Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance

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Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance

Ronald A. Brand*

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* Professor of Law, University of Pittsburgh School of Law. John Foster, John Kropf, and Pantelis Papzekos provided valuable research assistance in the preparation of this Article.
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There is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgments rendered by the courts of another nation. Very numerous decisions have been had relating to this question in the various forms in which it has arisen; but if we should undertake to learn from the opinions of the courts in these cases what principles had been decided, we should find ourselves in utter confusion.1

For many years the topic of recognition and enforcement of foreign judgments has been the scholar's delight. Students of conflict of laws, constitutional law, comparative law, international law, and civil procedure have explored its complexities and have proposed reforms. Yet, these efforts have not significantly influenced American law.2

I. INTRODUCTION

When international trade and investment increase, so does the need for satisfactory means of dispute resolution. Dispute resolution in national courts requires that litigants consider not only the likelihood of a favorable judgment but also the ability to collect on that judgment. In cases where the defendant's assets lie in another jurisdiction, collection is possible only if the second jurisdiction will recognize and enforce the first jurisdiction's judgment.3

In the international arena, enforcement of United States judgments overseas is often possible only if the United States court rendering the judgment would enforce a similar decision of the foreign enforcing court.4 This reciprocity requirement places em-

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1 Hilton v. Guyot, 159 U.S. 113, 123 (1895) (appellant's brief).
3 Discussions of transnational dispute resolution often focus on planning for disputes through the preselection of favorable forums or alternative methods of dispute settlement—particularly arbitration. Many disputes are not founded on a prenegotiated contract, however, and provide little or no opportunity for choosing other than a national judicial system for the dispute resolution process.
4 For a list of prior commentaries on the issues of recognition and enforcement of foreign judgments, see infra note 47. This Article deals only with judgments for stated
phasis on the United States law regarding recognition and enforcement. United States courts have been customarily liberal in recognizing and enforcing foreign judgments. While the law applied in such actions reflects a common core of considerations, discerning the source of the applicable law can be a confusing process. Most United States courts begin the analysis of foreign judgment enforcement cases with reference to the 1895 United States Supreme Court decision in *Hilton v. Guyot*. Results often are clouded, however, by reference to different sources of the ultimate rules to be applied, and by the problems engendered when an issue arises in federal court but, because of *Erie Railroad v. Tompkins*, requires the application of state law.

When proof of reciprocity is necessary in an overseas enforcement action, a litigant will want a judgment rendered in a United States jurisdiction that has a clear rule of its own on recognition and enforcement of foreign judgments. Under the current system, a United States litigant seeking a judgment enforceable overseas is best served by obtaining the United States judgment in one of the fifteen states that has adopted both the Uniform Enforcement of Foreign Judgments Act (Enforcement Act) and the Uniform Foreign Money-Judgments Recognition Act (Recognition Act), without adding a reciprocity requirement to the latter Act.

Other types of judgments (e.g., child support, divorce, descent) create special problems that require considerations beyond the scope of this Article. See, e.g., *Uniform Foreign Money-Judgments Recognition Act* § 1(2), 13 U.L.A. 263 (1986) [hereinafter Recognition Act] ("'[F]oreign 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."). As used in this Article, the term, "foreign judgment" means a money judgment rendered in a jurisdiction outside the United States.

5 159 U.S. 113 (1895).
6 304 U.S. 64 (1938).
8 Recognition Act, supra note 4, 13 U.L.A. at 261.
9 For foreign nation judgments, the most important uniform act is the Recognition Act. Despite the passage of over a quarter of a century since the promulgation of the Recognition Act by the National Conference of Commissioners on Uniform State Laws, this statute has not produced the type of uniformity brought about by other uniform acts. While twenty-two states have adopted the Recognition Act, five of these have included a reciprocity requirement. Of the remaining seventeen, fifteen have also enacted the Enforcement Act. The statutes of the twenty-two states which have adopted the Recognition Act are ALASKA STAT. §§ 09.30.100-180 (1983); CAL. CIV. PROC. CODE §§ 1716-1719.8 (West 1982); COLO. REV. STAT. §§ 13-62-101 to 109 (1987); CONN. GEN. STAT. ANN. §§ 52-610 to 618 (West Supp. 1990); GA. CODE ANN. §§ 9-12-110 to 117 (1982); IDAHO CODE §§ 10-1401 to 1409 (1990); ILL. ANN. STAT. ch. 110 paras. 12-618 to 626 (Smith-Hurd 1984); IOWA CODE ANN. §§ 626B.1-8 (West Supp. 1990); MD. CTS. & JUD. PROC.
FOREIGN MONEY-JUDGMENTS

A truly national approach to the recognition and enforcement of foreign money-judgments would be consistent with Congress' authority to regulate foreign commerce and the Executive's powers to negotiate in the area of foreign affairs. However, if neither Congress nor the President is ready to act, it may be possible for the courts to recognize the importance of this issue to our foreign relations, through federal common law. No matter where the change occurs, however, the resulting rule must further the goals of uniformity among states and within our federal system, and acceptance of United States judgments in foreign courts.

After reviewing the status of the law on recognition and enforcement of foreign judgments in the United States, this Article discusses prior attempts at providing uniformity and international acceptability. This Article considers "uniform" state legislation, multilateral treaties, bilateral treaties, federal legislation, federal common law, and the Federal Rules of Civil Procedure. Each has advantages and disadvantages depending on the factors considered most important in a given circumstance.

The outlook for positive change is not promising. Uniformity through state legislation has proved troublesome both in terms of the relatively small number of adopting states and the tendency to vary important terms of uniform acts. Treaties have proved difficult or impossible to negotiate. An amendment to the Federal Rules of Civil Procedure will be of limited value unless subsequently followed in all states. While federal legislation and federal com-

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12 See infra notes 192-288 and accompanying text.
mon law may represent the most likely alternatives for development of a coordinated approach to dealing with foreign judgments in United States courts, they fall short of the goal of certainty in terms of recognition of United States judgments by foreign courts.

There has been no significant effort to use federal legislation to address the recognition and enforcement of foreign judgments. Thus, litigants and federal courts are compelled to consider the development of federal common law in dealing with foreign money-judgment enforcement actions. At the same time, the standard judicial practice of deciding a case on the narrowest possible grounds also makes this course unlikely, since courts in most jurisdictions can find an acceptable rationale for enforcement of a foreign judgment. Thus, the lack of a clear connection between enforcement of foreign judgments in United States courts and enforcement of United States judgments overseas is likely to continue to frustrate attempts at uniformity in United States law.

II. THE STARTING POINT: FEDERAL COMMON LAW, HILTON V. GUYOT, AND CONSIDERATIONS OF COMITY AND RECIPROCITY

Unlike judgments rendered in sister states, foreign country judgments are not entitled to recognition under the full faith and credit clause of the United States Constitution. Neither has there been guidance in this area from Congress or the executive branch in the form of legislation or treaty. Consequently, on the federal level, the issue of enforcement of foreign judgments has been left to the common law.

Few cases in state or federal courts discuss the issue of enforcement of foreign judgments in the United States without refer-


14 It would appear that Congress has the authority to develop uniformity by national legislation governing the enforcement of foreign judgments through its powers to "regulate Commerce with foreign Nations." U.S. CONST. art. I, § 8, cl. 3. At present, the only federal statute related to the issue is 28 U.S.C. § 1696, dealing with "service in foreign and international litigation." This provision authorizes service upon a resident of a judicial district "of any document issued in connection with a proceeding in a foreign or international tribunal." It also provides that "[s]ervice pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal." Id. at § 1696(a).

15 The treaty approach was attempted, without success, with the United Kingdom in the late 1970s. See infra notes 177-84 and accompanying text.
ence to the 1895 United States Supreme Court decision in *Hilton v. Guyot*.\(^\text{16}\) Most courts begin the discussion with the elements of comity and reciprocity enunciated by Justice Gray in *Hilton*, even though they consider state law to be controlling on questions of recognition and enforcement of foreign judgments, under *Erie Railroad v. Tompkins*.\(^\text{17}\) Whether applying common or statutory law, Justice Gray’s oft-quoted definition of comity is generally repeated:

Comity, in the legal sense, is neither a matter of absolute obligation on the one hand, nor a mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.\(^\text{18}\)

In *Hilton*, this concept of comity was applied to a French plaintiff’s request to enforce a French judgment against a United States defendant. The specific requirements for granting recognition and enforcement through the comity analysis were listed by Justice Gray:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice

\(^{16}\) 159 U.S. 113 (1895).

\(^{17}\) 304 U.S. 64 (1938); see infra note 29 and accompanying text.

\(^{18}\) *Hilton*, 159 U.S. at 163-64. The “recognition” mentioned in this portion of Justice Gray’s opinion in *Hilton* is not synonymous with “recognition” of judgments themselves. Here, it means the acknowledgement that some deference is to be given in the international system to the sovereign powers of another nation. This was emphasized when Judge Aldisert further refined the *Hilton* definition of comity in Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (citations omitted):

Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation’s expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.
between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.\footnote{Hilton, 159 U.S. at 202-03.}

After an extensive analysis of the law in "civilized nations,"\footnote{Among others, the opinion discussed the laws of England, Russia, France, Holland, Belgium, the United States, Denmark, Germany, Switzerland, Poland, Romania, Bulgaria, Austria, Italy, Monaco, Spain, Portugal, Greece, Egypt, Cuba, Puerto Rico, Mexico, Peru, Chili, Brazil, Argentina, and Norway. Id. at 206-27.} the \textit{Hilton} opinion reached the conclusion that in the majority of countries, "the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed."\footnote{Id. at 227.} Finding that "the rule of reciprocity has worked itself firmly into the structure of international jurisprudence,"\footnote{Id.} the Court concluded that "judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are \textit{prima facie} evidence only of the justice of the plaintiff's claim."\footnote{"[B]y 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.}

\begin{quote}
When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is \textit{prima facie} evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.
\end{quote}
While the Hilton case was ultimately decided on the issue of reciprocity, this element of Justice Gray’s comity analysis has been either rejected or ignored by most subsequent courts. For example, in the Third Circuit case of Somportex Ltd. v. Philadelphia Chewing Gum Corp., Judge Aldisert dismissed the reciprocity argument in a footnote, determining that “[t]he doctrine has received no more than desultory acknowledgement.” However, judicial decisions, statutes, and Restatements have continued to be built upon the other requirements extracted from the comity analysis in Hilton. Determinations about recognition and enforcement have often been predicated on whether there was a “full and fair trial,” whether the rendering court had competence and jurisdiction, whether the proceedings were “regular,” whether there was due notice and a voluntary appearance, whether the system of effect to an in personam judgment rendered against an American citizen by a Canadian court sitting in Ontario, stating that “[b]y the law of England, prevailing in Canada, a judgment rendered by an American court under like circumstances would be allowed full and conclusive effect.” Id. at 242.

24 It has been argued that the reciprocity discussion in Hilton is in large part responsible for existing reciprocity requirements in foreign nations. Nadelmann, Reprisals Against American Judgments?, 65 HARV. L. REV. 1184 (1952).

25 453 F.2d 435, 440 n.8 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972). Other cases have, similarly, explicitly rejected the reciprocity doctrine. See, e.g., Toronto-Dominion Bank v. Hall, 567 F. Supp. 1009, 1012-14 (E.D. Ark. 1973) (determining that Arkansas law would not require reciprocity); Nicol v. Tanner, 256 N.W2d 796, 801 (Minn. 1976) (declining to adopt the reciprocity doctrine of Hilton and holding that reciprocity is not a prerequisite to enforcement of a foreign judgment in Minnesota); Johnston v. Compagnie General Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926) (concluding that New York courts are not bound by the decision of the Supreme Court of the United States regarding the effect to be given to the judgment of a court of France and enforcement of private rights acquired thereunder). Still others have found ways to distinguish it. See, e.g., Direction der Disconto-Gesellschaft v. United States Steel, 300 F. Supp. 741, 747 (S.D.N.Y. 1924) (limiting application of a reciprocity requirement to judgments and refusing to apply it to the seizure by a British public trustee of certificates of stock in a New Jersey corporation owned by a German corporation, leaving open the question of whether the reciprocity requirement extended beyond protection of United States citizens against foreign judgments); Bata v. Bata, 163 A.2d 493, 505 (Del. 1960) (holding that the reciprocity rule was based upon a desire to protect American nationals and was limited to cases in which it was invoked by an American citizen), cert. denied, 366 U.S. 964 (1961).


27 See, e.g., RECOGNITION ACT, supra note 4, §§ 3-4, 13 U.L.A. at 265-68.

justice was "impartial," and whether there was "fraud in procuring the judgment."

III. RECOGNITION AND ENFORCEMENT IN THE UNITED STATES AFTER ERIE

Following Erie Railroad v. Tompkins, 29 and Klaxon Co. v. Stentor Electric Manufacturing Co., 30 federal courts have consistently held that state law governs judgment recognition and enforcement in diversity cases. 31 Because diversity commonly exists in an action to enforce a foreign judgment, many such actions are initiated in federal district court. 32 Thus, it is often necessary for federal

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29 304 U.S. 64 (1938).

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Id. at 78. But see Hinderlider v. La Plata Co., 304 U.S. 92 (1938) (decided the same day as Erie).

[W]hether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive.

Id. at 110.

30 313 U.S. 487 (1941) (Under Erie, the rules of conflict of laws applied by federal courts exercising diversity jurisdiction are those of the state in which the court sits).


32 Diversity jurisdiction is founded on the article III jurisdiction of the federal courts, U.S. Const. art. III, and is statutorily prescribed by 28 U.S.C. § 1332 (1988), which reads in part:

a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
1. citizens of different States;
2. citizens of a State and citizens or subjects of a foreign state;
3. citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
4. a foreign state, defined in § 1603(a) of this Title [the Foreign Sovereign Immunities Act], as plaintiff and citizens of a State or of different States.

Id.
judges to determine the applicable state law rule on recognition and enforcement. This leads to a variety of problems. Not the least of the problems is that, similar to the federal level, state legislatures often have provided neither substantive nor procedural guidance in dealing with the issues of recognition and enforcement. Further, because diversity jurisdiction often exists to bring enforcement cases in the federal courts, those courts frequently have little, if any, state common law available. The result is that federal judges are compelled to determine what the relevant state courts would decide if faced with the same issue.

In determining the applicable state law rule, a federal district court is faced with four possible sources of that rule, and three possible categories of resulting rules. The possible sources of the rule are:

(1) Enactment of the Uniform Foreign Money-Judgments Recognition Act or a similar statute;

(2) Prior state court decisions setting forth local common law rules;

(3) Prior federal court decisions determining as best as possible the law the state court would have applied if it had been faced with the same issue; and

(4) Sources outside the state where no state statute, state court decision, or federal court decision on point exists.\(^{33}\)

The rules derived from these sources generally fall into three categories:

(1) Reciprocity as the principal standard: Some courts and commentators have continued to adhere to the pre-\textit{Erie} federal common law standard of reciprocity as set out in \textit{Hilton}
v. Guyot. The reciprocity requirement has been statutorily adopted in Georgia, Idaho, Massachusetts, Ohio, and Texas.

(2) Full faith and credit to foreign judgments: Some states have treated foreign nation judgments in much the same manner as sister state judgments, granting full faith and credit under article IV, section 1 of the United States Constitution.

(3) Comity analysis: The majority have, either by judicial decision or by statute, embraced a comity analysis whereby a presumption of recognition and enforceability exists, subject to certain mandatory and discretionary grounds for nonrecognition. This is the approach taken in the Recognition Act, and in the Restatement (Third) of Foreign Relations Law.

