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Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted - A Call for Revised Legislation in Florida

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RECOGNIZING AND ENFORCING FOREIGN NATION JUDGMENTS: THE UNITED STATES AND EUROPE COMPARED AND CONTRASTED—A CALL FOR REVISED LEGISLATION IN FLORIDA

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INTRODUCTION

As the level of commercial transactions between the United States and foreign nations increases, so does the level of litigation involving foreign defendants.[1] A problem arises when a successful plaintiff fails in his attempts to enforce the judgment in the country where the judgement was rendered (hereinafter F-1) because of the lack of the defendant's assets in that country. In that scenario, the plaintiff must attempt to enforce the judgment in the country where the defendant's assets are located (hereinafter F-2). What is the value of such a judgment in F-2? In other words, will F-2 treat the judgment as *res judicata*? Will F-2 ignore the judgment, or will F-2 treat the judgment as something in between?

Most often, the plaintiff must commence a new action in F-2, seeking recognition and enforcement of the F-1 judgment. Note that recognition and enforcement are not synonymous. Each depicts a unique process. If a court recognizes a judgment, this means it has found the issue to have been fairly litigated in F-1, and will not allow relitigation in F-2.[2] They will render their own judgment recognizing the foreign judgment.[3] Thus, recognition is the first step towards enforcement. Once the court in F-2 renders its own judgment recognizing the judgment of F-1, that judgment becomes enforceable through the ordinary enforcement procedures in F-2 of F-2 judgments.[4] Nevertheless, while recognition is usually a first step in the plaintiff's action in F-2, sometimes it is the ultimate goal. That is,

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1. *See generally* William C. Honey & Marc Hall, *Bases for Recognition of Foreign Nation Money Judgments in the U.S. and Need for Federal Intervention*, 16 SUFFOLK TRANSNAT'L L. J. 405 (1993) [hereinafter Honey].

2. Hilarión A. Martínez-Llanes, Note, *Foreign Nation Judgments: Recognition and Enforcement of Foreign Judgments in Florida and the Status of Florida Judgments Abroad*, 31 U. FLA. L. REV. 588, 590 (1979).

3. *Id.*

4. *Id.*

sometimes a party may seek recognition without enforcement; for example, a judgment rendered in F-1 could be presented in F-2 as a defense to an action, or the party might be simply seeking a declaratory judgment in F-2. In any event, before the party seeks recognition of the foreign judgment, he must be aware of F-2's law concerning the recognition and enforcement of foreign judgments.

There is one common denominator among nations in recognizing foreign judgments; no nation will recognize a judgment of a foreign nation if that foreign nation lacked jurisdiction to entertain the suit.[5] Some nations require a treaty or proof of reciprocity, while others have no such requirements.[6] Some nations treat default judgments as they do contested judgments, (for instance, the United States) while others enforce default judgments in limited circumstances only.[7] Finally, while many nations have entered into conventions or bilateral treaties concerning the recognition and enforcement of foreign judgments,[8] other nations, such as the United States, are not parties to any such treaties or agreements.[9]

This Article will compare and contrast the recognition and enforcement of foreign judgments[10] in the United States and in Western Europe. Part I will analyze the development and current status of the law in the United States as concerns this issue. In so doing, the Article will analyze the Uniform Foreign Money-Judgments Recognition Acts,[11] the Restatement (Third) of Foreign Relations Law of the United States (1987), and the law in Florida regarding recognition and enforcement. Part II of this article will analyze the law in Europe, and how the creation of the European Economic Community has affected the recognition and enforcement of foreign nation judgments. Both the Brussels Convention[12] and the Lugano Convention[13]

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5. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 368-69 (1993).

6. *Id.*

7. *Id.*

8. *See* discussion on Brussels and Lugano Conventions, *infra* part II.A.

9. LOWENFELD, *supra* note 5, at 368-69.

10. Note that the term foreign judgments in this article refers to money judgments except where otherwise indicated.

11. Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261 (1991), [hereinafter Uniform Act], reprinted in Appendix A.

12. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *done* Sept. 27, 1968, 1972 O.J. (L 299) 32, *reprinted in* 8 I.L.M. 229 [hereinafter Brussels Convention]. The official translation of the Convention can be found in 1978 O.J. (L 304) 26. Because the Brussels Convention has undergone various amendments, the Secretariat of the Council of the European Communities compiled a consolidated, unofficial text which can be found in 1990 O.J. (C 189) 1, *reprinted in* 29 I.L.M. 1413 [hereinafter Consolidated Text]. Excerpts of the Consolidated Text are reprinted in Appendix B.

will be discussed, as will cases from the European Court of Justice and the German courts. Finally, in Part III, recommendations are proposed to facilitate the enforcement of foreign judgments in Florida, and in the rest of the United States, and to facilitate the free movement of United States' judgments in other industrialized nations.

I. UNITED STATES

A. Hilton v. Guyot

The United States Constitution provides that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State."[14] Yet, only sister states in the United States fall within the purview of that mandate. The Constitution does not require state courts to recognize judgments obtained in foreign nations.

In *Hilton v. Guyot*,[15] the United States Supreme Court spoke on the recognition of foreign nation judgments. There, Justice Gray, writing for the Court, asserted that, although courts in the United States should generally recognize foreign judgments, if judgments of the United States are reviewable upon the merits in the rendering nation, then that nation's judgments "are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim."[16]

Recognizing that the Full Faith and Credit Clause does not apply, and that "[t]he extent to which the law of one nation . . . shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations,'" the Court held that the recognition of a foreign judgment as *res judicata* rests upon principles of reciprocity, and thus, reciprocity controls the decision to grant comity.[17] The doctrine of

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13. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 6, 1988, 1988 O.J. (L. 319) 9, *reprinted in* 28 I.L.M. 620 [hereinafter Lugano Convention].

14. U.S. Const. art. IV, § 1.

15. 159 U.S. 113 (1895).

16. *Id.* at 227. In *Hilton*, an official liquidator of a French firm successfully sued two United States citizens in France. Subsequently, the plaintiff sought to enforce the French judgment in the federal district court sitting in New York. The district court recognized the French judgment and directed a verdict in favor of the plaintiff.

17. *Id.* at 163. Justice Gray added that:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and

reciprocity provides that a foreign judgment will be entitled to conclusive effect in the United States only when the rendering nation gives conclusive effect to the judgments of the United States courts.[18] Accordingly, because French law at the time did not provide reciprocity, the Court accepted the French judgment only as *prime facie* evidence, thus allowing the defendants a second opportunity to defend on the merits.[19]

B. *Post* Hilton

Notwithstanding *Hilton v. Guyot*, the recognition and enforcement of foreign nation judgments is governed by state law, not federal law. In *Erie Railroad Co. v. Tompkins*,[20] the United States Supreme Court eliminated the existence of federal common law in exchange for a rule that federal courts sitting in diversity jurisdiction shall

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> convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 164. Justice Gray also quotes Justice Cooley, in *McEwan v. Zimmer*, 38 Mich. 765, 769 as saying "True comity is equality; we should demand nothing more, and concede nothing less." *Id.* at 214.

18. *See* Honey, *supra* note 1, at 406. The *Hilton* court concluded by stating the following:

> In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

Id. at 228. Yet, some argue, including this author, that, even if the doctrine is not aimed at retaliation, someone will ultimately suffer a loss (i.e., not having his judgment recognized) because of a judicial policy of a foreign country, which, presumably, the individual took no role in shaping.

19. *Hilton* was a five to four split on the issue of reciprocity. The dissent, led by Chief Justice Fuller, argued that public policy dictates that the doctrine of *res judicata* should apply to foreign judgments because there needs to be an end to litigation. 159 U.S. at 229 (Fuller, C.J., dissenting). Lowenfeld notes the following:

> The difference between the majority and the dissent in *Hilton* shows once more the elusive distinction between public and private law. Chief Justice Fuller does not accept treating recognition of foreign judgments as a matter of public or international law. His focus is on the common law of *res judicata* and the desirability of an end to litigation, and he regards the citizenship of the parties as immaterial. To Justice Fuller, the question is one of acquired rights, and the judgment in favor of plaintiffs is a species of property.

LOWENFELD, *supra* note 5, at 389.

Note, however, that the *Hilton* majority indicated that its holding would be limited to cases where an action is brought by a foreigner trying to enforce a foreign judgment against a United States citizen. 159 U.S. at 205.

20. 304 U.S. 64 (1938).

apply state law.[21] Further, because Congress has not enacted federal legislation in this area, even though it probably possesses the constitutional power to do so,[22] and because the United States is not a present signatory to any treaty or convention on the recognition of foreign judgments, state law continues to govern. This point was clearly espoused in *Johnston v. Compagne Generale Transatlantique*,[23] where the New York state court rejected *Hilton* and held that New York law will apply to actions brought in New York which seek recognition and enforcement of a foreign judgment.[24]

Unlike the *Hilton* court, most states have rejected the reciprocity requirement. Such a requirement is seen as unsophisticated in that the judgment holder is punished for the policy of his government (or, in the case of a United States citizen holding a foreign judgment, for the policy of a foreign government), and is also seen as contrary to the goal of foreign recognition of United States judgments. Although most states reject the reciprocity requirement,[25] courts continue to employ other restrictions as espoused in *Hilton*.[26] Most importantly, most jurisdictions, and indeed the Uniform Foreign Money-Judgments Recognition Act[27] and the Restatement (Third) of Foreign Relations Law, before recognizing a foreign judgment, will consider *inter alia* whether (1) the rendering court had jurisdiction, sometimes focusing on the minimum requirements of due process,[28]

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21. *See* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3rd Cir. 1971) (applying state law, as concerning the recognition of foreign judgments, pursuant to Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

22. "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3.

23. 152 N.E. 121 (N.Y. Ct. App. 1926).

24. The court asserted that "[a] right acquired under a foreign judgment may be established in this state without reference to the rules of evidence laid down by the courts of the United States. Comity is not a rule of law, but it is a rule of 'practice, convenience, and expediency . . .' It therefore rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment." *Id.* at 123 (quoting Brown, J., in Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900)).

25. *See infra* parts I.C., I.D. *See also* Honey, *supra* note 1, at 406-07.

26. The *Hilton* court declared that recognition of foreign money judgments will be limited to cases where:

> [T]here has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings,. . . and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment. . . .

159 U.S. at 202.

27. *See supra* note 11.

28. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (holding that interstate jurisdiction exists if (1) the defendant has sufficient "minimum contacts" with the forum and (2) if the exercise of jurisdiction will not offend traditional notions of "fair play and substantial

(2) the defendant was properly served or noticed, (3) the defendant had an opportunity for a full and fair trial, and (4) whether the judgment was procured through fraud.[29]

C. *Uniform Foreign Money-Judgments Recognition Act*

In 1962, the National Conference on Uniform State Laws promulgated the Uniform Foreign Money-Judgments Recognition Act.[30] The Uniform Act codified the principles applied by the majority of jurisdictions at the time, and was based on the need for United States courts to demonstrate, in a clear and concise manner, their receptivity to foreign judgments, thus increasing the likelihood that foreign courts would, in turn, recognize United States judgments.[31] Absent the adoption of the Uniform Act, each state will consider the recognition of a foreign judgment based on its common law. As of this writing, twenty-five states and one United States Territory have adopted the Uniform Act.[32]

The Uniform Act's most significant feature is section three, which provides as follows:

> Except as provided in section 4 [grounds for non recognition], a foreign judgment meeting the requirements of section 2 [judgment must be final and conclusive] is *conclusive* between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.[33]

Thus, the Act proceeds to treat foreign judgments on similar grounds as sister state judgments. It sets forth a rule which contrasts the one

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justice." *See* 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, n.31 (1983).

29. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3rd Cir. 1971). In *Somportex*, a British court entered a default judgment against the defendant and the plaintiff sought recognition in the United States. The United States Circuit Court determined that (1) the default judgment, which is valid in all other respects, is as conclusive as a contested judgment, (2) that the British court possessed jurisdiction by virtue of the defendant's contacts with the United Kingdom, citing Hanson v. Denckla, 357 U.S. 235, 253 (1958) and McGee v. International Life Ins. Co., 355 U.S. 220 (1957), and (3) found that there had been no fraud committed in the attainment of the British judgment.

30. *See supra* note 11.

31. *See* Prefatory Notes to the Uniform Act, 13 U.L.A. 261 (1991); Honey, *supra* note 1, at 408; LOWENFELD, *supra* note 5, at 391.

32. The twenty-six jurisdictions are as follows: Alaska, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virgin Islands, Virginia, and Washington.

33. Uniform Act, *supra* note 11, § 3 (emphasis added).

espoused in *Hilton v. Guyot.*[34] Instead of *prima facie* evidence, a judgment will be treated as *res judicata,* provided other requirements of the Act are met. Thus, the doctrine of reciprocity is abandoned.[35]

Significantly, the Uniform Act governs only final judgments which are enforceable in the rendering nation.[36] Thus, interim orders and prejudgment remedies such as garnishment and attachment fall outside the Uniform Act's scope.[37] Also, note that the Act is specifically limited to foreign money judgments, but excludes judgments for taxes,[38] fines or penalties, or judgments for support in matrimonial or family matters.[39]

1. Appeals

As mentioned above, the Uniform Act includes in its concept of final judgments those judgments which are on appeal or subject to appeal in the foreign nation.[40] Yet, consider the inequity in recognizing and enforcing a foreign judgment which is later reversed on appeal in the rendering nation. What if the plaintiff levied and sold the defendant's assets in satisfaction of the judgment? To guard against this extreme and unjust possibility, the Act provides that, if an appeal is pending or if the judgment debtor intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has concluded or until the expiration of a period of time sufficient to prosecute the appeal. Note, however, that this section is discretionary; the court need not issue a stay.[41]

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34. *See supra* notes 15-19 and accompanying text.

35. In Ingersoll Milling Machine Co. v. Granger, 631 F. Supp 314, 318 (N.D. Ill. 1986), the court illustrated how the adoption of the Uniform Act by Illinois precluded refusal to recognize a foreign judgment based on lack of reciprocity.

36. Uniform Act, *supra* note 11, § 2.

37. *Compare* Cardenas v. Solis, 570 So. 2d 996 (Fla. 3rd DCA 1990) (a Florida case decided prior to the Florida legislature's enactment of the Uniform Act in modified form).

> [A]s a general rule, only the final judgments of courts of a foreign country are subject to recognition and enforcement in this country, provided certain jurisdictional and due process standards are observed by the foreign court; non-final or interlocutory orders of foreign courts, however, are generally not entitled to such recognition or enforcement.

Id. at 998. Nevertheless, the court enforced a Guatemalan temporary injunction which froze half of the funds held by the defendant in a bank, stating that there is a "strong public policy in favor of enforcing . . . [interlocutory orders] which . . . (2) protect a creditor in collecting on a valid debt provided the foreign court observed basic due process standards and otherwise had jurisdiction over the parties." *Id.* at 999.

38. "[T]he revenue laws themselves . . . are all *positivi juris.*" Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775).

39. Uniform Act, *supra* note 11, §§ 1-2.

40. Uniform Act, *supra* note 11, § 2.

41. Uniform Act, *supra* note 11, § 6. Even though the Act authorizes a stay in lieu of requiring one, I found no case where the court refused to grant one. In Nippon Emo-Trans Co.,

2. Mandatory Grounds for Nonrecognition

Section 4 of the Uniform Act provides nine grounds for a court to refuse recognition of a foreign judgment.[42] The first three grounds are mandatory in that, if the court finds that one of those grounds applies, it cannot recognize the foreign judgment as conclusive. The three grounds are as follows: (1) if the judgment was rendered in violation of due process; (2) if the foreign court did not have personal jurisdiction over the defendant;[43] or (3) if the foreign court did not have jurisdiction over the subject matter.[44]

Due Process

Many defendants seeking avoidance of the foreign judgment, when brought into a United States court for enforcement proceedings, argue that the judgment should not be recognized because they were not afforded due process in the foreign proceedings. Indeed, the essence of this argument was lodged by the defendants in *Hilton v. Guyot*, even before promulgation of the Uniform Act, and, although the *Hilton* Court denied conclusive effect, it did so on grounds of reciprocity, not due process or fundamental fairness.[45]

Ingersoll Milling Machine Co. v. Granger[46] illustrates the due process argument under the Uniform Act. In that case, a party sought recognition of a judgment issued by a Belgium court as *res judicata* of the issues in the action pending in a federal district court.[47] The opposing party argued that the Belgium court erroneously applied Belgium law and denied a fair opportunity to present its claims,

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Ltd. v. Emo-Trans, Inc., 744 F. Supp. 1215 (E.D. N.Y. 1990), there was a pending appeal in the rendering court. The enforcing court, in New York, did not grant a stay, but, in that case, the relief sought in New York was an attachment, not a final judgment.

Even without the benefit of the Uniform Act, courts have issued stays when an appeal is pending in the foreign nation. Hunt v. BP Exploration Co. (LIBYA) Ltd., 492 F. Supp. 885 (N.D. Tex. 1980) (Texas court granting a stay even before the enactment of the Uniform Act in Texas).

Interestingly, the Connecticut legislature was not content to grant their courts discretion on this issue. Instead, the Connecticut act excludes judgments on appeal or subject to appeal from its definition of a final judgment, and the Connecticut counterpart to section 6 of the Uniform Act declares that "[i]f the judgment debtor shows the court that an appeal from the foreign judgment is pending or will be taken . . . the court *shall* stay enforcement of the foreign judgment until the appeal is concluded . . . ." Conn. Gen. Stat. § 50a-36 (emphasis added).

42. Uniform Act, *supra* note 11, § 4.

43. Personal Jurisdiction is defined in section five of the Uniform Act. *See* Uniform Act, *supra* note 11, § 5.

44. In the New York version of the Uniform Act, this subsection concerning subject matter jurisdiction appears as a discretionary ground for non-recognition. N.Y. Civ. Prac. L. & R. § 5304(b)(1).

45. 159 U.S. 113 (1895).

46. 631 F. Supp. 314 (N.D. Ill. 1986).

47. *Id.* at 316.

including denial of the right to cross-examine witnesses, and thus, denied due process.[48] The argument did not convince the federal court. Instead, the court declared that it had been shown nothing to indicate that the foreign system was unfair and that, because no witnesses had been presented in the foreign proceeding, the party opposing enforcement could not point to the lack of cross-examination as a violation of due process.[49] In sum, the court declined to find a violation of due process based on unfounded suspicions of bias by the Belgium court.[50] *Ingersoll* is but one example of the unwillingness by American courts to declare that a foreign court's system violates basic notions of due process under American jurisprudence.[51]

Personal Jurisdiction

Another favored defense is that F-1 lacked jurisdiction over the defendant in the original action. Accordingly, a consideration of what constitutes personal jurisdiction is appropriate.

Section 5 of the Uniform Act provides the bases for personal jurisdiction, and provides that courts shall not refuse recognition for lack of jurisdiction if (1) the defendant was personally served in the foreign nation, (2) the defendant voluntarily appeared in the foreign nation, other than for purposes of protecting property seized, or threatened to be seized, or for contesting the jurisdiction of the court, (3) prior to commencement of the foreign action, the defendant agreed to submit to the jurisdiction of the foreign court, i.e. forum selection clauses, (4) the defendant was domiciled in the foreign nation at the commencement of the foreign action, or, in the case of a corporate defendant, was incorporated or had acquired corporate status in that nation, (5) the defendant had an office in the foreign nation and the cause of action arose from acts by the defendant committed in that office, and (6) the defendant operated a motor vehicle or aircraft in that nation, and the cause of action arose from that operation.[52] Additionally, the Uniform Act provides that a domestic court may recognize other bases of jurisdiction.

In short, personal jurisdiction over the defendant by the foreign court depends upon the amount of contact by the defendant in the foreign nation. All of the jurisdictional bases of section 5 involve

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48. *Id.* at 317.
49. *Id.*
50. *Id.*
51. *See, e.g.*, Ma v. Continental Bank N.A., 905 F.2d 1073 (7th Cir. 1990) (due process as it relates to notice).
52. Uniform Act, *supra* note 11, § 5.

either consent or substantial conduct or activity by the defendant in that nation.[53]

The second basis deserves special discussion. Suppose a United States citizen appears in France to contest the assertion of jurisdiction by a French court over him. Is the citizen's appearance voluntary, thus creating jurisdiction? Or is the concept of a "special appearance" recognized? Section 5 of the Uniform Act specifies that there is personal jurisdiction if the defendant voluntarily appeared, except "for the purpose . . . of contesting the jurisdiction of the court over him."[54] Historically, if a defendant appeared in a United States court to protest jurisdiction, the court would secure jurisdiction even if it did not possess it before the appearance.[55] Nevertheless, the Uniform Act, along with modern case law, rejects such an outcome.[56]

In *Nippon Emo-Trans Co., Ltd. v. Emo-Trans, Inc.*,[57] the plaintiff, a Japanese corporation, sued the defendant, a New York corporation, in Japan. The defendant appeared to contest jurisdiction and, when it lost that argument, it proceeded to defend on the merits.[58] The Japanese court subsequently issued a judgment in favor of the plaintiffs, and the defendant followed with an appeal, contesting, among other things, the jurisdiction of the Japanese court.[59]

While the appeal was pending in Japan, the plaintiff sought an attachment of the defendant's property through the federal court sitting in New York.[60] New York had already adopted the Uniform Act.[61] In opposition to attachment, the defendant argued that, because it preserved its jurisdictional objection in Japan, it did not "voluntarily appear" within the meaning of the Uniform Act, that no other bases for jurisdiction applied, and that the Japanese court's stated bases for jurisdiction were not warranted under the Uniform Act.[62] The court rejected these arguments and rejected the defendant's contention that Japanese law applies as to the definition of a "voluntary appearance."[63] The court noted that the Uniform Act

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53. *See* Honey, *supra* note 1, at 410.

