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Stop the Madness! Procedural and Practical Defenses to Avoid Inconsistent Cross-Border Judgments Between Texas and Mexico

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Cover Page Footnote

J.D., St. Mary's University School of Law, 1999; B.A., Trinity University, San Antonio, 1996. Briefing Attorney for Justice Catherine Stone, Court of Appeals for the Fourth District of Texas, San Antonio. The author wishes to acknowledge her father, Dennis K. Drake. Thank you dad, for your contributions to the legal profession - from Alamo Lumber v. Gold to most recently, Southwest Livestock & Trucking Co. Inc. v. Ramon. Your integrity and enthusiasm for the law continue to inspire me and many others.

STOP THE MADNESS! PROCEDURAL AND PRACTICAL DEFENSES TO AVOID INCONSISTENT CROSS-BORDER JUDGMENTS BETWEEN TEXAS AND MEXICO

LAURETTA DRAKE*

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I. INTRODUCTION

Juan, a citizen of Mexico, enters into a contract with Bob, a United States citizen residing in Texas.[1] Both individuals represent a link in the thriving cross-border business chain between Texas and Mexico, largely the result of the North American Free Trade Agreement.[2] Unlike many of the cross-border contracts, which involve large corporations,[3] the contract between Juan and Bob is

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** Throughout this Comment "foreign judgment" refers to judgments rendered by foreign countries, not sister states. Furthermore, unless otherwise noted, "Texas courts" refers to Texas federal courts entertaining diversity of citizenship suits.

1. *See generally* Success Motivation Inst. of Japan, Ltd. v. Success Motivation Inst. Inc., 966 F.2d 1007, 1008 (5th Cir. 1992) (involving a contract dispute between Japanese defendant and Texas plaintiffs); Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1003 (5th Cir. 1990) (examining a breach of overdraft agreement between Abu Dhabi bank and Texas resident); Zorgias v. SS Hellenic Star and Hellenic Lines Ltd., 487 F.2d 519, 519 (5th Cir. 1973) (affirming a Greek settlement decree against an American corporation); Debra Beachy, *Cross-Border Legal Squabbles on the Rise*, DALLAS MORNING NEWS, Sept. 1, 1997, at 1D (focusing on increasing cross-border litigation reaching inconsistent judgments); John Council, *Usury Trial Raises Questions for NAFTA*, TEX. LAW., Mar. 3, 1997, at 1 (discussing NAFTA's lack of guidance on the issue of inconsistent cross-border judgments between Texas and Mexico).

2. North American Free Trade Agreement, *drafted* Aug. 12, 1992, *revised* Sept. 6, 1992, U.S.-Mex.-Can., pts. 1-3, 32 I.L.M. 289, pts. 4-8, 32 I.L.M. 605 (entered into force Jan. 1, 1994) [hereinafter NAFTA]. Article 102 lists six main objectives of NAFTA: 1) Eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the parties; 2) Promote conditions of fair competition in the free trade area; 3) Increase substantially investment opportunities in the territories of the parties; 4) Provide adequate and effective protection and enforcement of intellectual property rights in each party's territory; 5) Create effective procedures for the implementation and application of the agreement, for its joint administration and for the resolution of disputes; and 6) Establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of the Agreement. *Id. See also* BARRY APPLETON, NAVIGATING NAFTA: A CONCISE USER'S GUIDE TO THE NORTH AMERICAN FREE TRADE AGREEMENT 169 (1994) (discussing the objectives of NAFTA); Michael J. Chrush, Note, *The North American Free Trade Agreement: Reasons for Passage and Requirements to be a Foreign Legal Consultant in a NAFTA Country*, 3 ILSA J. INT'L COMP. L. 177, 178 (1996) (detailing the history, objectives and economic benefits of NAFTA).

3. *See* Dean C. Alexander, *The North American Free Trade Agreement: An Overview*, 11 INT'L TAX & BUS. LAW. 48, 48 (1993) (explaining that due to NAFTA stimulus, the combined gross national product for NAFTA signatories is $6.3 trillion); David Lopez, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 TEX. INT'L L.J. 163, 164 (1997) (emphasizing the

unique. It involves an agreement between two small businessmen, who, unfamiliar with the necessity for binding arbitration clauses or with chioce of law provisions, seal their contract in good faith.[4]

When the deal sours, Juan brings a breach of contract suit against Bob in Mexico.[5] In response, Bob files a parallel suit against Juan in Texas.[6] The case is tried first in Mexico and Bob loses.[7] The Texas

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importance of NAFTA because it will affect 380 million consumers); Linda Robinson & Andrea Dabrowski, *Reaching to the South: Free Trade Alone Cannot Bring Mexico and the United States Together*, U.S. NEWS & WORLD REPORT, March 1, 1993, at 43, 44 (noting that in 1990, Mexican workers at a Ford plant in Cuautitlan produced 117,000 cars and trucks); *Texas and Mexico Free Trade* (visited Aug. 30, 1997) <http://www.lamb.sos.state.tx.us/function/mexico/freel.html> (providing detailed statistics on companies doing billions of dollars of cross-border business like Shell, Pemex, and J.C. Penney).

4. *See* Southwest Livestock & Trucking Co. Inc. v. Ramon, 169 F.3d 317, 318 (5th Cir. 1999) (involving a contract dispute between a Mexican resident and a Texas resident over a default on a Mexican promissory note); Minnesota Mining & Mfg. Co. v. Nishika Ltd., 953 S.W.2d 733, 736 (Tex. 1997) (concerning a contract dispute which failed to include a choice of law provision and which involved the jurisdictions of Minnesota, Nevada, Oklahoma, Georgia, Pennsylvania, Texas and Italy); Maxus Exploration Co. v. Moran Bros., Inc., 817 S.W.2d 50, 53 (Tex. 1991) (involving a contract dispute where no choice of law provision existed in the agreement); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971) (noting that absent choice of law provisions, the location of the most significant relationship governs the law of contract); Council, *supra* note 1, at 1 (noting that in *Ramon*, the $680,000 loan from Mexican citizen to Texas resident was made between two friends who had done business for years, whose children had dated, and where trust was not an issue). *Cf.* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421-22 (Tex. 1984) (considering tort cause of action where no choice of law provision governing release form was present).

5. *See Ramon*, 169 F.3d at 318; Norkan Lodge Co. v. Gillum, 587 F. Supp. 1457, 1458 (N.D. Tex. 1984) (enforcing Canadian money judgment against Texas resident). In *Gillum*, the Canadian litigant brought suit in Canada and later sought to enforce the judgment in Texas. *Id.* *See also* Beachy, *supra* note 1, at 1D (discussing breach of contract on a Mexican promissory note brought initially by a Mexican citizen in Mexican court); Council, *supra* note 1, at 1 (discussing *Ramon* breach of contract).

6. Referred to as international parallel litigation, courts allow "virtually the same disputes [to be] litigated simultaneously in courts of multiple jurisdictions, one in a domestic court and the other in a foreign court." Yoshimasa Furata, *International Parallel Litigation: Disposition of Duplicative Civil Proceedings in the United States and Japan*, 5 PAC. RIM L. & POL'Y J. 1, 2 (1995). *See also* Interstate Material Corp. v. Chicago, 847 F.2d 1285, 1288 (7th Cir. 1988) (noting that a "'[s]uit is parallel' when substantially the same parties are contemporaneously litigating substantially the same issues in another forum" (quoting Calvert Fire Ins. Co. v. American Mutual Reins. Co., 600 F.2d 1228, 1229 n.1 (7th Cir. 1979))); Alfadda v. Fenn, 966 F. Supp. 1317, 1319 (S.D.N.Y. 1997) (involving Saudi Arabian litigants instituting parallel suits in U.S. federal court and in France); Lawrence W. Newman & Michael Burrows, *Simultaneous Disputes in the U.S. and Abroad*, N.Y.L.J., July 31, 1991, at D1 (noting that international business often results in simultaneous litigation in United States and a foreign country). The type of parallel litigation discussed in this Comment is defined as a "reactive suit" where "the defendant in the first litigation commences the second litigation in another court against the plaintiff in the first litigation." Furata, *supra* note 6, at 4. *See also* Southwest Livestock & Trucking Co. Inc. v. Ramon, No. 169 F.3d 317, 319 (noting that "after Ramon brought suit in Mexico, but prior to judgment, plaintiffs filed this lawsuit pursuant to the Court's diversity jurisdiction alleging usury and RICO claims"); Allan D. Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11, 16 (1961) (stating that "[r]eactive litigation with its waste and duplication surely is an anomaly").

litigation involves the same parties disputing the same issues as the Mexican litigation.[8] While the simultaneous Texas litigation is pending, Bob appeals the Mexican judgment. The highest court in Mexico affirms the judgment.[9] Despite the existence of the Mexican judgment, a Texas federal court subsequently renders judgment for Bob, directly contradicting the Mexican judgment.[10] Thus, two conflicting judgments exist on the same case – one in Mexico and one in Texas.[11]

Are there any available defenses Juan could have asserted to avoid re-litigation of his suit in Texas?[12] Does the Mexican judgment confer any preclusive effect upon a Texas federal court rendering its own judgment?[13] If a Texas court refuses to recognize the binding effect of a Mexican judgment, these "dueling courts" could, in effect, allow an individual to use the court as a form of "litigative harassment [by taking] multiple bites of the same apple."[14] With

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7. *See Ramon*, 169 F.3d at 319 (noting that the Mexican Court of First Instance in Acuna, Coahuila, Mexico entered a final judgment against Southwest Livestock); *see also* Beachy, *supra* note 1, at 1D (discussing adverse ruling for Texan in both the federal and state Mexican court system); Council, *supra* note 1, at 1 (noting judgment rendered against Southwest Livestock in Mexican courts).

8. *See generally* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 811 (1989) (noting that "relitigation of identical issues wastes scarce judicial resources"); Vestal, *supra* note 6, at 16 (noting that "the policy of the law generally seems to be that all facets of a controversy should be tried in a single action").

9. *See* Council, *supra* note 1, at 19 (stating that the owners of Southwest Livestock appealed the unfavorable judgment in both Mexican state and federal court).

10. *See* Southwest Livestock & Trucking Co. Inc. v. Ramon, 169 F.3d 317, 318 (5th Cir. 1999).

11. The inherent danger involved in international parallel litigation is contradictory judgments. *See* Furata, *supra* note 6, at 3 (1995) (recognizing that "when both litigations reach final judgments, there is no assurance that such judgments will be consistent with each other."); *see also* Takao Sawaki, *Battle of Lawsuit - Lis Pendens in International Relations*, 23 JAPANESE ANN. INT'L L. 17, 20 (1980) (noting that "[t]he double institution of actions might result in a conflict of judgments, which we should endeavor to avoid").

12. *See, e.g.*, Success Motivation Inst. of Japan, Ltd. v. Success Motivation Inst. Inc., 966 F.2d 1007, 1008 (applying Texas *res judicata* principles to former Japanese judgment); Scheiner v. Wallace, 842 F. Supp. 687, 694-95 (S.D.N.Y. 1993) (extending *res judicata* to former British judgment); Newman & Burrows, *supra* note 6, at D1 (discussing the preclusive effect of a foreign judgment in subsequent United States actions).

13. *See Success*, 966 F.2d at 1008 (applying Texas *res judicata* law to Japanese judgment); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 926-27 (D.C. Cir. 1984) (acknowledging that parallel proceedings are permissible until one forum reaches a judgment which may be pled as *res judicata* in other forum). *Cf.* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1006 (5th Cir. 1990) (declining to apply *res judicata* to former Abu Dhabi judgment).

14. Louise Ellen Teitz, *Taking Multiple Bites of the Apple: A Proposal to Resolve Conflicts of Jurisdiction and Multiple Proceedings*, 26 INT'L LAW. 21, 26 (1992). *See* Black & Decker Corp. v.

international parallel litigation, the proverbial analogy of taking a "multiple bite of the same apple" can be expanded to "a progressive dinner."[15]

A Texas case, *Southwest Livestock & Trucking Co. Inc. v. Ramon*,[16] addressed this issue. In *Ramon*, the Fifth Circuit Court of Appeals discussed the United States Magistrate's Recommendation, adopted by the district court, which refused to recognize the validity of a Mexican judgment and rendered a judgment[17] in direct opposition to the judgment of the highest court of Mexico.[18] While the Fifth Circuit did vacate and remand the District Court's decision, the District Court's first opinion concerns many cross-border practitioners and has ignited debate across the state. For example, the chairman of the international law section of the Texas State Bar recently remarked on the inconsistent result in *Ramon*. He stated: "What does it bode for the future? . . . If you can't be sure what you've got if you have a judgment from Texas or Mexico, and if you can't rely on the judicial system for decisions because they're not recognized in the other country, then you've got nothing left."[19] As a result of the *Ramon* judgment, cross-border practitioners also fear reciprocal hostility from Mexican courts.[20] One attorney stated that the decision not to recognize Ramon's judgment rendered from the Mexican high court was "absolutely outrageous."[21] A recent Continuing Legal Education course on cross-border litigation highlighted *Ramon* as a "decision [which] will not foster cooperation

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Sanyei Am. Corp., 650 F. Supp. 406, 407-08 (N.D. Ill. 1986) (discussing dismissal of parallel litigation where a party files a duplicative action as a method of litigative harassment). *Cf.* Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 878 (3d Cir. 1981) (holding that the district court abused its discretion in enjoining parallel litigation despite evidence of litigative harassment).

15. Teitz, *supra* note 14, at 29; *see also* Freer, *supra* note 8, at 811 (discussing that "relitigation of identical issues wastes scarce judicial resources"); Michael T. Gibson, *Private Concurrent Litigation in Light of Younger, Pennzoil, and Colorado River*, 14 OKLA. CITY U. L. REV. 185, 196-98 (1989) (noting that "the reacting party is often trying to vex or harass the original plaintiff . . . Reactive litigation generated by these illegitimate motives serves no useful purpose and often creates significant problems").

16. 169 F.3d 317 (5th Cir. 1999).

17. *See* Order Accepting Recommendation of Magistrate Judge, Southwest Livestock & Trucking Co. Inc. v. Ramon, No. SA-94-CA-1024 at 7 (W.D. Tex. Nov. 8, 1996).

18. *See* Ramon, 169 F.3d at 319.

19. Beachy, *supra* note 1, at 1D (quoting T. Mark Blakemore's comment on the *Ramon* decision).

20. *See* Council, *supra* note 1, at 19 (illustrating that as a result of the *Ramon* decision, international lawyers fear that Mexican courts will deny recognition of U.S. judgments).

21. *Id.* (quoting Jay Vogelson, former chairman of the International Law Section of the American Bar Association).

in Mexico in the enforcement of United States judgments in Mexico."[22]

While receiving a good deal of exposure, the *Ramon* situation is not an isolated occurrence in cross-border litigation.[23] If the original *Ramon* decision ultimately sets the standard for Texas' non-recognition of Mexican judgments, NAFTA-inspired cross-border business could be in jeopardy.[24] With cross-border trade comprising a significant degree of both the Texas and Mexico economies,[25] this problem of disparate judgments must reach a workable, and more importantly, an enforceable resolution.

Adding to the problem of inconsistent cross-border judgments is NAFTA'S silence on the issue.[26] Offering only drafting guidance, NAFTA suggests that arbitration clauses or dispute resolutions, such as mediation in contracts, effectively address cross-border disputes.[27] But NAFTA's provisions fail to address a scenario like *Ramon*, in which the parties neglected to include arbitration or choice of law clauses in their contract.[28] NAFTA also fails to inform cross-border litigants of the variations between the legal systems in Texas and

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22. Charles A. Beckham, Jr., *Mexico: Nuts and Bolts of Cross-Border Insolvency - A Trip to Mexico on the Bankruptcy and Insolvency Bus. Are You Going Over a Cliff or is That a Sandy Beach Ahead?, in* THE UNIVERSITY OF TEXAS SCHOOL OF LAW 16TH ANNUAL BANKRUPTCY CONFERENCE, Nov. 10, 1997, at 18.

23. *See* Beachy, *supra* note 1 (noting that in the last week of August 1997, "a Houston bankruptcy judge applied U.S. bankruptcy law for the first time to a foreign debtor").

24. *See id.*(recognizing the possibility of Mexican backlash by refusing to recognize U.S. judgments); *see also* Council, *supra* note 1, at 1 (noting that *Ramon* contradicts with the purpose of NAFTA and other judicial treaties and may cause Mexican courts to ignore U.S. judgments; Beckham, *supra* note 22, at 17-18 (discussing *Ramon* Memorandum Opinion and noting that "the decision will not foster cooperation in Mexico in the enforcement of United States judgments in Mexico).

25. *See* Lopez, *supra* note 3, at 164 (noting that NAFTA could facilitate an economic output as high as $8 trillion); *see also Texas and Mexico Free Trade, supra* note 3 (providing detailed statistics of the amount of exports and imports in billions of dollars between Texas and Mexico each year).

26. *See* Lopez, *supra* note 3, at 165 n.5 ("NAFTA does not provide a mechanism for the settlement of disputes exclusively between private parties. With respect to the resolution of international commercial disputes between private parties in the free trade area, NAFTA simply reflects each government's pledge to encourage the use of arbitration and other means of alternative dispute resolution and to comply with certain pre-existing international arbitration accords."); *see also* Beachy, *supra* note 1, at 1D (noting that NAFTA provides for private arbitration resolution not litigation).