Even though the majority of jurisdictions appear to have followed the comity analysis of Hilton, this does not necessarily simplify the analysis required by a federal court faced with an enforcement action. Both the enigma of determining the source of


35 In Georgia, reciprocity is a mandatory ground for nonrecognition. GA. CODE ANN. § 9-12-114(10) (1982). In the other four states, reciprocity may result in the discretionary refusal of recognition. IDAHO CODE § 10-1404(2)(g) (1991); MASS. GEN. LAWS ANN. ch. 235, § 23A (West 1986); OHIO REV. CODE ANN. § 2329.92 (Anderson Supp. 1987); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (Vernon 1986). N.H. REV. STAT. ANN. § 524:11 (1974) requires reciprocity to be shown for a Canadian federal or provincial judgment to be enforced.

36 "Full Faith and Credit shall be given in each State to public Acts, Records, and Judicial Proceedings of every other State." U.S. CONST. art. IV, § 1; see Atlantic Ship Supply, Inc. v. M/V Lucy, 392 F. Supp. 179, 183 (M.D. Fla. 1975), aff'd, 553 F.2d 1009 (5th Cir. 1977) (Costa Rican judgment entitled to recognition under the doctrine of full faith and credit as well as the doctrine of comity); see also A. von Mehren & Trautman, Recognition of Foreign Adjudications: A Survey and A Suggested Approach, 81 HARV. L. REV. 1601, 1606-07 (1968).


38 Explicit in the purposes of the Recognition Act is the hope that "[c]odification by a state of its rules on the recognition of money judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad." RECOGNITION ACT, supra note 4, 13 U.L.A. at 261 (commissioners' prefatory note).

this rule and the vagaries of its application can lead to further problems.

Because only twenty-two states have adopted the Recognition Act in some form, courts in the majority of states must look to the common law to determine the applicable rule. Many federal courts have found it necessary at this stage to refer to cases outside the forum state because of the lack of any clear authority within the jurisdiction. The result has been repeated reference to the Hilton line of federal cases, particularly as the comity analysis has been refined in the Restatements. This means that, despite Erie, as a practical matter, the issue is often determined by a unique distillation of federal common law.

IV. THE PREVAILING CURRENT SOURCES: THE UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT AND THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW

A. The Substantive Rules of Analysis

In states which have adopted the Recognition Act, the analysis begins with the requirements for "recognition" of the foreign judgment. If a foreign judgment "is final and conclusive and en-
forceable where rendered even though an appeal therefrom is pending or it is subject to appeal," then it "is conclusive between the parties to the extent that it grants or denies recovery of a sum of money," unless certain grounds for nonrecognition are shown to exist. This provides the initial preclusive effect of the judgment so that matters litigated elsewhere are not relitigated in the United States action.

Both the Recognition Act and the Restatement codify the comity analysis of Hilton v. Guyot in providing grounds for nonrecognition of a foreign judgment. Although the grounds are generally the same in each, some of them are dealt with differently. The following chart provides a comparison of the approaches in the Recognition Act and Restatement:

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44 Recognition Act, supra note 4, § 2, 13 U.L.A. at 264.
45 Id. at § 3.
46 Id. at § 4.
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>1) final and conclusive and enforceable where rendered **</td>
<td>1) final judgment *</td>
<td></td>
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<table>
<thead>
<tr>
<th>Mandatory Grounds for Nonrecognition: Act § 4(a); Restatement § 482(1)</th>
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</thead>
<tbody>
<tr>
<td>1) lack of due process</td>
<td>1) lack of due process</td>
<td></td>
</tr>
<tr>
<td>2) lack of personal jurisdiction</td>
<td>2) lack of personal jurisdiction</td>
<td></td>
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<tr>
<td>3) lack of subject matter jurisdiction</td>
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</tbody>
</table>

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<tr>
<th>Discretionary Grounds for Nonrecognition: Act § 4(b); Restatement § 482(2)</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1) insufficient notice to defendant</td>
<td>1) lack of subject matter jurisdiction</td>
<td></td>
</tr>
<tr>
<td>2) fraud</td>
<td>2) insufficient notice to defendant</td>
<td></td>
</tr>
<tr>
<td>3) cause of action contrary to public policy</td>
<td>3) fraud</td>
<td></td>
</tr>
<tr>
<td>4) judgment conflicts with another final judgment</td>
<td>4) cause of action contrary to public policy</td>
<td></td>
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<tr>
<td>5) proceedings contrary to agreement of the parties</td>
<td>5) judgment conflicts with another final judgment</td>
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<tr>
<td>6) &quot;seriously inconvenient forum&quot; with jurisdiction based only on personal service</td>
<td>6) proceedings contrary to agreement of parties</td>
<td></td>
</tr>
</tbody>
</table>
* "That a judgment is subject to appeal or to modification in light of changed circumstances does not deprive it of its character as a final judgment." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 comment e (1986).

** Generally, the ability to appeal does not affect the concept of finality of a judgment in United States courts. See Deposit Bank v. Frankfort, 191 U.S. 499 (1903). Section six of the Recognition Act gives the court the discretion to stay proceedings for recognition and enforcement until the appeal process is completed in the foreign jurisdiction. RECOGNITION ACT, supra note 4, 13 U.L.A. at 274.

[The above comments apply to the chart on the previous page]

As the chart on the previous page indicates, there are only two significant differences between the Recognition Act and the Restatement. Whereas the Act treats lack of subject matter jurisdiction as a mandatory ground for nonrecognition, it is only a discretionary ground under the Restatement rule. In addition, the Act includes a limited forum non conveniens ground in its list of discretionary grounds for nonrecognition.

A great deal has been written analyzing the various grounds for nonrecognition and how they have been applied by the courts.47 Some of the bases for nonrecognition have been the

subject of greater judicial discussion than others. The focus of United States cases is summarized in the following discussion of those factors most often considered by courts, using the criteria set forth in both the Recognition Act and the Restatement for guidance.

1. Finality and Conclusiveness of the Judgment

Although the *Hilton* opinion did not directly address the issue of finality, "[a] generally recognized rule of international comity states that an American court will only recognize a final and valid judgment." 48 Final judgments are defined as those that are not

subject to additional proceedings in the rendering court except for execution proceedings. At least one court has held that judgments subject to modification in the country where rendered do not lack finality when the subsequent suit is brought to enforce only amounts that have already accrued under the judgment. Where the foreign court's judgment is enforceable in the foreign court, though subject to possible appeal, the United States court may stay recognition until the foreign appeal has run its course. Alternatively, the court may permit the opposing party to make the same arguments for modification that would have been available in the rendering forum.

2. Due Process

The element of due process has arisen principally in the context of discussions of personal jurisdiction. United States courts apply United States concepts of due process developed in International Shoe v. Washington and its progeny, rather than looking to similar concepts applicable in the foreign jurisdiction. Given the expansive nature of this doctrine in determining whether jurisdic-

1984) (refusing injunction identical to that which plaintiff had obtained from a British court, because arbitration was still proceeding, as being an unnecessary interference in the foreign proceedings); see also Coulborn v. Joseph, 195 Ga. 723, 25 S.E.2d 576 (1943); Kordoski v. Belanger, 52 R.I. 268, 160 A. 205 (1932); Growe v. Growe, 2 Mich. App. 25, 33-34, 138 N.W.2d 537, 540-41 (1965); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1986); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 107 (1971). See generally R. von Mehren & Patterson, supra note 47.

49 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 comment e (1986). The concept is defined in the Restatement of Judgments as follows:

[A] judgment at law is not a final judgment if further judicial action by the court rendering the judgment is required to determine the matter litigated; and a decree in equity is not a final judgment if further action by the court is required beyond the supervision of the carrying out of the decree.

RESTATEMENT OF JUDGMENTS § 41 comment a (1942).


51 RECOGNITION ACT, supra note 4, 13 U.L.A. at 274; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 comment e (1986).

52 R. von Mehren & Patterson, supra note 47, at 70.


tion exists, most United States courts considering foreign judgments have found foreign procedures in compliance with United States due process requirements.\textsuperscript{55}

To comply with United States due process requirements, foreign courts need not have identical procedures.\textsuperscript{56} They need only be "compatible with the requirements of due process of law."\textsuperscript{57} Where personal jurisdiction exists, procedures different from those in the United States enforcing court will not generally rise to the level of a violation of due process in the granting of the foreign judgment.\textsuperscript{58}

3. In Personam and In Rem Jurisdiction

Lack of jurisdiction over the defendant or the property involved in the judgment is the most common ground for refusal to recognize or enforce a foreign judgment.\textsuperscript{59} Both the Recognition Act and the Restatement provide that lack of personal jurisdiction makes nonrecognition mandatory.\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{55} See, e.g., Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), \textit{cert. denied}, 405 U.S. 1017 (1972) (a contract negotiated with an English company by letter, telex, and telephone considered sufficient to create minimum contacts with the English forum).
\item \textsuperscript{56} Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 686 (7th Cir. 1987).
\item \textsuperscript{58} "[A] mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved." RECOGNITION ACT § 4 comment, \textit{supra} note 4, 13 U.L.A. at 268. \textit{See} Panama Processes v. Cities Service Co., 796 P.2d 276, 285 (Okla. 1990) (differences in procedure not grounds for denial of enforcement of Brazilian judgment where "in Brazil (1) no witnesses of any party may be subpoenaed, (2) testimony of corporate employees is inadmissible, (3) there is no available process for requiring testimony of indispensable U.S. witnesses, (4) there is no right of cross-examination, and (5) the parties may neither conduct pre-trial discovery nor subpoena documents"); see also Parsons v. Bank Leumi Le-Israel, B.M., 565 So. 2d 20, 24 (Ala. 1990) (due process is not violated where Israeli default judgment against an American citizen was not in English, so long as he was served in a method permitted under the Hague Convention on Service of Process).
\item \textsuperscript{59} RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 comment c (1986); R. von Mehren & Patterson, \textit{supra} note 47, at 48.
\item \textsuperscript{60} RECOGNITION ACT § 4(a), \textit{supra} note 4, 13 U.L.A. at 268 (1986); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(1)(b) (1986). The \textit{Hilton} Court required an "opportunity for a . . . trial abroad before a court of competent jurisdiction . . . after due citation or voluntary appearance of the defendant . . . ." \textit{Hilton} v. Guyot, 159 U.S. 113, 202 (1895). The Court further stated that "[e]very foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice." \textit{Id.} at 166-67.
\end{itemize}
Under section 5(a) of the Recognition Act, recognition may not be refused for want of personal jurisdiction if in personam jurisdiction in the foreign action is based upon any one of the following:

(1) Personal service on the defendant in the foreign state;  
(2) Voluntary appearance by the defendant for purposes other than protecting property from seizure or for contesting jurisdiction of the court;  
(3) A pre-litigation contractual choice of forum clause applicable to the underlying dispute;  
(4) Domicile, principal place of business, or place of incorporation of the defendant in the foreign state;  
(5) A claim arising out of business done by the defendant through an office in the foreign state; or  
(6) A claim arising out of the operation of a motor vehicle or airplane in the foreign state by the defendant.

The prevailing view is that, even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of American concepts of jurisdiction to adjudicate. International Shoe and its progeny govern the determination here.

Where the defendant appears voluntarily, the Recognition Act states that recognition cannot be refused for lack of personal jurisdiction. An exception is provided, however, where the appearance is “for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him.” Even then, where the defendant has contested personal jurisdiction in the foreign court, and that
court has held that jurisdiction exists on grounds other than the
defendant's appearance, that decision of the foreign court will be
given respect.67

The question of in rem jurisdiction was addressed by the
Hilton Court in dicta.68 Since United States courts generally con-
sider monetary judgments in personam rather than in rem,69 a
court must obtain personal jurisdiction over the parties before it
can grant an award of money.70

4. Subject Matter Jurisdiction

Although subject matter jurisdiction is uniformly listed as a
requirement for recognition and enforcement,71 it seldom pro-
vides the basis for denial of the requested use of the foreign judg-
ment.72 Those few cases addressing subject matter jurisdiction
tend to discuss it in a pro forma manner, ultimately finding juris-
diction to exist.73 "[J]urisdiction of the rendering court over the
subject matter is normally presumed, and an inquiry into possible
lack of competence is initiated only on the basis of a credible
challenge by the judgment debtor or by another person resisting
recognition or enforcement."74 Commentators have concluded
that issues of subject matter jurisdiction will generally be deter-
mined by application of the jurisdictional rules of the foreign
court.75 Although this is a logical conclusion, there seems to be
no clear authority for it. Regardless, United States courts have

1990).
68 Hilton v. Guyot, 159 U.S. 113, 168 (1895) ("[A] judgment in foreign attachment
is conclusive, as between the parties, of the right to the property or money attached.").
71 While the Restatement makes lack of subject matter jurisdiction a discretionary
ground for nonrecognition (RESTATAMENT (THIRD) OF FOREIGN RELATIONS LAW
§ 482(2)(a) (1986)), the Recognition Act makes it a mandatory ground (RECOGNITION
the Restatement position, placing lack of subject matter jurisdiction under the discretion-
72 Even commentators in articles with headings indicating attention to subject matter
jurisdiction tend to focus almost exclusively on personal and in rem jurisdiction. See, e.g.,
Bishop & Burnette, supra note 13; A Case for Federalization, supra note 47, at 336-39.
1980).
74 REStatement (THIRD) OF FOREIGN RELATIONS LAW § 482 comment a (1987).
75 Joiner, supra note 47, at 203; see also R. von Mehren & Patterson, supra note 47,
at 54-55.
seen fit to reexamine the issue of subject matter jurisdiction in the process of recognition.\textsuperscript{76}

5. Notice and Opportunity to Be Heard

Courts have required proper notice, generally in the form of proper service of process, as a prerequisite to granting recognition or enforcement of a foreign judgment.\textsuperscript{77} "Proper service" has been given two possible definitions. According to the first definition, proper service requires compliance with the foreign country's statutory notice provisions.\textsuperscript{78} In the second definition, proper service is that which gives adequate notice of the proceedings.\textsuperscript{79} Few cases have raised a claim of a lack of opportunity to be heard. If service is proper and the defendant is represented by counsel, later disputes about that representation appear unlikely to constitute a lack of opportunity to be heard.\textsuperscript{80}

6. Fraud

American courts generally list fraud as a defense to the recognition of a foreign-nation judgment.\textsuperscript{81} Generally, a foreign judgment can be impeached only for extrinsic fraud, which deprives the aggrieved party of an adequate opportunity to present his case to the court.\textsuperscript{82} A judgment cannot be impeached for intrinsic

\textsuperscript{76} Hunt, 492 F. Supp. at 898 (citing Liverpool & London & Globe Ins. Co. v. Lummus Cotton Gin Sales Co., 6 S.W.2d 728 (Texas 1928)).


\textsuperscript{78} See, e.g., \textit{Tahan}, 662 F.2d at 866 (though Israeli procedure inconsistent with federal rules requirement of second notice for default judgment, United States unrealistic to require all foreign judicial systems to adhere to federal rules).

\textsuperscript{79} See, e.g., \textit{Tahan}, 662 F.2d 862 (personal service in Israel was sufficient when suit papers were prepared in Hebrew, even though defendant did not read Hebrew); Boivin v. Talcott, 102 F. Supp. 979 (N.D. Ohio 1951) (service under foreign service of process statute, which only required notice by publication, held insufficient to satisfy due process requirements necessary to give foreign court personal jurisdiction); Hager v. Hager, 1 Ill. App. 3d 1047, 1058, 274 N.E.2d 157, 161 (1971) (personal service insufficient when complaint was served without summons showing appearance date).

\textsuperscript{80} See, e.g., Laskosky v. Laskosky, 504 So. 2d 726 (Miss. 1987) (later withdrawal of counsel does not constitute lack of opportunity to be heard).

\textsuperscript{81} See, e.g., Hilton v. Guyot, 159 U.S. 113, 206 (1895) (dica); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 442 (3rd Cir. 1971), \textit{cert. denied}, 405 U.S. 1017 (1972); Laufer v. Westminster Brokers, Ltd., 552 A.2d 130 (D.C. App. 1987); \textit{Restatement (Third) of Foreign Relations Law} \textsection 482 comment e (1987); \textit{Restatement (Second) of Conflict of Laws} \textsection 98 comment g, \textsection 115 comments a, d (1971).