54. Uniform Act, *supra* note 11, § 5(a)(2).

55. York v. Texas, 137 U.S. 15 (1890).

56. Nippon Emo-Trans Co., Ltd. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1220-22 (E.D. N.Y. 1990) (holding that an appearance solely to contest jurisdiction is an exception, under the Uniform Act, to the voluntary appearance jurisdictional hook). *See* LOWENFELD, *supra* note 5, at 414.

57. 744 F. Supp. 1215 (E.D. N.Y. 1990).

58. *Id.* at 1218.

59. *Id.*

60. *See supra* notes 40, 41 and accompanying text.

61. *See supra* note 44.

62. *Id.* at 1218-19.

63. *Id.* at 1220.

provides an exception to the voluntary appearance basis for jurisdiction, stating that "*any* appearance in which a defendant merely challenges the jurisdiction of the foreign court should qualify under the exception found in [section 5(a)(2)], regardless of the basis on which the foreign court upholds its jurisdiction."[64] Thus, for personal jurisdiction to exist in such a circumstance, there must be an independent basis for jurisdiction.[65] The court also noted, however, that the defendant had contested the merits, thus appearing voluntarily as envisioned under the Uniform Act.[66] In any event, the court concluded that the defendant had sufficient contacts with Japan so that, even had it not contested the merits, the Japanese court would have had common law jurisdiction as judged by both the standards of New York law and the United States Constitution.[67]

Finally, note that section 5 of the Uniform Act is that it favors forum selection clauses.[68] If the defendant agreed to submit to the jurisdiction of F-1, he cannot later challenge the exercise of jurisdiction.

3. *Discretionary Grounds for Nonrecognition*

In contrast to the first three grounds, the last six provide for discretionary nonrecognition of a foreign judgment as conclusive if (1) the defendant did not receive notice of the foreign proceedings in sufficient time to enable him to defend, (2) the judgment was obtained by fraud, (3) the action upon which the judgment is based

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64. *Id.*

65. In Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931), the defendant made a "special appearance" for purposes of contesting jurisdiction. The United States Supreme Court, in the context of a sister state judgment, held that a determination by the rendering court that it had jurisdiction, after contest, was conclusive. "Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." 283 U.S. at 525.

66. *See* Nippon Emo-Trans, *supra* note 56, at 1222-25. The court assured that:

> If a defendant genuinely has no significant contacts with a particular forum, then it can challenge jurisdiction there and, if unsuccessful at that stage, safely default on the merits; presumably, the judgment will be meaningless in the foreign country, since the defendant has no assets there, and such a judgment will not be enforced in New York.

Id. at 1225.

In Henry v. Geoprosco International Ltd., [1976] Q.B. 726 (C.A.), the British court found that, in addition to appearing in a foreign court for purposes of contesting jurisdiction, the defendant moved that court for a stay of the proceedings by reason of an arbitration clause in the contract at issue. Thus, held the court, because the defendant moved for stay in addition to contesting jurisdiction, the defendant voluntarily submitted to the jurisdiction of the foreign court.

67. *Id.* at 1231.

68. Uniform Act, *supra* note 11, § 5(a)(3).

violates public policy, (4) the judgment conflicts with another final judgment, (5) the foreign proceeding violated an agreement between the parties to settle the dispute outside the foreign court, or (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum.

As regards some of these six grounds, litigation has been plentiful. First, we consider notice.

Notice

In *Gondre v. Silberstein*,[69] a French court entered a judgment of guilt on a criminal charge, holding the defendant in default due to his failure to appear. The court sentenced the defendant to prison and ordered him to pay civil damages.[70] Subsequently, the defendant filed an "opposition" to the entry of default, pursuant to the French Code of Criminal Procedure,[71] but, because the defendant did not submit to arrest as required by the Code, the opposition was declared void.[72] The plaintiff then commenced an action in New York seeking enforcement of the civil side of the judgment and moved for summary judgment. The defendant countered that he did not receive fair notice of the French proceedings, and thus, that the judgment should not be granted conclusive effect pursuant to the Uniform Act as adopted in New York.[73]

The court began its analysis by quoting language from the United States Supreme Court.

> [A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[74]

Next, the court quoted section 4(b)(1) of the Uniform Act as adopted in New York and concluded that the defendant did not receive notice.[75] Further, the court rejected the argument that notice through

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69. 744 F. Supp. 429 (E.D. N.Y. 1990).

70. *Id.* at 430. Under French law, a victim of a crime may file a civil action for money damages caused by a criminal defendant. The civil and criminal action are then joined. *Id.* at 430-31.

71. Article 489(1) of the French Code of Criminal Procedure provides that a default judgment "becomes void in all its provisions if the accused submits an opposition to its execution." *See Gondre*, 744 F. Supp. at 431.

72. 744 F. Supp. at 431.

73. *Id.*

74. *Id.* (quoting from Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950)).

75. *See* N.Y. Civ. Prac. L. & R. § 5304(b)(2) (McKinney 1978). New York adopted 4(b)(1) of the Uniform Act in almost identical form.

diplomatic channels, as attempted in this case, was sufficient under French law. The court concluded that a description of the notice attempt was lacking in the case, and thus, that the plaintiff had not sufficiently shown notice so as to resolve the material issues of fact.[76] Additionally, the court declared that, although an "opposition" to a default judgment cures any defects in notice under French law, the manner in which the judgment was rendered raised due process concerns, and that "[i]ndeed, where the defect in notice offends traditional due process standards, '[t]he fact that the defendant was served in accordance with the foreign rules, or that the judgment is valid in the first state, will not necessarily save the judgment.'"[77]

Finally, note that the *Gondre* court fuses the notice requirements with due process. This illustrates the element of overlap between the requirements of the Uniform Act. Overlap can also be seen with respect to fraud. One can argue that a judgment obtained in fraud violates standards of due process envisioned in the Constitution. Thus, a court can couch its decision on alternative theories, which provide for mandatory nonrecognition, or one which provides for discretionary nonrecognition.

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76. 744 F. Supp at 435. The court denied the plaintiff's motion for summary judgment and added the following:

> Indeed, in the face of the defendant's sworn affidavit denying that he received the notice that would be required in an ordinary civil case, the plaintiff's inability to demonstrate the existence of a material issue of fact regarding whether proper notice was received by the defendant, would be a ground for granting summary judgment in favor of the defendant even in the absence of a formal motion. . . . This is especially true here because the original Memorandum and Order entered in this case put the plaintiff on notice of this possibility.

Id. Nevertheless, the court did not go so far as to grant summary judgment in favor of the defendant, stating that whether adequate notice was given could have been facts within the exclusive control of the defendant, and accordingly, that the plaintiff should be given an opportunity to conduct discovery.

77. *Id.* at 433 (quoting from Kulzer, *The Uniform Foreign Money-Judgments Recognition Act*, 13 N.Y. JUD. CONF. REP. 194, 213 (1968), *reprinted in* 18 BUFF. L. REV. 1, 30 (1969) (with minor editorial revision)). The *Gondre* court also cited *Somportex* as the proper standard. "The ultimate question, therefore, 'is whether a reasonable method of notification [was] employed and reasonable opportunity to be heard [was] afforded to the person affected.'" *Id.* at 434 (quoting Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 443 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972)).

As regards notice and its interplay with service, Judge Easterbrook, writing for the Seventh Circuit in Ma v. Continental Bank N.A., 905 F.2d 1073, 1076 (7th Cir. 1990), stated as follows:

> Although service of process is an ingredient of personal jurisdiction as that term often is used in the United States, not all of the technical requirements of service are sufficient grounds for a collateral attack. Service is designed to produce knowledge; although rules may and usually do require formal service in order to make very sure of knowledge, and courts may dismiss a case when proper service has not been secured, the sort of jurisdiction pertinent to a collateral attack depends on whether the plaintiff uses a method reasonably calculated to produce actual notice.

Fraud

The fraud provision of section 4(b) of the Uniform Act has also been substantially litigated. *Bank of Nova Scotia v. Tschabold Equipment Ltd.*[78] illustrates the court's willingness to reject this argument for nonrecognition. There, based on the plaintiff's sworn statement that "this action is founded on a contract executed in the Province of Alberta [Canada]," an Alberta court entered an order allowing for service on the defendant in the United States.[79] The court exercised its long arm jurisdiction pursuant to an Alberta Court Rule which allows service outside of Alberta when "the proceeding is to enforce . . . or otherwise affect a contract . . . made within Alberta."[80] Subsequently, at a hearing, counsel for plaintiffs asserted some facts concerning an indebtedness which later proved to be untrue.[81] The Alberta court ultimately entered a default judgment, and the plaintiff sought enforcement of that judgment in a Washington state court.

Before the Washington court, the defendant argued that the statements by plaintiff's counsel concerning the location of the contract's formation and the issue of indebtedness were false, and thus, that the judgment was obtained by fraud.[82] The court rejected the fraud contention on two grounds. First, the court contended that there exists different types of fraud, and that, assuming the false statement concerning indebtedness was in fact fraudulent, that is not the type of fraud envisioned by the Uniform Act because such fraud involves the merits of the case which could have been litigated.[83] Second, the court found no fraud in the false statement because they were not satisfied that the plaintiff deliberately made a false statement to the court.[84]

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78. 754 P.2d 1290 (Wash. Ct. App.).

79. *Id.* at 1292.

80. Alberta Court Rule 30(f)(i).

81. 754 P.2d at 1293.

82. *Id.* at 1294. On appeal, the defendant ultimately abandoned the argument that the statement concerning formation of the contract constituted fraud, conceding that it waived that argument by later appearing before the Alberta court and submitting to jurisdiction.

83. *Id.* at 1294-95.

84. *Id. See also* Fiske 1989, Emery & Associates v. Ajello, 577 A.2d 1139 (Conn. Super. Ct. 1989) (stating that "[f]raud also must be proven by clear, precise and unequivocal evidence ....").

Another section 4(b) defense typically seen is that the judgment is in violation of an agreement to settle the dispute somewhere other than the rendering court. *See* Uniform Act, *supra* note 11, § 4(b)(5). This defense was attempted, but also rejected, in Ingersoll Milling Machine v. Granger, 631 F. Supp. 314 (N.D. Ill. 1986). The defendant argued *inter alia* that a contract between the parties provided that the relationship was to be governed by Illinois law. *Id.* at 318. Nevertheless, the court quickly labeled this provision a choice of law clause as opposed to a forum selection clause, and thus, rejected the argument. *Id. Cf.* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (stating, in context of an international arbitration clause, that "[a]

4. Reciprocity within the Uniform Act

Although the essence of the Uniform Act is to eliminate the doctrine of reciprocity,[85] six states have added the requirement to their codification of the Act,[86] and thus, cause the Act to take a step backwards in purpose. Of these states, Georgia and Massachusetts require that a court consider reciprocity of the foreign nation.[87] The remaining four states which have incorporated reciprocity into their

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contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.").