27. *See* Alina A.C.E. Aldape, *A Practitioner's Introduction to Resolving Cross-Border Disputes Under the North American Free Trade Agreement*, 699 PLI/COMM 185, 192 (1994) (focusing on NAFTA arbitration dispute resolution provisions).

28. *See* Lopez, *supra* note 3, at 165 n.5 (acknowledging NAFTA's failure to address disputes between private parties).

Mexico.[29] This omission poses a threat to small business owners who enter into cross-border contracts without ever contemplating that choice of law might become an issue in the event of litigation.[30] Further, NAFTA fails to explain how a successful foreign litigant should effectively introduce the foreign country judgment into evidence and plead the foreign law in a Texas court.[31]

This Comment discusses procedural and practical defenses available in Texas to cross-border litigants in order to avoid a potentially inconsistent judgment in Texas courts. This Comment favors neither the Mexican litigant nor the Texas litigant. Rather, it examines the rules of law which apply to recognition of foreign judgments. The alternative to proper recognition, is a situation like *Ramon*, where two inconsistent judgments exist, where the concept of reciprocity breaks down and litigants cannot fully and finally resolve their claims. Although Texas case law addressing the *Ramon* dilemma is scarce, this Comment will draw at-length comparisons to opinions rendered by other jurisdictions as a guideline for Texas practitioners who may encounter this problem in the future.

Part II briefly discusses an attempt at negotiating a foreign judgment recognition treaty. Part III addresses the preliminary choice of law issue as to whether state or federal law applies to foreign judgment recognition. Part IV examines *res judicata* as a threshold procedural defense to avoid inconsistent cross-border judgments. Part V discusses the use of international comity as a possible defense for the cross-border practitioner in Texas courts. This section also deals with the public policy exception to international comity[32] and examines the Texas approach to this

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29. *See id.*

30. *See* Aldape, *supra* note 27, at 187 (stating that "the sheer volume of business that will be unleased by NAFTA, practically guarantees the advent of a plethora of controversies born out of the differences among the U.S., Canada, and Mexico"); Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY'S L.J. 1059, 1059-60 (1994) ("[C]ommercial and private traffic between the two countries is destined to increase dramatically over the next several decades. Unfortunately, the increased interaction will likely result in a significant increase in litigation involving parties on both sides of the United States and Mexican border.").

31. *See* Anderson, *supra* note 30, at 1075 (illustrating various evidentiary procedures under the Hague Convention, rather than NAFTA).

32. *See generally* Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146, 1147 (5th Cir. 1990) (refusing to recognize a judgment from a Luxembourg court on the grounds that the U.S. has an "inexpugnable public policy that favors payment of lawfully owed federal income taxes"). *See also* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, § 482(2) (d) (1987) (stating that the public policy exception to enforcement of a foreign judgment applies if either "the cause of action upon which the judgment was based, or the judgment itself, is repugnant to the

exception. Part VI examines issues of extending full faith and credit to foreign country judgments. Specifically, this section discusses the doctrine of reciprocity which is codified under both Texas and Mexican laws.[33] Reciprocity creates provisions for mutual recognition between a foreign country and a domestic state's judgment.

This Comment also examines constitutional and statutory law in both Texas and Mexico in order to facilitate a full understanding of each country's views on reciprocity. Section VII addresses procedural problems encountered in recognition of foreign judgments in Texas courts. Lacking a code of procedure for international parallel litigation, a Mexican party may encounter problems admitting the foreign judgment into evidence. This section offers practical pointers for cross-border practitioners on how to avoid these evidentiary problems. Finally, Section VIII addresses a potential constitutional problem which might arise from diverse approaches to foreign judgment recognition.

II. A FAILED ATTEMPT AT AN INTERNATIONAL TREATY ON THE RECIPROCAL RECOGNITION OF FOREIGN JUDGMENTS

Currently, no United States treaty governs the issue of recognition of foreign judgments.[34] Although the United States and the United Kingdom attempted to form such a treaty during the Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, the effort proved to be a futile endeavor.[35] If ratified, the treaty would have provided for the

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public policy of the United States or of the state where recognition is sought"); Brian Nelson Mitchell, *Foreign Judgments*, 22 LITIG. 43, 45 (1996) (discussing the defense of public policy to a foreign judgment in parallel American forum).

33. *See* TEX. CIV. PRAC & REM. CODE § 36.005(b) (7) (refusing to recognize a foreign country judgment if "it is established that the foreign country in which the judgment was rendered does not recognize the judgments rendered in this state"); De la Ejecucion de las Sentencias, [Execution of Judgment], COD.COM art. 1347-A (Mex.) (acknowledging reciprocity for foreign country final judgments and decrees).

34. *See* Matthew H. Adler, *If We Build It, Will They Come? - The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79, 106 (1994) (discussing that the "United States currently is not a party to an agreement on judgment recognition and enforcement").

35. *See generally* Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Oct. 26, 1976, 16 I.L.M. 71. *See also* Adler, *supra* note 34, at 91 (discussing the October 1976 failed attempt at reciprocal recognition of judgments treaty between the United States and the United Kingdom); Peter Hay & Robert J. Walker, *The Proposed U.S.-U.K. Recognition of Judgments Convention: Another Perspective*, 18 VA. J. INT'L L. 753, 763 (1978) (discussing the failed U.S.-U.K. treaty endeavor); Hans Smit, *The Proposed United States - United Kingdom Convention on the Recognition and Enforcement of Judgments: A Prototype for the Future?*,

reciprocal recognition of judgments between the United Kingdom and the United States, eliminating the potential for inconsistent international judgments between the two countries.[36] The treaty failed primarily because the United Kingdom did not want to recognize United States judgments which could subject British litigants to multiple statutory, punitive, or exemplary damages which far exceed British limits.[37] Not limited to the United Kingdom, other countries view the prospect of high United States penalties with disdain.[38] Such dislike stems from the European desire to insulate businesses from insurmountable damages.[39] It is unlikely that the United States will engage in a reciprocal recognition treaty in the near future if the failed attempt with the United Kingdom, a country with a similar common law system and mutual cultural ties, is any indication.[40] Without an international recognition treaty, courts may resolve recognition problems according to either state or federal law.

III. APPLICATION OF STATE OR FEDERAL LAW TO THE RECOGNITION OF FOREIGN JUDGMENTS: WHICH LAW GOVERNS?

As a preliminary matter, a federal court must determine whether federal or state law applies to foreign judgment recognition. Although no federal statute or treaty addresses the issue, federal courts generally follow the Supreme Court's holding in *Erie R.R. v. Tompkins*.[41] *Erie* directs a federal court sitting in diversity to apply the substantive law of the forum state to the recognition of foreign

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17 VA. J. INT'L L. 443, 443 (1997) (discussing the failed attempt at the U.S.-U.K. treaty as a prospective model for future treaties on foreign judgment recognition).

36. *See* Adler, *supra* note 34, at 91.

37. *See id.* at 93 (discussing British dismay at the possibility of paying "outrageous American jury awards").

38. *See id.* ("[T]he U.S. court system also produces jury verdicts that foreign and even domestic observers find staggering."); *see also* Brian Miller, *Hey Waiter! Now There's a Lawyer in My Soup*, N.Y. TIMES, Mar. 12, 1995, at D16 (discussing voluminous American jury awards).

39. *See* Adler, *supra* note 34, at 93-94 (1994) (commenting on high United States jury awards in exclaiming that "Europeans thus find U.S. practice daunting in light of their long traditions, only now eroding, of remaining behind their respective borders, and of protecting their businesses from large awards"). *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, 314 (1984) (discussing European practice of restraint in large jury awards).

40. *See* Adler, *supra* note 34, at 92-93 (1994) (stressing the difficulties of reciprocal recognition treaties as evidenced by the U.S.-U.K. attempt – "two countries with the same language, strong cultural ties, and a similar common law system").

41. 304 U.S. 64 (1938).

state judgments.[42] Reflecting the *Erie* doctrine, the Second Restatement of Conflict of Laws commentary states that "the consensus among the State courts and lower federal courts, that have passed upon the question, is that . . . such recognition is governed by State law and that the federal courts will apply the law of the State in which they sit."[43] Thus, when a Texas Federal court acquires diversity jurisdiction over a Texas litigant and Mexican litigant, state law, not federal law, governs recognition and enforcement of the foreign judgment.[44]

In *Success Motivation Inst. of Japan Ltd. v. Success Motivation Inst.*,[45] the Fifth Circuit examined whether federal law or state law should apply to the recognition of a Japanese judgment. *Success* involved a breach of contract dispute stemming from a Japanese franchise. While simultaneous litigation continued in Japan, the defendants in *Success* sued the plaintiff buyers in Texas. In a race to judgment, the Japanese court rendered a judgment for the plaintiffs, which preceded the American suit. Thus, the U.S. District Court addressed the issue of whether to apply Texas *res judicata* or federal *res judicata* principles to the foreign judgment.[46] Choosing the former, the Fifth Circuit sent a clear signal that in recognition of foreign country judgments, the *Erie* doctrine and the Second Restatement of Conflict of Laws control the issue.[47] In fact, other jurisdictions have acknowledged *Success* as the pre-eminent case which followed the Second Restatement approach. For example, the United States District Court for the District of Massachusetts in *McCord v. Jet Spray*

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42 *See id.*; *see also* Banque Libanise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1003 (5th Cir. 1990) (applying Texas law to the recognition of foreign-money judgment in diversity suit between a Texas resident and an Abu Dhabi resident); Andes v. Versant Corp., 878 F.2d 147, 148 (4th Cir. 1989) (recognizing that a federal court must apply the law of the forum in diversity suits).

43. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 98 cmt. c (1988).

44. See Khreich, 915 F.2d at 1003 (noting that courts frequently hold that state law applies to foreign judgment recognition and enforcement); *see also* Randall v. Arabian Am. Oil Co., 778 F.2d 1146, 1150 (5th Cir. 1985) (recognizing that a federal court must apply the conflict of law rules of the forum state); Somportex Ltd. v. Philedelphia Chewing Gum Corp., 453 F.2d 435, 443 (3d Cir. 1971) (applying state recognition and enforcement laws regarding foreign money judgments)

45. 966 F.2d 1007 (5th Cir. 1992).

46. *See id.* at 1009.

47. *See id.* at 1009-10 (stating that the Fifth Circuit is bound by the *Erie* doctrine of forum law application to the "recognition of foreign country judgments when jurisdiction is based on diversity"). *See also* Klaxon Co. v. Stentor Electric Mfg. Co, 313 U.S. 487, 496 (1941) (holding that *Erie*-required rules apply to conflict of laws rules). The Fifth Circuit in *Success* strictly adhered to the *Erie* doctrine invoked in *Klaxon* and *Khreich*. *See Success*, 966 F.2d at 1010.

Int'l Co., quoted the *Success* rationale in finding that "federal courts sitting in diversity should use state law to measure the preclusive effect of a foreign country's judgment."[48] Similarly, the Tenth Circuit in *Phillips USA, Inc. v. Allflex USA, Inc.*[49] recognized *Success* and adopted the Second Restatement approach. Acknowledging that state law applies to foreign judgment recognition, a cross-border litigant must first assert that under state law, the subsequent court should recognize the former judgment under the doctrine of *res judicata*.

IV. CROSS-BORDER *RES JUDICATA*: A THRESHOLD DEFENSE TO AVOID INCONSISTENT JUDGMENTS

A. The Texas Doctrine

The doctrine of *res judicata* prevents the re-litigation of claims decided on the merits in a prior suit.[50] Under Texas law, federal courts permit foreign and domestic parallel litigation until one court reaches a final judgment on the merits of the case.[51] Once a court reaches final judgment, it may be pled as *res judicata* in the other, provided that the judgment satisfies the requisite elements.[52] As early as 1895, in *Hilton v. Guyot*,[53] the United States Supreme Court recognized that where a foreign country judgment meets the

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48. 874 F. Supp. 436, 438 (D. Mass. 1994). The *McCord* court quoted *Success* in dicta noting that "*Erie* applies even though some courts have found that these suits necessarily involve relations between the U.S. and foreign governments, and even though some commentators have argued that the enforceability of these judgments in the courts of the United States should be governed by reference to a general rule of federal law." *Id.*

49. 77 F.3d 354, 359 (10th Cir. 1996). *See* Philip Casad, *Issue Preclusion and Foreign Country Judgment: Whose Law?*, 70 IOWA L. REV. 53, 78 (1984) (noting that until a treaty or federal statute addresses the issue, state law applies to the conclusive effect of foreign judgments).

50. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980) (explaining that "[u]nder res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"); Barr v. Resolution Trust Corp., 847 S.W.2d 627, 628 (Tex. 1992) (noting that *res judicata* prohibits the re-litigation of claims already finally adjudicated, "as well as related matters that, with the use of diligence, should have been litigated in the prior suit").

51. *See* China Trade & Dev. Corp. v. M.V. Choong Yong, 847 F.2d 33, 36 (2d Cir. 1987) (recognizing that *res judicata* attaches to first final judgment in parallel litigation).

52. *See* Bank of Montreal v. Kough, 612 F.2d 467, 472-73 (9th Cir. 1980) (extending *res judicata* to Canadian default judgment); Sangiovanni Hernandez v. Dominicana de Aviacion, 556 F.2d 611, 615-16 (1st Cir. 1977) (upholding Dominican judgment on grounds of *res judicata*); Herbstein v. Bruetman, 743 F. Supp. 184, 188 (S.D.N.Y. 1990) (holding that *res judicata* applies to the first judgment rendered in a parallel suit).

53. 159 U.S. 113 (1895).

elements of *res judicata*, the trial should not "be tried afresh, as on a new trial or an appeal, upon the mere assertion of the [unsuccessful] party that the [foreign] judgment was erroneous in law or in fact."[54]

The use of *res judicata* as a threshold defense to avoid inconsistent judgments is not a novel concept to parallel litigation.[55] On a national scale, federal courts acknowledge the preclusive effect of a final foreign country judgment on a domestic court.[56] When an unsuccessful domestic litigant attempts to re-litigate the suit with the successful foreign litigant, federal courts allow *res judicata* to step in and uphold the foreign judgment.[57]

Texas *res judicata* principles mirror *Hilton* dicta and offer the successful foreign litigant a persuasive defense to the re-litigation of his suit in a Texas court.[58] To invoke the *res judicata* defense in Texas, the successful foreign litigant must show that the judgment satisfies

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54. *Id.* at 202-03.

55. *See* Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 466 (1939) (holding that international parallel proceedings are permissible until one judgment can be pled as *res judicata* in the other court); *China Trade*, 847 F.2d at 36 (acknowledging that a domestic court may recognize that *res judicata* attaches to a previously rendered foreign judgment); Laker Airways, Ltd. v. Sabena, Belgian World Airways, 731 F.2d 909, 926-27 (D.C. Cir. 1984) (recognizing that parallel proceedings may continue until one forum reaches a judgment which may be pled as *res judicata* in the other); Kenneth R. Adamo, *Effect of Foreign Litigation on U.S. Litigation*, 3 U. BALT. INTELL. PROP. L.J. 1, 8-11 (1994) (discussing concepts of *res judicata* and collateral estoppel in the context of international parallel litigation).

56. *See Laker Airways*, 731 F.2d at 931 (recognizing that the second forum in an international parallel litigation suit must respect prior judgment from another forum); *see also* Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (acknowledging *res judicata* for foreign judgments rendered prior to domestic judgments); Bank of Montreal v. Kough, 612 F.2d 467, 472-73 (9th Cir. 1980); Sangiovanni Hernandez v. Dominicana de Aviacion, 556 F.2d 611, 615-16 (1st Cir. 1977); Hunt v. BP Exploration Co., 580 F. Supp. 304, 310 (N.D. Tex. 1984).

57. *See* Allen v. McCurry, 449 U.S. 90, 96 (1980) (noting that when disposition of a claim in state court precludes a subsequent suit on the same claim in federal court, a federal court must apply the state court's law of *res judicata*); Redfern v. Sullivan, 444 N.E.2d 205, 208 (Ill. App. 4d 1982) (noting that *res judicata* applies where two causes of action are based upon a common core of operative facts); Morris v. Landoll Corp, 856 S.W.2d 265, 266-67 (Tex. App.—Fort Worth 1993, writ denied) (affirming summary judgment for appellees where appellant's claim was barred by *res judicata*).