\textsuperscript{82} See United States v. Throckmorton, 98 U.S. 61, 65 (1878); \textit{Laufer}, 552 A.2d at
fraud, which involves matters passed upon by the original court, such as the veracity of testimony and the authenticity of documents. If the foreign court has actually considered and determined the question of fraud, whether “extrinsic” or “intrinsic,” the facts bearing on that issue may not be subject to reexamination when enforcement is sought in the United States.

7. Public Policy

In applying principles of comity, United States courts have uniformly declared themselves not required to recognize or enforce a foreign judgment that contravenes state public policy. Such a declaration, however, seldom has led to the denial of recognition or enforcement. Mere difference in policy or procedure within the foreign and United States forums will not necessarily rise to the level of the public policy concern required to deny recognition or enforcement. A judgment has been described as

83 See, e.g., Mackay v. McAlexander, 268 F.2d 35, 39 (9th Cir. 1959) (fraud in obtaining a Canadian naturalization decree by false statements not grounds for denial of recognition); see also Harrison v. Triplex Gold Mines, 38 F.2d 667, 671-72 (1st Cir. 1929); The W. Talbot Dodge, 15 F.2d 459, 462 (S.D.N.Y. 1926); Laufer, 532 A.2d at 133-34; Tamini v. Tamini, 38 A.D.2d 197, 328 N.Y.S.2d 477 (App. Div. 1972). RESTATEMENT (SECOND) OF JUDGMENTS § 68, § 70 comment c (1982) reject the intrinsic/extrinsic distinction. In Hilton v. Guyot, 159 U.S. 113 (1895), the Supreme Court noted that certain allegations of fraud were intrinsic fraud, and that extrinsic fraud was generally required to impeach domestic judgments. But the Court did not decide whether intrinsic fraud was sufficient to impeach a foreign judgment. Id. at 207-10. Section 4(b)(2) of the Recognition Act allows discretionary nonrecognition for judgments “obtained by fraud,” without specifying whether extrinsic fraud is necessary. Recognition Act, supra note 4, 13 U.L.A. at 261.

84 Harrison, 33 F.2d at 667.


86 See, e.g., Hilton, 159 U.S. at 204-05 (procedures of the French courts that admitted hearsay and testimony not under oath, and that denied the defendants the right to cross-examine witnesses, did not constitute an offense to public policy); Sompotex, 453 F.2d at 443 (English judgment enforced even though substantial portion was for compensatory damages for loss of goodwill and for attorney fees, items for which Pennsylvania law did not allow recovery); Compania Mexicana Radio Difusora Franteriza v. Spann, 41 F. Supp. 907, 909 (N.D. Tex. 1941), aff’d, 131 F.2d 609 (5th Cir. 1942) (the awarding of costs and attorney fees against unsuccessful plaintiff in Mexican action enforced notwithstanding fact that they would not be granted by the enforcing forum in similar circumstances); Neporany v. Kir, 5 A.D.2d 438, 173 N.Y.S.2d 146 (App. Div. 1958) (Quebec judgment for seduction and criminal conversation enforced even though similar actions had been abolished in New York); see also Hunt v. BP Exploration Co. (Libya), 492 F. Supp.
necessarily offensive to public policy when it “tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty, or of private property . . . .” A party generally will be estopped from attacking a judgment on public policy grounds if that party initiated the foreign proceedings, unless the enforcing forum perceives an interest in the action other than that of protecting the litigant.

8. Inconsistent Judgments

Inconsistent judgments may arise either in the context of two conflicting foreign judgments or of a foreign judgment in conflict with a judgment from another United States court. Although United States courts have at times recognized the later of two inconsistent foreign judgments, they may also recognize the earlier one. When a foreign judgment is otherwise entitled to recognition but conflicts with an earlier sister state judgment, there is no requirement of automatic preference for the sister state judgment.


Section 4(b)(3) of the Recognition Act allows nonrecognition if “the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state.” Recognition Act, supra note 4, 13 U.L.A. at 261. This focus on the underlying cause of action has been seen as providing a scope somewhat narrower “than the test of public policy generally.” R. von Mehren & Patterson, supra note 47, at 61 n.129.

87 Somportex, 453 F.2d at 443 (quoting Goodyear v. Brown, 155 Pa. 514, 26 A. 665, 666 (1893)); see also Ricart v. Pan Am. World Airways, Inc., No. Civ. A. 89-0768 (D.D.C. Dec. 21, 1990) (Westlaw, Allfeds library) (damages awarded by Dominican court enforced even though liability to deported passenger was for action taken in obedience to immigration authorities); Gutierrez, 583 S.W.2d at 321-22 (The laws of a foreign nation do not violate the public policy of Texas unless they are “inimical to good morals, natural justice, or the general interests of the citizens of this state.”).


89 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 comment g (1986).

90 Id.; see Ackerman v. Ackerman, 517 F. Supp. 614, 625-26 (S.D.N.Y. 1981) (indicating that a later foreign judgment would be enforced notwithstanding a conflict with an earlier sister state judgment entitled to full faith and credit), aff’d, 676 F.2d 898 (2d Cir. 1982).
9. Judgments Contrary to Party Agreement

The United States Supreme Court clearly supports enforcement of forum-selection clauses in international contracts.91 Consistent with this position, United States courts presumably will show similar respect for choice of forum clauses where a judgment may be obtained in a different forum over the objection of one of the contracting parties.92

10. Inconvenient Forum

The inclusion of the forum non conveniens factor in section 4 of the Recognition Act authorizes refusal of recognition or enforcement where the judgment is "rendered in a foreign country on the basis only of personal service," and the United States enforcing court "believes the original action should have been dismissed by the court in the foreign country on grounds of forum non conveniens."93 This does not require that the foreign jurisdiction recognize the doctrine of forum non conveniens as it is applied in United States courts. It rather allows the enforcing court to determine whether, if the foreign court did recognize the doctrine, the foreign court should have dismissed on grounds of serious inconvenience.94 No similar discretionary ground for non-recognition is found in the Restatement.95

The forum non conveniens exception is both discretionary and limited. It is available only when personal jurisdiction is based solely on personal service. So long as jurisdiction exists on any other ground, recognition may not be refused because the foreign court was a seriously inconvenient forum.96

92 See Restatement (Third) of Foreign Relations Law § 482 comment h (1986).
93 Recognition Act § 4 comment, supra note 4, 13 U.L.A. at 268-69.
95 See supra text after note 46.
B. The Procedural Rules of Enforcement

Once recognition is obtained, the Recognition Act provides that "[t]he foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." Thus, proof of grounds for recognition provides proof of grounds for enforcement. However, the manner of enforcement is not provided in the Act. In some states, the related Uniform Enforcement of Foreign Judgments Act (Enforcement Act) provides the procedure for obtaining actual enforcement.

The 1964 version of the Enforcement Act has been enacted in forty-one states, with the 1948 version in three states. It applies only to a "judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit" in the enforcing state. The Recognition Act, on the other hand, applies only to judgments of "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." Unfortunately, courts applying the acts have not always acknowledged this distinction.

Even though the Enforcement Act, by its terms, initially applies only to sister-state judgments, section 3 of the Recognition Act provides that a foreign nation judgment entitled to recognition is entitled to enforcement "in the same manner as the judgment of a sister state which is entitled to full faith and credit." As such, the Recognition Act effectively incorporates the Enforcement Act into its terms in those states that have adopted long-arm rule and voluntary appearance).
both. Thus, the clearest procedure is provided in states that have enacted both the Recognition Act and the Enforcement Act.\textsuperscript{105}

There would appear at first glance to be a problem with federal court application of the Recognition Act in a state that also has the Enforcement Act. In diversity cases, courts have interpreted \textit{Erie} to require the application of state \textit{substantive} law, with \textit{procedural} matters governed by federal law.\textsuperscript{106} However, Rule 69 of the Federal Rules of Civil Procedure states that a judgment shall be enforced by writ of execution, unless the court directs

\begin{flushright}
\textsuperscript{105} A series of Texas cases have raised questions about the constitutionality of judgment enforcement under the Recognition Act. In Hennessy \textit{v.} Marshall, 682 S.W.2d 340 (Tex. Ct. App. 1984), it was determined that enforcement must be predicated upon recognition and recognition could be prevented if the judgment debtor successfully raised one of the Recognition Act’s grounds for nonrecognition. Thus, in order to comply with due process requirements, a plenary hearing on recognition was found to be necessary, and due process denied, because “a judgment of a foreign country cannot be registered under the Uniform Enforcement of Foreign Judgments Act by the mere filing of the foreign country judgment.” \textit{Id.} at 345. In three later cases, the Texas Courts of Appeals in Houston, Amarillo, and Corpus Christi followed the \textit{Hennessy} court in holding the Recognition Act to be unconstitutional for failure to provide a hearing on the defenses to recognition prior to enforcement through the provisions of the Enforcement Act. Docksteader Motors, Ltd. \textit{v.} Patal Enters., Ltd., 776 S.W.2d 726 (Tex. Ct. App. 1989), rev’d on other grounds, 794 S.W.2d 760 (1990); Plastics Eng’g Inc. \textit{v.} Diamond Plastics Corp., 764 S.W.2d 924 (Tex. Ct. App. 1989); Detamore \textit{v.} Sullivan, 731 S.W.2d 122 (Tex. Ct. App. 1987). The Texas Supreme Court ultimately considered the third of these cases on appeal, determining that a plenary hearing on recognition was constitutionally required. Docksteader Motors, Ltd. \textit{v.} Patal Enters., Ltd., 794 S.W.2d 760 (Tex. 1990). Noting that the Texas legislature had, subsequent to the litigation in question, amended the Recognition Act to require a hearing on the recognition issue (TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.004-044 (Vernon Supp. 1991)), the state supreme court said that the Recognition Act “states that a foreign country judgment ‘is enforceable in the same manner as a judgment of a sister state that is entitled to full faith and credit,’” and a judgment of a sister state is enforceable either by the Enforcement Act’s “short-cut” method that requires only filing of the judgment, or by “the bringing of a common-law action to enforce a judgment.” \textit{Docksteader}, 794 S.W.2d at 761. The option to enforce a judgment through common-law proceedings is specifically retained under section 6 of the Enforcement Act. Enforcement Act, \textit{supra} note 7, at § 6; TEX. CIV. PRAC. & REM. CODE ANN. § 35.008 (Vernon 1988). Determining that the judgment creditor had filed a common-law suit to recognize and enforce its Canadian judgment, the court concluded that the judgment debtor had been afforded notice and a plenary hearing at which all defenses, including grounds for nonrecognition, could have been asserted. \textit{Docksteader}, 794 S.W.2d at 761.

\textsuperscript{106} \textit{See} Erie R.R. \textit{v.} Tompkins, 304 U.S. 64, 92 (1938) ("no one doubts federal power over procedure"); \textit{see also} C. WRIGHT, HORNBOOK ON THE LAW OF FEDERAL COURTS § 59 (1983). Although a general substance/procedure dichotomy has been specifically rejected as the sole determining factor in applying the \textit{Erie} test, the United States Supreme Court has held that an issue presented in a diversity case which is addressed by the Federal Rules of Civil Procedure will be governed by the Federal Rules. Hanna \textit{v.} Plumer, 380 U.S. 460, 471-72 (1965).
\end{flushright}
otherwise.\textsuperscript{107} Rule 69 then goes on to state that “the procedure on execution . . . shall be in accordance with the practice and procedure of the state in which the district court is held,” except to the extent federal law prescribes otherwise.\textsuperscript{108} In states without the Recognition Act, the enforcement procedure is not always clear, and federal courts (and foreign courts applying a reciprocity test) must either determine for themselves the applicable state procedure to be applied under Rule 69, or “direct otherwise.”\textsuperscript{109} This represents one more aspect of the tension created by interpreting \textit{Erie} to require reference to state law on a matter primarily dealing with foreign commerce and on which the de facto development of the law is in many ways indistinguishable from other areas of federal common law.\textsuperscript{110}

The Restatement (Third) of Foreign Relations Law follows the Uniform Act analysis in distinguishing recognition from enforcement in section 481:

\textsection{481. Recognition and Enforcement of Foreign Judgments: Law of the United States.}

\begin{enumerate}
\item Except as provided in \textsection{482}, a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.
\item A judgment entitled to recognition under Subsection (1) may be enforced by any party or its successors or assigns against any other party, its successors or assigns, in accordance with the procedure for enforcement of judgments applicable where enforcement is sought.\textsuperscript{111}
\end{enumerate}

The Restatement rule, like that found in the Recognition Act, fails to aid in resolving the substance/procedure problems of \textit{Erie} in federal courts.

\textsuperscript{107} \textit{Fed. R. Civ. P. 69}.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} Without the Recognition Act, even those states which have otherwise adopted the Enforcement Act cannot look immediately to the provisions of the latter act for enforcement procedure. The Enforcement Act, without the Recognition Act or some other directive, applies only to sister state judgments, and not to foreign nation judgments. See \textit{supra} notes 101-03 and \textit{infra} notes 192-288 and accompanying text.
\textsuperscript{110} See \textit{supra} notes 41-42 and \textit{infra} notes 192-288 and accompanying text.
\textsuperscript{111} \textit{Restatement (Third) of Foreign Relations Law} \textsection{481} (1986).
V. TAKING THE UNITED STATES JUDGMENT ABROAD: DEALING WITH FOREIGN RECIPROCITY REQUIREMENTS

Even though the Recognition Act and the Restatement (Third) of Foreign Relations Law take very similar approaches to recognition and enforcement, states without the Recognition Act will continue to face problems in obtaining recognition of judgments abroad.\textsuperscript{112} When enforcement of a United States judgment is sought in a foreign jurisdiction requiring reciprocity, the foreign court must look at the applicable United States law to determine whether, had the judgment been rendered in the foreign jurisdiction under the same circumstances, the United States court would enforce that judgment.\textsuperscript{113} This creates several distinct problems:

(1) The first problem arises when one court attempts to determine under another jurisdiction’s law what the nonforum court would have done with a similar set of facts. The confusion and complexity faced by United States federal courts applying state law under \textit{Erie} are indicative of the problems creat-

\textsuperscript{112} The Recognition Act was specifically designed to aid in the enforcement of United States judgments abroad as well as foreign judgments in the United States:

Codification by a state of its rules on the recognition of money judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.

\textsuperscript{113} The Federal Republic of Germany is a good example of a foreign jurisdiction requiring reciprocity in the enforcement of a United States judgment. Section 328 of the West German Code of Civil Procedure provides five grounds for refusal of recognition of foreign judgments. The fifth of these grounds is a reciprocity requirement. \textit{Zivilprozbordnung [ZPO]} § 328(1)(5) (W. Ger.). In the Federal Republic of Germany, the reciprocity requirement is “the largest single obstacle to the recognition of foreign judgments . . . .” V. DROBNIG, \textit{AMERICAN-GERMAN PRIVATE INTERNATIONAL LAW} 351 (1972). The determination about whether reciprocity exists is left to the courts. \textit{What to Do, supra} note 47, at 250, 253. A California judgment was denied recognition and enforcement in Germany on the grounds of lack of reciprocity under the California statute which preceded that state’s adoption of the Recognition Act. From this case, commentators have inferred that in the absence of a treaty, German courts will generally deny recognition and enforcement to United States money judgments. \textit{What to Do, supra}, at 255.

More recent cases have assumed reciprocity to exist between Germany and South Africa, Germany and Syria, and Germany and France. However, the German Supreme Court has denied reciprocity to a South African judgment rendered in personam on the basis of assets owned by the defendant in South Africa, after determining that South Africa would not recognize the establishment by a foreign court of in personam jurisdiction over nonresidents, on the basis of assets owned by the nonresidents in the foreign country.
ed, even without differences in the legal systems, languages, and cultures.

