

## Articles

# The Continuing Evolution of U.S. Judgments Recognition Law

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*The substantive law of judgments recognition in the United States has evolved from federal common law, found in a seminal Supreme Court opinion, to primary reliance on state law in both state and federal courts. While state law often is found in a local version of a uniform act, this has not brought about true uniformity, and significant discrepancies exist among the states. These discrepancies in judgments recognition law, combined with a common policy on the circulation of internal judgments under the United States Constitution's Full Faith and Credit Clause, have created opportunities for forum shopping and litigation strategies that result in both inequity of result and inefficiency of judicial process. These inefficiencies are fueled by differences regarding (1) substantive rules regarding the recognition of judgments, (2) requirements for personal and quasi in rem jurisdiction when a judgment recognition action is brought (recognition jurisdiction), and (3) the application of the doctrine of forum non conveniens in judgments (and arbitral award) recognition cases. Recent cases demonstrate the need for a return to a single, federal legal framework for the recognition and enforcement of foreign judgments. This Article reviews the history of U.S. judgments recognition law, summarizes cur-*

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*rent substantive law on the recognition and enforcement of foreign judgments, reviews recent decisions that demonstrate the three specific problem areas, and proposes a coordinated approach using federal substantive law on judgments recognition and state law on related matters in order to eliminate the current problems of non-uniformity and inefficient use of the courts.*

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INTRODUCTION

The recognition and enforcement of foreign judgments in U.S. courts has, over the course of the past 120 years, moved from being a matter of general federal common law to one governed largely by state law. While there has been general uniformity in the basic rules states apply to the recognition of foreign judgments, recent cases demonstrate significant discrepancies from state to state. These discrepancies in judgments recognition law, combined with a common policy on the circulation of internal judgments under the United States Constitution’s Full Faith and Credit Clause, have created opportunities for forum shopping and litigation strategies that result in both inequity of result and unnecessary inefficiency of judicial process.

When a foreign judgment is brought to the United States for recognition and enforcement, a number of questions affect the litigation strategy of the judgment creditor. Because recognition and enforcement have become matters governed by state law, these questions must be filtered through multiple legal systems. This requires attention to the way in which combinations of differing rules affect both the ability to achieve recognition of the foreign judgment and

the ability to use that recognition to collect through enforcement of the judgment. A combination of issues increases the forum shopping incentives. These issues include (1) a lack of uniformity of substantive state law on the recognition and enforcement of foreign judgments, (2) differences among the states regarding whether personal jurisdiction is required over the judgment debtor in a recognition action (recognition jurisdiction), and (3) potential differences among the states on the application of the doctrine of *forum non conveniens*. These issues often cut across the law of both judgments recognition and the recognition of arbitral awards, making consideration of the law of recognition and enforcement of arbitral awards instructive as well.

Recent cases demonstrate the need for a return to a single legal framework for the recognition and enforcement of foreign judgments. Such a framework will not be achieved through the federal common law process by which it originated, or through the patchwork of state common law and statutes by which the federal approach has been substantially replaced. Thus, a cohesive framework will be achieved only through federal legislation and treaties.

Unfortunately, this area of law has not escaped the vagaries of the current political climate, and the development of coherent federal law on the recognition and enforcement of foreign judgments is likely to be a difficult process. The problems created by the existing system demonstrate the need to put political concerns aside and move to a system that prevents the inefficiencies and inequities resulting from party manipulation under the current system. Moreover, it is possible to balance important state and federal interests in that process, providing room for a framework of coordinated federalism that respects the legitimate interests of both.

In Part I of this Article, I provide a brief history of the development of the law on the recognition and enforcement of foreign judgments in U.S. courts, including recent efforts to develop the law on state, federal, and international levels. In Part II, I summarize current substantive law on the recognition and enforcement of foreign judgments. In Part III, I review several recent cases which demonstrate the problems of non-uniform approaches to the law on (1) substantive rules regarding the recognition of judgments, (2) recognition jurisdiction, and (3) *forum non conveniens* in judgments (and arbitral award) recognition cases. In Part IV, I propose a combination of measures I believe will promote uniformity through federal law on basic judgments recognition issues, while respecting the necessary role of state law governing both the formation of agreements on choice of court and the enforcement of judgments.

## I. A BRIEF HISTORY OF U.S. LAW ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

There are two types of “foreign” judgments in the United States. The first is a judgment originating in another U.S. state. Prior to the drafting of the United States Constitution in 1787, each state was considered sovereign, with its own judicial system. The Full Faith and Credit Clause in Article IV of the Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>1</sup> The Supreme Court has stated that “[t]he concept of full faith and credit is central to our system of jurisprudence,”<sup>2</sup> and “the judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.”<sup>3</sup>

The Full Faith and Credit Clause, and the accompanying federal statute which helps implement it,<sup>4</sup> have been interpreted to preclude any inquiry into the merits of the case, the reasoning behind the decision, or the validity of the legal principles applied in the judgment.<sup>5</sup> While a recognizing court may review the jurisdiction of the originating court, it must give preclusive effect to a sister-state judgment even on that matter if it was ruled upon by the originating court.<sup>6</sup> This preclusive effect applies throughout the U.S. legal system, without distinction as to whether a judgment was rendered in, or recognition and enforcement is sought in, a state or federal court.<sup>7</sup>

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1. U.S. CONST. art. IV, § 1.

2. *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 703 (1982).

3. *Id.* at 704 (quoting *Hampton v. McConnel*, 16 U.S. (3 Wheat.) 234, 235 (1818)).

4. 28 U.S.C. § 1738 (2012) (“The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”).

5. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 14.15 (5th ed. 2015).

6. *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 166 (1932).

7. *See* 28 U.S.C. § 1738 (2012); Stephen B. Burbank, *Interjurisdictional Preclusion*,

The second type of “foreign” judgment is the focus of this Article. Judgments from outside the United States are not covered by the Full Faith and Credit Clause. Nonetheless, there is a common root to just about all discussions of the recognition and enforcement of non-U.S. judgments. Nearly every discussion of the recognition of foreign judgments—whether judicial, legislative, or academic—begins with reference to Justice Gray’s 1895 opinion in *Hilton v. Guyot*.<sup>8</sup> While the decision in *Hilton* denied recognition of a French judgment in favor of a French plaintiff and against a U.S. defendant on the basis of a lack of reciprocity,<sup>9</sup> the case is the foundation for a system that is very receptive to the recognition and enforcement of foreign judgments.

The *Hilton* legacy is the application of the doctrine of comity to the recognition of foreign judgments—showing respect for, and giving effect to, the decisions of foreign courts.<sup>10</sup> Justice Gray determined that cases brought either against a national of the state of the court of origin, or by the party against whom the judgment was rendered, presented easy decisions to recognize the result.<sup>11</sup> On the other hand, cases like that in *Hilton*, brought by the home plaintiff (French in *Hilton*) against a foreign defendant (American in *Hilton*) required more detailed analysis.<sup>12</sup> In every case, however, it was important to discern that the court of origin was “a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice,” and that there was no “fraud in procuring the judgment.”<sup>13</sup> If those safeguards are met, “the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.”<sup>14</sup>

Less frequently discussed is the source of the rule Justice

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*Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986).

8. 159 U.S. 113 (1895).

9. *Id.* at 209–28.

10. *Id.* at 163–64 (“‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of 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 both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”).

11. *Id.* at 167–68.

12. *Id.* at 170–71.

13. *Id.* at 202.

14. *Id.* at 203

Gray laid out in *Hilton*. His opinion relies heavily on Story's *Commentaries on the Conflict of Laws*, focusing more on Story's principles of applicable law than his chapter on foreign judgments.<sup>15</sup> Thus, Justice Gray cites to cases from U.S. and English courts for the propositions that:

- 1) "[a] judgment *in rem*, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere";<sup>16</sup>
- 2) "[a] judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law";<sup>17</sup>
- 3) "a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached";<sup>18</sup>
- 4) "[a] judgment [in personam] between two citizens or residents of the country, and thereby subject to the jurisdiction, in which it is rendered, may be held conclusive as between them everywhere";<sup>19</sup>
- 5) "if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either";<sup>20</sup>
- 6) "if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound";<sup>21</sup> and
- 7) "[t]he effect to which a judgment, purely executory, rendered in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country, as is the case now before us, presents a more difficult question, upon which there has been

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15. Four of the first nine paragraphs of Justice Gray's opinion end with citations to Story's treatise for discussion of principles by which one nation respects the law of another nation. *Id.* at 162–66 (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 23, 24, 28, 33–38 (3d ed. 1846)).

16. *Hilton*, 159 U.S. at 167. For this proposition, Gray principally cites early prize cases in federal courts, including the opinion of Chief Justice Marshall in *Williams v. Armroyd*, 11 U.S. (7 Cranch) 423 (1813).

17. *Hilton*, 159 U.S. at 167.

18. *Id.* at 168 (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 592a (2d ed. 1841)).

19. *Hilton*, 159 U.S. at 170.

20. *Id.*

21. *Id.*

some diversity of opinion.”<sup>22</sup>

The last item in Justice Gray’s list of propositions is the focus of his more extensive analysis. That analysis relies largely on Gray’s earlier exhortation that, in determining the applicable law for judgments recognition purposes,

[i]nternational law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.<sup>23</sup>

Thus, Justice Gray applies international law, as general common law, in deciding both that comity favors the recognition of foreign judgments,<sup>24</sup> and that an international law rule of reciprocity requires

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22. *Id.* at 170–71. Justice Gray’s list, with the exception of item (7), looked much like the English common law of that time. In *Emanuel v. Symon*, Lord Justice Buckley (relying heavily on Justice Fry’s opinion in *Rousillon v. Rousillon*, (1880) 14 Ch D 351, 371 (Fry J) (Eng.)) wrote:

In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

*Emanuel v. Symon* [1908] 1 KB 302, 309 (Lord Buckley LJ) (appeal taken from Eng.). This common law approach to the recognition of foreign judgments is largely carried forward to current U.K. law. *See, e.g.*, 1 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 673–715 (Lord Collins of Mapesbury et al. eds., 15th ed. 2012); JAMES FAWCETT & JANEEN M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 513–39 (Sir Peter North ed., 14th ed. 2008).

23. *Hilton*, 159 U.S. at 163.

24. *Id.* at 202–03 (“[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any

non-recognition of the specific French judgment in U.S. courts.<sup>25</sup>

Justice Gray's heavy reliance on the third edition of Story's *Commentaries on the Conflict of Laws*—published nearly fifty years prior to the decision in *Hilton*—is consistent with the practice of the time.<sup>26</sup> Story, in turn, relied on English cases and commentary, as well as earlier U.S. cases.<sup>27</sup> Like Justice Gray's opinion, Story's chapter on Foreign Judgments quotes heavily from Chief Justice Marshall's opinions in early prize cases, particularly *Rose v. Himely*.<sup>28</sup> Early twentieth century commentary, including Francis Wharton's *A Treatise on the Conflict of Laws*,<sup>29</sup> continued the trend of reference to both U.S. and English cases, but relied heavily on Justice Gray's opinions in *Hilton*, and in *Ritchie v. McMullen*,<sup>30</sup> which was decided the same day as *Hilton*.<sup>31</sup>

At the beginning of the twentieth century, this body of federal common law emerged, receiving its ultimate expression in the Supreme Court and clearly taking into account the general practice of nations as indicia of international law.<sup>32</sup>

The evolution of the law of recognition of judgments from federal common law to something more disjointed began with state court decisions that followed Justice Gray's comity analysis, but rejected his expression of a requirement of reciprocity with the foreign nation from which the judgment originates. This shift appears in the

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other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.”).

25. *Id.* at 209–28.

26. 1 FRANCIS WHARTON & GEORGE H. PARMELE, A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW (3d ed. 1905).

27. See *supra* notes 16–22 and accompanying text.

28. See STORY, *supra* note 15, §§ 587–90.

29. WHARTON & PARMELE, *supra* note 26.

30. 159 U.S. 235 (1895).

31. WHARTON & PARMELE, *supra* note 26, at 1393–1425.

32. “Because it is clear that there is a ‘federal common law,’ even if not a ‘federal general common law,’ it is not accurate to say that state law is to be applied in all cases except on matters governed by the Constitution or by an Act of Congress.” 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4514 (3d ed. 2016). For a discussion of the relationship between federal common law and a statute designed to replace and limit an area of federal common law, see *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981). For a discussion focused on judgments recognition law as federal common law, see Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 312–18 (discussing *jus gentium*, Federal Common Law, and “The Lost Legacy of *Swift v. Tyson*”).

leading case of *Johnston v. Compagnie Générale Transatlantique*,<sup>33</sup> decided in 1926 by the New York Court of Appeals, which acknowledged that the facts represented one of Justice Gray's easier categories of cases,<sup>34</sup> but stated that the matter was "one of private rather than public international law, of private right rather than public relations."<sup>35</sup> Thus, a determination based on comity was "not a rule of law, but . . . a rule of 'practice, convenience and expediency'" which "therefore rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment."<sup>36</sup>

The 1938 Supreme Court decision in *Erie Railroad v. Tompkins* determined that the Rules of Decision Act of 1789 requires a federal district court to apply both the statutory and common law of the state in which it is located.<sup>37</sup> While this holding does not foreclose the existence of specific areas of federal common law,<sup>38</sup> particularly in the area of foreign relations,<sup>39</sup> it did provide a foundation for state courts to develop the law of recognition and enforcement of foreign judgments as state law, building on the approach already taken by the New York Court of Appeals in the *Johnston* decision. Thus, after *Erie*, federal courts joined state courts in stating that the reciprocity element of the *Hilton* holding had "received no more than desultory acknowledgment" as a "condition precedent to the recognition of comity," and looked to state law for the principal rules of recognition and enforcement.<sup>40</sup> Nonetheless, the comity analysis of *Hilton* remains at the core of judgments recognition law in both state

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33. 152 N.E. 121 (N.Y. 1926).

34. The *Johnston* court specifically acknowledged that, in *Hilton*, Justice Gray:

[L]imits his discussion . . . to the effect which a judgment, purely executory, rendered in favor of a citizen or resident of France in a suit there brought by him against a citizen of the United States, may be entitled to in an action thereon in the United States. Here the plaintiff was the actor in the French court . . . [who] now seeks to impeach the judgment rendered against him. The principles of comity should give conclusiveness to such a judgment as a bar to the present action.

*Id.* at 123.

35. *Id.*

36. *Id.* (citations omitted).

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

38. See, e.g., *Hinderlider, State Eng'r v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (decided the same day as *Erie* and applying federal common law).

39. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (applying the act of state doctrine as a matter of federal common law).

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

and federal courts.<sup>41</sup>

The evolution from federal common law to state law rules on the recognition of judgments has not been without limits. Because federal courts apply federal law on questions of claim and issue preclusion in cases involving federal question subject matter jurisdiction,<sup>42</sup> it has been stated that they also apply a federal standard “in determining whether to recognize the judgment of a foreign nation.”<sup>43</sup>

What began as a common law approach to the development of judgments recognition law among the states after *Erie* came to include a legislative option when the National Conference of Commissioners on Uniform State Laws (“Uniform Law Commission” or “ULC”) promulgated the Uniform Foreign Money-Judgments Recognition Act in 1962 (“1962 Recognition Act”).<sup>44</sup> Under the Act, “any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal”<sup>45</sup> is then “conclusive between the parties to the extent that it grants or denies recovery of a sum of money.”<sup>46</sup> Section 4 then sets out three mandatory grounds for non-recognition and six discretionary grounds for non-recognition—which tend to follow the language of *Hilton*, discussed above.<sup>47</sup> When no mandatory basis for

41. *See id.*

42. *Hurst v. Socialist People’s Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 32 (D.D.C. 2007).

43. *Id.*; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (AM. LAW INST., rev. 1988). Section 98 of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS reflects this bow to federal common law in federal courts:

The Supreme Court of the United States has never passed upon the question whether federal or State law governs the recognition of foreign nation judgments. The consensus among the State courts and lower federal courts that have passed upon the question is that, apart from federal question cases, such recognition is governed by State law and that the federal courts will apply the law of the State in which they sit. It can be anticipated, however, that in due course some exceptions will be engrafted upon the general principle. So it seems probable that federal law would be applied to prevent application of a State rule on the recognition of foreign nation judgments if such application would result in the disruption or embarrassment of the foreign relations of the United States.

