The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?

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INTRODUCTION

Transnational practitioners and litigants are bound to encounter at least one case that will require the recognition and enforcement of either a U.S. court judgment[1] abroad, or a foreign court judgment in the United States.[2] Upon encountering this situation, these parties may be interested to learn that while the United States has been a signatory of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[3] ("New York Convention") since 1970, it is not currently party to any international treaty for

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1. This study will use the term "court judgments," rendered either in the United States or foreign courts, interchangeably with "judgments."

2. It is well recognized that transnational litigation has become a prominent feature of American jurisprudence; within the group of internationally tinged cases making inroads into U.S. courts are actions against foreign defendants, class actions with absent foreign plaintiffs, Alien Tort Statute claims, and transnational regulatory actions. *See* Samuel. P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe*, 40 GEO. WASH. INT'L L. REV. 173, 174, nn.2-4 (2008) (describing the current character of international litigation); 28 U.S.C. § 1350 (2000) (granting district courts original jurisdiction of any civil action by an alien for a tort, committed in violation of the law of nations or a treaty of the United States).

3. United Nations 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]. *See Status: 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Nov. 2, 2012).

the recognition of foreign court judgments.[4] Unlike foreign arbitral awards, which are governed by the New York Convention, no treaty outlines the circumstances under which U.S. courts may recognize foreign awards and vice versa. Transnational litigants are therefore more likely to encounter difficulties enforcing their foreign court awards than parties seeking to enforce their foreign arbitral awards.[5] This disparity is particularly clear because of the almost universal agreement that recognition and enforcement under the New York Convention "works,"[6] and the absence of a comparably reliable mechanism for the recognition and enforcement of foreign court awards. In the United States, for instance, while the principle of Comity of Nations, the common law, and individual states' laws do allow American courts to recognize and enforce foreign judgments, foreign courts may not necessarily reciprocate.[7] Enforcing U.S. court judgments abroad can prove especially difficult in light of divergent rules on jurisdiction, requirements for special service of process, reciprocity, and some foreign countries' public policy concerns over enforcing American jury awards carrying hefty punitive damages.[8]

This study has two overarching goals. The first goal is to discern the shortcomings in the current system of foreign court judgment recognition and enforcement in the United States and investigate the reasons why America and its trading partners, while remaining proponents of the New York Convention, have not agreed to a similar treaty governing the recognition and enforcement of foreign judgments. After all, court judgments are promulgated by professional judges operating in the public eye, under restrictive procedural rules and subject to appellate review, while arbitral awards are virtually unreviewable and rendered by private arbitrators who are not necessarily professional judges and are not held publically accountable.[9] Considering the more rigorous procedural

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4. *Enforcement of Judgments*, U.S. Department of State, *available at* http://travel.state.gov/law/judicial/judicial_691.html (last visited Mar. 2, 2012).

5. *See* Committee on Foreign and Comparative Law, Association of the Bar of the City of N.Y., *Survey on Foreign Recognition of U.S. Money Judgments* 20 (2001) [hereinafter Survey on Foreign Recognition] ("[A] party seeking to enforce a [U.S. Money Judgment] [is] at a distinct disadvantage to parties that have access to the more expedited procedures provided for in legislation, forcing such a party instead to rely on more expensive, procedurally complex, and lengthy proceedings, with far less certainty that a judgment will be recognized.").

6. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 21 (2d ed. 2001); *see also* Stephen M. Schwebel, *A Celebration of the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 12 ARB. INT'L 83, 85 (1996).

7. *See*, *e.g.*, Volker Behr, *Enforcement of United States Money Judgments in Germany,* 13 J.L. & COM. 211, 222 (1994).

8. *See Recognition and Enforcement of Foreign Money Judgments*, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, *available at* http://www.osec.doc.gov/ogc/occic/refmj.htm (last visited May 11, 2011).

9. Richard W. Hulbert, *Symposium Articles, Some Thoughts on Judgments, Reciprocity, and the Seeming Paradox of International Commercial Arbitration,* 29 U. PA. J. INT'L L. 641, 641 (2008). *See* Eljer Mfg. Inc. v. Kowin Dev. Corp., 14 F.3d 1250, 1253 (7th Cir. 1994) (providing for

standards for court judgments, one might expect the United States and its trading partners to reach an agreement to mutually respect foreign court judgments. The second goal of this study is to make a concrete proposal for a realistic change that could be applied to the system now, without having to wait and bet on the success of future multilateral negotiations.

This study finds that while broad and conclusive empirical evidence of systematic procedural problems in enforcing American court judgments abroad and foreign court judgments in the United States is not currently available,[10] the most recent legal surveys conducted by scholars and practitioners suggest that the perceived problems do exist.[11] In light of these findings, this study concludes that the absence of an international enforceability regime for foreign judgments leaves a void in the realm of private international law that sits in stark contrast to the well-established mechanism for enforcing foreign arbitral awards. However, while acknowledging that a multilateral convention would be the ideal mechanism for addressing the procedural defects in the existing system of recognition and enforcement of U.S. judgments abroad and foreign judgments in the United States, this study reasons that the latest failed attempt at negotiations through The Hague Conference on Private International Law ("Hague Conference") proves that such a treaty is not likely to materialize in the near future.[12] In light of this impasse on the international front, this study puts forth a domestically-focused alternative aimed at first closing the gap in American foreign judgment law with a view toward facilitating future multilateral negotiations. Specifically, it proposes the adoption of a federal statute codifying a single national law that would govern the recognition and enforcement in the United States of judgments rendered in foreign courts. Such a statute, based on a modified version of a pending project of the American Law Institute ("ALI"), would preempt the fifty state laws currently governing the recognition and enforcement of foreign judgments in U.S. courts,[13] and replace them with a clear, uniform standard aimed at increasing the free flow of worthy judgments—

"grudgingly narrow" review of the merits of an arbitral awards based on the four limited bases established in section 10(a) of the Federal Arbitration Act ("F.A.A."), 9 U.S.C. § 10 (2004): (1) the award was procured by corruption, fraud or undue means; (2) there was evident partiality or corruption by the arbitrators; (3) there was arbitral misconduct, such as refusal to hear material evidence; or (4) the arbitrators exceeded their powers, or so imperfectly executed their powers that they failed to render a mutual, final and definite award.)

10. Hulbert, *supra* note 9, at 647 ("[I]t appears that this is a subject on which reliable evidence is unavailable").

11. *See generally infra* Part II.B.

12. *See generally infra* Part III.A.

13. Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (Proposed Official Text 2006), THE AMERICAN LAW INSTITUTE, *available at* http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=82 (last visited Feb. 24, 2012) [hereinafter ALI Proposed Statute].

thus partially accomplishing the goals of a long-sought-after international judgments convention.[14]

Before analyzing the merits of this proposed federal statute, this study will first summarize the current system of recognition and enforcement of foreign judgments in the United States and abroad, and the difficulties this system presents to transnational litigants (Part I). Second, it will discuss, from a U.S. public policy perspective, the benefits of adopting an international judgments convention, and analogize to the success of the New York Convention in standardizing the law on recognition and enforcement of international arbitral awards (Part II). Part III will discuss the difficulties heretofore experienced in drafting an international judgments convention by examining the 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ("1971 Convention") and the proposed 1976 U.S.-U.K. Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters ("U.S.-U.K. Convention") (Part III). Finally, Part IV will propose an alternative solution: a federal statute unifying the state laws currently governing recognition and enforcement of foreign court judgments in the United States (Part IV). This proposal will focus on the reasons that a federal statute—while having no effect on foreign laws concerning U.S. judgments in foreign courts—is desirable on a national level. Particularly, a federal foreign judgments statute will unify and nationalize a set of state laws that fall squarely within the foreign affairs policy sphere, which is inherently suited for federal lawmaking. Part IV also acknowledges the work already accomplished by the ALI in drafting a model federal judgments statute, but recommends a major change to that draft through the removal of its reciprocity provision, which this author believes will address the statute's main criticisms.

I.
PROCEDURE AND LAW ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY JUDGMENTS

Whether you are a foreign creditor trying to recover on a claim against a debtor in the United States or a third country, or an American creditor seeking to enforce a U.S.-made judgment abroad, your procedural alternatives and roadblocks will significantly differ. This part of the study will focus on the procedure for enforcing foreign-made judgments in the United States and U.S.-made judgments abroad. Generally speaking, this study finds that a foreign claimant will have a faster and easier time enforcing his or her foreign-made judgment in America, while a creditor possessing a U.S.-made judgment can expect a bumpier ride through foreign court bureaucracy. This is simply a reflection of what many commentators see as a disparity in the willingness of American and foreign courts to recognize and enforce judgments of other

14. *See generally infra* Part II.

nations.[15] While the United States has been *relatively* generous in recognizing and enforcing foreign judgments, even without a treaty, there is at least a strong perception that U.S. creditors have been comparatively less successful in their endeavors to enforce their judgments abroad.[16] But even in the United States, meritorious foreign judgments are likely to encounter problems due to the lack of uniformity among the state laws governing their recognition and enforcement, and the resulting number of procedural and substantive defenses a foreign judgment creditor must overcome before a U.S. court will effectuate the creditor's judgment.[17]

I shall now turn to a general—and by no means exhaustive—discussion of both categories of creditors: first describing a hypothetical foreign creditor's experience in U.S. courts and subsequently turning to what a U.S. creditor should expect to encounter in courts abroad.

A. System for Recognition and Enforcement of Foreign Judgments in the United States

In the United States, every judgment from another country or another U.S. state is considered to be a "foreign judgment" that cannot be directly enforced without a prior court action "recognizing" that judgment as a domestic one.[18] However, under the Full Faith & Credit Clause of the U.S. Constitution, a judgment rendered in any U.S. state or federal court is given the same recognition and effect in any other U.S. court.[19] This treatment does not apply to judgments made in the courts of foreign countries.[20] However, the principle of Comity of Nations[21] has produced a pro-recognition attitude in U.S. courts that

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15. *See* Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT'L L. 167, 168 (1998).

16. Sean D. Murphy, *Negotiation of Convention on Jurisdiction and Enforcement of Judgments*, 95 AM. J. INT'L L. 418, 419 (2001) (noting that U.S. courts lead the way in enforcing foreign judgments on comity grounds).

17. *See generally infra* Part I.A.

18. CHARLES PLATTO AND WILLIAM HORTON, EDS., ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE, Andreas F. Lowenfeld and Linda J. Silberman, *United States of America* 123 (International Bar Association 1993).

19. U.S. CONST. art. IV, § 1.

20. *See* Aetna Life Ins. Co. v. Tremblay, 223 US. 185, 190 (1912) (stating that full faith and credit is not conferred upon the judgments of any foreign nations on the basis of the U.S. Constitution, a federal statute or a treaty); RESTATEMENT (SECOND) OF CONFLICT OF LAW § 98 cmt. b (1971).

21. Comity of Nations is a British doctrine adopted in U.S. courts, which, in the words of Lord Blackburn, is based on the idea that it is an "admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal." Godard v. Gray (1890) L.R. 6 Q.B. 139, 148. For an elaborate overview of the British cases, which served as authorities for the creation of this doctrine, *see* FRANCIS T. PIGGOTT, THE LAW AND PRACTICE OF THE COURTS OF THE UNITED KINGDOM RELATING TO FOREIGN JUDGMENTS AND PARTIES OUT OF THE JURISDICTION 4-5 (2d ed., London 1884).

has carried over to foreign-country judgments even in the absence of any bilateral or multilateral treaties.[22] In fact, it has been said that in the United States, foreign judgments are enforced more regularly than in perhaps any other country.[23]

As a preliminary matter, it is important to distinguish between "recognition" and "enforcement" of foreign judgments. To "recognize" a foreign judgment is in essence to domesticate it, thus making it equal to any other judgment produced by a U.S. court, as well as to judgments of other state courts that benefit from the Full Faith & Credit Clause.[24] A recognized judgment is also considered res judicata upon other actions in the recognizing jurisdiction because it is seen as producing the same effect and having the same authority as a case originally decided in the jurisdiction.[25] "Enforcement," on the other hand, requires the aid of the courts and law enforcement of the enforcing jurisdiction, which may or may not be afforded along with recognition of the judgment.[26]

Here, it is important to note that there is no federal law governing the recognition and enforcement of foreign judgments, and that state law on the topic applies even in federal courts hearing such actions.[27] Thus, even in the case of a foreign plaintiff seeking to enforce a foreign judgment, removal of the enforcement action from state to federal court[28] through reliance on the statutory alienage diversity jurisdiction provision[29] will merely result in the federal court's application of the same state statute that would have been applicable in the rendering state court. Furthermore, in federal courts, the application of Rule 64 of the Federal Rules of Civil Procedure requires the courts to apply state law for remedies involving seizure of property, which may be integral to an action seeking to collect on a foreign money judgment in a U.S. court.[30] Because there

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22. *See* Platto & Horton, eds., *supra* note 18, at 123.

23. *See* Juan Carlos Martinez, *Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted*, 4 J. TRANSNAT'L L. & POL'Y 49, 51 (1995).

24. *See* Platto & Horton, eds., *supra* note 18, at 123.

25. *See id*.

26. *See id*. at 134-35.

27. Under the *Erie* doctrine established in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), state law must be applied when federal courts sit in diversity jurisdiction. Because the United States is not a member of a judgment recognition or enforcement treaty and Congress has not enacted federal legislation on the subject, state law, rather than federal law, has continued to govern this area. *See* Martinez, *supra* note 23, at 53.

28. 28 U.S.C § 1446(b) (Supp. 2012) (governing removal of proceedings from state to federal court).

29. While federal courts are courts of limited jurisdiction, the U.S. Constitution gives Congress the power to expand such jurisdiction through statutory enactment. U.S. CONST. art. III, § 2. Congress has used this power to codify diversity jurisdiction in 28 U.S.C. § 1332(a)(3) (granting original jurisdiction to federal courts in civil actions with an amount in controversy exceeding $75,000 and between "citizens of difference States and in which citizens or subjects of a foreign state are additional parties").

30. FED. R. CIV. P. 64(a) ("At the commencement of and throughout an action, every remedy

are fifty individual sets of state law describing the circumstances under which foreign judgments are to be recognized and enforced, this multiplicity of laws seems daunting to a foreign litigant's prospects for obtaining recognition and enforcement, and in fact individual states vary on what is required for recognition.[31] At the same time, however, there is also a semblance of uniformity among the states' approaches to foreign judgment recognition because thirty-one states have adopted the Uniform Foreign Money-Judgments Recognition Act ("UFMJRA").[32] Promulgated in 1962 by the Uniform Law Commission, the UFMJRA is an agreement under which the individual signatory states of the United States have mutually committed to recognize and enforce certain money judgments entered by foreign courts.[33] The remaining non-signatory states apply the common law as summarized in The Restatement (Third) of Foreign Relations of the United States ("Restatement").[34]

The UFMJRA does not prescribe a uniform enforcement procedure and instead provides that, "a judgment entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state which is entitled to full faith and credit."[35] This basically extends the benefit of the Full Faith & Credit Clause to the class of foreign court judgments covered by the UFMJRA.[36] The UFMJRA applies to any foreign court money judgment that is "final, conclusive, and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal," but excluding "judgments for taxes, a fine or other penalty, or judgment for support in matrimonial or family

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is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.").

31. *See infra* notes 42-51 and accompanying text.

32. Uniform Foreign Money-Judgments Recognition Act, UNIFORM LAW COMMISSION (1962), *available at* http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf (last visited Oct. 11, 2012) [hereinafter UFMJRA]. The states to have adopted the UFMJRA, either legislatively or through case law, are: 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, and Washington. *Legislative Fact Sheet - Foreign Money-Judgments Recognition Act*, Uniform Law Commission: The National Conference of Commissioners of Uniform State Laws, *available at* http://uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act (last visited Feb. 26, 2012).

33. *Foreign Money Judgments Recognition Act Summary*, Uniform Law Commission: The National Conference of Commissioners of Uniform State Laws, *available at* http://uniformlaws.org/ActSummary.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act. (last visited Oct. 20, 2012).

34. *See* Martinez, *supra* note 23, at 64-65.

35. UFMJRA, *Prefatory Note* (1962), *available at* http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf (last visited Oct. 11, 2012).

36. *See infra* notes 19-20 and accompanying text.

matters."[37] But even judgments not meeting this definition are generally recognized under the Restatement's definition, which includes final judgments "granting or recovering a sum of money, establishing or confirming the status of a person, or determining interests in property."[38]

In essence, the UFMJRA is a codification of common law decisions relating to recognition and enforcement.[39] The most important of these cases is *Hilton v. Guyot*,[40] in which the U.S. Supreme Court set the criteria for the recognition of foreign judgments when confronted with a French court's judgment against an American defendant. The Court in *Hilton* stated that an enforcing U.S. court shall not retry the merits and shall accept the foreign judgment of a case where the foreign tribunal had provided:

(1) an opportunity for a full and fair trial;
(2) before a court of competent jurisdiction;
(3) proceedings following due citation or voluntary appearance of adverse parties;
(4) upon regular proceedings;
(5) under a system of jurisprudence likely to secure impartial administration of justice between citizens of its own country and those of others;
(6) no evidence of:
    (a) fraud;
    (b) prejudice in the system of laws and the courts; or
    (c) any other reason why comity of the United States should not be given to the foreign judgment.[41]

Having laid out these requirements, the Supreme Court nevertheless refused to recognize the French judgment because French courts themselves refused to recognize valid U.S. judgments—and thus failed to meet what came to be known as *Hilton*'s "reciprocity" requirement.[42] Initially, *Hilton*'s requirement that recognition of foreign judgments as res judicata be contingent upon reciprocity proved controversial; however, in light of the *Erie* doctrine, this requirement is no longer binding on state courts reviewing foreign judgments for recognition and enforcement.[43]

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37. UFMJRA §§ 2, 1(2) (1962).

38. Platto & Horton, eds., *supra* note 18, at 124 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1) [hereinafter Restatement]).

39. DENNIS CAMPBELL, ED., *United States*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS, at 442 (LLP 1997) (citing Commissioner's Prefatory Note to the UFMJRA).

40. 159 U.S. 113 (1895).

41. *Id*. at 202.

42. *Id*. at 210.

43. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *see*, *e.g.,* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971); Restatement § 481, Reporter's Note 1.

