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The Enforcement of Foreign Judgments in the U.S. - A Matter of State Law in Federal Courts

John A. Spanogle

THE ENFORCEMENT OF FOREIGN JUDGMENTS IN THE U.S. – A MATTER OF STATE LAW IN FEDERAL COURTS

JOHN A. SPANOGLE*

I have two basic points to make in this presentation:

1) Even though most of the decisions on enforcement of foreign judgments are being made in federal courts, the applicable law concerning whether or not to enforce the foreign judgment is almost always state law; and
2) The law in most of the states in the United States recognizes and enforces most foreign judgments, unless the foreign judgment is a default judgment.

THE APPLICABLE LAW

Why, if such a case is in a federal court, is this a matter of state law? After all, whether we will enforce the judgments from foreign courts necessarily involves relations between the United States and foreign governments. But almost all the actions that create foreign judgments are based on either contract or tort causes of action. Under U.S. federalism principles, contract and tort issues are matters of state law, not federal law. So, even though most of these cases get into federal court because of diversity jurisdiction, the doctrine of *Erie Railroad v. Tompkins*[1] requires that the federal courts apply state law to such diversity cases. So, the federal courts must look to state court precedents.

It is beneficial for foreign plaintiffs and their attorneys that actions to enforce foreign judgments are a matter of state law rather than federal law. The U.S. Supreme Court, in *Hilton v. Guyot,*[2] made a decision in the very early days of the Republic about actions to enforce foreign judgments. Even though the court used language that referred to "*comity,*"[3] and respect for the decisions of other courts, the holding and decision in the *Hilton* case stated that federal law provided recognition and enforcement of judgments only from jurisdictions where there was reciprocity—jurisdictions which can prove that they enforce U.S. judgments.[4] Thus, the basic doctrine in the federal courts, and *Hilton v. Guyot* has never been overturned, is that Mexico, for example, must provide reciprocal enforcement of U.S. judgments, or federal law will not provide recognition and enforcement of Mexican judgments.

This approach can create a lot of problems, because it may be difficult to show actual enforcement of U.S. judgments in a foreign country. It can lead to a chicken-and-egg situation because other countries very often also insist on reciprocity. So U.S. courts state, "We will not enforce a foreign judgment unless you can show that the courts of that foreign nation will enforce U.S. judgments" while of course, the other nations' courts are, likewise, saying, "We will not enforce U.S. judgments

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* William Wallace Kirpatrick Professor of Law, The George Washington University Law School. The author wishes to thank Cynthia Lopez-Beverage for her valuable assistance in preparing this article.

1. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
2. Hilton v. Guyot, 159 U.S. 113 (1895).
3. *Id.* at 143-157.
4. *Id.* at 154.

until you can show that U.S. courts will enforce our judgments." Who will act first in these situations?

The *Erie* doctrine changed the underlying thinking applicable to analysis of U.S. recognition and enforcement of foreign judgments. First, enforcement became a matter of state law; and second, the state courts were less interested in inter-governmental relations, meaning reciprocity, and more interested in inter-court relationships. Thus, the most prevalent analytical doctrine used by most state courts was based on a concept called "comity." Comity meant that one court should give due deference to the orders of another court in order to promote mutual respect of courts for each other. The basic thrust of the comity doctrine was to promote recognition and enforcement of foreign judgments. There were, of course, some limits on that doctrine. Recognition and enforcement would be denied (1) if the foreign court did not observe minimum standards of decency; (2) if the foreign court did not have jurisdiction over the subject matter or personal jurisdiction over the defendant, at least as judged by the enforcing court; or (3) if the foreign judgment violated the public policy of the enforcing state.

Historically, once enforcement of foreign judgments became a matter of state law, another interesting chicken-and-egg situation arose from the fact that most of these cases are decided in federal courts, rarely staying in state courts. As a result, the federal courts found themselves trying to guess what the state courts might do when the state courts had not yet confronted the issue. In some instances, it became sort of a federal case decision-making by ouija board, which is not quite good policy or decision-making. Nevertheless, a few foreign plaintiffs' attorneys figured this out and kept their cases in state courts. They started to obtain state court decisions which enforced foreign judgments: Judge Pound, as a leader in the New York State courts in the early Twentieth Century, said that comity should be the criterion, and New York courts would enforce judgments on that basis.[5] After that, a number of other courts made similar pronouncements, but they were very few, and their definitions of comity were exceedingly diverse, because they were each looking at their own history.