(2) If the judgment was rendered by a United States federal district court having diversity jurisdiction, the foreign court is forced to try to understand the United States federal system and the manner in which Erie requires a federal court in the United States to look to state law. The foreign court cannot simply assume that there is a single United States law applicable to the issue. It must understand the difference between those decisions of federal courts applying federal law, and those applying state law.

(3) Once the foreign court determines that the United States court that rendered the judgment applied the law of a particular state, the foreign court must determine whether the state's law on the matter is to be found in statutes or case law. In some civil law systems, courts may have conceptual problems if they are required to look primarily to case law for the rule applicable in the United States jurisdiction.

(4) In cases where the United States state has neither an applicable statute nor clear judicial precedent, after it has been explained to the foreign court that state law governs, it will be necessary to explain further that state law may be found in prior federal court decisions or inferred from the law of sister states.114

These problems demonstrate the importance of obtaining the United States judgment in a jurisdiction which clearly states the law and allows enforcement of foreign judgments without undue restrictions. States which have not adopted both the Recognition Act and the Enforcement Act generally provide neither certainty nor clarity.

Neither are states which have adopted a reciprocity requirement likely to be the best jurisdictions in which to obtain a judgment for which foreign enforcement proceedings are required.

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114 For example, prior to the Pennsylvania enactment of the Recognition Act in November 1990, the leading precedent on Pennsylvania law was the Third Circuit Court of Appeals decision in Somportex, Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 45 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972). Professor Peterson has noted the further problem arising from the tendency of foreign judges and scholars "to put heavier reliance on the work of the American Law Institute than do their counterparts in this country." Foreign Country, supra note 47, at 266. For this reason, Peterson expressed regret at "the laconic treatment of foreign country judgments" in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, noting that it "may invite distorted treatment of American judgments submitted for recognition or enforcement abroad, in countries which impose reciprocity requirements." Id.
Reciprocal reciprocity requirements lead to the problem of "renvoi," in which the forum jurisdiction's rule requires reference to the granting jurisdiction's rule for conflict of laws purposes. Such a reference in determining the applicable rule may provide adequate analysis when the granting jurisdiction's law provides a substantive rule. However, when the granting jurisdiction's law provides a mirror-image procedural rule referring back to the law of the forum jurisdiction, there is no easy exit from this analytical circle.

Hence, the best situation for the litigant in a United States court is in a state whose law is clearly stated and contains no reciprocity requirement. Some may find a certain unfairness in acknowledging the existence of a reciprocity requirement in the foreign jurisdiction while seeking absence of such a requirement in the United States jurisdiction. But it is unlikely that cases would require a denial of recognition or enforcement on grounds of reciprocity in a United States court, and would not also raise the possibility for denial of recognition or enforcement as a result of other factors considered under the Recognition Act and Restatement analyses.

The rules on recognition and enforcement are relatively clear in those states that have adopted both the Recognition Act and the Enforcement Act without substantial alteration. That only fifteen states have adopted both acts without a reciprocity requirement shows how these acts have failed to engender uniformity. These uniform acts have been available for a quarter of a century. The mere availability of the acts has resulted neither in uniformity nor in international acceptance of judgments of United States courts.

VI. ALTERNATIVES TO THE CURRENT PATCHWORK OF RULES ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The Supreme Court has not clearly reconsidered the issue of recognition and enforcement of foreign judgments since its 1895 decision in *Hilton v. Guyot*. Thus, any approach to uniformity

116 The irony of this position is that some contend existing reciprocity requirements in foreign countries applicable to United States judgments have their roots in our own Supreme Court decision in Hilton v. Guyot, 159 U.S. 113 (1895). See Nadelmann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184 (1952).
117 159 U.S. at 113. The opportunity for review arose in Sonforte, 453 F.2d 435, but
first faces uncertainties regarding (1) whether recognition and enforcement is governed by state or federal law in a federal diversity case, and (2) whether the Hilton reciprocity requirement has survived the many state and lower federal court decisions which have not required reciprocity.118 Certainly, it is important to know what law we are dealing with and what rule that law creates if we are supporting change. On the other hand, it is the existence of uncertainty that compels change. The preemptive quality of federal law in matters affecting international relations further requires that federal law receive serious consideration in any efforts at change.

Although commentators have lamented the absence of a uniform rule on recognition and enforcement of foreign judgments, they have so far been unable to stimulate successful efforts to generate uniformity. While the Recognition Act has been enacted in twenty-two states, this process has taken over a quarter of a century, and variations on the Act have prevented true uniformity even in the adopting states. Commentators have supported routes to uniformity including uniform acts,119 multilateral or bilateral treaties,120 and federal common law.121 The point of agreement

118 See supra notes 24-28 and accompanying text.
119 See, e.g., Bishop & Burnett, supra note 13; Homburger, supra note 2; Kulzer, supra note 47; Zicherman & Brand, Improving the Litigation Climate for Pennsylvania Business: The Uniform Foreign Money-Judgments Recognition Act, 7 Pitt. Legal J. 36 (1989); Alternative Theories, supra note 47.
120 See, e.g., HAY & WALKER, supra note 47; Smit, The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?, 17 Va. J. Int'l L. 443 (1977); R. von Mehren & Patterson, supra note 47, at 82 ("[I]t would seem that the dual objectives of clear, uniform standards and procedures for enforcement of foreign judgments in the United States and increased hospitality to U.S. judgments abroad can best be achieved through the negotiation of bilateral or multilateral conventions.").
121 Henkin, The Foreign Affairs Power of the Federal Courts: Sabbatino, 64 Colum. L. Rev. 805, 820 (1964); Homburger, supra note 2; Reese, supra note 47; Scoles, supra note 47,
is that uniformity is an important goal. The point of divergence is the method offered to attain uniformity.\textsuperscript{122} Rather than restate all the arguments for uniformity, the remainder of this Article will focus on the possibilities for achieving uniformity. Consideration of any single alternative in a vacuum may provide useful analysis. Comparison with other possibilities goes further to demonstrate both the strengths and weaknesses of each approach. Each approach is considered here in terms of its potential for success as well as the extent to which it would achieve the following goals: (1) uniformity among the states of the United States; (2) uniformity between state and federal court systems within the United States; (3) increased recognition and enforcement of United States judgments in foreign courts; and (4) rectification of problems created by treaties to which the United States is not a party, most notably the European Convention on Jurisdiction and Judgments in Civil and Commercial Matters.\textsuperscript{123}

Six approaches may be considered for unification of the law applicable to the recognition and enforcement of foreign judgments in the United States. They are:

1) Uniform and comprehensive enactment of the Uniform Foreign Money Judgments Recognition Act and the Uniform Enforcement of Foreign Judgments Act;

2) Negotiation and ratification of a multilateral treaty governing recognition and enforcement of foreign judgments in those countries party to the treaty;

3) Negotiation and ratification of a series of bilateral treaties providing for reciprocal recognition and enforcement of judgments entered in the courts of the other party to each such treaty;

4) Enactment of federal legislation preempting the field by making the question of recognition and enforcement of a foreign judgment a matter of federal law;

5) Development of federal common law preempting the field by making the question of recognition and enforcement of a foreign judgment a matter of federal law; and

\textsuperscript{122} See e.g., Alternative Theories, supra note 47, at 642.

\textsuperscript{123} See infra notes 142-50 and accompanying text for a discussion of the problems created for U.S., parties as a result of the jurisdictional provisions of the Brussels Convention and their treatment in the related enforcement of judgment provisions.

A review of these alternatives demonstrates the problems with each. None of the six provides a perfect solution. Experience has demonstrated that significant uniform enactment of the Recognition Act is not likely to occur. United States participation in a multilateral treaty has seemed unlikely. The negotiation of a series of bilateral treaties has proved difficult and carries with it the potential for nonuniformity as well as time-consuming separate negotiations. While the development of federal law by the legislative or judicial branch may provide a singular rule, and thus result in internal uniformity, it will not always result in foreign country recognition and enforcement. Resolving the matter through the Federal Rules of Civil Procedure would not bring uniformity in state courts unless all states adopted a similar procedural rule.

A. The Uniform Foreign Money-Judgments Recognition Act

1. The Analysis Revisited and Summarized

The above discussion of the current status of United States law indicates the problems with approaching uniformity through the enactment in over fifty jurisdictions of a uniform act. Even though the Recognition Act has been available since 1962, only twenty-two states have enacted any version of the Act. Even then, Idaho, Massachusetts, Ohio, and Texas have included lack of reciprocity as discretionary grounds for nonrecognition.\(^\text{124}\) Georgia makes all of the Recognition Act grounds for nonrecognition mandatory, and includes lack of reciprocity as an additional ground.\(^\text{125}\) And New Hampshire, which has not adopted the Act, has a separate statute that requires reciprocity to be shown for the enforcement of a Canadian federal or provincial judgment.\(^\text{126}\)


2. The Effect of the Uniform Act Approach

The advantages of the uniform act approach are several. First, unvarying adoption of the Recognition Act in all fifty states would provide the type of uniformity engendered by the success of the Uniform Commercial Code. The U.C.C. has become, in many ways, a "national" code as a result of uniform adoption throughout the United States. Given the Recognition Act's similarities to existing common law, particularly as set forth in the Restatement, its failure to garner acceptance in even half the states over a period of nearly thirty years is regrettable.

The Recognition Act also provides uniformity between the law applied in state and federal courts, because federal diversity cases consistently hold that state law governs this issue. The dearth of recognition or enforcement cases dealing with true federal questions has meant that the reciprocity rule of Hilton v. Guyot has not been reconsidered as federal common law, even while the states have consistently rejected (or at least avoided) a reciprocity requirement.

The Recognition Act has the advantage of providing a clear code-type form of evidence for foreign courts asked to recognize or enforce a United States judgment. Its enactment in a state, even if it does not change the existing common law rules, makes proof of that state's law in a foreign forum a much easier matter.

There are two principal disadvantages of the uniform act approach. The first is its inability to deal with problems concerning enforcement rules in foreign jurisdictions. It does not alleviate issues raised in the enforcement of judgments obtained on exorbitant jurisdictional grounds throughout the European Community or the states party to the Lugano Convention. A judgment obtained in one member state and based on exorbitant jurisdictional provisions will still be enforceable in all of the other member states of the European Community and in the Lugano Convention states. As a practical matter, this may be unimportant, since little empirical evidence exists that enforcement of judgments based solely on exorbitant jurisdiction provisions has been a problem for

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127 Restatement (Third) of Foreign Relations Law §§ 481, 482 (1986).
128 Supra notes 29-32 and accompanying text.
129 159 U.S. 113 (1895).
130 See supra notes 24 & 25.
131 Infra notes 142-50 and accompanying text.
United States parties. The fact remains, however, that uniform adoption of the Recognition Act will not obtain the desirable article 59 bilateral treaty protection allowed by the Brussels Convention.

The greatest disadvantage of the uniform act approach is that uniformity is so elusive. The majority of states have failed to adopt the Recognition Act and others have varied its terms when adopted. While commentators have continued to demonstrate its value to United States litigants, state legislatures have not given priority to enacting a statute that does little, if anything, to change existing common law. Even more troublesome is the damage to uniformity engendered when states have modified the Recognition Act in order either to make reciprocity a discretionary ground for nonrecognition or to make all grounds for nonrecognition, including reciprocity, mandatory.

B. The Multilateral Treaty Approach

1. Issues Affecting a Multilateral Treaty

Although in the past there may have been doubts about the power of the President to enter into a treaty in the field of private international law, United States participation in the Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), and the United Nations Commission on International Trade Law (UNCITRAL) make this concern nothing more than a historic footnote in a world in which the distinctions between public and private international law are increasingly less visible.

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132 See, e.g., supra note 119.
133 See supra notes 124-26 and accompanying text.
137 For a discussion of United States participation in the Hague Conference,
In 1969, American delegates to the Hague Conference voted in favor of a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and a Convention on the Recognition of Divorces and Legal Separations. The first of these conventions came into force on February 1, 1971, but only Cyprus, the Netherlands, and Portugal are parties. The other came into force on June 1, 1970, with only fourteen countries (mostly European countries) having ever ratified or acceded. The United States has never ratified either convention. Neither is it a party to any other multilateral convention on the recognition or enforcement of foreign judgments.

The twelve member states of the European Economic Community are parties to the European Convention on Jurisdiction and Judgments. The Convention, known popularly as the "Brussels Convention," obligates the member states to recognize and enforce the judgments of other member states unless recognition is contrary to public policy, of a default judgment rendered without proper notice, of a judgment that is irreconcilable with a judgment given in the enforcing state, of a judgment that decides

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141 Id. at 202-03.

certain issues of capacity, property rights, or wills law contrary to the rules of the enforcing state, or of a judgment that is irreconcilable with an earlier judgment, on the same cause of action, which is also entitled to recognition. Within the European Community, it has created a type of federal system of recognition of jurisdiction and judgments which has been compared to the recognition of sister-state judgments in the United States. This system of cooperation has been expanded beyond the Community through the similar Lugano Convention among the Community member states and the member states of the European Free Trade Association.

Both the Brussels Convention and the Lugano Convention provide that domiciliaries of a contracting state cannot be sued in the courts of other contracting states where the only source of jurisdiction is one of certain "exorbitant" bases of jurisdiction. However, a defendant not domiciled in a contracting state remains subject to such grounds of jurisdiction. While a judgment against a domiciliary of a contracting state that is based only on exorbitant jurisdiction is unenforceable in another contracting state, no such protection is provided for a nondomiciliary. Thus, a judgment rendered against a defendant not domiciled in a contracting state is enforceable in all other contracting states, even if rendered under jurisdictional grounds that all other contracting states consider improper. This problem is exacerbated in article 4 of both conventions, which makes national exorbitant jurisdiction provisions available to plaintiffs who are nationals of any contracting state, against a defendant not domiciled in a contracting state.

143 Brussels Convention, supra note 142, at arts. 25, 27.
144 See, e.g., A. von Mehren, supra note 47.
146 Brussels Convention, supra note 142, at art. 3; Lugano Convention, supra note 145, at art. 3. Examples of such exorbitant jurisdiction include article 14 of the French Civil Code, which provides personal jurisdiction over any party so long as the plaintiff is a Frenchman, and article 23 of the German Civil Code, which provides personal jurisdiction over a party on the basis of the presence of any property within Germany owned by that party, regardless of the value of that property or the size of the claim.
147 Brussels Convention, supra note 142, at art. 4; Lugano Convention, supra note 145, at art. 4.
148 Brussels Convention, supra note 142, at art. 28; Lugano Convention, supra note 145, at art. 28.
149 Supra note 147. For example, for purposes of art. 14 of the French Civil Code, a
The problems posed for noncontracting-state parties, by the Brussels and Lugano conventions, may be avoided. Article 59 of each convention provides that any contracting state may enter into a treaty on the recognition and enforcement of judgments and include in such a treaty an obligation toward a third country "not to recognize judgments given in other contracting states against defendants domiciled or habitually resident in the third state where, in cases provided for in article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of article 3." Thus, through treaties with the states that are parties to the Brussels and Lugano conventions, the United States could avoid enforcement problems related to the convention provisions dealing with exorbitant jurisdiction. This possibility was addressed in the unsuccessful negotiation of a bilateral treaty on recognition and enforcement with the United Kingdom in the late 1970s. Unfortunately, the failure of this effort has been followed by no other attempt at either a bilateral or multilateral treaty that would accomplish such a goal.

The Brussels Convention is designed to provide uniformity in jurisdiction and judgment practice within the European Community. Article 63 of the Convention requires that any state becoming a member of the European Economic Community (EEC) accept the Brussels Convention as a basis for negotiating arrangements required by the EEC Treaty, to simplify recognition and enforcement of judgments within the Community. Thus, no provision appears to allow negotiation to include the United States as a party to the Brussels Convention. The Lugano Convention, on the other hand, is "open to accession by . . . other States which have been invited to accede upon a request made by one of the Con-

national of any contracting state, who is domiciled in France, is considered a Frenchman for purposes of being able to bring an action against a foreign party in French courts, whether or not any other basis of personal jurisdiction exists.

