d 263, 616 N.Y.S.2d 424 (Sup. Ct., N.Y. Co. 1994) (wherein the court held that settlement payments should not be treated as collateral source payments. The rationale, however, was that settlements entitle a defendant to "the benefit of the setoff of GOL § 15-108." *Id*. at 266). *See also Carrols Equities v. Villnave*, 76 Misc. 2d 205, 207, 350 N.Y.S.2d 90, 92 (Sup. Ct., Onondaga Co. 1973), *aff'd mem.*, 49 A.D.2d 672, 373 N.Y.S.2d 1012 (4th Dep't 1975) (no contribution claim in construction case because alleged wrongful conduct was "distinctly different and separable damages for which each must be held separately liable to plaintiff").

76. 272 A.D.2d 818, 822, 709 N.Y.S.2d 225, 230 (3d Dep't 2000).

77. 40 Fed. R. Serv. 2d 850, 1984 WL 1191 (S.D.N.Y. 1984).

78. *Id.* at 853 (citations omitted).

79. 252 A.D.2d 179, 683 N.Y.S.2d 179 (1st Dep't 1998).

80. PW sought a set-off pursuant to GOL § 15-108 for the settlement recoveries from the Federal suit. (Apparently PW did *not* assert an "equitable share" set-off, a tactical decision which might have been read as implicit acknowledgement that it was being sued for a distinct, separate injury.)

81. 683 N.Y.S.2d at 196. Actually, in the New York terminology PW *was* an alleged "successor" tortfeasor. The point is that a successor tortfeasor typically does not have a contribution claim again the original tortfeasor because the successor is only liable for the "aggravation" injuries. If the injury is not divisible or separable because of its nature (far less likely in a business context than with personal injuries like brain damage or death, however,) then the successor is potentially liable for the entire injury and will have a contribution claim—but this is the exception, not the rule.

82. For these reasons, the settled claims might reasonably be analogized to *Hill v. Saint Claire's Hosp.*, where the Court of Appeals directed a hearing to allocate the settlement payment between "original" and "aggravation" injuries, allowing the litigating successor tortfeasors a reduction for the consideration for the latter. 67 N.Y.2d 72, 499 N.Y.S.2d 904 (1986).

83. 229 A.D.2d 559, 645 N.Y.S.2d 865 (2d Dep't 1996).

84. 104 Misc.2d 762, 429 N.Y.S.2d 141 (Sup. Ct., Oneida Co. 1979).

85. 257 A.D.2d 754, 683 N.Y.S.2d 345 (3d Dep't 1999).

86. *See National Enterprises*, 181 A.D.2d at 444, 580 N.Y.S.2d at 763.

87. 570 F. Supp. 1032 (S.D.N.Y. 1983).

88. 79 N.Y.2d 540, 583 N.Y.S.2d 957 (1992).

89. 712 F. Supp. 312 (W.D.N.Y. 1989).

90. 78 A.D.2d 134, 434 N.Y.S.2d 288 (4th Dep't 1980).

91. 39 N.Y.2d 34, 382 N.Y.S.2d 720 (1976).

92. 39 N.Y.2d at 41. This was not the end of it, however. Since only $250,000 was paid in satisfaction of a $400,000 judgment, Westbury's contribution liability would no longer be the "pre-existing judgment" amount. Thus, although the judgment could not be judicially "nullified," it apparently could be thoroughly judicially re-written: the ratio of $50,000 to $400,000 (12.5%) was applied to the $50,000 judgment, entitling Prentice to recover on its judgment against Westbury only to the extent of $31,250. *Id.*

93. The Judicial Conference Report on the CPLR discussing the proposed new CPLR Article 14 and related changes to GOL § 15-108 expressly rejected allowing a settling tortfeasor a contribution claim where it is later determined to have paid more than its "equitable share," viewing the settling party as "a volunteer as to the excess paid by him." *See* 1974 N.Y. Laws at 1817-18.

94. *See also State of New York v. County of Sullivan*, 43 N.Y.2d 815, 402 N.Y.S.2d 397, 373 N.E.2d 291 (1977), *reversing on grounds stated in dissenting op. below*, 54 A.D.2d 29, 35, 386 N.Y.S.2d 253, 257 (3d Dep't 1976) (sole defendant did not waive contribution claim against other tortfeasors by paying judgment in reduced amount, because it "has not obtained its own release from liability"; it has merely "satisf[ied] that liability by paying and discharging the judgments that were predicated thereon" (citation omitted)).

95. 113 A.D.2d 502, 497 N.Y.S.2d 382 (2d Dep't 1985).

96. However the court pointed out that an actual recovery from one *joint* tortfeasor still reduced *pro tanto* what was recoverable from another, citing *Livant*. In *Astor Cover* the judgment debtor was actually seeking a reduction for the "equitable share" of the later-settling defendant B, suggesting that the allocations found by the jury at trial be used—even though as to B that finding had been vacated and a new trial ordered. The court also found this unpersuasive. *Id*. at 512.

97. Presumably, then, such a settling defendant would also retain *its* right to seek contribution from others—if GOL § 15-108 "cannot logically be construed to permit one but not others of its provisions to apply in a given case." *Astor Cover*, 113 A.D.2d at 511. Nonetheless one wonders whether a different result might have obtained if the issue had been presented as the *settling* defendant seeking contribution from defendant A.

98. The relief would seem to be this: If defendant A never actually paid the judgment, defendant B would never have to pay contribution. Such a possibility would, no doubt, stimulate creative solutions by plaintiffs interested in collecting in full from somebody. *See Feldman v. New York City Health & Hosp. Corp.*, 107 Misc. 2d 145, 437 N.Y.S.2d 491, (Sup. Ct., Kings Co.), *rev'd,* 84 A.D.2d 166, 445 N.Y.S.2d 555 (1st Dep't), *rev'd*, 56 N.Y.2d 1011, 453 N.Y.S.2d 683 (1982), which points the way: After judgment is final against defendant A, a loan is arranged for A, guaranteed by P, which is used by A to pay the judgment to P; A assigns its contribution claim to the lender (and perhaps to P) as collateral for the loan. Collection may now be pursued from B, so long as A has actually paid the judgment. Perhaps regretting what it had thus allowed in *Feldman*, in *Reich v. Manhattan Boiler & Equip. Corp.*, 91 N.Y.2d 772, 676 N.Y.S.2d 110 (1998), the Court of Appeals declined to allow this procedure for claims over by third parties against employers when sued by employees.

99. 9 F.3d 1042 (2d Cir. 1993).

100. *Id*. at 1048.

101. *See also LeFevre v. State of N.Y.*, 176 Misc. 2d 666, 673 N.Y.S.2d 855 (N.Y. Ct. Cl. 1998)(settlement after damage verdict but before structuring judgment under CPLR Articles 50A and B did not extinguish settling party's contribution rights); *Williams v. Weiser*, 175 Misc. 2d 289, 671 N.Y.S.2d 236 (Sup. Ct., Kings Co. 1997) (settlement after judgment signed but before it was entered preserved settling party's contribution claim based on the jury's verdict against third parties). The amount of the contribution judgment in *Orsini* was modified pursuant to the *Rock* methodology. While the opinions in *Orsini*, *LeFevre* and *Williams* may struggle to bring their facts within the "non-volunteer" rationale—and when *is* a defendant *really* a "volunteer"? —the other rationale for *Rock* was the presence of a judgment, which was then satisfied. These cases do not fall within that rationale. If the rationale for not applying GOL § 15-108 post judgment seems shaky (but firmly established), its extension to post verdict but pre-judgment settlements based on policy arguments seems sophistic when GOL § 15-108 *is* applied to immediately pre-verdict "high-low" agreements and the like.

102. *See Makeun v. State*, 98 A.D.2d 583, 590, 471 N.Y.S.2d 293, 298 (2d Dep't 1984).

103. This is perhaps the right juncture to take note of the bitter observation of Kornhauser & Revesz that "essentially all the arguments raised by the courts about the relative settlement-inducing properties of the competing set-off rules are based on an incomplete or incorrect understanding of the incentives faced by the respective parties." Kornhauser & Revesz, 68 N.Y.U.L. Rev. at 434. Those authors conclude that courts' predictions concerning which rules perform better in inducing settlements "are the product, quite simply, of logical flaws." *Id*. at 492.

104. 62 A.D.2d 810, 406 N.Y.S.2d 510 (2d Dep't), *aff'd,* 48 N.Y.2d 662, 421 N.Y.S.2d 879 (1979).

105. It can be noted that the first subsection of GOL § 15-108 addresses "a release or covenant not to sue or not to enforce a judgment," whereas subsections (b) and (c) expressly deal only with releases. Case law, however, has dealt with the three subsections as co-extensive.

106. 61 N.Y.2d 208, 215-17, 473 N.Y.S.2d 148, 151-53 (1984).

107. *Cf. LNC Inv., Inc. v. First Fidelity Bank, N.A* 935 F. Supp. 1333, 1349 (S.D.N.Y. 1996) (third-party action could continue "because Shawmut was a party to that settlement" which apparently stated that third-party action would continue).

108. 181 A.D.2d 443, 580 N.Y.S.2d 762 (1st Dep't 1992).

109. *Apple v. Jewish Med. Ctr.*, 829 F.2d 326, 331 (2d Cir. 1987).

110. *See Lettiere*, 48 N.Y.2d 662.

111. Many years ago (and well before *Didner* adopted the "aggregation" approach), in a multi-defendant business tort case, I negotiated a modest settlement with an impecunious defendant which allowed plaintiff to rescind the settlement and restore the action in the event that any co-defendant sought an "equitable share" set-off. The remainder of the case eventually settled, and so this device was never tested. Under present aggregation rules, my personal practice is simply not to settle with impecunious defendants to whom any significant "equitable share" might be attributed. Risking a set-off against a verdict otherwise collectible from deeper pocket tortfeasors is just not acceptable.

112. However, the "liquidation agreement" discussed *supra*, does offer one glimmer of a way out—by drafting something which apparently is a *defense* to prosecution of a claim, but not a *release*.

113. 93 F. Supp. 487, 495-96 (S.D.N.Y. 2000).

114. Subsection (c) also does not have a "good faith" limitation. Does this mean that a "collusive" releasee may be sued for contribution but is barred from itself making a contribution claim? Since one assumes a "collusive" release will usually involve consideration paid that is less than the releasee's equitable share of the

eventual verdict, this question is unlikely to arise—but it is not logically impossible, and the plaintiff's failure to win a trial against the litigating defendant does not collaterally estop an absent party with a live contribution claim.

115. Practice Commentary to GOL § 15-108. *See, e.g.*, *Riviello v. Waldron*, 47 N.Y.2d 297, 306, 418 N.Y.S.2d 300, 305 (1979) ("Section 15-108 is meant to be read in conjunction with contribution rights set forth in article 14"). In *Roma v. Buffalo Gen. Hosp.*, 103 A.D.2d 606, 608, 481 N.Y.S.2d 811, 813 (3d Dep't 1984), for example, the court construed GOL § 15-108 and CPLR 1401 as applying to a successor tortfeasor, and concluded that both provisions should be interpreted so that each party's "responsibility will be apportioned according to his 'equitable share' and 'relative culpability' regardless of theories or mixture of theories concerning the apportionment claims."

116. *Raquet v. Braun*, 90 N.Y.2d 177, 659 N.Y.S.2d 237 (1997). For a discussion of the "firefighter's rule," see *Cooper v. City of New York*, 81 N.Y.2d 584, 601 N.Y.S.2d 432 (1993).

117. *See Tassone v. Haggar Apparel Co.*, 259 A.D.2d 1035, 688 N.Y.S.2d 322 (4th Dep't 1999) (holding that because the employer could not be liable in tort to the employee where the employer's liability under Workers' Compensation Law was "exclusive," GOL § 15-108 did not bar a third party's contribution claim against the employer).

118. *See Trazaska v. Cincinnati, Inc.*, 277 A.D.2d 1048, 715 N.Y.S.2d 810 (4th Dep't 2000). The court distinguished the release at issue in its earlier *Tassone* decision as dealing with a different injury than that for which the third party was sued. However, the *Trazaska* opinion continues, "to the extent that our decision in *Tassone* holds that General Obligations Law § 15-108 does not apply to a settlement between an injured person and his or her employer, it is not to be followed." *Trazaska* at 1049. Readers should be aware that claims over against employers are now limited by Workers' Compensation Law § 11 to cases of "grave injury" or pre-existing written agreement. *See* Alexander, McKinney's Practice Commentary 7 to CPLR 1401 (1997).

119. *Raquet*, 90 N.Y.2d at 182-83, 659 N.Y.S.2d at 239.

120. *See Id*. at 183; *see also Garrett v. Holiday Inns, Inc.*, 58 N.Y.2d. 253, 460 N.Y.S.2d 774 (1983) (although town owed no duty to hotel guest, town could be proportionally liable to owners, etc., for breach for special duty to them causing plaintiffs' injury).

121. *See* discussion of the "same injury" test as applied in legal malpractice cases, *supra*, pp. 32-33. Rather than contribution, is this a claim for "implied indemnification?" *See National Enterprises Corp. v. Dechert Prices & Rhoads*, 181 A.D.2d 443, 444, 580 N.Y.S.2d 762, 763 (1st Dep't 1992). If so, is GOL § 15-108 then completely inapplicable?

122. Judicial Conference, *Twentieth Annual Report*, Legislative Doc. 90 (1975) at 215.

123. *Board of Educ. v. Sargent, Webster, Crenshaw & Foley*, 71 N.Y.2d 21, 28, 523 N.Y.S.2d 475, 478 (1987).