The National Conference of Commissioners on Uniform State Laws entered this field and drafted "The Uniform Foreign Money Judgments Recognition Act."[6] The purpose of this act is twofold. One purpose is to make certain that states can articulate their policy, whether it is reciprocity or comity or something else, without having to worry about whether their cases remain in their state courts or are removed to the federal courts on diversity grounds. Their proposed statute allows the state legislature to make the determination of the applicable criteria, not the courts. The other purpose was to try to create a uniform definition of comity, to specify the requirements that must be met to get enforcement of judgments.[7]

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5. Johnston v. Compagnie Generale Transatlantique, 152 N.E. 121 (N.Y. 1926) (Comity is not a rule of law, but is one of practice, convenience and expediency, and in determining the force of a foreign judgment rests upon its persuasiveness rather than on a basis of reciprocity) (Pound, J.); Roscoe Pound, *Judge Holmes' Contributions to the Science of Law*, 34 HARV. L. REV. 449, 450 (1921).

6. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 1, et seq., 13 U.L.A. 156 (1962) (hereafter "UFMJRA"). The UFMJRA was approved by the National Conference of Commissioners on Uniform State Laws, and the American Bar Association, in 1962; also *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/ufmjra62.htm.

7. Jay M. Zitter, *Construction and Application of Uniform Foreign Money-Judgments Recognition Act*, 88 A.L.R.5th 545 (2001).

In general, they have succeeded in both purposes. The Uniform Foreign Money Judgments Recognition Act (referred to interchangeably as "the Uniform Act" or "the Act") has now been enacted by a majority of states.[8] It has become a "national law" in the sense that thirty-one states have now adopted an express legislative policy based on this act.[9] The current "national law" on enforcement of foreign judgments is not a matter of federal law since each state enacts this legislation separately. But, it has created a basic concept that foreign money judgments will be enforced unless there is a legislatively stated defense. Thus, a foreign judgment-holder can start with the presumption that they will be able to enforce their judgment, if they meet basic criteria, unless a stated defense in the statute can be proven. That set of concepts limits freelancing by the courts, both federal and state.

THE SCOPE OF APPLICATION

The statute applies to all foreign judgments that are for money.[10] What is not included? It does not include foreign judgments granting injunctive relief, or foreign declaratory judgments. It does not include foreign judgments that decide title disputes concerning either a particular chattel or an immovable, and it does not include specific performance decrees. Thus, it applies only to money judgments.

However, even within money judgments, the Act does not apply to certain types. It does not apply to fines or other money judgments that arise out of a criminal process.[11] It does not apply to money judgments that arise out of tax causes of

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8. See Attorney General of Canada v. Gorman, 769 N.Y.S.2d 369, 371 (N.Y.Sup. 2003) ("Helping to fill the void in the law is the Uniform Foreign Money-Judgments Recognition Act ('the Act'), approved in 1962 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association and presently adopted in some form by 31 states and the District of Columbia and the Virgin Islands.... The Act serves principally as a 'showpiece' since its principal purpose is to make it more likely that judgments rendered in a state that has adopted it will be recognized abroad, since the courts of many foreign countries value reciprocity.").

9. *Id.*

10. *See* UFMJRA § 3, *supra* note 6: "Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is conclusive between the parties to the extent that it grants or denies recovery of *a sum of money*...." (Supp. 2002) (emphasis added); *see also* Bianchi v. Savino Del Bene Intern. Freight Forwarders, Inc., 770 N.E.2d 684 (Ill. Ct. App. 2002) (Illinois was not required, under Uniform Foreign Money-Judgments Recognition Act, to recognize defective Italian judgment for wrongful termination which did not grant recovery of specific sum of money); Ocean Warehousing B.V. v. Baron Metals and Alloys, Inc., 157 F.Supp.2d 245 (S.D.N.Y. 2001) (Under New York law, foreign-country judgment that is final, conclusive and enforceable where rendered must be recognized and is enforced as conclusive between parties to extent that it grants or denies recovery of sum of money); Biel v. Boehm, 406 N.Y.S.2d 231 (N.Y. 1978) (A foreign country judgment is conclusive between parties to extent that it grants or denies recovery of a sum of money and may be recognized and accepted in New York if it is final, conclusive and enforceable where rendered); *cf.* Allstate Ins. Co. v. Administratia Asigurarilor de Stat, 962 F.Supp. 420 (S.D.N.Y. 1997) (Enforceability of foreign country judgment which allegedly nullified contract was not governed by New York's version of Uniform Foreign Money Judgments Act, since that Act was limited to foreign state judgments granting or denying recovery of sums of money).

