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ENFORCING FOREIGN JUDGMENTS: IN SEARCH OF A TREATY TO LOCATE ASSETS ABROAD

Luke J. Umstetter*

I. INTRODUCTION AND SCOPE

The United States' continual increase in social, political and economic interaction with countries has been followed by the predictable increase in related legal interactions. Less predictable is the likelihood of satisfying a judgment in a jurisdiction where legal practices differ from those of the United States. U.S. judgments are routinely refused enforcement abroad, and little recourse is available because sovereigns are generally powerless to enforce civil judgments outside their own political borders. Questions about the enforcement of foreign judgments increase transaction costs and complicate business, making it necessary for internationally involved companies to adapt behaviors to individual jurisdictions.¹ The practice of anticipating litigation can be inefficient as most major companies do not interact with entities in just one other country. For these multinational corporations (MNCs), transaction costs are also higher than necessary because the current system reduces the ability to predict or hedge against the outcome of litigation abroad.² Further results of such uncertainties are price fluctuations and decreased efficiency in international production and trade.³ Despite the high costs, disputes are arising with increased frequency, creating the need for a standardized mechanism to recognize and execute judgments practically.

U.S. involvement in multilateral judgment enforcement treaty is not a new idea. The Convention on Jurisdiction and Recognition of Foreign

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¹ Mark D. Rosen, *Should "Un-American" Foreign Judgments be Enforced?* 88 MINN. L. REV. 783, 849 (2004).

² Symposium, RENDERING AND ENFORCING FOREIGN JUDGMENTS IN MEXICO AND THE UNITED STATES: A PANEL DISCUSSION, U.S.-Mex. Law Inst., U.N.M School of Law (1994), available at <http://www.natlaw.com/pubs/usmxlaw/usmjnm25.htm>.

³ *Id.*

Judgments has been under negotiations since 1993.⁴ These negotiations, initiated by the United States, are conducted under the auspices of The Hague Conference on Private International Law, which has produced, other agreements including: The Hague Service Convention (1965), The Hague Evidence Convention (1970), and The Hague Child Abduction Convention (1998).⁵

Europe successfully adopted the Brussels Regulation (formerly Convention) on Judgment Recognition and Enforcement in 1968, which served to decrease trade barriers and stimulate the economy. It can serve as an important model to the United States both because Europe is a major trade and business partner and because it has had this sophisticated and effective judgments recognition agreement firmly in place for many years.⁶ The United States is not party to this or any similar convention partly because of our geographical alienation, but also because our judicial system is far more exotic, excessive, and unpredictable than those of other countries.

In order to successfully negotiate a Treaty on Judgment Enforcement, the United States should weaken its position on some peripheral issues, defer to similar provisions utilized in other judgment enforcement treaties, and allow countries to refuse enforcement in the event that a signatory judgment runs directly contrary to the stated and widely understood public policy of the enforcing country as found in the treaty.

II. BACKGROUND

Absent a treaty on the recognition and enforcement of foreign judgments, the United States and other foreign countries must look to domestic law and principles of comity, reciprocity and *res judicata*.⁷ The best starting point for a common law discussion of the enforcement of foreign money judgments is with *Hilton v. Guyot*. This area developed at common law and has been partially adopted by statute.⁸ As in many other areas of law, English precedents provided guidance to U.S. decisions on recognition and enforcement of foreign judgments prior to the *Hilton* judgment. From the mid-nineteenth century, U.S. courts began to accord conclusive rather than

⁴ Memorandum from Andreas F. Lowenfeld & Linda Silberman to the American Law Institute (Nov. 30, 1998), available at http://www.ali.org/ali/1999_Lowenl.htm [hereinafter Lowenfeld & Silberman].

⁵ *Id.*

⁶ Council Regulation 44/2001, 2001 O.J. (L 12) 1(EC) [hereinafter Brussels Regulation].

⁷ *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS §481(1) (1987) [hereinafter FOREIGN RELATIONS RESTATEMENT].

merely prima facie effect to foreign judgments for all purposes, subject to certain conditions and exceptions.⁹ U.S. courts have not articulated a consistent policy or rationale for recognizing foreign judgments, and are usually content to cite the general principles of comity identified in *Hilton*.¹⁰ The foundation for this discussion begins with the concept of sovereignty, a basic tenant of which is that no law has any effect, in and of itself, beyond the limits of the political milieu from which its authority is derived. The extent to which the law of one nation, as put in force within that nation's territory through executive order, legislative act, or judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations."¹¹ In *Hilton*, which involved a French plaintiff seeking to enforce a French judgment against a U.S. defendant, Justice Gray gave his enduring and often quoted definition of comity:

Comity in a legal sense is neither a matter of absolute obligation on one hand, nor a mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard for both international duty and convenience, and to the rights of its own citizens or other persons who are under the protections of its laws.¹²

The decision went on to list more specific requirements for recognition and enforcement, which included: full and fair trial abroad, regular proceedings, voluntary appearance, and the impartial and non-fraudulent administration of justice.¹³

Although issues of reciprocity ultimately decided *Hilton*, more recent decisions have rejected the concept.¹⁴ No case since *Hilton* has denied recognition to a foreign judgment solely on the grounds that the foreign

⁹ ROBERT B. VON MEHREN & MICHAEL E. PATTERSON, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UNITED STATES, 22 (1972) (citing Courtland H. Peterson, *Foreign Country Judgments and the Restatement of Conflict of Laws in the United States*, 72 COLUM. L. REV. 220 (1972)).