124. *Westchester Co. v. Welton Becket Assoc.*, 102 A.D.2d 34, 478 N.Y.S. 305 (2d Dep't 1984). Note, however, that in *Sargent* the Court of Appeals commented that "while it is true that the statute is applicable in cases where the tortfeasor is charged with 'breach of warranty' in connection with a defective product that causes injury, in such cases the breach of warranty is as much a tortious wrong as it is a breach of contract." 523 N.Y.S.2d at 478, n.2. *Welton* was decided prior to *Sargent*. *Cf. Gonzales v. Armac Indus., Ltd.*, 756 F. Supp. 165 and 768 F. Supp. 107 (S.D.N.Y. 1991) (motion to reargue) *aff'd on other grounds*, 990 F.2d 729 (2d Cir. 1993), questioning whether a different aspect of *Welton* survives in light of *Sargent*. In *MDS Health Group, Inc. v. Carmichael*, 258 A.D.2d 876, 684 N.Y.S.2d 742 (4th Dep't 1999), an employee sued for breaching duties of loyalty under an employment contract sought a set-off for a settlement. The court rejected this because "the statute applies to tort claims, not to claims for breach of contract." However, the opinion tells us nothing about the nature of the *settled* claim, so whether the case bears on the precise issue of the *settled* party being liable in tort, one cannot say.

125. *Cf. City of N.Y. v. Black & Veatch*, 1997 WL 6245985 (S.D.N.Y. Oct. 6, 1997). In *Black & Veatch*, contractors on a construction project sued the City of New York for delay-related damages. The city then sought contribution from the engineering firm on the project with which it had separately contracted, alleging that the engineering firm had prepared defective progress schedules which were at the root of the construction delays. The court allowed the city's contribution claim to proceed, concluding that the city's third-party claim against the engineers sounded in tort and thus the "tortious conduct" requirement imposed by *Sargent* was met on the facts before it. *Black & Veatch*, 1997 WL 624985 *5-6.

126. 73 F.3d 1276 (2d Cir. 1996).

127. 935 F. Supp. 1333, 1346-49 (S.D.N.Y. 1996).

128. *Rogers v. Dorchester Assocs.*, 32 N.Y.2d 553, 347 N.Y.S.2d 22 (1973); *see also McDermott v. City of N.Y.*, 50 N.Y.2d 211, 428 N.Y.S.2d 643 (1980) (City's settlement of employee's claim did not preclude City's indemnification claim against manufacturer of defective truck).

129. 67 N.Y.2d 72, 85, 499 N.Y.S.2d 904, 912 (1986).

130. 47 N.Y.2d 297, 418 N.Y.S.2d 300 (1979).

131. *See* Siegel, New York Practice § 176 at 292 (4th ed. 1998).

132. *See, e.g.*, *Salisbury v. Wal-Mart Stores, Inc.*, 225 A.D.2d 95, 690 N.Y.S.2d 156 (3d Dep't 1999) (snow removal).

133. 109 A.D.2d 254, 491 N.Y.S.2d 661 (2d Dep't 1985).

134. *Id*. at 261.

135. *See Guzman v. Haven Plaza Hous. Dev. Fund*, 120 A.D.2d 998, 502 N.Y.S.2d 952 (1st Dep't 1986), *aff'd*, 69 N.Y.2d 559, 516 N.Y.S.2d 451 (1987); *Flood v. Re-lou Location Engr.*, 487 F. Supp. 364 (E.D.N.Y.), *aff'd*, 636 F.2d 1201 (2d Cir. 1980) (shipping case).

136. *Flood* at 367 (noting that "[c]haracterizing the claim [against the settled party] as one for contribution or indemnification has harsh consequences").

137. 73 F.3d 1276 (2d Cir. 1996).

138. 75 N.Y.2d 680, 555 N.Y.S.2d 669 (1999).

139. Plaintiff was 5% at fault.

140. *Id*. at 691.

141. J. McLaughlin, Practice Commentary, CPLR 4533-b. *Compare Livant v. Livant*, 18 A.D.2d 383, 239 N.Y.S.2d 608 (1st Dep't 1963), reflecting the prior practice for payments by a joint tortfeasor.

142. Although CPLR 4533-b by its terms deals only with "proof as to payment by or settlement with another joint tortfeasor, or one claimed to be a joint tortfeasor," the 1974 Judicial Conference Report, amending the rule to conform to revised GOL § 15-108, states that the reference to "joint tortfeasors" is intended to be construed "to also include all those who may claim contributions in accordance with Article 14" whether or not technically "joint" tortfeasors.

143. As previously mentioned, courts construing the "same injury" test for purposes of this statute and Article 14 recognize that "injuries" may be distinct "although the damages might be identical." *Edouard*, 229 A.D.2d at 560, 645 N.Y.S.2d at 866.

144. One could imagine drafting to try to avoid this result—multiple agreements for separate considerations, for example—and one can imagine ancillary litigation about whether the separate considerations should be aggregated or re-apportioned. Many of the allocation questions discussed in this section could also arise with respect to the "stipulated consideration" alternative of GOL § 15-108(a), discussed below.

145. *Westwood Chem. Co., Inc. v. Kulick*, 570 F. Supp. 1032, 1039 (S.D.N.Y. 1983), quoting *Retzel v. State*, 94 Misc. 2d 562, 572, 405 N.Y.S.2d 391, 398 (N.Y. Ct. Cl. 1978). A closer look at *Retzel*, however, shows that a different kind of allocation was at issue there. *Retzel* involved the apparently frequent situation where a suit for both the surviving spouse's claim for wrongful death and the claim of decedent's estate for conscious pain and suffering are settled with a single payment. Thus the allocation necessary in *Retzel* was one between two distinct claims of two distinct claimants, not among the multiple claims of a particular claimant. There is a line of medical malpractice cases invoking GOL § 15-108 which deal with the allocation of settlement proceeds between a wrongful death claim brought by a surviving dependent and a conscious pain and suffering claim brought on behalf of the decedent's estate. Such claims are typically settled together. *See Hager v. Hutchins*, 91 Misc. 2d 402, 398 N.Y.S.2d 316 (Sup. Ct., Orange Co. 1977), for a particularly complicated allocation problem where the settling party was exonerated on one of the claims. More typically there is some stipulated allocation to reflect the difference in claimants. A nonsettling defendant pursued on only one cause of action may still want to challenge that allocation. New York practice appears to be to hold a hearing to determine whether "the settlement was made in good faith and that the amount of the settlement for the wrongful death claim was reasonable." Apparently if the agreement's stipulated allocation is deemed "reasonable" then the nonsettling defendant, although not a party to the agreement, is stuck with it. *See, e.g., Arbutina v. Bahuleyan*, 159 A.D.2d 973, 552 N.Y.S.2d 766 (4th Dep't 1990).

146. 200 A.D.2d 701, 607 N.Y.S.2d 65 (2d Dep't 1994).

147. It is to be noted that *Budimlic* was decided subsequent to the Court of Appeals decision in *Pollicina*, which did reduce a verdict by the amount of a settlement obtained from a party exonerated at the later trial where the settling party had only been claimed to be liable for that same injury. *Pollicina* is not cited in *Budimlic*, however. Given *Pollicina*, the opinion in *Budimlic* should not be read too broadly and might better be read as finding reasonable the allocation of the settlement proceeds made by the settling parties.

148. 67 N.Y.2d 72, 499 N.Y.S.2d 904 (1986).

149. *Id*. at 77. Making it worse, here too the earlier settlement also covered derivative claims by plaintiffs' spouse for which the consideration was not separately specified.

150. *Id*. at 85-86.

151. *Compare Budimlic* 200 A.D.2d at 701, 607 N.Y.S.2d at 65.

152. In *Guerra v. City of N.Y.*, 186 Misc. 2d 97, 98-99, 718 N.Y.S.2d 133, 134-35 (Sup. Ct., Bronx Co. 2000), the trial court recognized the potential for "apportionment of settlement proceeds related to different categories of loss" but distinguished that from "apportionment of the pre-verdict settlement proceeds between two causes of action related to liability," which the court concluded was all the plaintiff was attempting in that case. The court offset the full pretrial settlement proceeds so that plaintiff could not "recover monetary damages in excess of the plaintiff's actual loss as determined by a jury verdict."

153. Or suppose in suing for fraudulent inducement plaintiffs had expressly sought consequential damages, perhaps even mentioning subsequent losses based on PW's (allegedly) bad tax advice. Or suppose any other hypothetical, the main point of which is that the settling defendant was *claimed* to be liable *both* for some arguably separate and distinct injury *and* for arguably the "same" injury for which the remaining defendant is sued.

154. 862 F.2d 10 (2d Cir. 1988).

155. *See Hill* 67 N.Y.2d 72, 499 N.Y.S.2d 904.

156. 862 F.2d at 15-16.

157. *Id*. at 15.

158. Siegel, New York State Law Digest, No. 466 (N.Y. St. B.A., October 1998).

159. 235 A.D.2d 245, 652 N.Y.S.2d 32 (1st Dept 1977).

160. Bear in mind that some state verdicts may be rendered on a pre-interest basis. In that case, deducting the (later) settlement before adding any interest to the verdict cuts against the plaintiff.

161. *In re Joint E. & S. Dist. Asbestos Litig*., 18 F.3d 126 (2d Cir. 1994) ("*Asbestos II*").

162. *Asbestos I*, 971 F.2d at 852.

163. *In re New York City Asbestos Litig. (Dudick v. Keene Corp.)*, 82 N.Y.2d 821, 625 N.Y.S.2d 588 (1993) ("*Dudick*").

164. 188 A.D.2d 214, 593 N.Y.S.2d 43 (1st Dep't 1993).

165. 188 A.D.2d at 225.

166. 857 F. Supp. 1086, 1111-12 (S.D.N.Y. 1994).

167. One should contrast the *Asbestos II* concern with "judgment-time dollars" with an earlier Eastern District opinion in the same litigation which held that settlement payments due in the future would *not* be discounted back to "present value" in computing a settlement. 760 F. Supp. 33 (E.D.N.Y. 1991). This attitude should not prevail where "roll forward" interest on sums that *have* been received is being calculated.

168. It should be emphasized that the Second Circuit was addressing the question in the particular context of wrongful death verdicts, as to which the form and calculation of interest are governed by EPTL 5-43(a), and the Second Circuit limited its opinion to such cases. Nonetheless the *logic* of this analysis may bear on many other litigations.

169. 583 P.2d 482 (Okl. 1978).

170. *Id*. at 485-86.

171. *In re Joint E. & S. Dist. Asbestos Litig. (Gallin v. Owens-Illinois, Inc.)*, 760 F. Supp. 33 (E.D.N.Y. 1991). *See also Asbestos I*, 971 F.2d at 843-44 (discussing settlements where the defendant subsequently went bankrupt and commenting "insolvency does not render settlements voidable").

172. *In re E. & S. Dist. Asbestos Litig*., 772 F. Supp. 1380, 1398-99 (E.D.N.Y. 1991).

173. *Asbestos I*, 971 F.2d at 842-43.

174. 82 A.D.2d 199, 442 N.Y.S.2d 664 (3d Dep't 1981).

James Beha II is a partner with the New York office of Winston & Strawn. His partner, Steven M. Schwartz, was also much involved in evaluating the case law discussed here, particularly in the course of briefing issues that arose in the *BBL* cases cited in the text. Mr. Schwartz thereby made many much-appreciated contributions to this article, and was also kind enough to review a draft of this article and provide helpful comments. The author also expresses his debt to two colleagues at other firms, Lance Gotthoffer and Robert Malchman, whose work on briefs for other parties in the same actions sharpened the author's appreciation of these issues, particularly where the positions they presented differed from the author's, as was frequently the case.

APPENDIX A

Relevant Statutes and Rules

CPLR 1401. Claim for contribution.

Except as provided in sections 15-108 and 18-201 of the general obligations law, sections eleven and twenty-nine of the workers' compensation law, or the workers' compensation law of any other state or the federal government, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

CPLR 1402. Amount of contribution.

The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.

CPLR 4533-b. Proof of payment by joint tortfeasor.

In an action for personal injury, injury to property or for wrongful death, any proof of payment by or settlement with another joint tortfeasor, or one claimed to be a joint tortfeasor, offered by a defendant in mitigation of damages, shall be taken out of the hearing of the jury. The court shall deduct the proper amount, as determined pursuant to section 15-108 of the general obligations law, from the award made by the jury.

GOL § 15-108 Release or covenant not to sue.

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or for the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it or in the amount of the released tortfeasor's equitable share of the damages under Article Fourteen of the civil practice law and rules, whichever is the greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in Article Fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

APPENDIX B

The *Williams* Scenarios

Trial Court	
Verdict	2,600,000
Less 65%	1,690,000
	910,000
Less pretrial settlements	900,000
Recovery	10,000
Appellate Division	
Verdict	2,600,000
Less pretrial settlements	900,000
	1,700,000
Less 65%	1,105,000
Recovery	595,000
Proposed by Plaintiff	
Verdict	2,600,000
Less 65%	1,690,000
Recovery	910,000
Because this set-off is more favorable to nonsettling defendant than the alternative:	
Verdict	2,600,000
Less pretrial settlements	900,000
	1,700,000
Less trial settlements	200,000
Recovery	1,500,000

Preparing For and Trying the Civil Lawsuit

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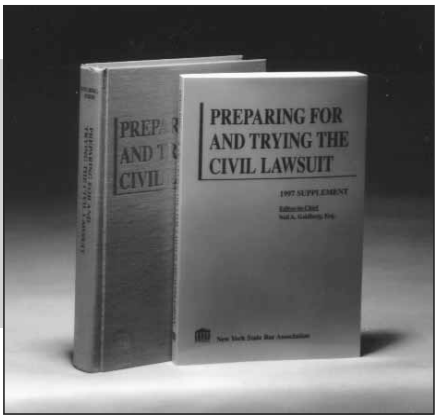

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Report of the Commercial and Federal Litigation Section on a Proposal for Revision of CPLR Article 65

Introduction

Article 65 of the CPLR provides for the filing, recording and cancellation of written notices of the pendency of "any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property."[1] The filing of a notice of pendency constitutes constructive notice of the action to any purchaser or encumbrancer of the real property affected, and "any person whose conveyance is filed thereafter is bound by all proceedings taken in the action after such filing to the same extent as if he were a party."[2]

Historically, the purpose of the notice of pendency statutes enacted in New York and approximately 40 other states[3] was to mitigate the hardship imposed upon innocent purchasers of real property by the common law doctrine of *lis pendens*.[4] Under the common law doctrine, a purchaser of property was held to be in privity with his or her grantor, and thus subject to the outcome of any lawsuit to which the grantor was a party, regardless of notice. Under the notice of pendency statutes, the innocent purchaser is not on constructive notice of litigation, and does not take subject to its outcome, unless and until the plaintiff files a notice of pendency.[5] Thus, the notice of pendency statutes effectively narrowed the rights of the plaintiff in favor of the third-party purchaser.[6]