*Id.* § 98 cmt. c.

44. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM’N 1962) [hereinafter 1962 RECOGNITION ACT], <http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf>.

45. *Id.* § 2.

46. *Id.* § 3.

47. For specific discussion of the bases for non-recognition, see *infra* notes 101–08 and accompanying text.

non-recognition is available, and no discretionary basis is accepted, the foreign judgment is then “enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.”<sup>48</sup>

The 1962 Recognition Act was rather slow to achieve widespread adoption among the states.<sup>49</sup> This was, in part, because it did little to change the common law, and thus did not provide a compelling argument for legislative attention.<sup>50</sup>

The next major step in the evolution of U.S. law on the recognition and enforcement of foreign judgments was the American Law Institute’s (“ALI”) adoption of the *Restatement (Third) of Foreign Relations Law* in 1986.<sup>51</sup> Sections 481 and 482 of that text present a summary of the common law, in black letter form, which looks very much like the rules found in the 1962 Recognition Act. Section 481 provides that, subject to the bases for non-recognition found in section 482, “a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.”<sup>52</sup> Section 482 then parallels the 1962 Recognition Act, providing two mandatory grounds for non-recognition in section 482(1), and six discretionary grounds in section 482(2).<sup>53</sup>

In May of 1992, Edwin Williamson, then Legal Adviser at the U.S. Department of State, wrote the Secretary General of the Hague

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48. 1962 RECOGNITION ACT, *supra* note 44, § 3.

49. *Legislative Fact Sheet—Foreign Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act> (last visited Mar. 4, 2017).

50. The Prefatory Note to the 1962 Recognition Act made clear that the Act’s purpose was not so much to change the law in any adopting state as to make it more likely that the judgments of courts in adopting states would be recognized in foreign countries:

In a large number of civil law countries, grant of conclusive effect to money-judgments from foreign courts is made dependent upon reciprocity. Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.

*Id.* prefatory note.

51. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 1987).

52. *Id.* § 481(1).

53. *Id.* § 482.

Conference on Private International Law, proposing that the Conference take up the negotiation of a multilateral convention on the recognition and enforcement of judgments.<sup>54</sup> Several Special Commission meetings considered the U.S. request, and it was officially placed on the agenda of the Hague Conference in October 1996,<sup>55</sup> resulting in a Preliminary Draft Convention text, produced in October 1999.<sup>56</sup> Concerns over both substance and process resulted in a decision to have a split Diplomatic Conference, with the first part held in June 2001.<sup>57</sup> A new text was created, closely following the 1999 Text, but with many more bracketed provisions, footnotes, and explanations of various positions,<sup>58</sup> indicating the problems that stood between it and a successful convention. In April 2002, an informal working group was instructed to consider drafting a convention based on those jurisdictional provisions on which substantial consensus existed, and, in March 2003, that group produced a Draft Text on Choice of Court Agreements.<sup>59</sup> This led to further Special Commission meetings and the conclusion of the Convention on Choice of Court Agreements at a Diplomatic Conference in June of 2005.<sup>60</sup>

The Hague Convention on Choice of Court Agreements went into effect for the first two parties, Mexico and the European Union

54. Letter from Edwin D. Williamson, Legal Advisor, U.S. Dep't of State, to Georges Droz, Sec'y Gen., Hague Conference on Private Int'l Law (May 5, 1992), <https://www.state.gov/documents/organization/65973.pdf>.

55. Hague Conference on Private Int'l Law, *Final Act of the Eighteenth Session*, 35 I.L.M 1405 (1996).

56. Hague Conference on Private Int'l Law, *Informational Note on the Work of the Informal Meetings Held Since October 1999 to Consider and Develop Drafts on Outstanding Items*, Preliminary Doc. No. 15 (May 2001), <https://assets.hcch.net/docs/f76f699d-0e14-4e1a-aed9-ccc296459e10.pdf> (containing the text of the Preliminary Draft Convention drawn up by the Permanent Bureau).

57. The author was deeply involved in the negotiation process and, as such, is reporting his experience and observations.

58. Hague Conference on Private Int'l Law, Commission II: Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001* (June 20, 2001), <https://assets.hcch.net/docs/e172ab52-e2de-4e40-9051-11aee7c7be67.pdf>.

59. Hague Conference on Private Int'l Law, *Preliminary Result of the Work of the Informal Working Group on the Judgments Project*, Preliminary Doc. No. 8 (Mar. 2003), [https://assets.hcch.net/upload/wop/genaff\\_pd08e.pdf](https://assets.hcch.net/upload/wop/genaff_pd08e.pdf).

60. Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Convention]. For a documentary history of the Choice of Court Convention project, see *Choice of Court Section*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court> (last visited Mar. 4, 2017).

(and its Member States), on October 1, 2015, with Singapore ratifying in 2016.<sup>61</sup> The Convention contains three basic rules: Article 5 provides that a court chosen in an exclusive choice of court agreement shall have exclusive jurisdiction;<sup>62</sup> Article 6 provides that a court not chosen shall defer to the chosen court;<sup>63</sup> and Article 8 provides that the courts of all contracting states shall recognize and enforce judgments from a court chosen in an exclusive choice of court agreement, subject to an explicit list of bases for non-recognition found in Article 9.<sup>64</sup>

During the course of the negotiation of the Choice of Court Convention, three related—but not necessarily consistent—projects were undertaken in the United States. In 2005, the ULC completed the first of these, the Uniform Foreign-Country Money Judgments Recognition Act (“2005 Recognition Act”),<sup>65</sup> designed to update and replace the 1962 Recognition Act. The 2005 Act makes several significant changes to the 1962 Act. First, it directly addresses the question of procedure, making clear that if recognition of a foreign judgment is sought as an original matter, the judgment creditor must file an action to obtain recognition (a party may also raise the issue of recognition in a counterclaim, cross-claim, or defense, seeking preclusive recognition).<sup>66</sup> This was designed to prevent continued confusion over the relationship between the Recognition Act and the Revised Uniform Enforcement of Foreign Judgments Act (“Enforcement Act”), which, by its terms, applies only to judgments from sister states.<sup>67</sup> The 2005 Act also provides clear rules on burden of proof. The party seeking recognition has the burden of proving that the judgment falls within the scope of the Act, while the party seeking non-recognition has the burden of proving any of the grounds for non-recognition.<sup>68</sup> Finally, the 2005 Act provides a specific stat-

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61. See *Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last updated June 2, 2016).

62. Hague Convention, *supra* note 60, art. 5.

63. *Id.* art. 6.

64. *Id.* arts. 8–9.

65. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM’N 2005) [hereinafter 2005 RECOGNITION ACT], [http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra\\_final\\_05.pdf](http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf).

66. *Id.* § 6.

67. REVISED UNIF. ENF’T OF FOREIGN JUDGMENTS ACT (UNIF. LAW COMM’N 1964), <http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf>.

68. 2005 RECOGNITION ACT, *supra* note 65, §§ 3(c), 4(d).

ute of limitations for recognition of a foreign judgment.<sup>69</sup>

The second of these projects also was completed in 2005, when the American Law Institute promulgated its Proposed Federal Statute on the Recognition and Enforcement of Judgments.<sup>70</sup> This project called for the return to the federalization of the law of foreign judgments recognition, concluding that (1) the federal government has the authority, “as inherent in the sovereignty of the nation, or as derived from the national power over foreign relations shared by Congress and the Executive, or as derived from the power to regulate commerce with foreign nations,” to govern the recognition and enforcement of foreign judgments,<sup>71</sup> and (2) “a coherent federal statute is the best solution” for addressing “a national problem with a national solution.”<sup>72</sup> The ALI Proposed Federal Statute began as a project designed to propose implementing legislation for the Treaty on Jurisdiction and the Recognition and Enforcement of Judgments being negotiated at the Hague Conference. When the Hague negotiations turned from a broad convention to a choice of court convention, the ALI project was adjusted to provide an approach that would deal with judgments recognition as federal statutory law rather than through a treaty.<sup>73</sup> At the same time, the ALI continued to work with the State Department Office of the Legal Adviser to seek a compromise process for ratification and implementation of the Hague Choice of Court Convention.<sup>74</sup>

The 2005 ALI Proposed Federal Statute clearly took a very different approach from the 2005 Uniform Foreign-Country Money

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69. *Id.* § 9 (prohibiting recognition after the earlier of (1) the date on which the judgment is no longer enforceable in the country of origin or (2) fifteen years from the time the judgment is effective in the country of origin).

70. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (AM. LAW INST. 2006).

71. *Id.* at 3.

72. *Id.* at 6.

73. The original ALI project was designed only to provide implementing legislation for a comprehensive Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments. See Memorandum from Andreas F. Lowenfeld, Professor, N.Y. Univ. Sch. of Law & Linda S. Silberman, Professor, N.Y. Univ. Sch. of Law to the Council, through Geoffrey Hazard, Professor, Univ. of Pa. Law Sch. (Nov. 30, 1998), [https://www.ali.org/media/filer\\_public/ed/f9/edf92d0f-e280-4480-b8de-5aade127c56c/foreign-judgments-memorandum.pdf](https://www.ali.org/media/filer_public/ed/f9/edf92d0f-e280-4480-b8de-5aade127c56c/foreign-judgments-memorandum.pdf).

74. Memorandum from Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Regarding United States Implementation of the Hague Convention on Choice of Courts Agreements (COCA) (Jan. 19, 2013) [hereinafter Koh Memo], <https://2009-2017.state.gov/documents/organization/206865.pdf> (recording the position of the Legal Advisor following the meetings).

Judgments Recognition Act. The former would have judgments recognition governed by federal law,<sup>75</sup> and the latter would have it governed by state law.<sup>76</sup> This divide between the ALI and ULC projects manifested itself again in 2012, when the ULC completed its third project in the trilogy, the Uniform Choice of Court Agreements Convention Implementation Act.<sup>77</sup> While the ALI had moved its project's focus away from the implementation of the Hague Convention, the ULC had taken up a project to implement the 2005 Choice of Court Convention, but to do so through a more limited federal statute accompanied by state-by-state enactments of a uniform act.<sup>78</sup> Thus, the ULC approach would result in three instruments governing judgments recognition under the Convention: a treaty, a federal implementing statute, and a state statute—all applicable in any case of judgments recognition under the Convention, but not all containing the same language for dealing with similar issues.

An informal working group convened by Harold Koh, who was then the Legal Adviser to Secretary of State Hillary Clinton, took up the question of how much of the Choice of Court Convention implementation should be a matter of federal law and how much a matter of state law.<sup>79</sup> Meeting under the auspices of the State Department's Advisory Committee on Private International Law, this group included representatives of the ULC, who favored placing as much of the law at the state level as possible, and others designated by the ALI, who favored a mostly-federal approach to implementation.<sup>80</sup> Representatives of the Department of Justice and other interested federal offices also participated.<sup>81</sup> The group favoring a federal approach leaned toward the model the United States had used for the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"),<sup>82</sup> which was implemented through Chapter II of the Federal Arbitration Act.<sup>83</sup>

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75. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (AM. LAW INST. 2006).

76. 2005 RECOGNITION ACT, *supra* note 65.

77. UNIF. CHOICE OF COURT AGREEMENTS CONVENTION IMPLEMENTATION ACT (UNIF. LAW COMM'N 2012), [http://www.uniformlaws.org/shared/docs/choice\\_of\\_court/2012am\\_ccaia\\_approvedtext.pdf](http://www.uniformlaws.org/shared/docs/choice_of_court/2012am_ccaia_approvedtext.pdf).

78. *Id.*

79. Koh Memo, *supra* note 74.

80. *Id.*

81. *Id.*

82. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

83. 9 U.S.C. §§ 201–08 (2012).

This was consistent with a principal goal of the Choice of Court Convention: to place the choice between arbitration and judicial dispute resolution on a more even international footing.<sup>84</sup>

The informal working group failed to resolve these differences. The Legal Adviser recorded the results of the working group in a memorandum,<sup>85</sup> noting that implementation in a manner similar to that used for the New York Convention in the Federal Arbitration Act presented “the most promising way forward.”<sup>86</sup> The State Department has not made progress in preparing the Convention for submission to the Senate for advice and consent.

The split between state and federal approaches to judgments recognition law generally does not indicate disagreement on what the substantive rules of law should be. In fact, the ULC Recognition Acts, the ALI Restatement, and the ALI Proposed Federal Statute all contain very similar substantive rules, which they sometimes borrowed from one another.<sup>87</sup> Rather, the split demonstrates very different political approaches to the source of that substantive law. One camp prefers to see judgments recognition law governed by each state, and the other prefers a single set of rules developed on the federal level.

Both states and the federal government have enacted legislation dealing with the recognition of foreign judgments. In 2008, New York enacted the Libel Terrorism Protection Act in response to concerns regarding foreign libel judgments, particularly from the United Kingdom.<sup>88</sup> That Act added a paragraph (d) to the rules on personal jurisdiction found in New York Civil Practice Law and Rules Section 302 to specifically provide for jurisdiction “to the fullest extent per-

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84. See, e.g., RONALD A. BRAND & PAUL M. HERRUP, *THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS* 25 (2008) (“Whether the Hague Convention on Choice of Court Agreements can become as successful as the New York Arbitration Convention remains to be seen. It is likely to be some time before such a determination can be made. If the Hague Convention is ratified by important trading states, and by the European Community, it clearly has the potential to facilitate the free movement of judgments based upon the single most uniformly-recognized basis of jurisdiction—the consent of the parties—and to place litigation on a more equal footing with arbitration at the contract planning stage.”).

85. Koh Memo, *supra* note 74 (recording the position of the Legal Adviser following these meetings).

86. *Id.* at 4.

87. See *infra* notes 90–107 and accompanying text (providing greater elaboration on these substantive rules).

88. N.Y. C.P.L.R. § 302(d) (McKinney 2010); see also Vincent C. Alexander, *Practice Commentaries*, CPLR C302:17 (McKinney 2010).

mitted by the United States constitution,” in order to allow parties otherwise subject to jurisdiction in a New York court to bring actions for negative declaratory judgments preventing the recognition or enforcement of a foreign defamation judgment.<sup>89</sup> Congress soon followed suit, and on August 10, 2010, President Obama signed into law the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act.<sup>90</sup> The SPEECH Act similarly prevents recognition and enforcement of foreign libel judgments and allows preemptive declaratory judgments against recognition.<sup>91</sup>

In 2012, multilateral work on judgments recognition law began again, with the Hague Conference on Private International Law convening a Working Group to pursue a global judgments recognition convention.<sup>92</sup> In 2016, the Hague Council on General Affairs and Policy established a Special Commission to draft a judgments convention based on the Working Group product.<sup>93</sup> That Special Commission met in June 2016 and again in February 2017.<sup>94</sup>

## II. CURRENT STATUS OF THE SUBSTANTIVE LAW

As of March 2017, twenty-one states and the District of Co-

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89. N.Y. C.P.L.R. § 302(d).

90. 28 U.S.C. §§ 4101–05 (2012).

91. The basic rule of the SPEECH Act provides:

[A] domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that—

(A) the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located.

28 U.S.C. § 4102(a)(1) (2012). The Act also provides:

Any United States person against whom a foreign judgment is entered on the basis of the content of any writing, utterance, or other speech by that person that has been published, may bring an action in district court, under section 2201(a), for a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States.

28 U.S.C. § 4104(a)(1) (2012).

92. See Hague Conference on Private Int’l Law, Council on General Affairs and Policy of the Conference, *Conclusions and Recommendations Adopted by the Council* ¶¶ 16–19 (Apr. 17–20, 2012), <https://assets.hcch.net/docs/8c32ee93-e150-4575-aad1-88ea8787f872.pdf>.

93. See *The Judgments Project*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/projects/legislative-projects/judgments> (last visited Mar. 4, 2017).