¹⁰ *Id.* at 23.

¹¹ *Hilton*, 195 U.S. at 202.

¹² *Id.*

¹³ *Id.* at 202-03.

¹⁴ *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 n.8 (3d Cir.1971).

country would not recognize a U.S. judgment.¹⁵ U.S. courts, most notably in New York, have “expressly rejected the *Hilton* requirement of reciprocity and extended recognition of foreign judgments” without even addressing reciprocity.¹⁶ A more recent view on the subject is that judicial economy and international comity play a much larger role than the reciprocity analysis put forth in *Hilton v. Guyot*.¹⁷ However, this more recent comity analysis is simultaneously being displaced by the idea that the underlying policy should be similar to policies of *res judicata* and collateral estoppel, favoring finality and ending litigation rather than merely acceding to the laws of another nation.¹⁸ Although these theoretical divergences do not alter the effect, they might provide the appropriate focus and methodology required for an effective judgment treaty.

The goals of the *Hilton* decision were ostensibly to limit American liability abroad while at the same time encourage foreign nations to enforce U.S. judgments. If so, deciding the case based on reciprocity was not the most effective method.¹⁹ Since a vast majority of foreign states have reciprocity requirements, there is potential for circular non-recognition that would be unfavorable to the international economic system as a whole. For example, a nation with a reciprocity requirement will generally require a showing that its judgments would likewise be given effect in the judgment creditor’s nation before it will agree to enforce the judgment.²⁰ Accordingly, foreign courts will often refuse recognition of a U.S. judgment based on the incorrect conclusion that because we do not have a definitive statutory provision relating to the enforcement of foreign judgments, we would not reciprocate their inbound judgment.²¹

It is widely recognized that a multilateral agreement would serve to encourage commercial relations, and also to avoid the appearance of hostility

¹⁵ Courtland H. Peterson, *Foreign Country Judgments and the Second Restatement of Conflicts of Laws*, 72 COLUM. L. REV. 220, 235 n. 90 (1972).

¹⁶ See *Tahan v. Hodgson*, 662 F.2d 862, 868. (D.C. Cir. 1981); see also *Somportex*, 453 F.2d 435, 440, at n.8.

¹⁷ VON MEHREN & PATTERSON, *supra* note 9, at 22.

¹⁸ *Id.* (quoting *Hilton v. Guyot*, 155 U.S. 113, 202 (1895)).

¹⁹ See *Mata v. American Life Ins. Co.*, 771 F.Supp. 1375 (D. Del. 1991), *aff’d* 961 F.2d 208 (3d Cir. 1992) (quoting the Minnesota Supreme Court in *Nicol v. Tanner*, 310 Minn 68, 256 N.W.2d 796 (Minn. 1976)).

²⁰ Brandon B. Danford, *The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?* 23 REV. LITIG. 381, 384 (2004) (citing *Hilton v. Guyot*, 159 U.S. 113, 227-28 (1895) (refusing to uphold a French judgment because a similar American judgment would not be upheld in a French court)).

²¹ *Id.* at 422.

by the United States to foreign judgments.²² An agreed upon mechanism for recognition and enforcement would minimize such issues and leave political, judicial, and business resources to more productive ends.

III. THE DOCTRINE OF RECOGNITION AND ENFORCEMENT

Recognition and enforcement are often used synonymously in modern court cases, but have different practical meanings. A foreign judgment is *recognized* “when a court concludes that a certain matter has already been” legitimately decided, whereas the judgment is *enforced* “when a party is accorded the relief to which the judgment entitles him[sic].”²³ It follows that, while a court must recognize every foreign judgment it enforces, it will not necessarily enforce every foreign judgment it recognizes. It is therefore possible for a U.S. court to recognize a foreign court judgment but not grant the relief entitled by the foreign jurisdiction or vice versa.

Recognition and enforcement of judgments in the United States are far more complex than in other countries. The bifurcated federal and state judicial structure in the United States precludes simple and universal answers.²⁴ Results can depend on whether the court applies state precedent, federal case law, general common law principles or the Uniform Foreign Money Judgment Recognition Act.²⁵

A. *The Uniform Foreign Money Judgment Recognition Act*

Another solution to improving the fate of U.S. money judgments abroad is through the voluntary state adoption of The Uniform Foreign Money Judgment Recognition Act (UFMJRA).²⁶ The UFMJRA, first written in 1962, is an attempt by the United States to create transparency and lucidity for its domestic law regarding recognition and enforcement of foreign judgments.²⁷ The UFMJRA is applicable only to money judgments and basically codifies the common law to increase the likelihood that U.S. judgments are enforced in

²² VON MEHREN & PATTERSON, *supra* note 9, at 58.

²³ VON MEHREN & PATTERSON, *supra* note 9, at 16.

²⁴ *Id.*

²⁵ *Id.*

²⁶ VON MEHREN & PATTERSON, *supra* note 9, at 57.

²⁷ Jennifer M Anglim, Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes Over Artwork and Other Chattels, 45 HARV. INT’L L.J. 239, 253. (2004). (citing Robert B. von Mehren & Michael E. Patterson, Recognition and Enforcement of Foreign Country Judgments in the United States, 6 LAW & POL’Y INT’L BUS. 37, 42 (1974)).

countries with reciprocity requirements.²⁸ Section 3 of the UFMJRA provides that, "a foreign judgment...is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as a judgment of a sister state which is entitled to full faith and credit."²⁹ Once recognized, the inbound judgment carries the same weight as if it were from another American state. Currently, the UFMJRA "has been adopted in 28 states, the District of Columbia and the Virgin Islands."³⁰ Four of the states enacting the UFMJRA have added reciprocity requirements to the versions of the Act they have adopted,³¹ including Colorado, which bars recognition of foreign judgments because it limits recognition to judgments of a country that has joined the United States in a judgment-recognition treaty.³² However, no such country or treaty yet exists.