In modern times, however, the practical effect of the notice of pendency has been to expand the rights of plaintiffs at the expense of defendant property owners. A notice of pendency makes it impossible, as a practical matter, to transfer or encumber real property. The mere filing of a notice effectively gives the plaintiff a preliminary injunction enjoining any transfer or encumbrance of the property during the pendency of the litigation. In this way, the notice of pendency now functions as a provisional remedy and, indeed, it has been classified as such by CPLR 6001.[7] But unlike the other provisional remedies of attachment, injunction and receivership, the burden of a notice of pendency is imposed upon the defendant property owner without prior judicial review, without regard to the evidentiary merit of the plaintiff's claims[8] and, in most cases, without any requirement that the plaintiff give an undertaking with respect to,[9] or compensate the property owner for,[10] any damages and costs sustained as a result of the notice in the event of a final determination that the plaintiff's claims to the property are without merit. Given the absence of such safeguards, the use of the notice of pendency as a provisional remedy has been the subject of criticism.[11] In *5303 Realty Corp. v. O & Y Equity Corp.*, the New York Court of Appeals observed that "it is simply improper to use a notice of pendency as a form of attachment," indicating that the better course for a plaintiff who seeks to block conveyance of real property that is the subject of a lawsuit would be to seek attachment or an injunction so that "a court will have an opportunity to review the interference with alienability [of the property] before it begins to operate."[12]

In an era when *ex parte* relief has come to be carefully circumscribed,[13] the notice of pendency might have been expected to suffer the same fate. But New York courts have held that the deprivation suffered by the owner of real property affected by a notice of pendency does not constitute a taking without due process of law.[14] The burden of a notice of pendency nevertheless may be severe, particularly where the property owner's main objective is to develop and/or resell, rather than simply occupy, the property.[15] In such circumstances, an unscrupulous plaintiff can use a notice of pendency to force a property owner into a settlement regardless of the merits of the plaintiff's claims.[16] In an effort to provide some protection for the interests of property owners, New York courts have demanded strict compliance with the statutory requirements for filing and maintaining a notice of pendency.[17] For example, the courts have relieved some property owners of the burden of a notice of pendency by refusing to allow a plaintiff to file a second notice after an initial notice has expired.[18] However, this approach has provided at most haphazard protection to property owners, while at the same time producing harsh results for some plaintiffs who may have had meritorious claims.

It is the recommendation of the Commercial and Federal Litigation Section that Article 65 be revised to provide for a more equitable balancing of the competing interests of plaintiffs and property owners. Specifically, the Section recommends that Article 65 be revised to provide some protection for property owners against the unfair burden of a notice of pendency that is based upon unmeritorious claims to the affected real property, and to relax some of the statutory requirements for filing and maintaining a notice of pendency that are unrelated to the merits of plaintiffs' claims. Part I of the report provides a brief summary of the current New York law concerning notices of pendency. Part II presents alternatives for revising Article 65, drawn from revisions made to, and proposals for revision of, the notice of pendency statutes in other states. Part III presents a modest proposal for revision of Article 65. A draft of a proposed bill to amend Article 65 follows as an Appendix to this report.

I. Notices of Pendency Under Article 65

A. Requirements for Filing and Maintenance of Notice of Pendency

Article 65 provides a single method by which a plaintiff may obtain the benefits of a notice of pendency, the filing of a notice with the county clerk "before or after service of a summons and at any time prior to judgment."[19] No order of court is required to file the notice.[20]

If the notice is filed prior to service of the summons, such service must follow within 30 days.[21] If for any reason the summons is not served within the 30 days, upon motion of any person aggrieved, the court "shall direct any county clerk to cancel [the] notice of pendency."[22] After an initial notice of pendency has been cancelled for untimely service of process, "[s]uccessive filings of notices of pendency under such circumstances are improper, and may not be permitted to stand."[23] This is because the courts view the notice of pendency as "an extraordinary privilege" which must be exercised strictly in accordance with the procedural requirements of the statute that creates the privilege:

> [p]roper administration of the law by the courts requires promptness on the part of a litigant so favored and that he accept the shield that has been given him upon the terms imposed and that he not be permitted to so use the privilege granted that it becomes a sword usable against the owner or possessor of realty. If the terms [of the statute] are not met, the privilege is at an end.[24]

Apart from service of the summons, there is no requirement that owners of record receive any notice of the filing of the notice of pendency. Thus, if the plaintiff has a dispute with one of several owners of record, unless the plaintiff names all owners of record as defendants and serves them, the other owners may not receive any notice of the commencement of the action or the filing of the notice. Indeed, there is no requirement that defendant receive notice of the notice of pendency itself; it is only notice of the action by service of the summons which is required, even though the summons and complaint are not likely to give express notice of the notice of pendency.

A notice of pendency terminates three years after the date of filing, unless extended by prior order of the court, for good cause shown.[25] "If the extension procedure is not properly completed the notice of pendency lapses without any further action,"[26] and a *nunc pro tunc* order can have no effect on this outcome.[27] If the initial three-year life of a notice of pendency is not timely extended "successive notices may not be filed for the purposes of CPLR Article 65 and the plaintiff loses the special privilege afforded by that article."[28]

On first impression, the refusal to permit the filing of a second notice of pendency after the lapse of a prior notice is perhaps illogical, as the prejudice to the defendant in such circumstance would be at worst no greater than if the notice had been renewed in a timely manner. However, the only decision to permit filing of a new notice protecting plaintiffs "prospectively from the date that the new order is filed, recorded and indexed,"[29] was reversed subsequently.[30] Viewed in isolation, there may be no reason to prohibit filing of a second notice of pendency after the first has expired, but it is only by such technical attention to detail that the courts of New York have been able to ameliorate the harsh consequences of the notice of pendency to the defendant.

A notice of pendency that has lapsed by the passage of time has no effect with respect to a purchaser recording an interest thereafter. A person who examines the records and discovers an expired notice is not charged with notice of a pending suit, even if that person actually knows that the suit is pending.[31] Nor does the expired notice give rise to a duty to investigate.[32] However, a person who recorded an interest in the property before the expiration of the notice of pendency continues to take subject to the outcome of the action, even after the notice has expired.[33] However, in a further permutation of this situation, a judgment creditor whose lien is recorded after recordation of a valid notice of pendency which thereafter expires without renewal, can avoid the effect of the stale notice of pendency by rerecording its judgment after the notice has expired.[34]

Of course, the notice of pendency will be vacated when the action has been terminated, for example, by settlement.[35] If the defendant ultimately prevails on the merits, either after trial or on a motion for summary judgment, the notice of pendency will be vacated after the plaintiff's time to appeal has expired.[36] "[O]nce a final judgment has been entered, the plaintiff has no further right to restrain the free transfer of property that was the subject of the complaint unless he has followed the statutorily prescribed procedures for continuance of the previously filed notice."[37] If an unsuccessful plaintiff takes a timely appeal, the notice of pendency will be vacated unless the plaintiff has obtained a stay pursuant to CPLR 5519.[38] "Having failed to obtain such a stay, [plaintiff will not be] entitled to the reinstatement of the notice of pendency."[39]

B. Grounds for, and Effect of, Cancellation of Notice of Pendency

If the plaintiff has complied with the statutory procedural requirements for filing and maintenance of the notice of pendency, the defendant's ability to obtain cancellation of the notice prior to termination of the action is limited.

CPLR 6514(b) provides for vacating the notice "if the plaintiff has not commenced or prosecuted the action in good faith." This has been held to include both a bad faith belief in the merits of the filing and dilatory prosecution. As to the former:

> In seeking to vacate a *lis pendens* based on a claimed lack of good faith . . . the burden is upon defendants to show that plaintiffs lacked good faith in their commencement of prosecution of the action. Nor, is the burden easily met since it has been held that the presence of "*any* cognizable claim" is sufficient to establish good faith and there must be at least a substantial question to show the absence of good faith.[40]

There have not been any reported cases in which a court has made a finding of bad faith on a motion made pursuant to CPLR 6514(b) since the CPLR was adopted in 1962.

As to the other basis for invoking CPLR 6514(b), dilatory prosecution, this was done successfully in *Williams v. Harrington*, where plaintiff had delayed several years in responding to a demand for a bill of particulars and failed by a wide margin to satisfy a court-ordered deadline for same.[41] Although this is the only reported instance of such a result under CPLR 6514(b), the new era of standards and goals, with its increased emphasis on early disposition, could see a wider use of this provision.

The CPLR makes no specific provision for a motion to vacate on grounds that the relief sought by plaintiff would not "affect the title to, or the possession use or enjoyment of such property,"[42] but such a motion will be entertained readily by the courts, and vacatur of the notice granted if the action does not seek such relief.[43] However, in entertaining such a motion, the court is limited to reviewing the face of the pleading, and must assume the truth of the allegations set forth therein.[44] The plaintiff is not required to demonstrate a likelihood of success on the merits.[45]

Article 65 was amended in 1967 to provide that a notice of pendency may be cancelled by agreement of the parties, CPLR 6514(d), and by the plaintiff unilaterally if no parties have appeared.[46]

In the event that a defendant prevails on a motion for cancellation of a notice of pendency, CPLR 6514(c) authorizes the court to direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation of the notice. However, such awards appear to be unusual.[47] And it appears that a showing of bad faith would generally be necessary.[48]

If a notice of pendency is cancelled pursuant to any of the subsections of CPLR 6514, it is clear that the cancelled notice can have no effect on subsequently created interests in the real property. In *Da Silva v. Musso*, the Court of Appeals held that a purchaser for value takes clear title to the property where the notice of pendency has been cancelled on the ground that enforcement of a final judgment dismissing plaintiff's complaint has not been stayed pending appeal,[49] even if the purchaser has actual notice that the unsuccessful plaintiff has appealed. The Court of Appeals based its decision, at least in part, on the rationale that a contrary holding would have permitted the unsuccessful plaintiff to continue to interfere with the marketability of the property by simply notifying potential purchasers of the existence of the appeal, without experiencing the inconvenience and practical difficulties of having to obtain a judicial stay and, possibly, post a bond in favor of the property owner.[50] The court viewed the stay requirement as "statutory provision for judicial oversight to protect the property owner's legitimate interests [in the marketability of his title]."[51]

The effect of a cancelled notice upon an interest in the property that has been recorded between the time of filing and the time of cancellation of the notice is not so obvious in all cases. On the one hand, if the notice of pendency is cancelled because of untimely service of process, it is deemed to have been void *ab initio*: "'[a] lis pendens, invalid for failure to comply with the mandate of [CPLR 6512], is a nullity' . . . [that] never had any legal significance."[52] Accordingly, a bank whose mortgage over the property was recorded after the filing of a notice of pendency and prior to its cancellation for untimely service did not have constructive notice of the plaintiff's claims.[53] This reasoning would compel the same result in the case of a notice of pendency cancelled for failure to allege an interest in real property.[54]

However, in the case of discretionary cancellation pursuant to CPLR 6514(b) (failure to commence or prosecute in good faith) or cancellation pursuant to CPLR 6514(d) (by stipulation of parties or upon default of a defendant), the basis for cancellation is a development in the action subsequent to filing, and the reasoning applicable to cancellation for lack of timely service of process is not directly applicable since the notice presumably was effective prior to its cancellation. Given the continued effect of a notice expiring due to passage of time on interests acquired between filing and expiration,[55] it is likely that notices cancelled due to post-filing developments constitute constructive notice to purchasers whose interests were recorded between the time of filing and the time of cancellation of the notice. In view of the paucity of cases arising under CPLR 6514(b) or (d), this uncertainty is not likely to be resolved for some time.

C. Substitution of Bond

One other provision of Article 65 provides an opportunity for a defendant to be freed of a notice of pendency prior to termination of the action, but its availability in practice is both limited and expensive. CPLR 6515(1) provides that a court may direct the vacatur of a notice of pendency on motion of an aggrieved party, if the moving party shall give an undertaking in an amount, to be fixed by the court, which the court finds adequate to secure relief to the plaintiff.

Pursuant to CPLR 6515(1), courts have allowed substitution of an undertaking for the notice of pendency where the plaintiff was unlikely to succeed on the merits,[56] and declined to do so where the record showed a likelihood that the plaintiff would succeed on the merits.[57]

However, courts have held that a property owner cannot post a bond under CPLR 6515(1) where the plaintiff's claim is for specific performance.[58] In such a case, the defendant must use the "double bonding" procedure in CPLR 6515(2), which provides for cancellation of the notice of pendency upon an undertaking by the defendant only if the plaintiff fails to give an undertaking to indemnify the defendant for damages the defendant may incur as a result of the continuation of the notice.[59] The amount of the undertaking that the plaintiff will be ordered to post in such circumstances need bear no relation to the amount of the undertaking that the defendant would have had to post in order to obtain cancellation of the notice of pendency.[60] In other words, under CPLR 6515(2) if the plaintiff who seeks specific performance is willing and able to post a bond, the defendant cannot obtain cancellation of the notice of pendency by posting a bond, even when the court finds "that adequate relief can be secured to the plaintiff by the giving of such an undertaking," and "even when plaintiff's likelihood of success [on the claim for specific performance] is doubtful."[61]

D. Availability of Damages for Prevailing Defendant

Generally, a plaintiff who ultimately does not prevail will not be liable to the property owner for any damages caused by the filing and maintenance of a notice of pendency, unless the property owner is able to succeed in a separate action against the plaintiff for malicious prosecution.[62]

The only exception to this is when the plaintiff has posted an undertaking, from which he or she will be liable to the property owner for damages incurred as a result of the notice of pendency.[63] As previously noted, as a practical matter the plaintiff will be ordered to post an undertaking as a condition of maintaining his or her notice of pendency only in actions seeking specific performance where the defendant has moved to substitute a bond for the notice of pendency.[64] Pursuant to CPLR 6515(2), in such actions the court will fix the plaintiff's undertaking in an amount sufficient to indemnify the property owner "for the damages that he may incur if the notice is not cancelled." However, the property owner's potential damages may be extremely difficult to quantify, and demonstrate, in advance.