11. *See* UFMJRA § 1, *supra* note 6: "'foreign judgment' means any judgment of a foreign state granting or denying recovery of a *sum of money, other than a judgment* for taxes, *a fine or other penalty*...." (Supp. 2004) (emphasis added); *cf.* Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp. 73 (D.Mass. 1987) (Belgian judgment did not constitute "fine or other penalty" so as to be necessarily unenforceable under Massachusetts UFMJRA law, even though proceeding was primarily criminal, but Belgian court considered damage petition as civil remedy; where judgment did not afford punishment for offense against public justice of Belgium; and where benefit of judgment accrued to private judgment creditor, not to Belgium); Desjardins Ducharme v. Hunnewell, 585 N.E.2d 321 (Mass. 1992) (Whether judgment is a "fine or other penalty" within meaning of Massachusetts UFMJRA depends on whether its purpose is remedial in nature, affording a private remedy to an injured person, or penal in nature, punishing an offense against the public justice).

action.[12] A foreign government may not bring its tax collections judgments to the U.S., and expect routine enforcement of those judgments. Finally, historically, it has not applied to matrimonial and child support judgments and other judgments that are of family matters, although a shift may be occurring on this point.[13] There are separate treaties that deal with those family law situations,[14] so those are now matters of federal law; and the Uniform Commissioners wisely decided that their statute should not be involved in those issues. After all these exclusions, in general, the remaining foreign money judgments covered by the Uniform Act all arise out contract and tort causes of action. In addition, these are traditionally matters of state law; and therefore, subject to the *Erie* doctrine.

CRITERIA FOR ENFORCEMENT

In order to obtain enforcement of a foreign money judgment, the first requirement is that the judgment must be final and conclusive; and second, that the judgment must be enforceable where it was rendered.[15] What about judgments that are subject to appeal? Under the Act, the judgment can be final even though it is on appeal or can be subject to an appeal, as long as local law permits enforcement

12. *See* UFMJRA § 1, *supra* note 6: "'foreign judgment' means any judgment of a foreign state granting or denying recovery of a *sum of money, other than a judgment for taxes* ...." (Supp. 2004).

13. *See* UFMJRA § 1, *supra* note 6: "'foreign judgment' means any judgment of a foreign state granting or denying recovery of a sum of money, *other than ... a judgment for support in matrimonial or family matters*." (Supp. 2004) (emphasis added); *see also In re* Marriage of Grant, 964 P.2d 963 (Okla. Civ. App. 1998); Nardi v. Segal, 234 N.E.2d 805, 808 (Ill. Ct. App. 1967) (Action could not be maintained in Illinois court for arrearages of child support based on divorce decree of foreign country including provisions for such support); *contra* Zalduendo v. Zalduendo, 360 N.E.2d 386 (1977), *overruled by* Pinilla v. Harza Engineering Co., 755 N.E.2d 23, (Ill. Ct. App. 2001) ("Although several Illinois cases have held that judgments of a foreign country cannot be registered under the Enforcement Act (*In re Marriage of Brown*, 225 Ill.App.3d 733, 738, 167 Ill.Dec. 379, 587 N.E.2d 648 (1992); In re Marriage of Agathos, 194 Ill.App.3d 168, 170, 141 Ill.Dec. 115, 550 N.E.2d 1161 (1990); Dayan v. McDonald's Corp., 78 Ill.App.3d 194, 198, 33 Ill.Dec. 768, 397 N.E.2d 101 (1979); Zalduendo v. Zalduendo, 45 Ill.App.3d 849, 853, 4 Ill.Dec. 450, 360 N.E.2d 386 (1977); Hager v. Hager, 1 Ill.App.3d 1047, 1052, 274 N.E.2d 157 (1971)), these decisions are antiquated. Each case involved the Enforcement Act in effect prior to its amendment in 1991."); Wolff v. Wolff, 389 A.2d 413 (Md. Ct. Spec. App. 1978), *aff'd*, 401 A.2d 479 (Md. 1979) (though UFMJRA does not provide a jurisdictional basis for recognition or enforcement of alimony provisions of foreign divorce decrees, it does not prevent such recognition or enforcement on a jurisdictional basis other than that provided for in the Act); Dart v. Dart, 568 N.W.2d 353 (1997), *aff'd on other grounds*, 597 N.W.2d 82 (1999), *cert. denied*, 120 S. Ct. 1418 (2000).

14. For treaties dealing with marriage and child support: Agreement relating to documentary requirements for marriage of American citizens in Italy (Rome) entered into force March 26, 1966, 18 U.S.T. 342; T.I.A.S. 6239; 688 U.N.T.S. 37; Agreement concerning enforcement of alimony and child support obligations of Panama Canal Commission employees (Panama) February 22, 1988, *available at* http://www.state.gov/documents/organization/38406.pdf.