While domestic judgments rendered by sister states are entitled to full faith and credit under the U.S. Constitution,³³ foreign inbound judgments are not. Due to the lack of uniformity among the states, it is possible that an inbound judgment may be enforceable in one state but not another. State law governs judgment recognition and enforcement, even when such recognition is sought in federal court.³⁴ Unlike the Full Faith and Credit Clause of the Constitution, a treaty could include elaborate provisions for not only jurisdiction, but also more uniform guidelines for recognizing and enforcing judgments.³⁵

When a properly authenticated foreign judgment is valid on its face, "U.S. courts generally presume the necessary prerequisites are met unless challenged by the defendant."³⁶ Absent major violations of due process, policy or justice, U.S. courts have traditionally been quite liberal in

²⁸ See Commissioners Prefatory Note to the Uniform Recognition Act, 9B Uniform Law Ann. 64 (1966).

²⁹ Uniform Foreign Money Judgment Recognition Act § 4(b), 13 U.L.A. 264 (1986) [hereinafter UFMJRA].

³⁰ Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4473 (2d ed. 2006).

³¹ Ga. Code Ann. §9-12-114 (1993); Idaho Code Ann. §10-1404 (1990); Mass. Gen. Laws ch. 235 §23A (1985); Tex. Civ. Prac. & Rem. Code Ann. §36.005 (1986).

³² Colo. Rev. Stat. Ann. § 13-62-102(1) (1997).

³³ U.S. Constitution. art. IV, §1.

³⁴ *Tonga Air Services, Ltd. v. Fowler*, 826 P.2d 204, 208, 118 Wash.2d 718, 726.

³⁵ Lowenfeld & Silberman, *supra* note 4.

³⁶ GEORGE B. MURR, ENFORCING AND RESISTING JUDGMENTS, IN, INTERNATIONAL LITIGATION: DEFENDING AND SUING FOREIGN PARTIES IN U.S. FEDERAL COURTS 345 (David J. Levy ed. 2003).

recognizing and enforcing inbound judgments.³⁷ Professors von Mehren and Trautman have even suggested that domestic courts should not refer automatically to either foreign or domestic rules, but instead begin from the assumption that “American law probably accords broader conclusive effects to domestic judgments than does any other legal system.”³⁸ A reflection of this liberal enforcement is the fact that U.S. courts will probably enforce judgments based on causes of action that do not exist in the United States. As Judge Cardozo observed, “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”³⁹ For example, U.S. courts have enforced foreign judgments awarding attorney’s fees or damages for loss of business goodwill despite the fact that US law generally does not allow for these types of recoveries.⁴⁰

Generally, a foreign state claims and exercises the right to examine judgments for four causes: (1) to determine if the court had jurisdiction; (2) to determine whether the defendant was properly served; (3) to determine if the proceedings were vitiated by fraud; and (4) to establish that the judgment is not contrary to the public policy of the country.⁴¹ Some countries, including the Nordic countries, the Netherlands, and Saudi Arabia may refuse to

³⁷ *International Nutrition Co., v. Horphag Research Ltd*, 257 F.3d 1324 (Fed. Cir. 2001) (enforcing a French judgment regarding patent ownership based on comity and found there to be no public policy violation in the French Court’s determination); *Pariente v. Scott Meredith Literary Agency, Inc.*, 771 F. Supp. 609 (S.D. N.Y. 1991) (enforcing French judgment rendered according to a local custom requiring literary agents to verify that their clients indeed own the literary rights that they are purporting to sell); *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 293 F. Supp. 892 (S.D. N.Y. 1968) (awarding *res judicata* effect to a decision of the West German Supreme Court with respect to the question of whether the plaintiff was the successor in interest to a foundation that was the owner of certain U.S. trademarks); *Lenchyshn v. Pelko Elec., Inc.*, 723 N.Y.S.2d 285 (2001) (recognizing money judgement rendered in Canada resulting from royalties dispute, even though the court had no personal jurisdiction over the defendants).

³⁸ Wright, Miller & Cooper, *supra* note 30, at § 4473.

³⁹ *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111, 120 N.E. 198 (1918).

⁴⁰ Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis*, 18 LOY. L.A. INT’L & COMP. L.J. 795, 800 (1996) (citing *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 8 (3d Cir.1971)).

⁴¹ U.S. Department of State, Judicial Assistance, http://travel.state.gov/law/info/judicial/judicial_691.html (last visited Oct. 8, 2006).

recognize a foreign judgment absent the existence of a judgment convention between the rendering and recognizing countries.⁴²

A treaty is important because the United States is involved in a great deal of trans-border litigation, making the continued use of common law's varied approach extremely inefficient and unpredictable. This situation has been simplified by the gradual adoption of the UFMJRA, but at the same time complicated because it has not been uniformly adopted. The United States must continue to work to replace this federalized approach with an international view aligned with our economic partners.