In summary, Article 65 in its current form provides a powerful restraining device to plaintiffs with no requirement of a showing of merit. Once filed, a notice of pendency renders a property unmarketable. In all but the most flagrant cases of abuse of the notice of pendency, a defendant cannot recover damages caused by the imposition of the notice of pendency, unless the plaintiff has posted an undertaking, available only after defendant has first posted an undertaking itself. Recognizing the imbalance between the minimal burden placed on a plaintiff to obtain this powerful provisional remedy, and the heavy and often insurmountable burden placed on a defendant seeking to avoid it prior to final judgment, the courts have read the requirements for filing and maintaining a notice of pendency with hair-splitting precision.

II. Enacted and Proposed Revisions to Notice of Pendency Statutes in Other States

The notice of pendency statutes in most states are similar to Article 65 in New York in that they provide for the filing and continuance of a notice of pendency without prior judicial intervention and without regard to the merits of the plaintiff's alleged interest in the affected real property. However, in recent years several states, including Connecticut,[65] New Jersey[66] and California,[67] have revised their notice of pendency statutes to include a mechanism by which, early in the course of litigation, a property owner may obtain relief from a notice of pendency that is based on an unmeritorious claim.[68] Connecticut and New Jersey appear to have done this at least partly in response to due process concerns.[69] As previously noted, such concerns are not shared by New York courts, which have held that a notice of pendency under Article 65 does not constitute a taking for constitutional purposes.[70] On the other hand, the concern that apparently motivated reform of the California *lis pendens* statute—that the notice of pendency functions as a provisional remedy but does not provide the defendant with the same protections as other provisional remedies—is directly applicable to Article 65.[71]

A. Prompt Post-Filing Hearing on Merits of Plaintiff's Claim

In general, the states that have revised their notice of pendency statutes in order to address due process or general fairness concerns have done so by granting the

defendant/property owner the right to a prompt, preliminary hearing on the merits of the plaintiff's claim.[72] The notice of pendency statutes in those states typically provide that, within a specified period of time after recording, a copy of the notice of pendency must be served upon the owners of record of the affected property,[73] some or all of whom then have the right to apply to the court in which the action is pending for a preliminary determination as to validity of the plaintiff's underlying claim.[74] The court must schedule an evidentiary hearing on the application[75] at which the plaintiff is required to carry some burden of proof of the validity of his or her claim.[76] The Nevada[77] and New Jersey[78] statutes expressly require that the hearing and determination of the defendant/property owner's application be conducted promptly.[79]

B. Standard of Proof

The standard of proof to be satisfied by the plaintiff whose notice of pendency is the subject of such an application varies among the different states. The most exacting standard—imposed under the California,[80] Nevada[81] and New Jersey[82] *lis pendens* statutes—is analogous to the "probability of success on the merits" standard that New York courts impose upon a party seeking a preliminary injunction.[83] In order to demonstrate "probability of success on the merits," a plaintiff need not show that he is certain to win, but ordinarily must show a greater than a 50 percent probability of prevailing.[84]

Under the California *lis pendens* statute, the notice of pendency must be cancelled if the plaintiff is unable to establish "the *probable validity* of the real property claim"[85] by demonstrating "that it is *more likely than not* that [he or she] will obtain a judgment."[86] In Nevada and New Jersey, on the other hand, the plaintiff who is unable to establish "[t]hat he is *likely to prevail* in the action,"[87] may still succeed in maintaining his notice of pendency if he is able to satisfy the court that he has some chance of success on the merits and that the balance of hardship tilts in his favor.

The Nevada *lis pendens* statute expressly articulates two alternate standards of proof, which mirror the standards for obtaining a preliminary injunction in Nevada and the Ninth Circuit.[88] Specifically, it requires the plaintiff to satisfy the court either "[t]hat he is *likely to prevail* in the action," [89] *or* "[t]hat he has a *fair chance of success* on the merits in the action and . . . that the *hardship on him* in the event of a transfer [of an interest in the property before the action is concluded] *would be greater than the hardship on the defendant* resulting from the notice of pendency." [90] As an "irreducible minimum," to demonstrate "a fair chance of success on the merits," it would appear that the plaintiff must show that his or her claims raise "questions serious enough to require litigation."[91]

The Superior Court of New Jersey, Chancery Division, has interpreted the New Jersey *lis pendens* statute as providing similar, alternate standards of proof. The New Jersey *lis pendens* statute provides that the plaintiff shall bear the burden of establishing that "there is a *probability* that final judgment will be entered in favor of the plaintiff *sufficient to justify the filing or continuation of the notice of lis pendens*."[92] In *Fravega v. Sec. Sav. and Loan Assoc.*, the New Jersey court construed this language—in particular the coupling of the word "probability" with the phrase "sufficient to justify the filing or continuation of the notice of lis pendens"—as "requir[ing] the court to weigh the strengths of plaintiffs' case against the detriment imposed on defendant by reason of the filing of the notice of lis pendens."[93] The court analogized this "weighing process" to that involved in the issuance of preliminary injunctions and explained that "[s]uch a weighing does not necessarily mean that plaintiff is relieved of showing that success on the merits is more probable than not; rather it would depend on the circumstances of each particular suit and would obviously vary from case to case."[94] In all cases, however, the plaintiff must establish something more than a mere possibility of success.[95]

In contrast to California, Nevada and New Jersey, Connecticut appears to require only a minimal showing of merit by the plaintiff in order to defeat a motion to vacate a notice of pendency. In Connecticut, the plaintiff is "required to establish that there is *probable cause* to sustain the validity of his claim,"[96] a legal standard that the Connecticut Supreme Court has held "is not intended to be a trial on the merits, nor does it require plaintiffs to establish their claims by a preponderance of the evidence."[97] However, it does appear to require the court to look beyond the face of the complaint,[98] and where the facts are disputed it may require the plaintiff to demonstrate a reasonable ground for belief in the existence of facts supporting his or her claim.[99]

C. Distinction Between Narrow and Expansive Uses of Notice of Pendency

The New Jersey *lis pendens* statute limits the defendant property owner's right to seek a preliminary determination of the merits of the plaintiff's underlying claim to those situations where the plaintiff is using the notice of pendency "expansively" or "substantively," in an attempt to create a new interest in the real property.[100] Examples of the expansive use of a notice of pendency include actions seeking to impress a constructive trust or equitable lien on particular real property[101] or to set aside an alleged fraudulent conveyance.[102] By contrast, where the plaintiff's suit relates to the protection or enforcement of an existing, recorded interest in the real property—as occurs in a mortgage foreclosure action, for example—the New Jersey defendant has no right to a post-filing hearing on the merits of the plaintiff's claim.[103]

The rationale for so limiting the post-filing merits review mechanism is that use of a notice of pendency to protect or enforce an existing recorded interest in real property imposes no additional restriction on the defendant's ability to transfer or encumber his or her real property. It is only when the notice of pendency is used expansively that it becomes the functional equivalent of a preliminary injunction or order of attachment.[104] In addition, where a plaintiff makes expansive use of the notice of pendency, he or she is more likely to be interested in the real property simply as a form of security for an *in personam* obligation, rather than because of its unique qualities.[105]

D. Advantages of Prompt Post-Filing Merits Hearing

By providing property owners with the opportunity to obtain cancellation of a notice of pendency where the plaintiff's underlying claims are not sufficiently meritorious, California, Connecticut, Nevada and New Jersey afford significantly greater protection to property owners than is available currently in New York under Article 65. A post-filing merits hearing appears to strike a reasonable balance between the legitimate interests of plaintiffs and property owners. It provides more efficient and adequate protection to property owners than would the alternative of a right to recover post-judgment damages for losses resulting from the notice of pendency in the event that the plaintiff does not prevail.[106] Post-judgment damages remedies are potentially inadequate because of the difficulties in proving the property owner's losses. By comparison, a post-filing merits hearing can provide relief to the property owner at an early stage, possibly even before his or her interests have been harmed, and provides a greater deterrent to recording of a notice of pendency based upon meritless claims.[107] It is noteworthy that the California *lis pendens* statute was first revised in 1991 to provide property owners with a damages remedy and again revised in 1993 to provide for a post-filing merits hearing.[108]

Other pre-judgment procedural mechanisms capable of protecting the interests of property owners include requiring a merits hearing prior to the recording of the notice of pendency[109] and/or requiring the plaintiff to post a bond as a condition of recording and maintaining a notice of pendency.[110] As previously noted, the provisional remedies other than notice of pendency impose analogous procedural requirements on plaintiffs. However, such requirements would not be appropriate in circumstances where the action is one to protect or enforce an existing interest in the real property and the notice of pendency does not function as a form of attachment, and likely would limit the availability and utility of the notice of pendency to many other plaintiffs with meritorious claims.[111]

III. Proposal for Revision of Article 65

The Commercial and Federal Litigation Section recommends that Article 65 of the CPLR be amended to: (1) provide for all persons potentially aggrieved to receive prompt notification of the filing of a notice of pendency; (2) provide for all persons potentially aggrieved to have an opportunity to seek a post-filing hearing on the merits of any notice of pendency that is not coextensive with a preexisting recorded interest in the affected real property; (3) clarify the notice effect of a judicially cancelled notice of pendency; and (4) permit the filing of subsequent notices of pendency in certain circumstances.

It is the Section's conclusion that providing for a prompt post-filing merits review of the plaintiff's claim where that claim is not co-extensive with existing recorded interests in the real property strikes a more appropriate balance between the legitimate, competing interests of plaintiffs and property owners than exists under the current law. The opportunity for judicial oversight of the merits of a notice of pendency at an early stage will enable a more rational and equitable balancing of interests than the courts have been able to achieve historically by insisting upon plaintiffs' strict compliance with the technical requirements of the notice of pendency statute. Indeed, the availability of prompt post-filing merits review will permit some relaxation of the restrictions currently imposed upon the filing of subsequent notices of pendency in a single action.

A. Notice Requirement

To ensure that persons potentially aggrieved by a notice of pendency can make effective use of the ability to obtain a post-filing hearing on its merits, such persons need to be aware that a notice of pendency has been recorded. Under current law, a joint tenant or partner of the defendant, who is not also a defendant to the action, may not be aware of the plaintiff's suit, or the notice of pendency affecting the property.

Proposed new subdivision (e) of section 6511 requires the plaintiff to serve a copy of the notice of pendency upon all of the parties to whom the plaintiff's real property claim is adverse, and any other owners of record of the property affected, by registered or certified mail prior to filing the notice of pendency with the county clerk. Compliance with this requirement will be enforced by the clerk, who is directed not to accept a notice of pendency for filing unless it is accompanied by proof of such service, or a sworn statement to the effect that there is no known address for a particular adverse party or owner. Because this proposal permits the plaintiff to file the notice of pendency immediately upon mailing copies of it to the property owners, and retains the current rule permitting the plaintiff to file the notice in advance of serving the summons and com-

plaint (CPLR 6512), the property owners will not receive advance notice of the plaintiff's intention to file the notice, thus obviating any risk of an attempt to frustrate the notice by transferring or encumbering the property in advance of its filing.

Incidental changes to subdivisions (a) and (c) of section 6511 are proposed to accommodate new subdivision (e).

B. Additional Ground for Mandatory Cancellation

Proposed new paragraph (5) of subdivision (a) of section 6514 codifies an existing ground for mandatory cancellation of a notice of pendency that is well established under current case law; namely, that the pleading on which the notice of pendency is based does not contain a demand for judgment that would affect the title to, or the possession, use or enjoyment of, the affected real property. The express inclusion of this ground for cancellation is intended to clarify that the post-filing merits hearing (in proposed new paragraph (2) of subdivision (b) of section 6514) constitutes a ground for cancellation that is distinct from, and in addition to, the right of a party aggrieved to challenge a notice of pendency on the ground that the pleadings do not state a real property claim. It is intended that revised section 6514 will constitute a comprehensive statement of all available grounds for cancellation of a notice of pendency.

C. Post-Filing Merits Hearing

Proposed new paragraph 2 of subdivision (b) of section 6514 provides for a person aggrieved by a notice of pendency filed in connection with an action that seeks to create or enforce an unrecorded interest in the affected property to obtain the cancellation of the notice of pendency unless the plaintiff is able to establish either a likelihood of success on the merits of his or her claim, or the existence of sufficiently serious questions going to the merits of the claim to make them a fair ground for litigation and a balance of hardships decidedly in the plaintiff's favor.

1. Merits Review Limited to Expansive Uses of Notice of Pendency

Under this proposed revision, a post-filing merits hearing will not be available in circumstances where the plaintiff's action seeks to enforce an existing lien or other interest of record in the property. A mortgage foreclosure is the most common example of the type of action excluded from merits review. When a notice of pendency is used in this limited way, it does not impair the marketability of the property owner's title because the interest asserted by the plaintiff already was recorded against the title before the plaintiff filed the notice of pendency and commenced the litigation. Moreover, cancellation of such a notice of pendency will not expunge the previously recorded interest, which will remain of record until the plaintiff's claim has been adjudicated finally or settled. Accordingly, a property owner in this situation could obtain no practical benefit from cancellation of the notice of pendency prior to the conclusion of the action, but might be motivated to misuse the merits review procedure to delay or add to the expense of the plaintiff's prosecution of the action. This possible abuse is avoided by limiting the availability of post-filing merits review to those situations where the plaintiff's claim does not arise out of a written instrument, other than a contract of sale, that already is of record with respect to the title of the real property at issue.