58. *See* Success Motivation Inst. of Japan, Ltd. v. Success Motivation Inst. Inc., 966 F.2d 1007, 1010 (5th Cir. 1992) (holding that Texas *res judicata* and collateral estoppel applied to Japanese judgment, precluding subsequent Texas suit). The Fifth Circuit recognized that in diversity actions, Texas law of *res judicata* and collateral estoppel supercede Fifth Circuit laws on judgment preclusion. *See id.* The Fifth Circuit also afforded *res judicata* effect to a former Greek settlement decree in Zorgias v. S.S. Hellenic Star and Hellenic Lines Ltd., 487 F.2d 519, 519 (5th Cir. 1973). *Cf.* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1006 (5th Cir. 1990) (denying preclusive effect to Abu Dhabi judgment where foreign litigant failed to prove applicable foreign law).

several requirements.[59] First, the foreign court that rendered the prior judgment must be a court of competent jurisdiction.[60] Second, the foreign litigant must show that the foreign court rendered a final judgment on the merits of the case.[61] Third, the foreign litigant must demonstrate that the parties or those in privity,[62] are identical in both the foreign and domestic litigation.[63] Finally, the foreign judgment must reflect the same cause of action presented in the parallel Texas litigation.[64]

B. Texas Case Law Applying Res Judicata to Foreign Judgments

The application of *res judicata* to a foreign judgment is not an uncommon occurrence in Texas federal court.[65] For example, in *Zorgias v. SS Hellenic Star and Hellenic Lines Ltd.*, the Fifth Circuit affirmed the district court's application of *res judicata* to a former Greek settlement decree.[66] Additionally in *Success*, although ultimately decided as a choice of law question, the Fifth Circuit recognized that Texas *res judicata* principles must be used to determine the preclusive effect of a prior Japanese judgment.[67] However, in *Khreich*, the Fifth Circuit denied *res judicata* effect to a judgment from Abu-Dhabi where the successful foreign litigants failed to establish the validity of the foreign law.[68]

Despite the Fifth Circuit's application of *res judicata* to foreign country judgments, at least one Texas Federal court initially refused

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59. *See* Howell Hydrocarbons, Inc. v. Adams, 897 F.2d 184, 189 (5th Cir. 1990) (defining the four elements of Texas *res judicata*); Nilsen v. City of Moss Point, 701 F.2d 556, 559 (5th Cir. 1984) (en banc) (listing Texas *res judicata* factors); RICHARD E. FLINT, TEXAS CIVIL PROCEDURE, CASES AND MATERIALS 525 (Grail & Tucker, eds. 1997) (listing the Texas *res judicata* elements).

60. *See* Texas Water Rights Comm'n v. Crow Iron Works, 582 S.W.2d 768, 771 (Tex. 1979).

61. *See Adams*, 897 F.2d at 188; *Sutherland*, 843 S.W.2d at 130.

62. *See Adams*, 897 F.2d at 187; Sutherland v. Cobern, 843 S.W.2d 127, 130 (Tex. App.–Texarkana 1992); *see also* Getty Oil Co. v. Ins. Co. of N. Am., 845 S.W.2d 74, 80-01 (Tex. 1992) ("[T]hose in privity with a party may include persons who exert control over the action, persons whose interests are represented by the party, or successors in interest to the party.").

63. *See* Texas Water Rights Comm'n v. Crow Iron Works, 582 S.W.2d 768, 771 (Tex. 1979); *Sutherland*, 843 S.W.2d at 127.

64. *See Adams*, 897 F.2d at 188; *Sutherland*, 843 S.W.2d at 130.

65. *See* Success Motivation Inst. Of Japan Ltd. v. Success Motivation Inst. Inc., 966 F.2d 1007, 1009-10 (5th Cir. 1992); Hunt v. BP Exploration Co., 580 F. Supp 304, 310 (applying *res judicata* effect to English judgment).

66. 487 F.2d 519 (5th Cir. 1973).

67. *See Success*, 966 F.2d at 1010.

68. *See* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1006 (5th Cir. 1990).

to apply res judicata to foreign country judgments. In 1996, the United States District Court for the Western District of Texas held that res judicata did not apply to a Mexican judgment.[69] Notwithstanding the district court's holding in *Ramon*, the principals of *res judicata* should still be asserted for upholding the Mexican judgment.

In 1990, Ramon, a Mexican resident, initially loaned Southwest Livestock, a company owned by Texas residents, $400,000 through a series of "pagares," Mexican promissory notes made payable in Mexico.[70] Over a four year period, Southwest Livestock executed payments towards the principle, but borrowed additional money from Ramon. In 1994, Southwest Livestock defaulted on the last pagare.[71] Ramon sued Southwest Livestock in Mexico to recover the balance and interest accrued since the default. Additionally, Ramon sought interest on the unpaid balance at a rate of 48%, a legal rate of interest in Mexico. The Mexican courts rendered judgment in favor of Ramon.[72]

Southwest Livestock appealed the Mexican judgment in both the state and federal Mexican appellate system while instituting a parallel suit against Ramon in Texas. In the district court, Southwest Livestock argued that the interest charged on the defaulting pagare violated Texas usury laws[73] and was therefore against Texas public policy. Thus, Southwest argued that the Texas court should refuse to recognize the Mexican judgment.[74]

The district court specifically declined to recognize *res judicata* and rendered judgment for Southwest Livestock on Texas public policy grounds. The United States Court of Appeals for the Fifth Circuit vacated and remanded this decision on March 24, 1999.[75] For

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69. *See* Order Accepting Recommendation of Magistrate Judge, Southwest Livestock & Trucking Co. Inc. v. Ramon, No. SA-94-CA-1024 at 7 (W.D. Tex. Nov. 8, 1996).

70. *See* Southwest Livestock & Trucking Co. Inc. v. Ramon, 169 F.3d 317, 318 (5th Cir. 1999).

71. *See id.*

72. *See id.* at 319.

73. *See* TEX. REV. CIV. STAT. ANN. arts. 5069-1.02 (Vernon 1989) (defining "usury" as "interest in excess of amount allowed by law"); C.C. Port, Ltd. v. Davis-Penn Mort. Co., 61 F.3d 288, 289 (5th Cir. 1995) (listing usury elements in Texas: loan of money; mandatory obligation to repay principal; and exaction of greater compensation than the law permits); First Bank v. Tony's Tortilla Factory, Inc., 877 S.W.2d 285, 287-88 (Tex. 1994); Alamo Lumber v. Gold, 661 S.W.2d 926, 927 (Tex. 1984).

74. *See* Southwest Livestock & Trucking Co. Inc. v. Ramon, 169 F.3d 317, 319 (5th cir. 1999).

75. *See id.* at 323.

purposes of this Comment, a *res judicata* application to a *Ramon* fact situation is still a viable defense to avoid inconsistent judgments.

Using the Texas *res judicata* factors, the Mexican judgment in favor of Ramon appears to satisfy the Texas elements. The first element of the Texas *res judicata* test requires a judgment from a competent foreign court. Indeed, both the Recommendation from the United States Magistrate and the Order from the U.S. District Court recognized the validity of the Mexican trial and appellate courts which issued judgments in favor of Ramon.[76] Further, Southwest Livestock availed itself of the Mexican court system, appealing the adverse judgment in both the Mexican state and federal appellate court system.[77] The second Texas *res judicata* element requires that the foreign court render a judgment on the merits of the case. In *Ramon*, the Texas District Court's Order acknowledged that the Mexican state and federal courts rendered a judgment on the merits in Ramon's favor.[78] The third Texas *res judicata* element requires that the parties in both suits be identical or in privity with each other. The District Court's Order also acknowledged that the identical parties were involved in both the Mexican and Texas lawsuits.[79] Finally, the last element of the Texas test requires that the same cause of action was instituted in both suits. The pagare on which Southwest defaulted remained the key issue in the Texas suit, despite the pre-existing Mexican judgment for Ramon on the same pagare.[80]

The Texas court declined to address the *res judicata* analysis in *Ramon*, finding that the interest Ramon charged Southwest Livestock on the pagare contravened Texas usury laws.[81] The *Ramon* court relied on public policy as a basis for refusing to recognize the Mexican judgment.[82] Nevertheless, the facts of *Ramon* demonstrate how *res judicata* could be used to prevent a similar outcome of inconsistent cross-border judgments between Texas and Mexico. With cross-border trade between small businesses on the rise, this

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76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See* Southwest Livestock & Trucking Co. Inc. v. Ramon 169 F.3d 317, 318 (5th Cir. 1999) (discussing the identical dispute over the same loan transaction in both Texas and Mexican forums).

81. *See id.*

82. *See id.*

situation is likely to reoccur. If faced with a situation like *Ramon*, perhaps another federal court in Texas will dismiss the subsequent Texas suit and apply a *res judicata* effect to the former Mexican judgment.

C. *Alfadda v. Fenn: National Case Law Applying Res Judicata Effect to Foreign Judgments*

Just as the Fifth Circuit recognized the doctrine of *res judicata* in the recognition and enforcement of foreign judgments, other jurisdictions utilize the doctrine with equal vigor.[83] The Second Circuit's recent holding in *Alfadda v. Fenn*,[84] demonstrates the preclusive effect of *res judicata* to a foreign judgment.

The plaintiffs in *Alfadda*, all nationals of Saudi Arabia, sued the defendants, mostly Dutch or French companies and banks, on charges of fraud and securities fraud under the Racketeer Influenced and Corrupt Organizations Act (RICO)[85] in connection with investment in the stock of a Dutch company.[86] The Saudi Arabian plaintiffs simultaneously filed suit in both France and the United States.[87] Four years after the suit's initiation, the French intermediate appellate court rendered judgment in favor of the Dutch and French defendants.[88] Despite the simultaneous appeal to the Cour de Cassation, the highest court in France, the French and Dutch

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83. *See* Montana v. United States, 440 U.S. 147, 152 (1979) (discussing that the doctrine of *res judicata* eliminates the wasteful expense of conducting a full trial over issues finally decided by another competent court); Panama Processes v. Cities Service Company, 796 P.2d 276, 295 (Okla. 1990) (holding that a prior Brazilian declaratory judgment was entitled to the *res judicata* effect); Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984) (defining *res judicata*, also known as claim preclusion); *see also* Adamo, *supra* note 55, at 8-9 (citing *Montana*, 440 U.S. at 152-54 (stating that *res judicata* protects successful litigants from expensive and vexatious multiple lawsuits and inconsistent decisions)). The policies behind *res judicata* reflect the need to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, prevent forum shopping for more favorable outcomes, and ensure that American judgments are recognized abroad. *See also* David Thurston White III, *Civil Litigation and Procedure*, 25 CUMB. L. REV. 764, 766 (1995).

84. 966 F. Supp. 1317 (S.D.N.Y. 1997); *see* Newman & Burrows, *supra* note 6, D1 (discussing the holding of *Alfadda* and the international implications of attaching issue preclusion to foreign judgment).

85. Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. § 1961 (1968). *See* H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 232-33 (1989) (defining a RICO claim as "habitual racketeering in connection with an interest in, control of, employment with, association with, or participation in the conduct of an enterprise").

86. *See Alfadda*, 966 F. Supp. at 1320.

87. *See id.* at 1322-23.

88. *See id.* at 1322.

defendants, concurrently litigating in the United States district court, argued for a dismissal of the United States suit on the basis of *res judicata*.[89]

The Second Circuit considered four factors to determine the preclusive effect of the French judgment over the parallel litigation in United States.[90] First, the federal court examined whether the issues in both the foreign and domestic proceedings were identical.[91] Second, the relevant issues must actually have been litigated and decided in the prior proceeding.[92] Third, there must have been "full and fair opportunity" for the litigation of the issues in the prior proceeding.[93] Fourth, the issues were necessary to support a valid and final judgment on the merits of the case.[94]

The Second Circuit considered additional policy reasons to support *res judicata*, such as: 1) the desire to avoid duplication of effort and waste; 2) protection for successful litigants from harassing or evasive tactics; and 3)stability and unity in deciding the preclusive effect of the French judgment.[95]

The crux of the Second Circuit's opinion followed the rationale set forth in *Herbstein v. Bruetman*.[96] In *Herbstein*, the U.S. District Court for the Southern District of New York held that, under federal law, domestic and foreign courts should exercise jurisdiction concurrently until judgment is reached in one of the proceedings which can be pled as *res judicata* in the other.[97] In *Alfadda*, the French

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89. *See id.* at 1330.

90. *See id.* (citing Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995)); *see also* Newman & Burrows, *supra* note 6, D1 (recognizing the four common law elements of federal *res judicata* discussed by *Alfadda* court). The article focuses on whether a successful foreign party plead *res judicata* in the foreign forum. Using the result in *Alfadda*, the article serves as a useful guide to addressing the question of *res judicata* in simultaneous international suits. *See id.*

91. *See* Alfadda v. Fenn, 966 F. Supp. 1317, 1330-31 (S.D.N.Y. 1997).

92. *See id.* at 1331.

93. *Id.*

94. *See id.*

95. *See id. See also* Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1603-04 (1968) (outlining five policy considerations of giving preclusive effect to foreign judgment: 1) avoid duplication of effort in re-litigation; 2)protect successful litigant from harassment and evasion from the unsuccessful opponent; 3) prevention of forum-shopping in plaintiff's choice of forum; 4) promoting stability in international order; and 5) recognizing in some cases that the former forum was more appropriate).

96. 743 F. Supp. 184, 184 (S.D.N.Y. 1990).

97. See *id.* at 187-88.

court rendered a judgment conclusive on the merits of the case before the parallel United States proceeding reached a judgment.[98]

The court found that the issues decided in the parallel French proceedings were "sufficiently identical" to the U.S. proceedings.[99] The French trial afforded the parties a full and fair opportunity to litigate the issues in the case, and the issues decided by the French court supported the French judgment.[100] Satisfying all the *res judicata* factors, the Second Circuit determined that the French judgment issued by the intermediate appellate court precluded the claims in the United States action and dismissed the case.[101]

The Second Circuit's application of *res judicata* in *Alfadda* conforms to recent judgments rendered in other jurisdictions faced with international parallel litigation. Recently, in *Van Den Biggelaar v. Wagner*, an Indiana district court enforced a Dutch judgment and applied *res judicata* effect to the subsequent American suit.[102] In that case, Wagner, an Indiana resident, contracted with Biggelaar, a Dutch resident, to board, lease or sell horses.[103] Wagner sued Biggelaar for breach of the lease, excessive boarding fees, misappropriation of monies, and inaccurate accounting in the Dutch district court.[104] The Dutch district court ruled in Wagner's favor.[105] However the Dutch appellate court reversed, holding that Wagner failed to prove that Biggelaar breached the contract.[106] The court ordered Wagner to pay costs and damages to Biggelaar.[107] Subsequently, Biggelaar brought an action in the New Jersey court to enforce the Dutch appellate money judgment.[108] Both parties filed motions for summary judgment and each party took a different interpretation of how *res judicata* applied to the New Jersey suit.[109] In his motion for summary judgment, Wagner argued that *res judicata* attached to the Dutch judgment, preventing the New Jersey

98. *See* Alfadda v. Fenn, 966 F. Supp. 1317, 1326 (S.D.N.Y. 1997).

99. *See id.* at 1331.

100. *See id.* at 1330–32.

101. *See id.* at 1336.

102. 978 F. Supp. 848, 850 (N.D. Ind. 1997).

103. *See id.* at 851.

104. *See id.*

105. *See id.* at 852.

106. *See id* at 850.

107. *See id.*

108. *See id.*

109. *See id.* at 853–61.

court from enforcing the Dutch judgment.[110] In contrast, Biggelaar asserted that the New Jersey court should enforce the Dutch judgment under *res judicata*.[111] The court granted Biggelar's motion and ruled that the New Jersey action was not a re-litigation of the same issues but rather a suit to enforce the previous Dutch money judgment.[112]

The Tenth circuit's holding in *Phillips USA, Inc. v. Allflex USA, Inc.*,[113] rendered in 1996 also coincides with the *Alfadda* use of *res judicata* as a threshold defense to avoid inconsistent judgments. *Phillips* involved a contractual dispute between Australian and American based companies. Phillips, the American company, instituted the first suit in Australia alleging breach of contract and deceptive trade practices.[114] The Australian court rendered a judgment for Phillips.[115] Following the Australian litigation, Phillips sued the Australian company, NJP, (Allflex was not a party to the Kansas appeal) in the United States District Court for the District of Kansas alleging tortious interference with contract, a new cause of action.[116] NJP argued that *res judicata* barred the new cause of action because Phillips failed to raise it in the prior Australian proceeding.[117] The Tenth Circuit agreed with NJP's argument and held that the underlying facts in the tortious interference claim mirrored those in the breach of contract action decided by the Australian court.[118] Thus, the Tenth Circuit affirmed the district court's application of *res judicata* to the Australian judgment and held that "under Kansas claim preclusion law if an issue could have been raised, but was not, it is barred."[119]

While not as recent as *Wagner* and *Phillips*, *Panama Processes v. Cities Service Co.*,[120] rendered from the Oklahoma Supreme Court in 1990, also coincides with the *Alfadda* application of *res judicata* to foreign judgments. *Panama Processes* concerned a breach of contract

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110. *See id.* at 850.
111. *See id.* at 856–57.
112. *See id.* at 856.
113. 77 F.3d 354, 356 (10th Cir. 1996).
114. *See id.*
115. *See id.*
116. *See id.* at 357.
117. *See id.*
118. *See id.* at 361.
119. *Id.*
120. 796 P.2d 276, 278 (Okla. 1990).

suit between minority and majority shareholders over a letter agreement. Panama sued Cities Service in the Oklahoma state court on theories of breach of contract and breach of fiduciary duty.[121] In response to Panama's suit, Cities sued Panama in Brazil.[122] The Brazilian court rendered a judgment for Cities, finding the letter agreement unenforceable.[123] Subsequently, the Oklahoma trial court rendered summary judgment for Cities, precluding Panama from re-litigating issues fully and finally litigated in the Brazilian court.[124] The Oklahoma Supreme Court noted that "the first final judgment would be *res judicata* as to issues that were or could have been raised in that action."[125] Recognizing that the Brazilian court rendered a final judgment prior to the Oklahoma proceeding, the court held that the Brazilian judgment must be afforded a *res judicata* effect.[126] The court further noted that the issues raised in both proceedings arose from the same transaction involving the same parties; therefore, Oklahoma's *res judicata* factors were satisfied.[127]

While the use of the *res judicata* defense to avoid inconsistent judgments, as illustrated in the previous cases, are not binding in Texas federal courts, these cases offer plausible options for how *res judicata* may resolve the dilemma of inconsistent cross-border judgments. For example, the successful Dutch litigant in *Van Den Biggelaar v. Wagner* sought to enforce the foreign judgment in New Jersey and collect the damages that the Dutch court awarded him.[128] In contrast, the Mexican litigant in *Ramon* did not bring the action or seek enforcement of the Mexican judgment in Texas.[129] Rather, Ramon asserted that the Mexican judgment simply be recognized as *res judicata* to preclude the Texas lawsuit.[130] In *Phillips*, the Tenth

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121. *See id.* at 280.