B. Examples of Grounds for Non-Recognition

1. Jurisdiction

Lack of jurisdiction is the most common ground for non-recognition of U.S. judgments. For example, in England and Wales, it is not sufficient that U.S. courts assert jurisdiction based on U.S. law when enforcing judgments. Instead, jurisdiction must be according to English rules of conflicts of laws.⁴³ Other countries such as Switzerland, South Africa, France, Italy, Spain and Mexico take a narrow view when considering whether a U.S. court had jurisdiction over a defendant.⁴⁴ South Africa will refuse to recognize a judgment if it is not in accord with South African rules, meaning that long arm style assertions of jurisdiction, among others, are systematically denied.⁴⁵

On the other hand, Mexico and Spain are more likely to allow U.S. assertion of jurisdiction as long as it is similar to the rules of the enforcing country.⁴⁶ Canada takes a more expansive approach as reflected in the recent case *Morguard Investments v. DeSavoye*.⁴⁷ A Canadian court will look at factors very similar to those upon which jurisdiction is based in the United States.⁴⁸

Under the proposed Hague convention, the universal basis of adjudicatory jurisdiction will be the domicile, habitual residence, or principal

⁴² Lectric Law Library, Recognizing and Enforcing Foreign Money Judgments, <http://www.lectlaw.com//files/bul12.htm> (last visited Oct. 8, 2006).

⁴³ Committee on Foreign and Comparative Law, Association of the Bar of the City of New York, Survey on Foreign Recognition of U.S. Money Judgments 5 (2001)[hereinafter NY Bar Survey].

⁴⁴ *Id.* at 6-7.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 7.

⁴⁷ [1990] 3 S.C.R. 1077.

⁴⁸ *See id.*

place of business of the defendant.⁴⁹ Other basis of jurisdiction may include probable place of injury in a tort action, place of performance of a contract, and the domicile of the insured in an action based on an insurance contract.⁵⁰

2. Public Policy

At some level, public policy is the underlying basis for all grounds under which foreign judgments are denied recognition even though courts regularly use the term in connection with lack of jurisdiction, inadequate notice, and fraud.⁵¹ The public policy test can be generally stated as, "whether the foreign judgment proceeding was conducted in a manner, or was based on a cause of action so contrary to the laws of the recognizing forum that recognition or enforcement of the judgment would be seriously offensive to the state's notions of fairness or policy."⁵² The problem is that there is a fundamental political and cultural disharmony between the U.S. legal system and others around the world, creating an impediment to U.S. judgment recognition abroad.⁵³ Many foreign jurisdictions are often apprehensive of several areas of U.S. law. Although a detailed discussion of the many reasons⁵⁴ that that are used in refusing to enforce U.S. judgments is beyond the scope of this paper, the four principal public policy grounds for refusal include: (1) judgments awarding multiple or punitive damages; (2) judgments deemed to have the effect of unacceptable restraining trade; (3) judgments based on decisions grounded in novel causes of action; (4) judgments deemed to be based on U.S. public law or having criminal or quasi-criminal nature.⁵⁵

IV. FEDERAL PREEMPTION

Including foreign judgments in the realm of federal legislation would have many benefits and would avoid many of the problems presented by state laws. The Supreme Court has never ruled on the question of whether federal or state law governs the recognition of foreign judgments. State courts are often unprepared to render a decision on the enforcement of an inbound

⁴⁹ Lowenfeld & Silberman, *supra* note 4, at 2.

⁵⁰ *Id.*

⁵¹ von Mehren & Patterson, *supra* note 9, at 39.

⁵² *Id.*

⁵³ NY Bar Survey, *supra* note 43, at 4.

⁵⁴ Other Grounds for Non-Recognition include: Inadequate notice, lack of opportunity to defend, lack of finality, no review of the merits, reciprocity, choice of law, expiration of time limits, conflict with other proceedings, no proof of judgment and fraud make up the remainder of the areas under which an inbound judgment may be refused recognition by the enforcing court.

⁵⁵ *Id.*

judgment either because there is no common law to provide precedent or because the state legislature has not completely developed its substantive and procedural guidelines.⁵⁶ The consensus among state courts and lower federal courts is that recognition is governed by state law and federal courts will apply the law of the state in which they sit.⁵⁷ However, federal law would likely be applied to prevent the application of a state law rule if such application would result in the disruption or embarrassment of the foreign relations of the United States.⁵⁸ Since the U.S. Constitution vests the conduct of foreign affairs in the Federal Government⁵⁹, it would not be extraordinary if the Supreme Court found that the recognition of foreign judgments so directly affects U.S. foreign relations that it needed to be governed by a uniform body of federal law rather than by the potentially conflicting laws of various states.⁶⁰

In 1968, the Supreme Court decision in *Zscherning v. Miller* held that certain state laws were invalid to the extent that they caused states to make value judgments into the administration of foreign laws. The Court decided that state inquiries into the inheritance rights of aliens which were not reciprocated to U.S. citizens intruded on the federal domain of international and diplomatic relations.⁶¹ This analysis could possibly be applied to a State's refusal to enforce an inbound judgment since non-recognition could involve similar interference.

V. SOURCES OF CONFUSION IN THE CURRENT SYSTEM

Along with the UFMJRA, the *Restatement (Third) of Foreign Relations* is a widely recognized authority providing another element to be considered by a foreign court. The *Restatement* looks to principles developed by interstate judgment recognition cases and indicates that basic American laws regarding recognition and enforcement of foreign judgments are entitled to recognition in courts in the United States.⁶² Comment (c) to §481 suggests that the same general rules regarding recognition apply to foreign judgments as they do between sister states.⁶³ Also, if the rendering court lacks jurisdiction over the defendant or the proceeding was not conducted in a

⁵⁶ VON MEHREN & PATTERSON, *supra* note 9, at 17.