15. Ingersoll Mill. Mach. Co. v. Granger, 833 F.2d 680 (7th Cir. 1987) (Judgment rendered by Belgium's court of last resort was enforceable under Illinois Uniform Foreign Money Judgments Recognition Act because Belgian judgment was presented to district court after completion of all appellate review in Belgium and was therefore final and conclusive and enforceable where rendered); Ocean Warehousing B.V. v. Baron Metals and Alloys, Inc., 157 F.Supp.2d 245 (S.D.N.Y. 2001) (Under New York law, foreign-country judgment that is final, conclusive and enforceable where rendered must be recognized and is enforced as conclusive between parties to extent that it grants or denies recovery of sum of money).

while it is on appeal or subject to appeal.[16] Thus, the foreign law of the jurisdiction granting the judgment must be consulted to see whether it is enforceable on appeal.

In the U.S., of course, enforcement of most judgments is stayed when they are on appeal or subject to appeal, making most U.S. appealable judgments not final judgments in that sense. If local law does permit enforcement while it is on appeal, the U.S. court, before which recognition and enforcement is sought, may stay the proceedings until there is a decision by the appellate court.[17] If it is on appeal or subject to appeal, the likelihood that the U.S. courts will provide recognition or enforcement is very small. First, it must be enforceable in the jurisdiction where it was rendered, and second, even if it is so enforceable, the court is likely to stay the proceedings until there is an appellate court decision.

Defenses

Though a foreign judgment that meets all of these conditions is enforceable in any of the states that enacted the Uniform Act, there are nine defenses that must also be considered.[18] Three of the defenses are mandatory. First, the foreign judgment cannot be recognized or enforced under the Act if it is rendered by a court that is not impartial.[19] However, the likelihood that one court will say that another court is not impartial is very small.[20] It is not likely to happen.

Second, if the foreign judgment was rendered by a court whose procedures violate our concepts of due process, the foreign judgment cannot be recognized or

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16. *See* UFMJRA § 2, *supra* note 6: "This Act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." (Supp. 2002); *see also* Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973) (court held that the potential for appellate review of the award in the courts of Curacao ceased when the defendant failed to seek such review within three months of the award, and thus judgment was definite, conclusive, enforceable and final in Curacao, to the extent that it specified precisely what the defendant was to pay); S.C. Chimexim S.A. v. Velco Enterprises Ltd., 36 F. Supp. 2d 206 (S.D.N.Y. 1999) (After three Romanian lawyers testified that a judgment was final under Romanian law despite an appeal, court held that the money judgment was final even though the judgment was on appeal in Romania.). In addition, most recently, in Dart v. Dart, though an English judgment of divorce, awarding the spouse a lump sum, child support, and certain property, was an English interlocutory court order in a matrimonial action concerning finances that was appealable, it was, nonetheless, enforceable since the UFMJRA was applicable to a judgment despite the fact that there was an appeal pending or the judgment was subject to appeal, and because under English law a judgment that determined an issue was final even if it was subject to appeal. Dart v. Dart, 568 N.W.2d 353 (1997), *aff'd on other grounds*, 597 N.W.2d 82 (1999), *cert. denied*, 120 S. Ct. 1418 (2000).

17. *See* UFMJRA § 6, *supra* note 6: "If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal." (Supp. 2002); *see also* UFMJRA § 1, *supra* note 6, at comment: "Where an appeal is pending or the defendant intends to appeal, the court of the enacting state has power to stay proceedings in accordance with section 6 of the Act." (Supp. 2002).

18. *See id.* §4, *supra* note 6.

19. *See* UFMJRA § 4(a)(1), *supra* note 6.

20. *Id.*; *see also* Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (Judgments of English court, affirmed on appeal, were not unenforceable UFMJRA on ground they were "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law," even though the English concept of fair procedure is not identical to that in the United States); Canadian Imperial Bank of Commerce v. Saxony Carpet Co., Inc., 899 F.Supp. 1248 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 352 (1995) (a foreign judgment is not conclusive if judgment was rendered under system which does not provide impartial tribunals or procedures comparable with requirements of due process, but exceptions to recognition to foreign judgments involving procedural unfairness should be construed especially narrowly, and mere diversions from American procedure do not render foreign judgment unenforceable).

enforced under the Act.[21] However, the purpose of the comity doctrine is to promote inter-court recognition on a global scale; and to encourage recognition of equality and a spirit of cooperation among courts of different nations that operate under different legal regimes. Thus, the likelihood of one court ruling that the procedures of another court violate basic notions of fairness is very small.