In Bank of Nova Scotia v. Tschabold Equipment, 754 P.2d 1290, 1296 (Wash. App. Ct. 1988), a spin on this argument was attempted. There, the defendant seeking avoidance of a default judgment argued that they did not defend because of an agreement between themselves and a codefendant whereby the codefendant "would take care of" the Canadian case for both of them. *Id.* Thus, argued the defendant, there was an agreement to settle the dispute outside of the rendering court. Without much surprise, the court rejected this argument, stating that, while the Uniform Act does not specify, section 4(b)(5) as adopted in Washington applies only to agreements between opposing parties and not to agreements between codefendants. *Id.*

85. Uniform Act, *supra* note 11, §3.

86. Florida, § 55.605(2)(g), FLA. STAT. (Supp. 1994) (as discussed in part I.E.2 below); Georgia, Ga. Code Ann. §§ 9-12-114 (Michie 1993); Massachusetts, Mass. Gen. L. ch. 235, § 23A (West 1986); Idaho, Idaho Code § 10-1404 (1990); Ohio, Ohio Rev. Code Ann. § 2329.92(B) (Anderson 1991); and Texas, Tex. Civ. Prac. & Rem. Code Ann. § 36.005(b) (West 1986).

87. The Georgia version of the Act reads as follows: "A foreign judgment shall not be recognized if: . . . (10) The party seeking to enforce the judgment fails to demonstrate that judgments of courts of the United States and states thereof of the same type and based on substantially similar jurisdictional grounds are recognized and enforced in the courts of the foreign state." Ga. Code Ann. § 9-12-114(10) (Michie 1993). Lack of reciprocity is a mandatory ground for refusing recognition. The burden of proving reciprocity of the foreign nation is on the party seeking recognition. The Massachusetts statute reads as follows: "A foreign judgment shall not be recognized if . . . (7) judgments of this state are not recognized in the courts of the foreign state." Mass. Gen. L. ch. 235, § 23A (1986).

In Knothe v. Rose, 392 S.E.2d 570 (Ga. Ct. App. 1990), the Georgia court applied the doctrine of reciprocity, as found in the Georgia codification of the Uniform Act, but found that the foreign rendering court would recognize Georgia court judgments. Interestingly, the plaintiff brought the action to enforce a German judgment which increased the defendant's child support obligations. *Id.* at 572. The court recognized that the Uniform Act does not apply, but proceeded to apply the requirement of reciprocity as found in the Georgia statute. 392 S.E. 2d at 573. An interesting question arises: Had the Georgia statute not adopted the doctrine of reciprocity, would the court have still applied the doctrine? The answer seems to be yes. "While we fail to see the relevance of OCGA § 9-12-110 et seq. to this case, it is true that reciprocity lies at the heart of the doctrine of comity." *Id.* In any case, the outcome would not have differed because the court found reciprocity by the German courts, and thus, enforced the judgment.

As a parallel to *Knothe*, consider Hager v. Hager, 274 N.E.2d 157 (Ill. Ct. App. 1971). There, the plaintiff sought enforcement of a judgment for alimony entered by a Greek court. The Illinois statute codifying the Uniform Act, Ill. Rev. Stat. ch. 77, §§ 121-29 (1965), did not require reciprocity. The court declared the statute inapplicable because of the nature of the judgment, and held that, under common law, the doctrine of reciprocity was recognized in Illinois, and that, because the requirement of reciprocity was not met, the judgment would not be enforced. 274 N.E.2d at 157. Additionally, the court held that the Greek court lacked personal jurisdiction. *Id.* at 160. (citing Pennoyer v. Neff, 95 U.S. 714 (1877)).

codification of the Uniform Act (Florida, Idaho, Ohio, and Texas) grant their courts discretion in this area.[88]

Finally, note that nothing in the Uniform Act prevents a court from recognizing other kinds of judgments.[89] Also, note that, although twenty-five states and one territory have adopted the Uniform Act, the underlying purpose of consistency and predictability has not yet been fully achieved across the United States because twenty-five states have not adopted it. This is due, in part, to the fact that the Uniform Act simply codifies the common law. Granted, one can argue that consistency and predictability was already achieved before the Act. Nevertheless, passage of the Act will always lend more consistency and predictability. Although some states, through case law, reject the majority view and require reciprocity, some states have no clear case law on this issue. In addition, even though the Uniform Act might not change the substantive law of a state, a non-Uniform Act state is disadvantage in that its own judgments might not be recognized as freely as those of a Uniform Act state. This disadvantage arises because most other industrialized nations follow civil law and do not share the same trust of case law as do common law countries.[90]

D. The Restatements

The Restatement (Third) Foreign Relations Law of the United States and the Restatement (Second) Conflict of Laws summarize the majority position taken in the remaining twenty-five states as concerns the recognition and enforcement of foreign nation

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88. For example, the Texas statute reads as follows:

> 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 Ann. § 36.005(b) (West 1986).

In Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000 (5th Cir. 1990), a French bank sought enforcement of a judgment rendered by an Abu Dhabi court. The Texas Court of Appeals noted that, under the Texas statute, the party seeking recognition has the burden of proving reciprocity. *Id.* at 1005. The court upheld the lower court's refusal to recognize the judgment and concluded that "[s]ince the 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 Judgment can only be set aside upon a clear showing of abuse of that discretion." *Id.* at 1004.

89. Wolff v. Wolff, 389 A.2d 413 (Md. Ct. Spec. App. 1978) (holding that "the Uniform Foreign Money-Judgments Recognition Act neither provides for the recognition or enforcement of the alimony provisions of the English divorce decree, nor precludes such recognition or enforcement on a basis other than that set out in the Act.") (citation omitted).

90. *See infra* part III.

judgments.[91] This subpart of the Article will concentrate on the Restatement (Third) Foreign Relations Law.[92] Thus, the term Restatement shall refer to the Restatement (Third) Foreign Relations Law.

In general, because the Uniform Act was an attempt to codify the majority rule arising from common law, the concepts in both of the Restatements parallel those bases for recognition and nonrecognition found in the Uniform Act. The Introductory Note of the Restatement acknowledges that the United States is the most receptive country to recognition of foreign nation judgments, indicating that the principles embodied in the Full Faith and Credit Clause apply, in general, to judgments of foreign nations.

One significant difference between the Restatement and the Uniform Act is that the general principles of the Restatement applies to family law judgments. The Restatement also sets forth some particular rules for the recognition of foreign divorce, custody, and support judgments.[93]

Section 481 sets out the prevailing common and statutory law on recognition:

> (1) Except as provided in § 482, [Grounds for Nonrecognition] a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.
> (2) A judgment entitled to recognition under Subsection (1) may be enforced . . . in accordance with the procedure for enforcement of judgments applicable where enforcement is sought.[94]

Thus, the general thrust towards recognition and away from reciprocity is embodied in the Restatement, and applies to a broader array of judgments than the Uniform Act. It includes, in addition to money judgments, judgments confirming the status of persons or determining interest in property.[95]

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91. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 481-86 (1987) [hereinafter RESTATEMENT (THIRD) FOREIGN RELATIONS LAW]; RESTATEMENT (SECOND) CONFLICT OF LAWS, §§ 93-98 (1969).

92. The RESTATEMENT (SECOND) CONFLICT OF LAWS § 98 (1969) considers recognition of foreign nation judgments. The topic is discussed alongside the enforcement of sister state judgments. Section 98 states as follows: "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned."

93. RESTATEMENT (THIRD) FOREIGN RELATIONS OF LAW § 484-86 (1986).

94. RESTATEMENT (THIRD) FOREIGN RELATIONS OF LAW § 481 (1986).

95. Note that section 481 is limited to final judgments, as is the Uniform Act, but such limitation does not prohibit the enforcement of a judgment that is subject to appeal or modifi-

Similar to the Uniform Act, the Restatement sets forth several grounds for refusing recognition.[96] The first part of section 482 tracks the mandatory grounds in section 4(a) of the Uniform Act.[97] It mandates refusal of recognition if (1) the foreign judicial system did not afford due process or (2) the foreign court lacked personal jurisdiction. If the foreign court lacked subject matter jurisdiction, then there exists a discretionary ground for refusing recognition, along with five of the six discretionary grounds enumerated in section 4(b) of the Uniform Act.[98] Thus, the Restatement recognizes both mandatory and discretionary grounds for nonrecognition.

Lack of personal jurisdiction is the most common ground for refusal of recognition or enforcement of a foreign judgment.[99] Although the Restatement does not have a section enumerating the acceptable grounds for personal jurisdiction in the context of recognition of foreign judgments, the comments to section 482 provide that the general principles of jurisdiction pertaining to civil matters, as found in section 421, apply in this context as well.[100] The comments also provide some guidance concerning a foreign court's determination of personal jurisdiction where the defendant appeared solely to contest jurisdiction and failed. Comment c suggests that factual determinations supporting an assertion of jurisdiction by the foreign court will be given greater weight than legal or mixed law/fact determinations—for example, whether a nonresident corporation is present in the forum state by virtue of an "alter ego" subsidiary in that forum state.[101]

There are three more distinctions between the Uniform Act and the Restatement. First, unlike the Uniform Act, the Restatement does not provide as a ground for nonrecognition the concept of "seriously inconvenient forum" where jurisdiction is based solely on personal service. Second, where the Uniform Act specifically excludes foreign judgments for taxes and penalties, the Restatement simply states that courts are not required to recognize or enforce such judgments.[102] The comments to that section stress that "[n]o rule of United States law or of international law would be violated if a court in the United

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cation in light of changed circumstances. RESTATEMENT (THIRD) FOREIGN RELATIONS OF LAW § 481 cmt. e (1986).

96. RESTATEMENT (THIRD) FOREIGN RELATIONS OF LAW § 482 (1986).

97. Uniform Act, *supra* note 11, § 4(a).

98. RESTATEMENT (THIRD) FOREIGN RELATIONS OF LAW § 482(2) (1986); Uniform Act, *supra* note 11, § 4(b).

99. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 482 cmt. c (1986).

100. RESTATEMENTS (THIRD) FOREIGN RELATIONS LAW § 482 cmt. c (1986).

101. *Id. See* LOWENFIELD, *supra* note 5, at 414 n.5.

102. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 483 (1986).

States enforced a judgment of a foreign court for payment of taxes or comparable assessments that was otherwise consistent with the standards of §§ 481 and 482."[103] The boldness of that statement seems to ignore the revenue rule as set forth in *Holman v. Johnson*.[104] Finally, as with the Uniform Act, there is nothing to prevent a court from enforcing a foreign judgment which is not within the purview of the Restatement.