An exception to this limitation for claims arising out of contracts of sale (and memoranda thereof) is considered necessary because these documents have the potential to be recorded, even though it is not current practice to do so. By taking the hitherto unusual step of recording a contract or memorandum of sale immediately prior to filing a notice of pendency and commencing a suit based on the agreement of sale, a plaintiff effectively could immunize his or her notice of pendency from the merits review that would otherwise be appropriate under proposed 6514(b)(2). A notice of pendency filed in connection with an action arising out of an agreement of sale is an expansive use of *lis pendens* because, unlike mortgages and mechanics liens (in which the recorded instrument is a memorandum of an independent transaction memorialized by recording), the contract of sale would not be recorded against the title in the absence of the litigation. Moreover, the contract of sale itself does not create a present interest in real property, but only the possibility of such an interest through performance. The contract of sale does not create an interest which by its terms must be superior to a subsequently recorded interest, unlike a mortgage or lien; it is only by reason of the notice of pendency that a subsequent purchaser would take subject to any interest created by the contract of sale. Finally, the facts that a contract of sale is in writing and signed by the owner are in no way dispositive of the potential merits of claims arising out of the contract. New York courts that have heretofore considered the merits of actions based upon written contracts of sale on applications to substitute notices of pendency with undertakings have found both merit[112] and an absence of merit[113] in such actions. In short, the presence of a written contract of sale does not indicate either such an absence of prejudice to defendant or such a likelihood of plaintiff's success as to exempt the notice of pendency from a post-filing merits hearing.

2. Burden and Standard of Proof

When used expansively, the notice of pendency functions as a preliminary injunction against transfer or encumbrance of the affected real property, pending a court's determination of the plaintiff's claim. Accord-

ingly, it is appropriate that the plaintiff who seeks to impose such a limitation on the marketability of affected real property should bear the burden of proving that it is necessary to protect his or her legitimate interests. Accordingly, the proposed new paragraph 2 of subdivision (b) of section 6514 places the burden of proof on the plaintiff to demonstrate the merits of his or her underlying claims.

The plaintiff may discharge this burden under the proposed new paragraph 2 *either* by demonstrating a likelihood of success on the merits *or* the presence of sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships decidedly in the plaintiff's favor. The first alternative—likelihood of success on the merits—is analogous to the first element to be satisfied by a plaintiff seeking a preliminary injunction in New York.[114] In that context, New York courts have held that the quantum of proof necessary to establish a likelihood of success on the merits is reduced in circumstances where denial of the preliminary injunction would render ineffective any final judgment in the plaintiff's favor[115] and that the existence of a factual dispute will not preclude a finding that the plaintiff is likely to succeed on the merits where imposition of the preliminary injunction will preserve the status quo,[116] at least where the party enjoined will suffer no great hardship as a result.[117] These same standards should guide the courts in determining whether the plaintiff has established a likelihood of success on the merits under proposed new subparagraph 2(ii) of subdivision (b) of section 6514.

The proposed alternate standard of proof—presence of sufficiently serious questions going to the merits to make them a fair ground for litigation combined with a balance of hardships decidedly in plaintiff's favor—is the well-established alternate standard of proof available to a plaintiff seeking a preliminary injunction in the courts of the United States Court of Appeals for the Second Circuit.[118] In determining where the balance of hardship lies, the court, on a motion for preliminary injunction "must weigh the harm to the plaintiff if the preliminary injunction is not granted against the harm that will accrue to defendants and third parties if it is."[119] If a court concludes that the harm to the plaintiff will be decidedly greater, it may grant a preliminary injunction despite a lack of probability that the plaintiff will succeed on the merits[120] and can do so even in the presence of factual conflicts or difficult questions of law.[121] In the context of proposed section 6514(b)(2)(ii), it is anticipated that the presumed uniqueness of real property ordinarily would weight the balance of hardships heavily in the plaintiff's favor: If the notice of pendency is cancelled and the property is transferred before the court can resolve the plaintiff's claim to it, the plaintiff has presumptively suffered an irreplaceable loss. However, in circumstances where the plaintiff is making expansive use of a notice of pendency (for example, to impose a constructive trust on real property purchased with funds obtained in breach of fiduciary duty),[122] the plaintiff's purpose is to use the real property to secure payment of the judgment he or she hopes eventually to obtain. In these circumstances, determining the relative balance of hardship between the plaintiff and property owner would require the court to analyze their individual circumstances. If the court finds that continuance of the notice of pendency would cause substantially more harm to the property owner or a third party than its cancellation would cause to the plaintiff, under proposed section 6514(b)(2) the notice of pendency would be cancelled unless the plaintiff could demonstrate a likelihood of success on the merits[123]—an appropriate result, given the recommendation by the New York Court of Appeals that in such circumstances:

> [I]t is simply improper to use a notice of pendency as a form of attachment . . . [Rather, t]he property's conveyance may be blocked by, for example, attachment or injunction. In this way, a party may guard against conduct that will defeat the purpose of a lawsuit, but a court will have an opportunity to review the interference with alienability before it begins to operate.[124]

In order to enjoin the conveyance of real property under Article 63, the plaintiff would be required to demonstrate a likelihood of success on the merits.

D. Court May Not Impose an Undertaking as Condition of Cancellation Under Section 6514

Under existing case law applying CPLR 6515, the defendant may be entitled to substitute an undertaking for the notice of pendency where a court finds that the plaintiff is unlikely to succeed on the merits. The following amendments are proposed to eliminate the possibility of inconsistent decisions under existing subdivision (1) of section 6515 and proposed paragraph (2) of subdivision (b) of section 6514, which provides that the defendant is entitled to cancellation of the notice of pendency in the event that, *inter alia*, the plaintiff is unable to establish a likelihood of success on the merits. It is proposed to amend section 6515 to eliminate the possibility of judicial consideration of the plaintiff's likelihood of success on the merits as a factor in determining whether "adequate relief can be secured to the plaintiff by the giving of [an undertaking in an amount to be fixed by the court]." A new subdivision (f) is proposed for section 6514 in order to clarify that where a defendant is otherwise entitled to cancellation of the notice of pendency pursuant to subdivision (a) or (b) of section 6514, the court cannot condition such cancellation on the posting of an undertaking by the defendant.

E. Effect of Cancelled Notice

A new section 6516 is proposed in order to clarify that cancellation of a notice of pendency for any of the grounds set forth in section 6514 relates back to the time of filing of the notice. Unlike an expired notice, the cancelled notice of pendency should have no effect on interests recorded after the time of its filing and prior to its cancellation.

F. Filing of Subsequent Notices of Pendency

A new section 6517 has been added to modify existing case law that prohibits a plaintiff from filing a subsequent notice of pendency after an initial notice has expired pursuant to CPLR 6513, or has been rendered ineffective, or cancelled, due to the plaintiff's failure to serve the summons within the 30-day time limit prescribed by section 6512. Given the availability of a prompt, post-filing review of the merits of the plaintiff's claim under the proposed new section 6514(b)(2), the historical rationale for imposing this limitation—namely, to provide some protection to property owners against a remedy that overwhelmingly favored the interests of plaintiffs—is no longer compelling.

G. Effective Date

It is recommended that, if enacted, the amendments to Article 65 proposed herein should apply immediately to all actions commenced on or after the effective date of the amendments, and to all notices of pendency filed on or after the effective date in actions pending as of the effective date.

Endnotes

1. CPLR 6501. By its terms, Article 65 has broad applicability to actions involving an interest in real property. Other New York statutes contain more specific provision for the filing of notices of pendency. For instance, CPLR Article 13-A, provides at 1343 to 1346 a near clone of Article 65 pertaining to action by district attorneys for forfeiture of real property which is the proceeds of criminal activity; EPTL 12-2.5 provides for filing of a notice of pendency by a creditor of a decedent as constructive notice of the creditor's pending claim against the estate to a purchaser from a distributee of the decedent; Mental Hygiene Law § 81.24 requires filing a notice of pendency at any time prior to entry of judgment in a proceeding for appointment of a guardian for personal needs or property management. Proceedings under the Multiple Dwelling Law §§ 308 (unsafe conditions), 357 (use for prostitution) include provisions for notices of pendency which have their own abbreviated procedure not derived from CPLR Article 65. Real Actions and Proceedings Law § 1331 requires filing of a notice of pendency prior to entry of judgment in a mortgage foreclosure action. A notice of pendency is also a prerequisite to enforcement of a mechanic's lien on a public or private improvement. Lien Law §§ 17-18. Specific reference to the filing of a notice of pendency is contained in the Abandoned Property Law §§ 201, 203, 212, Eminent Domain Procedure Law § 402(B)(1), General City Law § 20(34), and the Real Property Law § 382.
2. CPLR 6501.
3. *See* William Douglas White, *Lis Pendens in the District of Columbia*, 36 Cath. U. L. Rev. 703, 703 (1987).
4. McLaughlin, McKinney Practice Commentary, C6501:1 (1987).
5. McLaughlin, McKinney Practice Commentary, C6501:1 (1980).
6. McLaughlin, McKinney Practice Commentary, C6501:1 (1987) ("[Section 6501] was not enacted to expand the rights of plaintiffs"). *But see Cayuga Indian Nation v. Fox*, 544 F. Supp. 542, 548 (N.D.N.Y. 1982) ("[N]otice of pendency statutes manifest the public policy of the State of New York that a suitor's action shall not be impeded or defeated by an alienation of the subject property during the course of the lawsuit").
7. CPLR 6001 ("The provisional remedies are attachment, injunction, receivership and notice of pendency").
8. *Compare* CPLR 6212(a) (plaintiff seeking order of attachment must "show, by affidavit and such other written evidence as may be submitted, that . . . that it is probable that the plaintiff will succeed on the merits"); CPLR 6312(a) (plaintiff seeking preliminary injunction must "show, by affidavit and such other evidence as may be submitted, . . . and that plaintiff has demanded or would be entitled to a judgment restraining the defendant from the commission or continuance of an act"), and CPLR 6401(a) (movant seeking appointment of a receiver must have "an apparent interest in [the] property" and must show that "there is danger that the property will be removed from the state, or lost, materially injured or destroyed") *with* CPLR 6501.
9. *Compare* CPLR 6212(b), 6312(b), and 6403 *with* 6515(2) (discussed *infra* at notes 47-49 and accompanying text).
10. *Compare* CPLR 6212(e) and 6315 *with* discussion of malicious prosecution *infra* at notes 50-52 and accompanying text).
11. *See, e.g., Hilberg v. Superior Court*, 215 Cal. App. 3d 539, 542, 263 Cal. Rptr. 675, 677 (1989) ("We cannot ignore as judges what we know as lawyers—that the recording of a lis pendens is sometimes made not to prevent conveyance of property that is the subject of the lawsuit, but to coerce an opponent to settle regardless of the merits"); Justice John Zebrowski and Barry P. Jablon, *Free and Clear: A Three-Year-Old Law Seems to be Having the Desired Effect of Ending Lis Pendens Blackmail,* Los Angeles Lawyer 37, 38 (June 1996) ("In every other forum for provisional relief, a preliminary showing of evidentiary merit is required before the relief is granted. The [State Bar Subcommittee that drafted the revised California notice of pendency provisions] found that similar requirements for prompt objective review should apply to lis pendens as well").
12. 64 N.Y.2d 313, 324, 486 N.Y.S.2d 877, 884 (1984).
13. *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972) (holding that a replevin statute permitting pre-trial seizure of chattels without notice to defendant violated due process clause of the Fourteenth Amendment); McLaughlin, *McKinney Practice Commentaries,* C6211:1 (1987) (*ex parte* orders of attachment unconstitutional unless severely limited).
14. Although one judge of the New York State Supreme Court has found that Article 65's failure to provide for a preliminary inquiry into the merits of plaintiff's claim is a denial of due process, *Hercules Chemical Co., Inc. v. VCI, Inc.*, 118 Misc. 2d 814, 462 N.Y.S.2d 129 (Sup. Ct., N.Y. Co. 1983), that decision has not been followed, and the general view is that a notice of pendency survives due process attack because it does not "detract from a landowner's possession, use, or enjoyment of his realty. Nor does it prevent a sale of the property." *U.S. v. Rivieccio*, 661 F. Supp. 281, 297 (S.D.N.Y. 1987). *See also, In re American Motor Club, Inc.,* 109 B.R. 595 (Bankr. E.D.N.Y. 1990).
15. *See* Thomas Stone Marrion, Note, *Connecticut's Lis Pendens Shapes Up: Williams v. Bartlett*, 16 Conn. L. Rev. 413, 425, 425 n. 93 (1984) ("The inability to sell or mortgage land can represent the deprivation of a developer's livelihood . . . A developer could be ruined financially by a relatively brief period of inability to alienate his land"); Jane E. Cronin, Note, *Georgia's Lis Pendens Statute: Suggested Legislative Changes to Comply with Due Process*, 4 Ga. St. Univ. L. Rev. 79, 89-90 (1988) ("If a developer is

unable to market the property or obtain sufficient financing to develop the property because a notice of *lis pendens* has been filed, then the developer is deprived of the intended, most beneficial use of the property").