With respect to state law on reciprocity, only a minority of the thirty-one[44] states that have adopted the UFMJRA also adopted the reciprocity requirement for recognition of foreign judgments[45]—a requirement absent from the original UFMJRA.[46] Additionally, a minority of the non-UFMJRA states require reciprocity.[47] Thus, although only a minority of all U.S. states requires reciprocity, a foreign litigant should be advised to determine whether the state of the court where the litigant wishes to enforce his or her foreign judgment falls within that overall minority, and whether the foreign court in which the litigant obtained the judgment actually reciprocates.[48] Although the Uniform Foreign Country Money-Judgments Recognition Act[49] ("UFCMJRA") revised the UFMJRA in 2005 with the intent of clarifying provisions and correcting problems created by varying interpretations of provisions by courts over the years, the absence of a reciprocity requirement was left intact.[50] The sections of the UFMJRA that the UFCMJRA revised include: the definitions, scope provision, burden of proof requirement, and statute of limitations,[51] as well as the actual procedure for recognition that the UFMJRA had left to the states.[52]

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44. UFMJRA, Enactment Status Map, *available at* http://uniformlaws.org/Act.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act (last visited Oct. 12, 2012).

45. William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 228, n.446 (2002); Robert L. McFarland, *Federalism, Finality, and Foreign Judgments: Examining the ALI Judgments Project's Proposed Federal Foreign Judgments Statute*, 45 NEW ENG. L. REV. 63, 92, nn.187-92 (2011) ("Most states currently reject a reciprocity requirement for recognition of foreign judgments . . . . A few states have adopted a reciprocity requirement or a limited reciprocity requirement in addition to the provisions of the UFMJRA.").

46. *See* Vishali Singal, Note, *Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments*, 59 HASTINGS L.J. 943, 952, nn.51-54 (2008).

47. *See* Campbell, *supra* note 39, at 444.

48. *See*, *e.g.*, Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1002-04 (5th Cir. 1990). In *Khreich*, the Fifth Circuit affirmed a district court decision refusing to recognize an Abu Dhabi judgment because the Texas Recognition Act treats non-reciprocity as a discretionary ground for non-recognition. The court found as sufficient evidence of non-reciprocity an affidavit by an American attorney practicing in Abu Dhabi, stating that he and other members of his firm were "unaware of any Abu Dhabi courts enforcing United States' judgments." *Id*. at 1005.

49. Uniform Foreign-Country Money Judgments Recognition Act, UNIFORM LAW COMMISSION (2005) [hereinafter UFCMJRA], *available at* http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf; *see also* UFCMJRA, *Summary*, UNIFORM LAW COMMISSION *available at* http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act (last visited Oct. 27, 2012).

50. *See generally id.*

51. UFCMJRA, *Prefatory Note,* UNIFORM LAW COMMISSION (2005), *available at* http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf (last visited Oct. 12, 2012).

52. *E.g.*, prior to the adoption of the UFCMJRA, a number of states had adopted a version of the UFMJRA that allowed judgment creditors to simply register their foreign judgment with a court clerk, who would then notify the debtor that he/she had 30 days to initiate an action for non-

The UFCMJRA has been adopted in eighteen states and the District of Columbia, which has certainly increased the variety of recognition and enforcement regimes available to foreign judgment creditors seeking enforcement and recognition in U.S. courts.[53]

Despite the variations, the procedure for gaining recognition and enforcement of a final foreign court judgment in a U.S. court can be generally outlined as follows. In the majority of states, the procedure first requires the judgment creditor to bring an action against the debtor in a U.S. court, obtaining jurisdiction over the debtor and/or the debtor's property.[54] Most of the cases reviewing whether a foreign judgment should be recognized and enforced resolve the matter through a motion for summary judgment, without the need to first file a complaint.[55] To support his or her claim, the foreign-judgment holder needs only to present evidence—such as an affidavit—of a final foreign judgment[56] rendered against the U.S. defendant in a proceeding that meets the standards set out by the law of the state of the recognizing court.[57] The foreign judgment holder has the initial burden of proving that the foreign judgment is

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recognition. Steven C. Shuman, *Enforceability of Foreign Country Money Judgments in California*, LOS ANGELES LAWYER, Apr. 2009, at 17. As adopted by the Uniform Law Commissioners and states like California, the new law under the UFCMJRA does away with the registration option by instead codifying the requirement that creditors file an action for recognition to enforce their foreign country judgments. *See*, *e.g.*, CA CODE CIV. PROC. § 1718(a).

53. UFCMJRA, *Enactment Status Map*, *available at* http://www.uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act (last visited Oct. 27, 2012). Former Legal Adviser for the U.S. Department of State under Secretary of State Condoleezza Rice, John B. Bellinger, III, has described the impact of the UFCMJRA in further diversifying the state laws for the recognition and enforcement of foreign judgments:

> First, there are significant differences between the 1962 [UFMJRA] and 2005 [UFCMJRA] Acts that result in the application of different procedural requirements and substantive standards in different states. And even those states that have adopted the same uniform act have not done so uniformly, modifying requirements to suit local interests. And, of course, many states have enacted neither Act.

John B. Bellinger, III, *Recognition of Foreign Judgments: Balancing International, Federal, State, and Commercial Interests*, Keynote Address, 2012 Stefan A. Riesenfeld Symposium, Enforcement of Foreign Judgments, University of California, Berkeley Law School, Mar. 13, 2012, at 6, *available at* http://www.arnoldporter.com/resources/documents/BerkeleyRemarksonForeignJudgments%20(Final).pdf

54. *See* Campbell, *supra* note 39, at 448-49.

55. *See, e.g.*, NY CIVIL PRACTICE LAW AND RULES § 5303 (modeled on the UFMJRA § 3).

56. In the United States, only final judgments will be enforced, but finality is not affected by the fact that a judgment may still be subject to an appeal. Platto & Horton, eds., *supra* note 18, at 125. A final judgment is one not subject to further action—except execution—by the rendering court, but the court where enforcement is sought will usually stay the proceedings if an appeal is pending. UFMJRA § 6.

57. Campbell, *supra* note 39, at 448 ("If the affidavits conflict with each other in material respects, then a trial becomes necessary in which a finder of fact . . . weighs the credibility of each side's evidence . . . ."). However, in typical cases, the facts in the record are undisputed because of the detailed record from the rendering court.

authentic and valid, and assuming that there are no questions of material fact, the U.S. court simply decides the legal question of whether the foreign court proceedings can be given effect in the United States under the agreed-upon facts.[58] This process does not require a jury or even a trial, and can be resolved within a matter of weeks or months, depending on the court's docket.[59]

However, this system is quickly complicated if objections arise regarding the propriety of the foreign rending court's procedures in reaching its judgment from the perspective of the recognizing court's law.[60] For instance, under the UFMJRA, which remains the most widely adopted version of the Uniform Commission's legislation on this subject, courts are supposed to recognize foreign judgments that meet the enumerated criteria listed in Section 2 of the Act, and failure to meet them is grounds for either mandatory or discretionary non-recognition.[61] The mandatory criteria include an impartial tribunal with procedures satisfying due process and personal jurisdiction over the defendant under the law of the rendering state and international rules.[62] If the defendant successfully proves one of the elaborated procedural or jurisdictional defenses, the U.S. court will refuse to recognize that particular foreign country judgment without a renewed action on the merits.[63] However, even if the foreign judgment meets all the mandatory provisions and is final, conclusive, and enforceable where rendered,[64] the UFMJRA grants U.S. courts discretion not to recognize the judgment in certain circumstances. For instance, if the defendant did not receive notice of the foreign proceeding in sufficient time to defend, or if the judgment was obtained by fraud that deprived the parties of an opportunity to present their case, the court can choose not to recognize the foreign judgment.[65] The full list of discretionary grounds for non-recognition under the UFMJRA includes:

(1) lack of subject-matter jurisdiction by the rending court;

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58. *Id*.

59. *Id*. at 449.

60. For a list of the important exceptions to recognition under the UFMJRA, *see supra* notes 53-55 and accompanying text. One exception that defendants opposing foreign judgment enforcement in U.S. courts have increasingly relied on with success is the "fraud" exception, UFMJRA § 4(b)(2). *See* Timothy G. Nelson, *Down in Flames: Three U.S. Courts Decline Recognition to Judgments from Mexico, Citing Corruption*, 44 INT'L LAW. 897 (2010) (citing to three specific cases of non-recognition and arguing that U.S. courts, while unwilling to infer fraud, will take such allegations seriously and decline to recognize a judgment proven to be the result of fraud).

61. UFMJRA § 3 ("Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money.").

62. *Id*. § 4(a) (listing mandatory grounds for non-recognition).

63. *See id*.

64. Sanchez Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1323-24 (S.D. Fla. 2009) (discussing the standard for recognizing foreign-country judgments under the UFMJRA).

65. UFMJRA § 4(b).

(2) inadequate notice to defendant;
(3) fraud;
(4) violation of the public policy of the recognizing court;
(5) conflict with another final judgment entitled to recognition; and
(6) inconsistency of the foreign proceedings with the parties' forum selection agreement.[66]

A foreign litigant seeking recognition and enforcement of his or her judgment in the United States should keep these requirements in mind, along with those articulated in *Hilton*. It is equally important to note their application. For instance, in determining whether a foreign judgment is the product of an impartial judicial system, as required by the UFMJRA, a reviewing U.S. court will not require the foreign court's procedural and substantive law to mirror its own.[67] Thus, the absence of such systemic characteristics as a trial by jury, right to cross-examination, testimony under oath, or evidentiary rules applicable in U.S. courts will not justify non-recognition.[68] However, when it comes to proving that the rendering court's exercise of jurisdiction over the U.S. defendant satisfied due process, *Hilton* and the UFMJRA require the U.S. court to demand that the foreign court had personal jurisdiction meeting the U.S. due process standard established by the Constitution.[69] The U.S. Supreme Court set forth the standard for personal jurisdiction in *International Shoe Co. v. Washington*,[70] which requires that the defendant have had certain "minimum contacts" with the forum state, "such that the maintenance of the suit did not offend traditional notions of fair play and substantial justice."[71] To establish minimum contacts, the defendant must have carried out systematic and continuous activities in the foreign forum that would make it just and reasonable for that forum's courts to subject the defendant to a judgment in personam.[72]

The UFMJRA also establishes rules for determining when a recognizing U.S. court cannot dismiss a foreign judgment for lack of personal jurisdiction. Section 5(a) states that a foreign court may have properly asserted personal jurisdiction over any defendant that:

(1) was properly served;
(2) voluntarily appeared in court not with the sole purpose of contesting jurisdiction;
(3) agreed to submit to the foreign court's jurisdiction;
(4) was domiciled, or if the defendant is a corporation, incorporated in the foreign forum;

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66. *Id*.

67. *See* Ackerman v. Levine, 788 F.2d 830, 842 (2d Cir. 1986) (quoting Judge Cardozo's observation that, "[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.").

68. Platto & Horton, eds., *supra* note 18, at 127.

69. Campbell, *supra* note 39, at 445-46.

70. 326 U.S. 310, 316 (1945).

71. *Id*.

72. *Id*. at 320.

(5) had a business office in the foreign forum and the case arose out of that business;
(6) operated a motor vehicle in the foreign forum, and the case arose out of that operation.[73]

Section 5(b) also recognizes that the UFMJRA does not prevent a U.S. court from recognizing foreign judgments rendered on "other" un-enumerated bases of jurisdiction, which the Act does not define.[74]

A recognizing U.S. court will also scrutinize the adequacy of notice of the proceedings and service of process on the U.S. defendant according to U.S. notions of due process,[75] which require notice "reasonably calculated" to inform the defendant of the action against him or her and provide the opportunity to present a defense.[76] With regard to the requirement that a rendering court be impartial,[77] however, the U.S. enforcing courts operate under the presumption of the foreign rendering court's impartiality, unless there is specific evidence to the contrary.[78]

Thus, in general, if the mandatory elements are met, a recognizing U.S. court will not reexamine the merits of the foreign-made money judgment, either on grounds of substantive law or evidentiary support, although more scrutiny is given to default judgments.[79] In summary, foreign-made judgments are recognized and enforced in the United States under the law of the state where the receiving court sits, which can vary in substance from its nearest neighboring state's law on the subject. Absent a showing of the mandatory or discretionary grounds for non-recognition, such foreign judgments are recognized and enforced through an expedited process. Although the rules dictating mandatory or discretionary non-recognition vary slightly from state to state and may or may not include a reciprocity requirement, the process is generally simpler, faster, and less costly than de novo litigation.

B. System for Recognition and Enforcement of U.S. Judgments Abroad

The literature discussing recognition and enforcement of foreign judgments is replete with observations of the contrast between the U.S. courts' generally

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73. UFMJRA § 5(a).

74. *Id*. § 5(b).

75. Campbell, *supra* note 39, at 446 (citing De La Mata v. American Life Ins. Co., 771 F. Supp. 1375, 1386 (D. Del. 1991)).

76. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

77. *See*, *e.g*., Hilton v. Guyot, 159 U.S. 113, 202 (1895).

78. *See*, *e.g*., *De La Mata*, 771 F. Supp. at 1389 (stating that the "impartiality criteria only comes into play where plaintiff seeks to enforce a judgment from a country whose foreign policy manifests express hostility to the United States and whose jurisprudence has been molded to reflect such hostility."); *see also* Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified by* 433 F.2d 686 (2d Cir. 1970) (involving the East German judicial system).

79. Platto & Horton, eds., *supra* note 18, at 133; *see*, *e.g*., Tahan v. Hodgson, 622 F.2d 862 (D.C. Cir. 1981).

liberal approach to their recognition and enforcement, and the seemingly reverse approach taken by foreign courts reviewing U.S.-made judgments.[80] [81] While it is not the goal of this section to address the reasons behind this general disparity, it will lay out some of the main procedural differences that may be responsible for the relative difficulty that a U.S. judgment creditor can encounter in his or her action in foreign court.

Just as a foreign judgment creditor seeking recognition and enforcement in a U.S. court must look to specific state law in planning his or her enforcement action in a specific U.S. state, so too must a creditor aiming to enforce an American judgment abroad look to the enforcing country's specific laws on the topic.[82] This, again, is the product of the absence of a multilateral judgments treaty binding other nations to recognize and enforce U.S.-made judgments abroad. Under these circumstances, a creditor possessing a U.S. judgment must bring an entirely new action on the judgment in order to obtain its recognition and enforcement.[83] Moreover, many countries do not allow for an expedited process comparable to a summary judgment action that is commonly used for recognition and enforcement of foreign judgments in the United States. Consequently, a U.S. creditor must commence a full-length action in foreign court.[84]

For instance, in the courts of common law countries like Canada and the United Kingdom, a U.S. money judgment will only receive an expedited process if statutory reciprocal arrangements exist between that country and the United States.[85] No such treaty exists with the United Kingdom and only a few American states bordering Canada have reciprocal arrangements with respective bordering Canadian provinces.[86] As a result, in the United Kingdom, American litigants must seek recognition and enforcement through the common law, under which a U.S. judgment is recognized merely as an "implied contract to pay" that must itself be enforced by a U.K. court.[87] Thus, a hypothetical U.S. judgment

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80. Matthew Adler, *If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79, 94, n.86 (1994) (citing several cases in which foreign judgments were found enforceable in several U.S. state and federal courts).

81. It should be noted here that, while U.S. courts are reputed to be more generous in recognizing foreign court judgments, this does not diminish this study's conclusion that the U.S. foreign judgment recognition and enforcement law is ripe for reform. As Part IV of this study will show, there are several strong arguments in favor of unifying the current state-based system of foreign judgment recognition and enforcement under a federal statute.

82. *See* Philip R. Weems, *How to Enforce U.S. Money Judgments Abroad*, TRIAL, July 1988, at 72.

83. *See* Adler, *supra* note 80, at 94-95; *see also* Ronald A. Brand, *Enforcement of Judgments in the United States and Europe*, 13 J.L. & COM. 193, 204-05 (1994).

84. *See* Singal, *supra* note 46, at 955; Survey on Foreign Recognition, *supra* note 5, at 18-19.

85. *Id*.

86. *See* Survey on Foreign Recognition, *supra* note 5, at 18-19.

87. Christopher Charlesworth, *Can U.S. Judgments be Enforced in the U.K.?*, ¶ 3, *available at*

creditor will have to initiate new proceedings in the U.K. court of enforcement; however, such proceedings are said to be simpler than trial de novo, with U.K. courts generally refraining from reexamining the merits of the underlying dispute.[88] Additionally, the U.S. judgment holder may be able to avail himself of an expedited procedure available under Part 24 of the U.K. Civil Procedure Rules, which is comparable to U.S. summary judgment.[89]

By contrast, countries that have a bilateral arrangement with the United Kingdom are covered by the English Administration of Justice Act 1920 and the Foreign Judgments Reciprocal Enforcement Act 1933, which provide for an expedited registration process that essentially domesticates a foreign judgment in the United Kingdom.[90] In Canada, litigants must also seek recognition and enforcement through the common law, which is a federal system where recognition and enforcement is reserved for the laws of the provinces.[91] As in the courts of the United Kingdom, a common law suit in Canada will treat the U.S. judgment debt as a "contract containing an implied promise to pay," and the U.S. judgment creditor will have to seek recognition through an ordinary lawsuit to enforce a debt or file the entire suit de novo.[92]

In civil law countries such as those of continental Europe, recognition and enforcement is governed exclusively by national statute, and courts pay much less attention to prior jurisprudence than in common law countries.[93] Exequatur is the civil law system for enforcing foreign judgments, where a foreign judgment is registered with the court and made to have the same force and effect

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http://www.primerus.com/business-law-news/can-us-judgments-be-enforced-in-the-uk.htm (last visited Oct. 27, 2012).

88. David de Ferrars, Taylor Wessing LLP, *Enforcing U.S. Judgments in England*, July 12, 2010, *available at* http://www.taylorwessing.com/news-insights/details/enforcing-us-judgments-in-england-2010-07-12.html.

89. *See id*.; *see also* Ministry of Justice of the United Kingdom of Great Britain and N. Ireland, *Civil Procedure Rules, Rule 24: Summary Judgment*, *available at* http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part24 (last visited Oct. 27, 2012).