E. The Florida View

1. Case Law

In 1994, Florida enacted a modified version of the Uniform Act,[105] which statute is discussed below in part I.E.2. Prior to that statute, Florida caselaw relied on the doctrine of international comity in dealing with the recognition of a foreign judgment.[106] Many of the Florida cases on this issue concerned matrimonial or family law judgments, and thus, to a large extent, did not deal with the same types of cases covered by the Uniform Act. A review of several Florida cases predating Florida's enactment of the Uniform Act is provided for insight into the courts' historical attitudes toward foreign judgments.

Applying principles of comity, Florida courts balanced competing policy considerations.[107] Factors considered by the Florida courts included the following: (1) the interest in protecting a successful litigant from duplicative efforts or further harassment, (2) the promotion of international stability, and (3) the protection of domiciliaries against systems which fail to afford due process or fairness.[108] Florida courts also considered the existence of any elements which would support the foreign judgment if procured in the United States.[109] Such elements include the following: (1) grounds for

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103. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 483 cmt. a (1986).

104. 98 Eng. Rep. 1120 (K.B. 1775). *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

105. § 55.601-.607, FLA. STAT. (Supp. 1994).

106. *Ogden v. Ogden*, 33 So. 2d 870, 874 (Fla. 1947), *cert. denied*, 340 U.S. (1951); In re Schorr, 409 So. 2d 487, 489 (Fla. 4th DCA 1981). *See also* Martínez Llanes, *supra* note 2, at 601.

107. Martínez-Llanes, *supra* note 2, at 602. As noted by Justice Gray in *Hilton*, comity is neither a matter of absolute obligation nor a matter of mere courtesy and good will. 376 U.S. at 163-64.

108. Martínez Llanes, *supra* note 2, at 602.

109. Ogden v. Ogden, 33 So. 2d at 874 (citing Parker v. Parker, 21 So. 2d 141 (1945)); Schwartz v. Schwartz, 143 So. 2d 901, 902 (Fla. 2nd DCA 1962) (citing Pawley v. Pawley, 46 So. 2d 464 (Fla. 1950)).

bringing the action,[110] (2) personal and subject matter jurisdiction,[111] (3) opportunity for a fair trial,[112] (4) notice,[113] (5) absence of fraud,[114] and (6) finality of the foreign judgment.[115]

Whether the lack of reciprocity by a foreign court was sufficient to deny recognition of a judgment rendered by that foreign court remained an issue in Florida until the adoption of the new statute discussed below. In *Ogden v. Ogden*,[116] an English woman sought recognition and enforcement of an English decree concerning status and alimony. The court refused to recognize that judgment, stating that "the general rule is that the judgments of a foreign court . . . will be enforced only when the courts of the jurisdiction where the cause first arose would afford relief under the same circumstances to the judgments of the forum."[117] The court then determined that an English court would not have given conclusive effect to a similar Florida judgment.[118] Nevertheless, the court's refusal to recognize was based, not on the issue of reciprocity, but on due process and jurisdictional grounds.[119] Thus, because the statements concerning reciprocity was dicta, the requirement of such reciprocity remained unclear.

2. *The Uniform Act in Florida*

During the 1994 legislative session, the Florida legislature spoke on recognizing foreign judgments, and adopted a modified version of the Uniform Act. Unfortunately, however, although the original bills tracked the Uniform Act almost verbatim, the legislature saw fit to incorporate a reciprocity amendment that allows courts to refuse recognition if the rendering court would not accept a similar Florida judgment.[120] The legislature adopted the bill as amended, and, the

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110. Schwartz v. Schwartz, 143 So. 2d 901, 902 (Fla. 2nd DCA 1962). For a discussion on the requirement that a cause of action have existed in the forum where recognition is sought, see Winston Anderson, *Enforcement of Foreign Judgments Founded Upon a Cause of Action Unknown in the Forum*, 42 INT'L & COMP. L.Q. 697 (1993).

111. Pawley v. Pawley, 46 So. 2d 464, 467 (Fla. 1950); Willson v. Willson, 55 So. 2d 905 (Fla. 1951).

112. Mathor v. Lloyd's Underwriters, 174 So. 2d 71, 72 (Fla. 3rd DCA 1965).

113. *Id.*; Pawley v. Pawley, 46 So. 2d 464, 467 (Fla. 1950).

114. Parker v. Parker, 21 So. 2d 141, 142 (Fla. 1945).

115. Ogden v. Ogden, 33 So. 2d 873; *cert. denied*, 340 U.S. 866 (1947). *But see* Cardenas v. Solis, 570 So. 2d 996 (Fla. 3rd DCA 1991) (enforcing a temporary injunction).

116. 33 So. 2d 870 (Fla. 1947).

117. *Id.* at 873.

118. *Id.* at 874.

119. *Id.* at 874-76.

120. The original House version is found in CS/HB 51 (1994), the original Senate version was SB 2274 (1994). In the Senate, CS/HB was substituted for SB 2274, with the reciprocity

bill is now codified in section 52.605(2)(g), Florida Statutes (Supp. 1994). Although the Florida legislature has thus enacted a statute on this issue, and as a result has added a marginal degree of certainty as concerns recognizing foreign judgments in Florida, it has also eviscerated the essence of the Uniform Act by adding a reciprocity provision.[121]

In addition to the reciprocity provision, the new Florida statute adds a section on summary procedure. Rather than filing a complaint to seek enforcement of a foreign judgment, the judgment creditor need only file the judgment with the clerk of the court.[122] Upon such filing, notice and an opportunity to respond are provided to the judgment debtor.[123] Then, upon entry of an order recognizing the foreign judgment, that judgment becomes enforceable as any other Florida judgment.[124]

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amendment found in Enrolled HB 51, section 5, which creates section 55.605(2)(g), Florida Statutes (Supp. 1994).

121. Requiring reciprocity nullifies the benefits of the Act in that (1) there will be no uniformity or consistency among Florida and other states, (2) it will hinder the free flow of judgments, and (3) it will hinder the chances of foreign nations recognizing judgments from Florida. *See infra* part III.

122. § 55.604(1), FLA. STAT. (Supp. 1994).

123. *Id.*

124. Section 55.604, Florida Statutes (Supp. 1994), provides as follows:

> 55.604 Recognition and enforcement.—Except as provided in s. 55.605 [the counterpart to section 4 of the Uniform Act], a foreign judgment meeting the requirements of s. 55.603 [finality of judgment] is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Procedures for recognition and enforceability of a foreign judgment shall be as follows:
>
> (1) The foreign judgment shall be filed with the Clerk of the Court and recorded in the Public Records in the county or counties where enforcement is sought.
>
> (a) At the time of the recording of a foreign judgment, the judgment creditor shall make and record with the clerk of the circuit court an affidavit setting forth the name, social security number, if known, and last known post office address of the judgment debtor and the judgment creditor.
>
> (b) Promptly upon the recording of the foreign judgment and the affidavit, the clerk shall mail notice of the recording of the foreign judgment, by registered mail with return receipt requested, to the judgment debtor at the address given in the affidavit and shall make a note of the mailing in the docket. The notice shall include the name and address of the judgment creditor and of the judgment creditor's attorney, if any, in this state. In addition, the judgment creditor may mail a notice of the recording of the judgment to the judgment debtor and may record proof of mailing with the clerk. The failure of the clerk to mail notice of recording will not affect the enforcement proceedings if proof of mailing by the judgment creditor has been recorded.
>
> (2) The judgment debtor shall have 30 days after service of the notice to file a notice of objection with the Clerk of the Court specifying the grounds for nonrecognition or nonenforceability under this act.
>
> (3) Upon application of any party, and after proper notice, the Circuit Court shall have jurisdiction to conduct a hearing, determine the issues, and enter an appropriate order granting or denying recognition in accordance with the terms of this act.

Recommendations as concerns Florida law are set forth below in part III of this Article. In summary, this author recommends a revisit by the Florida legislature to adopt the Uniform Act in Florida without the reciprocity requirement, so that Florida can optimize the benefits of such an Act.

II. EUROPE

A. European Economic Community – The Brussels Convention

Article 220 of the Treaty of Rome of 1957, which established the European Economic Community, provides that "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitral awards." Thus, in 1960, pursuant to Article 220, the Committee of Experts from the six original member nations of the European Economic Community began work on a treaty.[125] After circulation of preliminary drafts, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels

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(4) If the judgment debtor fails to file a notice of objection within the required time, the Clerk of the Court shall record a certificate stating that no objection has been filed.

(5) Upon entry of an order recognizing the foreign judgment, or upon recording of the clerk's certificate set forth above, the foreign judgment shall be enforced in the same manner as the judgment of a court of this state.

(6) Once an order recognizing the foreign judgment has been entered by a court of this state, the order and a copy of the judgment may be recorded in any other county of this state without further notice or proceedings, and shall be enforceable in the same manner as the judgment of a court of this state.

125. The original member states were Belgium, West Germany, France, Italy, Luxembourg, and the Netherlands. *See* Brussels Convention, *supra* note 12. *See also* Lowenfeld, *supra* note 5, at 420-21; Robert C. Reuland, *The Recognition of Judgments in the European Economic Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559, 564 (1993).

One basic premise of the Brussels Convention is that "any State which becomes a member of the European Economic Community is required to accept the Convention as a basis for the negotiations necessary to ensure implementation of Article 220 of the Treaty of Rome." Report by Martinho de Almeida Cruz et al. on the Convention on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on Its Interpretations by the Court of Justice with the Adjustments Made to Them by the Convention on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the Adjustments Made to Them by the Convention on the Accession of the Hellenic Republic, 1990 O.J. (189) 35, 38 *reprinted in* 29 I.L.M. 1471, 1472 [hereinafter Cruz Report]. Thus, when the United Kingdom, Ireland, Denmark, Greece, Spain, and Portugal entered the European Community, they became signatories of the Brussels Convention, with several technical adjustments to accommodate the interests of the new Member States. *Id.* at 38-45; Reuland, *supra* note 125, at 567-69.

Convention) was signed in Brussels on September 27, 1968, and on February 1, 1973, the Convention entered into force among the original Member States.[126]

The essence of the Brussels Convention ensures that judgments within the "common market" of the European Economic Community maintain their worth and enforceability within that community.[127] Indeed, it affords legal certainty throughout the Community. As one author describes, "the Brussels Convention . . . does not merely simplify the 'formalities governing the mutual recognition and enforcement of judgments,' . . . [it] introduces a novel and streamlined body of laws applicable to the recognition and enforcement of judgments in Europe."[128] In exchange for an "indirect" system of enforcement as found in the precommunity era, the Brussels Convention provides for "direct" enforcement where the judgments of one Member State are *per se* enforceable in the courts of another Member State.[129]

1. Jurisdictional Concerns

A civil or commercial judgment of one Member State is conclusive in all other Member States.[130] The courts of Member States may not, except in very limited circumstances, question the jurisdiction of the rendering court.[131] Instead, if the defendant believes that the court in F-1 lacked jurisdiction, that argument must be raised in F-1. Further, if the defendant fails to appear in F-1, that court must make a determination as to its jurisdiction, and the court in F-2 will be bound by such determination.[132] Finally, if the defendant appeared and lost a jurisdictional contest, or if the defendant failed to appear in F-1, Article 27 of the Brussels Convention—grounds for non-recognition—provides no basis for a challenge of F-1's jurisdiction in

126. Brussels Convention, *supra* note 12.

127. Brussels Convention, *supra* note 12, tit. III, § 1.

128. Reuland, *supra* note 125, at 573.

129. *Id.* at 574.