94. *Id.*

lumbia have enacted the 2005 Recognition Act.<sup>95</sup> Another thirteen states, plus the Virgin Islands, have the 1962 Recognition Act in effect.<sup>96</sup> Thus, thirty-four states, the District of Columbia, and the Virgin Islands have enacted at least one of the Recognition Acts. In the remaining sixteen states, judgments recognition remains primarily a matter of common law, heavily influenced by the Restatement.

Whether a state's law on judgments recognition is found in one of the Uniform Acts or in common law, the starting point is the requirement that the foreign judgment be final, conclusive, and enforceable in the jurisdiction of the originating court.<sup>97</sup> While the Recognition Acts apply only to judgments that grant or deny a sum of money,<sup>98</sup> the Restatement summary of the common law on judgments recognition includes judgments "establishing or confirming the status of a person, or determining interests in property,"<sup>99</sup> making the scope of that discussion of the common law broader than the Uniform Acts.

While neither the Restatement nor the Recognition Acts includes a reciprocity requirement similar to that applied in *Hilton*,<sup>100</sup> five states that have enacted the 1962 Recognition Act and three that have enacted the 2005 Recognition Act have included lack of reciprocity as a ground for non-recognition.<sup>101</sup> While the ULC commit-

95. *Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <http://uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act> (last visited Mar. 4, 2017) (Alabama, Arizona, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Virginia, Washington).

96. *Legislative Fact Sheet—Foreign Money Judgments Recognition Act*, *supra* note 49 (Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, U.S. Virgin Islands, Virginia, Washington).

97. *See, e.g.*, 1962 RECOGNITION ACT, *supra* note 44, § 2; 2005 RECOGNITION ACT, *supra* note 65, § 3(a)(2); *Pilkington Bros. v. AFG Indus. Inc.*, 581 F. Supp. 1039, 1045 (D. Del. 1984).

98. 1962 RECOGNITION ACT, *supra* note 44, § 1(2); 2005 RECOGNITION ACT, *supra* note 65, § 3(a)(1). Both acts explicitly exclude from their scope judgments for taxes, fines, penalties, and support in matrimonial or family matters. 1962 RECOGNITION ACT, *supra* note 44, § 1(2); 2005 RECOGNITION ACT, *supra* note 65, § 3(b).

99. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1) (AM. LAW INST. 1987).

100. *See supra* notes 8–50 and accompanying text.

101. Florida, Idaho, Maine, North Carolina, Ohio, and Texas make reciprocity a discretionary ground, and Georgia and Massachusetts make it a mandatory ground. For a listing of state statutes, see Ronald A. Brand, *Federal Judicial Center International*

tee that prepared the 2005 Recognition Act rejected any effort to add a reciprocity requirement to the 1962 Act,<sup>102</sup> the ALI Proposed Federal Statute includes such a requirement, but places the burden of proof on the party resisting recognition and enforcement “to show that there is substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments of courts in the United States.”<sup>103</sup> The reciprocity requirement was included in the ALI project, “not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States.”<sup>104</sup>

The Restatement and the Uniform Acts provide for both mandatory and discretionary grounds for non-recognition of a foreign judgment. The mandatory list of grounds in all three systems provides for non-recognition when the judicial system from which the judgment originates does not provide impartial tribunals and due process of law.<sup>105</sup> They also provide that lack of personal jurisdiction makes non-recognition mandatory.<sup>106</sup> This test is determined by ap-

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*Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491 app. d (2013).

102. See, e.g., 2005 RECOGNITION ACT, *supra* note 65, prefatory note (“In the course of drafting this Act, the drafters revisited the decision made in the 1962 Act not to require reciprocity as a condition to recognition of the foreign-country money judgments covered by the Act. After much discussion, the drafters decided that the approach of the 1962 Act continues to be the wisest course with regard to this issue.”).

103. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 7(b), at 95 (AM. LAW INST. 2006).

104. *Id.* § 7 cmt. b, at 95. The procedure to be applied by courts under section 7(c) was designed to provide transparency in the reciprocity determination and to encourage agreements negotiated by the Secretary of State to acknowledge reciprocity. *Id.* § 7 Reporters’ Notes 1, at 98.

105. 1962 RECOGNITION ACT, *supra* note 44, § 4(a)(1); 2005 RECOGNITION ACT, *supra* note 65, § 4(b)(1); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(a) (AM. LAW INST. 1987).

106. 1962 RECOGNITION ACT, *supra* note 44, § 4(a)(2); 2005 RECOGNITION ACT, *supra* note 65, § 4(b)(2); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(b) (AM. LAW INST. 1987). Under the 2005 Recognition Act, recognition may *not* be refused for lack of personal jurisdiction if:

- (1) the defendant was served with process personally in the foreign country;
- (2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;
- (3) the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
- (4) the defendant was domiciled in the foreign country when the proceeding

plication of American concepts of jurisdiction to adjudicate,<sup>107</sup> rather than by applying the direct jurisdiction rules of the State of the court of origin. Lack of subject matter jurisdiction is a mandatory ground for non-recognition in both Recognition Acts, but a discretionary ground in the Restatement.<sup>108</sup>

Generally, the discretionary grounds for non-recognition are similar in the three sources. The 1962 Recognition Act, in section 4(b), provides:

- (b) A foreign judgment need not be recognized if
- (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
  - (2) the judgment was obtained by fraud;
  - (3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;
  - (4) the judgment conflicts with another final and conclusive judgment;
  - (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
  - (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously in-

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was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;

(5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country; or

(6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of that operation.

2005 RECOGNITION ACT, *supra* note 65, § 5(a). The list in section 5(a) of the 1962 Act is virtually identical in language. 1962 RECOGNITION ACT, *supra* note 44, § 5(a).

107. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 cmt. c (AM. LAW INST. 1987); *see, e.g.*, *Koster v. Automark Indus., Inc.*, 640 F.2d 77 (7th Cir. 1981); *Mercandino v. Devoe & Reynolds, Inc.*, 436 A.2d 942 (N.J. Super. Ct. App. Div. 1981).

108. 1962 RECOGNITION ACT, *supra* note 44, § 4(a)(3); 2005 RECOGNITION ACT, *supra* note 65, § 4(b)(3); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(a) (AM. LAW INST. 1987).

convenient forum for the trial of the action.<sup>109</sup>

The Restatement list of discretionary grounds for non-recognition is found in section 482(2), which provides:

(2) A court in the United States need not recognize a judgment of the court of a foreign state if:

(a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;

(b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;

(c) the judgment was obtained by fraud;

(d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;

(e) the judgment conflicts with another final judgment that is entitled to recognition; or

(f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.<sup>110</sup>

Section 4(c) of the 2005 Recognition Act contains the same list of discretionary grounds of non-recognition as the 1962 Act, but adds the following grounds: “(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or (8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.”<sup>111</sup>

As the discussion below demonstrates, while these three sources state rather similar basic substantive rules, non-uniformity of state law remains in ways that significantly influence litigation strategy and important policy issues.

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109. 1962 RECOGNITION ACT, *supra* note 44, § 4(b).

110. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2) (AM. LAW INST. 1987).

111. 2005 RECOGNITION ACT, *supra* note 65, § 4(c).

### III. PROBLEMS DEMONSTRATED BY RECENT DEVELOPMENTS

#### A. *The Non-Uniformity Problem*

If the substantive law of judgments recognition were federal law developed by statute and treaty, then there would be a single source of the law, along with a single ultimate interpreter of that law. To the extent that lower courts might produce divergent interpretations, the U.S. Supreme Court would have the ability to take a case to resolve those conflicts, just as it does with conflicts among the Federal Circuit Courts of Appeal in the interpretation of other federal law.<sup>112</sup> Recent cases indicate the opportunities for forum shopping and the expensive litigation which results from not having such a unified approach to the recognition of foreign judgments.

#### 1. Leveraging Full Faith and Credit

The current framework, in which the substantive rules are considered for the most part to be a matter of state law—and are found in divergent statutes and common law jurisprudence—creates problems of non-uniformity that encourage expensive forum shopping and inefficient use of the judicial system. This is demonstrated by two recent disputes, each of which has played out in multiple courts. In each dispute, a foreign judgment was brought to the United States, with recognition first sought in a state in which success proved to be easier than it would have been in other states. The resulting state court recognition judgment was then taken to at least one sister state, for recognition and enforcement under the Full Faith and Credit Clause.<sup>113</sup> In each dispute, the judgment creditor in the foreign action was able to obtain recognition in a state in which recognition might not have been possible if the foreign judgment had been brought to the courts of that state directly rather than through initial recognition in a sister state. The result is a recipe for forum shopping that takes advantage of non-uniform state law on judgments recognition in a manner that wastes judicial resources, adds significant cost for litigants, and creates the possibility of inequitable outcomes.

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112. See SUP. CT. R. 10(a).

113. U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”).

a. Standard Chartered Bank v. Ahmad Hamad Al Gosaibi

The first of these disputes began when Standard Chartered Bank (“SCB”), a UK bank, agreed to sell Saudi Riyals to a Saudi partnership in exchange for \$25 million.<sup>114</sup> When the Riyals were transferred, and SCB did not receive the U.S. dollars in exchange, it filed an action in the Kingdom of Bahrain against the partnership, Ahmad Hamad Al Gosaibi (“AHAG”).<sup>115</sup> The Bahrain Chamber for Dispute Resolution (“BCDR”), an arbitral institution that also hears commercial cases for the Bahraini government as a judicial entity, decided the case.<sup>116</sup> The judgment creditor took the resulting \$25 million judgment to New York, where the Supreme Court for New York County, applying the New York version of the 1962 Recognition Act, rejected AHAG’s defenses to recognition, recognized the judgment, and awarded interest and costs.<sup>117</sup>

SCB took its favorable New York judgment to both Pennsylvania and the District of Columbia, seeking recognition under the Full Faith and Credit Clause of the United States Constitution. In the Pennsylvania action, the Court of Common Pleas of Philadelphia County granted recognition of the New York judgment, and the Superior Court affirmed, both holding that the New York decision to recognize the Bahraini judgment is entitled to full faith and credit in Pennsylvania.<sup>118</sup> The Court of Common Pleas stated:

[T]he New York judgment is entitled to the same *res judicata* effect it would have in New York. Therefore, it is of no moment whether Pennsylvania would have recognized the Bahraini judgment under [Pennsylvania’s Recognition Act] because here, [Standard Chartered] is seeking to enforce a New York judgment, not a direct Bahraini judgment.<sup>119</sup>

The Superior Court affirmed this position, noting that Pennsylvania courts enforce sister-state judgments even if those judgments violate a public policy of Pennsylvania,<sup>120</sup> and relying heavily

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114. Standard Chartered Bank v. Ahmad Hamad Al Gosaibi & Bros., 957 N.Y.S.2d 602, 605 (Sup. Ct. 2012), *aff’d*, 973 N.Y.S.2d 197 (App. Div. 2013).

115. *Id.*

116. *Id.* at 603.

117. *Id.* at 608.

118. Standard Chartered Bank v. Ahmad Hamad Al Gosaibi & Bros., 99 A.3d 936 (Pa. Super. Ct. 2014).

119. *Id.* at 939.

120. *Id.* at 942 (citing *Greate Bay Hotel & Casino, Inc. v. Saltzman*, 609 A.2d 817, 820

on the *Milwaukee County* decision of the U.S. Supreme Court, in which that Court stated:

The very purpose of the full-faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.<sup>121</sup>

Notably, the Pennsylvania Superior Court rejected AHAG's argument that the use of full faith and credit in this context was an improper backdoor method of recognition and enforcement of a foreign country judgment.<sup>122</sup> AHAG had relied in its brief on the 1998 Texas Court of Appeals decision in *Reading & Bates Construction Co. v. Baker Energy Resources Corp.*,<sup>123</sup> in which the Texas court had refused recognition of a Louisiana judgment that had, in turn, recognized an earlier money judgment rendered in a Canadian federal court in Ontario.<sup>124</sup> The *Reading & Bates* court had specifically stated that "it is not within the spirit or intent of the [Uniform Enforcement Act] to compel a state to recognize and enforce a 'foreign country judgment' on the sole basis that it has been recognized and made executory by a sister state's judgment."<sup>125</sup> Ultimately, the Pennsylvania Superior Court rejected the *Reading & Bates* approach and determined that the policy behind the Full Faith and Credit Clause prevailed over any concerns about whether Pennsylvania would have treated the Bahraini judgment differently under state law than did the court in New York.<sup>126</sup>

SCB also sought registration of the New York judgment in

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(Pa. Super. Ct. 1992), in which a New Jersey judgment for unpaid gambling debts was recognized and enforced even though gambling debts violated public policy and were not recoverable in Pennsylvania).

121. *Standard Chartered Bank*, 99 A.3d at 940–41 (quoting *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 276–77 (1935)).

122. *Standard Chartered Bank*, 99 A.3d at 944.

123. 976 S.W.2d 702 (Tex. App. 1998).

124. See *Standard Chartered Bank*, 99 A.3d at 944–45.

125. *Reading & Bates*, 976 S.W.2d at 714. In refusing to grant full faith and credit to the Louisiana judgment, the Texas Court of Appeals stated that it would "not permit a party to clothe a foreign country judgment in the garment of a sister state's judgment and thereby evade the [Texas] recognition process." *Id.* at 715.

126. *Standard Chartered Bank*, 99 A.3d at 944–45.

the District of Columbia for enforcement there.<sup>127</sup> Like Pennsylvania (and most other states), D.C. has enacted the 1964 Revised Uniform Enforcement of Foreign Judgments Act.<sup>128</sup> The term “foreign judgment” in the Enforcement Act, however, specifically refers to “any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state,”<sup>129</sup> and not to judgments from outside the United States. The Enforcement Act carries out the full faith and credit process by providing a system for administrative registration of a sister-state judgment for enforcement purposes, without the need to bring a separate action on the judgment.<sup>130</sup> In both of the Pennsylvania and D.C. actions, SCB had filed the New York recognition judgment under the local version of the Enforcement Act.<sup>131</sup> In D.C., AHAG then filed a motion to set aside the registration of the New York judgment.<sup>132</sup>

In considering whether to recognize the New York judgment, the D.C. Court of Appeals distinguished between the administrative process for registering a sister-state judgment under the Enforcement Act and the D.C. version of the 2005 Recognition Act, which “requires a litigant seeking recognition of a foreign country judgment to

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127. *Ahmad Hamad Al Gosaibi & Bros. v. Standard Chartered Bank*, 98 A.3d 998 (D.C. 2014).

128. D.C. CODE §§ 15-351 to -357 (2001).

129. REVISED UNIF. ENF'T OF FOREIGN JUDGMENTS ACT § 1 (UNIF. LAW COMM'N 1964), <http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf>.

130. *Id.* §§ 2–3.

131. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1002–03; *Standard Chartered Bank*, 99 A.3d at 938–39.

132. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1003. The 1962 Recognition Act provides that a foreign judgment, once recognized, “is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.” 1962 RECOGNITION ACT, *supra* note 44, § 3. In some states (and in some federal courts), this has been interpreted to mean that the simplified registration procedure for enforcement found in the Enforcement Act is applicable to foreign judgments as well as to sister-state judgments. *See, e.g., Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Enron (Thrace) Expl. & Prod. BV v. Clapp*, 874 A.2d 561, 566 (N.J. Super. Ct. App. Div. 2005). *But see Bianchi v. Savino Del Bene Int’l Freight Forwarders, Inc.*, 770 N.E.2d 684 (Ill. App. Ct. 2002) (holding that a foreign judgment must be recognized before it can be enforced). While section 7(2) of the 2005 Recognition Act also provides that a foreign country judgment is “enforceable in the same manner and to the same extent as a judgment rendered in this state,” section 6(a) of that Act makes clear that simple registration under the Enforcement Act is not available for foreign country judgments, and “[i]f recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign country judgment.” 2005 RECOGNITION ACT, *supra* note 65, §§ 6(a), 7(2).

raise the issue in a new or pending action before the Superior Court.”<sup>133</sup> The court focused on the non-uniformity of state enactment of the Recognition Acts, noting that “there are significant differences between the District’s provisions and their analogues in some states,” and stating in particular that New York has “fewer grounds to withhold recognition of a foreign country judgment than are available to courts in the District of Columbia.”<sup>134</sup>

The D.C. court acknowledged the conflicting precedent created by the Pennsylvania decision in the same dispute and the Texas decision in *Reading & Bates*.<sup>135</sup> It also noted that the Fourth Circuit Federal Court of Appeals had taken the same approach as Pennsylvania when it affirmed a decision of a Virginia Federal District Court granting full faith and credit to a Florida judgment denying recognition to a Canadian judgment.<sup>136</sup> But it distinguished the case before it by quoting the U.S. Supreme Court’s statement that “the full faith and credit clause is not an inexorable and unqualified command.”<sup>137</sup> Specifically, the D.C. court focused on the fact that the New York court had not had personal jurisdiction over AHAG when issuing the recognition judgment, and that even full faith and credit is limited to judgments from sister states whose courts had jurisdiction over the judgment debtor.<sup>138</sup> New York courts, unlike those in many other states,<sup>139</sup> do not require a showing of personal jurisdiction in a judgment recognition action.<sup>140</sup> Later proceedings in New York had

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133. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1001–02 (citing D.C. CODE §§ 15-361 to -371 (2012 Repl.)); see *supra* note 132 (explaining this development from the 1962 Recognition Act to the 2005 Recognition Act). While the D.C. court noted that the bases for non-recognition in D.C. were broader than those in New York, its opinion did not indicate that a specific basis would be grounds for non-recognition if the Bahraini decision had been brought directly to the D.C. court for recognition and enforcement. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1001–02.

134. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1002.

135. *Id.* at 1004.

136. *Id.* at 1004 (considering *Jaffe v. Accredited Sur. & Cas. Co.*, 294 F.3d 584 (4th Cir. 2002)).

137. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1004 (quoting *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941)).

138. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1005.

139. See *infra* Sections III.B.1–III.B.4.

140. See *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1002 (“[A] party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts.”) (quoting *Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S.2d 285, 289 (App. Div. 2001)).

found that there was no personal jurisdiction over AHAG.<sup>141</sup> Thus, the D.C. court distinguished both between full faith and credit for sister-state judgments and recognition of foreign judgments, and between sister-state judgments where personal jurisdiction existed and those where it did not. Finding that the New York court lacked personal jurisdiction in reaching its recognition judgment, the D.C. court held that judgment not entitled to full faith and credit.<sup>142</sup> This left the judgment creditor only with the option of seeking direct recognition and enforcement of the Bahraini judgment in D.C.

In terms of policy, the D.C. court clearly set out the opposing arguments. On the one hand,

[r]equiring . . . recognition would . . . have troubling policy implications. AHAB rightly points out that if the New York judgment is entitled to full faith and credit, litigants may obtain recognition of foreign country judgments in *any* U.S. jurisdiction and then enforce those judgments throughout the country. Such litigants would be free to seek recognition in whichever state offers the most lax standards, with no federal requirement that the state of choice be able to establish jurisdiction over the parties.<sup>143</sup>

On the other hand, the D.C. court explained that the U.S. Supreme Court has stated that granting full faith and credit to decisions from other states is “part of the price of our federal system,”<sup>144</sup> even though it makes possible that “one state’s policy of strict control” may be “thwarted by the decree of a more lax state.”<sup>145</sup>

In discussing the differences between New York and D.C. law on judgments recognition, and the forum shopping choices that result, the D.C. court closed its analysis by noting the desirability of federal law that would prevent this problem:

We acknowledge that, if the type of judgment rendered in New York is not entitled to full faith and credit, litigants will need to obtain recognition of foreign country judgments in each U.S. jurisdiction where they seek to enforce them. We likewise acknowledge that international comity may well be

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141. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1005.

142. *Id.* at 1008.

143. *Id.* at 1006.

144. *Williams v. North Carolina*, 317 U.S. 287, 302 (1942).

145. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1007 (quoting *Williams*, 317 U.S. at 302).

served by a policy that favors uniform enforcement of foreign country judgments across all of the nation's jurisdictions. However, *we view this policy consideration as a matter to be addressed, if at all, by federal statute or international treaty.*<sup>146</sup>

*b. Alberta Securities Commission v. Ryckman*

The second recent dispute to highlight the forum shopping effect of non-uniformity of U.S. judgments recognition law began in Canada. In a 1996 hearing before the Alberta Securities Commission ("ASC"), Lawrence Ryckman was found to have violated the Alberta Securities Act.<sup>147</sup> ASC sanctioned Ryckman, ordered him to pay CAD 492,640.14, and obtained a judgment from the Court of Queen's Bench in Alberta for that amount against him.<sup>148</sup> When Ryckman moved to Arizona in 1997, ASC sought recognition and enforcement of the Canadian judgment there, prevailing on a motion for summary judgment of recognition before the Superior Court of Arizona, including costs and interest.<sup>149</sup> That judgment was affirmed by the Arizona Court of Appeals in 2001.<sup>150</sup>

In 2013, ASC filed its Arizona judgment in Delaware under that state's Uniform Enforcement of Foreign Judgments Act,<sup>151</sup> thus seeking recognition in Delaware of the Arizona judgment through full faith and credit. The Delaware court made clear that, if the Alberta judgment had been brought directly to Delaware, it would not have been recognized under Delaware's version of the 2005 Recognition Act ("UFCMJRA"):

It is undisputed that Delaware could not directly domesticate the Canadian Judgment for two reasons. First, the Canadian Judgment violates the UFCMJRA's statute of limitations. Delaware's UFCMJRA imposes a 15-year statute of limitations on foreign-country judgment recognition. The Canadian

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146. *Ahmad Hamad Al Gosaibi*, 98 A.3d at 1008 (emphasis added).

147. Lawrence Gilbert Ryckman (Re) (1996), 5 ASCS 223 (Alta. Sec. Com.), [http://www.albertasecurities.com/Notices%20Decisions%20Orders%20%20Rulings/Enforcement/Ryckman,\\_Lawrence\\_-\\_Reasons\\_-\\_1996-01-18\\_-\\_1571336.pdf](http://www.albertasecurities.com/Notices%20Decisions%20Orders%20%20Rulings/Enforcement/Ryckman,_Lawrence_-_Reasons_-_1996-01-18_-_1571336.pdf).

148. *Id.* at 35.

149. *Alta. Sec. Comm'n v. Ryckman*, No. N13J-02847, 2015 WL 2265473, at \*1 (Del. Super. Ct. May 5, 2015), *aff'd*, 127 A.3d 399 (Del. 2015).

150. *Alta. Sec. Comm'n v. Ryckman*, 30 P.3d 121 (Ariz. Ct. App. 2001).

151. *Ryckman*, 2015 WL 2265473, at \*2.

Judgment was issued in 1996 and the instant action was filed in Delaware in 2013—a 17-year gap.

Second, the Canadian Judgment constitutes a fine or penalty. The UFCMJRA “does not apply to a foreign-country judgment . . . to the extent that the judgment is: . . . [a] fine or other penalty.” The Canadian Judgment is a fine or penalty because the ASC ordered a pecuniary judgment on Ryckman to punish him for his Securities Act violations.<sup>152</sup>

Thus, by first obtaining a recognition judgment in Arizona, and then taking that judgment to Delaware under the Full Faith and Credit Clause, ASC was seeking to turn likely direct-action failure into indirect-action success. Forum shopping became outcome-determinative.

Like the D.C. Court in *Standard Chartered Bank*, the Delaware court acknowledged the policy conundrum created by the differences in judgments recognition law in the two states involved:

If the Court finds in favor of Ryckman, Delaware only could enforce a foreign-country judgment if the domestication originally is sought in Delaware. The ASC could be viewed as potentially circumventing the UFCMJRA. The ASC first filed the Canadian Judgment under Arizona’s more lenient foreign-country judgment recognition procedures. The ASC then brought the Canadian Judgment to Delaware, arguing that it is a sister-state judgment entitled to full faith and credit. If the Court were to permit this procedure, future judgment creditors simply could file a judgment in a state that has not enacted the UFCMJRA, obtain a valid judgment, then rely on the UEFJA to obtain full faith and credit in a sister state.

Finding in favor of Ryckman would avoid this type of forum-shopping and “bootstrapping” a foreign-country judgment “through the back door” in Delaware. However, finding in favor of Ryckman potentially could require this Court to “pierce the veil” of an otherwise valid sister-state judgment entitled to full faith and credit. Such a ruling would disturb Delaware’s clear precedent instructing this Court to respect sister-state judgments without relitigating the case on the merits.<sup>153</sup>

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152. *Id.* (footnotes omitted).

153. *Id.* at \*4.

In addressing this policy choice, the court reviewed the Texas decision in *Reading & Bates*,<sup>154</sup> the Pennsylvania decision in *Standard Chartered Bank v. Ahmad Hamad Al Gosaibi & Bros.*,<sup>155</sup> and the District of Columbia decision in *Ahmad Hamad Al Gosaibi & Brothers Co. v. Standard Chartered Bank*.<sup>156</sup>

Relying on the earlier decision of the Delaware Supreme Court in *Pyott v. Louisiana Municipal Police Employees' Retirement System*,<sup>157</sup> the Delaware Superior Court held that the Arizona judgment was entitled to full faith and credit:

Even though Delaware could not directly domesticate the Canadian Judgment, this Court's analysis is guided by the Delaware Supreme Court's ruling that Delaware public policy must yield to the stronger national interest in giving full faith and credit to sister-state judgments. The ASC obtained a valid judgment on the merits against Ryckman in Canada. The ASC then obtained a valid domestication of the Canadian Judgment in Arizona. Accordingly, the Court finds that the Arizona Judgment is entitled to full faith and credit in Delaware pursuant to the UEFJA.<sup>158</sup>

The court distinguished both the D.C. action in *Ahmad Hamad Al Gosaibi* (noting that here the Arizona court clearly had jurisdiction over Ryckman to recognize the Alberta judgment) and the Texas action in *Reading & Bates* (noting that the Texas court relied heavily on an earlier Kansas decision, *Tanner v. Hancock*,<sup>159</sup> which had not involved a foreign country judgment).<sup>160</sup>

In the end, the Delaware Superior Court relied on policy to give effect to the Arizona judgment, elevating the uniformity required by full faith and credit over policies that differ from state-to-state and might otherwise arise from the Recognition Act or common law comity analysis applied to foreign judgments:

Granting full faith and credit to the Arizona Judgment

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154. See *supra* notes 123–25 and accompanying text.

155. See *supra* notes 118–26 and accompanying text.

156. See *supra* notes 127–46 and accompanying text.

157. 74 A.3d 612 (Del. 2013) (holding that full faith and credit principles required dismissal of a stockholders' derivative action based upon an earlier dismissal in a similar action against the same directors in California).

158. *Ryckman*, 2015 WL 2265473, at \*7.

159. 619 P.2d 1177 (Kan. Ct. App. 1980).

160. *Ryckman*, 2015 WL 2265473, at \*8.

is consistent with important public policy considerations. First, *enforcing the Arizona Judgment promotes the national interest* in giving full faith and credit to sister-state judgments. This national interest outweighs Delaware's interest in enforcing foreign-country judgments under the UFCMJRA. Second, applying full faith and credit to the Arizona Judgment avoids the necessity of looking behind an otherwise valid judgment. Such an examination of a valid judgment would involve potentially needless, expensive, and time-consuming litigation. Further, such a process would disturb Delaware's clear precedent to respect sister-state judgments without relitigating the case on the merits. Once a creditor domesticates a foreign-country judgment, the Court finds that the UEFJA permits the creditor to seek enforcement in a sister state.<sup>161</sup>

This focus on the "national interest" founded on the Constitution's Full Faith and Credit Clause, over a state's interest in having different rules than other states for recognizing foreign judgments, is consistent with the D.C. court's suggestion of a federal law solution in *Ahmad Hamad Al Gosaibi & Bros. v. Standard Chartered Bank*.<sup>162</sup>

## 2. Other Judicial Evidence of Non-Uniformity Problems

The *Standard Chartered Bank* and *Ryckman* cases demonstrate the problems of forum shopping that bring into conflict the policies behind a single federal system facilitated by full faith and credit and divergent state positions on the treatment of foreign country judgments. Other cases reveal additional problems resulting from non-uniformity of judgments recognition law. One such problem is that some states require reciprocity and some do not for recognition purposes, a concern already noted above.<sup>163</sup>

The initial question of what makes a foreign judgment "final" for purposes of recognition is also subject to divergent positions. The California Supreme Court, in *Manco Contracting Co. v. Bezdikian*, demonstrates that different states (and state and federal courts) have different rules on whether a judgment subject to appeal is considered

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161. *Id.* (emphasis added).

162. *See supra* note 146 and accompanying text.

163. *See supra* notes 100–04 and accompanying text (discussing the reciprocity requirement).

“final.”<sup>164</sup> Thus, the finality requirement of the 1962 Recognition Act may lead to one result in one state and a different result in another state. The *Manco Contracting* case also indicates the impact of different approaches to statutes of limitations under the 1962 Act.<sup>165</sup> While the 2005 Act adopts a specific statute of limitations, and may correct this problem, it does not guarantee uniformity of either adoption or interpretation for all purposes.

In *Transportes Aereos Pegaso, S.A. de C.V. v. Bell Helicopter Textron Inc.*, a Delaware Federal District Court dealt with the burden of proving the fraud exception to recognition under the Delaware version of the 1962 Recognition Act.<sup>166</sup> The court concluded that, under Delaware state law, allegations of fraud create a difficult burden for the judgment creditor.<sup>167</sup> Stating the matter in an awkward double negative, the court concluded that “[b]ecause we are not satisfied that the Mexican judgment was not obtained by fraud, we will not enforce the Mexican judgment under the UFMJRA.”<sup>168</sup> While the 2005 Act places the burden of proving all grounds for discretionary non-recognition on the party seeking to prevent recognition,<sup>169</sup> the Delaware approach thus places the burden on the party seeking recognition.

The two Recognition Acts are excellent examples of the valuable work of the Uniform Law Commissioners. They are clearly-reasoned and well-drafted. Nonetheless, such an act has been available now for over fifty years, and nearly a third of the states still have not enacted either of the available Recognition Acts. Moreover, as the discussion above indicates, even those states which have enacted a Recognition Act have not done so in a manner that promotes uniformity. The result is a recipe for litigation strategy that either creates duplicate litigation in multiple states or allows a judgment creditor to seek the least restrictive state for the initial recognition judgment and then shop the outcome through full faith and credit to every other state. Neither result is satisfactory, and cases to date diverge on which approach is proper. Unfortunately, the current

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164. *Manco Contracting Co. v. Bezdikian*, 195 P.3d 604, 608–09 (Cal. 2008) (discussing differing decisions on when a judgment is “final” for purposes of the 1962 Recognition Act).

165. *Id.* at 612–13 (discussing divergent approaches on the applicable statute of limitations for the recognition of a foreign judgment under the 1962 Recognition Act).

166. *Transportes Aereos Pegaso, S.A. de C.V. v. Bell Helicopter Textron Inc.*, 623 F. Supp. 2d 518, 535–36 (D. Del. 2009).

167. *Id.* at 536–37.

168. *Id.* at 538.

169. 2005 RECOGNITION ACT, *supra* note 65, § 4(d).

framework's reliance on state law for the substantive rules on judgments recognition provides no suitable exit from this conundrum.

### *B. The Recognition Jurisdiction Problem*

As the path of the *Standard Chartered Bank* case demonstrates, not only does the substantive law of judgments recognition differ from state-to-state, but this lack of uniformity extends to procedural issues, including matters of personal jurisdiction. Thus, in New York, recognition of the Bahraini judgment was accomplished without proving personal jurisdiction over the foreign judgment debtor.<sup>170</sup> The D.C. court, on the other hand, made clear that it would not have heard a recognition action without having personal jurisdiction over the judgment debtor, and that this defect in the New York proceedings was considered sufficient to deny recognition even under full faith and credit standards.<sup>171</sup>

While the issue of personal jurisdiction over the judgment debtor in judgments recognition cases (recognition jurisdiction) is a matter of constitutional law and could thus be resolved by the U.S. Supreme Court, that has not happened and may not happen for some time. The closest the Supreme Court has come to the question is a footnote in the celebrated case of *Shaffer v. Heitner*.<sup>172</sup> *Shaffer* raised the question of whether a court may proceed when the defendant is without sufficient contacts with the forum state to support personal jurisdiction, but property of the defendant is located in the forum state.<sup>173</sup> In its footnote 36, the Court stated:

Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.<sup>174</sup>

This is as near as the Supreme Court has come to touching on the question of recognition jurisdiction, so it also is the language on which lower courts have focused when faced with jurisdictional chal-

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170. See *supra* notes 138–41 and accompanying text.