⁵⁷ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁵⁸ ABA SECTION OF INTERNATIONAL LAW AND PRACTICE, ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 6-7, n.28(Ronald A. Brand, ed. 1992) [hereinafter ENFORCING FOREIGN JUDGMENTS].

⁵⁹ *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942).

⁶⁰ VON MEHREN & PATTERSON, *supra* note 9, at 17.

⁶¹ *Zscherning v. Miller*, 389 U.S. 429 (1968).

⁶² FOREIGN RELATIONS RESTATEMENT, *supra* note 8, at § 481(1).

⁶³ *Id.* at §481 cmt (c).

manner consisted with due process, the U.S. court cannot enforce the inbound judgment.⁶⁴ A major difference between the *Restatement* approach and the UFMJRA's approach is that the UFMJRA treats subject matter jurisdiction as mandatory grounds for non-recognition the *Restatement* leaves it to the court's discretion.⁶⁵ Other discretionary grounds for non-recognition include: (1) due to inadequate notice of proceedings, the defendant did not have enough time to properly defend himself ; (2) the judgment is a result of fraud; (3) the judgment is contrary to the enforcement of a state's public policy; (4) the judgment conflicts with another final and conclusive judgment; (5) the foreign forum conducted a proceeding contrary to an arbitration agreement; (6) if jurisdiction is based on personal service and the forum is seriously inconvenient.⁶⁶

If the enforcing state has not adopted a version of the UFMJRA or *Restatement*, the state will look to prior decisions providing applicable common law rules. If the issue is of first impression, the state will examine federal court decisions. Even though inbound judgments are currently recognized under state law, due to the nature of the parties in the proceedings, many inbound enforcement cases tend to be in federal court due to diversity jurisdiction. Federal courts must then determine what the state courts would have decided if faced with the same issues.⁶⁷ For example, in *South Carolina National Bank v. Westpac Banking Corporation*,⁶⁸ the court recognized an Australian judgment on the assumption that South Carolina would have adopted principles of comity. Although it was a matter of first impression in South Carolina, the opinion indicated that it gave some credence to the fact that,

The only South Carolina authority on the enforceability of foreign judgments of which this court is aware is the S.C. Attorney General's opinion that 'the courts of this state would accept the judgment of a Court of Denmark as conclusive upon the merits of the case tried in such a court.'⁶⁹

Similarly, when deciding whether to allow enforcement of an judgment, foreign courts often look to the United States to determine if our

⁶⁴ *Id.* at § 482(1).

⁶⁵ See UFMJRA, *supra* note 29, at §4; FOREIGN RELATIONS RESTATEMENT, *supra* note 8, at §§481-82.

⁶⁶ *Id.*

⁶⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁶⁸ *South Carolina Nat'l Bank v. Westpac Banking Corp.*, 678 F.Supp. 596 (D. S.C., 1987).

⁶⁹ *Id.* at 597, n. 2.

courts would enforce a similar judgment going in the opposite direction.⁷⁰ Given the confusion that our own Federal Courts have in applying law under the *Erie* doctrine, foreign courts should not be expected to clearly understand the differences between a federal court applying federal law and federal court applying state law. Foreign courts often encounter considerable difficulty in determining what law the non-forum court would have applied, especially considering differences in the legal systems, languages and cultures.⁷¹ If and when a foreign court is able to decide which state's law to apply, it then must look to decide whether the issue can be determined by statute or case law, another conceptually difficult task, especially for civil law courts.⁷² If there is no direct state law or precedent on the matter, foreign courts must then consider whether applicable law may be found in prior federal court decisions or inferred from the law of sister states.⁷³

Considering this maze of complexity that coincides with the fundamentally different system of law in America, it is no wonder that U.S. outbound judgments go under-enforced. Comity and international relations notwithstanding, the sheer volume of U.S. dollars exchanged outside our border suggests that it is generally in the best interest of the United States to enforce the judgments of foreign courts in order that such enforcement be reciprocated. The fact that this enforcement may not reliably or predictably fall neatly under state law means that a multilateral treaty or series of bilateral agreements are essential in a global economy.⁷⁴

VI. TREATY NEGOTIATIONS

Judgments and jurisdiction are governed by a combination of international, regional and domestic laws often resulting in complex and irregular rules increasing the cost of transnational commercial activity.⁷⁵ International cooperation by means of a judgment treaty is important to encourage the free-flow of business between borders. Examples of this

⁷⁰ Danford, *supra* note 20 at 384.

⁷¹ ENFORCING FOREIGN JUDGMENTS, *supra* note 58, at 24.

⁷² *Id.*

⁷³ *Id.* (citing *Somportex v. Pennsylvania Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971)).

⁷⁴ Rosen, *supra* note 1, at 794.

⁷⁵ Minehan, *supra* note 40.

cooperation include The Hague Evidence Convention⁷⁶ and The Hague Service of Process Convention.⁷⁷

As Judge Wilkey in *Tahan v. Hodgson* wrote:

As commerce becomes increasingly international in character, it is essential [to] recognize and respect the laws of [other] nations. Foreign tribunals cannot have one set of laws for their own citizens and another, more favorable set for the citizens of other countries. It is also essential that American courts recognize and respect the judgments entered into by foreign courts to the greatest extent consistent with our own ideals of justice and fair play. Unfettered trade, good will among nations, and a vigorous and stable international and national economy demand no less.⁷⁸

If the United States were to enter a multilateral treaty recognizing and encouraging the free flow of judgments, many specific and general sovereignty interests must be accommodated. If negotiations in these key areas continue to fail, the treaty will suffer the same fate since other countries have far less to gain from a treaty than the United States.