130. Brussels Convention, *supra* note 12, tit. III, § 1, art. 26. One salient feature of the Convention is that it applies automatically. In other words, the courts of a Member State must apply the Brussels Convention when the judgment is within the purview of the Convention; it is irrelevant that the parties did not cite the Convention in their pleadings. *See* Report by P. Jenard on the Convention of 27 Sept. 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59) 1, 3 [hereinafter Jenard Report]; Reuland, *supra* note 125, at 576 n.79.

131. T. C. Hartley, *The Recognition of Foreign Judgments in England Under the Jurisdiction and Judgments Convention*, in Harmonisation of Private International Law by the E.E.C. 103, 103 (K. Lipstein ed. 1978).

132. Brussels Convention, *supra* note 12, tit. III, § 1, art. 28. *See also* LOWENFELD, *supra* note 5, at 426. Further, Article 28 provides that "the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction."

F-2.[133] Only when the defendant was not served with the document instituting the action will he have a jurisdictional argument in F-2.[134] Thus, many equate the Brussels Convention with the Full Faith and Credit Clause of the United States Constitution.[135]

The above-stated principles exist because the Brussels Convention assumes that F-1 will follow strict jurisdictional rules found in the Convention. As long as F-1 is trustworthy, no problems should arise.[136] Nevertheless, these strict jurisdictional rules apply only to cases where the defendant is domiciled in a Member State. If the defendant is domiciled elsewhere, F-1 is not bound to any jurisdictional rules.[137] Indeed, in that case, F-1 can assert any exorbitant ground for jurisdiction which it sees fit. Further, even if the defendant is domiciled outside the Community, F-2 cannot question the jurisdictional assertion of F-1.[138] One writer notes as follows:

> Thus it is possible that a person domiciled in a third country—say the United States—will be sued on the basis of German Article 23 or French Article 14 [exorbitant bases of jurisdiction which are not recognized under the Brussels Convention], and the resulting judgment will be enforceable in another contracting state—say the United Kingdom—where the defendant has assets.[139]

Conversely, if the defendant is from the European Economic Community, F-2 could not enforce F-1's judgment. As to this potential problem, Article 59 provides that Member States may negotiate treaties with States which are not parties to the Convention, by which treaties judgments based on exorbitant grounds of jurisdiction will not be recognized.[140]

2. *Civil and Commercial Matters*

The scope of the Brussels Convention is limited to judgments arising from civil and commercial matters.[141] Yet, the Brussels

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133. Brussels Convention, *supra* note 12, tit. III, § 1, art. 27.

134. *Id.*

135. Reuland, *supra* note 125, at 562 (citing Lee S. Bartlett, *Full Faith and Credit Comes to the Common Market: An analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INT'L & COMP. L.Q. 44 (1975); Bruce M. Landay, *Another Look at the EEC Judgments Convention: Should Outsiders be Worried?* 6 DICK. J. INT'L L. 25 (1987)).

136. Hartley, *supra* note 131, at 113.

137. *Id.*

138. Brussels Convention, *supra* note 12, arts. 3 & 4.

139. LOWENFELD, *supra* note 5, at 438.

140. Brussels Convention, *supra* note 12, art. 59.

141. *Id.* at art. 26. If the matter is not civil and commercial, the Brussels Convention does not apply, but, the member State may still recognize or enforce the judgment. Indeed, the Brussels Convention is similar to the Uniform Act and the Restatement (Third) Foreign

Convention does not define the terms civil and commercial. One commentator, T.C. Hartley, notes as follows:

> The general concept is fairly clear and well established in the legal systems of at least the Continental Member States of the Community. There is, however, no general consensus as to the detailed application of the principle and this varies from country to country. Consequently it could happen that a matter which was regarded as civil under the rules in force in Country A would not be so regarded under the rules in force in Country B. How should one decide whether a judgment relating to such a matter comes within the scope of the Convention? Should one look to the classification of the judgment-granting state or to that of the judgment-recognising state?[142]

Hartley points to a difficult problem. If the courts of the Member States are to construe the terms "civil and commercial matters," different interpretations may result and the free movement of judgments among such nations may be impaired. As a result, the essential goal of the Brussels Convention might be thwarted.[143] Therefore, a document signed by the contracting states, the protocol on the interpretation of the Convention, charges the European Court of Justice with the power to construe the meaning of the terms "civil and commercial matters," as well as all other aspects of the Brussels Convention.[144]

Relations Law in that nothing therein precludes a court from enforcing a judgment outside the scope of the Convention. Nor does it preclude the applicability of bilateral treatises predating the Convention which apply to matters outside the scope of the Convention. Brussels Convention, *supra* note 12, art. 56. *See* Reuland, *supra* note 125, at 577 n.80.

Also similar to the Uniform Act, the Brussels Convention provides for a stay in cases where an appeal from the foreign judgment is pending. *Supra* note 12, art. 30.

142. Hartley, *supra* note 131, at 106.

143. *See* Brussels Convention, *supra* note 12, pmbl.

144. In 1971, the original Member States of the European Economic Community signed a protocol granting the European Court of Justice the power to interpret the Brussels Convention. Protocol on the Interpretation by the Court of Justice of the Convention of Sept. 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, *done* June 3, 1971, 1975 O.J. (L 204) 28 [hereinafter Interpretation Protocol]. The official language version was published in 1978 O.J. (L 304) 50. The Secretariat of the Council of Europe has produced a consolidated and updated version of the Interpretation Protocol. 1990 O.J. (C 189) 25, *reprinted in* 29 I.L.M. 1439 (1990). *See* Reuland, *supra* note 125, at 565 n.18 and accompanying text.

The goal of the Interpretation Protocol is the consistent interpretation of the Brussels Convention. Under the Protocol, courts of any Member State may petition the European Court of Justice to issue an interpretive ruling on the Brussels Convention. Interestingly, the European Court of Justice is the first international court to be given jurisdiction to hear matters concerning a private international law convention. *Id.* at 566. One commentator noted that:

> This aspect must be particularly stressed because of the important role played in recent times by the European Court in promoting a more intensive integration between the member States and in asserting the primacy of European law over national laws. Therefore the Court has been given an opportunity of solving, in a

The European Court of Justice, recognizing the parade of horribles concomitant to a parochial interpretation of the Brussels Convention's scope, adopted a Community definition of "civil and commercial matters" in its *Eurocontrol* decision.[145] In that case, Eurocontrol, a public organization that provided air navigation safety services, brought suit in the Brussels *Tribunal of Commerce* against a German company, alleging an amount owing to Eurocontrol.[146] Rejecting the defendant's argument that the matter was one of public law, the Belgium court ruled for Eurocontrol and entered a judgment accordingly.[147] Subsequently, Eurocontrol sought enforcement in Germany, and the German court referred the question concerning the meaning of "civil and commercial matters" to the European Court of Justice for an interpretive ruling.[148]

The Court of Justice, after considering whether the definition should come from F-1 or from F-2, determined that it should come from neither. The court declared as follows:

> In the interpretation of the concept "civil and commercial matters" for the purposes of the application of the [Brussels] Convention . . . reference must not be made to the law of one of the States concerned but, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems.[149]

Thus, the court held that the definition of "civil and commercial matters" must be derived from independent Community standards, and must ensure uniformity in the enforcement of judgments from Member States. Accordingly, because of the public nature of Eurocontrol and because it was acting in its public capacity, the court held that the matter was one of public law rather than a civil and

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unitary European perspective, the problems of interpretation arising from the 1968 Convention.

Andrea Giardina, *The European Court and the Brussels Convention on Jurisdiction and Judgments*, 27 INT'L & COMP. L.Q. 263, 265 (1978).

The Court of Justice has not shied away from its power to interpret the Convention. Indeed, it has interpreted ambiguous terms with the vision of adopting a Community definition instead of the definition favored by a particular Member State. *See e.g.*, Case 29/76, LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol, 1976 E.C.R. 1541, 1552, 1 C.M.L.R. 88, 102 (1977) (preliminary ruling requested by the Oberlandesgerichte [Court of Appeal], Dusseldorf, Germany).

145. Case 29/76, LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol, 1976 E.C.R. 1541, 1552, 1 C.M.L.R. 88, 102 (1977) (preliminary ruling requested by the Oberlandesgericht [Court of Appeal], Dusseldorf, Germany).

146. *Id.*, 1 C.M.L.R. at 91.

147. *Id.*, 1 C.M.L.R. at 89.

148. *Id.*, 1 C.M.L.R. at 90.

149. *Id.*, 1 C.M.L.R. at 102 (as quoted in Reuland, *supra* note 125, at 579).

commercial matter; therefore, it was outside the scope of the Brussels Convention.[150] Nevertheless, the importance of *Eurocontrol* was that the terms "civil and commercial matters" should be defined with a Community definition.

One unanswered question in *Eurocontrol* is whether F-2 is bound by F-1's categorization of the matter as being civil and commercial when there is no reference to the European Court of Justice. One commentator has argued that, although not expressed in the Brussels Convention, its essence suggests that, provided F-1's determination is "at least defensible and the enforcement-court has no serious reasons for doubting its correctness," such enforcement-court (F-2) should accept F-1's findings.[151] Nevertheless, when a serious question arises concerning F-1's determination, the question should be referred to the European Court of Justice for resolution based on Community standards.

3. *Grounds for Nonrecognition*

Article 27 of the Brussels Convention prescribes five grounds for nonrecognition of a Member State judgment.[152] These grounds include (1) violations of public policy, (2) insufficient service of the documents instituting the action, (3) judgments which are irreconcilable with other judgments between the same parties in F-2, (4) if F-1 decided a preliminary question concerning status or capacity of natural persons, right in property arising from matrimonial relationship, or wills or succession in a way which conflicts with the private

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150. *Id.*, 1 C.M.L.R. at 102. The court concluded that "a judgment given in an action between a public authority and a person governed by private law, in which a public authority has acted in the exercise of its powers, is excluded from the area of application of the Convention." *Id.* Reuland observes that "[t]his holding is applicable only to public entities *qua* public entities—had Eurocontrol been acting as a private entity, the Brussels Convention would have applied." Reuland, *supra* note 125, at n.98.