The third defense is that the judgment was rendered by a court that did not have jurisdiction over the subject matter, or by a court that did not have personal jurisdiction over the defendant.[22] This defense creates a number of difficult issues. Usually the question arises: Did the foreign court have personal jurisdiction over the defendant? Previous presentations in this conference have alluded to the idea that there may be differences in the methods available to obtain personal jurisdiction, and they are especially different between a civil law country and a common law country. For example, as was stated earlier, private process servers should not be sent to Mexico, as they will probably be arrested if they try to do their jobs in Mexico. Service of process must be done by the courts in Mexico, not by private parties.

Different legal regimes have totally different concepts of how to obtain personal jurisdiction over the parties. The Uniform Act contains a separate section that deals with obtaining valid personal jurisdiction, and the criteria for obtaining valid personal jurisdiction for purposes of the Act. One method to obtain valid personal jurisdiction under the Act is by serving the defendant personally in the foreign state.[23] Thus, if service of process is validly served in Mexico, according to Mexican law, the Mexican courts have valid personal jurisdiction. Secondly, if the defendant voluntarily appears before a Mexican court, for a purpose other than to contest jurisdiction, that Mexican court has valid personal jurisdiction. [24] Third, a valid and binding forum selection clause that nominates a foreign forum gives personal jurisdiction to that forum to render a judgment that will be recognized and enforced under the Act.[25]

Fourth, if the defendant is domiciled in the foreign state, or as a corporation was chartered in the foreign state or had its principal business office in the foreign state, the courts of that state will have personal jurisdiction over that party.[26] Thus, for a foreign corporation or an individual living abroad, jurisdiction will be presumed under the statute to be in the courts where the corporation is chartered or has its "seat," or where an individual is domiciled.[27]

Fifth, if the defendant has a business office in the foreign state and the cause of action arises out of business done by that particular office in the foreign state, the courts of that foreign state can claim personal jurisdiction over that defendant, and

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21. *See* UFMJRA § 4(a)(2)-(3), *supra* note 6; Saxony Carpet Co., *supra* note 20, at 1252 (personal jurisdiction requirement must be met); Allendale Mut. Ins. Co. v. Excess Ins. Co., Ltd., 970 F.Supp. 265 (S.D.N.Y. 1997), *vacated*, 172 F.3d 37 (2nd Cir. 1999), *on remand*, 62 F.Supp.2d 1116 (S.D.N.Y. 1999) (foreign court's decision that reinsurers had not breached service-of-suit provision of their reinsurance agreement with ceding insurer did not preclude subsequent litigation of that issue in separate action brought in federal court by ceding insurer where foreign court also determined that it lacked subject matter jurisdiction).

22. *See* UFMJRA § 5, *supra* note 6.

23. *See id.* § 5(a)(1), *supra* note 6.

24. *See id.* § 5(a)(2), *supra* note 6.

25. *See id.* § 5(a)(3), *supra* note 6.

26. *See id.* § 5(a)(4), *supra* note 6.

27. *Id.*

this claim of personal jurisdiction over the defendant will be recognized under the Uniform Act.[28] Mexican courts could not claim personal jurisdiction over a defendant because of acts done by its Houston office, but they could for a cause of action which arises out of something done by the Monterrey office.[29]

Finally, sixth, if the defendant operates a car or an airplane in the foreign state, and the cause of action arises out of the operation of this car or airplane in the foreign state, the courts of the foreign state can claim personal jurisdiction over that defendant, and this claim of personal jurisdiction will be recognized under the Uniform Act.[30] Thus, the Uniform Act provides a detailed definition of how to obtain personal jurisdiction. Therefore, when bringing an action in a foreign state, foreign practitioners need to be careful to establish personal jurisdiction over the defendant in the foreign court in one of the manners provided in the Uniform Act.

There is a second group of half a dozen defenses that the Act states are allowable defenses to recognition and enforcement of a foreign judgment.[31] The Act does not make these into mandatory defenses that will prohibit a court from enforcing a foreign judgment if proven. Instead, it provides that a court may refuse recognition and enforcement if such defenses are proven. By implication, this means that sometimes the court may enforce the foreign judgment, even though these defenses are proven. One such defense is that the judgment was obtained by fraud.[32] However, I do not have a very realistic picture of any court saying: "Well, even though this judgment was obtained by fraud, we will enforce it anyway." But I suppose that could happen.