150 Brussels Convention, supra note 142, at art. 59; Lugano Convention, supra note 145, at art. 59.

151 See infra notes 177-84 and accompanying text.

152 Brussels Convention, supra note 142, at art. 63. Article 220 of the Treaty Establishing the European Economic Community, 1 TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 207 (1987 ed.) [hereinafter Rome Treaty], expressly envisions such a treaty by requiring the Member States of the Community to "enter into negotiations . . . with a view to securing . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitral awards."
tracting States to the depositary state." However, such a state will be invited to accede only if the existing parties to the convention unanimously agree to its participation. Given the difficulty the United States has had in negotiating bilateral recognition and enforcement with the United Kingdom, the Brussels and Lugano conventions, it is unlikely that unanimous consent could ever be achieved in regard to United States accession. After all, the United Kingdom, a member of both conventions, has a system most like that in the United States.

The Convention on Private International Law of the Final Act of the Sixth International Conference of American States (Bustamante Code) and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards provide for the general recognition by their Latin American contracting states of civil and commercial judgments rendered in other contracting states. The second of these conventions is modified by the 1985 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, designed to prevent jurisdictional disputes by setting out the grounds of jurisdiction that will be accepted by the enforcing state. The Inter-American system, like the Brussels and Lugano conventions, thus has recognized the importance of addressing jurisdiction along with recognition and enforcement. The United States is not a party to any of the Inter-American conventions.

2. Effect of a Multilateral Treaty

If a multilateral treaty were possible, it would provide an advantageous method for dealing with recognition and enforcement issues. As federal law, under article VI of the United States Constitution, it would preempt state law on the issue. Thus, the same rule would be applicable in all state and federal courts regardless
of prior state law on the matter. Perhaps no other method would deal as efficiently with the issue of uniformity. The disadvantage is that, absent a treaty with all nations in which a United States judgment may require recognition or enforcement and vice versa, such a treaty would create a system in which different rules apply to judgments from treaty and nontreaty nations. So, judgments from nontreaty nations would remain subject to the problems of the current system in the United States, and vice versa.

A multilateral treaty with the contracting states to either the Brussels or Lugano Convention could also address the exorbitant jurisdiction problems of those conventions. As either a contracting party to a Lugano-type convention, or a party to a convention receiving the benefit of article 59 of the Brussels and Lugano conventions, the United States could directly address those problems.

Finally, the multilateral convention alternative, at least for matters involving the other contracting states, would provide perhaps the best answer to the problem of proving up the United States judgment and complying with any reciprocity requirement when seeking recognition or enforcement in a foreign court. Both the Brussels and Lugano conventions provide, simply, that “[a] judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.” Each provides grounds for nonrecognition similar to those found in the Recognition Act and Restatement (Third) of Foreign Relations Law, and provides clear requirements about the type of document required to prove the foreign judgment. Such an arrangement would provide the type of procedural efficiency, which is the goal of the Enforcement Act in dealing with sister-state judgments in the United States.

Despite all the advantages of a multilateral treaty approach, there is no indication that such a treaty is likely in the foreseeable future. At the same time, however, the success of the United Na-

160 Supra notes 146-49 and accompanying text.
161 Supra note 150.
162 Brussels Convention, supra note 142, at art. 26; Lugano Convention, supra note 145, at art. 26.
163 Brussels Convention, supra note 142, at art. 27; Lugano Convention, supra note 145, at art. 27.
164 Brussels Convention, supra note 142, at art. 46; Lugano Convention, supra note 145, at art. 46.
165 See supra notes 97-105 and accompanying text.
tions Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)\(^{166}\) offers an example of multilateral recognition of tribunal awards that could form the basis for negotiation within the UNCITRAL framework.\(^{167}\) The New York Convention now has over eighty contracting parties in which a foreign arbitral award will be recognized and enforced, with "the force of a final judicial judgment" of the country in which enforcement is sought.\(^{168}\)

In the past, the more limited competence of arbitral tribunals has meant that enforcement of arbitral awards would not raise the possibility of enforcement of public law concerns of another sovereign. In the United States, for instance, until relatively recently, cases held that certain matters of important public policy, such as antitrust claims,\(^{169}\) securities law claims,\(^{170}\) and claims under the Racketeer Influenced and Corrupt Organizations Act (RICO),\(^{171}\) could be decided only in the courts and could not be submitted to arbitration. Recent decisions, particularly in the international setting, have found that the need for consistency and predictability in policies regarding international transactions justifies the submission of even such "public" law concerns to arbitration.\(^{172}\)

It is often assumed that a judgment enforcement treaty with the United States is distasteful to other countries, because of the abhorrence of United States treble damage actions in antitrust


\(^{167}\) *Supra* note 136.

\(^{168}\) *New York Convention, supra* note 166, at art. 4.


\(^{172}\) *See, e.g.*, Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987) (Securities Exchange Act and RICO claims are arbitrable even where agreement to arbitrate appears in a form brokerage contract that is seldom the subject of negotiation); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (arbitration of United States antitrust claims ordered even though arbitration was to be in Japan by Japanese arbitrators); Scherk v. Alberto-Culver Co., 417 United States 506 (1974) (arbitration ordered in dispute between the parties, including a claim of securities fraud under section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5). *See generally Brand, Nonconvention Issues in the Preparation of Transnational Sales Contracts, 8 J.L. & COM. 145, 158-64* (1988).
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matters, punitive damage awards in civil trials, large jury awards (particularly in products liability cases), the intrusive nature of United States pre-trial discovery techniques, and the extraterritorial application of United States laws by United States courts (particularly in antitrust and export trade cases). The ability of arbitral tribunals to address antitrust and other traditional public law issues—and to award damages in accordance with the applicable statutes—means that tribunal decisions applying United States public laws and awarding treble damages are in fact enforceable under the New York Convention if rendered in arbitration. While article V(2)(b) does allow refusal to recognize and enforce an arbitral award where "recognition or enforcement of the award would be contrary to the public policy" of the enforcing country, there is no reason such a provision could not be included in a parallel convention on recognition and enforcement of judgments.173

Arbitral tribunals typically set rules on discovery between the parties in both institutional and ad hoc arbitrations.174 Thus, it is conceivable that discovery proceedings similar to those applied in United States courts could occur in an arbitration subject to the New York Convention.

Further, protests from other countries against the extraterritorial application of United States laws, particularly in the field of antitrust law, have an increasingly hollow ring, especially when decisions in the courts and agencies of the principal protestors parallel those same criticisms.175 To face concerns about the size of United States jury awards, a treaty provision could allow for

173 Supra note 166. See the similar provisions of the Recognition Act and Restatement (Third) of Foreign Relations Law, supra notes 85-88 and accompanying text.

174 See, e.g., UNCITRAL Arbitration Rules, art. 15(1), Report of the United Nations Commission on International Trade Law on the Work of its Ninth Session, 31 U.N. GAOR Supp. (No. 17) at 34, U.N. Doc. A/31/17 (1976), reprinted in 15 I.L.M. 701 (1976) ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.").

discretionary refusal of recognition and enforcement based on public policy.

Three developments tend to show that foreign governments should no longer be as concerned about the effect of a judgment recognition treaty with the United States: the ability of arbitral tribunals (whose decisions are enforceable in over eighty countries under the New York Convention) to consider and grant awards in public law matters; the ability of those tribunals to adopt discovery procedures mirroring those in United States courts; and the increasing tendency of foreign courts and agencies to apply their own laws extraterritorially. Important differences remain between litigation and arbitration, particularly the ability of the parties in arbitration to participate in the selection of the arbitrators. Parties may avoid arbitrators likely either to award treble damages in public law matters, or to authorize United States court-style discovery. But the distinctions between arbitration and litigation have diminished substantially since the signing of the New York Convention in 1958. Thus, it may be appropriate to consider opening negotiations in UNCITRAL or another body, on a convention for the recognition and enforcement of foreign judgments.176

176 The parallels with the Brussels Convention, supra note 142, are worth mentioning here. Consideration of a judgments convention among the Community member states was directed in article 220 of the Rome Treaty, supra note 152. That provision, however, required only that member states "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 arbitration awards." The resulting Brussels Convention dealt first with coordination of rules regarding jurisdiction, indicating that this was a necessary precondition to agreement on the enforcement of the resulting judgments. It may be that multilateral consideration of a judgments recognition and enforcement convention will result in valuable consideration of the existing jurisdictional approaches of the nations involved. This could become either a hindrance in seeking agreement, or an important effort in coordinating judicial procedure generally.

The Brussels Convention also serves as an example that could be followed in other regional trade agreements. Perhaps consideration should be given, in the negotiation of a North American Free Trade Agreement, to a provision similar to article 220 of the Rome Treaty—calling for negotiations among the United States, Canada, and Mexico, with the goal being to simplify the "formalities governing the reciprocal recognition and enforcement of judgments." Rome Treaty, supra note 152.
C. The Bilateral Treaty Approach

1. Issues Affecting a Bilateral Treaty


The negotiations between the United States and the United Kingdom on a Convention Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters arose in part in response to the European Convention on Jurisdiction and Judgments in Civil Matters (Brussels Convention).\footnote{\textit{Super note 142.}} Under article 59 of the Brussels Convention, such a treaty would have removed the threat against United States domiciliaries in the United Kingdom, who face judgments from other European Community member states. United States domiciliaries would have been protected from judgments founded on exorbitant jurisdiction provisions of local civil codes.\footnote{179 \textit{Supra note 146 and accompanying text.}}

The Draft Convention between the United States and the United Kingdom did contain a provision protecting United States defendants against enforcement of exorbitant jurisdiction foreign judgments in England.\footnote{180 1979 Draft, \textit{supra note 177}, at art. 18.} Negotiations on the convention nevertheless broke down amid English concerns about enforcement of United States multiple damages awards (particularly in antitrust
cases), United States products liability judgments, "excessive" United States jury verdicts in tort cases, and United States discovery judgments. The United Kingdom withdrew from negotiations in 1980, despite substantial changes from the 1976 Draft addressing these issues. No further attempts at a bilateral treaty have been initiated by the United States.

2. Effect of a Bilateral Treaty

Like a multilateral treaty, a bilateral treaty would have the effect of unifying—in both state and federal courts—federal law applicable to judgments of the other nation's courts. A series of such treaties could also address concerns arising from the Brussels and Lugano conventions on a nation-by-nation basis. Further, such treaties could provide specifically for the manner of proving the foreign judgment for which recognition or enforcement is sought, and thus avoid current concerns about proving the United States judgment, and meeting reciprocity requirements of foreign courts. Given the unfortunate results of the negotiations with the United Kingdom, however, the possibility for a series of such agreements (let alone a single treaty with that nation to which our legal system is most closely tied) is remote at best.

D. Federal Legislation on Recognition and Enforcement of Judgments

1. Issues Affecting Federal Legislation

Addressing the problems of recognition and enforcement of foreign judgments through federal legislation may be the most direct path to true unification of United States law on the matter. Such an approach would be consistent with Congress' power "to regulate commerce with foreign Nations, and among the several states." Like alien registration, considered by the Supreme

181 See Woodward, supra 47, at 312-13.
182 See A. von Mehren, supra note 47, at 1060 n.61.
183 See Woodward, supra note 47, at 312-14.
184 Such a treaty has been negotiated between Australia and the United Kingdom. Australia-United Kingdom Agreement Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Canberra, August 23, 1990.
185 U.S. CONST. art. I, § 8. There is little doubt that congressional power over foreign commerce includes the authority to preempt state law dealing with recognition and enforcement of foreign judgments. See, e.g., A Case for Federalization, supra note 47, at 347. While some have questioned whether federal common law in the foreign judgments area can be based on the general foreign affairs power of the federal government, they have
Court in *Hines v. Davidowitz*, enforcement of foreign judgments is an area in which Congress might determine that "whether or not [it] is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable." The Constitution explicitly grants to Congress the power to "prescribe the Manner in which . . . Acts, Records and Proceedings shall be proved, and the Effects thereof," when requiring that one state give full faith and credit to the judicial proceedings of other states. If Congress is to have such power over the judicial authority of the states in regard to recognition of sister-state judgments, it is consistent for Congress to have similar power in regard to foreign country judgments.

Even if enforcement of judgments should be determined to be an area otherwise reserved to the states, when the process threatens to impinge on foreign relations, the issue is solely a federal matter to which state law will not apply. In *Zschernig v. Miller*, the courts of Oregon denied an inheritance to a resident of East Germany because he could not satisfy the court that his country allowed Americans to inherit estates in East Germany. In reversing, the United States Supreme Court found "an intrusion by the State into the field of foreign affairs which the Constitution nonetheless asserted that federal courts can use the foreign commerce power as justification for a federal common law rule. *Alternative Theories, supra note 47."

186 312 U.S. 52 (1941).

187 *Id.* at 73. The *Hines* Court expressly refused to rule on the contention that "the federal power in [the field of registration of aliens], whether exercised or unexercised, is exclusive." *Id.* The nature of issues for which the Court considers federal law displacement of state law appropriate was indicated by the *Hines* Court as follows:

It cannot be doubted that both the state and the federal [alien] registration laws belong "to that class of laws which concern the exterior relation of this whole nation with other nations and governments." Consequently the regulation of aliens is . . . intimately blended and intertwined with responsibilities of the national government . . . . And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.

*Id.* at 66-67.

188 U.S. CONST. art. IV, § 1.

entrusts to the President and the Congress." This rejection of
the application of state law in an area (probate) traditionally re-
served for the states indicates the importance of a uniform federal
approach to matters touching on foreign relations.

2. Effect of Federal Legislation

Federal legislation would seem appropriate in the recognition
of foreign judgments. Like a pervasive multilateral treaty, a pre-
emptive federal law could serve to unify the United States rules
both among the states and between the state and federal systems.
While it would not guarantee recognition and enforcement of
United States judgments in foreign courts, it would provide great-
er predictability by putting United States law in a code-type format
more likely cognizable in foreign courts. It would not, however,
solve the problem created by the enforcement of judgments based
on exorbitant jurisdiction under article 3 of the Brussels and
Lugano conventions. Because of these problems, a federal law
obtained through a multilateral treaty, with parties including the
member states of the European Community and EFTA, would be
more desirable.191

E. Federal Common Law as the Source of a Singular Rule

In *Erie Railroad v. Tompkins*,192 the Supreme Court declared
there to be "no federal general common law," and directed feder-
al courts to apply the law of the state "[e]xcept in matters gov-
erned by the Federal Constitution or by Acts of Congress. . . ."193
Although there may be no federal "general" common law,
subsequent cases have made it clear that there are areas in which

190 Id. at 432.
191 See supra notes 152-55 and accompanying text.
192 304 U.S. 64 (1938).
193 Id. at 78.
federal courts appropriately may mold special common law.\textsuperscript{194} These rules have been described as “substantive rules of decision not expressly authorized by either the Constitution or any Act of Congress,” which “supplant state law.”\textsuperscript{195}

1. Room for a Federal Rule Under Current Theory

The Supreme Court has recognized this special form of federal common law in cases involving federal proprietary interests,\textsuperscript{196} obligations and rights of the United States under its contracts,\textsuperscript{197} civil liability of federal officials for acts taken in the course of their duty,\textsuperscript{198} admiralty cases,\textsuperscript{199} contracts governed by the Labor Management Relations Act,\textsuperscript{200} interstate disputes,\textsuperscript{201}

\textsuperscript{194} See Boyle v. United Technologies Corp., 487 U.S. 500 (1989):

In most fields of activity, to be sure, this Court has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription, . . . or a direct conflict between federal and state law . . . . But we have held that a few areas, involving "uniquely federal interests," . . . are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law."

\textsuperscript{195} Id. at 504 (citations omitted).