16. *See, e.g.*, Zebrowski and Jablon, *supra* note 11, at 37 ("In the rising market of the 1980s, the mere recordation of a lis pendens became a method to effectively stop a pending real estate sale dead in its tracks"); Judge David M. Gersten, *The Doctrine of Lis Pendens: The Need For A Balance*, The Fla. B.J. 83, 83 (June 1995) ("Nowhere is the impact of the notice [of pendency] more clearly seen than in negotiations where the threat of lis pendens is used as leverage to squeeze a property owner into an unfavorable settlement").
17. *See 5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 320, 486 N.Y.S.2d 877, 882 (1984) ("To counterbalance the ease with which a party may hinder another's right to transfer property, this court has required strict compliance with the statutory procedural requirements"); *Isrealson v. Bradley*, 308 N.Y. 511, 516 (1955) ("This is an extraordinary privilege which has been granted to a litigant upon the mere filing of the notice of pendency of an action, a summons and a complaint and strict compliance with [CPLR Article 65] is required. . . . If the terms are not met, the privilege is at an end").
18. *See infra* at notes 21-25 and accompanying text.
19. CPLR 6511(a).
20. *5303 Equity Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 319, 486 N.Y.S.2d 877, 881 (1984) ("Basically, a plaintiff can cloud a defendant's title merely by serving a summons and filing a proper complaint and notice of pendency").
21. CPLR 6512.
22. CPLR 6514(a).
23. *Holiday Investors Corp. v. M. Breger & Co., Inc.*, 112 A.D.2d 979, 493 N.Y.S.2d 10 (2d Dep't 1985).
24. *Isrealson v. Bradley*, 308 N.Y. 511, 516 (1955). *See also, Deerfield Bldg. Corp. v. Yorkstate Indus., Inc.*, 77 Misc. 2d 302, 353 N.Y.S.2d 331, 337 (Sup. Ct., Westchester Co. 1974) ("After [*Isrealson*], and enactment of the CPLR the commentators are uniform in concluding that once a notice is canceled, a new one cannot be filed upon the same property and same cause of action"); *Lanzoff v. Bader*, 13 A.D.2d 995, 216 N.Y.S.2d 632 (2d Dep't 1961).
25. CPLR 6513.
26. *Carvel Dari-Freeze Stores, Inc. v. Lukon*, (not officially reported), 219 N.Y.S.2d 716, 721 (Sup. Ct., Suffolk Co. 1961).
27. *Id.*
28. *Slutsky v. Blooming Grove Inn, Inc.*, 147 A.D.2d 208, 211, 542 N.Y.S.2d 721, 723 (2d Dep't 1989) (internal citations omitted). *See also, Robbins v. Goldstein*, 32 A.D.2d 1047, 303 N.Y.S.2d 822 (2d Dep't 1969) which, together with *Slutsky v. Blooming Grove Inn, Inc.*, also illustrates the only exception to the fatal consequences of failure to renew on time. In a mortgage foreclosure action, in which filing a notice of pendency not less than 20 days before entry of a judgment is a mandatory element without which plaintiff would be denied its causes of action, RPAPL § 1331, the notice of pendency is merely an "added special privilege" so that its filing or nonfiling does not affect the cause of action." 36 A.D.2d at 731, 320 N.Y.S.2d at 554.
29. *Estate of Sakow*, 182 Misc. 2d 775, 699 N.Y.S.2d 660 (Surr. Ct., Bronx Co. 1999).
30. *In re Judicial Accounting of Walter Sakow*, 721 N.Y.S.2d 34, 2001 N.Y. App. Div. LEXIS 1751 (1st Dep't Feb. 20, 2001) (citing *Slutsky v. Blooming Grove Inn, Inc.*, 147 A.D.2d 208, 542 N.Y.S.2d 721 (2d Dep't 1989)), *leave to appeal granted*, 2001 N.Y. App. Div. LEXIS 4367 (1st Dep't April 24, 2001).
31. Jack B. Weinstein, Harold L. Korn and Arthur R. Miller, 13 New York Civil Practice, ¶ 6513.04.
32. *Id.*
33. *Walter v. State Bank of Albany*, 73 A.D.2d 406, 409, 426 N.Y.S.2d 438, 440 (3d Dep't 1980); *Pacific Lime, Inc. v. Lowenberg Corp.*, 77 A.D.2d 737, 431 N.Y.S.2d 190 (3d Dep't 1980).
34. 73 A.D.2d at 409, 426 N.Y.S.2d at 440.
35. CPLR 6514(a).
36. *Id.*
37. *DaSilva v. Musso*, 76 N.Y.2d 436, 444, 560 N.Y.S.2d 109, 113 (1990).
38. CPLR 6514(a); *DaSilva v. Musso*, 76 N.Y.2d at 444, 560 N.Y.S.2d at 113.
39. *Estate of Vetri,* 208 A.D.2d 755, 755, 617 N.Y.S.2d 803, 804 (2d Dep't 1994) (internal citations omitted).
40. *U.S. v. Rivieccio*, 661 F. Supp. 281, 298 (S.D.N.Y. 1987) (quoting *Weksler v. Yaffe*, 129 Misc. 2d 633, 635, 493 N.Y.S.2d 682, 685 (Sup. Ct. Kings Co. 1985)).
41. 216 A.D.2d 761, 628 N.Y.S.2d 842 (3d Dep't 1995).
42. CPLR 6501.
43. *See, e.g., 5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 320, 486 N.Y.S.2d 877, 882 (1984) (notice of pendency cannot be filed in action for specific performance of contract for purchase of stock in a corporation the major asset of which is a single piece of real property).
44. 64 N.Y.2d at 320, 486 N.Y.S.2d at 882.
45. 64 N.Y.2d at 320, 486 N.Y.S.2d at 881.
46. CPLR 6514(e).
47. *Rabinowitz v. Larkfield Bldg. Corp.*, 231 A.D.2d 703, 647 N.Y.S.2d 820 (2d Dep't 1996) (costs denied); *Praver v. Remsen Assocs.*, 181 A.D.2d 723, 581 N.Y.S.2d 78 (2d Dep't 1992) (costs denied). *But see Lunney & Crocco*, 180 A.D.2d 472, 579 N.Y.S.2d 388 (1st Dep't 1992) (costs awarded).
48. *See Josefsson v. Keller*, 141 A.D.2d 700, 530 N.Y.S.2d 10 (2d Dep't 1988).
49. CPLR 6514(a).
50. 76 N.Y.2d 436, 443-44, 560 N.Y.S.2d 109, 113 (1990).
51. 76 N.Y.2d at 443, 560 N.Y.S.2d at 112-13. *See also Estate of Vetri*, 208 A.D.2d 755, 617 N.Y.S.2d 803 (2d Dep't 1994) (appeal dismissed as academic where property was sold after judgment for administrator permitting its sale and canceling the notice of pendency).
52. *Chiulli v. Reitter,* 173 A.D.2d 672, 672-73, 570 N.Y.S.2d 820, 821 (2d Dep't 1991) (quoting *Skoler v. Rinberg*, 20 A.D.2d 580, 581).
53. *Id.*
54. *See supra* at notes 42-44 and accompanying text.
55. *See* discussion *supra* at notes 31-32 and accompanying text.
56. *Pix Furniture, Inc. v. Loew's Theatres & Realty Corp.*, 131 Misc. 2d 517, 500 N.Y.S.2d 959 (Sup. Ct., Bronx Co. 1986), *aff'd without opinion*, 129 A.D.2d 1018, 513 N.Y.S.2d 648 (1st Dep't 1987); *Dimond v. Jeanril Realty Corp.*, (not officially reported), 217 N.Y.S.2d 767 (Sup. Ct., Suffolk Co. 1961); *Weisinger v. Berfond*, 19 Misc. 2d 526, 185 N.Y.S.2d 912 (Sup. Ct., Kings Co. 1959); *Oster v. Bishop*, 20 Misc. 2d 445, 186 N.Y.S.2d 737 (Sup. Ct., Westchester Co. 1959); *Brandstetter v. Kramer*, 8 Misc. 2d 718, 168 N.Y.S.2d 144 (Sup. Ct., Queens Co. 1957); *Deitch v. Atlas*, (not officially reported), 132 N.Y.S.2d 806 (Sup. Ct., Nassau Co. 1954); *63rd St. Theatres*, 137 Misc. 285, 243 N.Y.S. 204, *aff'd*, 230 A.D. 827, 245 N.Y.S. 767 (1930).
57. *Creno v. Masterpol*, 48 Misc. 2d 48, 264 N.Y.S.2d 168 (Sup. Ct., Onondaga Co. 1965).

58. *Andesco, Inc. v. Page*, 137 A.D.2d 349, 357, 530 N.Y.S.2d 111, 115 (1st Dep't 1988) (citing *Ansonia Realty Co. v. Ansonia Assocs.*, 117 A.D.2d 527; 498 N.Y.S.2d 141 (1st Dep't 1986)).

59. As originally enacted, CPLR 6515(2) was limited to actions for specific performance. In 1973, that limitation was eliminated by an amendment that substituted the current language—"in such action"—for "in an action for specific performance." 1973 N.Y. Laws ch. 1029. Despite this amendment, the reported cases indicate that the "double bonding" procedure has not been used in actions other than those for specific performance.

60. *See, e.g., Weksler v. Yaffe*, 129 Misc. 2d 633, 638, 493 N.Y.S.2d 682, 686 (Sup. Ct., Kings Co. 1985) (ordering that "if plaintiffs desire to maintain the lis pendens they must within 10 days . . . give an undertaking in the amount of $13,000 to indemnify defendants for any damages they may incur from noncancellation. In the event that plaintiffs fail to post such an undertaking, then the lis pendens shall be canceled upon the posting by defendants of an undertaking in the amount of $180,000").

61. *Andesco, Inc. v. Page*, 137 A.D.2d at 358; 530 N.Y.S.2d at 115.

62. *E.g., Chappelle v. Gross*, 26 A.D.2d 340, 274 N.Y.S.2d 555 (1st Dep't 1966) (damages for malicious prosecution recovered from lawyer who filed notice of pendency in action to enforce an unsigned contract of sale which lawyer knew to be unenforceable).

63. *Chain Locations of America, Inc. v. T.I.M.E.-DC, Inc.*, 99 A.D.2d 111,112, 472 N.Y.S.2d 462, 464 (3d Dep't 1984); *Bronstein v. Dayton Peninsula Corp.*, 11 A.D.2d 1036, 206 N.Y.S.2d 12 (2d Dep't 1960).

64. *See supra* notes 55-58 and accompanying text.

65. 1981 Conn. Acts 81-8 (Reg. Sess.).

66. 1982 N.J. Laws ch. 200.

67. 1991 Cal. Stat. ch. 112 § 2; 1992 Cal. Stat. ch. 883 § 1.

68. Commentators have recommended that the notice of pendency statutes in other states, including Georgia and Iowa, be similarly revised. *See, e.g.*, Cronin, *supra* note 15 at 113 (1988) ("A statutory mechanism providing for a prompt post-filing hearing at the request of the property owner also would reduce the possibility of unjust deprivation if the court were permitted to inquire into the validity of the underlying claim, rather than merely making a determination [as to whether] real property is involved, as is currently done by Georgia courts"); Lawrence E. Jahn, Note, *A Proposal for Reformation of the Iowa Lis Pendens Statute*, 67 Iowa L. Rev. 289, 305 (1982) ("The new statute would provide for a temporary *lis pendens* indexing immediately upon service of process [on the defendant] but would give the defendant an opportunity for a preliminary hearing to determine the validity of the allegations. The defendant would be required to request such a hearing within a specified period of time after receiving the original notice . . . [and] would then have the right to the preliminary hearing within ten days after the request."). *See also* White, *supra* note 3, at 714 (proposing that the common law doctrine of *lis pendens* be supplanted in the District of Columbia by a statute that would provide for the cancellation of a notice of *lis pendens* "upon motion by any party aggrieved after a showing of good cause").

69. *See* Marrion, *supra* note 15, at 420-21 (1984) ("Presumably as a response to the *Kukanskis* decision [holding that the Connecticut notice of pendency statute violated procedural due process], the Connecticut legislature revised section 52-325") (citing *Kukanis v. Griffith*, 180 Conn. 501, 430 A.2d 21 (1980)); *Fravega v. Security Savings and Loan Association*, 192 N.J. Super. 213, 469 A.2d 531 (N.J. Super. Ct. Ch. Div. 1983) ("As indicated by the legislative history [1982 N.J. Laws ch. 200] was passed in response to a concern over the lack of procedural safeguards in the previous statute as well as its possible constitutional deficiencies") (citing, *inter alia, Chrysler Corp. v. Fedders Corp.* and N.J. Senate Judiciary Committee Statement to Substitute for Senate Bill 918 (1982)); Donald Scarinci, Current Legislation, *Lis Pendens: A Legislative Response to a Judicial Invitation*, 7 Seton Hall Leg. J. 59, 68 (1983) ("The legislative history of the amended lis pendens statute indicates the Legislature's concern for establishing a due process safeguard greater than that required by the Federal Constitution").

70. *See supra* note 14 and accompanying text.

71. Jan A. Joss, *New Lis Pendens Statutes*, Los Angeles Lawyer 29, 30 (Jan. 1994) ("[California's] traditional lis pendens statutes were repealed in 1992 and a new statutory scheme was enacted to make the lis pendens more closely aligned with the other provisional remedies"); Zebrowski and Jablon, *supra* note 11, at 38 ("In every other forum for provisional relief, a preliminary showing of evidentiary merit is required before the relief is granted. The [State Bar Subcommittee that drafted the revised California notice of pendency provisions] found that similar requirements for prompt objective review should apply to lis pendens as well").

72. California Civ. Proc. Code §§ 405.30, 405.32 (West 1998); Connecticut Gen. Stat. §§ 52-325a (1999); Nebraska Rev. Stat. Ann. § 25-531 (LEXIS 2000); Nevada Rev. Stat. Ann. § 14.015 (2000); New Jersey Stat. § 2A:15-7(b) (2000).

73. Connecticut Gen. Stat. § 52-325 (c) (1999) (30 days); New Jersey Stat. § 2A:15-7(b) (2000) (3 days). *Cf.* California Civ. Proc. Code § 405.22 (West 1998) (requiring service of a copy of the notice by registered or certified mail on all owners of record and all parties to whom the real property claim is adverse prior to recordation).

74. California Civ. Proc. Code § 405.30 (West 1998) ("any party, or any nonparty with an interest in the real property affected"); Connecticut Gen. Stat. § 52-325a (a) (1999) (application may be made by "property owner"); New Jersey Stat. § 2A:15-7(b) (2000) ("[a]ny party claiming an interest in the real estate affected"); *but see* Nevada Rev. Stat. Ann. § 14.015(1) (2000) ("the defendant or, if affirmative relief is claimed in the answer, the plaintiff").

75. California Civ. Proc. Code § 405.30 (West 1998) ("The court may permit evidence to be received in the form of oral testimony, and may make any orders it deems just to provide for discovery by any party affected by a motion to expunge the notice"); Connecticut Gen. Stat. § 52-325a (a) (1999); Nevada Rev. Stat. Ann. § 14.015 (1), (2) and (4) (2000) (affidavits, counter-affidavits, and other evidence); *Fravega v. Security Savings and Loan Association*, 192 N.J. Super. 213, 217-18, 469 A.2d 531, 533 (N.J. Super. Ct. Ch. Div. 1983) ("Although the [New Jersey] statute does not speak directly to [the nature of the hearing required], a recent rule amendment makes it clear that such a motion is to be determined on the pleadings, affidavits and 'testimony taken by leave of the court'") (citing R. 4:63A (effective Sept. 12, 1983)).

76. California Civ. Proc. Code § 405.30 (West 1998); Connecticut Gen. Stat. § 52-325b (a) (1999); Nevada Rev. Stat. Ann. § 14.015 (2) and (5) (2000); New Jersey Stat. § 2A:15-7(b) (2000).