151. Peter Kaye, Civil Jurisdiction and Enforcement of Foreign Judgments 1347-48 (1987). *See* Reuland, *supra* note 125, at 581 n.99.

152. Additionally, Article 1 exempts four areas of law from the purview of the Brussels Convention. These areas are as follows:

> 1. The status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
> 2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
> 3. social security; and
> 4. arbitration.

Brussels Convention, *supra* note 12, at art. 1. Subsequently, an amendment to the Brussels Convention provided that it "shall not extend, in particular, to revenue, customs or administrative matters." Consolidated Text, *supra* note 12, art. 1. *Cf.* Holman v. Johnson, 98 Eng. Rep. 1120 (1775). For a complete discussion of the Brussels Convention's exclusions found in Article 1, *see* Reuland, *supra* note 125, at 581-89.

international law of F-2, unless the same result would have been reached under the private international law of F-2, and (5) if the judgment is irreconcilable with an earlier judgment of a non-Member State involving the same cause of action, provided the earlier judgment is recognizable in F-2.[153]

Public Policy

The first ground for nonrecognition, public policy, provides an escape clause, giving courts the freedom to take care of problems which might arise in exceptional cases. The Committee of Experts, however, expressed that this exception was applicable to extraordinary cases only.[154] In keeping with this expression, this "release" is narrowed by Article 28 which precludes courts from applying the public policy exception to matters of jurisdiction.[155] Another area where the exception might be inapplicable concerns cases where F-1 applied a system of law other than that which would have been applied in F-2.[156] Arguably, the fourth ground for nonrecognition in Article 27 is the sole ground concerning such cases, because to hold otherwise would undermine the essence of the Brussels Convention.[157]

Defective Service

The defective service ground for nonrecognition precludes recognition of default judgments in violation of certain procedural safeguards.[158] Thus, if the defendant appears, he loses his protection. In sum, the provision requires two elements: The defendant must be duly served and that service must be timely.[159] In other words, F-2 must consider (1) whether the defendant was properly served under the laws of F-1 and (2) whether the service was in sufficient time to defend. Of course, F-1 must also consider those questions, but, unlike jurisdiction, F-2 is not bound by F-1's determination.[160]

Irreconcilable Judgments

Article 27 provides two subsections concerning irreconcilable judgments. Under article 27(3), a court may refuse recognition when

153. Brussels Convention, *supra* note 12, art. 27.
154. Jenard Report, *supra* note 130, at 44.
155. Brussels Convention, *supra* note 12, art. 28.
156. *Id.* art. 27(4); Hartley, *supra* note 131, at 114.
157. Brussels Convention, *supra* note 12, art. 26; Hartley, *supra* note 131, at 114.
158. Brussels Convention, *supra* note 12, art. 27(2); Reuland, *supra* note 125, at 592.
159. Brussels Convention, *supra* note 12, art. 27(2).
160. Hartley, *supra* note 131, at 115.

the judgment is "irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought."[161] Note that, while this exception might be categorized as falling under public policy, the Committee of Experts created a separate exception because of the "danger that the concept of public policy would be interpreted too widely."[162] One commentator has noted the following:

> In theory a conflict of judgments of this kind should be rare since it is provided in Article 21 that in cases of *lis alibi pendens* any court other than the court first seized of the claim must decline jurisdiction. However, this provision, which applies only when both courts are within a contracting state, does not apply unless the cause of action is the same in both proceedings; Article 27(3), on the other hand, does not have this limitation. Since it is possible for two judgments to be in conflict even if they do not involve the same cause of action, conflicting judgments could be given by courts in different contracting states.[163]

Thus, when such a conflict arises, the judgment in F-2 will always prevail, irrespective of which was rendered first.[164]

Article 27(5) also addresses irreconcilable judgments, providing that a judgment shall not be recognized if it is irreconcilable with an earlier judgment rendered in a non-contracting state involving the same cause of action between the same parties.[165] For this exception to apply, the earlier judgment must fulfill the requisite conditions for recognition in F-2. Article 27(5) differs in two respects from 27(3). First, the non-contracting state judgment must have been rendered before the judgment with which it conflicts and, second, the conflicting judgments must concern the same cause of action.[166]

Finally, Article 27(4) provides an exception to parallel the exclusion found in Article 1(1)[167] and Article 28 declares other certain circumstances where a court may not recognize a foreign nation judgment.[168]

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161. Brussels Convention, *supra* note 12, art. 27(3).
162. Jenard Report, *supra* note 130, at 45.
163. Hartley, *supra* note 131, at 115.
164. *Id.* at 116.
165. Brussels Convention, *supra* note 12, art. 27(5).
166. *Id.*
167. *See supra* note 153 and accompanying text.
168. Brussels Convention, *supra* note 12, art. 28. A court may not recognize a judgment which does not conform to the requirements set forth in the Convention concerning the following: (1) insurance matters; (2) consumer contracts; (3) exclusive jurisdiction; or (4) conventions with third States. *Id.*; Reuland, *supra* note 125, at 596.

4. Lugano Convention

In 1988, the members of the European Economic Community and the members of the European Free Trade Association (EFTA)[169] entered into a Convention in Lugano, Switzerland, on the issues of jurisdiction and the enforcement of judgments in civil and commercial matters.[170] This Convention is based on the Brussels Convention, and thus, shares many of the same attributes. Nevertheless, the two Conventions are district.[171] For example, the Lugano Convention's Protocol on Interpretation does not charge the European Court of Justice with jurisdiction to construe that Convention. Instead, the Lugano Convention chooses a different approach of interpretation.[172] Still, one writer concluded that "[t]he Lugano Convention therefore has the remarkable effect of establishing a basic text on jurisdiction and the recognition of foreign judgments applicable in the whole of Western Europe."[173]

B. Recognition and Enforcement Without Benefit of a Treaty

This part will focus on Germany, simply as one illustration of how a European country deals with recognition of a judgment from a nation not covered by any Treaty, such as the United States. In Germany, a party seeking enforcement of a foreign judgment must bring an action under the ordinary rules of jurisdiction.[174] Nevertheless, Article 723 of the German Code of Civil Procedure provides conclusive effect to the foreign judgment, provided the judgment is not excluded by Article 328. That Article reads as follows:

§ 328 [Recognition of Foreign Judgments]

(1) Recognition of a foreign judgment is excluded:

1. If the courts of the foreign state do not have jurisdiction according to German law;
2. If the defendant did not participate in the foreign proceeding and was not properly served with the initiating

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169. These EFTA members are Austria, Finland, Iceland, Norway, Sweden, and Switzerland.

170. Lugano Convention, *supra* note 13.

171. Reuland, *supra* note 125, at 570-71.

172. Under Protocol 2 on the Uniform Interpretation of the Lugano Convention, Conventions are to be communicated to central authorities in each signatory State, and meetings are held in which representatives of those States exchange their views on the functioning of the Lugano Convention. *See* P. Jenard & G. Moller, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters done at Lugano on 16 September 1988, 1990 O.J. (C 189) 58, 64 *reprinted in* 29 I.L.M. 1481, 1484.

173. Reuland, *supra* note 125, at 570.

174. LOWENFELD, *supra* note 5, at 440.

process, or was not served in sufficient time to enable him to defend himself;
3. If the judgment is inconsistent with a domestic judgment or with a prior foreign judgment entitled to recognition, or if the proceeding on which the judgment was based is inconsistent with a prior domestic proceeding that has become final;
4. If recognition of the judgment would lead to a result manifestly incompatible with the fundamental principles of German law, in particular if recognition would be incompatible with the Basic Laws;[175] and
5. If reciprocity is not assured.

(2) The provision of paragraph 5 does not preclude recognition of a judgment concerning a claim other than a claim related to property if there would have been no jurisdiction of a German court under German law or if the proceeding was concerned with filiation.[176]

Thus, assuming F-1 had jurisdiction, German courts will enforce the F-1 judgment, but only on the basis of reciprocity.[177] Nevertheless, German courts will deeply analyze the enforcement practices in F-1 to determine if there exists reciprocity.[178] If a state in the United States has adopted the Uniform Act or the rules set forth in the Restatements, there would presumably exist reciprocity and the German court could enforce.[179]

A recent decision by the German Federal Court of Justice ("Bundesgerichtshof" or "BGH") illustrates the public policy grounds which are often raised by defendants seeking avoidance of judgments from United States courts.[180] In that case, an American plaintiff was awarded, by a default judgment from a California state court, the sum of $750,260, $150,260 of which was for past and future medical expenses, $200,000 for anxiety, pain, and suffering, and $400,000 as punitive damages.[181] After adjustments to these figures by the German court of first instance, the BGH readjusted the figures

175. The Basic Laws include at least the federal constitution, the constitution of the individual states, and the European Convention on Human Rights. LOWENFELD, *supra* note 5, at 440.

176. Zivilprozeßordnung (ZPO), German Code of Civil Procedure, § 328.

177. § 328 (1)(5).

178. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 481 Reporters' Note 6(d).

179. *Id.*

180. Judgment of June 4, 1992, BGH Sen. Z., *reprinted in* 1992 Zeitschrift Fur Wirtschaftsrecht und Insolvenzpraxis [hereinafter ZIP] 1256 (F.R.G.).

181. John Doe v. Eckhard Scmitz, No. 168-588 (Cal. Super. Ct. Apr. 24, 1985). *See* Joachim Zekoll, 30 COLUM. J. TRANSNAT'L L. 641 (1992).

to comport with those of the California court, with the exception of the punitive damage awards.[182]

The court began its analysis by rejecting the defendant's argument that service of trial notice was technically defective. As to this, the court stressed that section 328 is limited to guarantee that an adequate opportunity to participate in the proceedings is afforded.[183] Then, as to the first two awards of damages, the court held they were enforceable even though they were extremely high according to German standards.[184] Yet, as concerns punitive damages, the court found that such an award violates German public policy.[185] Nevertheless, despite its refusal to enforce the punitive damages, the court indicated, in dicta, that such damages might have been enforceable had they served a legitimate compensatory purpose.[186] Thus, even though the court struck down the punitive damages, it showed a high level of tolerance for United States judgments which the court indicated are significantly higher than German judgments arising from similar causes of action.

III. RECOMMENDATIONS

The United States is in a unique international situation concerning the recognition and enforcement of foreign nation judgments. It is an economic superpower with many multinational corporations and an ever increasing level of trade with foreign nations. The North American Free Trade Agreement is a prime example of the United States' increasing, albeit slow, commitment to expanding the nation's economic horizons. Additionally, the trade levels of Florida continue to increase. Yet, the United States is not a signatory to any treaty concerning the recognition and enforcement of foreign judgments. Because of this, and because some countries require proof of reciprocity before enforcing a foreign judgment, holders of United States judgments may stand at an international disadvantage.