90. *See* Administration of Justice Act 1920 (c. 81), Part II, *available at* http://www.legislation.gov.uk/ukpga/Geo5/10-11/81/contents (last visited Oct. 27, 2012); Foreign Judgments (Reciprocal Enforcement) Act 1933 (c.13), *available at* http://www.legislation.gov.uk/ukpga/Geo5/23-24/13 (last visited Oct. 27, 2012). For a more detailed explanation of the process of recognition and enforcement of foreign judgments under these treaties, largely applying to the countries of the former British Commonwealth, *see* Brian Richard Paige, Comment, *Foreign Judgments in American and English Courts*, 26 SEATTLE U. L. REV. 591, 608-13 (2003).

91. *See* 1 ENFORCEMENT OF MONEY JUDGMENTS, at Can-10 (Lawrence W. Newman ed., 2006) ("Legislation which provides for enforcement of foreign judgments upon registration has been enacted in all of the provinces and territories except Quebec . . . . They provide a procedure whereby a foreign judgment from a "reciprocating jurisdiction may be registered and, once registered, enforced as though it were a judgment rendered by the courts in that province."). The United States is not mentioned as a reciprocating jurisdiction for purposes of Canadian judgment registration. *Id*.

92. Survey on Foreign Recognition, *supra* note 5, at 3.

93. *Id*.

as if it had originally been rendered by that registering court.[94] Exequatur has been described as a "simpler" method than the common law enforcement procedure of requiring an action on the foreign judgment; however, here too a judgment debtor can raise a number of the same bases for non-recognition that are applicable in American courts.[95]

For instance, although each country's laws will vary to some degree, civil law courts almost universally enforce a judgment if the rendering court possessed proper personal and subject-matter jurisdiction, and gave the defendant proper notice.[96] Foreign courts also require that the foreign judgment sought to be enforced be final, have no conflicts with prior final judgments, and comply with the public policy of the enforcing jurisdiction.[97] When it comes to determining whether the rendering U.S. court had jurisdiction and gave due notice, however, many foreign countries will use much stricter standards than a U.S. court making the same determination.[98] For example, many countries, including China, Japan, and Italy, do not recognize the American "long-arm"[99] basis for personal jurisdiction and will likely refuse to recognize and enforce judgments rendered on such jurisdictional grounds.[100] Furthermore, courts in Greece, Japan, Korea, Mexico, Portugal, South Africa, Germany, and Taiwan will not enforce a judgment "if a local court (i.e., the court of the foreign country) would not have had jurisdiction under the facts."[101] Brazil, France, and Switzerland will not enforce a judgment against their nationals unless there is a clear indication that that "national intended to submit to the rendering court's jurisdiction."[102] Additionally, most civil law countries do not approve of America's use of "tag" or "transient" jurisdiction,[103] which is jurisdiction based

94. *See* Dodge, *supra* note 45, at 194.

95. EUGENE F. SCOLES, CONFLICTS OF LAWS 1187-98 (3d ed. 2000).

96. *See id.*; Adler, *supra* note 80, at 95.

97. *See generally* Survey on Foreign Recognition, *supra* note 5.

98. *See id*. at 4-5.

99. "Long arm" jurisdiction refers to the ability of local courts to exercise jurisdiction over an out-of-state defendant, provided the individual defendant has sufficient minimum contacts with the forum state to satisfy the constitutional standard established in International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See* David L. Doyle, Long-Arm Statutes: a Fifty-State Survey, i (2003), *available at* http://www.vedderprice.com/index.cfm/fuseaction/pub.detail/object_id/64a3d50f-1bf1-4b7d-a238-6b76933afa53/LongArmStatutesiAFiftyStateSurveyi.cfm (last visited Oct. 27, 2012). For a list of the individual U.S. states' long arm jurisdiction statutes, *see id*.

100. *See generally* Survey on Foreign Recognition, *supra* note 5, at 5-6.

101. Adler, *supra* note 80, at 95 (citing Weems, *supra* note 82, at 74).

102. *Id*.

103. Burnham v. Superior Court of Cal., 495 U.S. 604, 607-08 (1990) (upholding the constitutionality of transient jurisdiction); *see also* Linda Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 75 (1978) (coining the term "tag jurisdiction" to refer to jurisdiction conferred on a defendant served in the physical boundaries of a state, "no matter how transient the defendant's presence in the state or how unrelated the cause of action").

solely upon a defendant's temporary presence in the forum.[104] To sum up, as one study noted, the "widely varied concepts of jurisdiction makes the prospect of pursuing a judgment abroad an uncertain proposition."[105]

Another noteworthy defense for a party objecting to the recognition and enforcement of a U.S.-made judgment is the lack of proper notice defense.[106] This defense can be neutralized if the creditor followed the procedural requirements of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters,[107] which codifies accepted procedures for service of process in civil or commercial matters among its signatories, and eliminates the need to serve defendants through consular or diplomatic channels.[108] However, there are still a number of countries not party to this agreement where the propriety of service may never be certain. In those cases, if the U.S. rendering court did not employ a locally recognized method of service, the resulting judgment will likely be unenforceable abroad.[109]

In addition to the aforementioned defenses to recognition, two other important defenses are: (1) the lack of reciprocity by the U.S. state in which the judgment was rendered or whose law governed the claim in federal court; or (2) that the U.S. judgment is in violation of the foreign jurisdiction's public policy. As to the first, a number of countries require at least some form of reciprocity from U.S. courts—among them are Mexico, Canada, Japan, South Africa, Germany, China, and Spain.[110] In these countries, as a prerequisite to enforcement, the creditor seeking to give effect to an American judgment will have to furnish proof that a judgment of the receiving foreign court would itself

104. *See* Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 85-86 (1993).

105. Survey on Foreign Recognition, *supra* note 5, at 9.

106. UFMJRA § 4(b)(1) provides that, "[a] foreign judgment need not be recognized if the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend."

107. Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=17 (last visited June 9, 2011).

108. Evan Greene, Adam Berkowitz, Charles Sanders McNew, *Chapter 3—Service Outside U.S.: Hague Convention on International Service*, Proskauer on International Litigation and Arbitration: Managing, Resolving, and Avoiding Cross-Border Business or Regulatory Disputes, *available at* http://www.proskauerguide.com/litigation/3/II (last visited July 19, 2011).

109. *E.g.*, in Korea, service of process must be made through a local court and Japan, Mexico, Panama, Portugal, South Africa, Spain, Taiwan, and Venezuela impose service of process procedures uncommon in the United States. *See* Weems, *supra* note 82, at 74.

110. Survey on Foreign Recognition, *supra* note 5, at 18-20.

be recognized by the rendering U.S. court.[111] This is a factual question that is largely beyond the litigant's control.[112]

The public policy defense may be the most important of the affirmative defenses to the recognition and enforcement of foreign judgments. This defense enables the enforcing court to deny recognition where the foreign judgment is contrary to the enforcing jurisdiction's public policy or repugnant to its laws, morality, or sense of justice.[113] Its importance stems from the sheer breadth of issues that it can theoretically encompass. However, in practice, both in the United States and abroad courts give the public policy defense a narrow interpretation.[114] Notwithstanding this narrow interpretation trend, the public policy exception still has the potential to curtail the recognition and enforcement of some judgments that would be perfectly legitimate in the United States, because they are contrary to the public policy of other countries. Among the American legal practices that have been found "repugnant" to the public policy of other states are "treble damages in antitrust suits, punitive damages[115] in product liability suits, [and] unrestricted and excessive jury awards."[116]

In addition to the aforementioned defenses to the recognition and enforcement of foreign judgments, one extra obstacle is worth exploring: de novo review by the receiving court. While in the United States there is a presumption against reviewing the foreign judgment on its merits, different countries will—to varying degrees—review the original action de novo, making the prior resolution of the dispute ineffective in the foreign forum. For instance, in Belgium, the courts will review the merits of a foreign suit to determine the facts, law, and statute of limitations,[117] while the courts in Italy will review the

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111. *See* Brandon B. Danford, Note, *The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?*, 23 REV. LITIG. 381, 384.

112. *Id*.

113. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 98 cmt. g (1969).

114. *See* Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis*, 18 LOY. L.A. INT'L & COMP. L. REV. 795, 799, 819 (1996) ("Empirical data . . . suggest that U.S., E.U., and EFTA states have not exhibited the rampant denial of enforcement that doubters of the public-policy exception fear."); *see*, *e.g.*, Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) ("The standard is high, and infrequently met . . . ."); Tahan v. Hodgson, 662 F.2d 862, 866 n.17 (D.C. Cir. 1981) ("Only in clear-cut cases ought [the exception] to avail the defendant."); *see also* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 117 cmt. c. (1969).

115. Germany is one nation that has refused to enforce U.S. judgments carrying punitive damages. *See*, *e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] June 4, 1992, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 118 (312), 1993 (F.R.G), translated in 32 I.L.M. 1320 (1993).

116. Alder, *supra* note 80, at 105 (noting that the quoted practices are "absolutely contrary to British notions of public policy"); Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 47 (1996).

117. Survey on Foreign Recognition, *supra* note 5, at 26. However, the new Belgian Code has done away with the "revision au fond," or reexamination of the merits, requirement in 2004. Wet

merits of the case if the original judgment was obtained by default, if the judgment debtor is able to prove that the foreign money judgment is based on an error of fact, or if the judgment debtor was unable to produce a document in the original trial due to force majeure or the act of the judgment creditor.[118] In Portugal, provided that the debtor is Portuguese, the courts may review the merits of the case to the extent that the rendering court did not apply Portuguese law if that law is more favorable to the debtor.[119] It should also be noted that, even though the laws of some countries may not outwardly permit reexamination of a foreign case's merits, the courts of those countries might still be doing so.[120]

Having laid out the general procedure and defenses to the recognition and enforcement of foreign judgments in the United States, and American judgments in foreign courts, I will next address the question of the value that a comprehensive multilateral convention would bring to the existing system. I will end the next section by summarizing the experience of perhaps the most successful multilateral agreement in private international law—the New York Convention.

II.
THE NEED FOR A JUDGMENTS CONVENTION

This study takes the view that as a matter of public policy, the unification of the law on recognition and enforcement through an international agreement would be a positive development. Achieving greater uniformity in private international law is not simply of theoretical significance; the international marketplace craves certainty in the enforcement of commercial agreements and the resolution of contractual disputes.[121] This has been shown by the

houdende het Wetboek van internationaal privaatrecht [Belgium Code of Private International Law], Belgisch Staatsblad of July 27, 2004, art. 25(2); Baumgartner, *supra* note 2, at 187.

118. Phillip Weems, *Guidelines for Enforcing Money Judgments Abroad*, 21 INT'L BUS. LAW. 509, 510 (1988). The term "force majeure" refers to an event that is a result of the elements of nature, as opposed to one caused by human behavior and is often used in the law of contracts and insurance to protect the parties in the event that a contractual obligation cannot be fulfilled as a result of such force. *Force Majeure*, Oxford Reference Online, *available at* http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095827896 (last visited Oct. 28, 2012).

119. *Id.*; Carlos Manuel Ferreira Da Silva, *De la reconnaissance et de l'execution de jugements etrangers au Portugal (hors du cadre de l'application des conventions de Bruxelles et de Lugano)*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF BRUSSELS AND LUGANO CONVENTIONS 465, 480-81 (Gerhard Walter & Samuel P. Baumgartner eds., 2000); Baumgartner, *supra* note 2, at 187.

120. Weems, *supra* note 118, at 510 (listing the United Arab Emirates as an example).

121. Some international practitioners have specifically expressed this sentiment. *E.g.*, Peter D. Trooboff, *Foreign Judgments*, THE NAT'L L. J. (Aug. 23, 2004), http://www.cov.com/files/Publication/1fb3abae-c2b7-49d0-a41f-b45a00820808/Presentation/PublicationAttachment/3fdd7f43-5505-4afd-bcd7-

commercial world's wholehearted embrace of the New York Convention, which offers such certainty through its clear and tested method for recognition and enforcement of international arbitral awards. Empirical data presented in this section also suggest that U.S. court judgments are not optimally enforced in foreign courts—even those of our closest trading partners.[122] In light of these facts, this study finds ample reasons to support the idea that the United States should continue pursuing a multilateral judgments convention paralleling the New York Convention. However, as shown by evidence presented in Part III, the prospect for attaining a viable treaty on the subject is currently bleak and leaves the United States with few options for addressing this issue other than to make internal legal reforms that could facilitate a greater flow of judgments.

A. Public Policy Reasons Supporting a Judgments Convention

As a matter of U.S. public policy, the potential benefit of a multilateral convention is clear: it would unify the law on recognition and enforcement among signatories, providing more certainty to foreign investors with international commercial contracts as well as individual litigants determining the proper country in which to file their international disputes.

A judgments convention can provide considerable clarity to the positions of plaintiffs and defendants alike in international litigation. For instance, by consulting the convention, plaintiffs can determine with relative ease and accuracy where they can bring an action capable of generating a judgment assured of recognition and enforcement under that convention.[123] All they would need to know is whether a certain country had signed on to the convention and enacted any necessary implementing legislation.[124] By the same

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b618e4d76689/oid51615.pdf; *see also* Nadja Vietz, *Will Your U.S. Judgment Be Enforced Abroad?*, THE ADVOCATE: THE FLORIDA BAR TRIAL LAWYERS SECTION, Vol. XL, No. 1 (Fall 2010) (attorney licensed in Germany and Spain suggesting several steps to avoiding the "nightmare" of having to re-litigate a case due to the inability to enforce it in a foreign forum).

122. *See* Baumgartner, *supra* note 2, at 181-82 ("[In Europe,] judgments emanating from the United States are recognized under the same regime as are judgments from less important, far away nations with which there exist no special trading relationships. Indeed . . . there have been countries in which some of the domestic recognition requirements have been interpreted so as to make recognition of U.S. judgments more difficult . . . .").

123. This is the approach provided under the New York Convention. *See generally Objectives, 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards—the "New York" Convention*, United Nations Commission on International Trade Law, *available at* http://www.uncitral.org/uncitral/uncitral_texts/arbitration/NYConvention.html (last visited Mar. 3, 2012) ("the [New York Convention] seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign and non-domestic arbitral awards . . . . The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.")

124. Treaties may be "self-executing" in that merely becoming a party puts the treaty and all of its obligations in effect. The Supreme Court has defined a "self-executing" treaty as one for which

token, defendants would know in advance which (non-member) states would not automatically recognize and enforce foreign judgments against them with the same relative ease. Accordingly, basic information needed to make litigation decisions would be more accessible to both parties under a convention regulating recognition and enforcement.

The benefits of a recognition convention are more obvious in light of the increasing globalization of economic and social relationships, which produces an ever-growing number of cross-border legal dispute resolutions, many of which must be enforced abroad.[125] In international trade, for example, the recognition and enforcement of judgments rendered by the courts of other countries is "a central tool of trade integration."[126] International business and commercial interests place immense value on the protection provided by the enforcement of legal rights and remedies.[127] One scholar suggests that in the absence of a mechanism ensuring a means for securing and effectuating such remedies, international traders may "undervalue" trade gains, discounting them and consequently forgoing otherwise socially and/or economically beneficial commercial opportunities.[128] To the extent that the current recognition and enforcement system lacks clarity or creates apprehension to international trade by raising tension among would-be foreign traders and investors, it is ripe for an inclusive multinational reform effort.

Yet another policy reason favoring a unified approach to the enforcement and recognition of judgments is that a single mechanism would remove political disincentives from private dispute resolution. Scholarly opinion notes that, "the law concerning recognition of foreign country judgments . . . regulates a dispute that, in essence, is private."[129] This assumes that in a majority of scenarios, a private entity or person seeks to enforce locally a foreign judgment against

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"no domestic legislation is required to give [it] the force of law in the United States." Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984). Alternatively, "non-self-executing treaties" require implementing legislation, which changes domestic law to enable the state to fulfill its treaty obligations. Medellin v. Texas, 552 U.S. 491, 504-05 (2008) (a "non-self-executing" treaty does not by itself give rise to domestically enforceable federal law) (citing Foster v. Neilson, 27 U.S. 253, 315 (1829)). Thus, while treaties "may comprise international commitments, they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *Id*. (citing Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005).

125. Arthur von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 17, 23-25 (1998); Franklin O. Ballard, *Turnabout Is Fair Play: Why a Reciprocity Requirement Should Be Included in the American Law Institute's Proposed Federal Statute*, 28 HOUS. J. INT'L L. 199, 201 (2006).

126. Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 BERKELEY J. INT'L L. 44, 44 (2001).

127. *Id.*

128. *Id*.

129. Yaad Rotem, *The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 CHI. J. INT'L L. 505, 508 (2010).

another private entity or person.[130] However, public interests and politics come into play because each nation is sovereign, and therefore able to unilaterally decide whether and to what extent it will accept another national court's judgment.[131] Since economic theory suggests that a nation will only give effect to a foreign judgment if doing so is in that nation's best interest,[132] a nation's incentive to allow recognition of foreign judgments is therefore very relevant to the recognizing court's decision whether to do so or not. Moreover, to the extent that domestic political judgments about competing policies and/or values are embedded in judicial judgments, political tensions may emerge as litigants seek recognition and enforcement of these judgments in foreign states holding divergent policies and/or values.[133] A clearly defined set of internationally agreed-upon rules on recognition and enforcement of judgments would remove a recognizing court's need to grapple with such conflicting political values and/or incentives in the recognition and enforcement process.[134] Specifically, it would do so by providing a greater measure of independence to courts facing public scrutiny.[135] As a result of being bound by the government's ascension to a multilateral judgments agreement,[136] the judicial branch would be free to

130. *See id*.

131. While a civil judgment inherently involves a private dispute, its resolution by a court of a sovereign nation involves a public act, deriving its authority and force from the power of the sovereign over its citizens and territory. *See* McFarland, *supra* note 45, at 69-70.

132. Consulted literature describes two competing economic hypotheses as relevant to modeling the incentives of countries to recognize foreign country judgments: the first describes the classical Prisoner's Dilemma game, while the alternate alludes to the Stagg Hunt game. For a detailed description of each, *see* Perez, *supra* note 126, at 59; *see also* Rotem, *supra* note 129, at 505.

133. Perez, *supra* note 126, at 46.

134. Analogous issues have inevitably surfaced in the European Union as it seeks to integrate new members, whose court decisions will be recognizable and enforceable under the Brussels Regime regulating which courts have jurisdiction in civil or commercial disputes between individual residents of the different member states of the European Union and the European Free Trade Association. The Brussels Regime consists of two treaties and one regulation: (1) Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1972 O.J. (L 299) 32, *reprinted in* 29 I.L.M. 1417 (consolidated and updated text) [hereinafter Brussels Convention]; (2) Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 O.J. (L 319) 40 [hereinafter Lugano Convention]; and (3) the Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I Regulation].