77. Nevada Rev. Stat. Ann. § 14.015(1) (2000) ("[S]uch a hearing must be set as soon as is practicable, taking precedence over all other civil matters except a motion for preliminary injunction"), § 14.015(2) (plaintiff is entitled to 15 days notice thereof). *See also* White, *supra* note 3, at 715 (proposing that a notice of pendency statute for the District of Columbia provide for a hearing to be held within 30 days); Jahn, *supra* note 67, at 305 (proposing that under a revised Iowa notice of pendency statute, "[t]he defendant would then have the right to the preliminary hearing within ten days after the request").

78. It is not clear whether the New Jersey statute's requirement that the court determine the property owner's motion "after hearing and within 10 days," New Jersey Stat. § 2A:15-7(b) (2000), means that the determination must be made within ten days after the filing of the property owner's application, or within ten days after the date of the hearing.

79. As originally introduced, the bill to amend the New Jersey notice of pendency statute required the property owner to apply to the court for a hearing on the merits of the plaintiff's claim within 20 or 35 days after service of the notice of pendency. Scarinci, *supra* note 68, at 62, n.31. A similar requirement has been proposed by commentators proposing revisions to the notice of pendency laws of the District of Columbia and Iowa. *See* White, *supra* note 3, at 715 ("Such a request must be invoked within ten days of service of notice of lis pendens or be waived"); Jahn, *supra* note 67, at 305 ("The defendant would be required to request such a hearing within a specified period of time after receiving the original notice. Perhaps twenty days would be an appropriate amount of time for the request to be made, for this is the time period normally allowed for the filing of an answer in a civil suit in Iowa").

80. California Civ. Proc. Code §§ 405.32, 405.3 (West 1998).

81. Nevada Rev. Stat. Ann. § 14.015(3)(b) (2000).

82. New Jersey Stat. § 2A:15-7(b) (2000).

83. *See, e.g., Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862, 552 N.Y.S.2d 918, 919 (1990) ("[I]n order to be entitled to a preliminary injunction, plaintiffs had to show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor").

84. *See, e.g., Romm Art Creations Ltd. v. Simcha Int'l, Inc.*, 786 F. Supp. 1126, 1133 (E.D.N.Y. 1992) ("As to the 'likelihood of success' element, the movant [for a preliminary injunction] 'need not show that success is an absolute certainty. He need only make a showing that the probability of his prevailing is better than fifty percent'") (quoting *Abdul Wali v. Couglin*, 754 F.2d 1015, 1025 (2d Cir. 1985)).

85. California Civ. Proc. Code § 405.32 (West 1998) (emphasis added). *Cf.* Cronin, *supra* note 15 at 111-12 (recommending revision of the Georgia lis pendens statute to provide for "a prompt post-filing hearing at which the claimant would need to establish the *probable validity* of the claim") (emphasis added).

86. California Civ. Proc. Code § 405.3 (emphasis added).

87. Nevada Rev. Stat. Ann. §§ 14.015(3)(a) (2000); *Fravega v. Security Sav. and Loan Assoc.*, 192 N.J. Super. 213, 20, 469 A.2d 531, 534 (N.J. Super. Ct. Ch. Div. 1983) (construing New Jersey Stat. § 2A:15-7(b) as requiring the plaintiff to show, in certain circumstances, "that success on the merits is more probable than not").

88. *See, e.g., Stanley v. Univ. of S. California*, 13 F.3d 1313, 1319 (9th Cir. 1994) ("[A] court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor"); *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) ("In this circuit, preliminary injunctive relief is available to a party who demonstrates either (1) a combination of probable success and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardship tips in its favor").

89. Nevada Rev. Stat. Ann. §§ 14.015(3)(a) (2000).

90. Nevada Rev. Stat. Ann. §§ 14.015(3)(b) (2000) (emphasis added).

91. *Cf., e.g., Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d at 937 ("If the plaintiff shows no chance of success on the merits . . . the injunction should not issue. As an 'irreducible minimum,' the moving party must demonstrate a fair chance of success on the merits, or questions serious enough to require litigation") (internal citations omitted).

92. New Jersey Stat. § 2A:15-7(b) (2000) (emphasis added).

93. 192 N.J. Super. 213, 219, 469 A.2d 531, 534 (N.J. Super. Ct. Ch. Div. 1983).

94. 192 N.Y. Super. at 220, 219-20, 469 A.2d at 535, 534.

95. *Id.*

96. Connecticut Gen. Stat. § 52-325b (a) (1999) (emphasis added).

97. *Williams v. Bartlett*, 189 Conn. 471, 483, 457 A.2d 290, 296 (1983) (citations omitted). *See* Marrion, *supra* note 15, at 425, 426-27 ("[I]t is easy to imagine an unscrupulous litigant succeeding at a probable cause hearing, though his claims may not be made in good faith").

98. *Williams v. Bartlett*, 189 Conn. at 481-83, 457 A.2d at 295-96 (concluding that plaintiff's uncontroverted evidence of the defendants' fraud was sufficient to establish probable cause for the imposition of a constructive trust).

99. *Cf. Dinko v. Wall*, 531 F.2d 68 (2d Cir. 1976) (discussing the requirement of "good cause" as a prerequisite to litigation under the Federal Labor-Management Reporting and Disclosure Act of 1959, the court observed that "[i]t has been suggested that good cause in this context should mean that the plaintiff has made a showing of probable cause, with the latter defined as 'a reasonable ground for belief in the existence of facts warranting the proceedings complained of'").

100. *See* Scarinci, *supra* note 68, at 67 ("The new N.J. Stat. Ann. § 2A:15-7(b) applies when the *lis pendens* statute is being used expansively, namely, to affect title to real property. Here the use of *lis pendens* does more than provide notice; the filing takes on a substantive aspect"); Gersten, *supra* note 16, at 84 ("Where . . . the initial pleading does not show that the action is founded on a duly recorded instrument or on a construction lien . . . the lis pendens for the first time announces plaintiff's claimed interest in the property placing a cloud on the title that did not [previously] exist").

101. *E.g., Grossfeld v. Beck*, 42 A.D.2d 844, 346 N.Y.S.2d 650 (1973) (notice of pendency may be filed in shareholder derivative action seeking to impress a constructive trust on certain real property); *Rosenberg v. Ritter*, 34 Misc. 2d 1099, 229 N.Y.S.2d 766 (1962) (notice of pendency may be filed in an action seeking to establish and impress an equitable lien on certain real property).

102. *E.g. Resnick v. Doukas*, 261 A.D.2d 375, 689 N.Y.S.2d 228 (2d Dep't 1999) (notice of pendency may be filed in an action seeking to set aside an allegedly fraudulent conveyance of real property).

103. New Jersey Stat. § 2A:15-7 (2000) (Discharge of notice of pendency under § 2A:15-7(b) is only available in actions other than those specified in § 2A:15-7(a); that is, "action[s] to enforce or declare rights in, or concerning, or for partition of real estate, wherein plaintiff's claim arises out of a written instrument, which instrument either is executed by defendant and identifies such real estate or appears of record with respect to the title thereto"). *Cf.* Florida Stat. ch. 48.23(3) (2000) (Limiting the court's authority to control and discharge a notice of lis pendens to those actions where "the initial pleading does not show that the action is founded on a duly recorded instrument or on a [mechanics] lien").

104. *See B.J.I. Corp. v. Larry W. Corp.*, 183 N.J. Super. 310, 319-20 n. 9, 433 A.2d 1096, 1101 n. 9 (Ch. Div. 1982) ("In its substantive aspect, the notice of *lis pendens* in effect establishes a restriction or creates a lien on the defendant's property. This use of the statutory procedure amounts to an attachment of or a prejudgment execution on defendant's realty . . . In its notice aspect, however, the filing merely provides constructive notice to the world that a pre-existing lien is being foreclosed . . . [and] no new restriction is imposed thereby on the defendant's property"). *Cf.* Marrion, *supra* note 15, at 427 ("Since the plaintiff has less at stake in instances where the statute is used expansively, such a use of lis pendens has less justification"); Cronin, *supra* note 15, at 110 ("The potential for abuse of the *lis pendens* procedures is reduced with this narrow use because the plaintiff presently has an interest in the property").

105. *See, e.g., Peterson v. Kelly*, 173 A.D.2d 688, 570 N.Y.S.2d 592 (2d Dep't 1991) (holding that interests of plaintiff seeking to impose constructive trust on property could be adequately protected by

posing of an undertaking). *See also* Cronin, *supra* note 15, at 110 ("Because, under these circumstances [i.e., a claim seeking to impose a constructive trust against real property], the [plaintiff] is not really concerned with establishing an ongoing interest in the property, the unique aspect of property is not as important. Consequently, if other assets are available, other less restrictive means may provide the creditor sufficient security for the amount of the alleged interest without tying up the debtor's land"); Marrion, *supra* note 15, at 427 n.105 ("If a plaintiff is using the lis pendens statute expansively, he risks no more than the loss of one means of enforcing an in personam right. By comparison, a plaintiff using the statute narrowly could be subject to the loss of an estate in the property he seeks to bind").

106. *See* Gersten, *supra* note 16, at 84 ("Prejudgment procedural safeguards, rather than post-judgment remedies, are a more efficient and adequate method of protecting each party's interests").

107. Cronin, *supra* note 153, at 108-109. *Cf.* Zebrowski and Jablon, *supra* note 11, at 60 (Noting that the reduction in the number of notices filed since the enactment of the 1993 revision to the California notice of pendency statute "may stem from lawyers being more concerned about whether their client's facts will truly support filing a lis pendens . . . and the mandatory award of attorneys' fees and damages to the prevailing party").

108. Under the 1991 amendment, which is now California Civ. Proc. Code § 405.34, the court could condition the denial of motion to expunge the notice of pendency upon the posting of an undertaking to indemnify the movant for all damages suffered as a result of maintenance of the notice. Joss, *supra* note 70, at 30. *Cf.* CPLR 6515(2).

109. *See* Cronin, *supra* note 15, at 113 (proposing revision of Georgia notice of pendency statute to require initial judicial participation prior to the filing of the notice of pendency to determine whether property is in fact involved in the claim). *Cf.* Massachusetts Gen. Laws Ann. ch. 184, § 15 (court must determine that "the subject matter of the action constitutes a claim of a right to title to real property or the use and occupation thereof" prior to recording of the notice of pendency).

110. *See* Jahn, *supra* note 67, at 304 (proposing revision of Iowa notice of pendency statute to require the plaintiff to file a bond instrument in an amount equal to double the amount of the alleged claim as a precondition of recording the notice of pendency).

111. *See, e.g.*, Cronin, *supra* note 15, at 103-104 ("[T]here are sound reasons for not requiring prior notice of a filing of *lis pendens* . . . [including] to ensure that a claimant's legitimate interest in property is not defeated by an owner's conveyance before the notice of *lis pendens* is filed—a possible outcome if prior notice were required"); Marrion, *supra* note 15, at 428 (describing a bonding requirement as "an unrealistic solution . . . [that] would make lis pendens available only to those wealthy enough to post a bond sufficient to protect an unwary property owner").

112. *Dimond v. Jeanril Realty Corp.*, (not officially reported), 217 N.Y.S.2d 767 (Sup. Ct., Suffolk Co. 1961).

113. *Brandstetter v. Kramer*, 8 Misc. 2d 718, 168 N.Y.S.2d 144 (Sup. Ct., Queens Co. 1957).

114. *See, e.g., Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 862, 552 N.Y.S.2d 918, 919 (1990) ("[I]n order to be entitled to a preliminary injunction, plaintiffs had to show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor").

115. *See, e.g., Gramercey Co. v. Benson*, 223 A.D.2d 497, 637 N.Y.S.2d 383, 384 (1st Dep't 1996) ("Denial of injunctive relief would render the final judgment ineffectual . . . and therefore, 'the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced'") (quoting *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 145, 561 N.Y.S.2d 566, 568-69 (1st Dep't 1990).

116. *See, e.g., 193 Second Ave Condominium v. End Real Estate Corp.*, 253 A.D.2d 587, 677 N.Y.S.2d 139 (1st Dep't 1998) (preliminary injunction issued to maintain status quo despite existence of questions of fact); *U.S. Reinsurance Corp. v. Humphreys*, 205 A.D.2d 187, 618 N.Y.S.2d 270 (1st Dep't 1994) (same).

117. *Melvin v. Union College*, 195 A.D.2d 447, 448, 600 N.Y.S.2d 141, 142 (2d Dep't 1993) ("[T]he existence of a factual dispute will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance"); *Mr. Natural, Inc. v. Unadulterated Food Prods.*, 152 A.D.2d 729, 730, 544 N.Y.S.2d 182, 183 (2d Dep't 1989) (same); *City Store Gates Mfg. Corp. v. United Steel Prods., Inc.*, 79 A.D.2d 671, 671, 433 N.Y.S.2d 876, 877 (2d Dep't 1980) ("If a defendant will suffer no great hardship from the issuance of a preliminary injunction which is necessary to preserve the status quo, such will be issued despite a factual dispute").

118. *See, e.g., SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc.*, 211 F.3d 21, 24 (2d Cir. 2000) ("A preliminary injunction may issue only if the plaintiff demonstrates irreparable harm, and either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in its favor"); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953) ("To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; . . . [if] the balance of hardships tips decidedly toward plaintiff, it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation").

119. *Joneil Fifth Ave Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197, 1201 (S.D.N.Y. 1978).

120. 458 F. Supp. at 1201, n.12 (citing *Jacobson & Co. v. Armstrong Cork Co.*, 416 F. Supp. 564 (S.D.N.Y. 1976), *aff'd*, 548 F.2d 438 (2d Cir. 1977)).

121. 11A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice & Procedure § 2948.3 (2d ed. 1995).

122. *See supra* notes 53-58 and accompanying text.

123. *Cf.* 11A Wright, Miller & Kane, *supra* note 120 at § 2948.3 ("[I]t has been held that a preliminary injunction may be granted even though the harm factor favors defendant if plaintiff demonstrates a substantial likelihood that he ultimately will prevail").