171. See *supra* note 138 and accompanying text.

172. 433 U.S. 186 (1977).

173. For a complete discussion of *Shaffer v. Heitner*, see Linda J. Silberman, Commentary, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

174. *Shaffer*, 433 U.S. at 210 n.36.

lenges in judgments recognition cases. The same issue arises whether it is a foreign judgment or a foreign arbitral award for which recognition is being sought, so the cases from both of these areas are instructive.

### 1. Option 1: No Personal Jurisdiction Required

Cases and commentary have demonstrated three possible approaches to the question of recognition jurisdiction.<sup>175</sup> Each approach comes to a different conclusion about whether a court must apply a full due process analysis, which is otherwise required in the consideration of personal jurisdiction in a U.S. civil action,<sup>176</sup> when a judgment has already been rendered by another court, and the question before the U.S. court is simply the recognition and enforcement of that judgment. The first approach is to determine that due process is a matter appropriate for the court deciding the rights of the parties, and that a court asked only to recognize and enforce a judgment is simply implementing that decision, but not making decisions regarding “life, liberty, or property.” This approach does not require a full personal jurisdiction analysis in a judgments recognition action, and—as a practical matter—facilitates preemptive recognition so that enforcement may occur quickly if, and when, the judgment debtor’s assets are later found in the recognizing state. A proponent of this approach would argue that the judgment debtor has had her day in court in the court of origin, and that due process applies most importantly in that forum.

This approach is demonstrated by the decision of the New York Appellate Division in *Lenchyshyn v. Pelko Electric, Inc.*<sup>177</sup> There the court held

that the judgment debtor need not be subject to personal jurisdiction in New York before the judgment creditor may obtain recognition and enforcement of the foreign country money judgment, as neither the Due Process Clause of the United States Constitution nor New York law requires that the New York court have a jurisdictional basis for proceeding against a

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175. For a more detailed discussion of recognition jurisdiction issues, see Ronald A. Brand, *Recognition Jurisdiction and the Hague Choice of Court Convention*, in LIBER AMICORUM KREŠIMIR SAJKO 155 (Hrvoje Sikirić et al. eds., 2012).

176. Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661 (1999).

177. 723 N.Y.S.2d 285 (App. Div. 2001).

judgment debtor.<sup>178</sup>

Although the plaintiff's allegation that the defendant had assets within the forum state was not specifically established, the New York court went on to state:

[E]ven if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment pursuant to [the Uniform Foreign Money-Judgments Recognition Act], and thereby should have the opportunity to pursue all such enforcement steps *in futuro*, whenever it might appear that defendants are maintaining assets in New York . . . .<sup>179</sup>

The *Lenchyshyn* analysis was followed more recently in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Financial Services Co.*<sup>180</sup> The First Department Appellate Division quoted from the *Lenchyshyn* opinion:

“[A] party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts,” because “[n]o such requirement can be found in the CPLR, and none inheres in the Due Process Clause of the United States Constitution, from which jurisdictional basis requirements derive.” Although CPLR 5304(a) provides that the trial court may refuse recognition of the foreign country judgment if the foreign country court did not have personal jurisdiction over the judgment debtor, it does not provide for non-recognition on the ground that the New York court lacks personal jurisdiction over the judgment debtor in a CPLR article 53 proceeding.<sup>181</sup>

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178. *Id.* at 286.

179. *Id.* at 291. While *Lenchyshyn* is a New York decision, it is notable that the International Commercial Disputes Committee of the Association of the Bar of the City of New York has rejected its approach in favor of requiring either personal jurisdiction or the presence of the judgment debtor's assets in order to support an action. THE INT'L COMMERCIAL DISPUTES COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., LACK OF JURISDICTION AND FORUM NON CONVENIENS AS DEFENSES TO THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 15 (2005), <http://www.nycbar.org/pdf/report/ForeignArbitral.pdf>.

180. 986 N.Y.S.2d 454 (App. Div. 2014).

181. *Id.* at 457–58 (citations omitted); see also Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath*

Thus, the *Lenchyshyn* approach effectively treats the Uniform Act bases for non-recognition as exclusive, foreclosing the argument that the lack of personal jurisdiction over the judgment debtor can be added as a basis for non-recognition.

## 2. Option 2: Requiring Full Personal Jurisdiction

The second approach is to determine that every judicial proceeding requires a separate due process determination, and thus full personal jurisdiction analysis is required in any action to recognize a foreign judgment. Unless there is personal jurisdiction over the judgment debtor, no recognition action may be maintained and no recognition judgment may be granted.

This approach was adopted by the Fourth Circuit Court of Appeals in *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*,<sup>182</sup> an action to recognize and enforce a foreign arbitral award. The court held that even *quasi in rem* jurisdiction through the attachment of assets of the judgment debtor within the state is not sufficient and that personal jurisdiction over the judgment debtor is always required in an action to recognize an arbitral award.<sup>183</sup> A court adopting this logic for recognition of arbitral awards would seem easily to do the same for judgments recognition.

## 3. Option 3: Requiring Either Personal Jurisdiction or *Quasi In Rem* Jurisdiction

The third approach is to acknowledge that the presence of the judgment debtor's assets within the state of the court asked to recognize the foreign judgment is also sufficient to allow a court to adjudicate the question of recognition and enforcement, at least to the extent and value of the assets present in the state of the recognizing court. This approach essentially adopts the language of footnote 36

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Daimler *Wrought?*, 91 N.Y.U. L. REV. 344, 353 (2016) (criticizing the *Abu Dhabi* opinion on the grounds that the New York appellate court "overlooked the requirement of C.P.L.R. 5303, which provides that foreign country judgments are 'enforceable by an *action on the judgment*,' indicating that institution of an action is required for recognition and enforcement of a foreign country judgment," and concluding that "[t]he New York court decisions that hold neither property nor personal jurisdiction is required for recognition of a judgment stand as an aberration").

182. 283 F.3d 208 (4th Cir. 2002).

183. *Id.* at 213 ("[W]hen the property which serves as the basis for jurisdiction is completely unrelated to the plaintiff's cause of action, the presence of property alone will not support jurisdiction.").

from *Shaffer v. Heitner*,<sup>184</sup> with the effect of recognition being limited to the value of the judgment debtor's assets in the forum if full personal jurisdiction does not exist. Thus, due process is considered to be satisfied if either (1) the defendant has sufficient personal contacts to satisfy the standard minimum contacts analysis, or (2) there are assets of the defendant in the forum state, even if those assets are unrelated to the claim in the underlying judgment.<sup>185</sup>

This approach is adopted in both the *Restatement (Third) of Foreign Relations Law*<sup>186</sup> and the American Law Institute's *2005 Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*.<sup>187</sup> The Restatement—relying on *Shaffer's* footnote 36—states that, while

a state has jurisdiction to adjudicate a claim on the basis of presence of property in the forum only where the property is reasonably connected with the claim, an action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum.<sup>188</sup>

The ALI Proposed Federal Statute similarly provides, in section 9, that “[a]n action to recognize or enforce a judgment under this Act may be brought in the appropriate state or federal court (i) where the judgment debtor is subject to personal jurisdiction; or (ii) where assets belonging to the judgment debtor are situated.”<sup>189</sup> In each of these ALI texts, it would seem that the language would be limited by traditional jurisprudence on *quasi in rem* jurisdiction and that the ex-

184. See *supra* notes 172–74 and accompanying text.

185. See, e.g., *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905, 910 (N.D. Iowa 2002) (“[T]he minimum contacts requirement of the Due Process Clause does not prevent a state from enforcing another state’s valid judgment against a judgment-debtor’s property located in that state, regardless of the lack of other minimum contacts by the judgment-debtor.”); *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874, 885 (Mich. Ct. App. 2003) (“[I]n an action brought to enforce a judgment, the trial court must possess jurisdiction over the judgment debtor or the judgment debtor’s property.”).

186. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. h (AM. LAW INST. 1987).

187. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 9, at 18 (AM. LAW INST. 2006).

188. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. h (AM. LAW INST. 1987).

189. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 9(b), at 19 (AM. LAW INST. 2006).

tent of recognition would go no further than the value of the judgment debtor's assets present within the forum state.<sup>190</sup>

#### 4. Sorting Out the Options

Unlike the 1962 Recognition Act, section 6 of the 2005 Recognition Act specifically provides that the question of recognition of a foreign judgment is to be raised either by filing a separate new action "seeking recognition of the foreign-country judgment," or through a "counterclaim, cross-claim, or affirmative defense" in a pending action.<sup>191</sup> While this makes the procedure for judgments recognition clear, the Uniform Law Commission took no position on the question of recognition jurisdiction if offensive recognition is sought in the first of these two manners.<sup>192</sup>

Other courts have rendered decisions that seem only to add to the uncertainty existing through non-uniformity when considering recognition jurisdiction. In *Pure Fishing, Inc. v. Silver Star Co.*,<sup>193</sup> the Federal District Court for the Northern District of Iowa appears to follow the *Lenchyshyn* analysis, requiring neither contacts sufficient to find personal jurisdiction over the judgment debtor nor the presence in the forum state of assets of the judgment debtor.<sup>194</sup> But the facts in both *Pure Fishing* and *Lenchyshyn* indicated that the judgment debtor in each case had assets in the forum state, leaving it un-

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190. See, e.g., *CME Media Enterprises B.V. v. Zelezny*, No. 01 CIV. 1733(DC), 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001) (ultimately limiting the enforcement of an arbitration award to \$0.05 in the judgment debtor's bank account within the state).

191. 2005 RECOGNITION ACT, *supra* note 65, § 6.

192. *Id.* § 6 cmt. 4 ("While this Section sets out the ways in which the issue of recognition of a foreign-country judgment may be raised, it is not intended to create any new procedure not currently existing in the state or to otherwise effect existing state procedural requirements. The parties to an action in which recognition of a foreign-country judgment is sought under Section 6 must comply with all state procedural rules with regard to that type of action. Nor does this Act address the question of what constitutes a sufficient basis for jurisdiction to adjudicate with regard to an action under Section 6. Courts have split over the issue of whether the presence of assets of the debtor in a state is a sufficient basis for jurisdiction in light of footnote 36 of the U.S. Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977). This Act takes no position on that issue.")

193. 202 F. Supp. 2d 905 (N.D. Iowa 2002).

194. *Id.* at 910 ("The Iowa [Foreign Money-Judgments Recognition Act] itself contains no requirement of personal jurisdiction over the judgment debtor. The court notes that in the context of the recognition and enforcement of other state judgments, the minimum contacts requirement of the Due Process Clause does not prevent a state from enforcing another state's valid judgment against a judgment-debtor's property located in that state, regardless of the lack of other minimum contacts by the judgment-debtor.")

clear whether the language of each decision that would not require that condition is part of the holding or merely dicta.<sup>195</sup>

In *Electrolines, Inc. v. Prudential Assurance Co.*,<sup>196</sup> the Michigan Court of Appeals rejected the less stringent jurisdictional approach in *Lenchyshyn*, stating that “in an action brought to enforce a judgment, the trial court must possess jurisdiction over the judgment debtor or the judgment debtor’s property.”<sup>197</sup> Two cases in Texas specifically rejected the *Electrolines* approach in favor of the New York language in *Lenchyshyn*, finding a requirement of personal jurisdiction for purposes of judgments recognition in neither the United States Constitution nor the Texas version of the 1962 Recognition Act. In *Haaksman v. Diamond Offshore (Bermuda), Ltd.*,<sup>198</sup> the Texas Court of Appeals held that “the United States Constitution does not require in personam jurisdiction over the judgment debtor in the state in which a foreign judgment is filed.”<sup>199</sup> Thus, “even if a judgment debtor does not currently have property in Texas, a judgment creditor should be allowed the opportunity to obtain recognition of his foreign-money judgment and later pursue enforcement if or when the judgment debtor appears to be maintaining assets in Texas.”<sup>200</sup> Additionally, “a trial court does not have to possess jurisdiction over the judgment debtor or the judgment debtor’s property in order to rule on a motion for nonrecognition under the Uniform Act.”<sup>201</sup> A second Texas Court of Appeals opinion in *Beluga Chartering B.V. v. Timber S.A.*<sup>202</sup> went further in its analysis of the 1962 Recognition Act as enacted in Texas, finding that the Act in fact prohibited a requirement of personal jurisdiction in an action to recognize a foreign judgment.<sup>203</sup>

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195. In *Lenchyshyn*, the plaintiff alleged that the defendant had assets within the forum state, but that fact was not specifically established. *Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S.2d 285, 291 (App. Div. 2001).

196. 677 N.W.2d 874 (Mich. Ct. App. 2003).

197. *Id.* at 885.

198. 260 S.W.3d 476 (Tex. App. 2008).

199. *Id.* at 480 (determining that the language in *Shaffer v. Heitner* regarding full faith and credit to sister-state judgments applies equally to the recognition of foreign judgments).

200. *Id.* at 481 (“[T]he plain language of the Uniform Act does not require the judgment debtor to maintain property in the state in order for that state to recognize a foreign-money judgment. [The Act] provides a list of specific reasons why the trial court may refuse recognition of the foreign-country judgment; however, lack of property in the state is not a ground for nonrecognition.”).

201. *Id.*

202. 294 S.W.3d 300 (Tex. App. 2009).

203. *Id.* at 305 (“Under the [Texas Uniform Foreign Money-Judgments Recognition

Cases dealing with the recognition of foreign arbitral awards provide useful analysis of the same recognition jurisdiction issue as that in judgments recognition actions. While judgments recognition law currently is dispersed at the state level, and thus suffers significant non-uniformity, arbitration law is governed by federal law as a result of the Federal Arbitration Act<sup>204</sup> and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>205</sup> Under that combination of federal sources, the Second, Third, Fourth, Fifth, and Ninth Federal Circuit Courts of Appeal have all held that there must be personal jurisdiction over the award debtor—or presence of the award debtor’s assets in the forum state—in order to confirm a foreign arbitral award.<sup>206</sup>

The Second Circuit decision in *Frontera Resources Azerbai-*

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Act’s] express language, the trial court ‘may not, under any circumstances, review the foreign country judgment in relation to any matter not specified in Section 36.005.’ Section 36.005 provides that the trial court may refuse recognition if the foreign country court did not have personal jurisdiction over the judgment debtor in connection with the underlying action giving rise to the foreign country judgment for which enforcement is sought. The trial court does not entertain claims against the judgment debtor in the enforcement proceeding, and does not exercise personal jurisdiction over the judgment debtor. Therefore, lack of personal jurisdiction over the judgment debtor is not an available basis for resisting the subsequent UFCMJRA proceeding in Texas.” (citations omitted). While the court did not specifically address the question of *quasi in rem* jurisdiction, the judgment debtor had argued that there must be either in personam or *in rem* jurisdiction, suggesting that the judgment debtor did not have assets within Texas. *Id.* at 304.

204. 9 U.S.C. §§ 1–16 (2012).