135. *See* Lee Epstein and Andrew D. Martin, *Does Public Opinion Influence the Supreme Court?: Possibly Yes (But We're Not Sure Why)*, Symposium, *The Judiciary and the Popular Will,* 13 U. PA. J. CONST. L. 263 (discussing the influence of public opinion on the Supreme Court's decisions, and vice versa) (2010).

136. *See* Emilia Justyna Powell and Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT'L STUD. Q. 149 (2009), for a discussion of why many states ratify and adopt human rights treaties yet proceed to disregard their obligations under the same treaties. The authors hypothesize that a state's evaluation of the costs of doing so depends on the effectiveness of its domestic legal system, which is the primary domestic enforcer of new

recognize foreign judgments that might otherwise have been unpalatable by shifting the blame for an unpopular recognition decision to the government.[137]

While the perceived policy benefits of an international agreement on the enforcement and recognition and foreign judges have been laid out, what must be clarified is the empirical research supporting the notion that the current system is indeed in need of the sort of overhaul that such a treaty would introduce. While such data are indeed mixed, there is nevertheless enough support for such a proposed undertaking in legal scholarship, case law, and among practitioners.

B. Empirical and Other Data on the Need for a Convention

Empirical data on the need for a judgments convention do not clearly point in either direction primarily because comprehensive, current data are lacking. For instance, in 1998, a member of the Study Group advising the U.S. Department of State on negotiations during an attempt at a judgments convention, discussed *infra* Part III.A, stated that "the little empirical research conducted to date by the author and others has not demonstrated a great need for a convention."[138] However, that information is out of date and the number of cross-border transactions and resulting disputes increased substantially between 2000 and 2010.[139] Yet an inclusive, verified study on the current treatment of U.S. judgments abroad is still lacking. The little information on which we can rely comes from samples of cases that may or may not be representative, as well as anecdotal evidence of a few countries' general receptiveness to U.S. judgments.[140]

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international treaties. *Id.* at 150-51.

137. *See* Eli Salzberger and Paul Fenn, *Judicial Independence: Some Evidence from the English Court of Appeal*, 42 J.L. & ECON. 831, 832 (1999) ("Independent courts can be used to shift blame for unpopular collective decisions, they can decrease the effects of uncertainty from political ramifications of collective decision making, and they help to reduce social choice problems.").

138. Adler, *supra* note 80, at 82, n.11 (the author's comments were based on an informal telephone survey of attorneys throughout the United States with the assistance of the state bar associations of Florida, Texas, and New York and this survey yielded no attorneys with negative experience in enforcing U.S. judgments abroad); *see also* Weintraub, *supra* note 15, at 170-71 ("[i]f, as I suspect, judgments obtained by U.S. lawyers who follow proper procedures are readily recognized and enforced abroad, there is little need for a convention . . . .").

139. *See* Andrew Cook & Gordon Smith, *International Commercial Arbitration in Asia-Pacific: A Comparison of the Australian and Singapore Systems*, 77 J. INST. ARB. 108, 108 (2011).

140. Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 548 (2005) ("While broad empirical evidence regarding the enforcement of American judgments abroad is hard to find, we have significant anecdotal evidence.").

> In a survey of practitioners conducted by the ABA Section of International Litigation and Practice in October-November 2003, over 98% of those responding indicated that a convention on choice of court agreements would be useful for their practice. Over 70% indicated that a convention would make them "more willing to designate litigation instead of arbitration" in their contracts. The survey is a product of the ABA

Generally, scholarly opinion concerning receptiveness to U.S. court judgments abroad holds that such judgments do not fare as well as they could when taken to foreign courts for recognition and enforcement.[141] The studies that are available mainly focus on U.S. judgments in European courts, where the results vary dramatically among the individual countries of the European Union and largely depend on the specifics of each judgment, such as the individual defendant, the underlying facts, and the basis of jurisdiction.[142] For instance, Nordic countries like the Netherlands and Norway, as well as Austria, are severe trouble spots for U.S. litigants seeking to enforce their money judgments.[143] Conversely, U.S. judgments do relatively well in European countries where the written recognition requirements are similar to those under U.S. law, such as in: England, France, Greece, Italy, Spain, and Switzerland, and more recently, Germany.[144] The trend in post-communist Eastern European countries, while still weak, seems to be moving those countries' judicial practices for recognition and enforcement of foreign court judgments closer in line with the European system under the Brussels and Lugano Conventions.[145]

One practitioner, who is licensed to practice in Germany, Spain, and the state of Washington, noted that despite the fact that all of Europe shares basically the same requirements for recognition and enforcement, her experience is that enforceability of U.S. judgments will still vary widely across the continent, with some countries virtually always enforcing and others virtually

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> Working Group on the Hague Convention on Choice of Court Agreements . . . . The survey was based on the draft text prior to the December 2003 Special Commission which provided some coverage for non-exclusive choice of court agreements.

Id. at n.16.

141. *See* Singal, *supra* note 46, at 958. *See generally* Baumgartner, *supra* note 2. *See also* Kevin M. Clermont, *A Global Law of Jurisdiction and Judgments: Views from the United States and Japan,* 37 CORNELL INT'L L.J. 1, 13-14 (2004) ("Americans are being whipsawed by the European approach. Not only are they still subject (in theory) to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but also U.S. judgments tend (in practice) to receive short shrift in European courts.").

142. *See id.* at 184-86, 230.

143. *See id*. at 227 ("The ensuing practice is most deplorable in the Nordic countries and Austria, where most U.S. judgments simply are not recognized."); *but see* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 109 & n.1 (1996) (stating that absent a treaty, the listed European countries, as well as Brazil, do not regard a foreign judgment as having effect outside the rendering state, but pointing out that Dutch courts often recognize foreign judgments even though they are not required to do so); *see also* Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 38 (1988) (stating that the Netherlands has "advanced from a narrow, ethnocentric position to one of considerable liberality toward judgments rendered outside the Common Market").

144. *See* Baumgartner, *supra* note 2, at 185-86, n.71.

145. *See id*. at n.73 (citing Gerhard Walter & Samuel P. Baumgartner, *General Report*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, 1, 19 (Gerhard Walter & Samuel P. Baumgartner eds., 2000)); *see infra* for further discussion of the Brussels and Lugano Conventions governing recognition and enforcement of foreign judgments in member countries.

never.[146] Another practitioner, frustrated with the exequatur procedure necessary to obtain recognition of a U.S. judgment in Mexico, stated that U.S. judgments are practically "worthless" there.[147] In China, the enforcement of foreign judgments has also been reportedly challenging in recent years.[148] The "lack of transparency" and absence of a system of case-reporting has resulted in the absence of clear empirical measurement of this problem, but secondary sources conclude that a large percentage of judgments, both domestic and foreign, are never enforced.[149] Additionally, officials from the U.S. Departments of Commerce and Justice have claimed to receive frequent inquiries from litigants having enforcement problems.[150]

On the other hand, some scholars believe that there is very little evidence, except for a few "horror stories," suggesting that a significant percentage of American judgment creditors has been unable to satisfy their domestic judgments abroad.[151] One such scholar is Friedrich K. Juenger, who explained that American judgment creditors do not normally need to enforce their U.S. judgments abroad because the typical foreign defendants in American courts are global enterprises with enough domestic assets to satisfy any U.S. judgment domestically.[152] Additionally, Juenger suggests that, "[e]ven medium-sized and smaller foreign enterprises are bound to have open accounts or other assets that American judgment creditors can attach."[153] If this is so, the problem of recognizing U.S. judgments abroad is limited to cases in which the foreign defendant is a "fairly small business or an individual."[154] However, the absence of a study confirming the ratio of small-to-large foreign defendants with local assets makes it difficult to assess the validity of this claim.

In the absence of clear empirical data, this study will assess the need for a convention by looking at the relative procedural difficulty for gaining recognition and enforcement of U.S. judgments in countries of the European Union. It is this author's contention that the existence of a perceived disparity

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146. Vietz, *supra* note 121, at 16 (author also qualifies her statements by saying that non-default, non-tort money judgments have a much better rate of recognition and enforcement abroad).

147. *See* David W. Kash, *Enforcement of Judgments: Across the Border with Mexico*, ARIZ. ATT'Y, July 1995, at 11, 13 (stating that a U.S. judgment is "worthless except in limited circumstances"); Matthew H. Adler, *Enforcement in a New Age: Judgments in the United States and Mexico*, 5 U.S.-MEX. L.J. 149, 152 (1997) (stating that a litigant can block enforcement of a U.S. judgment by bringing parallel litigation in Mexico).

148. Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective*, 36 GEO. WASH. INT'L L. REV. 757, 758 (2004).

149. *Id*.

150. Adler, *supra* note 80, at n.11.

151. Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 114 (1998). Juenger made this assertion without citing concrete empirical or secondary support, so this author is unable to verify the information upon which Juenger's contention is based.

152. *Id*.

153. *Id*.

154. *Id*. at 114, n.18.

between the recognition and enforcement of European-made court judgments in the United States, and U.S.-made judgments in Europe, if any, is made evident by comparing the aforementioned process that a hypothetical U.S. creditor must undergo in a European court with the same process a European creditor holding a European judgment must undergo in another European country's court. The relative ease of enforcing European judgments in the courts of other European countries is attributed to the membership of every country in the European Community in either the Brussels Convention or the similar Lugano Convention governing enforcement of judgments between their member states.[155] This European convention regime comprises a comprehensive recognition and enforcement mechanism for member states that is comparable to the Full Faith & Credit system of the American states.[156] Because the United States is an outsider, its judgments receive less favorable treatment in Europe than judgments from the member states, and are subject to local laws, which sometimes require an entirely new action on the merits.[157] It is thus likely that a judgment creditor seeking to enforce his or her U.S. judgment in a European court would take longer to achieve this result than a judgment creditor holding a comparable E.U. judgment.[158]

The length of time required for a U.S. creditor to obtain recognition and enforcement of his or her judgment in a foreign court is one provision that negotiators can try to standardize in drafting a multilateral judgments recognition convention. Granted, it is probably impossible to require each country to limit the length of time its courts will use to recognize and enforce a foreign judgment because of differing procedural rules. However, a convention

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155. *See generally supra* note 134.

156. *See*, *e.g.*, Lee S. Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INT'L & COMP. L.Q. 44, 55 (1975); Brand, *supra* note 83, at 203.

157. *See* Brand, *supra* note 83, at 195, 205.

158. In the course of this study, no data were found confirming exactly how long it takes for a U.S. court judgment to gain recognition and enforcement in a European court. However, the time needed to obtain recognition and enforcement of a European court's judgment has been found to take, in the majority of European jurisdictions, "less than a couple of weeks, if recognition and enforcement are not resisted by the judgment-debtor, and less than one year even if recognition and enforcement is resisted." Stavros Brekoulakis, *Enforcement of Foreign Arbitral Awards: Observations on the Efficiency of the Current System and the Gradual Development of Alternative Means of Enforcement*, 19 AM. REV. INT'L ARB. 415, nn.36-37 and accompanying text (citing Burkhard Hess, Thomas Pfeiffer & Peter Schlosser, *Heidelberg Report on the Application of Regulation Brussels 1 in the Member States* ¶ 454 (2008), *available at* http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf). Given the fact that E.U. judgments must simply be "registered" in the courts of other E.U. countries while U.S. judgments must undergo an entirely new judicial proceeding to gain the same recognition and enforcement, this author contends that the length of time it would take an E.U.-made judgment to become enforceable in another E.U. country is shorter than the respective time period for a U.S. judgment. *See* Samantha Holland, *Enforcing Foreign Judgments*, Jan. 19, 2009 (describing the process of registering an E.U. judgment in England as "straightforward and therefore relatively inexpensive and quick"), *available at* http://www.wragge.com/analysis_3788.asp.

can at least provide for an expedited procedure, such as the summary judgment process that exists in common law countries and under the Brussels and Lugano regimes, where recognition and enforcement can take as short as a few weeks.[159] Under the existing system of recognition and enforcement, where no multilateral convention applies, a judgment creditor seeking recognition and enforcement in another country may encounter waiting periods of between one to two years just to get a court date, and two to nine years for the entire recognition and enforcement process.[160] It is this study's suggestion that such a span of time may be prohibitively long for individuals and institutional judgment creditors doing business in the international economy, and provides additional support for a multilateral judgments convention.

The elaborate reciprocity regime described in Part I is another aspect of the current recognition and enforcement system that stands to benefit from a convention. The reciprocity requirements of many countries and some U.S. states have been called "cumbersome and complex," resulting in "uncertainly and unpredictability" for creditors seeking to enforce their judgments in the United States and abroad.[161] This is in total contrast to the comprehensive recognition and enforcement regimes of Brussels and Lugano—where reciprocity is more likely.[162] Outside this treaty system, empirical evidence suggests that the reciprocity requirement delays the resolution of international commercial disputes in the United States and abroad.[163]

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159. *E.g.*, in unchallenged exequatur proceedings among member states, the length of time for recognition and enforcement may be summarized as follows: in Austria, one week; in Cyprus, one to three months; in England and Wales, one to three weeks; in Estonia, three to six months; in Finland, two to three months; in France, ten to fifteen days; in Germany, three weeks; in Greece, ten days to seven months; in Hungary, one to two hours; in Ireland, one week; in Italy, up to thirty days; in Latvia, ten days; in Lithuania, up to five months; in Luxembourg, one to seven days; in Poland, one to four months; in Slovenia, two to six weeks; in Spain, one to two months; and in Sweden, two to three weeks. Brekoulakis, *supra* note 158, at nn.36-37.

160. *E.g.*, in Canada it takes one to two years to get a trial date; in Japan it takes two to nine years to obtain recognition of a foreign monetary judgments; in Italy, the average time may be between two and four years. Survey on Foreign Recognition, *supra* note 5, at 26.

161. Survey on Foreign Recognition, *supra* note 5, at 20.

162. *See supra* note 147 and accompanying text.

163. Ronald Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 255 (1991) (stating that "enforcement of United States judgments overseas is often possible only if the United States court rendering the judgment would enforce a similar decision of the foreign enforcing court"); Barbara Kulzer, *Some Aspects of Enforceability of Foreign Judgments: A Comparative Summary*, 16 BUFF. L. REV. 84, 88 (1966) (stating that "reciprocity is an important concept on the Continent"); Bernardo Rodriguez Ossa, *Recognition and Enforcement of Foreign Judgments*, LATIN AM. L. & BUS. REP., Sept. 30, 1996, at 18 (stating that Colombian courts require reciprocity in order to recognize foreign judgments); Ramon E. Reyes, Jr., *The Enforcement of Foreign Court Judgments in the People's Republic of China: What the American Lawyer Needs to Know*, 23 BROOK. J. INT'L L. 241, 260 (1997) (stating that "when there is no treaty between [China and another nation], the principle of mutual reciprocity must be used"); Morio Takeshita, *The Recognition of Foreign Judgments by the Japanese Courts*, 39 JAPANESE ANN. INT'L L. 55, 72-73 (1996) (discussing Japan's reciprocity

A U.S. litigant trying to overcome the reciprocity defense faces yet another complication—the fact that some countries are unitary while others, like Canada and Mexico, are federal in their legal organization.[164] In federal countries, just like in the United States, some provinces or states require reciprocity while others do not.[165] As a result, a foreign litigant trying to enforce his or her judgment in a U.S. state requiring reciprocity must know ahead of time whether the foreign rendering court regularly recognizes and enforces judgments from that state's courts.

The same is true when an enforcing court in a foreign country requiring reciprocity faces a U.S.-made judgment; that is, that foreign enforcing court must decide whether, if faced with a judgment from the same foreign enforcing court arising from similar facts, the U.S. rendering court, in applying its own law, would grant recognition and enforcement to that foreign court's judgment.[166] In making this determination, the enforcing foreign court must look at the recognition and enforcement law applied by the rendering U.S. court, and if the U.S. court just happened to be a federal district court sitting in diversity, the foreign court would be faced with additional confusion in deciphering the U.S. federal system and *Erie*'s application within.[167] Clearly, this is a dizzying exercise because, even though there may be mutual reciprocity requirements between the recognizing and rendering courts, the law and its historical application will rarely provide certainty as to whether those two courts actually reciprocate by regularly recognizing and enforcing each other's decisions.[168] One can imagine how foreign-domiciled businesses would be sensitive to such uncertainty—uncertainty not only within the applicable law, but also as to which of fifty sets of law actually applies.[169]

Thus, any government intent on maintaining a reputation for being a haven for international business should strive to provide its foreign investors and corporate constituents reassurance in the stability and certainty of its legal

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requirement).

164. For instance, in Canada and Mexico, like in the United States, the laws of the provinces and territories, not the federal law, govern the recognition of foreign judgments. Survey on Foreign Recognition, *supra* note 5, at 4, 18.

165. *E.g.*, in Canada, the common law provinces, excluding Quebec, have enacted statutes on recognition of foreign judgments that require reciprocity arrangements with the countries from which the judgment in question emanates. *Id*. at 18. Similarly, in Mexico, a judge has the discretion to deny recognition to a foreign judgment for lack of reciprocity, although there is no mandatory reciprocity requirement. *Id*.

166. Brand, *supra* note 163, at 281.

167. *Id*. at 282.

168. *See* Hulbert, *supra* note 9, at 651 (discussing the general uncertainty and complexity of satisfying the reciprocity requirement, which in many cases will require the presentation of expert testimony on the issue).

169. *See* Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 48 (1996).

system.[170] Because the aforementioned evidence suggests that a single U.S. law on the recognition and enforcement of foreign judgments would better serve the well-being of U.S. commercial interests than the current disunity offered by the state law system governing this sphere, it is this study's contention that any normative discussion should focus on providing a unified law on the recognition and enforcement of foreign judgments. Having outlined the empirical evidence supporting the need for some reform of the current judgments recognition system, the next section will briefly summarize the success of the New York Convention in addressing some of the same problems with respect to the recognition and enforcement of foreign arbitral awards.