\textsuperscript{196} See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (federal common law controlled the issue of liability for a check issued by the United States that had been stolen and cashed). In a later case, the Court recognized that even though federal interests are involved, state law may be adopted by a federal court as the federal standard where "application of a federal rule would disrupt commercial relationships predicated on state law." United States v. Kimbell Foods, Inc., 440 U.S. 715, 729 (1979).


\textsuperscript{199} This power derives from Article III, § 2 of the Constitution, which extends the federal judicial power to "all cases of admiralty and maritime jurisdiction." See, e.g., Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917) (state workmen’s compensation award overturned where application of state law was seen as undermining uniform application of federal maritime law); see also Kossick v. United Fruit Co., 365 U.S. 731 (1961); Kermarec v. Compagnie General Transatlantique, 358 U.S. 625 (1959).

\textsuperscript{200} See, e.g., Textile Workers Union v. Lincoln Mills, 335 U.S. 448 (1957) (Section 301 of Labor Management Relations Act vests the federal courts with power to establish federal common law of labor agreements.).

\textsuperscript{201} See, e.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (in case decided same day as \textit{Erie}, Court held that federal common law controlled apportionment of an interstate stream between two states).
interstate pollution,202 enforcement of constitutional rights,203 native American relations,204 and foreign relations.205 Cases have also applied federal common law analysis to issues of mixed procedure and substance that had previously been found to call for the application of state law. These cases have dealt with questions of the statute of limitations applicable to section 1983 actions,206 enforceability of a forum selection clause,207 and dismissal under the doctrine of forum non conveniens.208

202 See, e.g., Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (holding that federal common law would provide a remedy against municipal pollution of Lake Michigan even though no federal statute created such a remedy). But see City of Milwaukee v. Illinois, 451 U.S. 304 (1981) (holding that the Federal Water Pollution Act Amendments of 1972 displaced federal common law, and that federal common law could not be the source of standards more stringent than those contained in the statute).

203 See, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing a private damage remedy for unreasonable searches and seizures in violation of the Fourth Amendment, even though neither the Constitution nor any federal statute provides such a remedy); see also Bush v. Lucas, 462 U.S. 367, 378 (1983) ("When Congress provides an alternative remedy, it may, of course, indicate its intent, by statutory language, by a clear legislative history, or perhaps even by the statutory remedy itself, that the Court's [common law] power should not be exercised."); Davis v. Pasmant, 442 U.S. 228 (1979) (limitations on the Bivens remedy prevented its application to suit for damages from alleged violation of the first amendment, where federal employee was demoted for making critical statements about working conditions (claimed by his superiors to be false) to the news media).

204 See, e.g., County of Oneida, N.Y. v. Oneida Indian Nation, 470 U.S. 226 (Indian relations are exclusive province of federal law under article I, § 8, clause 3 of the Constitution, and tribe had federal common law action for violation of possessory rights conveyed unlawfully in 1795).


206 Wilson v. Garcia, 471 U.S. 261, 279 (1985) (application of single statute of limitations in each state "minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by § 1983").


In *Boyle v. United Technologies Corp.* the Supreme Court continued the development of federal common law in regard to United States rights and obligations under contracts, and civil liability of federal officials for actions taken in the course of their duty. The Court found "the reasons for considering these closely related areas to be of 'uniquely federal' interest [applicable] as well to the civil liabilities arising out of the performance of federal procurement contracts." The family of a United States Marine helicopter co-pilot, who had drowned when his helicopter crashed in the ocean, brought a products liability action. After trial and a $725,000 jury award, the defendant manufacturer appealed the district court's denial of a motion for judgment notwithstanding the verdict, arguing that military contractors are protected from such actions when the product complies with applicable government procurement specifications.

Justice Scalia provided a two-step analysis in determining whether a federal common law rule would be applied in *Boyle*. The first step was to find that the area involved a uniquely federal interest. The next step was explained as follows:

That the procurement of equipment by the United States is an area of uniquely federal interest does not, however, end the inquiry. That merely establishes a necessary, not a sufficient, condition for the displacement of state law. Displacement will occur only where, as we have variously described, a "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law," . . . or the application of state law would "frustrate specific objectives" of federal legislation. The conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates "in a field which the States have traditionally occupied." . . . Or to put the point differently, the fact that

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210 It is interesting to compare the majority opinion by Justice Scalia in *Boyle*, adopting a rule of federal common law, with his dissent in *Stewart*, 487 U.S. 22, where he objected to the majority decision applying federal law to the enforcement of a forum-selection clause in a dispute over a distributorship contract. A similar comparison can be made between Justice Marshall's majority opinion in *Stewart*, and Justice Brennan's dissent in *Boyle*, in which Justice Marshall joined. A comparison of these two cases accents the need to develop a clearer approach to the application of federal law in cases of mixed substance and procedure. Despite the tensions indicated by the differing positions of various Justices, these cases do provide consistency of result, in that both were decided in favor of the application of federal law.

211 *Boyle*, 487 U.S. at 505-06.
the area in question is one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can. But conflict there must be. In some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules. In others, the conflict is more narrow, and only particular elements of state law are superseded. 212

In Boyle, the Court found the state-imposed duty of care, applied by the jury in determining that the helicopter should have been equipped with an escape hatch opening outward, to be in direct conflict with the duty imposed by the federal government contract specifications. 213 This was the conflict justifying preemption through federal common law.

Like most other cases establishing federal common law rules, Boyle tied both the existence of the rule, and its ability to preempt state law rules, to a federal statute. 214 The Rules of Decision Act, 215 considered by the Erie Court to prevent the existence of a general federal common law, appears to require such a tie to either the Constitution, a treaty, or a statute:

[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. 216

Despite this apparent requirement of a tie to one of three sources of written federal law, not all cases applying federal common law have provided such a nexus. This is particularly so in the area of federal common law dealing with foreign relations.

212 Id. at 507-08 (citations omitted).
213 Id. at 510.
214 The Federal Tort Claims Act authorization of damages recovery against the United States for harm caused by the negligent or wrongful conduct of government employees, is subject to a specific exception in 28 U.S.C. § 1346(b) (1988), for a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1988). The Court found the selection of the appropriate design for military equipment "assuredly a discretionary function within the meaning of this provision." Boyle, 487 U.S. at 511.
216 Id.
The principal foreign relations case applying a rule of federal common law is *Banco Nacional de Cuba v. Sabbatino*.

In *Sabbatino*, sugar imported by an American commodity broker had been expropriated by Cuba prior to its importation. In preventing an action by the former owners of the sugar for payment, the Court applied the act of state doctrine, determining that the case fell within the rule that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." The Court was unable to discern a clear nexus for the act of state doctrine in either the Constitution or a statute.

Despite the classic statement of the act of state doctrine, Justice Harlan's majority opinion in *Sabbatino* acknowledges that the doctrine is not dictated by historic notions of sovereignty. Similarly, international law neither requires nor forbids application of the act of state doctrine. Further, "[t]he text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." However, the doctrine is based on "constitutional underpinnings":

It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere . . . . If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

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218 Id. at 416 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).
219 Id. at 421.
220 Id. at 421-22.
221 Id. at 423.
222 Id. at 423-24.
Noting that pre-\textit{Erie} courts were "not burdened by the problem of the source of applicable law" in act of state cases, the \textit{Sabbatino} court found precedent for development of federal common law in other "enclaves of federal judge-made law which bind the States."\textsuperscript{222}

The analogy between the act of state doctrine as a rule of federal common law, and a federal, common law rule on the recognition and enforcement of foreign judgments, reveals important similarities. The act of state doctrine prescribes judicial deference to the legislative and executive "acts of the government of another done within its own territory."\textsuperscript{224} A rule on foreign judgments would simply extend this doctrine to provide deference to the acts of the judicial branches of foreign governments in appropriate circumstances.\textsuperscript{225}

Recent cases lend support to the possibilities for the development of federal common law on issues important to transnational commercial relations. In \textit{Stewart Organization, Inc. v. Ricoh Corp.},\textsuperscript{226} the Supreme Court held that federal law governs the enforceability of forum selection clauses because the issue is procedural under \textit{Erie}. This is a natural extension of the Court's 1972 decision in \textit{Bremen v. Zapata Off-Shore Co.}\textsuperscript{227} Prior to the \textit{Bremen} decision, United States courts had been reluctant to enforce clauses which would "oust" them of jurisdiction.\textsuperscript{228} In some ways, \textit{Bre-
men represented a compelling argument on policy grounds to continue this approach. A German firm had contracted to tow an American company's oil-drilling rig from Louisiana to a point in the Adriatic Sea off the coast of Italy. When the rig was damaged in an accident in international waters, it was brought to Tampa, Florida, where the rig's owner brought an action in Federal District Court against the owner of the tug, claiming both in personam jurisdiction over the owner, and in rem jurisdiction over the tug.

The *Bremen* contract had two important clauses for purposes of the litigation. In one, the owner of the rig waived any right to hold the towing company liable for damage to the rig while at sea, even if such damage resulted from the negligence of the towing company or its employees. 229 Such a clause was arguably void as against public policy in the United States, 230 but enforceable in England. 231

The second pertinent provision of the *Bremen* contract was a clause providing that "[a]ny dispute arising must be treated before the London Court of Justice." If this clause were upheld, requiring the United States court to decline jurisdiction, then the waiver of liability clause was also likely to be effective. Cases prior to *Bremen* arguably required a holding that both clauses were contrary to the public policy of the forum in which suit was brought. 232

By upholding the choice of forum clause, the Supreme Court recognized the need to facilitate transnational commerce, and allow parties to determine the conditions of such transactions, when it stated that "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." 233 Although the parties were American and German, and the transaction involved carriage from the United States to Italy, the Court upheld the

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229 *Bremen*, 407 U.S. at 3 n.2.
230 *Id.* at 8 n.10; *see also* Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).
231 *Bremen*, 407 U.S. at 8 n.8.
232 *See supra* note 228.
choice of an English forum, recognizing that the parties to an international transaction often have good reason to provide for a neutral forum for the resolution of disputes. In doing so, the Court stated that forum selection clauses "are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances."

234 Id. at 13. When the same dispute was litigated concurrently in the English courts, the English Court of Appeals sustained jurisdiction there under the choice of forum clause, despite the fact that the transaction had no connection with England, noting that "in the absence of strong reason to the contrary," the discretion of the English court "will be exercised in favour of holding parties to their bargain." Unterweser Reederei GmbH v. Zapata Off-Shore Co., 2 Lloyd's Rep. 158, 163 (C.A. 1968).


The Bremen court qualified its position on enforcement of forum-selection clauses by specifically noting that the agreement enforced there was "unaffected by fraud, undue influence, or overweening bargaining power." Bremen, 407 U.S. at 12. Subsequent courts, the Restatement, and the now-withdrawn Model Choice of Forum Act, have interpreted Bremen to provide a presumption of validity for a choice of forum clause, with the party contesting the provision carrying the burden of proving grounds for an exception. See, e.g., Santamauro v. Taito do Brasil Industria E Comercia Ltd., 587 F. Supp. 1312, 1314 (E.D. La. 1984) ("The burden is on the party resisting enforcement of the clause to prove that the choice was unreasonable, unfair or unjust, or to show that the clause is invalid by reason of fraud or overreaching or that enforcement would contravene a strong public policy of this forum."); City of New York v. Pullman, Inc., 477 F. Supp. 458, 441 n.10 (S.D.N.Y. 1979), aff'd, 662 F.2d 910 (2d Cir. 1981), cert. denied, 454 U.S. 1164 (1982) ("Agreements entered into by knowledgeable parties in an arm's-length transaction that contain a forum selection provision are enforceable absent a showing of fraud, overreaching, unreasonableness or unfairness."); RESTATEMENT (SECOND) CONFLICT OF LAWS § 80 (1971); NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL CHOICE OF FORUM ACT (1968), text reprinted in Reese, The Model Choice of Forum Act, 17 AM. J. COMP. L. 292 (1969). The Model Act was approved by the National Conference of Commissioners on Uniform State Laws in 1968, and was withdrawn in 1975. See NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, HANDBOOK 142 (1975).
The Eleventh Circuit Court of Appeals has similarly applied federal law to dismissal under the forum non conveniens doctrine. *Sibaja v. Dow Chemical* involved a case brought by Costa Rican plaintiffs against two United States multinational corporations. In applying federal law, the court determined the forum non conveniens doctrine to be a rule of venue rather than a rule of decision. Consequently, the resulting deference to a more convenient forum was not "substantive," and did not determine the outcome of the litigation, because the application of the forum non conveniens doctrine "was a decision that occurred before, and completely apart from, any application of state substantive law."

The only court that appears to have addressed the issue directly has rejected the idea of a general rule of federal common law relating to the enforcement of foreign judgments. However, that rejection had no direct effect on the outcome of the case and is, at best, dictum.

In the post-*Hilton*, pre-*Erie* case of *Johnston v. Compagnie Générale Transatlantique*, Justice Pound held that the New York courts were not bound by the reciprocity rule of *Hilton*. He reasoned that state courts are not bound by United States Supreme Court cases dealing with questions "of private rather than public international law, of private right rather than public relations," and concluded that "our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights." Thus, the *Johnston* case has become a leading authority for the position that states may enforce foreign judgments absent proof of reciprocity (or even in the face of proof of no reciprocity), and for the proposition that federal common law is binding on international law matters only insofar as those matters fall under the rubric of "public" international law. Some have noted that the result of the public-private dis-

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236 757 F.2d 1215 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985).
237 *Id.* at 1219.
238 *Id.*
240 242 N.Y. 381, 152 N.E. 121 (1926).
241 *Id.* at 387, 152 N.E. at 123.
242 See, *e.g.*, *Alternative Theories*, *supra* note 47, at 644 ("[T]he development of federal case law indicates that federal common law encompasses only public and not private international law."). Interestingly, no case is cited in the footnote offered in support of this statement.
tinction in matters of international law is that "[a]ll matters of 'public' international law are, on their face, controlled by federal law, while 'private' international law questions may normally be determined according to state law." and that Zschernig v. Miller "merely refines this principle to provide for federal control in instances where a private international transaction has a direct impact on federal interests of a public international law nature."

While the public-private distinction may have offered Justice Pound the opportunity to circumvent the reciprocity requirement prior to Erie, it is not helpful in a world in which the distinction between "public" and "private" international law is often blurred at best. Further, the participation of our national government in institutions dedicated specifically to the development of private international law, and the ratification of conventions prepared by these institutions belies the argument that it is inappropriate for the federal government to be involved in such matters, or that courts should not follow a consistent pattern in the development of federal common law. It is incongruous to assume that in an area where federal legislation preempts state legislation, state common law would prevail over federal common law. To do so would stand the system of federal-state relations on its head.

Some have argued that the special status of admiralty courts accounts for important misconceptions in the development of judgment recognition law in the United States. Noting that "until 1840 the vast majority of cases involving foreign judgments in American courts involved . . . admiralty decrees," and that

243 Id. at 653.
244 389 U.S. 429 (1968).
245 Alternative Theories, supra note 47, at 653-54.
247 See, e.g., Peterson, supra note 47, at 224-29.
248 Id. at 226.
“admiralty judgments derived preclusive effect by virtue of the status of admiralty courts as ‘international courts’ under international law,” Professor Peterson finds that early admiralty cases (applying in rem jurisdiction concepts) provide no solid precedent for deciding the preclusive effect of foreign in personam judgments rendered by traditional civil courts. “The Law of Nations, which had once served as such a basis for recognition of admiralty decrees, had no direct application to judgments of the domestic courts of foreign nations.” This analysis seems inconsistent with the historic development of the Law of Nations, a law applicable to mercantile transactions as well as sovereign relations. The analysis also seems inconsistent with the traditional application (exemplified in both Swift and Hilton) of the Law of Nations to commercial relations.