205. New York Convention, *supra* note 82.

206. *First Inv. Corp. of the Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 750 (5th Cir. 2012) (“Congress could no more dispense with personal jurisdiction in an action to confirm a foreign arbitral award than it could under any other statute.”); *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 397–98 (2d Cir. 2009) (personal or *quasi in rem* jurisdiction required for confirmation proceeding under New York Convention); *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178–79 (3d Cir. 2006) (“[T]he New York Convention does not diminish the Due Process constraints in asserting jurisdiction over a nonresident alien.”); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1122 (9th Cir. 2002) (determining that Federal Arbitration Act requires personal jurisdiction because dispensing with such a requirement would raise question about the statute’s constitutionality); *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory,”* 283 F.3d 208, 212 (4th Cir. 2002) (“[W]hile the [New York] Convention confers subject matter jurisdiction over actions brought pursuant to the Convention, it does not confer personal jurisdiction when it would not otherwise exist.”); *see also Emp’rs Ins. of Wausau v. Banco De Seguros Del Estado*, 199 F.3d 937, 941–43, 941 n.1 (7th Cir. 1999) (requiring personal jurisdiction in dispute arising under the Inter-American Convention on International Commercial Arbitration but observing that the result would be the same under the New York Convention).

*jan Corp. v. State Oil Co. of the Azerbaijan Republic*<sup>207</sup> demonstrates the federal court analysis and reviews the earlier cases from other circuits. In rejecting the argument that no limitations outside the bases for non-recognition found in Article V of the New York Convention were available to avoid recognition of a foreign arbitral award, the Second Circuit stated:

[T]he need for personal jurisdiction is fundamental to “the court’s power to exercise control over the parties.” “Some basis must be shown, whether arising from the respondent’s residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court’s power.”

... Article V’s exclusivity limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought.<sup>208</sup>

The jurisprudence in arbitral award recognition thus holds that there must be either personal jurisdiction over the award debtor or the presence in the forum state of assets of the award debtor in order to recognize and enforce a foreign arbitral award under the New York Convention and the Federal Arbitration Act. A similar position is found in commentary as well. The draft ALI Restatement on International Commercial Arbitration,<sup>209</sup> the International Commercial Disputes Committee of the Association of the Bar of the City of New York,<sup>210</sup> and Gary Born’s leading commentary on international commercial arbitration<sup>211</sup> all consider it to be necessary to have either

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207. See generally *Frontera Res. Azer. Corp.*, 582 F.3d 393.

208. *Id.* at 397 (citations omitted).

209. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 5-19, § 5-19 Reporters’ Notes (AM. LAW INST., Tentative Draft No. 1, 2010) (stating a requirement of either statutory personal jurisdiction and compliance with “general constitutional due-process requirements under the Fifth and Fourteenth Amendments,” or *quasi in rem* jurisdiction, but also noting that “a court remains free to predicate jurisdiction on consent where the parties entered into an agreement selecting that court as a forum for the enforcement of an award”) (citing *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006)).

210. THE INT’L COMMERCIAL DISPUTES COMM. OF THE ASS’N OF THE BAR OF THE CITY OF N.Y., *supra* note 179.

211. 3 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2981-84 (2d ed. 2014). Born takes the position that “customary jurisdictional limitations on the judicial powers of Contracting States” are sufficient grounds to deny recognition and enforcement of an arbitral award under the New York Convention, but that the application of the doctrine of *forum non conveniens* to avoid recognition and enforcement (being, in his analysis,

personal jurisdiction over the award debtor or *quasi in rem* jurisdiction over assets of the award debtor for purposes of an action for enforcement of a foreign arbitral award.<sup>212</sup>

### 5. *Quasi In Rem* Jurisdiction and Litigation Strategy

The ability to use *quasi in rem* (presence of assets) jurisdiction in place of personal jurisdiction for purposes of recognition jurisdiction leads to further questions regarding just what is necessary in such cases.

#### a. *The Required Evidence and Jurisdictional Discovery*

A party litigating the recognition of a foreign judgment when assets are available in the forum state and personal jurisdiction does not exist must consider what evidence of the presence of the judgment debtor's assets within that state is required. The language and facts of the *Lenchyshyn* case suggest that the mere allegation that the judgment debtor has assets in the forum state is sufficient to establish jurisdiction for a recognition action.<sup>213</sup> Nonetheless, traditional *quasi in rem* jurisdiction analysis tends to require something more than the mere allegation of assets within the state.<sup>214</sup> Thus, jurisdictional discovery may be necessary in order to prove the presence of assets within the state and thus establish *quasi in rem* jurisdiction.<sup>215</sup>

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substantive and not procedural) is not reconcilable with Articles III and V of the New York Convention. *Id.* at 2982, 2984–87.

212. Note, however, that section 5-19 of the Restatement Tentative Draft No. 1 carries the title “Personal Jurisdiction in Actions to Enforce International Arbitral Awards,” leaving out the word recognition in its text, comments, and Reporters’ Notes. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 5-19 (AM. LAW. INST., Tentative Draft no. 1, 2010). One might infer from this that the discussion applies only to enforcement (for purposes of which there would necessarily have to be property of the award debtor within the jurisdiction of the forum state), and not to recognition. The absence of separate discussion of recognition also operates at the same time, however, to weaken this implicit result—if section 5-19 applied only to enforcement, and not to recognition, then there would necessarily be other discussion of recognition jurisdiction in the draft, and that is not the case.

213. *See supra* notes 177–81 and accompanying text.

214. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.8 (5th ed. 2015) (“Once the property comes under the court’s control, whether by attachment, garnishment, or equitable sequestration, the court has power to adjudicate all phases of the action.”).

215. For a discussion of this issue in regard to arbitration by the International Disputes Committee of the Association of the Bar of the City of New York, see THE INT’L

*b. Must There be a Relationship Between the Assets and the Underlying Claim?*

The second litigation strategy question if personal jurisdiction is not available is whether the judgment debtor's assets present in the forum state have any relationship to the claim underlying the foreign judgment. The International Disputes Committee of the Association of the Bar of the City of New York ("ABCNY Committee") has taken the position that, in regard to the New York Convention, the "Presence of the Debtor's Property Within the State, Regardless of Whether it has Any Connection to the Underlying Claim, Should be Sufficient to Establish Quasi In Rem Jurisdiction for Enforcement of a Foreign Arbitral Award."<sup>216</sup> This is supported by the language of the U.S. Supreme Court in *Shaffer v. Heitner*:

The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not have jurisdiction if *International Shoe* applied is that a wrongdoer

"should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit."

This justification, however, does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner's obligations. Nor does it support jurisdiction to adjudicate the underlying claim. At most, it suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*.<sup>217</sup>

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COMMERCIAL DISPUTES COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., *supra* note 179, at 3. For a discussion of the unique U.S. approach to jurisdictional discovery and the amorphous standards applicable to it, see generally S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489 (2010).

216. THE INT'L COMMERCIAL DISPUTES COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., *supra* note 179, at 9.

217. *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977) (footnotes and citations omitted).

*c. Is Attachment Required?*

The third litigation strategy question is whether the judgment debtor's assets in the recognizing state must be attached in order to support *quasi in rem* jurisdiction. On this question, the ABCNY Committee concluded that "Due Process Does not Require Attachment of the Debtor's Property for Enforcement of a Foreign Arbitral Award."<sup>218</sup> This conclusion acknowledged that some "[s]tate statutes may require seizure of assets as a basis for quasi-in-rem jurisdiction,"<sup>219</sup> and that "practical considerations may well lead creditors to obtain attachment of the assets upon which they base jurisdiction."<sup>220</sup> Nonetheless, the Committee found no constitutional requirement of attachment prior to establishing recognition jurisdiction on a *quasi in rem* basis.<sup>221</sup> While the Committee's report addressed the recognition of arbitral awards, the same analysis should apply to recognition jurisdiction in judgments cases.

*d. Limiting Recognition to the Value of the Assets Present*

A fourth litigation strategy question is whether recognition jurisdiction founded only on *quasi in rem* principles results in limiting any recognition judgment to the value of those assets. The ABCNY Committee concluded that such a limitation exists in determinations of recognition jurisdiction for both arbitral awards<sup>222</sup> and foreign judgments.<sup>223</sup> Obviously, the restriction of a recognition action to the

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218. THE INT'L COMMERCIAL DISPUTES COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., *supra* note 179, at 10.

219. *Id.*

220. *Id.* at 11.

221. *Id.* at 10.

222. *Id.* at 12.

223. *Id.* at 17. The Committee focused its analysis on *CME Media Enterprises B.V. v. Zelezny*, No. 01 CIV. 1733(DC), 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001), an unreported decision of the Federal District Court for the Southern District of New York. In *Zelezny*, confirmation of a \$23.35 million Dutch arbitration award against a Czech defendant was sought. *Id.* at \*1. The plaintiff conceded that personal jurisdiction did not exist, but based its allegation of *quasi in rem* jurisdiction on the presence in New York of the award debtor's bank account with Citibank. *Id.* That account had a balance of \$69.65 when the action was filed in New York, and had been reduced to \$0.05 at the time of hearing because of fees assessed by Citibank. *Id.* The court found *quasi in rem* jurisdiction to exist, and thereby confirmed the award for enforcement, but only to the extent of the \$0.05 of defendant's assets within the forum state. *Id.* at \*4. Because the court had no personal jurisdiction over the award debtor, "any judgment will have no effect beyond the property that forms the basis of quasi in rem jurisdiction." *Id.* Ultimately, the court's decision was

value of a judgment debtor's assets within the recognizing state limits the value of the recognition action itself, and may well have implications for the further use of any resulting judgment under the full faith and credit process.

## 6. Recognition Jurisdiction and Treaty Obligations

As noted above, and in particular in the Second Circuit decision in *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*,<sup>224</sup> some have argued that, when recognition of an arbitral award is governed by the New York Convention, U.S. courts must refuse recognition of an award only on bases explicitly allowed in Article V of the Convention.<sup>225</sup> If the United States were to become a party to the Hague Convention on Choice of Court Agreements,<sup>226</sup> the same argument could be made in the judgments recognition context. This position has been rejected by all of the circuit courts that have addressed the matter, by distinguishing the substantive bases for non-recognition found in the New York Convention from the procedural—and constitutional—nature of jurisdictional analysis.<sup>227</sup>

On a global scale, it is useful as well to consider how foreign courts have addressed the same issue. That record is mixed, and it is difficult to discern a clear interpretation that would prohibit a refusal to take a judgment recognition case based on jurisdictional principles. A number of cases have involved claims that jurisdiction could not be asserted unless the judgment debtor had assets in the forum state.

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summed up in the following language:

[Q]uasi in rem jurisdiction cannot be based on speculation about the possible existence of other property. Because it is the existence of property that provides the basis for jurisdiction, and in the absence of minimum contacts, the Court cannot exercise jurisdiction beyond the known assets based on petitioner's speculation that other assets might exist. [The award debtor] is not before the Court; only the limited assets in the Account—\$0.05—are before the Court. For these reasons, petitioner's request for discovery to locate other assets in this jurisdiction is denied.

*Id.* at \*5.

224. 582 F.3d 393, 397 (2d Cir. 2009).

225. See *supra* notes 205-08 and accompanying text.

226. See *supra* notes 54-64 and accompanying text.

227. See, e.g., *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178-79 (3d Cir. 2006); *Frontera Res. Azer. Corp.*, 582 F.3d at 396; *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 212-13 (4th Cir. 2002); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120-22 (9th Cir. 2002).

Thus, the UK Court of Appeal has held that granting leave for extra-territorial service on a foreign party (i.e. obtaining jurisdiction over that party) for purposes of recognition of a foreign judgment did not require proof that the judgment debtor had assets within the UK, but did require that the judgment creditor show that “he can reasonably expect a benefit” from the recognition action.<sup>228</sup>

In an arbitral award recognition case in Ireland, the High Court of Ireland rejected any New York Convention limitation on what it considered a jurisdictional claim, but quoted earlier case law stating that “the court should be careful not to bring a foreigner here as a defendant, where no positive relief is claimed against him unless it can be shown that a ‘solid practical benefit’ would ensue.”<sup>229</sup> Similarly, the Dubai International Financial Centre Court has held that, while a lack of assets in the jurisdiction may be a ground for refusal of enforcement of an arbitral award, it is not a ground for refusal of jurisdiction to hear the recognition action.<sup>230</sup>

Each of the previous cases did assume that a challenge to jurisdiction was possible. The opposite position was reached in Canada in *Yaiguaje v. Chevron Corp.*,<sup>231</sup> where the Ontario Court of Appeal determined that the standard “real and substantial connection” test of jurisdiction required under Canadian law need not be met for judgments recognition purposes, as “there is no constitutional issue because the decision of the court is limited to the enforceability of the judgment in Ontario.”<sup>232</sup>

While these examples are all from common law jurisdictions, some basis of recognition jurisdiction appears to be required in civil law jurisdictions as well. For example, in Germany, “[t]he action for a declaration of enforceability is an adversarial proceeding and the general rules of jurisdiction apply. The proper venue to file the motion is determined primarily by the defendant’s domicile or the location of the assets that are to be seized.”<sup>233</sup> These requirements for

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228. *Demirel v. Tasarruf Mevduati Sigorta Fonu* [2007] EWCA (Civ) 799 [29], [2007] 1 WLR 2508-2 (Eng.).

229. *Yukos Capital S.A.R.L. v. OAO Tomsneft VNK* [2014] IEHC 115 (Ir.) (quoting *Tasarruf*, [2007] EWCA (Civ) 799 [26]).

230. *Egan v. Eava* [2014] ARB 005 (Dubai Int’l. Fin. Ctr. Cts.), <http://difccourts.ae/arb-0022013-1-x1-2-x2-v-1-y1-2-y2> (redacted judgment).

231. *Yaiguaje v. Chevron Corp.* (2013), 118 O.R. 3d 1 (Can. Ont. C.A.).

232. *Id.* ¶ 33.

233. Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT’L L. 175, 198–99 (2005); see also ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], §§ 12, 23, [http://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.pdf](http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.pdf) (Ger.).

recognition jurisdiction in foreign legal systems, both common and civil law, indicate room for the majority approach in the United States, which requires either personal jurisdiction or *quasi in rem* jurisdiction for a recognition action, even when treaty obligations are involved.<sup>234</sup>

### C. *The Forum Non Conveniens Problem*

Recent cases in the Second Circuit have created another—heavily criticized—litigation strategy in recognition cases. This one also raises forum shopping concerns. While the Second Circuit cases involve the recognition of arbitral awards, the concept is equally applicable to judgments recognition. This trend began with *Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine*.<sup>235</sup> The holder of a Russian arbitral award against a Ukrainian company sought confirmation of that award against both the original award debtor and—by piercing the corporate veil—against the State of Ukraine.<sup>236</sup> The State of Ukraine had not been a party to either the arbitration agreement or the arbitration proceedings.<sup>237</sup> The Second Circuit affirmed the District Court’s granting of a motion to dismiss on grounds of *forum non conveniens*, finding that “[t]he Supreme Court has classified the doctrine of forum non conveniens as ‘procedural rather than substantive.’”<sup>238</sup>

The *forum non conveniens* doctrine is a common law tool which allows a court which has jurisdiction to nonetheless decline to exercise that jurisdiction in favor of a more appropriate forum in another state.<sup>239</sup> It has been applied by the U.S. Supreme Court and is

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234. For an excellent discussion of whether the narrowing of general jurisdiction brought about by *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), affects this issue and should result in a more liberal test of jurisdiction in judgments recognition cases, see Silberman & Simowitz, *supra* note 181; cf. BORN, *supra* note 211, at 2982 (“[A]ssertion of judicial jurisdiction [for arbitral award recognition purposes] over parties that had no contacts with the state would raise significant international law issues.”).

235. See generally *Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukr.*, 158 F. Supp. 2d 377 (S.D.N.Y. 2001), *aff’d*, 311 F.3d 488 (2d Cir. 2002).

236. *Id.* at 379–80.

237. *Id.* at 380.

238. *In re Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukr.*, 311 F.3d 488, 495 (2d Cir. 2002) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)).