122. *See id.*

123. *See id.* at 280–88.

124. *See* Panama Processes v. Cities Serv. Co., 796 P.2d 276, 281 (Okla. 1990).

125. *Id.* at 284.

126. *See id.*

127. *See id.*

128. 978 F. Supp. 848, 852 (N.D. Ind. 1997).

129. *See* Southwest Livestock & Trucking Co. Inc. v. Ramon, 169 F.3d 317, 319 ("Ramon filed a motion for summary judgment seeking recognition of the Mexican judgment.").

130. *See id.*; *see also* Vitrix Steamship Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 711 (2d Cir. 1987) (distinguishing between enforcement and recognition of foreign judgments); De la Mata v. American Life Ins. Co., 771 F. Supp. 1375, 1380 (D. Del. 1991) (discussing that foreign judgment recognition involves the doctrine of *res judicata*); Adamo, *supra* note 55, at 2 ("[R]ecognition of a foreign judgment is giving it collateral estoppel or *res judicata* effect,

Circuit examined in detail the identical issues in both the foreign and subsequent domestic litigation.[131] The *Phillips* court noted that the distinction between breach of contract in the first suit and tortious interference with contract in the second suit was indeterminative.[132] Instead, the court focused on the fact that the same underlying facts existed in both suits, which satisfied Kansas *res judicata* laws.[133] Similarly, in *Ramon*, the source of the contract dispute, the pagare, is identical in the subsequent Texas litigation.[134] Finally, *Panama Processes* reflects the "race to the judgment" aspect of *res judicata*, where there is a preclusive effect that attaches to the first final judgment, to all issues fully and finally litigated in the first judgment, and to those issues that could have been litigated in the first judgment.[135] In *Ramon*, the Mexican court rendered a final judgment prior to the inconsistent Texas judgment.[136] Southwest Livestock appealed the judgment through the Mexican appellate system, and neither the Texas court nor Southwest Livestock contested the Mexican court's subject matter jurisdiction over the suit.[137]

Thus, practitioners representing litigants in future cross-border litigation might argue the factors stressed by other jurisdictions which utilized *res judicata* in international parallel suits: enforcement versus recognition of the previous judgment; common identity of the issues; and whether the foreign court rendered a judgment prior to the Texas court. These factors meet the ultimate end of *res judicata* — to accord finality to judgments while aiding both the successful litigant and conserving the court's judicial resources.[138] Texas courts have followed other jurisdictions in other cases and should in this

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whereas enforcement of such a judgment usually involves execution for the payment of money.").

131. *See* Phillips USA, Inc. v. Allflex USA, Inc., 77 F.3d 354, 357-61 (10th Cir. 1996).

132. *See id.* at 360.

133. *See id.*

134. *See* Southwest Livestock & Trucking Co. Inc. v. Ramon, 169 F.3d 317, 319 (5th Cir. 1999) (discussing the same pagare at issue in the previous Mexican litigation).

135. *See* Panama Processes v. Cities Serv. Co., 796 P.2d 276, 284 (Okla. 1990).

136. *See Ramon*, 169 F.3d at 323 (noting that the Mexican court rendered judgment in Ramon's favor which Ramon asserted as *res judicata* in the Texas litigation).

137. *See id.* at 319 (noting that Southwest Livestock appealed, claiming that the Mexican court had not properly acquired personal jurisdiction over them, but the Court of the Second Instance - an intermediate appellate court - rejected their argument and affirmed the judgment in Ramon's favor).

138. *See* Barr v. Resolution Trust Corp., 847 S.W.2d 627, 629 (Tex. 1992) (noting that claim preclusion or *res judicata* "prevents splitting a cause of action").

area because, as noted by the *Phillips* court, "[t]he law does not favor a multiplicity of suits, and, where all the matters in controversy between parties may be fairly included in one action, the law requires that it should be done."[139] In terms of international parallel litigation, *res judicata* stands as a bulwark against harassing litigants who file identical proceedings in multiple jurisdictions.[140] If *Success*, *Alfadda*, and other recent case law are any indication, federal appellate courts will recognize *res judicata* as a predominant consideration in international parallel litigation. As a basis for applying *res judicata* to a foreign judgment, courts frequently defer to the doctrine of international comity.[141]

V. INTERNATIONAL COMITY AND THE PUBLIC POLICY HURDLE

A. *General Principles of International Comity and the Public Policy Exception*

Described as the mortar in the brick house of the international system,[142] comity plays an integral role in international parallel litigation. Comity ensures that the domestic forum will uphold the laws of foreign nations as a matter of international duty and convenience.[143] Thus, comity fosters goodwill among nations when their laws and judgments are recognized abroad.[144]

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139. Phillips USA, Inc. v. Allflex USA, Inc., 77 F.3d 354, 360 (10th Cir. 1996) (quoting Ellis v. State Farm Mut. Auto. Ins. Co., 822 P.2d 35, 38 (Kan. 1991)).

140. *See* Success Motivation Inst. of Japan, Ltd. v. Success Motivation Inst. Inc., 966 F.2d 1007, 1008 (5th Cir. 1992); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 910 (D.C. Cir. 1984); Alfadda v. Fenn, 966 F. Supp. 1317, 1326 (S.D.N.Y. 1997).

141. *See* Turner v. DeGeto, 25 F.3d 1512, 1523 (11th Cir. 1994) (affording German judgment on the merits preclusive effect in large part on the basis of international comity); Madanes v. Madanes, 981 F. Supp. 241, 263 (S.D.N.Y. 1997) ("[T]he general rule of comity is that the domestic court should exercise jurisdiction concurrently with the foreign court. If a judgment is reached first in the foreign court, it may then be pled as *res judicata* in the domestic court." (quoting China Trade Dev. Corp. v. M.V. Choong Yong, 847 F.2d 33, 36 (2d Cir. 1987))); Furata, *supra* note 6, at 16 ("[C]omity requires that the parties and issues in both litigations are the same or sufficiently similar, such that the doctrine of *res judicata* can be asserted." (quoting *Herbstein*, 743 F. Supp. at 188)).

142. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) (recognizing that "comity serves our international system like the mortar which cements together a brick house. No one would willingly permit the mortar to crumble or be chipped away for fear of compromising the entire structure").

143. *See* Hilton v. Guyot, 159 U.S. 163, 164 (1895) ("'[C]omity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will on 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

The United States Supreme Court first recognized comity as a pivotal force in international law in *Hilton v. Guyot*.[145] *Hilton* defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[146] The *Hilton* definition of comity continues to influence modern-day international parallel litigation.[147] *Hilton* established several grounds for judgment recognition on the basis of comity: 1) a competent foreign court must render judgment; 2) litigants must be afforded the opportunity to defend adverse claims; 3) the foreign proceeding must be conducted in a manner consistent with civilized jurisprudence; and 4) the foreign judgment must be conclusive on the merits.[148] As a general rule in international law, most states adopt the fundamental *Hilton* comity requirements.[149] Courts

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protection of its laws."). *See also* Turner v. DeGeto, 25 F.3d 1512, 1519 (11th Cir. 1994) ("[C]omity concerns include: 1) whether the judgment was rendered via fraud; 2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and 3) whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just."); *Laker Airways*, 731 F.2d at 937. Comity works to encourage international predicability and stability through satisfying mutual expectations. *Id.*; *see also* Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (recognizing the three comity concerns outlined in *Hilton*); RESTATEMENT (SECOND) CONFLICT OF LAWS § 117 cmt., c (1969) (outlining comity concerns of fraud, competency, and public policy); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 284 (1982) (noting that comity benefits all nations by ensuring that the foreign court's laws are vindicated and that the domestic court's international cooperation is strengthened).

144. *See Turner*, 25 F.3d at 1519 (recognizing that comity "contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as part of the voluntary law of nations" (quoting Bank v. Earle, 38 U.S. (13 Pet.) 519, 589 (1849))); Stephen M. Bainbridge, *Comity and Sovereign Debt Litigation: A Bankruptcy Analogy*, 10 MD. J. INT'L L. & TRADE 1, 24 (1986) (stating that comity aids "the efforts of U.S. courts and policy-makers to assert jurisdiction and enforce judgments abroad, because foreign lawmakers will be more willing to effectuate the rulings of U.S. courts if they can rely on U.S. courts to recognize the validity of foreign laws").

145. 159 U.S. 163, 164-65 (1895).

146. *Id.* at 164.

147. *See* Cunard S.S. Co. v. Salen Reefer Services, 773 F.2d 452, 456-60 (2d Cir. 1985) (acknowledging *Hilton* acceptance of international comity as a legitimate interest in foreign judgment recognition); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) (recognizing that comity as defined in *Hilton* is "the degree of deference that a domestic forum must pay to the act of a foreign government not otherise binding on the forum"); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440-41 (3d Cir. 1971); Adler, *supra* note 34, at 84 (stating that the *Hilton* court's definition of comity survives in current international enforcement litigation); R. Doak Bishop & Susan Burnett, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW. 425, 426-27 (1982) (citing *Hilton* as the standard defintion of comity established by the Supreme Court).

148. *See* Hilton v. Guyot, 159 U.S. 163, 202-03 (1895).

routinely refuse recognition where any of the *Hilton* comity requirements, especially due process, are absent.[150]

The *Hilton* decision contained two additional grounds for non-recognition of foreign judgments: 1) judgments rendered by fraud; and 2) judgments which prejudice the American court system.[151] These grounds for non-recognition evolved into the public policy exception to foreign judgment recognition.[152] Thus, under the public policy exception, a court may refuse to enforce a foreign judgment because enforcement would violate a public policy of the court or state.[153]

Despite the seemingly broad scope of the public policy exception, the standard for rejecting a foreign judgment on public policy grounds is a very difficult one for a domestic court to meet.[154] A court may not refuse a foreign judgment on public policy grounds simply because the domestic court would reach a different conclusion.[155] A judgment should not be disturbed unless its

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149. *See* Standard S.S. Owners' Protection & Indemnity Ass'n v. C&G Marine Services, 1992 WL 111186 at * 1 (E.D. La. 1992); *Laker Airways*, 731 F.2d at 951; Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1012 (E.D. Ark. 1973); *Somportex*, 453 F.2d at 440-41. *See also* Adamo, *supra* note 55, at 4 ("[T]he criteria for finding comity to permit recognition and enforcement may vary somewhat from state-to-state.").

150. *See* Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410 (9th Cir. 1995) (acknowledging that an American court "may not recognize a judgment of a court of a foreign state if the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law"); Choi v. Kim, 50 F.3d 244, 245 (3d Cir. 1994) (refusing to enforce Korean judgment where debtor never received notice of Korean suit); Sangiovanni Hernandez v. Dominicana de Aviacion, 556 F.2d 611, 612 (1st Cir. 1977) (noting that lack of due process in a foreign forum is grounds for non-recognition in a domestic forum); De la Mata v. American Life Ins. Co., 771 F. Supp. 1375, 1376 (D. Del. 1991) (refusing to recognize and enforce foreign judgment where litigants are not afforded basic due process).

151. *See* Hilton, 159 U.S. at 202-03.

152. *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.J. 795, 799 (1996) (explaining evolution of the public policy exception from *Hilton*).

153. *See id.*

154. *See* Ackermann v. Levine, 788 F.2d 840, 841 (2d Cir. 1986) (stating that the standard for meeting the public policy exception to foreign judgment recognition is "high and infrequently met"); Tahan v. Hodgson, 662 F.2d 862, 866 n.17 (D.C. Cir. 1981) (noting that the public policy exception to foreign judgment recognition applies "only in clear-cut cases"); Pariente v. Scott Meredith Literary Agency, Inc., 771 F. Supp 609, 617 (S.D.N.Y. 1991) (declining to apply public policy exception to French judgment). *See also* Minehan, *supra* note 152, at 808 ("[A]lthough U.S. courts have applied the public policy exception and refused to enforce judgments in specific types of cases, U.S. courts have narrowly interpreted the public policy exception and applied it on rare occasions."). The policy behind the U.S. courts narrow interpretation of the public policy is the potential for abuse. *See id.*

155. *See* Somportex Ltd. v. Philadelphia Chewing Gum Co., 453 F.2d 435, 443 (3d Cir. 1971).

enforcement would hurt the public.[156] At least one court has expressly stated that the public policy exception is available as a defense "only in exceptional cases."[157] In *Ackermann v. Levine*, the Second Circuit noted that the public policy exception applies only when a foreign judgment is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought."[158] The *Ackermann* court further noted that "the standard [for utilizing the public policy exception] is high and infrequently met."[159] Commentators note that courts infrequently utilize the public policy exception because other grounds for non-recognition under *Hilton* apply.[160]

In *Loucks v. Standard Oil*, Justice Cardozo noted, "[w]e are not so provincial as to say that every solution to a problem is wrong because we deal with it otherwise at home."[161] The rationale behind the narrow construction to the public policy exception stems from the competing principles of *res judicata* and equity for litigants.[162] Courts have recognized the public policy exception to foreign judgment recognition in the limited areas of awards linked to a wrongdoer's malfeasance,[163] libel judgments,[164] and penal sanctions.[165]

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156. *See id.*

157. Panama Processes v. Cities Service Co, 796 P.2d 276, 284 (Okla. 1990).

158. 788 F.2d 840, 845 (2d Cir. 1986) (quoting *Tahan*, 662 F.2d at 864). Specifically, the *Ackermann* court was concerned with the German statutory billing scheme for attorney work product, which according to American standards, produced not even a scintilla of evidence of attorney work product. The court reasoned that enforcing unconscionable attorney fee awards would endanger public confidence in the administration of the law. *See id.* at 844-45.

159. *Id.*; *see also* Laker Airways v. Sabena, Belgian World Airways, 731 F.2d 909, 931 (D.C. Cir. 1984) ("[T]he standard for refusing to enforce judgments on public policy grounds is strict."); *Somportex*, 453 F.2d at 443 (recognizing that the public policy exception applies to foreign cause of action which "tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty, or of private property, which any citizen ought to feel, is against public policy ") (quoting Goodyear v. Brown, 26 A. 665, 666 (Pa. 1843)).

160. *See* Minehan, *supra* note 152, at 808 (arguing that American courts narrowly construe the public policy exception and apply it only to specific types of cases).

161. 120 N.E. 198, 201 (N.Y. 1918). Justice Benjamin Cardozo served on the New York Court of Appeals when he decided this case. Justice Cardozo was appointed to the United States Supreme Court in 1932.

162. *See* Adkermann v. Levine, 788 F.2d 840, 841-42 (2d Cir. 1986) (recognizing that the narrow public policy exception serves the principles of *res judicata* and fairness to litigants).

163. *See* Jaffe v. Snow, 610 So. 2d 482, 484 (Fla. 5th DCA 1992) (refusing to enforce a Canadian judgment which awarded damages to a plaintiff who disregarded bail terms and was kidnapped and injured when a bondsman returned him to Florida). The *Jaffe* court refused

In contrast, courts have refused to recognize the public policy exception in the areas of loss of goodwill and attorney's fees,[166] court costs,[167] repayment of gambling debts,[168] prejudgment interest,[169] default judgments,[170] actions in seduction and damages for moral

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to enforce the Canadian judgment on the grounds that a fugitive sought to enforce a judgment based on his wrongdoing. *See id.* at 484-85.

164. *See* Matusevitch v. Telnikoff, 877 F. Supp. 1, 2 (D.D.C. 1995) (holding that recognition of British libel judgment violated Maryland public policy and deprived plaintiff of constitutional rights). In *Matusevitch*, the court acknowledged that under British law, a defendant may be held liable for statements in good faith believed to be true that were published under that belief; yet, under U.S. law, a defendant must be shown to have the required intent to commit libel. *See id.* at 4. Recognizing the direct affront to freedom of speech rights if the British judgment were recognized, the court refused to recognize the judgment as against U.S. and D.C. public policy. *See id. See also* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661, 661 (Sup. Ct. 1992). The *Bachchan* court noted that "if, as claimed by defendant, the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and it is deemed to be 'constitutionally mandatory.'" *Id.* at 662; *see also* Minehan, *supra* note 152, at 806 (suggesting that *Matusevich* and *Bachchan* illustrate that foreign judgments which are contrary to the U.S. Constitution are inherently violative of the policy of protecting citizens rights).