Other cases have determined that, as a matter of state law, rules of recognition and enforcement are subject to preemption by federal law. In Island Territory of Curacao v. Solitron Devices Inc., the Second Circuit Court of Appeals held New York’s version of the Recognition Act controlling in an action for enforcement of a Curacaean judgment enforcing an arbitral award rendered in Curacao. However, noting the “clear distinction between action on an [arbitral] award and action on a judgment enforcing the award,” the court noted that in the former case, New York state law is preempted by the United Nations Arbitration Convention and the Federal Arbitration Act. If federal law covered the issue of enforcement of foreign judgments, it would preempt state law in a similar manner.

249 Id. at 225.
250 Id. at 230.
252 Id. at 1319.
253 Id.
256 See also Société Nationale Industrielle Aérospatiale v. United States D. C., 482 U.S. 522 (1987), where the four dissenters would have established a presumption in favor of the use of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, over the Federal Rules of Civil Procedure. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, infra note 258, was cited in support of the need for adequate consideration of the policies of other countries and of the community of nations. Aérospatiale, 482 U.S. at 547-68 (Blackmun, J., dissenting).
Others have considered federal common law an appropriate source of a uniform rule governing the recognition and enforcement of foreign judgments. The Restatement (Second) of Conflict of Laws has predicted exceptions to the application of state law to recognition and enforcement of foreign judgments, followed by preemption through this case-by-case application of federal law. With recent determinations that federal law governs issues regarding forum selection clauses, forum non conveniens, and enforcement of foreign arbitration awards, it is arguable that this process of carving out exceptions has already begun.


The Rules of Decision Act has been roundly criticized by commentators as creating circular reasoning:

257 See supra note 121.
258 Restatement (Second) of Conflict of Laws § 98 comment c (1986 Revision).

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

Id.
262 One commentator has argued for a federal common law rule on the enforcement of judgments for practical reasons:

U.S. judgments may be denied enforcement abroad because a foreign court erroneously assumes that U.S. courts would not enforce its judgments. The presence of a single federal common law of enforcement would reduce the present complexity and should lead to a better understanding of the relevant U.S. law by foreign courts. This would make it simpler to show U.S. reciprocity and therefore easier to obtain foreign enforcement of U.S. judgments.

R. von Mehren, supra note 47, at 408.
263 Supra note 215.
Creation of federal common law would appear to constitute a violation of the Rules of Decision Act . . . .

Perhaps a persuasive response to this argument is that the Act’s language contains within it a circularity which renders it all but useless. To say that state laws shall serve as the rules of decision “in cases where they apply” ultimately fails to tell us to which cases state laws specifically “apply.”

It has been argued that section 34 of the 1789 Judiciary Act “was generally understood to be merely declaratory of existing law; that is, even if the section had never been enacted, the federal courts would have followed the local law of the states in cases where it applied.” Early judicial recognition of a distinction between “general” and “local” law lends credence to the position that state law simply was not meant to “apply” to certain categories of cases, especially those falling within the jus gentium, and therefore governed by the general law of nations.

In Erie, Justice Brandeis’ rejection of the Swift v. Tyson approach to section 34 was based in large part upon the “more recent research of a competent scholar, who examined the original document, which established that the construction given to it by the court was erroneous.” Current analysis raises questions

M. Redish, supra note 205, at 81.


Although this phrase had a meaning in the Roman law which may be rendered by our expression “law of nations,” it must not be understood as equivalent to what we now call “international law,” its scope being much wider. It was originally a system of law, or more properly equity, gathered by the early Roman lawyers and magistrates from the common ingredients in the customs of the old Italian tribes,—those being the nations, gentes, whom they had opportunities of observing,—to be used in cases where the jus civile did not apply; that is, in cases between foreigners or between a Roman citizen and a foreigner. The principle upon which they proceeded was that any rule of law which was common to all the nations they knew of must be intrinsically consonant to right reason, and therefore fundamentally valid and just. From this it was an easy transition to the converse principle, viz., that any rule which instinctively commended itself to their sense of justice and reason must be a part of the jus gentium. And so the latter term came eventually to be about synonymous with “equity,” (as Romans understood it), or the system of praetorian law.

Id.

about whether the Court should have been so quick to refute Swift on this basis.\textsuperscript{268}

In Swift, Justice Story interpreted section 34 as applying "to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality."\textsuperscript{269} He explicitly rejected its application to "questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation."\textsuperscript{270} In contrast, Justice Brandeis, in Erie, took the position that section 34 applies to all matters of law, making no distinction between those matters covered by "local" and "general" law. Two approaches favoring federal common law development in areas such as enforcement of foreign judgments seem worthy of consideration here; one is based on the contrast between Swift and Erie, and the other is based upon a reappraisal of the "general" law (the \textit{jus gentium} or \textit{lex mercatoria}\textsuperscript{271}) applied in Swift.

\textit{(a) Redefining the Swift/Erie Distinction.}—The post-Erie development of federal common law suggests an analytical structure that would give the language of section 34 of the Judiciary Act of 1789 neither the limited reading of Swift nor the expansive reading often ascribed to Erie. Swift limited the language in section 34 to matters of "local" law, leaving the rest for the federal courts on a theory of "general" law recognized throughout the common law. Erie, on the other hand, read section 34 to mean that "the laws of the states" included \textit{all} law within the states, whether "declared by its Legislature in a statute or by its highest court in a decision."\textsuperscript{272} Rather than a distinction between "local" law and "general" law, or a distinction between all law and none, post-Erie cases indicate that a more appropriate focus may be simply between state law and federal law.

Erie tells us that in most cases it is the law of the state that will apply as the rule of decision in federal cases under diversity jurisdiction. Later cases have acknowledged limited areas that remain the province of federal law, whether constitutional, statuto-

\begin{thebibliography}{271}
\bibitem{Jay} Jay, \textit{supra} note 266, at 1264-65.
\bibitem{Swift} Swift v. Tyson, 16 U.S. (1 Pet.) 1, 17 (1842).
\bibitem{Erie} \textit{Id.} at 18.
\bibitem{ErieRailroad} Erie Railroad v. Tompkins, 304 U.S. at 64, 78 (1938).
\end{thebibliography}
ry, or common law in origin. The effort in each case should be directed at determining the scope of this area covered by federal common law, and which rules apply in determining when a specific matter falls within this category.

A second element of Erie was concern with the forum shopping potential of the legacy of Swift. The limited reading of section 34 in Swift was seen, in practice, as introducing "grave discrimination by non-citizens against citizens," and making "rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court." This is not a problem in the federal common law rules carved out subsequent to Erie. These rules are applicable equally in state and federal courts, thereby preventing any benefits of forum shopping within a state. In fact, they work to prevent forum shopping by providing a single rule applicable whether the action is brought in state or federal court.

(b) Redefining the Jus Gentium of Swift.—Just as post-Erie cases articulating the development of federal common law indicate a distinction between Swift and Erie in the interpretation of section 34 of the Judiciary Act of 1789, they also provide particular direction in consideration of federal common law in the area of international relations. Banco National de Cuba v. Sabbatino provides authority for the development of federal common law applicable to international relations concerns, distinguishing that area from others in which federal common law has been applied since Erie. In Sabbatino, the Court was faced with decisions in the district and circuit courts that had decided the case through the interpretation and application of international law. Although the Supreme Court based its decision upon abstention flowing from "constitutional underpinnings" in the relationship between the executive and judiciary branches, it did so only after indicating that if

273 Supra notes 196-208 and accompanying text.
274 Erie, 304 U.S. at 74-75.
275 See supra notes 240-45 and accompanying text. But see Johnston v. Compagnie Générale Transatlantique, 242 N.Y. 381, 385-88, 152 N.E. 121, 122-24 (1926) (holding that the United States Supreme Court decision in Hilton involved private international law and was therefore not binding on state courts).
276 Supra notes 217-25 and accompanying text.
277 193 F. Supp. 375 (S.D.N.Y.) and 307 F.2d 845 (2d Cir. 1962).
278 Supra note 222 and accompanying text.
the applicable international law rule had been clearly developed, it would itself have applied international law. 279

Deference to international concerns and the role of the executive branch in dealing with such concerns were integral aspects of the act of state doctrine applied in Sabattino. It is here that a relationship to Swift exists. Swift applied general commercial law developed as part of the jus gentium, or law of nations. Justice Story found "[t]he law respecting negotiable instruments truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, to be in great measure, not the law of a single country only, but of the commercial world." 280 Justice Story considered the applicable law to be that of the law merchant, which he considered a part of the law of nations, and thereby a part of the law of the United States to be applied "generally" in our courts.

This application of the private transactional rules of the law of nations is not unique to Swift. In Hilton v. Guyot, 281 Justice Gray made explicit the application of the same rules to the question of enforcement of foreign judgments in United States courts:

International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination. 282

Like "public" international law, Justice Gray would find this "private" international law in treaties, if possible—and if not, then in "judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations." 283

There is a common thread running from Swift to Hilton to Erie to Sabattino; but it is difficult to pin down. Although Erie rejected a general federal common law, both Swift and Hilton based their holdings on concepts of jus gentium that arguably go beyond

280 Swift v. Tyson, 16 U.S. (1 Pet.) 1, 19 (1842).
281 159 U.S. 113 (1895).
282 Id. at 163.
283 Id.
the jurisprudential underpinnings of federal common law in other areas, and therefore go beyond the limitations of *Erie* itself in the interpretation of section 34 of the Judiciary Act of 1789. Professor Henkin makes a distinction between federal common law as judge-made law and international law as judge-found law.\textsuperscript{284} If private international law is a part of our law as "international law" rather than as "federal common law," then the rules of that law "must be ascertained and administered by the courts," in accordance with Justice Gray's statements. In that case, it makes sense to have the federal courts "finding" that law.

To date, there has been no prohibition on state courts applying international law as the law of the United States. This raises exactly the concern expressed in *Erie* with the "general common law" interpretation of section 34 in *Swift*. However, in this case it augurs for the opposite result for exactly the same reasons. So long as we have issues of international law being determined in both federal and state courts, we run the risk of application of different interpretations of the rules and a resulting promotion of forum shopping.\textsuperscript{285} Conceptually, there can be only one rule of international law applicable in United States courts, and it should be the same no matter what court is involved.

If common law includes general law as determined in *Swift*, then it overlaps with international law in cases implicating the conduct of international relations. Professor Henkin's distinction between judge-made law and judge-found law may become a distinction without meaning in the application of some rules of private international law. But we must realize that the law considered here, no matter what the moniker, must be applied uniformly in all courts in order to present a unified position in our relations with other nations. The best way to approach such consistency in judicial decisions is to develop that law under the rubric of what is now considered federal common law.

This discourse is open to the criticism that a rule on the enforcement of foreign judgments, like the act of state doctrine, is neither required nor prohibited by international law.\textsuperscript{286} However, Justice Gray did find the rule applicable in 1895 to be part of the


\textsuperscript{285} *Erie Railroad v. Tompkins*, 304 U.S. 64, 74-78 (1938).

\textsuperscript{286} *Supra* note 220 and accompanying text.
jus gentium and therefore governed by the law of nations.\textsuperscript{287} The important concern is that our approach to the enforcement of foreign judgments has significant implications for our relations with the sovereign states from which those judgments issue. It must be dealt with in a uniform federal system. Experience has demonstrated that any other approach is inconsistent with the forum shopping concerns of \textit{Erie}, contrary to the judicial respect for international law demonstrated in \textit{Hilton}, and likely to frustrate the concern for uniform national representation in matters of international relations reflected in \textit{Sabbatino}.

3. Effect of Federal Common Law

A federal common law rule on recognition and enforcement would be applicable in both federal and state courts through the preemptive weight granted to a substantive federal common law rule.\textsuperscript{288} Thus, uniformity among the states and between state and federal systems would be achieved. Ultimately, the source of the rule would be the United States Supreme Court, with its pronouncements providing singular authority to be followed by all United States courts.

By providing a singular rule for United States recognition and enforcement practice, a federal common law rule would also simplify the process of proving United States law in a foreign court. The confusion engendered by multiple sources of rules and by a federal system that requires reference to state law could be avoided. If the rule adopted as common law were consistent with that set forth in the Recognition Act and the Restatement (Third) of Foreign Relations Law, it would then be easier to prove that a United States court would enforce a judgment of the foreign jurisdiction, thus facilitating satisfaction of foreign court reciprocity requirements. While not providing the assurances of foreign court recognition and enforcement available in a bilateral or multilateral treaty, a federal common law rule would go a long way toward improving United States practice and promoting the recognition and enforcement of United States judgments overseas.

\begin{itemize}
\item \textsuperscript{287} \textit{Supra} note 282 and accompanying text.
\item \textsuperscript{288} \textit{See, e.g.}, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
\end{itemize}
F. The Federal Rules of Civil Procedure

1. Issues Affecting a Federal Rule

Federal courts with diversity jurisdiction have consistently held the issue of recognition and enforcement of foreign country money judgments to be governed by state law. As indicated above, this does not prevent federal law preemption on the recognition and enforcement rule through treaty, federal legislation, or federal common law. A fourth method of federalization of the rule on recognition and enforcement is possible: the amendment of the Federal Rules of Civil Procedure.

Even though federal procedure points to state law for purposes of enforcement procedure, in accord with Erie, an amendment to the Federal Rules of Civil Procedure would change the matter in federal courts. The Supreme Court in Hanna v. Plumer made clear that:

When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Thus, if a Federal Rule existed governing recognition and enforcement, that Rule would be applicable in both federal question and diversity cases before federal courts. If the case were originally brought in state court, the Federal Rule could be made applicable through removal to federal court where available.

289 Supra note 31 and accompanying text.
290 Supra notes 134-84 and accompanying text.
291 Supra notes 185-91 and accompanying text.
292 Supra notes 192-288 and accompanying text.
293 Supra notes 106-08 and accompanying text.
295 Id. at 471.

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
Under the Rules Enabling Act, Congress has authorized the Supreme Court "to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions." Amendments to the Rules are proposed by the Supreme Court Advisory Committee on Civil Rules and are reported to Congress by the Chief Justice. They automatically become effective ninety days after being reported to Congress, unless Congress legislates otherwise.

As already noted, Rule 69 provides that "the procedure on execution [to enforce a judgment for the payment of money] . . . shall be in accordance with the practice and procedure of the state in which the district court is held," except to the extent federal law prescribes, or the court directs, otherwise. Rule 9(e) governs the pleading of judgments, specifically applying to decisions of "domestic or foreign court[s]." Other Federal Rules deal more specifically with issues of transnational litigation. Rule 44(a)(2) provides the procedure for proof of foreign official records, and Rule 44.1 provides that determinations of foreign official records, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification of the genuineness of signature and official position of the attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authen-

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298 Id.
299 For a discussion of the history of the Federal Rules and the procedure for their creation and amendment, see 4 C. Wright & A. Miller, Federal Practice and Procedure ch. 1 (1987). The requirement that proposed rules be reported to Congress is found in the Rules Enabling Act:

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

300 Rules Enabling Act, supra note 297.
301 FED. R. CIV. P. 69; see supra notes 107-08 and accompanying text.
302 FED. R. CIV. P. 9(e).
303 FED. R. CIV. P. 44(a)(2):

A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification of the genuineness of signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authen-
law are to be made by the court upon consideration of "any relevant material or source." Both of these provisions were added by amendment to the Federal Rules of Civil Procedure in 1966. The language of Rule 44.1 in part parallels article VI of the earlier Uniform Interstate and International Procedure Act, approved by the Commissioners on Uniform State Laws in 1962. Thus, not only is a Federal Rule a possible target for changing the rule for recognition and enforcement of foreign money judgments in federal courts, but there exists precedent for enacting the substance of uniform act procedures in the form of a Federal Rule.


A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Id.

Sections 4.01-.03 are the provisions of the Uniform Act traced by Rule 44.1. They read as follows:

§ 4.01 [Notice]
A party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this state shall give notice in his pleadings or other reasonable written notice.