Current negotiations fail at many different levels. The general interests being negotiated include those of: the litigating parties, the issuing country, the recognizing country and the international system as a whole. An issuing country generally has two main interests in the enforcement of its judgment. The first reflects the policy concern underlying the act of state doctrine; that the official acts of a foreign government are respected by other governments.⁷⁹ The comity analysis in *Hilton v. Guyot* recognized that refusing to respect another state's judgment violated the interest of that country.⁸⁰ The issuing country also has an interest in seeing that other countries do not interfere with its domestic policies.⁸¹ Likewise, the enforcing country's interests revolve around aspects of its own foreign and domestic policies. A treaty would have the difficult task of navigating the different

⁷⁶ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163

⁷⁷ Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231.

⁷⁸ *Tahan v. Hodgson*, 662 F.2d 862, 868 (C.A. D.C. 1981).

⁷⁹ Rosen, *supra* note 1 at 795.

⁸⁰ *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1985).

⁸¹ Rosen, *supra* note 1, at 839.

interests in a manner consistent with the basic legal doctrine engrained in the signing countries.

A. Areas of Contention

Despite attempts, the United States has been unsuccessful in forming judgment recognition partnerships within the international community. Several doctrines and practices make the United States a potentially inconvenient partner to a convention from the perspective of the rest of the world. For example, the United States has a starkly different judicial system than most of the world and its economic reach may make some countries hesitant to enter a binding convention. The failure of the Hague Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters is but one example of the types of conflicts that impede agreement. Originally proposed by the United States in 1992, it was a major attempt to establish international rules for enforcement of foreign judgments.⁸² In 1999, the first draft was presented to the participating fifty-two countries and overwhelmingly rejected by European and U.S. business communities.⁸³ Subsequent revisions and the implementation of optional language on contentious points have still not found agreement between the signatories.⁸⁴

Undoubtedly, a major negotiating point for this convention involves jurisdiction and the other particular areas of contention are not surreptitious. Mathew H. Adler has synthesized a number of important requirements ranging from, among other sources, the Hilton decision; the existing Hague Judgments Convention; and UFMJRA. These requirements include: (1) Finality and binding nature of the judgment; (2). Subject matter jurisdiction in the rendering court; (3) Jurisdiction over the parties or the res; (4) Timely and proper notice of the proceedings; (5) Opportunity to present a defense; (6) Unbiased rendering court; and (7) The rendering court's proceedings must have been "regular" and conducted according to a system of civilized jurisprudence.⁸⁵

To accede to a judgments convention, the United States will likely have to give up parts of its minimum-contacts and tag bases of jurisdiction,

⁸² Compass Rose International Publications, Overview of Hague Convention on Jurisdiction and Choice of Law, *available at* http://www.compassroseintl.com/pubs/Hague_Convention_Overview.htm. [hereinafter Overview].

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Matthew H. Adler, If We Build It, Will They Come? The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments, 26 LAW & POL'Y INT'L BUS. 79, 97-98 (1994).

certain aspects of forum non conveniens, and it may also be asked to adopt the doctrine of lis pendens (notice of pending action) with respect to litigation involving citizens of Member States.⁸⁶

B. Existing Examples

Many countries have formed agreements allowing judgments between foreign countries to pass back and forth with little or no friction. These conventions have enabled signatories to increase trade and economic relations while keeping related costs and prices low. Examples of regional conventions include the Brussels and Lugano Conventions (which the current U.S. attempts are modeled on to a large extent). The Lugano Convention basically incorporates all of the key provisions of the Brussels Convention⁸⁷ regarding jurisdiction, recognition, and enforcement of judgments and replaces nearly two dozen previous bilateral and multilateral treaties and conventions regarding jurisdiction and judgments.⁸⁸

1. NAFTA

Although the North Atlantic Free Trade Agreement (NAFTA) may provide some general guidelines for reaching a multilateral treaty and dispute resolution, it does not include a provision to enforce court judgments. This could reflect an implicit understanding that laws pertaining to judgment enforcement are so fundamentally different, even within North America, that the decision was left to the respective countries.

⁸⁶ Danford, *supra* note 20, at 414.

⁸⁷ Under the Brussels Regulation, *supra* note 6, a judgment rendered in a signing state "shall be recognized in the other signing states without any special procedure being required. Non-recognition is mandated if:

- (1) recognition would be contrary to public policy of the forum state,
- (2) the judgment was rendered by default and the defendant was not timely served with a written notice from the institution of the proceedings,
- (3) there is a prior inconsistent judgment between the parties,
- (4) the judgment concerns status capacity, economic consequences of marriage, wills, or succession and was reached by applying law that the forum would not have applied, and,
- (5) irreconcilable with a prior judgment of a non-contracting state recognized in the forum state,
- (6) violates another non-recognition agreement,
- (7) was rendered by a court exercising exorbitant jurisdiction, or otherwise in violation of the core jurisdictional provisions (Art. 3-5) of the Convention.

⁸⁸ Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, at art. 55 (Lugano Convention).