165. *See* Republic of the Philippines v. Westinghouse Elec. Co., 821 F. Supp. 292, 293 (D.N.J. 1993) (refusing to enforce Phillipine penal judgment). Citing Justice John Marshall, the *Westinghouse* court held that "the Courts of no country execute the penal laws of another." *Id.* at 295; *see also* Minehan, *supra* note 152, at 807 (1996) (noting that U.S. courts decline to enforce foreign penal judgments).

166. *See* Compania Mexicana Radiodifusora Franteriza v. Spann, 41 F. Supp. 907, 907 (N.D. Tex. 1941) (affirming Mexican judgment awarding attorney's fees against Texas plaintiff); Minehan, *supra* note 152, at 800 (1996) (noting consistent U.S. recognition of foreign judgments on loss of goodwill and attorney's fees).

167. *See* Desjardins Ducharme v. Hunnewell, 585 N.E.2d 321, 324 (Mass. 1992) (enforcing a Canadian judgment and court costs noting that the Canadian award of court costs was remedial, not penal in nature.); Minehan, *supra* note 152, at 801 (noting that U.S. courts consistently enforce foreign judgments on reasonable court costs).

168. *See* Intercontinental Hotels Co. v. Golden, 203 N.E.2d 210, 211 (N.Y. 1964) (requiring a foreign litigant to pay gambling debt ordered by the foreign judgment despite contrary state practice). The foreign defendant in *Golden* argued that all gambling contracts were illegal and unenforceable under New York law. *See id.* at 212. The court held that though gambling obligations were unenforceable in a domestic action, New York's permission of some forms of gambling suggested that the enforcement of foreign judgments for gambling debts was appropriate. *See id.* at 213. *See also* Minehan, *supra* note 152, at 801; Harrah's Club v. Mijalis, 557 So. 2d 1142, 1145 (La. App. 1990).

169. *See* Ingersoll Milling Machine Co. v. Granger, 843 F.2d 680, 682 (7th Cir. 1987) (enforcing a Belgian judgment and prejudgment interest). The *Granger* court held that "[t]he mere fact that Belgian law permits prejudgment interest while Illinois law might not is not fatal to the Belgian award." *Id.* at 691; Hunt v. BP Exploration Co., 492 F. Supp. 885, 888 (N.D. Tex. 1980) (enforcing an English judgment and prejudgment interest). The Northern District of Texas in *Hunt* held that although English law provided for prejudgment interest, in direct contrast to Texas law, the variation could not invoke the public policy exception because no affront to the public moral or justice occurred. *See id.* at 901. *See also* Minehan, *supra* note 152, at 802.

reparations,[171] and injuries during deportation.[172] In these instances, courts have upheld the foreign judgment despite challenges to domestic public policy.

B. *Texas Application of Comity and Public Policy to Foreign Judgments*

Consistent with other federal courts, federal courts in Texas have adopted the *Hilton* definition of international comity.[173] Also consistent with other jurisdictions, Texas courts adopt the public policy exception to recognition of foreign judgments which are repugnant to Texas law.[174] However, the limited amount of case law suggests that Texas courts infrequently utilize the public policy exception.

In *Compania Mexicana Rediodifusora Franteriza v. Spann*,[175] the United States District Court for the Northern District of Texas examined whether the issue of disparate calculations of attorney's fees under Mexican law violated Texas public policy. *Spann* clearly set out Texas' adherence to international comity by recognizing that "[t]he modern tendency in this country is to recognize foreign judgments in personam as conclusive, where they are rendered on the merits, in foreign courts having jurisdiction of the parties."[176]

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170. *See* Tahan v. Hodgson, 662 F.2d 862, 862 (D.C. Cir. 1981) (upholding an Israeli judgment despite a public policy challenge on the grounds that the foreign judgment failed to qualify as repugnant to decency and justice). In *Tahan*, the Israeli court entered a default judgment inconsistent with U.S. notice requirements. Further, the Israeli judgment violated U.S. public policy by piercing the corporate veil, contrary to U.S. policy. Nevertheless, the *Tahan* court upheld the foreign judgment because under Israeli law the defendant could submit a viable defense. *See id at 866-67. See also* Minehan, *supra* note 152, at 802.

171. *See* Gutierrez v. Collins, 584 S.W.2d 312, 313 (Tex. 1979) (enforcing a Mexican judgment which included damages for moral reparation, which is non-existent under Texas law). The *Gutierrez* court noted "the mere fact that these aspects of the law differ from ours does not render them violative of public policy." *Id.* at 322. *See also* Neporany v. Kir, 173 N.Y.S.2d 146, 148 (N.Y. App. Div. 1958) (recognizing Canadian judgment for seduction because, "our public policy is not contravened by the enforcement of a money judgment arising from causes of action proscribed by Article 2-A, but which are recognized in the jurisdiction where the acts took place"); *see also* Minehan, *supra* note 152, at 803.

172. *See* Ricart v. Pan American World Airways, 1990 WL 236080, at * 3 (D.D.C. Dec. 21, 1990) (upholding Dominican Republic judgment for injured deported plaintiff).

173. *See* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1004 (5th Cir. 1990) (acknowledging the role of comity as a rule of accommodation in foreign judgment recognition).

174. *See* Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146, 1147 (5th Cir. 1990) (refusing recognition of a Luxembourg judgment on public policy grounds). *Cf.* Norkan Lodge v. Gillum, 587 F. Supp. 1457, 1460 (N.D. Tex. 1984) (recognizing a Canadian judgment where Texas public policy was not contravened).

175. 41 F. Supp 907, 908 (N.D. Tex. 1941).

176. *Id.* at 909.

With special attention to comity toward Mexico, the court noted, "[i]t is a friendly nation. We are at peace with it. Its citizens come here and engage in extensive commercial transactions, and our citizens go there and do likewise. Each uses the courts of the other."[177]

The *Spann* court held that the Mexican judgment was enforceable in spite of a public policy argument.[178] Thus, the court followed the series of federal cases declining to expand the public policy exception in the area of attorney's fees.[179] The court emphasized that absent fraud, denial of due process, or prejudice by the foreign court, Texas courts should recognize the general rule that a judgment is valid in Texas when it is valid under the laws of the foreign jurisdiction rendering the decision.[180] Further, the court noted that the public policy of a state must be well defined through case law or statute, which again reflects the high standard a litigant must meet to prevail on the public policy exception in Texas.[181]

Similarly, in *Norkan Lodge Co. v. Gillum*,[182] the United States District Court for the Northern District of Texas rejected a public policy argument and recognized a Canadian judgment. Norkan sued Gillum in Canada for trespass and conversion. Gillum failed to appear at the trial and the court rendered judgment in Norkan's favor.[183] Gillum failed to appeal the adverse Canadian judgment. Norkan sought to enforce the Canadian money judgment in Texas.[184]

In Texas, Gillum argued that the Canadian judgment was repugnant to Texas public policy due to differences in Canadian laws governing criminal trespass and conversion. The court rejected Gillum's public policy argument and held that the Canadian judgment could only be refused if the cause of action in the foreign

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177. *Id.*

178. *See id.* at 909-10.

179. *See id.* at 909. The Fifth Circuit affirmed the lower court's opinion one year later in Spann v. Compania Mexicana Radiodifusora Franteriza, S.A., 131 F.2d 609 (5th Cir. 1942). The Fifth Circuit found no public policy violation despite the large sum of attorney's fees awarded to the plaintiff. *See id. But see* Ackermann v. Levine, 788 F.2d 840, 844 (2d Cir. 1986) (refusing to enforce West German judgment on the issue of attorney's fees where no evidence of attorney work product existed).

180. *See* Compania Mexicana Rediodifusora Franteriza v. Spann, 41 F. Supp. 907, 909 (N.D. Tex. 1941).

181. *See id.*

182. 587 F. Supp. 1457, 1458 (N.D. Tex. 1984).

183. *See id.*

184. *See id.* at 1458-59.

country was repugnant to the public policy of Texas.[185] The court further held that the differences in damages for trespass and conversion under Canadian law did not classify the cause of action as repugnant to Texas public policy.[186]

Despite the high standard for the public policy exception evident in the *Spann* and *Gillum* holdings, *Overseas Inns S.A. P.A. v. United States*,[187] provides a good illustration of Texas' use of the public policy exception to foreign judgment recognition. *Overseas* concerned a Luxembourg corporation which failed to file U.S. income tax returns under its status as a U.S. foreign corporation. The district court acknowledged that under principles of comity, deference to foreign judgments may be denied "in the face of significant countervailing public policy reasons."[188] The court held that according to both United States and Texas law, public policy mandated federal income tax payment, and therefore refused the foreign judgment in favor of the Luxembourg litigants.[189] Affirming the district court's holding, the Fifth Circuit recognized that the foreign plaintiff "availed itself of the benefits of the United States business climate, it should not now be allowed to escape the corresponding tax burden."[190]

In *Ramon*, a federal district court exercised the public policy exception to deny recognition of the Mexican judgment. The district court held that the interest Ramon charged on the pagare violated Texas usury laws, and consequently, public policy.[191] Usury is defined as charging a rate of interest which exceeds the legal limit.[192] Texas usury laws are codified by statute and extensively illustrated

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185. *See id.* at 1461.

186. *See id.*

187. Overseas Inns S.A. P.A. v. United States, 911 F.2d 1146, 1147 (5th Cir. 1990).

188. *Id.*

189. *See id.* at 1148.

190. *Id.* at 1150.

191. *See* Southwest Livestock & Trucking Co. Inc. v. Ramon, 169 F.3d 317, 320 (5th Cir. 1999). *But see* Admiral Ins. Co. v. Brinkcraft Dev. Ltd., 921 F.2d 591, 591 (5th Cir. 1991) (recognizing that foreign laws which permit greater interest rates are not contrary to Texas public policy); Davidson Oil Country Supply Co. v. Klockner, Inc. 908 F.2d 1238, 1239 (5th Cir. 1990) (holding that greater interest under foreign law does not offend public policy); Apodaca v. Banco Longoria S.A., 451 S.W.2d 945, 947 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.) (noting that foreign interest rate does not contravene Texas public policy).

192. *See supra* note 73 and accompanying footnote text; *see generally* Michele M. Hightower, *The Current State of Usury Law in Texas*, 14 ST. MARY'S L.J. 149, 150 (1984); Justin T. Toth, *Texas Usury Law: When is a Borrower's Promise to Repay Absolute?*, 32 HOUS. L. REV. 42, passim (1994).

through case law.[193] Usury laws ensure that borrowers are not charged interest rates on their debts that are more than the legal limit.[194] In Texas, contracts which involve usurious rates of interest are void as against public policy.[195]

At the district court level, the *Ramon* court found that under the terms of the pagare, the Mexican promissory note, Ramon charged Southwest Livestock forty-eight percent (48%) interest on the accrued debt on the pagare.[196] Under Texas law, this rate violates Texas usury laws.[197] However, Ramon argued that the contract was to be performed under Mexican law, where the interest rate was perfectly legal.[198]

The United States Magistrate acknowledged that a court should not refuse recognition "merely because the law or practice of the foreign country differs; rather, the judgment must tend clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property."[199] Applying this high public policy standard of non-recognition to the facts of the *Ramon* case, the

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193. *See* TEX. REV. CIV. STAT. ANN. art 5069-1.01 (Vernon 1987 and Vernon Supp. 1998); *see also* Alamo Lumber v. Gold, 661 S.W.2d 926, 926 (Tex. 1984) (holding that a lender charged a borrower a usurious rate of interest on a loan by including interest owed by borrower's son to lender); Holley v. Watts, 629 S.W.2d 694, 695 (Tex. 1982); Moore v. Lidell, Sapp, Zivley, Hill & Laboon, 850 S.W.2d 291, 292 (Tex. App.—Austin 1993, writ denied) (establishing that usury statutes are penal in nature and narrowly construed); Rinyu v. Teal, 593 S.W.2d 759, 760 (Tex. Civ. App.—Houston [14th Dist] 1979, writ ref'd n.r.e.); Terry W. Conner, W. Alan Wright, & Scott Gordon Night, *Alamo Lumber & Texas Usury Law: Playing With Fire in the Usury Forest*, 22 ST. MARY'S L.J. 829, 840 (1991) (discussing the Texas Supreme Court's ruling in *Alamo Lumber* and the problems which arise under Texas usury law).

194. *See* Southwestern Inv. Co. v. Mannix, 557 S.W.2d 755, 756 (Tex. 1977); Pearcy Marine, Inc. v. Acadian Offshore Services, Inc., 842 F. Supp. 192, 194 (S.D. Tex. 1993) (stating that Texas usury statutes are designed to curb abusive credit practices by limiting interest rates to those which legislature considers fair, and not to thwart ability of debtors to negotiate early discharge of their debt); Southwestern Inv. Co. v. Mannix, 557 S.W.2d 755, 761 (Tex. 1977) (recognizing that Texas usury statutes are designed to prevent abusive credit practices and deceptive trade practices).

195. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1987). Article 5059-1.02 provides in pertinent part, "All contracts for usury are contrary to public policy and shall be subject to the appropriate penalties prescribed in Article 1.06 of this Subtitle." *Id.*

196. *See* Southwest Livestock & Trucking Co. Inc. v. Ramon, 169 F.3d 317, 320 (5th Cir. 1999).

197. Texas only allows a lender to charge a borrower a maximum of twenty-four percent (24%) interest. *See* TEX. REV. CIV. STAT. ANN. art. 5069-1.04(b) (1).

198. *See Ramon*, 169 F.3d at 320.

199. Memorandum and recommendation of the United States Magistrate Judge, Southwest Livestock & Trucking Co. Inc., No. SA-94-CA-1082, at 9 n.25 (W.D. Tex. Nov. 8, 1996) (citing Ackermann v. Levine, 788 F.2d 840, 841 (2d Cir. 1986).

United States Magistrate stated that Ramon charged Southwest Livestock an unconscionable rate of interest that threatened "the security of Texas citizens in their private property, and is clearly contrary to the statutorily articulated public policy" of Texas.[200]

On March 24, 1999, the United States Court of Appeals for the Fifth Circuit issued an opinion in *Southwest Livestock & Trucking Co. Inc. v. Ramon*.[201] The court held that the district court erred in refusing to recognize the Mexican judgment.[202] In its opinion, the court focused upon the purpose of the Texas Recognition Act. Specifically, the "Act" permits a district court to disregard a foreign country judgment only if the *cause of action* underlying the judgment is repugnant to Texas public policy.[203] In *Ramon*, the Fifth Circuit found that "the Mexican judgment was based on an action for collection of a promissory note," a cause of action which was "not repugnant to Texas public policy".[204] The court noted, "[u]nder the Texas Recognition Act, it is irrelevant that the Mexican judgment itself contravened Texas's public policy against usury."[205]

With regard to Southwest Livestock's argument on Ramon's violation of Texas usury law, the court found that Texas usury laws "protect unsophisticated borrowers from unscrupulous lenders".[206] Here, "both parties fully appreciated the nature of the loan transaction and their respective contractual obligations."[207] Finally, as a procedural matter, the court rejected Southwest Livestock's claim of improper service finding that Ramon complied with Article 13 of the Inter-American Convention on Letters Rogatory in serving Southwest Livestock through consular channels.[208] Although the court vacated the district court's summary judgment in favor of Southwest Livestock and remanded the case back to the district

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200. *Id.* at 10.

201. 169 F.3d 317 (5th Cir. 1999).

202. *See id.* at 321.

203. *See id.*

204. *Id.*

205. *Id.*

206. *Id.* at 323.

207. Southwest Livestock & Trucking Co. Inc. v. Ramon, 169 F.3d 317, 323 (5th Cir. 1999). The court noted "[t]his case, however, does not involve the victimizing of a naïve consumer. Southwest Livestock is managed by sophisticated and knowledgeable people with experience in business. Additionally, the evidence in the record does not suggest that Ramon misled or deceived Southwest Livestock. Southwest Livestock and Ramon negotiated the loan in good faith and at arms length." *Id.*

208. *See id.* at 323 n.5.

court, the court seemed to send a very strong signal that foreign judgments be afforded proper recognition by Texas courts. On remand the district court granted summary judgment in favor of Ramon and denied Southwest Livestock's motion for summary judgment.[209]

C. Turner Entertainment Co. v. DeGeto Film: The Eleventh Circuit's Extensive Reliance on Comity and Public Policy in Foreign Judgment Recognition

The use of international comity is substantially similar in Texas as it is on a national level. *Turner Entertainment Co. v. DeGeto Film,*[210] a recent case from the Eleventh Circuit, demonstrates this similarity. Although many modern cases illustrate the importance of comity in the international arena, the Eleventh Circuit used comity as a pivotal factor in its decision to defer to a foreign judgment.[211]

Turner involved a contractual dispute between German public broadcasters and an American broadcasting company.[212] The German broadcasting companies paid Turner Broadcasting to release Turner's films to licensed territories.[213] The contract provided for concurrent jurisdiction in Frankfurt, Germany and Atlanta, Georgia in the event of legal disputes.[214] Fearing broadcast reception outside the licensed territory, Turner prohibited broadcast by DBS satellite, the standard method to broadcast via satellite.[215] Turner later learned of the German companies' use of an ASTRA IB satellite, a satellite capable of encompassing five times the size of the licensed

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209. Southwest Livestock & Trucking Co. Inc. v. Ramon, No. SA-94-CA-1082-OG (W.D. Texas Sept. 23, 1999) (order granting summart judgement for Ramon). Currently, Southwest Livestock has filed notice of appeal in the Fifth Circuit.