239. See RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* (2007).

routinely the basis of motions to stay or dismiss when multiple fora are available with jurisdiction to hear the same case.<sup>240</sup>

The *Monde Re* court determined that, even if the grounds for non-recognition found in Article V of the New York Convention are the exclusive substantive bases for refusing recognition, Article III of the Convention provides that awards are to be recognized and enforced “in accordance with the rules of procedure of the territory where the award is relied upon.”<sup>241</sup> Thus, *forum non conveniens*—as a procedural doctrine—remained available and allowed dismissal of the action. A *forum non conveniens* dismissal in *Monde Re* might have been justified upon the grounds that the request to pierce the corporate veil and bring the State of Ukraine into the case was something more than simple recognition of an arbitral award, and that the evidence necessary to consider *that issue* was better found and considered in a Ukrainian court. The Second Circuit, however, did not limit its *forum non conveniens* dismissal to that issue, and applied the doctrine to the entire case, including the question of recognition of the foreign arbitral award.<sup>242</sup>

In *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*,<sup>243</sup> the Second Circuit again dismissed an attempt to recognize and enforce an arbitration award on grounds of *forum non conveniens*. A Brazilian company with a Brazilian arbitral award against a Peruvian entity (determined by the District Court not to be separate from the Peruvian government)<sup>244</sup> sought recognition of the award in the Federal District Court for the Southern District of New York. Following its earlier decision in *Monde Re*, the Second Circuit again concluded that the *forum non conveniens* doctrine is a matter of procedural law, and thus not subject to the exclusivity limitations of either Article V of the New York Convention or the similar language of Article IV of the Panama Convention.<sup>245</sup> Thus, the court applied *forum non conveniens* analysis, relying on a Peruvian statute that imposes “a limit of three percent of the budget of a governmental entity on the amount of money the entity may pay annually to satisfy a judgment,” to determine that public interest factors (of another coun-

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240. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

241. *Monde Re*, 311 F.3d at 494 (quoting New York Convention, *supra* note 82, art. III).

242. *Monde Re*, 311 F.3d at 500.

243. 665 F.3d 384 (2d Cir. 2011).

244. *Id.* at 388.

245. *Id.* at 398 (Lynch, J. dissenting) (citing the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448, 1438 U.N.T.S. 245 [hereinafter Panama Convention]).

try) favored hearing the matter in Peru.<sup>246</sup> Over a strong dissent by Judge Lynch,<sup>247</sup> and despite a decision by the District Court denying the *forum non conveniens* motion,<sup>248</sup> the court reversed and granted the *forum non conveniens* motion.

While a 2006 decision of the Federal District Court for the District of Columbia seemed to be consistent with *Monde Re*,<sup>249</sup> in 2010, the same court ruled that *forum non conveniens* was not appropriate in an award recognition action, stating that there could be no “adequate alternative forum” because “only a court of the United States . . . may attach the commercial property of a foreign nation located in the United States.”<sup>250</sup> This is consistent with the position taken by most commentators, who also emphasize that U.S. obligations under the New York Convention make it important not to dismiss award recognition actions.<sup>251</sup>

The *forum non conveniens* problem appears limited at this point to the Second Circuit, and to arbitral award recognition cases. Nonetheless, the principles behind it could be equally argued in a judgment recognition case. Thus, it presents both litigation strategy opportunities and obstacles to efficient and effective judgments

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246. *Figueiredo*, 665 F.3d, at 387, 391–92.

247. *Id.* at 394 (Lynch, J. dissenting).

248. *Figueiredo Ferraz Consultoria E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F. Supp. 2d 361, 376–77 (S.D.N.Y. 2009), *rev'd*, 665 F.3d 384 (2d Cir. 2011).

249. *Termorio S.A. v. Electricadora del Atlantico S.A.*, 421 F. Supp. 2d 87, 103 (D.D.C. 2006) (dismissing the recognition of an award because it had already been vacated in the court of the seat of arbitration, but also holding that “[i]n the alternative” the action would be dismissed on the basis of *forum non conveniens*), *aff'd sub nom* *Termorio S.A. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

250. *Cont'l Transfert Technique Ltd. v. Fed. Gov't. of Nigeria*, 697 F. Supp. 2d 46, 57 (D.D.C. 2010) (citing *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 303 (D.C. Cir. 2005)).

251. *See, e.g.*, RESTATEMENT OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 4-29(a) (AM. LAW INST., Tentative Draft No. 3, 2011) (“An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on *forum non conveniens* grounds.”); Alan Scott Rau, *The Errors of Comity: Forum Non Conveniens Returns to the Second Circuit*, 23 AM. REV. INT'L ARB. 1 (2012); Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT'L ARB. 439 (2012); The Int'l Commercial Disputes Comm. of the Ass'n of the Bar of the City of N.Y., *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 AM. REV. INT'L ARB. 407, 427–28, 433 n.98 (2004) (“[A]pplication of the *forum non conveniens* doctrine to awards governed by the New York Convention should be foreclosed by the exclusivity of the grounds for non-enforcement set forth in Article V . . . . Because of its breadth and discretionary nature, allowing *forum non conveniens* as a defense simply opens too large a hole in the enforcement fabric that the Convention was designed to create.”).

recognition processes. The better approach clearly is that represented in the commentary and the most recent decision in the D.C. Circuit.<sup>252</sup> Not only is the application of the *forum non conveniens* doctrine in award recognition cases contrary to the purpose of the New York Convention, but its application in either award or judgments recognition cases in order to send a case elsewhere simply makes no sense when the purpose of the proceeding is to seek the ultimate enforcement of a right against assets in the United States.

#### *D. Litigation Strategy and the Resulting Recipe for Forum Shopping*

As the above discussion indicates, the current diffusion of the law on judgments recognition creates both uncertainty and opportunities for forum shopping. The following chart demonstrates in decision tree format the litigation strategy issues that arise as a result of different states taking different positions on judgments recognition law issues. It begins with basic questions counsel for the judgment creditor must consider and then follows the results of the possible answers to those questions.

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252. See, e.g., Int'l Arbitration Club of N.Y., *Application of the Doctrine of Forum Non Conveniens in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New York and Panama Conventions*, 24 AM. REV. INT'L ARB. 1, 3 (2013) (discussing how the *Figueiredo* decision "is likely to encourage award debtors generally, not just foreign States, to raise *forum non conveniens* as a threshold barrier to proceedings in the United States to confirm foreign arbitral awards").



The above decision tree demonstrates the forum-shopping opportunities which must be considered as a matter of litigation strategy as a result of the current disjointed system of judgments recognition law. As in every possible action for recognition, the analysis of favorable fora begins with jurisdiction. Thus, the initial question always will be whether the state in which an action is contemplated has both in personam jurisdiction and is a state in which there are assets of the judgment debtor. Once this question is answered, the decision-making process splits into issues affected primarily by the substantive law on judgments recognition in the potential forum state (the portion of the decision tree on the left, which is engaged if the answer to the first question is “yes”), and issues affected primarily by the manner in which a state’s courts apply rules of jurisdiction in judgments recognition cases (the portion of the decision tree on the right, which is engaged if the answer to the first question is “no”).

It may be that most judgments recognition actions will easily be brought in a state in which (1) personal jurisdiction exists over the judgment debtor, (2) assets of the judgment debtor are present in order to facilitate enforcement (as well as *quasi in rem* jurisdiction), and (3) the substantive law of judgments recognition is favorable to the judgment creditor. Nonetheless, cases like *Standard Chartered Bank v. Ahmad Hamad Al Gosaibi*<sup>253</sup> and *Alberta Securities Commission v. Ryckman*<sup>254</sup> demonstrate that the legal system must address the questions which arise in the more difficult cases. Moreover, the discussion above indicates significant additional litigation strategy questions that further exacerbate the problems of non-uniformity of judgments recognition law throughout the United States.<sup>255</sup>

This non-uniformity leads to litigation strategy decisions which both complicate matters for a judgments recognition plaintiff and provide potential for the selection of a forum other than the natural forum in which a defendant should expect to be required to defend. A process of indirect recognition, using full faith and credit principles to escape what would be an otherwise unsuccessful attempt at direct recognition, raises important questions about the litigation process within a nation that presents itself as a single actor on the world stage. It creates unnecessary costs, inappropriate extension

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253. See *supra* Section III.A.1.a.

254. See *supra* Section III.A.1.b.

255. See *supra* notes 214–24 and accompanying text.

of the time required to reach finality in the litigation process, and significant uncertainty. A truly unified approach, with a single source of substantive rules, would be both more efficient and more equitable.

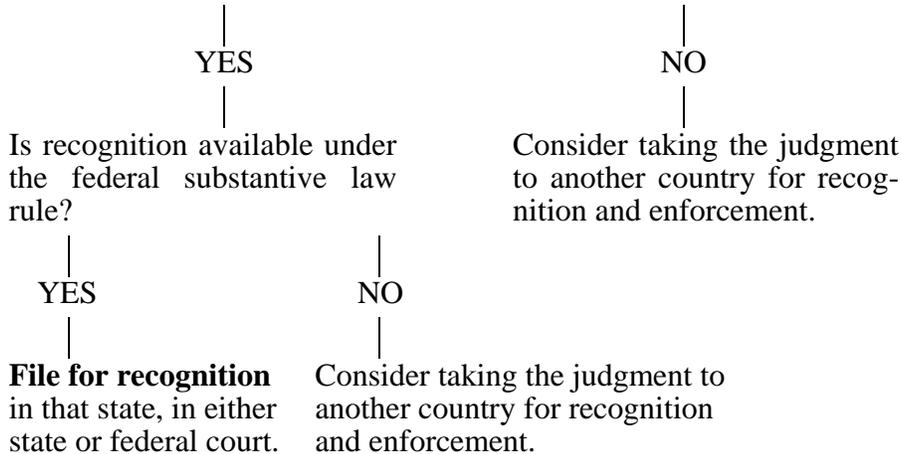
Unifying U.S. law on judgments recognition can be accomplished through federal legislation and treaties. The 2005 Hague Convention on Choice of Court Agreements presents a good vehicle for starting this process, but federal implementation of that treaty alone is not enough. Any real progress in development of the system will require attention to the three major issues discussed above, and should thus include:

- 1) federalization of the basic substantive law rules for recognition of foreign judgments;
- 2) federal statutory rules on recognition jurisdiction governing the exercise of personal and *quasi in rem* jurisdiction for purposes of judgment recognition; and
- 3) federal statutory rules on the unavailability of the doctrine of *forum non conveniens* in judgments recognition cases, in order to prevent the issues that have arisen in *Monde Re* and subsequent arbitral award recognition cases.

The 2005 Recognition Act and the 2005 ALI Proposed Federal Statute present excellent starting points for drafting the federal statute stating the substantive law of judgments recognition, and the ALI Proposed Federal Statute has appropriate provisions for both the recognition jurisdiction and *forum non conveniens* issues. A good federal statute can take the confusing, complex, and potentially inequitable decision tree in the chart above, and turn it into the following, much more efficient and effective decision tree analysis:

**CHART 2: Judgment Recognition Decision Tree (under a unified federal law system).**

Is there a state in which there exists either personal jurisdiction over the judgment debtor or in which the judgment debtor has assets?



#### IV. COORDINATED FEDERALISM AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

If both the 2005 Recognition Act and the 2005 ALI Proposed Federal Statute provide good points of departure for drafting a federal statute that would bring us from the confusion of the current non-uniformity of the law on judgments recognition to a more workable system, what might be the contours of such a future system? The process should begin with the existing treaty and include federal legislation that implements that treaty and sets forth substantive law on judgments recognition. It also should include uniform state law that coordinates with, but does not repeat, or overlap with, federal law.

Two distinctions seem to indicate specific separation, but coordination, of federal and state law in order to provide an improved regime of judgments recognition and enforcement. The first is the distinction between basic judgments recognition law and the related areas of law—particularly the law of contract formation—which are necessary in order to apply judgments recognition law. The Hague Convention contains judgments recognition rules, but relies on local law for both rules of contract formation—to determine that a choice

of court “agreement” exists—and contract law rules determining substantive validity of an agreement (i.e., whether a choice of court agreement is “null and void”).<sup>256</sup> This distinction allows judgments recognition law to be determined at the federal level, including through treaties. It also allows basic contract law matters that are fundamental to the application of that federal law to remain governed by state law, thus providing coordination without overlap.

The *Standard Chartered Bank* and *Ryckman* cases demonstrate that recognition of a foreign judgment and the enforcement of that judgment are separate (though clearly related) matters. Recognition requires uniformity at the federal level and has implications for foreign relations through the foundations of comity that are basic to any analysis of a foreign judgment. Enforcement, on the other hand, concerns what happens to assets within the jurisdictional authority of a court once recognition has been obtained. Enforcement clearly is a more local matter and more appropriate for state law. Thus, coordination between recognition law, on the federal level, and enforcement law, on the state level, can logically result in a more efficient structure for the law, and be consistent with a proper constitutional allocation of federal and state authority. As the discussion below indicates, federal courts are already accustomed to borrowing state law tools for enforcement purposes.

#### A. *The Federal Role*

##### 1. Beginning with the Existing Treaty: The 2005 Hague Convention on Choice of Court Agreements

As the discussion above indicates, a move to federal law for the substantive core of judgments recognition law must involve a combination of treaties and federal statutes. The 2005 Hague Convention on Choice of Court Agreements already provides a starting point for bringing judgments recognition law into balance with the law on recognition of arbitral awards. Ratification and implementation of the Hague Convention in a manner that parallels the U.S. legal framework for the New York and Panama Conventions on arbitration would be a step in putting the new puzzle pieces into place. But this approach is possible only if the current political hurdles can be removed.<sup>257</sup>

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256. For further discussion of the validity issue, see Ronald A. Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts*, in LIBER AMICORUM HUBERT BOCKEN 541 (I. Boone et al. eds., 2009).

257. For examples of the arguments that have been made on both sides of the federalism

A new framework could allow each of federal and state law to address distinct legal issues that coordinate rather than overlap and potentially conflict. If both sides of the current debate on implementation of the Hague Convention can see this as possible, then ratification and implementation of the Hague Convention may move forward based on the arbitration model at the federal level.

Today there is even greater urgency for becoming a party to the Hague Convention than when Harold Koh led the effort to find compromise beginning in 2011.<sup>258</sup> On December 4, 2014, the European Council adopted its Decision to ratify the Convention on behalf of the European Union and all of its Member States.<sup>259</sup> The Convention entered into force between the European Union (and its Member States) and Mexico on October 1, 2015, and for Singapore on October 1, 2016.<sup>260</sup>

The entry into force of the Hague Convention means that its effect is no longer merely an academic matter, but a matter of significant practical importance. Like the issues discussed above, the Convention will affect litigation strategy in many countries. Perhaps even more important, however, is how it will affect transaction planning strategy if the United States is not a contracting state—and thus will indirectly reduce the need for litigation strategy in the United States. As one commentator has explained:

It's probably only a matter of time before the rest of the world lines up for easy reciprocal enforcement with the nations of Europe.

Once that happens, a court judgment from London will be more valuable than one from New York. For if clients from Asia or Latin America can sue anywhere, which would they rather have in their back pockets? Deal lawyers drafting the dispute-resolution

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debate, see Stephen B. Burbank, *A Tea Party at the Hague?*, 18 SW. J. INT'L L. 629 (2012) (promoting federal implementation of the 2005 Hague Convention); Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOY. L. REV. 301 (2005) (supporting a larger role for state uniform law); William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L.J. 1 (2005) (supporting a larger role for state law). For a more general discussion of the 2005 Hague Convention, see BRAND & HERRUP, *supra* note 84.

258. See *supra* notes 82–87 and accompanying text.

259. Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements (2014/887/EU), 2014 O.J. (L 353) 5.

260. *Status Table 37: Convention of 30 June 2005 on Choice of Court Agreements*, *supra* note 61.

clause in international contracts are sure to take note. And U.S. litigators, having spent the past decade watching their global business flow to arbitration, may be chagrined to see more of it diverted to the Royal Courts of Justice.<sup>261</sup>

The result of fewer choice of court clauses selecting U.S. courts will also be fewer choice of law clauses selecting U.S. law, including any state's version of the Uniform Commercial Code. Thus, the Uniform Law Commissioners' efforts to prevent federal implementation of the Hague Convention may ultimately result in less, not more, use of state law in which the ULC has a vested interest.

The EU ratification and implementation of the 2005 Hague Convention places new urgency on the need for U.S. ratification and implementation. That urgency is now fueled by more than just having good law available to U.S. participants in international commerce. It is fueled by the goal of remaining competitive in legal markets with courts in the European Union and throughout the world.