C. Recognition and Enforcement Under the New York Convention

It is often acknowledged that the most substantial benefit of international arbitration is that in the overwhelming majority of cases it produces an award that is entitled to recognition and enforcement in the 147[171] countries that have ratified the New York Convention.[172] International arbitration affords the closest thing to certainty of recognition and enforcement of foreign-made legal decisions currently allowed under our transnational legal system. This is because arbitration governed by the New York Convention greatly reduces the uncertainties of litigation in foreign courts by providing those courts with strong guidance and a clear framework in enforcing international arbitral awards.[173] On the other hand, the uncertainties of length, procedure, cost, and, on occasion, bias are ever present in the current system of recognition and enforcement of foreign judgments.[174]

The New York Convention applies to all arbitral awards rendered pursuant to a written arbitration agreement in a country other than the state of enforcement, and arbitral awards not considered as domestic by the enforcing state.[175] If the New York Convention covers an arbitral award, member countries must recognize the award as binding and enforce it in accordance with local procedural requirements.[176] Enforcement must take place unless a party

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170. *See id*. (stating that international business entities desire certainty in legal affairs, and might well prefer to be subject to the laws of one national system of adjudication rather than fifty separate court systems).

171. *Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, supra* note 3.

172. Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. INT'L ARB. 297, 297 (2007).

173. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 2-3 (1994). In the United States, courts are guided in the New York Convention's application by the F.A.A., 9 U.S.C §§ 201-208 (outlining the enforcement of the New York Convention).

174. *See generally* Survey on Foreign Recognition, *supra* note 5.

175. New York Convention, *supra* note 3, arts. I(1), II(1)-(2).

176. *Id*. art. III. Furthermore, countries party to the Convention cannot impose "substantially

objects to it and proves that one of the enumerated grounds for non-enforcement exists. Article V provides the exclusive grounds for refusing enforcement:

(a) invalidity of the arbitration agreement;
(b) violation of due process;
(c) excess by arbitrator of his or her authority;
(d) defect in the composition of the arbitral tribunal or in the arbitral procedure; and
(e) award not binding, suspended or set aside in the country of origin.[177]

Domestic courts can also refuse to enforce the award under Article V(2) if its subject matter is incapable of settlement by arbitration under the enforcing country's laws, or if recognition or enforcement of the award would violate the enforcing country's public policy.[178]

While the list of grounds for non-recognition in Article V markedly resembles the list of grounds for non-recognition of foreign judgments under the UFMJRA,[179] the grounds enumerated in Article V are more limited in number, scope, and amount of discretion afforded to reviewing courts for refusing enforcement of arbitral awards.[180] In keeping with the New York Convention's general policy favoring arbitration, courts narrowly apply these grounds for non-enforcement.[181] For instance, the U.S. courts in particular only apply the public policy ground for non-enforcement, "where enforcement would violate our most basic notions of morality and justice."[182] This narrow reading of the seven grounds for non-recognition by national courts, which tends to favor enforcement, allows the New York Convention to remain a standard in the law of recognition and enforcement of international arbitral awards.

Another major achievement of the New York Convention is that it avoids the reciprocity problem. By allowing member states to sign the Convention, while at the same time limiting its application through the "reciprocity" and "commercial" reservations, the Convention avoids confusion among member

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more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which th[e] Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." *Id*.

177. *Id*. arts. V(1)(a)-(e).

178. *Id*. arts. V(2)(a)-(b).

179. *See supra* pp. 10-11.

180. Susan Choi, *Judicial Enforcement of Arbitral Awards Under the ICSID and the New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 176 (1996).

181. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 288 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004) (stating that defenses to enforcement under the New York Convention are construed narrowly, "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts").

182. Waterside Ocean Navigation Co. v. Int'l Navigation Ltd., 737 F.2d 150, 152 (2d Cir. 1984); Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (rejecting an American construction company's public policy defense because "[t]o deny enforcement of this award largely because of the United States' falling out with Egypt . . . would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement").

states concerning reciprocity.[183] The disadvantage of this system is that the permissible reservations may be used both to limit the New York Convention's applicability to "commercial" disputes under the enforcing state's laws, and to restrict its scope to the enforcement of arbitration agreements made only on the territories of other signatory countries.[184] The United States is one of the countries invoking both reservations.[185] However, even in light of this disadvantage, the New York Convention's reciprocity provision is easy to understand and apply because there is no confusion over whether a country reciprocates: it either will or will not adopt the reciprocity reservation at the time of its accession to the treaty.[186] Consequently, this makes the New York Convention's reciprocity reservation more palatable than the cumbersome reciprocity regime in the existing system of judgments enforcement. Reciprocity is therefore not an issue among member states. Between member and non-member states, member states will specify whether they require reciprocity upon signing the treaty.[187]

An additional major advantage of the New York Convention is the shorter amount of time it takes to get recognition and enforcement in the courts. First, since most arbitral awards are complied with voluntarily, a majority of them simply do not require judicial recognition and enforcement.[188] However, when arbitral awards are challenged and require recognition and enforcement in court,

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183. New York Convention, art. I(3) (allowing a member state making that reservation to apply the Convention to the recognition and enforcement of awards made in the territory of another member state only).

184. *Id*.

185. F.A.A., 9 U.S.C. §§ 202 (limiting the application of the New York Convention in the United States only to arbitration agreements or awards "arising out of a legal relationship . . . which is considered as commercial"), 304 (limiting the recognition and enforcement of foreign arbitral awards under the Inter-American Convention on International Commercial Arbitration only to states that have acceded to the treaty). Seventy-four states have made the reciprocity reservation; forty-five states have made the "commercial" dispute reservation. *See Status 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Oct. 25, 2012).

186. Joseph T. McLaughlin, *Enforcement of Arbitral Awards Under the New York Convention: Practice in U.S. Courts*, 477 PLI/Comm 275, 280 (1988). If a country does not explicitly adopt the New York Convention with the reciprocity reservation in Article XIV, a court of that member state will not then be able to refuse to recognize or enforce a foreign arbitration award from another member state in the absence of any of the narrowly construed range of objections permitted by Article V(1)(a)-(d), (e) of the New York Convention, none of which include reciprocity. *See* RAKTA, 508 F.2d at 973; 9 U.S.C. § 207.

187. *See Status 1958—Convention*, *supra* note 185 (noting that states designated with the letter "(b)" in the Notes box have indicated that, with regard to awards made in the territory of non-contracting states, such states will apply the Convention only to the extent to which those non-member states grant reciprocal treatment).

188. R. Doak Bishop & Elaine Martin, *Enforcement of Arbitral Awards*, at 1, King & Spalding, Hughes & Luce LLP, *available at* http://www.kslaw.com/library/pdf/bishop6.pdf (last visited June 2, 2011).

empirical evidence suggests that the time frame is usually shorter than that required for recognition and enforcement of foreign judgments outside a treaty system.[189] For instance, in England, getting an arbitral award recognized and enforced through the common law system can take three to six months when there is no serious dispute, or nine to twenty-four months for a disputed claim.[190] In Brazil, the procedure takes two to fourteen months between the application for confirmation and a final decision.[191] In the European Union, the enforcement of arbitral awards requires less than one year in about fifty-seven percent of cases.[192] Unlike recognition and enforcement of judgments, these time periods are framed in terms of months, not years.[193]

Having described the perceived benefits of a judgments convention and the successful experience of the international private law system under the New York Convention, it is useful to highlight prior attempts by the United States to negotiate a judgments convention, and to consider the reasons that such efforts have thus far been fruitless.

III.
PREVIOUS ATTEMPTS TO NEGOTIATE A JUDGMENTS CONVENTION

America is no stranger to the idea of negotiating a multilateral convention on the recognition and enforcement of foreign court judgments. As shown in the previous section, the U.S. government's ascension to the New York Convention has indeed had positive results. Despite the differences between private arbitration and public litigation, there does not seem to be a clear and fundamental reason why a judgments convention would not prove similarly advantageous. However, it seems that practice has proven that despite a multilateral judgments convention's recognized benefits, the urgency necessary to spur the world to sign one, is absent. The United States, in particular, while leading a number of failed drafting initiatives at the Hague Conference, seems to operate under a historical hesitation and lack of urgency to sign such a binding agreement. Before explaining this lackluster attitude among the negotiating partners, the next section will describe the past few attempts the United States has made to draft a multilateral and bilateral judgments treaty.

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189. *Compare* to notes 159-160 *supra* and accompanying text.

190. Robert Goldspink, *Enforcing International Commercial Arbitration Awards: An English Law Perspective*, Morgan Lewis Counselors at Law, *available at* http://www.morganlewis.com (enter title in search bar) (last visited June 12, 2011).

191. Fernando Eduardo Serec et al., TozziniFreire Advogados, *Brazil*, LATIN LAWYER: THE BUSINESS LAW RESOURCE FOR LATIN AMERICA, *available at* http://www.latinlawyer.com/reference/topics/45/jurisdictions/6/brazil/ (last visited June 12, 2011).

192. Brekoulakis, *supra* note 159, at 431.

193. *See supra* Part II.B., at 25.

A. Past Treaty Experience

Since 1893, the Hague Conference has worked to conclude multilateral conventions with rules for the exercise of jurisdiction and recognition and enforcement of resulting judgments.[194] One such example is the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, which came into force in 1971 with only three signatories, none of which made the necessary bilateral agreements to make the treaty operational.[195] The 1971 Convention put forward rules applicable only to the court being asked to recognize a judgment produced in a foreign court of origin; these rules were not applicable to the originating court. [196] This produced questionable results by allowing the enforcing court to review, although indirectly, questions of the originating court's jurisdiction through review of its judgments.[197] Further, the "unilateral" nature of this agreement left signatories free to claim jurisdiction on their own idiosyncratic grounds, and imposed an additional cumbersome implementation step, which required member states wishing to avail themselves of the agreement's provision to execute bilateral agreements with one another.[198] While the United States never ratified the 1971 Convention, by 1992, the U.S. State Department joined a second effort to negotiate a multilateral convention on recognition and enforcement of judgments.[199] This second effort addressed the failure in the earlier attempt by having rules of direct jurisdiction applicable to both the court of origin and reviewing courts.[200] The goal of these rules was to remove the need for "indirect consideration of the jurisdiction of the court of origin" by the enforcing court.[201] The envisioned result would thus be something akin to the Brussels and Lugano Conventions.[202]

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194. *Overview*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=text.display&tid=26 (last visited Oct. 30, 2012).

195. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 249 [hereinafter 1971 Convention]; RONALD A. BRAND & PAUL M. HERRUP, THE 2005 HAGUE CONVENTION ON THE CHOICE OF COURTS AGREEMENTS: COMMENTARY AND DOCUMENTS 5 (Cambridge University Press 2008); *see* Arthur von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 275 n.17 (1994).

196. *See* Brand & Herrup, *supra* note 195, at 7.

197. *See id*.

198. 1971 Convention, *supra* note 195, art. 21; Supplementary Protocol to the 1971 Convention, Feb. 1, 1971, 1144 U.N.T.S. 271; *see* Kurt H. Nadelmann & Arthur von Mehren, *The Extraordinary Session of the Hague Conference on Private International Law*, 60 AM. J. INT'L L. 803, 803-04 (1966).

199. *See* von Mehren, *supra* note 195, at 282.

200. *See* Brand & Herrup, *supra* note 195, at 7-8 (discussing the difference between "single," "double," and "mixed" conventions).

201. *See id*. at 7.

202. *See id*. (describing the Brussels and Lugano Conventions as "double conventions," providing "both rules of direct jurisdiction applicable in the court in which the case is first brought

After nearly ten years of negotiations, this early vision proved too contentious to muster a majority consensus.[203] In particular, U.S. drafters worried that its constitution-based jurisdictional system was incompatible with the civil law-oriented Brussels-type convention.[204] After this setback, the Convention working group abandoned its draft agreement and therefore its goal of producing a comprehensive list of required jurisdictional bases, any of which would have automatically entitled a judgment to recognition and enforcement in the courts of contracting states.[205] As a result, any ambitions to produce a successor to the 1971 Convention became a dead letter. The drafters switched gears to writing a jurisdictional convention on a topic that could muster a general consensus – a convention on jurisdiction based on the agreement of the parties, such as judicial forum selection clauses.[206] This change in direction produced the 2005 Convention on the Choice of Courts ("2005 Convention"), which America signed in 2009 but has yet to ratify.[207]

Under the 2005 Convention, any judgment rendered by a court exercising jurisdiction in accordance with an "exclusive choice of court agreement" must be recognized and enforced in the courts of other contracting states, save for a number of specified grounds for non-recognition.[208] In general, the 2005 Convention seems to create a regime of judgment recognition similar to the one established by the New York Convention, but for commercial contracts in which parties specifically agree to a forum. While this agreement presents a commendable stride toward international recognition of domestic court judgments, it stops far short of the goal set out by the U.S. State Department when it initially proposed that the Hague Conference take up negotiations for a multilateral convention with rules applicable to both the exercise of jurisdiction and the recognition of resulting judgments.[209]

An even earlier, and far less ambitious, attempt to ascend into a judgments treaty took place in 1976, when the United States and the United Kingdom

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("the court of origin"), as well as rules applicable in the court of another state asked to recognize and enforce the resulting judgment ("the court addressed")").

203. *See id*. at 9-10.

204. *See id*. at 9; *see*, *e.g*., Ronald A. Brand, *Due Process, Jurisdiction, and the Hague Judgments Convention*, 60 U. PITT. L. REV. 661, 703-05 (1999).

205. *See* Brand & Herrup, *supra* note 195, at 9.

206. *See Preliminary Result of the Work of the Informal Group on the Judgments Project*, Hague Conference on Private International Law, Prel. Doc. No. 8 of March 2003, *available at* http://www.hcch.net/index_en.php?act=publications.details&pid=3506&dtid=35 (last visited July 12, 2011).

207. Status Table, Convention of 30 June 2005 on Choice of Court Agreements, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited Nov. 1, 2012); Duncan Hollis, *U.S. Signs Hague Choice of Courts Convention*, OPINIO JURIS, (Jan. 2009), *available at* http://opiniojuris.org/2009/01/22/us-signs-hague-choice-of-courts-convention/.

208. Convention of 30 June 2005 on Choice of Court Agreements, ch. III, art. 8, 9 [hereinafter 2005 Convention], *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

209. *See* Brand & Herrup, *supra* note 195, at 6, n.19.

initiated their own Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters ("U.S.-U.K. Convention").[210] Unfortunately, that treaty was never ratified. The fact that the United States and the United Kingdom, two countries sharing the same legal traditions, language, and cultural influences, could not agree to a mutually acceptable treaty seriously calls into question the ability to produce anything on a grander scale, for example, through the Hague Conference.[211]

For the United States, the biggest advantage of a judgments treaty with the United Kingdom would have been its removal of the perceived unequal treatment of U.S. judgments under the Brussels Convention in the United Kingdom.[212] The basis of this unequal treatment is that under the Brussels Convention, member states are required to recognize judgments rendered in other member states against non-domiciliaries of the European Community, even when those judgments are reached under certain jurisdictional bases thought to be excessive.[213] This is termed "exorbitant jurisdiction," because it allows judgments against outsiders to be recognized even when the originating court lacked a generally accepted basis for jurisdiction.[214] The United Kingdom, while still a member of the Brussels regime, would have been able to make such a treaty with the United States because Article 59 of the Brussels Convention allows deviation from its jurisdictional provisions.[215] Indeed, this provision

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210. Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, U.S.-U.K., Oct. 26, 1976, 16 I.L.M. 71 [hereinafter U.S.-U.K. Convention]; *see also* Hans Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443, 443 (1977).

211. Adler, *supra* note 80, at 92-93.

212. *Id.* at 91. There is at least one secondary source pointing out that the fear of judgments being enforced in the European Union against Americans rendered on the basis of the Brussels Convention's exorbitant jurisdiction is purely theoretical and yet to be realized in practice. *See* Andreas F. Lowenfeld, *Thoughts About a Multilateral Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289, 303 (1994). However, because this study seems rather dated, its lasting persuasiveness is difficult to determine without new empirical data on the matter.

213. *See* Smit, *supra* note 210, at 445.

214. *See* Russell, *supra* note 104, at 59 ("'Exorbitant' jurisdiction is jurisdiction validly exercised under the jurisdictional rules of a state that nevertheless appears unreasonable to non-nationals because of the grounds used to justify jurisdiction"). Catherine Kessedjian describes that "exorbitant jurisdiction" may arise "when the court seised does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take account of the principle of the proper administration of justice. An exorbitant form of jurisdiction is one which is solely intended to promote political interests, without taking into consideration the interests of the parties to the dispute." CATHERINE KESSEDJIAN, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS ¶ 138 (Hague Conference on Private International Law, Prel. Doc. No. 7, 1997).

215. "This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3." Brussels Convention, *supra*

would have allowed America to avoid the effects of the Brussels Convention through country-by-country treaty negotiation.[216] However, the fact that the United States could not get a treaty with even this closest of allies does not bode well for its prospects with other E.U. members.

Some of the greatest points of contention arising during the negotiations of the proposed U.S.-U.K. Convention stemmed from U.S. long-arm jurisdiction. This is because at least one British interest group, namely the British insurance industry, was not thrilled about the prospect of British courts having to enforce U.S. judgments made on the basis of this form of jurisdiction.[217] Even more controversial was the fear that British courts would also have to recognize and enforce what were regarded as "outrageous" American jury awards in products liability cases.[218] But even after the draft was revised to allow for British review of U.S. jury awards when awards were considered substantially greater than those that a British court would have awarded, British opposition was not appeased, and negotiations officially ended in 1981.[219]

B. Historical Apprehensions in the United States

The United States' difficulty in negotiating a treaty on reciprocal recognition of court judgments is not solely a result of its negotiating partners' apprehension to aspects of the U.S. legal system; the problem is far more complex. The impasse may be partially attributed to internal changes in U.S. policies on private and public international law, which have been shaped by its changing role in the international community and the world economy since World War II.[220] While this study cannot give thorough treatment to this complex topic, it is important to note that the United States once harbored a strong and vocal policy of avoiding international treaties on matters of international law and procedure.[221] The late nineteenth and twentieth centuries presented a number of missed opportunities to negotiate such treaties with civil law countries eager to engage the United States in a recognition treaty.[222]

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note 134, art. 59.

216. Brand, *supra* note 83, at 204.

217. *See* Adler, *supra* note 80, at 93.

218. *Id*.; *see also* David L. Woodward, *Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom and the European Economic Community*, 8 N.C. J. INT'L L. & COM. REG. 299, 312 (1983).

219. *See* Adler, *supra* note 80, at 93; *see also* Woodward, *supra* note 218, at 312; P.M. North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219, 230-31 (1979).