210. 25 F.3d 1512, 1514 (11th Cir. 1994).

211. *See id.* at 1518-21. The *Turner* court held that the factors of international comity, fairness to litigants and judicial efficiency, required the court to defer to the prior German judgment. *See id.* at 1523. *See* White, *supra* note 83, at 766-67 (recognizing three concerns of international comity which the *Turner* court considered: 1)respect for foreign sovereigns; 2) fairness for litigants; and 3) judicial efficiency).

212. *See Turner*, 25 F.3d at 1514. In the statement of facts, the *Turner* court acknowledged that after the enactment of the agreement, a contractual dispute erupted because of rapid advances in geopolitics and television technology. *See id.*

213. *See id.* The licensed territory covered under the contract included the German Democratic Republic, the Federal Republic of Germany, German-speaking Switzerland, Austria, South Tyrol, Liechtenstein and Luxembourg. *See id.*

214. *See id.* at 1515.

215. *See id.* at 1515.

territory.[216] When Turner attempted to prohibit the use of the new satellite under the terms of the contract, parallel litigation erupted simultaneously in both Germany and the United States.[217]

The German court held that under the agreement, the German broadcasters did not have the absolute right to broadcast the licensed programs via the ASTRA IB satellite.[218] Nevertheless, the court reasoned that the contract failed to provide for the new ASTRA technology; therefore, German broadcasters were permitted to broadcast outside the licensed territory provided Turner received a higher fee.[219] Both parties appealed the judgment to the German appellate courts.[220]

Consequently, the Eleventh Circuit faced the difficult decision of whether to permit the Turner litigation in United States courts while a foreign judgment on the merits and a pending appeal already existed in Germany.[221] The Eleventh Circuit abstained from litigation, issuing a stay pending the conclusion of the parallel German litigation at the appellate level.[222] The court also noted that following the conclusion of the German litigation, either party could seek enforcement of the foreign judgment in the U.S. court.[223]

The Eleventh Circuit relied on international comity, equity for litigants, and judicial efficiency in deferring to the German litigation.[224] Expressing particular concern for international comity, the court examined whether the foreign judgment was rendered by fraud, whether the judgment came from a court of civilized jurisprudence, and whether the judgment violated United States public policy.[225]

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216. *See id.* at 1516.

217. *See id.*

218. *See id.* at 1517.

219. *See id.*

220. *See id.* at 1517.

221. *See id.* at 1518.

222. *See id.* at 1523.

223. *See id.*

224. *See id.* at 1518.

225. *See Turner*, 25 F.3d at 1519. *See also* Hilton v. Guyot, 159 U.S. 113, 206 (1895) (recognizing comity concerns of fraud, competency of rendering court, and American public policy); Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (acknowledging three comity concerns addressed in *Hilton*); RESTATEMENT (SECOND) CONFLICT OF LAWS § 117, cmt. c (1969) (emphasizing comity concerns defined in *Hilton*).

The court's comity analysis turned exclusively on the last factor.[226] Turner argued that the German judgment violated Georgia public policy because it abrogated the company's freedom of contract.[227] The court held that in order to find that the German judgment violated Georgia public policy, it had to first find the foreign judgment repugnant to the fundamental principles of decency and justice.[228]

The court expressly rejected Turner's public policy argument, holding that the German judgment violated neither American nor Georgian public policy.[229] In addition to considering public policy, the court found the relative interests of Germany and America relevant to the issue of international comity.[230] Determining whether the contract allowed for the broadcast via the ASTRA IB satellite required knowledge of European laws governing broadcasting technology and markets.[231] Further, the contract provided for performance in Germany, not Georgia. After balancing the relative interests, the court determined that the cause of action should commence in Germany rather than in the United States.[232]

In summing up its decision to issue a stay until the German proceedings ruled on the appeal, the court emphatically held once a judgment on the merits is reached in one of the cases, as in the German forum in this case, failure to defer to the judgment would have serious implications for the concerns of international comity. For example, the prospect of "dueling courts," conflicting judgments, and attempts to enforce conflicting judgments raise major concerns of international comity.[233]

For the cross-border practitioner, these holdings illuminate two important concepts of the public policy exception. First, as the *Gillum* court acknowledged, a Texas court must determine whether the cause of action, not the foreign judgment itself, violates public policy.[234] In addition to the sparse Texas case law in this area, practitioners should consider the causes of action in which courts of

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226. *See* Turner Entertainment Co. v. DeGeto Film, 25 F.3d 1512, 1520-21 (11th Cir. 1994).

227. *See id.*

228. *See id.* at 1519.

229. *See id.* at 1520.

230. *See id.*

231. *See id.* at 1521.

232. *See id.*

233. *Id.*

234. *See* Norkam Lodge Co. v. Gillum, 587 F. Supp. 1457, 1461 (N.D. Tex. 1984).

other jurisdictions utilized as well as rejected under the public policy exception. Nevertheless, according to *Gillum*, it would seem that the cause of action in *Ramon*, the collection of a debt on a pagare, or promissory note, does not itself contravene Texas public policy. Yet, in direct contrast to *Gillum*, the *Ramon* district court held that by applying a Mexican interest rate, the Mexican judgment itself violated Texas public policy.

For cross-border practitioners, the disparity between *Gillum* and *Ramon* presents an unanswered question as to whether Texas courts look to the foreign judgment itself or the underlying cause of action for public policy violations. Second, practitioners should argue that a balancing test much like that used in *Turner* applies also in Texas. Practitioners must argue that the foreign jurisdiction rendered judgment on the merits. The practitioner must show that there is no fraud, denial of due process, or prejudice, and that this consideration outweighs the inefficient alternative of inconsistent dueling courts.[235] Further, practitioners should argue that the prospect of becoming a "dueling court" threatens the relationship with Mexico which the *Spann* court fought avidly to safeguard.[236]

VI. APPLYING FULL FAITH AND CREDIT TO FOREIGN JUDGMENTS

The practice of extending full faith and credit to cross border judgments serves the dual purpose of protecting the Texas-Mexico relationship and provides another basis for *res judicata*. Courts involved in parallel domestic litigation often avoid the problem of inconsistent judgments by utilizing the Full Faith and Credit Clause. Article IV Section 1 of the United States Constitution provides, "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State."[237] The Full Faith and Credit Clause requires that a sister state award conclusive effect to the judgment of another state.[238] Interpreting this provision,

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235. *See* Turner Entertainment Co. v. DeGeto Film, 25 F.3d 1512, 1520 (11th Cir. 1994).

236. Compania Mexicana Radiodifusora Franteriza v. Spann, 41 F. Supp. 907, 909 (N.D. Tex. 1941) (emphasizing the friendly relationship between Texas and Mexico); *see also* Beckham, *supra* note 22, at 17-18 (noting that the *Ramon* decision will not foster reciprocal relations from Mexican courts).

237. U.S. CONST. art. IV, § 1.

238. *See* U.S. CONST. art. IV, § 1; *see also* Yarborough v. Yarborough, 290 U.S. 202 (1933) (recognizing that full faith and credit applies to judgments rendered by sister states); Fauntleroy v. Lum, 210 U.S. 230, 233 (1908) (holding that sister states must afford the same effect to a judgment rendered by another sister state under the Full Faith and Credit Clause); Bard v. Myers, 849 S.W.2d 791, 792 (Tex. 1992) (extending full faith and credit to Vermont

the court in *Tri-Steel Structures v. Hackman*, recognized, "[a] final judgment of a sister state must be given the same force and effect it would be entitled to in the state in which it was rendered."[239]

In contrast, the Full Faith and Credit Clause does not extend to foreign judgments.[240] In *Aetna Life Insur. Co. v. Tremblay*, the United States Supreme Court expressly held that the Full Faith and Credit Clause did not apply to foreign judgments.[241] Similarly, the Fourth Circuit in *S.A. Andes v. Versant Corp.*, held that the Full Faith and Credit Clause is inapplicable to foreign judgments.[242]

Despite conflicting case law and a void in constitutional authority, state and federal courts nevertheless afford foreign country judgments the same full faith and credit as afforded to a sister state judgment.[243] For example, in *Johnston v. Compagnie Generale Transatlantique*, the court held that the former French judgment was entitled to full faith and credit.[244] The controversy in *Johnston* arose from the wrongful delivery of goods by *Transatlantique*, a French corporation. Johnston, the New York corporation to whom the goods were to be delivered, sued *Transatlantique* in France. Following a French judgment in favor of *Transatlantique*, Johnston filed suit in New York.[245] *Transatlantique*

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receivership); Harrah's Club v. Mijalis, 557 So. 2d 1142, 1146-47 (La. App. 1990) (awarding full faith and credit to Nevada judgment notwithstanding that the cause of action was invalid under Louisiana law).

239. 884 S.W.2d 391, 393 (Tex. App.—Fort Worth 1994, writ denied).

240. *See* Spann v. Compania Mexicana Radiodifusora Franteriza, S.A., 131 F.2d 609, 610 (5th Cir. 1942) ("[T]he modern tendency in this country is to recognize foreign judgments in personam as conclusive, where they are rendered on the merits, in foreign courts having jurisdiction of the parties. Of course, such a judgment does not come clothed with full faith and credit.") (internal quotations omitted). *See also* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 443 (3d Cir. 1971) (acknowledging that foreign judgments are subject to comity not full faith and credit); Adler, *supra* note 34, at 83 (indicating that "the Full Faith and Credit Clause, does not, per se, apply to judgments rendered in foreign countries").

241. Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912).

242. Andes v. Versant Corp., 878 F.2d 147, 149 (4th Cir. 1989).

243. *See* Gull v. Constam, 105 F. Supp. 107, 108 (D. Colo. 1952) (recognizing that absent fraud or lack of jurisdiction, American courts award full faith and credit and conclusive effect to foreign country judgments). *See also* Compania Mexicana Rediodifusora Franteriza v. Spann, 41 F. Supp. 907, 909 (N.D. Tex. 1941) (recognizing Mexican judgment and affording it conclusive effect despite absence of constitutional authority for full faith and credit); Coulborn v. Joseph, 25 S.E.2d 576, 581 (Ga. 1943) (affording full faith and credit and conclusive effect to foreign judgment); Coudenhove-Kalergi v. Dieterle, 36 N.Y.S.2d 313, 315 (1942) (recognizing that German arbitration award was entitled to full faith and credit); 164 East Seventy-Second Street Corp. v. Ismay, 151 P.2d 29, 30 (Cal. App. 1944) (granting full faith and credit effect to English judgment).

244. 152 N.E. 121 (N.Y. App. Div. 1926).

245. *See id.* at 122.

argued that the French judgment commanded full faith and credit in the American court, and the New York district court agreed.[246] The *Johnston* court aptly stated that when the whole of the facts appear to have been inquired into by the French courts, judicially, honestly, and with full jurisdiction and with the intention to arrive at the right conclusion, and when they have heard the facts and come to a conclusion, it should no longer be open to the party invoking the foreign court against a resident of France to ask the American court to sit as a court of appeal from that which gave the judgment.[247]

In Texas, the chief case awarding full faith and credit to a foreign judgment is *Spann*.[248] The Fifth Circuit cited to the decision in *Milliken v. Meyer* which recognized that although foreign judgments are not cloaked with full faith and credit under the Constitution, "the modern tendency in this country is to recognize foreign judgments in personam as conclusive, where they are rendered on the merits, in foreign courts having jurisdiction of the parties."[249]

Thus, cross-border practitioners may argue that the foreign judgment is entitled to full faith and credit despite a lack of Constitutional support. Although courts frequently rely on international comity as a means of affording a foreign judgment full faith and credit, many states have enacted statutory laws which govern the issue.[250] In Texas, practitioners may rely on the Uniform Foreign Country Money-Judgment Recognition Act ("the Act"), which provides full faith and credit to foreign judgments.

A. The Uniform Foreign Money-Judgment Recognition Act

In 1989, seventeen states codified the Act to provide some guidance for federal courts faced with foreign judgment issues and to foster reciprocal treatment of United States judgments in foreign

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246. *See id.* at 124. The *Johnston* court based its decision to award full faith and credit to the French judgment on the basis of international comity. *See id.* at 123. Further, the *Johnston* court rejected the requirement of reciprocity as a prerequisite to foreign judgment recognition. *See id.*

247. *Id.* at 123.

248. *See* Compania Mexicana Rediodifusora Franteriza v. Spann, 41 F. Supp. 907, 909 (N.D. Tex. 1941); *see also* TEX. CIV. PRAC & REM. CODE § 36.002(a) (2) (providing for the enforcement of a foreign country judgment "that is in favor of the defendant on the merits of the cause of action and is final and conclusive where rendered, even though an appeal is pending or the judgment is subject to appeal").

249. *Spann*, 41 F. Supp. at 909 (quoting Milliken v. Meyer, 311 U.S. 457 (1940)).

250. *See* Adler, *supra* note 34, at 85.

countries.[251] Since 1994, seven more states have adopted the Act.[252] In order for a foreign judgment to receive domestic recognition, states adopting the Act require that the foreign court: 1) impartially adjudicate the case; 2)establish personal and subject matter jurisdiction; and 3)provide the defendant fair notice and opportunity to defend the suit.[253] Additionally, the Act provides that if a litigant procured the foreign judgment via fraud or if the foreign judgment is repugnant to American public policy a domestic court may refuse recognition.[254] The public policy exception to foreign judgment recognition will not be re-visited here, as it is substantially similar to the public policy exception addressed in the international comity discussion. Under the terms of the Act, a foreign judgment which satisfies all of the Act's provisions, is entitled to full faith and credit like that of a sister state judgment.[255]

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251. *See* Uniform Foreign Money-Judgments Recognition Act § 1-9, 13 U.L.A. 261, 265 (1986) (providing that a foreign judgment receives the same force and effect of full faith and credit as the judgment of a sister state); Adler, *supra* note 34, at 85 (stating that the eighteen states responded to the "federal statutory vacuum" on the issue of foreign judgment recognition by adopting the Uniform Foreign Money-Judgments Recognition Act). The eighteen member states are: Alaska, California, Colorado, Connecticut, Georgia, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Texas, and Washington.

252. *See* LAWRENCE W. NEWMAN & DAVID ZASLOWSKY, LITIGATING INTERNATIONAL COMMERCIAL DISPUTES 381 (West 1996) (noting that at the end of 1994, Florida, Idaho, New Mexico, North Carolina, Pennsylvania, and Virginia adopted the Act).

253. Uniform Foreign Money-Judgments Recognition Act § 4 (b) 2-3, 13 U.L.A. 261, 265 (1986).

254. Uniform Foreign Money-Judgments Recognition Act § 4(b)2-3, 13 U.L.A. 261, 265 (1986); *see also* Bank of Nova Scotia v. Tschabold Equipment, Ltd., 754 P.2d 1290, 1292 (Wash. Ct. App. 1988) (recognizing Canadian judgment absent showing of fraud); McCord v. JetSpray Int'l Corp., 874 F. Supp. 436, 437 (D. Mass. 1994) (enforcing Belgian judgment under the Act because minimial disparity between Belgian and Massachusetts law did not offend Massachusetts public policy); Porisini v. Petricca, 456 N.Y.S.2d 888, 889 (N.Y. App. Div. 1982) (discussing exception for fraud under the Act); Pittman, *supra* note 32, at 972.

255. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 36.004 (Vernon 1986) (providing that a foreign judgment which meets the other requirements of the Act codified in Texas, "is enforceable in the same manner as a judgment of a sister state that is entitled to full faith and credit"); Don Docksteader Motors, Ltd. v. Patal Enters., 794 S.W.2d 760, 761 (Tex. 1990) (holding that the Act allows a foreign judgment to be enforced in the same manner as a sister state judgment).

B. The Texas Reciprocity Requirement Contained in the Uniform Foreign Country Money-Judgment Recognition Act

As with Massachusetts and Georgia,[256] Texas diverges from the standard requirements codified under the Act by including reciprocity as an additional element to foreign judgment recognition.[257] Texas codified the reciprocity requirement in Section 36.005(7) of the Texas Civil Practices and Remedies Code. Even prior to the adoption of the Act, Texas required reciprocity as a condition precedent to foreign judgment recognition.[258] Reciprocity addresses whether the foreign court that had entered the judgment would have recognized and enforced a similar judgment if it had been entered by an American court. Failing to meet the reciprocity requirement qualifies a foreign judgment for non-recognition in Texas under the statute.[259]

The seminal case in Texas which deals with the Texas reciprocity requirement under the Act is *Banque Libanaise Pour Le Commerce v. Khreich*.[260] *Khreich* involved a French bank which operated out of Abu Dhabi, one of the seven entities of the United Arab Emirates.[261] The bank sued Khreich, a Texas resident, in Texas federal court when he failed to pay the amount on an overdraft agreement made payable in Abu Dhabi.[262] *Khreich* argued usury and sham transaction as

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256. *See* GA. CODE ANN. § 9-12-114(10) (1982); MASS. GEN. LAWS ANN. ch. 235, § 23A (1990); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(7) (West 1997); Adler, *supra* note 34, at 87.