§ 4.02 [Materials to Be Considered]
In determining the law of any jurisdiction or governmental unit thereof outside this state, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the rules of evidence.

§ 4.03 [Court Decision and Review]
The court, not jury, shall determine the law of any governmental unit outside this state. Its determination is subject to review on appeal as a ruling on a question of law.

The Uniform Act has been adopted in only four states, the District of Columbia, and the Virgin Islands. Id. at 53 (Supp. 1991).
2. Effect of Adoption of a Federal Rule of Civil Procedure

The principal advantage of a Federal Rule would be in the unification of practice before the federal courts. No longer would a federal district court be subject to the contortions required by *Erie* when the rule has not been clearly stated by either the state legislature or judiciary. Further, with the tendency of state systems to copy or at least emulate the Federal Rules, the existence of a Federal Rule would likely promote uniformity among the states. Even if a state did not follow the Federal Rule, where diversity jurisdiction exists, the parties would have the option of going to federal court, either through the initiation of the action there or by removal. Thus, while not immediately providing a singular rule for federal and state courts, a Federal Rule of Civil Procedure would markedly improve the existing system.

A Federal Rule would also create greater possibility that a United States judgment would be enforced in a foreign court. A Rule consistent with the Recognition Act and the Restatement (Third) of Foreign Relations Law would make it easier to prove that a United States federal court would enforce a judgment of the foreign jurisdiction, thus facilitating satisfaction of foreign court reciprocity requirements. With the rule in written code-type format, a Federal Rule would easily be demonstrated to a foreign court when recognition or enforcement of a United States judgment is sought. While not providing the certainty of foreign court practice resulting from a bilateral or multilateral treaty, a Federal Rule of Civil Procedure would be a substantial improvement in promoting the recognition and enforcement of United States judgments overseas.

VII. CONCLUSION: AN ASSESSMENT OF UNIFORMITY AND FOREIGN RECOGNITION AS NECESSARY AND REALISTIC GOALS, AND SOME COMMENTS ON HOW BEST TO PURSUE THEM

The question which perhaps first should have been addressed in this discussion is whether there is any practical need for change in United States law on recognition and enforcement of foreign judgments. The above discussion demonstrates the academic prob-

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lems with the existing system, but fails to provide substantive evidence of a practical problem. While foreign reciprocity requirements and a morass of sources for United States rules appear to present problems in the enforcement of United States judgments abroad, there is little empirical demonstration that the apparent problem is a real one. It may be that this omission is a result of the problems of searching multiple foreign legal systems, whose materials are in differing languages and formats. At the same time, it may be that academic concern with a challenging intellectual issue simply is not mirrored by the real world practice of law. Perhaps the practicing bar has had no real problem with recognition and enforcement of United States judgments abroad—just as, despite the differing sources of the rules, foreign parties have had little practical problem with enforcement of foreign judgments in the United States.

Yet, in a world in which business transactions and people are constantly crossing sovereign borders, it seems likely that the indications that some practical problems exist justify preventing the magnification of these problems in the future. Moreover, transnational consideration of legal process in the past has contributed to a better understanding of differing legal systems and a valuable reexamination of home country practices. 307 This exercise should continue.

A survey conducted in the early 1970s by the Association of the Bar of the City of New York, at the request of the Chairman of the Department of State’s Advisory Committee on Private International Law, concluded that “[t]he principal reason for failure to secure enforcement abroad was lack of reciprocity.” 308 A similar study by the Committee on International Law of the New York State Bar Association reported that, while foreign country judgments “have generally been recognized and enforced in the United States,” “nonrecognition of United States’ judgments abroad is the rule rather than the exception.” 309 This report attributed

307 The history of the various conventions of UNCITRAL, the Hague Conference on Private International Law and UNIDROIT provides numerous examples of valuable comparative study, whether or not each consideration of a new convention resulted in a widely-accepted agreement on a new set of rules.

308 Recognition and Enforcement of Foreign Judgments: A Summary of the Replies to a Questionnaire Prepared by the Association of the Bar (1972), quoted in R. von Mehren & Patterson, supra note 47, at 80.

nonrecognition to both the absence of recognition treaties and to foreign country reciprocity requirements.\textsuperscript{310}

Each of the available alternatives for seeking improvement of United States law on recognition and enforcement of foreign judgments has its disadvantages. The following chart categorizes each alternative in terms of the goals of (1) state/state uniformity; (2) state/federal uniformity; (3) international acceptance (i.e., the ability either to prove the rule for reciprocity purposes in the foreign court or to obtain recognition and enforcement through treaty obligation); and (4) exorbitant jurisdiction protection (i.e., the ability to avoid enforcement in foreign courts of other foreign countries' judgments based on exorbitant jurisdiction provisions).

\textsuperscript{310} Id.: Starting with the Common Market countries, United States judgments are not enforceable in the Netherlands because its law requires the existence of a treaty; they are reexamined on the merits in Belgium; they are subject to a statutory reciprocity requirement in Germany that is often difficult to establish to the satisfaction of the German courts, which are accustomed to look to statutes rather than to court decisions; and they are by statute subject to reexamination on the merits in Italy if rendered by default. In the Scandinavian countries, a treaty is needed for enforcement. In the rest of Western Europe, as well as in Latin America, the situation does not differ substantially. Under the Code of Quebec, any defense which might have been made in the original action may be pleaded against a judgment rendered outside Canada. Conclusive effect is also denied United States judgments in some other Canadian provinces as well.

\textit{Id.}
### Comparisons of the Available Alternatives for Changing United States Law on Recognition and Enforcement of Foreign Money Judgments

<table>
<thead>
<tr>
<th></th>
<th>State/State Uniformity</th>
<th>State/Fed. Uniformity</th>
<th>Intl' Acceptance</th>
<th>Exorbitant Jurisdct'n Protection</th>
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</thead>
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<tr>
<td>Adoption of UFMJRA &amp; UEFJA</td>
<td>YES</td>
<td>YES*</td>
<td>Reciprocity</td>
<td>NO</td>
</tr>
<tr>
<td></td>
<td>if adopted without modifications</td>
<td></td>
<td>Easier to prove, but not guaranteed</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Multi-Lateral Treaty</td>
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<td>YES</td>
<td>YES</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>with respect to treaty parties</td>
<td></td>
<td>with respect to treaty parties</td>
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</tr>
<tr>
<td>Bilateral Treaties</td>
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<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td></td>
<td>with respect to treaty parties</td>
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<td>with respect to treaty parties</td>
<td></td>
</tr>
<tr>
<td>Federal Statute</td>
<td>YES</td>
<td>YES</td>
<td>Reciprocity</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Easier to prove, but not guaranteed</td>
<td></td>
</tr>
<tr>
<td>Federal Common Law</td>
<td>YES</td>
<td>YES</td>
<td>Reciprocity</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Easier to prove, but not guaranteed</td>
<td></td>
</tr>
<tr>
<td>Rule of Civil Procedure</td>
<td>NO unless all states adopt federal rule</td>
<td>No unless all states adopt federal rule</td>
<td>Reciprocity Easier to prove for federal judgments</td>
<td>No</td>
</tr>
</tbody>
</table>

|                        |                        |                       |                 |                                   |

### Notes
- UFMJRA: Uniform Foreign Money Judgments Act
- UEFJA: Uniform Enforcement of Foreign Judgments Act
- Yes: Available
- No: Not available
- *: Reciprocity is conditional
*Erie* would create uniformity between state law and the law applicable in diversity cases in federal courts. Uniformity is uncertain in federal question cases in light of *Hilton v. Guyot*, 159 U.S. 113 (1895), and the potential for continuing validity of its reciprocity requirement.

[The above comment applies to the chart on the previous page]

Consistent comprehensive adoption of the Recognition Act and the Enforcement Act would provide uniformity among the states, and, through the *Erie* doctrine, would result in uniformity between state court and federal court diversity practice. While the resultant codification would make it easier to prove reciprocity before a foreign court, adoption would not guarantee foreign court recognition or enforcement, and would fail to address the problems of exorbitant jurisdiction practice under the Brussels and Lugano conventions.

Adoption of a singular federal rule through a treaty, federal legislation, federal common law, or the Federal Rules of Civil Procedure, would unify federal law and prevent a different rule from being applied from one federal district court to the next. Through preemption of state law, the first three of these four options would provide state/federal uniformity in the recognition and enforcement of foreign judgments. If states would follow an amendment to the Federal Rules with amendments to their own procedure, it may be that an amendment to the Federal Rules would also led to both state/state and state/federal uniformity. Like comprehensive adoption of the uniform acts, however, federal legislation, federal common law, and a Federal Rules amendment could not directly address the concern with foreign court recognition and enforcement of United States judgments. Although they may, by providing a singular rule, make proof of reciprocity less complicated, they would provide no guarantees and could not address concerns regarding judgments based only on exorbitant jurisdictional grounds.

Of the available alternatives, only a multilateral treaty with broad-based participation throughout the world will address all of the problems of state/state uniformity, state/federal uniformity, foreign court recognition, and exorbitant jurisdiction protection. Given the convergence of litigation and arbitration practice since the promulgation of the United Nations Convention on the Rec-
ognition and Enforcement of Foreign Arbitral Awards, the time may have come to consider a multilateral treaty on recognition and enforcement of judgments under the auspices of UNCITRAL or the Hague Conference on Private International Law.

The argument against a multilateral treaty is that there is no practical hope of achieving such a grand goal. Too many countries remain opposed to United States discovery practice, excessive United States jury verdicts, treble damage awards under United States antitrust, securities and RICO laws, and the extraterritorial application of United States laws generally. The existence of other multilateral treaties addressing transnational judicial procedure give reason for hope of progress through a judgments convention. While the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters has not engendered foreign acceptance of United States discovery practice, the Convention has led to increased discussion of the similarities and differences in legal systems, and the hope of fewer problems in the future.

Perhaps the best argument for a multilateral treaty lies in the implications of unification of United States law on recognition and enforcement of judgments through any of the other methods. Treaties represent the compromise of sovereign positions on matters of importance to each of the parties involved. While unification of recognition and enforcement procedure in the United States has value to the United States system itself, it would also serve to eliminate problems remaining in a United States system that already makes the enforcement of a foreign country judgment the rule rather than the exception. Unification through federal legislation, federal common law, the Federal Rules of Civil Procedure, or comprehensive and consistent adoption of uniform acts ironically would provide the foreign parties most, if not all, of the

311 Supra notes 166-76 and accompanying text.
benefits their sovereigns would seek for them in a treaty on recognition and enforcement. Thus, state-state and state-federal unification through a means other than a multilateral treaty runs the risk of inhibiting the joint goals of foreign country recognition of United States judgments, and protection against enforcement of judgments based on exorbitant jurisdictional grounds.
APPENDIX

STATE-BY-STATE ENACTMENT OF THE
UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT
AND THE
UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT
(CURRENT TO JUNE OF 1991)

An asterisk (*) denotes those states which have added a reciprocity requirement in their adoption of the Uniform Foreign Money-Judgments Recognition.

<table>
<thead>
<tr>
<th>State</th>
<th>Uniform Enforcement of Foreign Judgments Act</th>
<th>Uniform Money Judgments Recognition Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALABAMA</td>
<td>ALA. CODE §§ 6-9-230 to 6-9-238 (Supp. 1990)</td>
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<tr>
<td>ARIZONA</td>
<td>ARIZ. REV. STAT. ANN. §§ 12-1701 to 12-1708</td>
<td>none</td>
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<tr>
<td>CALIFORNIA</td>
<td>None. (adopted act for sister state judgments. CAL. CIV. PROC. CODE §§ 1710 to 1710.65 (West 1982).</td>
<td>CAL. CIV. PROC. CODE §§ 1713 to 1713.8 (West 1982)</td>
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<tr>
<td>DELAWARE</td>
<td>DEL. CODE. ANN. tit. 10, §§ 4781 to 4787 (Supp. 1990)</td>
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</table>
### DISTRICT OF COLUMBIA


### FLORIDA


### GEORGIA


### HAWAII


### IDAHO

Idaho Code §§ 10-1301 to 10-1308 (1990)

*Idaho Code §§ 10-1401 to 10-1409 (1990)

### ILLINOIS


### INDIANA

None

### IOWA

Iowa Code Ann. §§ 626A.1 to 626A.8 (West Supp. 1990)

Iowa Code Ann. §§ 626B.1 to 626B.8 (West Supp. 1990)

### KANSAS


None

### KENTUCKY


None

### LOUISIANA


### MAINE


None

### MARYLAND


<table>
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<td>MASSACHUSETTS</td>
<td>none in Massachusetts.</td>
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<td>MICHIGAN</td>
<td>None in Michigan</td>
</tr>
<tr>
<td>MINNESOTA</td>
<td>MINN. STAT. ANN. §§ 548.26 to 548.33 (West 1988).</td>
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<td>MISSISSIPPI</td>
<td>MISS. CODE ANN. §§ 11-7-301 to 11-7-309 (Supp. 1990).</td>
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<td>MISSOURI</td>
<td>MO. ANN. STAT. § 511.760 (Vernon 1952)</td>
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<tr>
<td>NEVADA</td>
<td>NEV. REV. STAT. ANN. §§ 17.330 to 17.400 (Michie 1986).</td>
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<td>NEW HAMPSHIRE</td>
<td>None in New Hampshire.</td>
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<td>NEW JERSEY</td>
<td>None in New Jersey.</td>
</tr>
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<td>NEW MEXICO</td>
<td>1989 N.M. Laws 256, signed Apr. 6, 1989.</td>
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<tr>
<td>NORTH CAROLINA</td>
<td>N.C. GEN. STAT. §§ 1C-1701 to 1C-1708 (Supp. 1990).</td>
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<td>State</td>
<td>Code References</td>
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<tr>
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<td>--------------------------------------------------------------------------------</td>
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<tr>
<td>SOUTH CAROLINA</td>
<td>None</td>
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<tr>
<td>UTAH</td>
<td>Utah Code Ann. §§ 78-22a-1 to 78-22a-8 (1987)</td>
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<tr>
<td>VERMONT</td>
<td>None</td>
</tr>
<tr>
<td>State</td>
<td>Statute Information</td>
</tr>
<tr>
<td>------------</td>
<td>--------------------------------------------------</td>
</tr>
</tbody>
</table>

**Number of States Enacting Each Statute:**

- Wisconsin: 43
- Wyoming: 22
† See D.C. Code Ann. § 12-307 (1966): "An action upon a judgment or decree rendered in a State, territory, commonwealth or possession of the United States or in a foreign country is barred if by the laws of that jurisdiction, the action would there be barred and the judgment or decree would be incapable of being otherwise enforce [sic] there."

‡‡ Montanna has not enacted the Uniform Foreign Money-Judgments Recognition Act. MONT. CODE ANN. § 26-3-205 (1990) makes in rem foreign judgments conclusive as to the title to the thing and in personam foreign judgments "presumptive evidence of a right as between the parties," subject to attack only on grounds of "want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact."

‡‡‡ N.H. REV. STAT. ANN. § 524:11 (1974), requires reciprocity to be shown for the enforcement of a Canadian federal or provincial judgment.

‡‡‡‡ New Jersey has enacted neither of the uniform acts. However, see N.J. STAT. ANN. §§ 2A:82-4.1 to 2A:82-4.7 (West Supp. 1990), specifically creating burdens on the enforcement of judgments under the Philadelphia Wage and New Profits Tax Ordinance.

‡‡‡‡† Sources for determining which states have adopted a uniform act tend to differ. Whereas most of the above statutes are noted in UNIFORM LAWS ANNOTATED, published by West Publishing Company, as of June 10, 1991, the Chicago office of the National Conference of Commissioners on Uniform State Laws (NCCUSL) listed 41 jurisdictions (including Puerto Rico, but excluding Louisiana, Mississippi, and North Carolina) that had adopted UEFJA, and did not include Iowa or Ohio in its list of 20 jurisdictions that had adopted UFMJRA.