220. For a detailed account of the origins of U.S. policies on matters of transnational litigation, *see* SAMUEL P. BAUMGARTNER, *§ 2; United States*, *in* THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS, at 16-46 (Mohr Siebeck 2003).

221. *Id*. at 16.

222. *See*, *e.g.*, Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323 (1954); Stephen B.

Although this internal anti-entanglement policy was gradually discarded with respect to private international law after the United States signed the New York Convention and finally joined the Hague Conference as a full member in 1963, the policy may still plague America's outlook with respect to public international law.[223]

The difference between private and public international law, and an ongoing fear within the U.S. government of signing an international agreement binding U.S. courts, may partially explain the existence of a highly supported arbitration convention and the simultaneous absence of a similar court judgments convention.[224] Even while the U.S. government has exercised leadership in the negotiation of a judgments convention,[225] America still hesitates to surrender its ability to act unilaterally by refusing to make important concessions that could require real changes to domestic legislation or procedural jurisdictional rules.[226] It is unclear whether this attitude is the product of interest groups' influence—states' rights advocates and conservative American jurists have been among the groups opposed to such an agreement—or whether it is simply a relic of a once-held attitude that common law was superior to civil law.[227] For instance, the United States was likely to have been more partial to ascending to the New York Convention because arbitration decisions do not produce binding precedent and so the body of law produced by enforcing such awards will not invade the system of stare decisis revered by common law jurists.[228] Under this logic, the United States would be unwilling to accept the prescribed list of jurisdictional bases that would be the foundation of any multilateral judgments convention, because such a list has the potential of clashing with American jurisdictional case law.

Another aspect of the private-public law dichotomy that may be relevant in shedding light on America's seemingly contradictory attitude toward an arbitration convention on the one hand, and a judgments convention on the other, is the absence of the element of "party consent" in court proceedings and its necessity in arbitral proceedings. Specifically, because arbitration under the New York Convention rests fully upon the agreement of the parties and does not

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Burbank, *Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 139-41 (Summer 1994).

223. *See* Kurt H. Nadelmann, *The United States Joins the Hague Conference on Private International Law: A "History" with Comments*, 30 LAW & CONTEMP. PROBS. 291, 291 (Spring 1965).

224. *See* Baumgartner, *supra* note 220, at 41-43; Burbank, *supra* note 222, at 103-04.

225. *See*, *e.g.*, *supra* at 42-44, recounting the State Department's efforts with respect to negotiating the unpopular 1971 Convention and the resumed negotiation efforts of 1992.

226. Baumgartner, *supra* note 220, at 44-45.

227. *Id*. at 24-25.

228. Mauro Rubino-Sammartano, INTERNATIONAL ARBITRATION: LAW AND PRACTICE, *The Binding Effect of Precedent* 797 (Klewer Law International 2d ed. 2001); K.P. Berger, *The International Arbitrators' Application of Precedent*, 9 J. INT'L ARB. 4, 5 (1992).

bind non-parties, it may have been more palatable for the United States to agree to the enforcement of international arbitral awards through a multilateral framework since such awards generally do not affect non-parties who did not agree to be bound by the arbitration. Moreover, it can be argued that the American accession to the New York Convention was done out of economic (and political) necessity for advancing American commercial interests in an essentially globalized economy.[229] The U.S. Supreme Court cited international commercial interests and supporting America's competitiveness in international commerce in its landmark decision to enforce an arbitration agreement in *Scherk v. Alberto-Culver Co*.[230] and subsequent case law.[231] *Scherk* advanced the notion that the courts' reliability in enforcing arbitration agreements specifying in advance the forum for dispute resolution is "almost indispensable" for international business.[232] While justifying the vigilant recognition of international arbitration awards, this economic rationale does not similarly apply to the recognition of foreign court judgments—which do not necessarily arise from contractual causes of action or party consent to a specific forum.

Although no longer very persuasive, another reason historically cited to explain the Unites States' hesitancy to enter a binding judgments convention was the federal government's purported lack of power to enter into international treaties binding civil procedure—which was considered a matter of state law.[233] Congressional enactment of the Federal Rules of Civil Procedure and the U.S. Supreme Court's decision in *Missouri v. Holland*,[234] which held that the federal government could bind states by entering into treaties even when Congress lacked the power to legislate on the matter, greatly dispelled this notion.[235] Nonetheless, this line of reasoning may still hold some ground for political interests sensitive to states' rights arguments.

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229. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) ("The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.").

230. *Id*. at 516, 519 (citing The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972)) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, 'reflect a parochial concept that all disputes must be resolved under our laws and in our courts' . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.").

231. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

232. 417 U.S. at 507.

233. *See* Burbank, *supra* note 222, at 103-07.

234. 252 U.S. 416, 433 (1920).

235. *See id*.

Paradoxically, ambivalence toward a multilateral convention on recognition and enforcement of foreign judgments may also stem from experience with the New York Convention. On the one hand, the New York Convention has been a success in terms of number of signatories and the regularity with which it is enforced. On the other hand, it has a number of drawbacks that U.S. legal scholars and practitioners raise in opposing a similar agreement on enforcement of court judgments. One such drawback is the difficulty of mustering enough support to modify—through amendment—a multilateral convention to meet new developments in law and technology.[236] Another difficulty lies in the varying interpretations that certain aspects of the New York Convention receive among its numerous member states, thus hampering its very goal of obtaining uniformity of law.[237] A third drawback is that signing a treaty will freeze the law on recognition and enforcement, preventing it from developing through subsequent case law.[238] In this respect, an alternative, such as a federal statute unifying the law on foreign judgments in the United States, may be more advantageous as it will allow case law to continue developing the law on recognition and enforcement of foreign court judgments.

C. Lack of Political Will and Urgency in the United States

Despite the almost unanimous agreement that the United States would benefit from a multilateral judgments convention—perhaps even more than any other party to such a convention—it is difficult to predict whether it will ever accede to such an agreement.[239] The efforts of the last few decades indicate that it is not for lack of trying that such an agreement has not been reached. Moreover, what those past attempts do seem to show for certain is that the U.S. government does, or at least at one point did, take the initiative in pursuing multilateral negotiations through the Hague Convention process.[240]

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236. DOMENICO DI PIETRO & MARTIN PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS: THE NEW YORK CONVENTION OF 1958, 16 (Cameron May 2001).

237. *E.g.*, the courts of several Asian member states of the New York Convention have given different interpretations to the public policy exception in Article V(2)(b), with some interpreting it as including domestic public policy, international public policy and transnational public policy. Erman Rajagukguk, *Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on Grounds of Public Policy*, Presented in the 3rd Asian Law Institute (ASLI) Annual Conference on "The Development of Law in Asia: Convergence versus Divergence?" at 1-2 (Shanghai May 25-26, 2006).

238. Smit, *supra* note 210, at 444.

239. *See* Joseph J. Simeone, *The Recognition and Enforceability of Foreign Country Judgments*, 37 ST. LOUIS U. L.J. 341, 357 (1993) (stating that "the modern trend in the courts of the United States is to grant recognition of, and conclusive effect to, a foreign judgment if all the elements of due process and civilized procedures are followed . . . ."); *compare* Adler, *supra* note 80, at 81 (stating that "the consensus" in academic circles and in the U.S. Department of State is that "individuals seeking enforcement of U.S. judgments abroad have not had the same good fortune as foreign litigants seeking enforcement in the United States").

240. *See*, *e.g.*, *supra* Part III.A.

Furthermore, whatever the reasons motivating the U.S. government for pursuing these negotiations, these reasons are not strong enough to force its hand in making the kinds of concessions that would result in a deal with America's negotiating partners.

Indeed, while this study has put forth empirical data suggesting that at least in some countries, recognition and enforcement of U.S. judgments is a problem, that problem has not been considered serious enough to warrant widespread attention from U.S. legislators and policymakers.[241] For unknown reasons that opponents to a multilateral treaty have interpreted as evidence of the absence of a significant problem in the current foreign judgments recognition system, there has been no wave of public outcries from aggrieved judgment creditors in the media or at Congressional hearings.[242] Because there is no urgency, there is a lack of motivation and political capital for the U.S. government to consider agreeing to some of the more serious demands from its negotiating partners at the Hague Conference.

Among the most painful of these concessions would likely require the United States to agree to place some of its courts' commonly used bases of jurisdiction on a "black list," and to accept some jurisdictional bases rejected in U.S. courts—presenting separate constitutional problems that could later defeat the convention in court.[243] Such a concession would mean that if a U.S. rendering court obtained jurisdiction on the basis of one of the prohibited jurisdictional bases appearing on the black list, then its judgment would not be entitled to enforcement in a contracting state.[244] This would effectively deprive the convention of its intended purpose of making recognition and enforcement of U.S. judgments predictable. While the concession would not apply to

241. *See* Danford, *supra* note 111, at 432.

242. *See supra* Part II.B; *see also* Juenger, *supra* note 151, at 114.

243. *See* Weintraub, *supra* note 15, at 185-86. Among the bases of jurisdiction offensive in other legal systems, and primarily in civil law Europe are: tag jurisdiction, and general jurisdiction based on continuous and systematic activities in the forum found constitutional in Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984). Conversely, the U.S. Supreme Court has rejected bases for jurisdiction that are on the Brussels Convention's "white list" of exclusive bases of jurisdiction. *See* Weintraub, *supra* note 15, at 190. Specifically, in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987), a plurality of the Supreme Court rejected jurisdiction over a component parts manufacturer in a tort suit even though that manufacturer was aware that its product would reach the forum of the accident. The Court explained that because there was no act "purposefully directed toward the forum State," the mere awareness that a product may reach a remote jurisdiction when put in the stream of commerce was insufficient to satisfy the requirement for minimum contacts under the Due Process Clause. *Id*. Under Article 5(3) of the Brussels Convention, which provides jurisdiction in tort suits "where the harmful event occurred," there would have been jurisdiction in *Asahi*. *See* Weintraub, *supra* note 15, at 191; Brussels Convention, *supra* note 134, art. 5(3). If a judgments convention agreed to by the United States contains a provision similar to Article 5(3) and thus contrary to *Asahi*, it is possible to envision a due process challenge in a U.S. court to the recognition of a foreign judgment based on such an offending jurisdictional basis. Weintraub, *supra* note 15, at 193-95.

244. *See* von Mehren, *supra* note 195, at 283.

interstate cases already covered by the Full Faith & Credit Clause,[245] its prospective negative effect on the recognition of U.S. judgments abroad would likely be politically costly to an extent that would destroy the necessary domestic support for such a diplomatic compromise.

Another serious point of contention that U.S. convention negotiators are likely to encounter concerns punitive damages and large jury verdicts. In fact, this was one of the main difficulties identified by the Hague Special Commission to study the proposal for a judgments convention in June 1994 and June 1996.[246] It is possible that if the United States concedes to a treaty eliminating treble and punitive damages, a due process and equal protection challenge is probable.[247] However, even the prospect of this kind of concession would probably meet intense opposition from U.S. plaintiff's lawyers sufficient to kill it.[248] These examples again highlight the incongruence between what it takes to obtain a viable convention, and the domestic will to make the necessary sacrifices. But as noted below, there is a general sense that the United States seems to have much more to gain from a convention than its foreign counterparts and it may get nowhere without making some very difficult concessions.[249]

D. Few Incentives for the International Community

While several reasons have been outlined justifying negotiation of a multilateral convention in terms of American interests, there seem to be few incentives for America's negotiating partners to enter into a judgments convention. For example, one scholar has argued that America's relative liberalism in recognizing and enforcing foreign money-judgments has "backfired" and that the "reciprocity provisions imposed by foreign nations are, to a large extent, the consequence of the United States' failure to enter bilateral or multilateral treaties with those nations."[250] The logic underpinning this argument is that by requiring reciprocity from already pro-enforcement U.S. courts, foreign nations ensure the perpetuation of this pro-enforcement environment, and reap the benefits of a judgments-recognition treaty with the United States without actually having to bargain to get such a treaty. If America will, for the most part, freely enforce foreign judgments, why should other countries rush to bind themselves into a multilateral—or even bilateral—treaty with the United States?

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245. *See* Weintraub, *supra* note 15, at 201 ("How the United States arranges interstate jurisdiction of state and federal courts is not a concern of other signatories."); *see supra* Part I.A.

246. *See* Weintraub, *supra* note 15, at 203 (citing KESSEDJIAN, *supra* note 214, ¶ 192).

247. *See* Adler, *supra* note 80, at 103 (stating that "a treaty that eliminated treble and punitive damages could be challenged on due process and equal protection grounds").

248. *See id*.

249. *See* Danford, *supra* note 111, at 383.

250. *See* Singal, *supra* note 46, at 956.

Additionally, it should be recalled that Europe already has a successful internal judgments-enforcement regime in place through the Brussels and Lugano Conventions. In this respect, it seems that the United States would disproportionately benefit from a convention that would place American judgments on a more equal footing with other foreign judgments already being recognized in other foreign courts. On the other hand, Europe is not America's only trading partner, and other countries lacking judgments-enforcement regimes, like China, may have some incentives to negotiate a convention, such as the desire to do away with mutual reciprocity requirements.

However, a recent trend against application of foreign law in U.S. courts that may extend to the recognition of foreign judgments seems to be on the horizon. Twenty-eight states introduced legislation banning the application of international law (specifically Islamic Sharia law) in 2011 alone.[251] If this trend does shift the liberal American approach to the recognition of foreign country judgments, then the potential improvements in recognition practices which would result from a contemplated convention may amount to a bargaining chip for the United States. Still, it is too early to tell whether any of the aforementioned state bills will become law, and if they do, the effect they will have on the current system of foreign judgment recognition and enforcement in the United States. In summary, it is not only the United States that is not storming the halls of the Hague Conference demanding a judgments convention; it is also the international community. Arguably, America has shown initiative in overcoming its historical apprehension to a judgments convention by leading the effort to draft a convention in 1992. However, as shown in Part III.A, that effort quickly fizzled, as there was no support for the very type of convention envisioned. Perhaps what this experience has shown is that while a judgments convention may be an ideal to strive for, in actuality, there is simply not enough urgency within the international community to produce one. Regardless of the lack of initiative within the international community, the United States can take immediate unilateral steps to unify its own recognition law—steps that would not only result in positive domestic legal reform, but also potentially increase

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251. *See infra* notes 289-90 and accompanying text; Bill Raftery, *Bans on court use of sharia/international law: ABA House of Delegates opposes "blanket prohibitions," state legislatures out of session*, Aug. 8, 2011, *available at* http://gaveltogavel.us/site/2011/08/08/bans-on-court-use-of-shariainternational-law-aba-house-of-delegates-opposes-blanket-prohibitions-state-legislatures-out-of-session/ (last visited Nov. 2, 2012). Among the states to have introduced anti-Sharia law legislation in 2011 are: Alaska, Alabama, Arizona, Arkansas, Kansas, Kentucky, Florida, Georgia, Indiana, Iowa, Maine, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Oklahoma, Virginia, West Virginia, Wyoming. Bill Raftery, *Bans on court use of sharia/international law: Introduced in Mississippi and Kentucky, advancing in Florida & South Dakota, dying in Virginia*, Feb. 13, 2012, http://gaveltogavel.us/site/2012/02/13/bans-on-court-use-of-shariainternational-law-introduced-in-mississippi-and-kentucky-advancing-in-florida-south-dakota-dying-in-virginia/ (last visited Nov. 1, 2012).

America's negotiation leverage for an eventual convention through the Hague Conference.[252]

IV.
THE ALTERNATIVE OF A FEDERAL STATUTE

Despite the current lack of urgency in the United States and abroad to achieve an international judgments convention, America can take action to rectify the problems in the current recognition and enforcement regime thus far identified in this paper. The United States has a variety of options to resolve the regime's outstanding issues. Alternatives for increasing mutual recognition of judgments on the international level—although they will not be discussed in detail here—may include bilateral judgment-recognition treaties or bilateral investment treaties requiring resolution of all private transnational disputes between citizens of the contracting states via New York Convention arbitration. However, there are difficulties attendant to the enactment of a bilateral treaty, as shown by the United States' and the United Kingdom's failure to agree to a bilateral treaty in 1977.[253] Since past experience has shown that the U.S. government may not be able to wield the desired impact over the recognition and enforcement of its judgments abroad through an international agreement, it is certainly capable of addressing the most prominent flaws in its own current state law system of recognition and enforcement of foreign judgments, rather than waiting for an international treaty to materialize.[254] The best solution

252. One potential benefit of a federal statute is that it would bring about coherence to the otherwise confused and perhaps even divergent state of law on certain topics that were of particular difficulty for the Hague negotiators. One such area of law is "*lis pendens*," which addresses the possibility of the same dispute proceeding simultaneously in two different forums by requiring any court that is not the court first seised of the dispute to decline jurisdiction in favor of that first court. *See* Brussels Convention, *supra* note 134, art. 21; Council Regulation 44/2001, 2001 O.J. (L 12) 1, art. 27. *Lis pendens* is addressed in European courts under the Brussels Convention, but is not specifically treated under U.S. law. *See id*.; GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 462 (Klewer Law International 3d ed. 1996) (stating that the U.S. Supreme Court has not considered the concept of *lis pendens* in the international context and few lower court decisions exist on the matter) (citing Advantage Int'l Mgmt. Inc. v. Martinez, 1994 WL 482114 (S.D.N.Y. Sept. 7, 1994)).

253. *See supra* Part III.A pp. 44-46 for discussion of the attempted negotiations of a U.S.-U.K. Convention.

254. In fact, the impetus for the ALI's project of drafting a model federal statute unifying the state laws on the recognition and enforcement of foreign country judgments was not a "sudden realization" that federal law governing the subject would be a positive change. Linda J. Silberman and Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, and International Treaty, and an American Statute*, 75 IND. L.J. 635, 635, n.3 (2000) (citing Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 127-31 (1997)). The catalyst was the last round of negotiations at the Hague Conference for a multilateral convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments, which would have presumably required federal implementation legislation for the resulting non-self-executing convention to become operative in the United States. *Id*. at n.4 (citing *generally* Peter H. Pfund, *The Project of the Hague Conference on Private*

available to the United States for revamping its judgments regime is a domestic one: a federal foreign judgments statue.