## 2. Providing Balance with Arbitration

The ratification and implementation of the 2005 Hague Convention is also necessary to fulfill one of the Convention's significant purposes: placing choice of court clauses in international commercial contracts on an equal footing with arbitration clauses. While this Article is focused primarily on the litigation strategy resulting from an imperfect system of judgments recognition law, transaction planning is also affected by the presence or absence of the Hague Convention as a legal tool. As already noted, EU participation in a Hague Convention regime without the United States will likely bring unintended negative consequences that will drive contract drafting away from a choice of U.S. courts and U.S. law. Moreover, the failure of the United States to become a contracting state will leave a significant imbalance for U.S. transactions lawyers faced with the option between choice of court and arbitration clauses. So long as the

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261. Michael D. Goldhaber, *Ideology Blocks Arbitration Treaty*, NAT'L L.J. (D.C.), July 6, 2015, at 6. While the impending exit of the United Kingdom from the European Union changes this analysis, the efforts of Singapore to develop a magnet commercial court system as a Contracting State to the Convention, and the likelihood that other EU Member States may respond with efforts to capture legal business from London, makes the basic thrust of the analysis both contemporary and cogent. The efforts of the Singapore International Commercial Court to become "A Prime Destination for International Commercial Dispute Resolution" are explained in detail on the court's website. SING. INT'L COM. CT., <http://www.sicc.gov.sg> (last updated Jan. 5, 2015).

New York Convention provides benefits of arbitration agreement and award recognition and enforcement that are not available on an equal basis to choice of court agreements, choice of forum clauses will be based on considerations other than a direct comparison of the relative advantages and disadvantages of arbitration and litigation. Not all disputes are best settled by international arbitration, and the ability to choose a court instead of arbitration, and to have that choice supported by the legal system, remains significantly impaired without the Hague Convention in effect.

Not everything about the New York Convention experience has approached perfection. The discussion above demonstrates that problems have arisen with arbitration award recognition despite the existence of U.S. participation in the Convention regime. The arbitral award recognition process suffers from the same recognition jurisdiction uncertainties as does judgments recognition,<sup>262</sup> and it is in the realm of arbitral award recognition that the Second Circuit has presented us with special *forum non conveniens* problems.<sup>263</sup> But the lessons of U.S. ratification and implementation of the New York Convention can be used to inform and improve the manner in which the Hague Convention is ratified and implemented, allowing the avoidance of those problems. We have the opportunity to choose the better path while learning from the example that is closest to that path.

### 3. Providing Uniformity of Law and Uniformity of Interpretation

The three problems highlighted by the *Standard Chartered Bank* and *Ryckman* cases can all be addressed through a single federal statute much like that found in the 2005 ALI Proposed Federal Statute. First, by making judgments recognition a matter of federal law, the non-uniformity problem can be addressed by having all of the basic substantive rules of judgments recognition governed by a single legal source. Not only will that statute provide the simplest form of uniform law, but it will also be subject to uniform interpretation through a single, binding, ultimate interpreter in the U.S. Supreme Court. Second, the problem of recognition jurisdiction also can be addressed in a federal statute. The model for this already exists in the 2005 ALI Proposed Federal Statute, Section 9(b), which states, “An action to recognize or enforce a judgment under this Act may be brought in the appropriate state or federal court (i) where the

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262. See *supra* notes 170–90 and accompanying text.

263. See *supra* notes 235–52 and accompanying text.

judgment debtor is subject to personal jurisdiction; or (ii) where assets belonging to the judgment debtor are situated.”<sup>264</sup> This approach selects the third alternative discussed above,<sup>265</sup> allowing a recognition action in any state or federal court in which there exists either personal jurisdiction over the judgment debtor or *quasi in rem* jurisdiction as a result of the presence of the judgment debtor’s assets within the forum state.

The third problem discussed above arises when a court, asked to recognize a foreign judgment (or, more particularly in the existing cases, a foreign arbitral award), also is faced with a motion to stay or dismiss based on the doctrine of *forum non conveniens*. A federal statute could easily avoid this problem by stating that no court may stay or dismiss an action for judgment recognition based on the doctrine of *forum non conveniens*. Thus, all three problems that lead to the complicated decision tree analysis of litigation strategy could be cured through the combination of federal implementation of the 2005 Hague Convention and a federal statute on judgments recognition.

### B. The State Role

Federal implementation of the Hague Convention, combined with a federal statute on judgments recognition, would not remove state law from important roles in the recognition and enforcement of foreign judgments. The Hague Convention specifically leaves issues important to judgments recognition for local law, and judgments recognition in federal courts has both borrowed from and deferred to state law on the enforcement of judgments in ways that provide for the continued relevance and importance of state law.

The idea of having a federal statute provide the principal set of rules for recognition of foreign judgments with supplemental state law on specific issues is not a new one. Others have suggested this approach in the past.<sup>266</sup> It is useful, however, to revisit this option and to consider its dimensions.

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264. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 9(b), at 19 (AM. LAW INST. 2006).

265. See *supra* notes 184–90 and accompanying text.

266. See, e.g., Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. PRIV. INT’L L. 287, 300 (2006) (“[T]he strongest argument for implementation of the Hague Convention by a process that relies on state lawmaking rests on a claim that state law should govern those few matters on which the treaty contemplates (or tolerates) disuniformity.”).

## 1. Rules of Contract Formation and Validity

The 2005 Hague Convention, like many private international law conventions, does not provide a complete set of rules, and thus retains the need for reference to local law in carrying out the basic treaty functions.<sup>267</sup> A number of issues are left for determination in this manner, some of which are appropriately governed by state law in the United States. Upon ratification and implementation of the Hague Convention, and implementation of a federal statute on judgments recognition, it would be extremely helpful to have a corresponding Uniform Act for state law adoption that would cover such issues.

### *a. Existence of a Choice of Court Agreement*

Like the New York Convention for arbitration, the Hague Convention on Choice of Court Agreements applies only if there has been an “agreement.”<sup>268</sup> Article 1(1) of the Convention provides that the Convention “shall apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters.”<sup>269</sup> Thus, without an agreement of the parties, there can be no application of the treaty rules. The Convention neither defines the term “agreement,” nor does it contain rules for determining when such an “agreement” exists. Nor should it. Basic rules of contract formation should guide the inquiry. Thus, in each instance, if there is a question about whether a choice of court agreement *exists*, that is a matter for the law applicable to contract formation between the parties. While that law may come from an international source such as the U.N. Convention on Contracts for the International Sale of Goods (“CISG”), if that is the applicable default law, it does not come from the Hague Convention.

In the United States, particularly when the CISG does not apply, contract formation rules are found in state law. While a choice

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267. See, e.g., JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION §§ 96–102 (Harry M. Flechtner ed., 4th ed. 2009) (discussing “gap-filling” when applying the United Nations Convention on Contracts for the International Sale of Goods).

268. For further discussion of the consent issue which determines the existence of a choice of forum agreement, see Ronald A. Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments*, 358 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 241–45 (2011); Brand, *supra* note 256.

269. Hague Convention, *supra* note 60, art. 1(1).

of forum clause normally is a part of a broader contract, the doctrine of separability requires that its existence and validity be considered separately from the substantive portions of the contract.<sup>270</sup> Given the separability doctrine, the Uniform Law Commissioners could helpfully develop a set of uniform law rules on consent to choice of forum agreements—both choice of court and arbitration.

*b. Validity of a Choice of Court Agreement*

Once a court determines there has been consent to a choice of forum agreement, challenges may be raised to the validity of that agreement. Like the New York Convention for Arbitration Agreements,<sup>271</sup> the Hague Convention has rules on formal validity for an exclusive choice of court agreement. Article 3(c) provides that “an exclusive choice of court agreement must be concluded or documented—i) in writing; or ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference.”<sup>272</sup> Unlike the New York Convention, however, the Hague Convention also has an autonomous choice of law rule for determining the law applicable to the question of substantive validity of an exclusive choice of court agreement. Article 5(1) provides, “The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State.”<sup>273</sup> Thus, the law determining validity of a choice of court agreement is the law of the state of the court chosen in the choice of court agreement. Article 6(a) repeats this rule for application by courts other than the chosen court,<sup>274</sup> and Article 9(a) does the same for courts asked to recognize and enforce any resulting judgment.<sup>275</sup> Thus, under the Hague Convention, both a choice of court agreement and a resulting judgment may be challenged based

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270. The separability doctrine arises more commonly in arbitration than in litigation, and is found in most sets of arbitration rules. *See, e.g.*, U.N. COMM’N ON INT’L TRADE LAW, MODEL LAW ON INT’L COMMERCIAL ARBITRATION, art. 16, U.N. Sales No. E.08.V.4 (2006); *see also* *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 445 (2006) (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”). The 2005 Hague Convention applies the same rule to choice of court agreements. Hague Convention, *supra* note 60, art. 3(d).

271. New York Convention, *supra* note 82, art. II(1)–(2).

272. Hague Convention, *supra* note 60, art. 3(c).

273. *Id.* art. 5(1).

274. *Id.* art. 6(a).

275. *Id.* art. 9(a).

on a claim that the agreement is “null and void” under the law of the state of the chosen court.

The Convention does not provide specific rules of substantive validity. These are the rules provided by the law of the state of the chosen court under the Convention’s autonomous choice of law rule. Thus, in the United States, the substantive law of that state in which the chosen court sits will determine the validity of a choice of court agreement choosing the courts of that state. This is a matter which deserves a uniform approach in the United States.

A uniform act adopted by the states could usefully address the validity issue. Part of that state law may be found in rules of contract formation, but part may also be found in rules that determine, for example, that a minor may not enter into a valid contract,<sup>276</sup> or that certain types of contracts may not contain choice of forum agreements leading to a forum outside the jurisdiction.<sup>277</sup> These types of laws have general application, and apply to, but do not deal exclusively with, choice of forum agreements. The question of substantive validity may also raise questions of fraud, mistake, misrepresentation, or unconscionability. These are, again, questions normally dealt with as state law matters of contract formation law, making them inappropriate for inclusion in a federal statute dealing only with substantive rules of judgments recognition. At the same time, there is good reason to have uniformity among the states on these matters.<sup>278</sup> This makes them a ripe subject for inclusion in a uniform act applicable to choice of court agreements.

## 2. Rules for the Enforcement of Judgments

Foreign judgments recognition and foreign judgments enforcement, while requiring coordination, are separate procedures. The common terminology used in different Uniform Acts, which are designed for these two separate purposes, has caused unfortunate confusion. The 1964 Uniform Enforcement of Foreign Judgments Act uses the term “foreign judgment” to refer to sister-state judgments, and provides a registration procedure for enforcement of those “foreign” judgments.<sup>279</sup> This is clearly different from the use of “for-

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276. *See, e.g.*, 23 PA. CONS. STAT. § 5101(a) (2010).

277. *See, e.g.*, CAL. BUS. & PROF. CODE § 20040.5 (West 2008).

278. *See* Burbank, *supra* note 266, at 304.

279. REVISED UNIF. ENF’T OF FOREIGN JUDGMENTS ACT §§ 1–2 (UNIF. LAW COMM’N 1964), <http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf>.

eign judgment” in the two Uniform Recognition Acts to refer to judgments from outside the United States.

The 1962 Recognition Act provides that a foreign judgment, once recognized, “is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit,”<sup>280</sup> and the 2005 Recognition Act provides that such a judgment is “enforceable in the same manner and to the same extent as a judgment rendered in this state.”<sup>281</sup> This has been mistakenly interpreted in some courts to mean that the simplified registration procedure for enforcement found in the Enforcement Act is applicable to foreign judgments as well as to sister-state judgments.<sup>282</sup> Fortunately, in most states the Enforcement Act has been applied only to sister-state judgments and not to foreign country judgments.<sup>283</sup> Moreover, section 6 of the 2005 Recognition Act clearly adopts a separate action requirement for recognition—which has existed in most states under the common law and the 1962 Recognition Act—stating that “the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment.”<sup>284</sup> This helps avoid any confusion with the Enforcement Act and its simple procedures for registration of a sister-state judgment. Nonetheless, once the foreign judgment is recognized, it is entitled to enforcement.

While each state has its own rules on the enforcement of a judgment, there is no general federal judgments enforcement law. For federal court judgments, Rule 69 of the Federal Rules of Civil Procedure provides that “[t]he procedure on execution . . . must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.”<sup>285</sup> While the U.S. Marshals Service is available to enforce a federal court judgment recognizing a foreign judgment, Rule 69 allows the same judgment to be enforced as well through state procedures.<sup>286</sup>

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280. 1962 RECOGNITION ACT, *supra* note 44, § 3.

281. 2005 RECOGNITION ACT, *supra* note 65, § 7(2).

282. *See, e.g., Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473 (7th Cir. 2000); *Enron (Thrace) Expl. & Prod. BV v. Clapp*, 874 A.2d 561, 566 (N.J. Super. Ct. App. Div. 2005).

283. *See Munitibanco Comermex, S.A. v. Gonzalez H.*, 630 P.2d 1053 (Ariz. Ct. App. 1981); *Bianchi v. Savino Del Bene Int’l Freight Forwarders, Inc.*, 770 N.E.2d 684 (Ill. App. Ct. 2002); *Baker & McKenzie Advokatbyra v. Thinkstream Inc.*, 20 So. 3d 1109 (La. Ct. App. 2009); *Becker v. Becker*, 541 N.Y.S.2d 699 (Sup. Ct. 1989), *aff’d*, 588 N.Y.S.2d 45 (App. Div. 1992).

284. 2005 RECOGNITION ACT, *supra* note 65, § 6(a).

285. FED. R. CIV. P. 69(1).

286. FED. R. CIV. P. 69.

It would seem that a uniform act for the enforcement of foreign country judgments, once recognized, would be an appropriate and useful tool in support of recognition judgments from both sister state and federal courts. Such an act would acknowledge that state authorities often are in the best position to achieve enforcement, and that matters dealing with property, both movable and immovable, within the territory of a state, may best be dealt with under state law.

## CONCLUSION

The basic substantive law on recognition and enforcement of foreign judgments in U.S. courts has developed logically over more than a century. It provides rational rules to assist a judgment creditor in seeking to collect on a judgment rendered abroad. While those rules are generally coherent, the fact that they can and do differ from state to state creates both confusion for the judgment creditor and opportunity to exploit those differences. The use of the Full Faith and Credit Clause to forum shop to seek back-door enforcement of judgments in one state that are more easily recognized in another state results in inefficiencies of judicial process, inequities in results, and non-uniformity in matters of foreign commerce.

The evolution of judgments recognition law in the United States from federal common law to state common and statutory law in the early twentieth century now results in significant substantive law differences from state to state. Recent decisions indicate the problems created by those substantive law differences. In addition, state law differences in applying both constitutional principles of due process to questions of personal jurisdiction in the recognizing court—and the doctrine of *forum non conveniens*—add additional opportunities for forum shopping and manipulation in ways that create inefficiencies and inequities. It is difficult to justify the resulting litigation strategies that have arisen.

The only way to effectively discourage such inefficient and inequitable litigation strategies is to return to a system in which judgments recognition law is a matter of federal law. This will allow the proper exercise of Congressional foreign commerce power under Article I, Section 8, of the U.S. Constitution, and reduce the opportunity for litigation inefficiencies and foreign relations problems that might otherwise result from a disjointed system of law in which outcomes may be determined by leveraging one state's divergent rules and the Full Faith and Credit Clause in order to obtain judicial advantage.

Political arguments against the reunification of judgments

recognition law at the federal level should be set aside in favor of a properly functioning legal system that reflects the United States's status as a single entity in its relationships with foreign nations. At the same time, however, that legal system should reflect the importance of state law to the underlying contract issues that may affect party relationships in the judgment recognition process, and the importance of state authorities to the process of judgment enforcement. A properly coordinated system of federal law for the substantive rules of judgments recognition—and uniform state law for (1) related agreement formation and validity issues involving choice of court agreements and (2) state judgment enforcement procedures—would result in a much more efficient, effective, and fair approach to the law of recognition and enforcement of foreign judgments in the United States.