A second non-mandatory defense arises if the defendant did not get timely notice.[33] There is case law on this defense, and it usually arises out of default judgments.[34] It is created when a notice is mailed in a foreign language to a U.S. defendant in the U.S. In those cases, the U.S. courts feel entitled to hold, especially if the U.S. defendant does not read or speak that language, that such a notice is neither effective nor timely. Thus, if a Mexican attorney is planning to send notice of a cause of action filed in Mexico to a U.S. defendant in the U.S., it would probably be wise to send along a translation, and not just the Spanish document. In this way, the Mexican attorney will not only be able to say that there was notice, but also that there was notice in English, and it was effective and timely. A Mexican attorney may assume that a person reads Spanish, but unless you have proof, there may be some difficulty in getting a court to adopt your assumption.

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28. *See id.*§ 5(a)(5), *supra* note 6.

29. Bank of Montreal v. Kough, 430 F.Supp. 1243 (N.D. Cal. 1977), *aff'd,* 612 F.2d 467 (1980) (Foreign judgment will not be refused recognition for lack of personal jurisdiction if defendant had a business office in foreign state and proceeding in foreign court involved cause of action arising out of business done by defendant through that office in foreign state.).

30. *See* UFMJRA § 5(a)(6), *supra* note 6.

31. *See id.* § 4(b), *supra* note 6.

32. *See id.* § 4(b)(2), *supra* note 6; *cf.* Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., Ltd., 470 F.Supp. 610 (S.D.N.Y. 1979) (Fraud has to relate to matters other than issues which could have been litigated and had to be fraud on court.).

33. *See* UFMJRA § 4(b)(1), *supra* note 6; *see also* Julen v. Larson, 25 Cal. App. 3d 325, 101 Cal. Rptr. 769 (1972).

34. Gondre v. Silberstein, 744 F.Supp. 429 (E.D.N.Y. 1990) (Though valid in French court, default judgment entered against defendant in French court did not save judgment from due process attack where defendant was precluded under French law from collaterally attacking default judgment in French courts on basis that he did not receive notice of hearing on his opposition to entry of judgment.).

The third non-mandatory defense under the Uniform Act arises if the foreign judgment conflicts with another final judgment from some other court, either U.S. or foreign.[35] In that circumstance, a foreign judgment need not be recognized.[36] A fourth defense, which is associated with the third, arises if the foreign judgment is contrary to a settlement agreement.[37] Thus, if there is a written settlement agreement followed by an action in the Mexican courts, and they render a judgment, do not expect that foreign judgment to be enforced in the U.S.

The fifth non-mandatory defense is that, if personal jurisdiction is based on personal service, and the forum where the suit is filed is seriously inconvenient to the defendant, the U.S. court need not recognize or enforce the resulting judgment.[38] If personal service is the only avenue to obtain personal jurisdiction, and the U.S. court would have entertained a *forum non conveniens* motion under similar circumstances, the likelihood of having the resulting foreign judgment enforced in the U.S. is small. Again, the Uniform Act does not say "don't enforce it," it only says that the court "need not" enforce it. But, if the forum is seriously inconvenient, do not expect enforcement.

The final non-mandatory defense under the Uniform Act, and the one that is creating the most litigation, is where the rendered foreign judgment violates the public policy of the enforcing state.[39] Although it is raised relatively often, it is not often successful.[40] An illustration of a court's analysis will be set forth after further discussion of non-uniform amendments to the Uniform Act, and attempts to re-federalize the handling of this issue.[41] The illustration is a case from Texas that is an example of how courts analyze the public policy defense. It will also illustrate how difficult it is to persuade a court to refuse recognition and enforcement of a foreign judgment on this ground.

NON-UNIFORM AMENDMENTS

The states took much more interest in enacting non-uniform amendments to this particular piece of legislation than with other uniform legislation, such as the Uniform Commercial Code (UCC). Some states put in a reciprocity requirement, even though the entire thrust of the Uniform Commissioners was to keep reciprocity requirements out. Such a reciprocity requirement, then, forces a plaintiff's attorney

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35. *See* UFMJRA § 4(b) (4), *supra* note 6.

36. Pentz v. Kuppinger, 107 Cal. Rptr. 540 (Cal. Ct. App. 1973) (When divorcee obtained alimony judgment in California, but later sued in Mexico and was awarded a greater amount than California award, court stated that the Mexican judgment conflicted with the earlier California final judgment).

37. *See* UFMJRA § 4(b)(5), *supra* note 6.

38. *See id.* § 4(b)(6), *supra* note 6: "[i]f in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action." (Supp. 2002).

39. *See id.* § 4(b)(3), *supra* note 6: "the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state...."