Scholarly opinion on the issue seems divided, but also indicates that one of the most prominently identifiable flaws we can attempt to rectify domestically is the lack of uniformity among the state laws on recognition and enforcement.[255] Indeed, for foreign litigants, the prospect of navigating the laws of fifty different jurisdictions seems a daunting task, notwithstanding the adoption of some version of the UFMJRA by a majority of U.S. states.[256] To address this problem, several scholars have stated that a federal statute unifying these state laws, while not crucial, may be a step in the right direction.[257] In light of these opinions and America's favorable experience with the New York Convention, as implemented by the Federal Arbitration Act,[258] it is this study's suggestion that Congress strongly consider adopting a federal statute setting a uniform procedure for the recognition and enforcement of foreign judgments. One specific model for Congress to consult, with some suggested changes, is the ALI's draft proposal, entitled The Foreign Judgments Recognition and Enforcement Act ("FJREA").[259]

A. Why Federalization of the State Foreign Judgment Laws is Preferred

The empirical evidence summarized in this study has shown that achieving greater uniformity in the law on foreign judgment recognition and enforcement "is not of merely theoretical significance."[260] Predictability and efficiency in the

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International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters, 24 BROOK. J. INT'L L. 7 (1998); von Mehren, *supra* note 195).

255. *See* Danford, *supra* note 111, at 424; *contra* Adler, *supra* note 80, at 96.

256. For a discussion of the states to have adopted the UFMJRA, in whole or in part, *see supra* notes 32-47 and accompanying text. Also noteworthy is the ALI's commentary, as put forth in its introductory note to the ALI Proposed Statute, that "it would strike anyone as strange to learn that the judgment of the English or German or Japanese court might be recognized and enforced in Texas but not in Arkansas, in Pennsylvania but not in New Jersey." ALI Proposed Statute, *supra* note 13, intro. note, at 1.

257. *See*, *e.g.*, Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 79 (1984) (stating that "although the [U.S.] Republic can survive without federalizing the law of foreign judgment recognition, the arguments in favor of that position are strong and the principal argument against it amounts to little more than inertia"); Brand, *supra* note 163, at 300 (stating that "federal legislation would seem appropriate in the recognition of foreign judgments"); Bellinger, *supra* note 53, at 13 ("A federal law would immediately provide uniformity and predictability for recognition of foreign judgments across the United States and would prevent judgment creditors from forum-shopping among the states.")

258. 9 U.S.C. § 1, et seq. (2004).

259. Recognition and Enforcement of Foreign Judgments—Proposed Final Draft, THE AMERICAN LAW INSTITUTE , *available at* http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=82 (last visited Feb. 24, 2012) [hereinafter FJREA].

260. Trooboff, *supra* note 121; *see generally supra* Part II.B.

ability to enforce rights is a vital element in the global marketplace and is a matter of international reputation for a leading economic power like the United States.[261] It is this study's contention that a federal statute is necessary to close the gaps in American foreign judgment law that remain as a result of its decentralization under state law, where decisions of international importance are left to ad hoc development in local legislatures and subsequently in state courts.[262]

Indeed, the U.S. state-law system on recognition of foreign court judgments is almost an oddity in the international legal context, where this issue is considered to be an aspect of the diplomatic relationship between the nation of the court rendering the original judgment, and the nation of the court reviewing it for recognition and enforcement.[263] If foreign judgment law is indeed a matter integrally tied to a nation's foreign and diplomatic relations, then this law should undoubtedly rise to the realm of national law, which in the U.S. legal system is governed by federal law.[264] Allowing state courts to apply their own state-made laws to questions that implicate U.S. foreign relations implies that state courts have the sovereign authority to decide whether or not to apply the principle of Comity of Nations to foreign court judgments.[265] However, this is simply inconsistent with the comity concept as defined in *Hilton v. Guyot*,[266] which, although decided pre-*Erie*, found comity to reside squarely within the body of federal common law.[267] Additionally, while the question of state sovereignty in

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261. *See* Trooboff, *supra* note 121.

262. *See* ALI Proposed Statute, *supra* note 13, intro. note, at 1.

263. "Just as the recognition or enforcement of an American judgment in France or Italy is an aspect of the relationship between the United States and the country where the recognition or enforcement is sought, so a foreign judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy that resulted in the foreign judgment involves only private parties." ALI Proposed Statute, *supra* note 13, intro. note, at 1. While this assertion has been attacked for overvaluing the public law aspect of foreign judgments and undervaluing or even ignoring states' interests in the administration of justice and determination of private rights within their borders, *see* McFarland, *supra* note 45, at 87-88, 91, this study concludes that the interests of the federal system in preserving exclusive control over foreign relations as well as maintaining a clear divide in parallel state and federal judicial systems, fully support the ALI's perspective.

264. *See* McFarland, *supra* note 45, at 87; *infra* notes 268-269 and accompanying text.

265. *See* McFarland, *supra* note 45, at 64-66, n.15 (discussing the question of sovereignty in the context of U.S. foreign judgment recognition law and the *Hilton* decision).

266. 159 U.S. 113, 163-64 (1895) ("'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.").

267. *Id*. at 163-65 ("The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial

the American federal system of government greatly exceeds the scope of this paper, the federal Constitution clearly preempts areas of foreign policy-making and international diplomacy as well as preventing the individual states from negotiating treaties without Congressional consent.[268] It is thus clear that a federal statute preempting the state law on foreign judgments is within the constitutional powers reserved for the federal government,[269] and the federal government should exercise this enumerated power to lift the foreign country judgment law into the national arena where it belongs.

While some opponents of the federalization of foreign judgment recognition law argue that displacement of the current state law regime would undermine federalist interests or reduce the states' authority over their laws,[270] such arguments themselves acknowledge the complications that the application of state law to such judgments poses for U.S. foreign affairs.[271] For instance, courts applying state foreign judgment law based on the UFMJRA can currently reject judgments emanating from countries where the reviewing court believes that fair justice is essentially unavailable.[272] Such a finding is possible if a reviewing court can show that "corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals."[273] While U.S. courts have historically shown restraint in making categorical findings dubbing an entire nation's judicial system as essentially unjust,[274] at least four courts

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decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations."); *see also* McFarland, *supra* note 45, at nn.123-25 (comparing the outcome in Johnson v. Compagnie Generale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926), where the New York State Supreme Court found the issue of comity to be one of state law, to *Hilton*, 159 U.S. at 164, where the U.S. Supreme Court used Justice Story's *Commentaries on the Conflict of Laws* to locate comity in the federal law).

268. U.S. CONST. art. I, § 10, cl. 3.

269. *Id*. art. I, § 8, cl. 3 (granting Congress the power "to regulate commerce with foreign nations, and among the several states, and the Indian tribes); *see* McFarland, *supra* note 45, at 87. The ALI also agrees that "there is no constitutional problem with the proposed [federal] statute." ALI Proposed Statute, *supra* note 13, intro. note, at 3 ("Whether regarded 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 national power to regulate commerce with foreign nations, *see* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-321 (1936), legislation to govern recognition and enforcement of foreign judgments fits comfortably into the power of Congress.").

270. *See* McFarland, *supra* note 45, at 63.

271. *See id*. at 66 ("If Florida's law governs, yet another complication emerges because Florida's judgment may implicate the foreign affairs of the United States.").

272. UFMJRA § 4(a)(1) (1962); UFCMJRA §4(b)(1) (2005).

273. UFCMJRA § 4, cmt. 11 (2005).

274. *See* Nelson, *supra* note 60, at 903, n.31 (citing In re Arbitration between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 499 (2d Cir. 2002) (rejecting, in a forum non conveniens application, the claim that the courts of the Ukraine are corrupt); Universal Trading & Inv. Co. v. Kiritchenko, No. C-99-3073 MMC, 2007 U.S. Dist. LEXIS 66317, at *49-50 (N.D. Cal. Sept. 7, 2007) ("[T]he Court finds UTI has not demonstrated that the Ukrainian courts are

have made such findings—denying recognition to judgments from Iran,[275] Liberia,[276] Paraguay,[277] and Nicaragua.[278] It seems that allowing courts to make such sensitive judicial findings of fact, potentially tarnishing an entire nation's legal institutions, based on state law, should be re-evaluated from the perspective of American foreign policy. While this study does not dispute the necessity of granting U.S. courts the ability to make such controversial findings when considering recognition actions, it suggests that raising this matter to federal statutory law would advance comity by showing America's diplomatic partners that the U.S. Congress takes the grant of judicial power to make such findings very seriously.[279]

Moreover, the potential for political controversy and local bias that can arise with regard to foreign judgments also warrants the preemption of this issue by federal law. The notion that some areas of law and some litigants require a more neutral forum offered by the federal courts and a national legislature is not new—indeed, it is directly implicated in federal diversity and alienage jurisdiction, which were created to address the same concerns.[280] Foreign

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so lacking in impartiality, due process, or procedural fairness that the United States courts should disregard all Ukrainian court decisions as a matter of course, or the particular decisions at issue herein.")).

275. *See* Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (9th Cir. 1995) (finding that the judicial system of post-1979 revolutionary Iran lacked procedural due process and was inherently biased against the Pahlavi royal family.)

276. *See* Bridgeway Corp. v. Citibank, 201 F.3d 134, 138 (2d Cir. 2000) (denying enforcement to a Liberian judgment based on the State Department's finding that "Liberia's judicial system was in a state of disarray and the provisions of the Constitution concerning the judiciary were no longer followed").

277. See HSBC USA, Inc. v. Prosegur Paraguay, S.A., 03 Civ. 3336, 2004 U.S. Dist. LEXIS 19750, at *10-12 (S.D.N.Y. Sept. 30, 2004) (refusing enforcement of Paraguay judgment based on evidence of mass corruption, and the lack of adequate procedural protections and independence of the national judiciary).

278. Sanchez Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1351-52 (S.D. Fla. 2009) (refusing to enforce Nicaraguan court's judgment in lengthy dispute between Nicaraguan farm workers and American companies based on vast evidence of judicial corruption and partiality).

279. An analogous international legal context dominated by federal law is the "act of state doctrine," which precludes U.S. courts from inquiring into the validity of public acts a foreign sovereign committed on their own territory. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410, 425 (1964) ("We are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.").

280. The most commonly stated purpose for diversity jurisdiction is the protection of out-of-state litigants from local bias by state courts and state legislatures. *See* Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81, WASH. U.L.Q. 119, 123 (2003) (citing JOHN J. COUND ET AL., CIVIL PROCEDURE CASES AND MATERIALS 260 (8th ed. 2001) (setting out presumption "that diversity jurisdiction was created to protect out-of-state litigants against local prejudice"); 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3601, at 339 (2d ed. 1984) ("Several historians have suggested . . . that the real fear was not of the state courts, but of the state legislatures . . . . The fear of state legislatures may have arisen less from interstate hostility than from a desire to protect commercial interests from class bias.")).

litigants, and particularly foreign business entities with vast economic interests in the United States, have been known to encounter in state courts the influence of nativism and irrational fear of foreign domination of U.S. capital,[281] which has manifested itself in outrageous jury awards and punitive damages against some foreign parties.[282] Such perceived bias in civil litigation involving foreign parties has the potential to spill over and affect America's general trade relations.[283] In fact, the federal government's support for alienage jurisdiction shows its view that internationally-tinged domestic adjudication should be reserved for governance under federal law. Specifically, the U.S. State Department's support for alienage jurisdiction is based on its position that while state courts are competent and impartial, "the availability of civil jurisdiction in federal courts under a single nationwide system of rules tends to provide a useful reassurance to foreign governments and their citizens."[284]

A similar argument in favor of federal law can be made with regard to the UFMJRA's public policy defense, which allows courts to refuse to recognize a foreign judgment if such judgment is "repugnant" to the public policy of the state whose law the reviewing court applies.[285] Because "public policy" is a purposely vague, undefined term providing reviewing courts an "escape hatch" when faced with potentially unpopular judgments, defining it in terms of larger federal public policy interests instead of potentially variable, and even idiosyncratic, state policies may make this a more concrete defense.[286]

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281. *See* Johnson, *supra* note 169, at 44 (discussing the domestic anxiety over perceived influences of "foreigners" in the economy). More recent examples of the rise in xenophobic fears of foreign domination of the U.S. economy center on China's control of the U.S. debt. *See* Kathy Barks Hoffman, *APNewsBreak: Super Bowl ad hits Sen. 'Spenditnow'*, ASSOCIATED PRESS, Feb. 5, 2012, *available at* http://www.deseretnews.com/article/700222304/APNewsBreak-Super-Bowl-ad-hits-Sen-Spenditnow.html.

282. *See* Honda Motor Corp. v. Oberg, 114 S. Ct. 2331, 2334-42 (1994) (overturning Oregon jury's award of $5 million in punitive damages, five times the compensatory damages amount, against a Japanese company); BMW of N. Am. Inc., v. Gore, 646 So. 2d 619 (Ala. 1994) (affirming Alabama jury award of $4,000 in compensatory damages and $4 million in punitive damages against German automobile manufacturer and American distributor, but reducing the $4 million award to $2 million on grounds of computation error), *rev'd*, 517 U.S. 559 (1996) (finding the $2 million punitive damages award to be grossly excessive and therefore exceeding the constitutional limit); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 412, 417-19 (1984) (reversing Texas jury verdict of over $1 million against a Colombian company based on that state court's erroneous application of the due process personal jurisdiction test).

283. *See* Johnson, *supra* note 169, at 33 (citing U.S. litigation involving Japan's Honda Motor Company and its effects on U.S.-Japan trade relations).

284. Letter from Powell A. Moore, Assistant Secretary for Congressional Relations, Department of State, to Honorable Robert W. Kasternmeier, Chairman, Subcomm. on Cts. Civil Liberties and the Admin. of Just., House of Representatives (Apr. 2, 1982), in Hearing before the Subcomm. on Cts., Civil Liberties, and the Admin. of Just. of the Comm. on Judiciary, 97th Cong., 2d Sess. 336 (1982).

285. UFMJRA § 4(b)(3); UFCMJRA § 4(c)(3).

286. *See* Silberman & Lowenfeld, *supra* note 254, at 643-44 (comparing two U.S. state court cases denying recognition and enforcement to two English libel judgments, one based on Maryland's

Therefore, making the recognition and enforcement of foreign judgments a matter of federal law is likely to mitigate the effects of some of the more extreme trends in state public policy on otherwise meritorious foreign judgments.[287] For instance, as already noted in this study,[288] in 2011 a number of state legislatures introduced legislation banning the application of Islamic Sharia law in state courts.[289] The impact that this wave of legislation—clearly undergirded by anti-Islamic sentiment—will have on those states' foreign judgment-recognition statutes is still unclear. However, one can assume that foreign judgments emanating from Muslim countries, at least where Sharia law is recognized,[290] will likely be implicated. This turn toward anti-foreign-law state legislation seems to highlight that now and more than ever, the state-law system on foreign judgments is prime for unification under federal auspices.

Once it is recognized that foreign judgment law is "properly a national concern and thus appropriately made subject to a national standard," then such a standard must be established in the form of a federal statute.[291] One such framework that has already been developed is the ALI's proposed FJREA, a final draft of which was produced in 2006 after some seven years of drafting, research, and thoughtful commentary.[292]

B. The ALI's Model Federal Statute—the FJREA

The FJREA has thirteen sections: section one covers scope and definitions; section two deals with recognition and enforcement generally; section three explains the effect of a foreign judgment in the United States; section four discusses claim and issue preclusion and the effect of a challenge to jurisdiction in the rendering court; section five covers non-recognition of a foreign

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notion of public policy, Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998), and the other based on public policy grounded in the First Amendment's speech protections, Bachchan v. India Abroad Publ'ns Inc., 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. 1992)).

287. *See* Johnson, *supra* note 169, at 51 (noting that alienage jurisdiction allows foreign litigants some distance from the xenophobia they may encounter in state courts, particularly because "[u]nlike their state counterparts, federal courts are more likely to be 'above the fray' than in its midst.").

288. *See supra* note 251 and accompanying text.

289. Bob Smietana, *Tennessee Bill Would Jail Sharia Followers*, THE TENNESSEAN, Feb. 23, 2012, *available at* http://www.usatoday.com/news/nation/2011-02-23-tennessee-law-shariah_N.htm.

290. Sharia is a source of laws in Muslim countries whose constitutions name Islam as the state religion. *See* Toni Johnson, *Council on Foreign Relations Backgrounder*, *Islam: Governing Under Sharia*, http://www.cfr.org/religion/islam-governing-under-sharia/p8034#p5 (last visited Mar. 1, 2012). Examples include: Saudi Arabia, Kuwait, Bahrain, Yemen, the United Arab Emirates, Pakistan, Egypt, Iran, and Iraq. *Id.*

291. Hulbert, *supra* note 9, at 656.

292. The ALI first convened a Council to direct a Project on International Jurisdiction and the Recognition and Enforcement of Foreign Country Judgments in 1999. *See* The American Law Institute, International Jurisdiction and Judgments Project Council Draft No. 1, at i (2001).

judgment; section six lists bases of jurisdiction not recognized or enforced; section seven outlines the reciprocity requirement; section eight discusses U.S. court jurisdiction; section nine sets forth the means of enforcement of foreign judgments; section ten covers the registration of foreign money judgments in federal courts; section eleven allows courts to decline jurisdiction when a prior action is pending; section twelve outlines provisional measures for aiding foreign proceedings; and section thirteen discusses foreign orders concerning U.S. litigation.[293]

The FJREA would redistribute law-making power with respect to foreign judgments by shifting to Congress the ability to legislate on matters that, since the U.S. Supreme Court's decision in *Erie*, have been left to state legislatures, state courts, and federal courts applying state law.[294] The ALI's Reporters persuasively argue that a federal standard is necessary because "recognition and enforcement of judgments is and ought to be a matter of national concern."[295] The FJREA would preempt state law governing foreign judgments, and essentially eliminate the UFMJRA and its revision—the UFCMJRA—through Congressional adoption of the FJREA.[296] The FJREA would also give U.S. federal district and state courts concurrent federal question jurisdiction over actions brought to enforce a foreign judgment or to secure a declaration with respect to recognition under that act.[297] Thus, like in arbitration matters governed by the Federal Arbitration Act,[298] the FJREA would grant defendants in foreign-country recognition proceedings the ability to remove the action from state to federal court.[299]

By granting concurrent jurisdiction to state and federal courts, rather than exclusive jurisdiction to federal courts, the FJREA mitigates the statute's impact on state courts by not fully depriving them of their traditional role in enforcing their respective laws on foreign judgments.[300] The FJREA achieves this by leaving the choice between state and federal court to the plaintiff bringing the

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293. *See generally* ALI Proposed Statute, *supra* note 13; *Publications Catalog, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, THE AMERICAN LAW INSTITUTE, *available at* http://www.ali.org/index.cfm?fuseaction=publications.fpage&node_id=82&product_code=1REFJOT (last visited Nov. 2, 2012).