For example, in the event of an inbound Mexican judgment or an outbound U.S. judgment against a Mexican entity, there is a good chance the debtor would not have to pay unless the judgment's creditor was willing to spend a large amount of money and endure lengthy battles in court.⁸⁹ This inefficiency means that it is economically sensible to pursue only large amounts across borders. Since a quick and easy method of enforcing judgments does not exist for U.S. entities, it is likely best to circumvent cross border judgment enforcement issues through arbitration or requiring security bonds, letters of credit, and cash in escrow or some other method to ensure collection.⁹⁰

2. The New York Convention

Arbitration proceedings are far less complicated than legal proceedings on account of the predetermination of the arbitral jurisdiction. Accordingly, arbitrating entities have not seen the same reluctance to enter into a governing treaty. Over 120 countries have entered into the United Nations Convention on the Recognition and Enforcement of Arbitral Awards (The New York Convention).⁹¹ Were the US to adopt a treaty on the Recognition and Enforcement of Foreign Judgments, The New York and Panama Conventions might help to navigate potential hurdles. In arbitration, parties voluntarily submit to the will of an arbiter so that fewer jurisdictional and due process questions arise in the course of a proceeding. With the proper mechanisms in place, a judgment enforcement treaty could provide similar benefits and succeed in the same manner.

Certain parallels exist between a court compelling parties to submit to arbitration and a court enforcing an inbound judgment from a foreign court. U.S. courts typically employ a four-part test to determine when to compel arbitration under the New York Convention:

1. Is there an agreement in writing to arbitrate the subject matter of the dispute?
2. Does the agreement provide for arbitration in the territory of a signatory to the Convention?
3. Does the agreement arise out of a legal relationship, whether contractual or not, that is considered commercial?

⁸⁹ DAVID W. KASH, ENFORCEMENT OF JUDGMENTS ACROSS BORDERS WITH MEXICO (1995) available at <http://www.natlaw.com/pubs/spmxgal.htm>.

⁹⁰ *Id.*

⁹¹ John P. Bowman, Compelling Arbitration in International Case, in *International Litigation: Defending and Suing Foreign Parties in U.S. Federal Courts* 176, 189 (David J. Levy ed. 2003).

4. Is a party to the agreement not an American Citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?⁹²

This test effectively represents a summation of established common law requirements for recognition, but codification makes arbitration more desirable because the resulting decisions are more easily enforceable between signatories.⁹³ The New York Convention requires that "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon..."⁹⁴ Article IV explains that the party makes a *prima facie* case for enforcement if they produce the original arbitration agreement and award.⁹⁵

3. Other Examples

In 1976, the United States and United Kingdom attempted a "Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters" but the negotiations over the final text failed in 1981.⁹⁶ This failure resulted from U.K. hesitation regarding the enforcement of high damage awards, as in product liability cases.⁹⁷ In general, however, US judgment creditors experience little apparent difficulty in enforcing judgments in England. For example in 1983, a U.S. \$10 million judgment was enforced by an English Court in *Israel Discount Bank v. Hadjipateras*.⁹⁸

The U.S. also entered into negotiations for the "Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards," in 1979⁹⁹ but no state signed the treaty nor is expected to.¹⁰⁰

⁹² *Id.* at 189(citing *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273 (5th Cir. 2002)).

⁹³ Enforcing Foreign Judgments, *supra* note 58, at 3 n.12, 6-7 n.28.

⁹⁴ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1952, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, at art. III [hereinafter New York Convention].

⁹⁵ *Id.* at art. IV.

⁹⁶ Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, U.S.- U.K., Oct. 26, 1976, 16 I.L.M. 71 (not in force).

⁹⁷ Symposium, *supra* note 2.

⁹⁸ NY Bar Survey, *supra* note 43, at 4.

⁹⁹ Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, 18 I.L.M. 1224 (among member states of the Organization of American States)

¹⁰⁰ The following States are Parties to the Convention: Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela.

As has been shown, the United States has an interest in courts consistently enforcing American judgments since the U.S. domestic courts rarely interfere with judgments against Americans in foreign courts. Accordingly, U.S. negotiators must be flexible or concede some peripheral issues that are met with stark resistance by other countries. European negotiators continue to insist on the inclusion of some mechanism to govern the choice of legal forum in civil litigation.¹⁰¹ Such jurisdictional concerns stem from their interest in making the international system more accessible to, and protective of individual consumers.¹⁰²

At least some correlation exists between the need for such a treaty and some major areas of resistance resulting from advancing technology and the confusion as to how these new elements can be brought within the folds of an international agreement. For example, "e-commerce" has transcended the boundaries of traditional jurisdiction and fault in terms of geographic connection to the harm.¹⁰³ Europe wants jurisdiction and choice of law based on the location of the consumer whereas the United States wants jurisdiction based on the laws under which the transmitting company has been incorporated.¹⁰⁴ Another area of contention is whether or not an ISP (internet service provider) should be liable for transmitted information not under their control. The United States would seek ISP exemption in this case whereas Europe would hold them responsible as regulators.¹⁰⁵

If recent trends in the negotiations continue, narrowing the proposed treaty's scope may be the easiest means of getting the dialogue back on track. For example, new frontiers involving electronic communication may have to be omitted until internet growth slows and the various individual policies and governing law of each nation can be examined and successfully incorporated.