124. *5305 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 324, 486 N.Y.S.2d 877, 884 (1984).

This report was originally prepared by the CPLR Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, and approved and adopted by the Section on October 17, 2001. The Section is particularly grateful for the efforts of James N. Blair and Susan M. Davies, principal authors of the report. The report states only the position of the Commercial and Federal Litigation Section of the New York State Bar Association and does not necessarily represent the view of the New York State Bar Association until such time as it is adopted by the Executive Committee or House of Delegates of the New York State Bar Association.

Appendix to Report on Proposal for Revision of CPLR Article 65

AN ACT to amend the civil practice law and rules in relation to notices of pendency.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Article 65 of the Civil Practice Law and Rules is amended to read as follows:

§ 6501. Notice of pendency; constructive notice.

A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party.

§§ 6502-6510. [Not used.]

§ 6511. Filing, content, and indexing of notice of pendency.

(a) Filing. Subject to subdivision (e) hereof, in a case specified in section 6501, the notice of pendency shall be filed in the office of the clerk of any county where property affected is situated, before or after service of summons and at any time prior to judgment. Unless it has already been filed in that county, the complaint shall be filed with the notice of pendency.

(b) Content; designation of index. A notice of pendency shall state the names of the parties to the action, the object of the action, and a description of the property affected. A notice of pendency filed with a clerk who maintains a block index shall contain a designation of the number of each block on the land map of the county which is affected by the notice. Except in an action for partition, a notice of pendency filed with a clerk who does not maintain a block index shall contain a designation of the names of each defendant against whom the notice is directed to be indexed.

(c) Indexing. Each county clerk with whom a notice of pendency and the proof of service or declaration required by subdivision (e) hereof are filed shall immediately record it and index it against the blocks or names designated. A county clerk who does not maintain a block index shall index a notice of pendency of an action for partition against the names of each plaintiff and each defendant not designated as wholly fictitious.

(d) Electronic indexing. A county clerk may adopt a new indexing system utilizing electro-mechanical, electronic or any other method he deems suitable for maintaining the indexes.

(e) The county clerk shall not accept a notice of pendency for filing unless accompanied by proof of service of a copy of the notice by registered or certified mail, return receipt requested, upon all known addresses of the parties to whom the real property claim is adverse and upon all owners of record of the real property affected as shown by the latest [county assessment roll], and a declaration under penalty of perjury that there is no known address for service of any adverse party or owner with respect to whom proof of service has not been provided.

§ 6512. Service of summons.

A notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed. If the defendant dies within thirty days after filing and before the summons is served upon him or publication is completed, the notice is effective only if the summons is served upon his executor or administrator within sixty days after letters are issued.

§ 6513. Duration of notice of pendency.

A notice of pendency shall be effective for a period of three years from the date of filing. Before expiration of a period or extended period, the court, upon motion of the plaintiff and upon such notice as it may require, for good cause shown, may grant an extension for a like additional period. An extension order shall be filed, recorded, and indexed before expiration of the prior period.

§ 6514. Motion for cancellation of notice of pendency.

(a) Mandatory cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if:

1. service of a summons has not been completed within the time limited by section 6512;
2. the action has been settled, discontinued or abated;
3. the time to appeal from a final judgment against the plaintiff has expired;
4. enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519; or
5. the court finds that the pleading on which the notice of pendency is based does not contain a demand for judgment that would affect the title to, or the possession, use or enjoyment of, the real property affected.

(b) Discretionary cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the court finds that

1. the plaintiff has not commenced or prosecuted the action in good faith, or
2. the plaintiff who filed the notice of pendency has not established, by affidavit and such other evidence as may be submitted, (i) that the plaintiff's claim arises out of a written instrument, other than a contract of sale or memorandum thereof, that appears of record with respect to the title of the property affected, or (ii) a likelihood of success on the merits of the plaintiff's claim, or sufficiently serious questions going to the merits of the plaintiff's claim to make them a fair ground for litigation and a balance of hardships decidedly in plaintiff's favor.

(c) Costs and expenses. The court, in an order canceling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing, and cancellation, in addition to any costs of the action.

(d) Cancellation by stipulation. At any time prior to entry of judgment, a notice of pendency shall be canceled by the county clerk without an order, on the filing with him of:

1. an affidavit by the attorney for the plaintiff showing which defendants have been served with process, which defendants are in default in appearing or answering, and which defendants have appeared or answered and by whom; and
2. a stipulation consenting to the cancellation, signed by the attorney for the plaintiff and by the attorneys for all the defendants who have appeared or answered including those who have waived all notices, and executed and acknowledged, in the form required to entitle a deed to be recorded, by the defendants who have been served with process and have not appeared but whose time to do so has not expired, and by any defendants who have appeared in person.

(e) Cancellation by plaintiff. At any time prior to the entry of judgment a notice of pendency of action shall be canceled by the county clerk without an order, on the filing with him of an affidavit by the attorney for the plaintiff showing that there have been no appearances and that the time to appear has expired for all parties.

(f) The court shall not order an undertaking to be given as a condition of canceling a notice of pendency under this section.

§ 6515. Undertaking for cancellation of notice of pendency; security by plaintiff.

In any action other than one to foreclose a mortgage or for partition or dower, the court, upon motion of any person aggrieved and upon such notice as it may require, and without regard to the merits of the plaintiff's cause of action, may direct any county clerk to cancel a notice of pendency that is not subject to cancellation under section 6514(b)(2), upon

such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in an amount to be fixed by the court, and if:

1. the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or
2. in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he may incur if the notice is not canceled.

§ 6516. Effect of Cancellation of Notice of Pendency.

Cancellation of a notice of pendency pursuant to section 6514 shall relate back to the time of filing of the notice, and neither the notice of pendency nor any information derived from it prior to cancellation shall constitute actual or constructive notice of any of the matters contained, claimed, alleged, or contended therein, or of any of the matters related to the action, or create a duty of inquiry in any person thereafter dealing with the affected real property.

§ 6517. Successive Notices of Pendency.

A notice of pendency may be filed at any time prior to entry of judgment, notwithstanding that the plaintiff previously filed a notice of pendency affecting the same property in the same or a different action, which prior notice of pendency:

1. is ineffective because service of a summons has not been completed within the time limited by section 6512;
2. has been canceled by an order of the court made pursuant to paragraph (1) of subdivision (a) of section 6514; or
3. has expired pursuant to section 6513.

Section 2. This act shall take effect immediately and shall apply to all actions commenced and notices of pendency filed on or after that date.

BOOK REVIEW:
New York Civil Practice Before Trial

By Michael H. Barr, Hon. Myriam J. Altman, Burton N. Lipshie and Sharon Stern Gerstman, James Publishing, 2001, 2 volumes, 1,300 pages with CD-ROM of full text and 120 forms

Reviewed by Michael S. Oberman

Whatever you might think about judging a book by its cover, I like to measure a new law book against the promises of its forward. *New York Civil Practice Before Trial (NYCPBT)* does not contain a forward, so we are missing its authors' own vision of how this just-published work fits into the crowded field of civil practice advice found in the venerable Weinstein, Korn & Miller; the arsenal of Prof. Siegel (practice commentaries, treatise and newsletter); and the most recent classic, Bob Haig's *Commercial Litigation in New York State Courts*. James Publishing has launched this new treatise with a sales brochure which does attempt to position the work. It states: "*New York Civil Practice Before Trial* delivers quick and reliable answers with its unique outline format, tight writing, superb scholarship, and extensive citations. Its practice-tested forms and pattern paragraphs speed drafting." Giving some allowance for "marketing speak," this pitch is a fair assessment of what the new book offers: a practical manual that is a good first place to look for how to perform a task, although—like a forward—some features are missing from the first edition.

NYCPBT is the product of an interesting collaboration. Its four co-authors are a civil litigator (Michael H. Barr, a partner in the New York City office of Sonnenschein Nath & Rosenthal); a justice of the Appellate Division, who previously presided over one of the four original commercial parts in New York County (Hon. Myriam J. Altman); the managing attorney of Stroock & Stroock & Lavan, who is also an adjunct professor of Cardozo Law School (Burton N. Lipshie); and the Principal Law Clerk for the Eighth Judicial District (Buffalo) of the New York Supreme Court, who is also an adjunct professor of Buffalo Law School (Sharon Stern Gerstman). This is a writing team that offers extensive experience as well as varying perspectives on the issues that face New York civil litigators—a combination that comes through in virtually every chapter.

The scope of *NYCPBT* covers the full breadth of its title. Its 26 chapters begin with "Taking the Case" and proceed sequentially through "Presuit Activities"; including jurisdiction and forum selection, pleadings, motions, discovery and pre-trial dispositions (e.g., summary judgment and settlement). Each chapter opens with a "Quick View," containing a chapter scope; a summary of strategies and tactics; citation of the applicable statutes and rules; and a list of included forms. The "outline format" mentioned in the sales brochure refers to the organization. The large number of headings for the sections grouped together in the detailed table of contents fit together like an outline, but the sections themselves are more expansive than mere outline items and read more like concise hornbook passages. The presentation has many practice pointers that are set off with the phrase "**IN PRACTICE**." The discussion also includes useful illustrations, which are set off with the heading "**EXAMPLES**" (such as types of fee arrangements in the discussion of "Taking the Case"). The text contains cross-references to the forms included on the companion CD-ROM.

NYCPBT is at its best as a "how to" guide, such as how to draft a document request or how to prepare motion papers. These sections should provide welcome instruction for less experienced litigators and—thanks to the input from inside the courthouse—insightful guidance for more experienced litigators. For example, sections 26:60-26:83 treat in reasonable detail the substance of drafting a document request, from formulating goals to framing requests which are neither too broad nor too narrow. Similarly, sections 16:80-16:89 address the drafting of motion papers, and provide the sensible cautions to avoid boilerplate (like the basic law of summary judgment) and to avoid patronizing the court (e.g., "[d]on't tell the court that failing to rule as requested would be 'reversible error'"). (Section 16:89 at 16-14.)

This "how to" orientation also emerges in the wealth of concrete practical advice. For example, if you want to determine whether you can obtain documents from a non-party witness, sections 26:370-26:394 provide both the rules (a party may not serve a document request on a non-party without a court order, but the party may serve a deposition notice including a document request) as well as lessons from experience (how to negotiate to obtain the documents without taking the deposition). It is such lessons that give *NYCPBT* its greatest value. The orientation of *NYCPBT* is more practical than academic; it typically provides only one or

two case citations for a point of law and does not plumb legal issues as deeply as do Prof. Siegel's works. In reading through the chapters, you will come to expect practice pointers and—in sections where a rule is stated without insights from experience—those insights are missed. As an illustration, the discussion of document production in section 26:170 flatly states that a party's control "includes documents in the possession of the party's attorney." (26-21.) Lessons from experience on whether, in common practice, a document request served on a party results in production of documents from the files of that party's attorney (and, if not, what to do) would bolster the section.

There are a few other ways to improve *NYCPBT* in its first annual update. Currently, there is no table of citations to CPLR sections or to other court rules. This omission is not entirely cured by the searchable CD-ROM, because the search program does not reach subsections. Thus, as confirmed by the prompt and courteous technical support employee, a search for CPLR 2214(b) produces 176 hits for all mentions of CPLR 2214, not just those of subsection (b). And the index does not completely retrieve the most relevant sections of the work. Look for "sanctions" and you will find five references, not including the most comprehensive discussion of the subject; search the word "sanctions" on the disk and you will get 217 hits in the text and in the forms (which can be quickly narrowed to the key sections by searching for "sanctions" within the same paragraph as "frivolous" in the easy-to-use search program). More specific topic listings in the index would be appreciated. On the other hand, some of the existing index listings are overdone. Look up "Witnesses" and you will find separate entries for "don't get angry, 27:322" and "don't get rattled, 27:326."

Reviewing the discussion of sanctions raises two other editing concerns. There is a lack of perfection in the proofreading of the first edition. For example, section 37:670 at 37-53 cites as the source for sanctions for a frivolous summary judgment motion "CPLR 130.1." The reference (as stated in section 2:13) should be to 22 N.Y.C.R.R. § 130-1.1. There are a few similar cite checking errors. Section 2:14 states that "the cumulative amount of fines, costs, and attorney['s] fees cannot exceed $10,000.00." (2-8.) The rule, however, was amended as of March 1, 1998, to remove the cap on costs and attorney's fees and to leave the $10,000 limit in place only for sanctions. In the same way, I felt that the broad statements about imputed disqualification of a law firm in Section 1:87 do not adequately reflect the nuances of DR 5-108 as amended in 1999. These sections, however, are exceptions to what appears overall to be an up-to-date and accurate summary of pre-trial civil practice law.

My one other suggestion for improvement would be to make the book more court specific. The words "Commercial Division" appear in only one section (and not in the index); section 8:28 advises the reader to consider the Commercial Division as a possible venue. There are a number of helpful references to specific practices in Erie County and upstate (e.g., section 16.22 on getting a judge assigned to a case upstate), as one might anticipate when one co-author is the Principal Law Clerk there. More guidance on, say, the motion calendar practices of individual courts or on how specific courts handle "confidential" documents cited in motion papers would enhance the usefulness of this book.

NYCPBT, as the sales brochure states, costs "only $129." This is very competitively priced, compared with other new legal publications—especially considering its fully searchable CD-ROM with useable forms that comes with the book.

There are many reserved chapter numbers and section numbers, obviously anticipating updates and expansions of the work over time. Indeed, the covers are quite large, with room in the ring binders for many more pages. *NYCPBT* is off to a very solid beginning and—judging by the covers—is likely to get even bigger and better over time.

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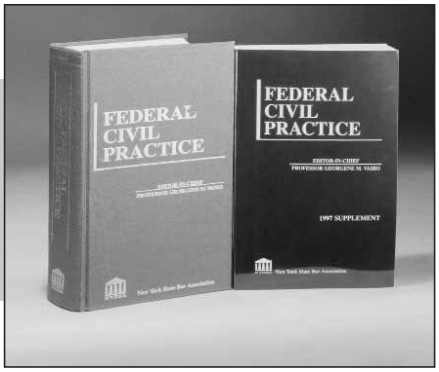

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