40. *See e.g.* Society of Lloyd's v. Mullin, 255 F. Supp. 2d 468 (E.D. Pa. 2003); Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002); Society of Lloyds v. Webb, 156 F. Supp. 2d 632 (N.D. Tex. 2001); Dart v. Dart, 568 N.W.2d 353 (1997), *aff'd on other grounds*, 597 N.W.2d 82 (1999), *cert. denied*, 120 S. Ct. 1418 (U.S. 2000); Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992); McCord v. Jet Spray Intern. Corp., 874 F. Supp. 436 (D. Mass. 1994); Ingersoll Mill. Mach. Co. v. Granger, 833 F.2d 680 (7th Cir. 1987); Colonial Bank v. Worms, 550 F. Supp. 55 (S.D.N.Y. 1982); Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973); New Central Jute Mills Co. v. City Trade and Industries, Limited, 318 N.Y.S.2d 980 (Sup 1971).

41. See discussion, *infra* note 45, and accompanying text.

to prove that the foreign state has, in fact, recognized and enforced a judgment from the particular enacting state in which enforcement of the foreign judgment is sought. This may, in fact, be very difficult to prove. For example, although Mexico may have enforced a judgment from New Mexico or Texas, the issue in a Minnesota court will be whether it has recognized and enforced a judgment from Minnesota. A judgment from Minnesota that sought recognition and enforcement in Mexico might be fairly difficult to find. One could argue that, since Mexico would enforce judgments from Texas and New Mexico, then Mexico would, of course, also enforce one from Minnesota. This argument may or may not be persuasive, but it also may require appellate-level litigation, and the holder of the foreign judgment would prefer to avoid that.

A far more common non-uniform amendment imposes a requirement of "negative reciprocity," which is somewhat different. The criteria for negative reciprocity do not depend upon whether U.S. judgments have actually been enforced in a foreign state.[42] Instead, they depend on proving that the courts of the foreign state have not refused to enforce a judgment from Minnesota. Proving "negative reciprocity" is usually fairly easy to do, and can be done by expert witness testimony. This approach also avoids the chicken-and-egg problem discussed previously.[43]

For example, in a case involving Spain and Florida, both of which have negative reciprocity requirements built into their foreign judgment statutes, it was fairly easy to prove that neither state had ever before confronted the issue of enforcing a judgment from the other. Therefore, there was negative reciprocity, in the sense that Florida had not refused to enforce Spanish judgments and Spain had not refused to enforce Florida judgments. The next case will be far easier, because Florida has now, in fact, enforced a Spanish judgment, and it should be easy to get a Spanish court to reciprocate for a Florida judgment.

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42. West's F.S.A. § 55.605(2)(g) (West 2005)(Florida's statute states: "[a] foreign judgment need not be recognized if: The foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state."); 14 M.R.S.A. § 8505(2)(G) (West 2005)(Main's statute states: "[a] foreign judgment need not be recognized if: The foreign court rendering the judgment would not recognize a comparable judgment of this State. "); M.G.L.A. 235, 23A (West 2005)(Massachusetts' statute states: "[a] foreign judgment shall not be recognized if: judgments of this state are not recognized in the courts of the foreign state."); N.C.G.S.A. 1C-1804(b)(7) (West 2005)(North Carolina's statute states: "[a] foreign judgment need not be recognized if: The foreign court rendering the judgment would not recognize a comparable judgment of this State."); TEX.CIV.PRAC. & REM.CODE ANN. 36.005(b)(7) (West 2005)(Texas' statute states: "[a] foreign country judgment need not be recognized if: it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of 'foreign country judgment.'"). See also Reading & Bates Constr. Co. v. Baker Energy Resources Corp., 976 S.W.2d 702, 710 (Tex. App. Houston [1st Dist.] 1998); Robbins v. City of Tallahassee, 694 So.2d 805, 814 (Fla. Ct. App. 1997); Norkan Lodge Co., Ltd. v. Gillium, 587 F. Supp. 1457, 1461 (N.D. Tex. 1984). Roger R. Evans, *Enforcement of U.S. Judgments in Mexico: Illusion or Reality*, 64 TEX. B.J. 139, 144 (2001); Nívea R. Berríos-Colón, *Transboundary Movement of Hazardous Waste from Mexico to the United States; EPA's Authority to Enforce RCRA Requirements Against Mexican Maquiladoras*, 8 ENVTL. LAW. 1, 70 (2001); Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 NW. J. INT'L L. & BUS. 376, 385-86 (1994); Tandi Armstrong Panuska, The Chaos of International Insolvency—Achieving Reciprocal Universality Under Section 304 or MIICA, 6 TRANSNAT'L LAW. 373, 392-93 (1993); Yasuhei Taniguchi, *International Bankruptcy and Japanese Law*, 23 Stan. J. Int. L. 449, 456 (1987) (describing a creative application of negative reciprocity under Japanese law (although not under that name)); Orlando A. González-Arias, *The Enforcements of United States Default Judgments in Spain*, 10 Hastings Int'l & Comp. L. Rev. 97, 100-03 (1986).