257. *See* Hilton v. Guyot, 159 U.S. 113, 228 (1895) (holding that the United States refused to recognize a French judgment because a United States judgment would not receive conclusive effect in France); Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1003-06 (5th Cir. 1990) (refusing to recognize judgment from Abu Dhabi court where a Texas judgment would not be given reciprocal recognition in the Abu Dhabi court). *See also* Mitchell, *supra* note 32, at 58 (noting that five states including Texas require reciprocity as a prerequisite to enforcing the Uniform Money-Judgments Recognition Act).

258. *See* Royal Bank of Canada v. Trentham Corp., 665 F.2d 515, 517-18 (5th Cir. 1981) (holding that prior to the enactment of the Uniform Foreign Country Money-Judgment Recognition Act, the precondition of reciprocity was required for the recognition and enforcement of foreign judgments).

259. As grounds for nonrecognition, "a foreign country judgment need not be recognized if: it is established that 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.'" TEX. CIV. PRAC. & REM. CODE § 36.005 (b) (7) (West 1997).

260. 915 F.2d 1000 (5th Cir. 1990).

261. *See id.* at 1001.

262. *See id.*

affirmative defenses to the Texas suit.[263] Khreich simultaneously filed a suit against the Bank in Abu Dhabi courts.[264]

The Abu Dhabi court reached a judgment first and held for the Bank.[265] Consequently, the Bank filed a motion for summary judgment in the parallel Texas suit asserting that the Abu Dhabi judgment mandated *res judicata* effect to the Texas suit.[266] The district court refused to recognize the Abu Dhabi judgment on non-reciprocity and procedural grounds.

The Fifth Circuit affirmed the district court's holding on two grounds. First, Abu Dhabi law lacked a reciprocity provision for Texas judgments. Second, the Bank failed to show that the Abu Dhabi court rendered a judgment consistent with due process.[267]

At the outset, the Fifth Circuit noted that if the foreign judgment met all of the statutory elements of the Act in Texas,[268] the judgment must receive full faith and credit.[269] The court further established an abuse of discretion standard of review for a trial court's

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263. *See id.*

264. *See id.* at 1002.

265. *See id.* at 1003.

266. *See id.*

267. *See id.*

268. The Fifth Circuit reaffirmed the three statutory requirements of grounds for non-recognition which reads as follows:

> A foreign country judgment is not conclusive if: 1) the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; 2) the foreign country court did not have personal jurisdiction over the defendant; or 3) the foreign country court did not have jurisdiction over the subject matter.

Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1004 n.2 (5th Cir. 1990) (quoting TEX. CIV. PRAC. & REM. CODE § 36.005 (a) (West 1997). In addition, the court set out the seven requirements which would permit a court to refuse to recognize a judgment if any of the seven requirements were missing. *See id.* at 1004 n.3. The statute provides:

> A foreign country judgment need not be recognized if: (1) the defendant in the proceedings in the foreign country did not receive notice of the proceedings in sufficient time to defend; (2) the judgment was obtained by fraud; (3) the cause of action on which the judgment is based is repugnant to the public policy of this state; (4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign country court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; (6) in the case of jurisdiction based only on personal service, the foreign country court was a seriously inconvenient forum for the trial of the action; or (7) it is established that 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."

Id. at 1004 n.3 (quoting TEX. CIV. PRAC. & REM. CODE § 36.005 (b) (West 1997)).

269. *See* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1004 (5th Cir. 1990).

determination of whether a foreign judgment satisfies the requirements of the Act.[270]

During its discussion of reciprocity, the Fifth Circuit stressed that reciprocity was an essential element to recognition under the Act in Texas.[271] Further, the court noted that non-reciprocity must be pled as an affirmative defense.[272] Thus, in *Khreich*, the defendant (Khreich) in the Texas suit had the burden of proving that the Abu Dhabi judgment lacked reciprocity for similar Texas and other state judgments.[273] Khreich satisfied the burden by introducing expert testimony of an American attorney who practiced in Abu Dhabi and who was unaware of any reciprocal enforcement of U.S. judgments in Abu Dhabi.[274]

Numerous courts have followed the *Khreich* interpretation of the reciprocity requirement in the Uniform Act. For example, in Texas, the court in *Dart v. Balaam*, addressed whether the trial court erred in recognition of an Australian foreign money judgment.[275] The *Dart* court began its analysis by recognizing that *Khreich* set out the requirement of reciprocity to the Texas recognition of foreign judgments.[276] Relying on *Khreich*, the court noted that the party who seeks to negate recognition bears the burden of showing lack of reciprocity. Because the party who sought to negate recognition was unable to satisfy the burden of non-reciprocity, the *Dart* court affirmed the trial court's recognition of the Australian judgment.[277] Additionally, Mexican courts adhere to the *Khreich* analysis of reciprocity.

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270. *See id.* ("[T]he Texas Recognition Act clearly gives judges discretion in deciding whether to refuse to recognize foreign judgments due to lack of reciprocity, the decision not to recognize the Abu Dhabi [j]udgment can only be set aside upon a clear showing of abuse of that discretion."); *see also* Westbrook v. General Tire and Rubber Co., 754 F.2d 1233, 1241 (5th Cir. 1985) (establishing an abuse of discretion standard of review in foreign money judgment recognition suits).

271. *See Khreich*, 915 F.2d at 1004.

272. *See id.* at 1005; *see also* Don Docksteader Motors, Ltd. v. Patal Enter., 794 S.W.2d 760, 761 (Tex. 1990) (holding that non-reciprocity must be pled as an affirmative defense).

273. *See Khreich*, 915 F.2d at 1005.

274. *See id.*

275. 953 S.W.2d 478, 479 (Tex. App.--Fort Worth 1982, no writ).

276. *See id.* at 480.

277. *See id.* at 484.

C. *The Mexican Reciprocity Requirement for Texas Judgments*

Adopted by the Code of 1884, reciprocity is acknowledged by Mexico as a recognized doctrine.[278] Both the *Leyes y Codicos de Mexico* [Mexican Federal Code of Civil Procedure] and *the De la Ejecucion de las Sentencias,* [Mexican Commercial Code] contain reciprocity provisions for foreign judgment recognition.[279] Specifically, Article 604 of the Code of Civil Procedure for the State of Coahuila provides: "The judgments and other judicial resolutions passed down in foreign countries, shall be enforceable in the State that establishes the respective treaties or in its absence shall be enforceable under international reciprocity."[280]

The Act may be utilized in Texas as a means of avoiding inconsistent judgments with Mexico if the Mexican judgment complies with all the requirements and is affirmatively pled by the Mexican litigant who possesses a Mexican judgment. Nevertheless, a Texas court may still refuse to recognize the Mexican judgment on public policy grounds. The public policy exception is not, however, the sole roadblock to foreign judgment recognition. A practitioner still faces several procedural and evidentiary requirements to obtain recognition of a foreign judgment in Texas.

VII. AVOIDING PROCEDURAL AND EVIDENTIARY PITFALLS IN CROSS-BORDER LITIGATION

A. *How to Legally Bring the Judgment Across the Border*

Both Mexico and Texas are signatories to several international treaties which enable cross-border litigation to proceed efficiently and equitably.[281] When the provisions of the treaties are properly followed, a practitioner may eliminate potential problems involved

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278. *See* Compania Mexicana Rediodifusora Franteriza v. Spann, 41 F. Supp. 907, 909 (1941) (noting that "[I]n Mexico the system of reciprocity has been adopted by the code of 1884 as the governing principle").

279. C.F.P.C. arts. 569, 571, 575 (Mex.); COD.COM. art. 1347-A (Mex.).

280. C.P.C.COAHUILA art. 604 (Mex.).

281. *See* Anderson, *supra* note 30, at 1062 ("The negotiation and ratification of several international treaties promoting judicial assistance has established uniform procedures for serving legal documents, gathering evidence, and enforcing judgments, thereby creating a system devoid of the procedural mazes inherent in conflicting judicial systems."). Both Mexico and the United States are signatories to three main treaties: the Inter-American Convention on Letters Rogatory, the Additional Protocol, and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. *See id.*

in transactions with Mexico, such as service difficulties and introducing the Mexican judgment into evidence.

1. Proper Service

Perhaps most important for the cross-border practitioner is establishing that the Mexican litigation satisfied due process requirements.[282] The main United States-Mexico treaty which addresses service requirements in cross-border litigation is the Inter-American Convention on Letters Rogatory ("the Convention").[283] As a preliminary requirement, the treaty provides that each country establish an agent for service of process.[284] Article 4 provides for a more formal method of service designating the Central State authority as an acceptable agent.[285] Alternatively, Article 13 of the Convention provides an informal method designating consular or diplomatic agents as process servers.[286]

Southwest Livestock & Trucking Co. v. Ramon effectively demonstrates compliance with the Convention.[287] In the first lawsuit, filed by Ramon in Mexico, Ramon served Southwest Livestock in Del Rio, Texas via the Mexican Consul.[288] Southwest Livestock argued that service by the Mexican Consul was improper

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282. *See* Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410-11 (9th Cir. 1995) (providing that recognition may not be extended to a foreign judgment where the foreign court failed to comply with due process); Choi v. Kim, 50 F.3d 244, 250 (3d Cir. 1995) (declining to enforce Korean judgment for lack of notice).

283. *See* Inter-American Convention on Letters Rogatory, Jan. 30, 1975, 14 I.L.M. 339 [hereinafter Inter-American Convention]. *See also* Order Accepting Recommendation of Magistrate Judge, Southwest Livestock & Trucking Co. Inc. v. Ramon, No. SA-94-CA-1024 at 7 (W.D. Tex. Nov. 8, 1996) ("[T]he [Inter-American] Convention establishes a procedure which may be followed when courts of signatory countries transmit judicial documents across their borders for the purpose of obtaining some legal effect, such as service of process"); Anderson, *supra* note 30, at 1072 (discussing that in order "[t]o bridge the gap between the United States and Mexico, the Inter-American Convention on Letters Rogatory and Additional Protocol create a detailed system for effecting service of process which is acceptable to both judicial systems and satisfies their respective constitutional requirements").

284. *See* Anderson, *supra* note 30, at 1072 (noting that the Inter-American Convention requires "each member state . . . to establish a central authority to serve as receiving agent for service requests from other contracting countries").

285. *See* Inter-American Convention , *supra* note 282, at art. 4. ("Letters rogatory may be transmitted to the authority to which they are addressed by the interested parties, through judicial channels, diplomatic or consular agents, or the Central Authority of the State of origin or the State of destination, as the case may be.").

286. *See id.* at art. 13.

287. *See* Order Accepting Recommendation of Magistrate Judge, Southwest Livestock & Trucking Co. Inc. v. Ramon, No. SA-94-CA-1024, at 5 (W.D. Tex. Nov. 8, 1996) (holding that Southwest Livestock was properly served according to the terms of The Convention).

288. *See id.*

because service should have occurred through the United States Justice Department, as a designated Central Agent under the Inter-American Convention. Following the United State's Magistrate's Recommendation, the district court rejected this argument and held that according to Article 13 of The Convention, informal service through a consular or diplomatic official satisfied due process requirements.[289]

2. *Introducing the Mexican Judgment Into Evidence: The Authentication Requirement*

Under Federal Rule of Evidence 902(3) and its counterpart, the Texas Rule of Civil Evidence 902(3), a Mexican judgment may be self-authenticating if the following requirements of the rule are satisfied.[290] First, a Mexican official must certify and attest to the judgment.[291] Second, a consular agent of the United States or of Mexico, an embassy secretary or other foreign diplomat must finally certify the judgment.[292] The purpose of the final certification is "to attest to the genuineness of the signature or the document and the signer's official position, or that of another official who has previously vouched for the original signature."[293] A cross-border practitioner may dispense with the final certification requirement however, because Rule 902(3) recognizes that the judge may sua

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289. *See id.* (finding proper service upon Southwest Livestock via the Mexican consul). The United States Magistrate held that "the Mexican court had personal jurisdiction over Southwest Livestock, and consequently, lack of jurisdiction cannot be a basis for nonrecognition." Memorandum and Recommendation of the United States Magistrate Judge, Southwest Livestock & Trucking Co. Inc. v. Ramon, No. SA-94-CA-1082 at 8-9 (W.D. Tex. Sept. 30, 1996).

290. *See* FED. R. EVID. 902(3); TEX. R. CIV. EVID. 902(3). *See also* FED. R. CIV. P. 44(a) (2) (providing identical self-authentication requirements for foreign official records); Wolfe v. Wolfe, 918 S.W.2d 533, 542-43 (Tex. App.--El Paso 1996, writ denied) (acknowledging compliance with Texas authentication requirements by party introducing New Zealand opinion).

291. *See* FED. R. EVID. 902(3). This section provides in part:

> A document purporting to be executed or attested in an official capacity by a person, authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation.

Id. See also TEX. R. CIV. EVID. 902(3).

292. *See* FED. R. EVID. 902(3) and TEX. R. CIV. EVID. 902(3).

293. SHUELTER, WENDORF, & BARTON, TEXAS RULES OF EVIDENCE IX-50 (4th ed. 1995).

sponte disregard the final certification requirement, or final certification may be accomplished by treaty provisions.[294]

Specifically, the Hague Convention Abolishing the Requirement of the Legalization of Foreign Public Documents, of which Texas and Mexico are now signatories, dispenses with the 902(3) consular attestation requirement.[295] Under the Hague Convention, the authentication of foreign documents and judgments may be accomplished by certification by an apostille, a certificate which recognizes that the foreign document is authentic.[296]

Therefore, a Mexican litigant who crosses the border with a judgment in his or her favor and establishes that Mexican service comported with due process, and who follows Texas' evidentiary requirements for introducing the Mexican judgment, demonstrates good standing for judgment recognition. Nevertheless, a Texas court may still refuse to recognize the judgment on other grounds, opening the door to new procedural and evidentiary pitfalls, the first of which is choice of law.

B. The Choice of Law Problem: Whose Law Governs the Contract?

Not to be confused with whether federal or state law applies to foreign judgment recognition, the choice of law issue here centers on which country's law governs the terms of the contract.

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294. *See* FED. R. EVID. 902(3) and TEX. R. CIV. EVID. 902(3) providing:

> If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

Id. See also TEX. R. CIV. P. 902(3) additionally providing:

> The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or the convention.

Id. See Jordan-Maier v. State, 792 S.W.2d 188, 191-92 (Tex. App.--Houston [1st Dist.] 1990, pet. ref'd) (permitting admission of foreign document despite lack of final certification).

295. *See* Hague Convention Abolishing the Requirement of the Legalization of Foreign Public Documents, Oct. 5, 1961, 527 U.N.T.S. 189.

296. *See id.; see also* LAWRENCE W. NEWMAN & DAVID ZASLOWSKY, LITIGATING INTERNATIONAL COMMERCIAL DISPUTES 160 (West 1996). The work provides that:

> The authority who issues the apostille must maintain a register or card index showing the serial number of the apostille and other relevant information recorded on it. A foreign court can then check the serial number and information on the apostille with the issuing authority in order to guard against the use of fraudulent apostilles.

Id.

1. Texas Evidence Requirements

The Mexican litigant must be able to convince the Texas court that Mexican law, not Texas law, applies to the foreign contract.[297] Several evidentiary requirements must be followed in order to effectively prove up the application of Mexican law to the contract. The Texas Rules of Evidence requires that a party provide the court with notice of intent to rely upon foreign law.[298] Under Texas Rule of Evidence 203, a party must provide written notice to the court thirty days prior to trial and provide the opposing party with copies of the sources which support the application of Mexican law.[299] Second, if the materials relied on are written in Spanish, opposing counsel must be supplied with both English and Spanish text.[300] Practitioners should submit to the court testimony or affidavits of expert witnesses, preferably competent international lawyers or interpreters, to translate Mexican law and relevant documents.[301] Finally, the judge decides which law applies to the contract; therefore, practitioners should provide the court with any additional

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297. *See* Anderson, *supra* note 30, at 1094 ("In some instances, it may be appropriate and desirable to apply Mexican law to the dispute even though the litigation is being pursued in Texas.").

298. *See* TEX. R. CIV. EVID. 203 (requiring written notice for determination of foreign country law); Lawrenson v. Global Marine, Inc., 869 S.W.2d 519, 525 (Tex. App.–Texarkana 1993, writ denied) (construing requirements of TEX. R. CIV. EVID. 203); Trailways, Inc. v. Clark, 794 S.W.2d 479, 484 (Tex. App. -Corpus Christi 1990, writ denied) (recognizing that the plaintiff followed proper notice requirements of intent to invoke Mexican law by "filing more than 30 days prior to trial a letter from a Mexican attorney explaining the provisions of Mexican law relating to wrongful death damages, together with copies of the Mexican law and certified translations"). *Cf.* FED. R. CIV. P. 44.1 (requiring written notice of intent to use foreign law).

299. *See* TEX. R. CIV. EVID. 203.

300. *See id.*

301. *See id.; see also* Volkswagen, A.G. v. Valdez, 909 S.W.2d 900, 902 (Tex. 1995) (accepting validity of uncontroverted opinions from foreign law experts); Dankowski v. Dankowski, 922 S.W.2d 298, 303 (Tex. App.—Fort Worth 1996, no writ) (considering foreign attorney affidavit in determining foreign law); Gardner v. Best Western Int'l Inc., 929 S.W.2d 474, 476-79 (Tex. App.—Texarkana 1996, writ denied) (admitting affidavits from foreign attorneys to aid in foreign law determination); Anderson, *supra* note 30, at 1109 providing:

> As a practical matter, proof of the Mexican law probably requires the retention of an expert to provide an affidavit or live testimony regarding the application of the particular code provisions by Mexican courts in similar situations. Possible sources for expert witnesses include law professors specializing in Mexican law or well-respected Mexican attorneys or judges.