VI. THE PUBLIC POLICY EXCEPTION

Public policy is a unilateralist doctrine in that it only considers the enforcing country's interest and neglects to consider the interests of the enforcing country.¹⁰⁶ Generally, the domestic laws of a recognizing country require proper notice, proper jurisdiction, final and binding judgment, and no violation of public policy. The first three requirements are fairly standard, but the public policy exception is far more broad and subjective. As one commentator observed, "There are as many definitions of public policy as

¹⁰¹ Overview, *supra* note 82.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Rosen, *supra* note 1, at 842.

there are political wills and political choices.”¹⁰⁷ Foreign courts are often unable to discern a coherent “U.S. policy” on recognition and enforcement because it comes from not only the fifty different states, but also federal interpretations of those state opinions. The public policy exception is not well defined, and while usually construed very narrowly by U.S. courts, outbound judgments often do not get the same consideration. Under the standard of *Somportex Ltd. v. Phila. Chewing Gum Corp.*, U.S. courts may refuse recognition of a foreign judgment on public policy grounds only if the recognition “injure[s] the public health, the public morals, the public confidence in the purity of the administration of law, or ..., undermines the sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel.”¹⁰⁸

This creates a potentially broad exception, theoretically allowing any foreign judgment to be refused if the rendering system was not completely in sync with the United States. Therefore, courts tend to narrowly construe the exception and only permit its use in rare circumstances.¹⁰⁹ In a Second Circuit case, *Ackerman v. Levine*, the U.S. Court of Appeals stated that, “the narrowness of the public policy exception to enforcement would seem to reflect an axiom fundamental to the goals of comity and res judicata that underlie the doctrine of recognition and enforcement of foreign judgments.”¹¹⁰ The court then enforced the inbound German judgment on the grounds that “mere variance with local public policy is not sufficient to decline enforcement.”¹¹¹ There is also great potential for abuse as recognized by the UFMJRA § 4 comment, “as indicated in [*Hilton v. Guyot*] a mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.”¹¹² To justify its refusal to enforce a foreign judgment, a U.S. court must find that the judgment not only affirmatively acts on matters as to which local law is silent, but also contravenes a crucial stated public policy affecting a fundamental interest of the forum.¹¹³

It is unclear how judgments with multiple or punitive damages would be treated by a convention, but it is likely that ‘excessive’ damage awards will

¹⁰⁷ Symposium, *supra* note 2.

¹⁰⁸ Minehan, *supra* note 40, at 799 n.21 (citing *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971)(quoting *Goodyear v. Brown*, 26 A. 665, 666 (Pa. 1893)).

¹⁰⁹ Minehan, *supra* note 40, at 799, n.20.

¹¹⁰ *Ackerman v. Levine*, 788 F.2d 830, 842 (2d Cir. 1986).

¹¹¹ *Id.*

¹¹² UFMJRA, *supra* note 29, at §4.

¹¹³ *Compania Mexicana Rediodifusora Franteriza v. Spann*, 41 F.Supp 907, 908-09 (N.D. Tex. 1941), *aff’d* 131 F.2d 609 (5th Cir. 1942).

have to be curbed in some manner¹¹⁴ according to a public policy exception. The United States should recognize that it has the most to gain since it already enforces most inbound judgments without a treaty. The public policy exception may be the key since it acts as a safety valve for countries engaging with the United States and provides a psychological incentive by countering the fears of hesitant countries.¹¹⁵

VII. CONCLUSION

A majority of the U.S. outbound judgments are enforced because the typical foreign defendants in U.S. courts are large multinational organizations with domestic assets for parties to satisfy judgments.¹¹⁶ When there is a claim involving a smaller foreign corporation it might be easier to just enter the foreign jurisdiction to litigate the claim since there is a far greater likelihood of encountering a problem enforcing the U.S. court's judgment abroad.¹¹⁷ Signing and implementing a treaty does not appear to be of any great urgency for the United States or its trading partners but it should be for many reasons. Not only would a treaty assist the continued involvement of the United States in the world market, certain concessions would also demonstrate the U.S. desire to harmonize the international legal world to eliminate uncertainties. As mentioned above, there are many obstacles to be traversed of which jurisdiction seems to be a key area of contention. Although counter to its own historical legal practices, the United States should consider abandoning its minimum contact test when involved in international cases. Professor Weintraub notes that the U.S. agreement to "black list" general jurisdiction based only on conducting business in the forum state (as opposed to being incorporated there) would prevent U.S. plaintiffs from filing suit in only a few particular types of cases, and he believes that this type of jurisdiction is well worth giving up if a judgments convention can be won in exchange.¹¹⁸

To date, the problem of enforcing U.S. judgments "has not been considered serious enough to warrant widespread attention from U.S. legislators and policymakers."¹¹⁹ The masses of aggrieved judgment creditors have not yet started testifying before Congress, and there has been no

¹¹⁴ Lowenfeld & Silberman, *supra* note 4.

¹¹⁵ Minehan, *supra* note 40.

¹¹⁶ Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 116 (1998).

¹¹⁷ *Id.*

¹¹⁸ Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 188-189 (1998).

¹¹⁹ Danford, *supra* note 20, at 432.

significant media coverage of the matter.¹²⁰ However, we should keep in mind that U.S. economic power in the new global economy will continue only as long as we are able to co-exist with the rest of the world. Establishing an agreement in which the United States is able to have a voice in the outcome is crucial to American interests and it should not wait until treaty entrance is necessary. If this happened, the United States would certainly have to forgo and concede more important “American style” legal practices than it would if such an agreement was forged sooner rather than later.

¹²⁰ *Id.*