294. *See* ALI Proposed Statute, *supra* note 13, intro. note, at 4.

295. *Id*. at 3.

296. *See id*. at 4.

297. ALI Proposed Statute, *supra* note 13, § 8(a).

298. 9 U.S.C. § 205.

299. *See* ALI Proposed Statute, *supra* note 13, § 8(b) ("Any such action brought in a state court may be removed by any defendant against whom the enforcement or declaration is sought to the United States District Court for the district embracing the place where the action is pending . . . .").

300. The ALI's Reporters suggest that the drafters may have at one point considered a version of the model federal statute that would give federal courts exclusive jurisdiction. *See* Silberman & Lowenfeld, *supra* note 254, at 645.

recognition or enforcement action.[301] It is this study's contention that adoption of the FJREA at the federal level would be more desirable than a more widespread adoption of the UFMJRA by states. Federal enactment would preempt states from picking and choosing desirable portions of the FJREA, as has been the case with some states that have inserted a reciprocity provision when adopting the UFMJRA or the updated UFCMJRA.[302] If enacted, the FJREA, or a similar proposed federal statute, would be the exclusive avenue for recognition and enforcement of foreign judgments and would thus achieve the sort of procedural uniformity that is currently reserved only for foreign arbitral awards.

Aside from money judgments, the FJREA, as currently worded, would recognize other judgments that have traditionally fallen within the scope of public law, such as judgments for taxes, fines, and penalties, so long as the Act's other procedural requirements are met.[303] Judgments related to family law, bankruptcy, and liquidation are completely excluded under the FJREA, leaving their recognition and enforcement to state law, as is currently the case.[304] On its face, because the FJREA allows recognition and enforcement of tax, fine, and penalty judgments, it expands the state laws currently based on the UFMJRA and the UFCMJRA,[305] encompassing judgments in the realm of foreign public law, which common law courts traditionally refrained from enforcing.[306] However, practically speaking, although the UFMJRA does not extend to public law judgments, it does not prevent courts from enforcing judgments that it does not cover,[307] which may include some public law judgments falling outside the

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301. ALI Proposed Statute, *supra* note 13, § 8(a)-(b). It is useful to reiterate here, that by allowing the defendant the procedural right of removal, the FJREA diffuses the plaintiff's sole discretion over the U.S. forum in which to bring his or her recognition and enforcement action. *See* ALI Proposed Statute, *supra* note 13, § 8(b).

302. *See supra* notes 44-45, 51-53 and accompanying text for a discussion of states that in enacting the UFMJRA, have at least partially modified its effect by concurrently adopting a reciprocity requirement.

303. ALI Proposed Statute, *supra* note 13, § 2(b)(i).

304. *See id*. § 1(a)(i)-(iii).

305. UFMJRA § 1(2) (explicitly restricting the scope of the Act by defining "foreign judgment" as "any judgment of a foreign state granting or denying recovery of a sum of money, *other than* a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters") (emphasis added); UFCMJRA § 3(a), (b) ("This [Act] does not apply to a foreign-country judgment, even if the foreign country judgment grants or denies recovery of a sum of money, to the extent that the foreign country judgment is (1) a judgment for taxes; (2) a fine or other penalty; or (3) a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations.").

306. *See* Dodge, *supra* note 45, at 161 ("when the foreign law at issue is public—criminal, tax, antitrust, or securities law, for example—courts will neither apply that law to decide a case nor enforce the decision of a foreign court applying that law. The non-enforcement of foreign public law constitutes a 'public law taboo.'"). (footnotes omitted).

307. UFMJRA § 5(b) ("The courts of this state may recognize other bases of jurisdiction."). The Reporter's Comment to section 5 also notes that "[s]ubsection (b) makes clear that the Act does not prevent the courts in the enacting state from recognizing foreign judgments rendered on the

list of the explicitly prohibited classes of judgments.[308] As a result, even under the current UFMJRA, U.S. courts may be able to extend recognition to foreign judgments for taxes, fines, and penalties under the Comity of Nations[309] principle or through "indirect" enforcement.[310] By analogy, this possibility for broader enforcement under the current UFMJRA regime may make the FJREA's expanded scope a bit less controversial—at least in theory.

Besides providing foreign judgment creditors a clearer picture of what to expect when bringing their judgments to U.S. courts, a national standard for judgment recognition and enforcement of the type embodied in the FJREA is likely to bring the additional benefit of reducing litigants' urge to "forum shop" among U.S. states[311]—although this of course depends on states uniformly interpreting the FJREA if enacted. Additionally, such uniformity is bound to help, not harm, America's future prospects of entering into a multilateral judgments convention since uniformity will give its negotiating partners a clearer picture of the U.S. legal system, and perhaps alleviate worries of inconsistency in reciprocity requirements among the U.S. states.[312]

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bases of jurisdiction not mentioned in the Act." *Id*. A number of states to have adopted the UFMJRA have explicitly adopted this savings clause into their foreign judgments statutes. *See*, *e.g.*, Cal. Code Civ. Proc. § 1723 ("This chapter does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this chapter."); Tex. Civ. Prac. & Rem. § 36.008 ("This chapter does not prevent the recognition of a foreign country judgment in a situation not covered by this chapter.").

308. For instance, antitrust and securities judgments, which are considered to fall within the public law realm, are not specifically excluded from recognition under the UFMJRA, while public law judgments concerning, *inter alia*, taxes, fines and family law are specifically excluded. *See supra* note 305. Applying the cannon of statutory interpretation known as *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) suggests that the unenumerated classes of public law judgments are thus excluded from the prohibited class expressly defined in the statute. *See* William N. Eskridge, Jr., DYNAMIC STATUTORY INTERPRETATION 323 (President and Fellows of Harvard College 1994); *see also* Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003) (applying the cannon *expressio unius est exclusio alterius*).

309. *See* Dodge, *supra* note 45, at 176-77, 225, n.58 (citing The Anne, 1 F. Cas., 955, 956 (C.C.D. Mass. 1818) (No. 412) ("It has appeared to me more consonant with national comity, sound morals, and public justice, that courts of all countries should lend their aid to discountenance frauds upon the revenue laws of other countries, and decline to enforce any agreements entered into for the purpose of evading those laws.")), n.372 (citing Re Sefel Geophysical Ltd. (1988), 62 Alta. L.R. 2d 193, 202 (Can. Alta. Q.B.) (stating that refusal to recognize foreign tax claims in bankruptcy is inconsistent with "present trends of international comity in the recognition of foreign bankruptcy proceedings")).

310. *See* Dodge, *supra* note 45, at 176, n.465 (citing Re Lord Cable, [1977] 1 W.L.R. 7 (Ch.) at 23-26 (Eng.) (enforcing a foreign tax judgment where failure to do so would subject a trustee to liability)), n.99 (citing Re Sefel Geophysical Ltd. (1988), 54 (4th) 117, 126 (Can. Alb. Q.B.) (holding that "foreign tax claims should be recognized in a Canadian liquidation setting . . . as long as they are of a type that accords with general Canadian concepts of fairness and decency in state imposed burdens")).

311. *See* Danford, *supra* note 111, at 426.

312. *See id*. (arguing that consolidation of state laws on foreign judgment recognition and enforcement "would be of considerable assistance to the United States if it should seek to accede to a judgments convention because it would be helpful to have a single bargaining platform going into

C. Proposed Changes to the FJREA

Although the FJREA is generally a solid model for a federal statute on the recognition and enforcement of foreign judgments, one provision of the FJREA in its current form that this study does not recommended for adoption is section seven. Section seven requires a U.S. court examining a foreign judgment for recognition to determine the reciprocal recognition and enforcement of comparable U.S. judgments in the courts of the state of origin when a judgment-debtor raises the "lack of reciprocity" defense.[313] This section places the burden of proof on the party resisting recognition or enforcement for lack of reciprocity.[314] While support for the FJREA is generally strong, it is this provision that has garnered much controversy in scholarship, as well as among members of the ALI itself.[315] Indeed, during the drafting phase, the ALI membership was divided on whether to include the reciprocity requirement, but it nevertheless carried the day in two substantial votes at the ALI's two successive annual meetings.[316] The main arguments against including a reciprocity requirement within the FJREA are the same as the general arguments against reciprocity—mainly that it creates an often-insurmountable hurdle to recognition and enforcement and increases the time, cost, and uncertainty of the entire court recognition process.[317] One especially poignant argument against

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negotiations . . . ." and might even be a "prerequisite to entering into multilateral negotiations in The Hague or anywhere else").

313. ALI Proposed Statute, *supra* note 13, §§ 7(a), (b).

314. *Id*. § 7(b). Having placed the burden on the party resisting recognition and enforcement, it seems that section 7 essentially creates a rebuttable presumption that reciprocity exists. *See* Singal, *supra* note 46, at 969.

315. *See* Singal, *supra* note 46, at 961 ("Many scholars agree that uniformity in the United States recognition and enforcement of foreign judgments is long overdue and that the ALI's Proposed Act could be the catalyst for such reform. The heated debate, however, is about whether a reciprocity requirement ought to be included in the Proposed Act."); ALI Proposed Statute, *supra* note 13, Reporters' Preface, at xii (acknowledging that the proposed statute's reciprocity requirement departs from the general view eschewing reciprocity and describing its own reciprocity requirement as "the most controversial issue" encountered in the project).

316. *See generally Publications Catalog, supra* note 293; *see also* Michael Traynor, *82nd Annual Meeting of the American Law Institute*, 82 A.L.I. Proc. 94, 159 (2005) (stating that a reciprocity requirement "has been much debated in [the ALI]" and included in the FJREA final draft by a vote of sixty-eight to fifty-five).

317. *See supra* pp. 11-12, 22-23, 35-37; *see also* McFarland, *supra* note 45, at 95-100 (laying out five persuasive arguments against accepting reciprocity as part of the ALI Proposed Statute); *see generally* Singal, *supra* note 46. For arguments in favor of accepting reciprocity in the ALI Proposed Statute, *see* ALI Proposed Statute, *supra* note 13, § 7, cmt. b ("The purpose of the reciprocity provision . . . is 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 the recognition and enforcement of judgments rendered in the United States."); *see also* Bellinger, *supra* note 53, at 10-11 (arguing that the current U.S. system, where most states don't require reciprocity, is "overly generous to other nations," and that the absence of a uniform reciprocity requirement among the states has had a negative impact on the U.S. State Department's ability to negotiate an international judgments-recognition agreement).

including reciprocity in the proposed federal statute is that it would be a step backwards from the current trend against reciprocity within the state laws and Restatements.[318] This, of course, assumes that the trend against reciprocity is a welcome one, which is this study's position. Thus, without this reciprocity requirement, the FJREA remains a productive template for a possible statute unifying an often-confusing system, but with it, it may be more beneficial to leave things as they currently stand.

Notably, section 7(a) of the FJREA departs from the discretionary reciprocity standards in effect in most of the states that have adopted a reciprocity requirement[319] by mandating that a reviewing U.S. court always refuse recognition and enforcement to a foreign judgment if that court finds a lack of reciprocity with the foreign rendering court.[320] The ALI Reporters' Notes highlight the difference between the discretion currently left to courts evaluating the reciprocity defense under the state foreign judgment laws, and the lack of such discretion afforded to them under the FJREA.[321] This departure from the current reciprocity regime is further compounded by the fact that the

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318. THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481(1), cmt. D (1987) and the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 98 cmt. f. (1971) both mirror state laws rejecting reciprocity as a precondition to recognition of foreign money judgments.

319. *See* Dodge, *supra* note 45, at n.446 ("In Georgia and Massachusetts, reciprocity is required. *See* Ga. Code Ann. § 9-12-114(10) (1993) ("A foreign judgment shall not be recognized if . . . [t]he party seeking to enforce the judgment fails to demonstrate that judgments of courts of the United States and of states thereof of the same type and based on substantially similar jurisdictional grounds are recognized and enforced in the courts of the foreign state."); Mass. Gen. Laws Ann. ch. 235 § 23A (West 1996) ("A judgment shall not be recognized if . . . judgments of this state are not recognized in the courts of the foreign state."). In Florida, Idaho, North Carolina, Ohio, and Texas, the absence of reciprocity is a discretionary basis for non-enforcement. See Fla. Stat. § 55.605(2)(g) (2000) ("A foreign judgment need not be recognized if . . . [t]he foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state."); Idaho Code § 10-1404(2)(g) (Michie 1998) ("A foreign judgment need not be recognized if . . . [j]udgments of this state are not recognized in the courts of the foreign state."); N.C. Gen. Stat § 1804(b)(7) (1999) ("A foreign judgment need not be recognized if . . . '[t]he foreign court rendering the judgment would not recognize a comparable judgment of this State." '); Ohio Rev. Code Ann. § 2329.92(B) (2001) ("A foreign country judgment rendered in a foreign country that does not have a procedure for recognizing judgments made by courts of other countries and their political subdivisions . . . that is substantially similar to [Ohio's] . . . may be recognized and enforced . . . in the discretion of the court."); Tex. Civ. Prac. & Rem. Code Ann. § 36.005(b)(7) (Vernon 1997) ("A foreign country judgment need not be recognized if . . . the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of 'foreign country judgment." ')").

320. *See* ALI Proposed Statute, *supra* note 13, § 7(a) ("A foreign judgment *shall* not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.") (emphasis added).

321. *Id*. § 7, Reporters' Note 4 ("Most of the states that have included a provision on reciprocity in their version of the Uniform Foreign Money-Judgments Recognition Act have authorized, but not required, their courts to deny recognition or enforcement on the ground of lack of reciprocity, thus leaving the decision to the discretion of the trial court. This Act, designed to achieve uniformity throughout the United States, rejects discretion in this context.").

FJREA would extend the reciprocity requirement beyond money-judgments, because unlike the UFMJRA and the UFCMJRA, the FJREA reaches beyond money-judgments to some judgments traditionally within the realm of public law.[322] This expansion of the reciprocity requirement's reach is likely to increase the length of foreign judgment litigation by producing mini-trials on this issue alone,[323] which seems to defeat the very efficiency, clarity, and unity of law that is a central goal of any proposed federal statute—the other main goal being the promotion of reciprocal recognition of U.S. judgments abroad. The irony of this matter was aptly described by Professor Richard W. Hulbert, who noted that in every case in which a foreign judgment is denied on a finding of lacking reciprocity, the judgment creditor is deprived of a victory not because of any procedural or other substantive defect in the proceedings leading to the foreign judgment, but because "the American court refusing enforcement decides that some hypothetical American judgment in some hypothetical case would not, or might not, be enforced by (some or all of the) courts in the country of origin."[324] Thus, it is this study's position that the FJREA's broad and mandatory reciprocity provision would levy an unnecessary additional burden on U.S. courts and litigants, and should therefore be excised from any version of a federal foreign judgments statute that Congress considers.

CONCLUSION

This study has attempted to provide a glimpse of the current system of foreign judgment recognition and enforcement in the United States and abroad with the aim of describing why that system is ripe for change. Having found that a number of areas in the existing foreign judgment law would stand to benefit from its standardization and unification, this study concludes that a multilateral convention would be beneficial. However, given the lack of urgency and the political deadlock that has characterized previous failed attempts to negotiate such a convention, this study finds that now may not be the time for another attempt, as few of the past roadblocks have been removed. On the other hand, some have argued that the mere "exercise" of negotiating a convention would be beneficial because it would allow America's scholars, policymakers, and legal practitioners to evaluate the aspects of the U.S. legal system that even America's

322. Particularly, it broadens the scope of recognizable foreign country judgments to include judgments for taxes, fines, and penalties. *See* ALI Proposed Statute, *supra* note 13, § 2(b)(i); Singal, *supra* note 46, at 962 (arguing that the reach of the ALI Proposed Statute's reciprocity provision extends to judgments redressing individual and human rights); *see also supra* notes 303-310 and accompanying text.

323. *See* Hulbert, *supra* note 9, at 651 (arguing that in a suit to enforce a foreign judgment, the difficulty of establishing whether reciprocity exits may pose a great challenge, so much so that it is likely to be raised by any judgment debtor hoping to defend against its enforcement).

324. *Id*. at 652-53.

closest allies find unacceptable.[325] That option, however, does not move us closer to addressing any of the practical issues identified as problematic within the current judgments recognition system—such as international confusion about the state of U.S. law on a subject of great significance to international commercial interests.

Heeding the calls of scholars, practitioners, and legal experts at the ALI, the U.S. Congress is in the best position to act upon this matter by enacting national legislation preempting the existing medley of state laws[326]—a mélange of adoptions of the outdated UFMJRA or the UFCMJRA. The infusion of certainty and uniformity into the U.S. law of foreign judgments provided by a federal statute will not only benefit judgment creditors vying for recognition and enforcement of their foreign awards in American courts. It also has the potential to bring about a reciprocal increase of foreign enforcement of U.S. court judgments by assuring other countries' courts of the reliability of America's foreign judgment law.[327] Looking to the ALI's proposed FJREA supports this notion, because it creates one rather than fifty places for foreign courts to look when assessing whether their judgments would be enforced in the United States. This issue of reciprocity—an issue integral to every judgment enforcement conversation—offers perhaps the most compelling and widely discussed reason to unify U.S. law in this area. Consequently, it is this study's assertion that any proposal for a federal statue to Congress, whether it is based on the FJREA or some other prototype, reject the oft-criticized reciprocity requirement in full—lest it entirely overtake the legislative proposal, plunging it into the dust bin of history as has been the fate of so many other unrealized statutes before it.

325. *See* Weintraub, *supra* note 15, at 220.

326. It is noteworthy that despite the growing treatment this subject, and particularly the ALI Proposed Statute, have received in scholarship, Congress has yet to take significant steps in analyzing the legislative merits of this proposal. John Bellinger's recent keynote address to the 2012 Stefan A. Riesenfeld Symposium on recognition of foreign judgments at University of California, Berkeley, School of Law, suggested that the reason behind Congressional inaction in this sphere lies with the Uniform Law Commission's opposition to the enactment of a federal law that would preempt the existing state law regime. *See* Bellinger, *supra* note 53, at 14-15.

327. *See* Martinez, *supra* note 23, at 82.