Id. at 1109. *Cf.* FED. R. CIV. P. 44.1 (permitting the court to "consider any relevant material or source, including testimony" in foreign law determination); United States v. Jurado-Rodriguez, 907 F. Supp. 568, 574 (E.D.N.Y. 1995) (providing an expert witness to interpret foreign law, consistent with FED. R. CIV. P. 44.1).

sources, such as treatises, testimony, briefs, and affidavits to aid the court in making its choice of law determination.[302]

Ossorio v. Leon provides a good example of how to effectively plead Mexican law in Texas state court.[303] *Ossorio* involved a Mexican couple who deposited funds in a Texas bank. The account provided sole ownership transfer to Ossorio's wife upon his death.[304] Following his death, Ossorio's children from a previous marriage argued that under Texas descent and distribution laws, a portion of the funds belonged to them.[305] In contrast, the wife argued that Mexican law controlled, awarding her the entirety of the funds.[306] The trial court ruled that Texas law applied. However, the appellate court reversed finding that Mexican law governed the choice of law dispute. Pivotal in the court's analysis was the appellant wife's compliance with Rule 203 of the Texas Rules of Evidence at the trial court level.[307] The court found that the appellant satisfied the evidentiary requirements of Rule 203 and granted summary judgment in the appellant's favor.[308]

Unlike the appellant in *Ossorio*, many international litigants are not apprised of the evidence requirements for pleading foreign law in Texas courts. For example, the Fifth Circuit in *Khreich* refused to recognize an Abu Dhabi judgment where the successful foreign

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302. *See* TEX. R. CIV. EVID. 203 providing:

> The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

Id. Cf. FED. R. CIV. P. 44.1 ("The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law."); Banco de Credito Indust. S.A. v. Tesoreria General de la Seguridad Soc. de Espana, 990 F.2d 827, 846 (5th Cir. 1993) (permitting the use of any relevant material in determination of foreign law despite admissibility); *see also* Anderson, *supra* note 30, at 1109 (recommending that practitioners who intend to use Mexican law in litigation provide the Texas court with useful sources or material to determine choice of law issue).

303. 705 S.W.2d 219, 221-22 (Tex. App.–San Antonio 1985, no writ).

304. *See id.* at 220–21.

305. *See id.* at 221.

306. *See id.*

307. *See id.* at 222.

308. *See id.*

litigant, the French bank, failed to effectively prove foreign law.[309] The *Khreich* court held that the burden to prove relevant foreign law rests with the party attempting to rely on it.[310] Failure to adequately plead foreign law results in the application of forum law to the choice of law issue.[311]

In *Khreich*, the bank neglected to provide the district court with expert testimony, affidavits of Abu Dhabi lawyers, or expert opinions on the relevant portions of foreign law to the parallel domestic litigation.[312] Instead of providing translations of applicable foreign law, the bank submitted secondary sources to explain basic principles of Abu Dhabi law. Reflecting on the inadequate showing of relevant foreign law in the district court, the Fifth Circuit tersely noted, "[t]he district court should not be asked to decide a case based on incomplete and frequently confusing explanations of foreign law, and the Bank should not be entitled to a second chance to meet his burden of proof on appeal."[313] The *Khreich* court concluded its opinion with an analogy - the foreign Bank failed to give the district court a "pallet, a painter with a usable brush, and paint possessing distinct visibility" of foreign law.[314] Such language leaves no room for doubt that the Fifth Circuit demands a lucid, accurate, and comprehensive account of relevant foreign law.

Conforming to the Fifth Circuit's holding in *Khreich*, other courts take a stringent approach to proving foreign law in federal court. In *Commerical Ins. Co. v. Pacific-Peru Constr. Corp.*,[315] the Ninth Circuit declined to apply foreign law where the parties failed to properly introduce it in court. In *Commercial Ins.*, a New Jersey corporation sued a Hawaiian corporation in Hawaii regarding a project to build homes in Peru.[316] Neither party notified the court of their intention

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309. *See* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1003 (5th Cir. 1990). The *Khreich* court also denied recognition on reciprocity grounds as discussed earlier in this Comment. *See Khreich*, 915 F.2d at 1005–06.

310. *See id.* ("It was the Bank's burden to . . . paint the district court a clear portrait of the relevant Abu Dhabi law."); *see also* Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464, 468 n.5 (5th Cir. 1966) (discussing that party invoking foreign law bears the burden of proof).

311. *See Khreich*, 915 F.2d at 1006 ("The law clearly states that absent sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the district court should apply the law of the forum." (citing *Symonette*, 365 F.2d at 468 n.5)).

312. *See id.* at 1006 (noting that the Bank filed extensive translations of Abu Dhabi law only after an appeal to the Fifth Circuit was filed).

313. *Id.* at 1007.

314. *Id.*

315. 558 F.2d. 948, 952 (9th Cir. 1977).

316. *See id.*

to invoke Peruvian law.[317] As a result, the Ninth Circuit applied Hawaiian law to the dispute despite the equally applicable Peruvian law.[318]

Frustrating not only to foreign litigants whose judgments are refused abroad, the inequitable results which ensue from ill-pled foreign law also frustrate the judicial resources of the court.[319] For example, in *Skandia Am. Reins. Co. v. Seguros La Republica*,[320] the court reprimanded a Mexican litigant's counsel for his failure to adequately prove Mexican law in the federal court and upheld an arbitration award against the Mexican litigant. The judge in *Seguros* commented to counsel that "I have absolutely no idea why this contract is invalid or against Mexican public policy. You give me a Mexican complaint in a foreign language, you give me absolutely no explanation by competent authorities explaining to me what's at issue."[321]

The lesson from *Khreich* and similar failed attempts at proving relevant foreign law, is that disregard for the rules of evidence can lead to non-recognition or enforcement of a judgment or an entire dismissal of the suit. To avoid potentially inequitable results, practitioners should strictly adhere to the provisions of Texas Rule 203 or the Federal Rule counterpart 44.1; specifically, the notice requirement, the translation requirement, and the supplementation of extensive material explaining relevant foreign law.[322] In addition to meeting evidentiary requirements, a Mexican litigant should argue that Mexico retains the most significant relationship to the terms of the contract, therefore, Mexican law should apply.

2. *The Most Significant Relationship Test*

The Texas Supreme Court has recognized the most significant relationship test, promulgated in the SECOND RESTATEMENT OF CONFLICT OF LAWS Section 188, when settling choice of law

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317. *See id.*

318. *See id; see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (1971) (noting that "where either no information, or else insufficient information has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law . . ." and "[W]hen both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum").

319. *See* Teitz, *supra* note 14, at 30-31 (arguing that the *Khreich* appeal to the Fifth Circuit resulted in "yet another waste of judicial resources and time" due in part to poor lawyering).

320. 1996 WL 622559, at * 1 (S.D.N.Y. Sept. 20, 1996).

321. *Id.*

322. *See* FED. R. CIV P. 44.1.

disputes.[323] Section 188 provides that absent a statute or choice of law provision, the law of the state with the most significant relationship to the disputed issue will be applied.[324]

In 1984, the Texas Supreme Court set out the most significant relationship test in *Duncan v. Cessna Aircraft Co.*[325] Although *Duncan* involved a tort action where a widow brought a wrongful death action against an airplane manufacturer, the Texas Supreme Court in *DeSantis v. Wackenhut Corp.*, indicated that the application of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS most significant relationship test defined in *Duncan* also applies to contractual disputes.[326]

In *Duncan*, the Texas Supreme Court faced a conflict of law question in deciding whether to apply New Mexico or Texas law to a signed release form.[327] The court held that "in all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue."[328] Rejecting any precise methodology, the court acknowledged that "the number of contacts with a particular state is not determinative. Some contacts are more important than others because they implicate state policies underlying the particular substantive issue. Consequently, selection of the applicable law depends on the qualitative nature of the

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323. *See* Minnesota Mining & Mfg. Co. v. Nishika Ltd., 953 S.W.2d 733, 735 (Tex. 1997) (noting Texas' adherence to the Restatement (Second) of Conflict of Laws most significant relationship approach to choice of law conflicts); Maxus Exploration Co. v. Moran Bros., 817 S.W.2d 50, 53 (Tex. 1991) (recognizing that the court adopts the Restatement (Second) approach to determine choice of law in contractual disputes).

324. *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 188 (1971); *see also* Anderson, *supra* note 30, at 1106 (emphasizing that the Second Restatement allows the law of the state with the most significant relationship to govern choice of law disputes in both tort and contract).

325. 665 S.W.2d 414, 417 (Tex. 1984).

326. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677-78 (Tex. 1990); *see also* Minnesota Mining & Mfg. Co. v. Nishika Ltd. 953 S.W.2d 753, 755 (Tex. 1997) (recognizing that when the contract does not stipulate the law to be applied in the event of a dispute, the general rule of section 188 of the Restatement controls the analysis).

327. *See* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 417 (Tex. 1984) (discussing the issue of "whether Texas or New Mexico law controls the construction of a release executed by Duncan in favor of the owner of the airplane, Air Plains West, Inc."). Cessna argued that New Mexico law applied to the release form because New Mexico courts "would construe the Duncan release to bar Duncan's cause of action against Cessna for damages arising out of the plane crash." *Id.* at 419. In contrast, Duncan argued that irrespective of choice of law, "the general language in the release did not discharge Cessna." *Id.*

328. *Id.* at 421.

particular contacts."[329] Applying this standard to the facts of *Duncan*, the court determined that Texas had the most significant relationship to the release.[330] Specifically, the court noted that Texas retained a significant interest to: 1) encourage settlements through eliminating the unity of release rule; 2) afford full compensation to injured Texas residents; 3) discourage the tortfeasor to delay out of timely settlement negotiations; and 4) protect the rights of Texas claimants who inadvertently waive their rights via release forms.[331] The RESTATEMENT (SECOND) CONFLICT OF LAWS adds several factors to the *Duncan* most significant relationship test to determine choice of law: 1) the place of contracting; 2) the place of negotiation of the contract; 3) the place of performance; 4) the location of the subject matter of the contract; and 5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.[332] While courts recognize these factors, no stringent formula exists for determining the most significant contact.[333] Rather, the trial judge must exercise discretion in balancing competing contacts on a case by case basis.[334]

Consistent with *Duncan*, the Texas Supreme court in *DeSantis v. Wackenhut Corp.*[335] utilized the most significant relationship test of the Second Restatement to determine choice of law in a contractual dispute.[336] The *DeSantis* court held that section 188 of the Second Restatement provides the general rule for choice of law analysis.[337] The Texas Supreme Court affirmed its position a year later in *Maxus*

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329. *Id.*

330. *See id.* at 421-22. The court held that New Mexico retained no governmental interest in the dispute resolution because Cessna was a Kansas corporation. The New Mexico forum simply served as the injury location. The court noted that neither the defendant nor the decedent were a New Mexico resident. *See id.* In contrast the court held that Texas had "direct and important interests in the effect given to the Duncan release." *Id.* at 422.

331. *Id.*

332. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971); *see also* ROGER C. CRAMTON, ET AL., CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 116-17 (5th ed. 1993).

333. *See* Gutierrez v. Collins, 584 S.W.2d 312, 319 (Tex. 1979) (noting that most significant relationship test be conducted in terms of qualitative not quantitative contact).

334. *See id.* (noting that the trial judge retains wide latitude in weighing conflicting state interests).

335. 793 S.W.2d 670, 677-78 (Tex. 1990).

336. *See id. See also* Minnesota Mining and Mfg. Co. v. Nishika Ltd., 953 S.W.2d 733, 735 (Tex. 1990) (noting that section 188 of the Second Restatement controls in the absence of choice of law stipulations (citing *DeSantis*, 793 S.W.2d at 679)).

337. *See DeSantis*, 793 S.W.2d at 677-78.

Exploration Co. v. Moran Bros.,[338] holding that the most significant relationship test controls contractual choice of law disputes.[339] Echoing dicta from these earlier decisions, the court's recent disposition in *Minnesota Mining*, emphasizes the adoption of the most significant relationship test in contractual choice of law questions in Texas.[340] *Minnesota Mining*, a breach of warranty case, involved multiple contacts between Minnesota, Nevada, Oklahoma, Georgia, Pennsylvania, Texas, and Italy.[341] Applying the factors of the Second Restatement, the court ultimately ruled that Minnesota had the most significant relationship to the parties and the transaction and applied Minnesota law to the case.[342] Additionally, the court noted that for purposes of the most significant relationship test, state contacts must be analyzed according to their quality, not number.[343]

For the cross-border practitioner, the most significant relationship test provides a persuasive option for convincing a court in Texas to apply Mexican law to a contract which is silent on the choice of law. The judge will conduct the analysis and ultimately determine which country has the most significant relationship to the contract;[344] therefore, it is vital for practitioners to provide ample factual support for each element of the test. Practitioners should be prepared to demonstrate to the Texas court that the place of contracting, negotiation, performance, subject matter, incorporation or domicile of the parties, existed primarily in Mexico, and that the quality of these contacts indicates that Mexican law applies.[345]

VIII. A CONSTITUTIONAL CONSIDERATION

Lacking a cohesive approach to the foreign judgment recognition and enforcement, states will continue to adhere to individual

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338. 817 S.W.2d 50 (Tex. 1991).

339. *See id.* at 53.

340. 953 S.W.2d 733, 735 (Tex. 1997).

341. *See id.* at 735-736; *see also* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 421 (Tex. 1984).

342. *See Minnesota Mining*, 953 S.W.2d at 735-36.

343. *See id.*; *see also Duncan*, 665 S.W.2d at 421 (noting that state contacts are evaluated in terms of quality not quantity); Gutierrez v. Collins, 584 S.W.2d 312, 319 (Tex. 1979) (evaluating state contacts according to quality not mere number); *see also* Anderson, *supra* note 30, at 1108.

344. *See* FED. R. CIV. P. 44.1 (requiring court to determine choice of law as a matter of law); TEX. R. CIV. EVID. 203 (providing that the court determines choice of law).

345. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1971).

statutory construction.[346] Thus, it is feasible that fifty different statutes governing recognition could result.[347] The outcome for a foreign litigant who brings his judgment to the United States, could in effect, vary distinctly from state to state.[348] A potential constitutional consideration under the Tenth Amendment could arise from divergent state approaches to foreign judgment recognition.[349] Constitutional and congressional silence on foreign judgment recognition provides no resolution for a potential Tenth Amendment conflict.[350]

IX. CONCLUSION

Without any indication in the near future of a NAFTA revision addressing choice of law disputes between cross-border business individuals, a judgment recognition treaty, or a federal statute to solve the problem of inconsistent cross-border judgments, *res judicata* appears to be the overriding defense available to cross-border litigants to avoid inconsistent cross-border judgments. Assuming that the foreign judgment meets Texas procedure and evidence requirements, Texas courts should consider upholding the final judgment under the principals of *res judicata*, international comity, or reciprocity. If a Mexican judgment satisfies the Texas *res judicata* test, courts as a general rule should honor the efficacy of the doctrine.

In contrast to the clearly defined recognition exceptions of due process, fraud, and final judgment, the public policy exception in Texas needs refinement. Consistent with the definition under international comity and the Act in Texas, some Texas courts recognize that the exception applies only when the cause of action is

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346. *See* Adler, *supra* note 34, at 84 (stating that due to the lack of a treaty or federal statute, states are free to adopt their own approach to recognition and enforcement of foreign judgments).

347. *See id.* at 85.

348. *See id.* at 96 ("[F]oreign courts looking at our federal system, where state law controls judgment recognition and enforcement, see fifty-one different approaches to judgment recognition and enforcement. This variety makes it extremely difficult to define a homogeneous U.S. policy on recognition and enforcement."); *see generally* Kurt H. Nadelmann, *Non-Recognition of American Money Judgments Abroad and What To Do About It*, 42 IOWA L. REV. 236, 249-57 (1957) (discussing various state approaches to foreign judgment recognition and the foreign court perspective on these approaches).

349. *See* U.S. CONST. amend. X. ("[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

350. *See generally* Adler, *supra* note 34, at 86 (discussing the possibility of fifty distinct approaches to foreign judgment recognition in absence of federal treaty or statute to govern the issue).

repugnant to public policy, while at least one other court has construed the exception to apply to the foreign judgment itself. The lack of a uniform application of the public policy exception in Texas allows unsuccessful litigants in foreign courts to forum shop among different districts. Unfortunately, this type of litigative harassment is vexatious to the Texas court system by entertaining issues previously decided by the foreign court, as well as to the original plaintiff who faces inconsistent judgments.

This problem will not go away quietly. With NAFTA trade numbers rising each year, one can reasonably assume that more small business deals will be made without choice of law provisions. Surely the answer to inconsistent cross-border judgments is not that the more powerful country ought to prevail. If the problem of inconsistent cross-border judgments is not addressed, Juan and Bob will each stand on their respective borders with unenforceable judgments. Such a result promotes judicial inefficiency and anarchy.