The law of the United States on the recognition and enforcement of foreign judgments is anything but organized. Because it is governed by state law, fifty different systems exist, although many

182. Judgment of June 4, 1992, BGH Sen. Z., *reprinted in* 1992 ZIP 1256, 1269 (F.R.G.).

183. *Id.* 1992 ZIP at 1261.

184. *Id.* The court also addressed the issue of wide open discovery in the United States. One writer summarizes the court's discussion as follows: "The Federal Court of Justice, recognizing the high level of tolerance accorded foreign judgments under ZPO § 328(1) No.4, as well as the longstanding requirement that German courts evaluate the foreign law as it was applied in the particular case, ruled out a blanket rejection of cases involving full-fledged discovery." Zekoll, *supra* note 181, at 648.

185. Judgment of June 4, 1992, BGH Sen. Z., *reprinted in* 1992 ZIP 1256, 1268 (F.R.G.).

186. Zekoll, *supra* note 181, at 657.

are similar. Additionally, foreigners often do not understand or trust our common law system.

Therefore, this author recommends two courses of action. First, although the Florida legislature did well in enacting the Uniform Act, the reciprocity requirement should be eliminated. The benefits of eliminating the reciprocity requirement are many. First, without the requirement, the new Florida statute would add predictability to the Florida system. Litigants would be more assured that foreign judgments would be enforced in Florida, and thus, would be more willing to litigate abroad if their chances of winning are greater by doing so. For example, if most of the evidence is in Germany and a Florida plaintiff believes that without that evidence his chances of success would be greatly decreased, that plaintiff will be more willing to litigate in Germany, where his chances of success are greater, because he will assured that a legitimate German judgment will be enforced at home.

Second, by eliminating the reciprocity requirement from the new statute, the chances of enforcement of Florida judgments abroad will increase. A clear statutory statement that foreign judgments will be recognized and enforced in Florida should appeal to foreign courts when faced with a Florida judgment. In addition, the problem of "who goes first" would be eliminated. Two nations, each with a reciprocity provision, will want the other nation to recognize their judgments first in order to be assured that reciprocity exists. By eliminating the reciprocity requirement, Florida will reduce its citizens' "who goes first" dilemma when said citizens seek enforcement of Florida judgments abroad.

Finally, elimination of the reciprocity requirement decreases forum shopping. As it now stands, a litigant who could bring a claim in either Florida or New York, everything else being equal, would chose New York because of the greater likelihood that the resulting judgment would be enforced abroad due to New York's rejection of the reciprocity doctrine. Elimination of the reciprocity requirement in the new Florida statute would help to diminish such shopping by adding uniformity.

Unfortunately, the Florida legislature accomplished only half the task. To their credit, it codified the law. Nevertheless, it came up short by including the reciprocity provision. This author recommends that, for the foregoing reasons, the Florida legislature revisit its recent attempts and amend the newly created statute to eliminate the reciprocity provision.

The second recommendation concerns Congress.[187] The federal government needs to preempt the existent state laws on this issue and pass federal legislation to bring certainty, uniformity, and an increase of foreign enforcement of all United States judgments.[188] Half the states have adopted the Uniform Act since its passage over twenty-five years ago. Nevertheless, six of those states (including Florida) have altered the essence of the Act by inserting reciprocity provisions. Thus, Congress can facilitate the movement of United States judgments and increase their value by providing uniformity. It will allow foreign nations to study United States law on the issue and assure themselves that their judgments will be enforced in this country. Finally, another recommendation to the federal government is to continue negotiating for a treaty on this subject. A palatable treaty which keeps in line with the United States' interest would be the best solution for United States litigants, albeit a difficult goal to attain.[189]

CONCLUSION

State law controls the recognition and enforcement of foreign nation judgments in the United States. To achieve this uniformity, twenty-five states have enacted the Uniform Foreign Money-Judgments Recognition Act, which provides for conclusive effect to final money-judgments from foreign nations, provided the judgment did not violate any one of nine grounds for nonrecognition. Thus, those states which have enacted the Uniform Act, with the exception of Florida, Georgia, Massachusetts, Texas, Idaho, and Ohio, who all modified the Act, reject the doctrine of reciprocity as espoused by the United States Supreme Court in *Hilton v. Guyot*.[190] Similarly, those states which have not adopted the Uniform Act but who otherwise follow the principles set forth in the Restatement (Third) Foreign Relations Law also reject the doctrine of reciprocity. They too provide conclusive effect to foreign judgments.

In contrast to the United States, the Member States of the European Economic Community enacted the Brussels Convention,

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187. Note that this author's second recommendation, if accepted and acted upon, would negate the authority of any statute adopted in Florida. Yet, the Florida legislature need not wait to see if Congress acts on the matter. The Florida legislature should act to eliminate the reciprocity requirement. Even if Congress does act, an improved Florida statute would serve to alleviate this problem in the interim.

188. Such a law should be constitutional under art. I, § 8, cl. 3.

189. For a discussion on possible treaties and conventions, *see* Gregory S. Paley, *Drafting a Multilateral International Recognition and Convention on the Enforcement of Judgments*, Wash. St. Bar News, June 1993, at 40.

190. 159 U.S. 113 (1895).

providing for conclusive effect of judgments emanating from other Member States. Similarly, those Member States entered into a subsequent Lugano Convention with the members of the European Free Trade Association. The Lugano Convention applies the basic principles of the Brussels Convention to the members of both the Community and the EFTA.

Finally, because of the reciprocity provision added to the new Florida statute, the Florida legislature needs to revisit this issue and eliminate the provision. Congress should follow by enacting federal legislation which would preempt state law. This federal legislation should also parallel the Uniform Act, and thus, completely eliminate the doctrine of reciprocity. Of course, if federal legislation is adopted, the Florida Act would become obsolete. Nevertheless, federal legislation may never come. Florida must avoid a "wait and see" attitude and, instead, provide certainty for its residents and litigants today.

APPENDIX A

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT

§ 1. [Definitions]

As used in this Act:

(1) "foreign state" means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands;

(2) "foreign judgment" means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

§ 2. [Applicability]

This act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or is subject to appeal.

§ 3. [Recognition and Enforcement]

Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

§ 4. [Grounds for Non-recognition]

(a) A foreign judgment is not conclusive if

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if

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

(2) the judgment was obtained by fraud;

(3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceedings in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

§ 5. [Personal Jurisdiction]

(a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if

(1) the defendant was served personally in the foreign state;

(2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;

(3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

(4) the defendant was domiciled in the foreign state when the proceedings were instituted or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

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

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

(b) The courts of this state may recognize other bases of jurisdiction.

§ 6. [Stay in Case of Appeal]

If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has determined or until the expiration of a period

of time sufficient to enable the defendant to prosecute the appeal.

§ 7. [Saving Clause]

This Act does not prevent the recognition of a foreign judgment in situations not covered by the Act.

§ 8. [Uniformity of Interpretation]

This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 9. [Short Title]

This Act may be cited as the Uniform Foreign Money-Judgments Recognition Act.

APPENDIX B

EUROPEAN ECONOMIC COMMUNITY CONVENTION ON JURISDICTION AND THE ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS

(90/c 189/02)

PREAMBLE

THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY,

DESIRING to implement the provisions of Article 220 of that Treaty by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals;

ANXIOUS to strengthen in the Community the legal protection of persons therein established;

CONSIDERING that it is necessary for this purpose to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements;

HAVE DECIDED to conclude this Convention . . . [and]

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE

Article 1

This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

The Convention shall not apply to:

1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
2. bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons. judicial arrangements, compositions and analogous proceedings;

3. social security;
4. arbitration.

TITLE II

JURISDICTION

Section 1

General provisions

Article 2

Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in sections 2 to 6 of this Title.

In particular the following provisions shall not be applicable as against them:

- in Belgium: Article 15 of the Civil code . . . and Article 638 of the judicial code . . . ,
- in Denmark: Article 246(2) and (3) of the law on civil procedure . . . ,
- in the Federal Republic of Germany: Article 23 of the code of civil procedure . . . ,
- in Greece, Article 40 of the code of civil procedure . . . ,
- in France: Articles 14 and 15 of the civil code . . . ,
- in Ireland: the rules which enable jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in Ireland,
- in Italy: Articles 2 and 4, Nos 1 and 2 of the code of civil procedure . . . ,
- in Luxembourg: Articles 14 and 15 of the civil code . . . ,
- in the Netherlands: Articles 126(3) and 127 of the code of civil procedure . . . ,

- in Portugal: Article 65(1)(c), Article 65(2) and Article 65A(c) of the code of civil procedure . . . and Article 11 of the code of labour procedure . . . ,
- in the United Kingdom: the rules which enable jurisdiction to be founded on:

  (a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or
  (b) the presence within the United Kingdom of property belonging to the defendant; or
  (c) the seizure by the plaintiff of property situated in the United Kingdom.

Article 4

If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State.

As against such a defendant, any person domiciled in a Contracting State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in the second paragraph of Article 3, in the same way as the nationals of that State.

. . . .

TITLE III

RECOGNITION AND ENFORCEMENT

Article 25

For the purposes of this Convention, "judgment" means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by any officer of the court.

Section 1

Recognition

Article 26

A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.

Any interested party who raises the recognition of a judgment as the principle issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Title, apply for a decision that the judgment be recognized.

If the outcome of proceedings in a court of a Contracting State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 27

A judgment shall not be recognized:

1. if such recognition is contrary to public policy in the State in which recognition is sought;
2. where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defense;
3. if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the State in which recognition is sought;
4. if the court of the State of origin, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State;
5. if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties, provided that this latter judgment fulfills the conditions necessary for its recognition in the state addressed.

Article 28

Moreover, a judgment shall not be recognized if it conflicts with the provisions of Sections 3, 4, or 5 of Title II, or in a case provided for in Article 59.

In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction.

Subject to the provisions of the first paragraph, the jurisdiction of the court of the State of origin may not be reviewed; the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction.

Article 29

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 30

A court of a Contracting State in which recognition is sought of a judgment given in another Contracting State may stay the proceedings if an ordinary appeal against the judgment has been lodged.

A court of a Contracting State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of appeal.

Section 2

Enforcement

Article 31

A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.

However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

. . . .

Article 33

The procedure for making the application shall be governed by the law of the State in which enforcement is sought.

. . . .

TITLE VII

RELATIONSHIP TO OTHER CONVENTIONS

. . . .

Article 56

The Treaty and the conventions referred to in Article 55 shall continue to have effect in relation to matters which this Convention does not apply.

They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Convention.

. . . .

Article 59

This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation

towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for an Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3.

However, a Contracting State may not assume an obligation towards a third State not to recognize a judgment given in another Contracting State by a court basing its jurisdiction on the presence within that State of property belonging to the defendant, or the seizure by the plaintiff of property situated there:

1. if the action is brought to assert or declare proprietary or possessory rights in that property, seeks to obtain authority to dispose of it, or arises from another issue relating to such property; or

2. if the property constitutes the security for a debt which is the subject-matter of the action.