43. See discussion, *supra* following note 4.

ATTEMPTS TO RE-FEDERALIZE THIS ISSUE

The Uniform Act has been a success, although an uneven one. However, there are some attempts to re-federalize this matter because of the unevenness of its success. The American Law Institute has a project led by Professor Andy Lowenfeld which is trying to develop a federal law on recognition and enforcement of judgments.[44] The underlying idea behind this project is that state law is not uniform enough because there are states with reciprocity requirements and other states with negative reciprocity requirements. Further, the definition of "comity," which is the standard for enforcement in most states, differs among the states. I am not certain whether this project will take root and be successful. The federal Congress has not shown much interest in it, but it is out there and you should be aware of it.

There have also been meetings in The Hague in an attempt to create a multilateral treaty on recognition and enforcement of judgments.[45] That effort at one time had collapsed, but it could revive. The U.S. was very interested in obtaining recognition and enforcement of such items as antitrust judgments, but most of the foreign nations saw antitrust judgments as incorporating treble damages, which they refused to agree to enforce since they considered treble damages to be penal damages. The foreign countries also recognize that, despite *Hilton v. Guyot*, their judgments were being enforced by the state courts in the U.S. without a convention, so why bother? Thus, despite the revival of those efforts, it is not very likely that anything will happen.

AN ILLUSTRATIVE CASE

In the usual case, a foreign judgment that meets the criteria of the Uniform Act will be enforced in U.S. courts. To prove this point, I close with an example of a typical case from Texas that involved a Mexican judgment that a plaintiff sought to enforce in the U.S. The Fifth Circuit, in *Southwest Livestock and Trucking v. Ramón*, upheld the judgment and ordered recognition and enforcement of it.[46] Southwest Livestock and Trucking apparently could not get financing in the United States, even though it was primarily a U.S. company. As a result, it went south of the border for financing. Mr. Ramón provided them with financing. Mr. Ramón gave them a thirty-day credit, and they signed a promissory note. At the end of the thirty days, they could not pay it. So he gave them more credit, and they signed another promissory note. If you analyze the series of transactions, apparently the interest rate was 52% per year, which is not exactly a normal bank interest rate, so this pretty clearly was not a bankable transaction. There was a long series of such transactions, and towards the end Mr. Ramón stated the interest rate at 48% in the last promissory note before the trucking enterprise collapsed, which probably was

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44. FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT (Tentative Draft No. 2, 2004), available at http://www.ali.org./; *see also* Council to the Members of the American Law Institute, *International Jurisdiction and Judgments Project (NKA Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute)* 82 A.L.I. Proc. 74-312 (2004) (unpublished), *available at* http://www. ali.org.

45. Peter D. Trooboff, *The Hague Conference*, THE NATIONAL LAW JOURNAL, July 23, 2001, at A19.

46. Southwest Livestock and Trucking Co., Inc. v. Ramón, 169 F.3d 317 (5th Cir. 1999).

a mistake on his part. After the trucking enterprise collapsed, Mr. Ramón sued on a promissory note in Mexican courts and obtained a final judgment on that promissory note. He then brought that final Mexican judgment to the U.S. to collect.

The problem with enforcement of this judgment was that it was based on a promissory note with a stated 48% annual interest rate. The Texas State Constitution prohibits usury.[47] Usury is variously defined under Texas law, but the basic definition of usury is any rate above 10% per year. There are exceptions that allow people to charge more, but only if they have certain kinds of licenses from Texas authorities.[48] Mr. Ramón had no such licenses. The Fifth Circuit was not concerned by any of that. To them, the issue was whether the usury in this transaction was against Texas public policy, and they were not convinced that it was. They found that usury laws, in principle, are to protect consumers and other needy borrowers. Of course, that approach elides the question of whether Southwest Livestock, which had to go to Mexico and agree to pay a 52% annual interest rate, was a needy borrower. The Fifth Circuit thought not. They thought this was a transaction between two commercial entities. Further, they limited the public policy defense by saying that the cause of action itself had to violate public policy. They then said that in this case, the cause of action was to collect on a promissory note, and that such actions are not against public policy. The fact that there was a 48% annual interest rate provision in the promissory note, which would make the note usurious, was not considered by the Fifth Circuit.

CONCLUSION

This decision may be explained as just some ultraconservative judges in the Fifth Circuit deciding that they really do not like usury laws, regardless of what Texas state law may say. But for foreign attorneys, the primary point is that it is an illustration that U.S. courts will bend over backwards to avoid using the public policy defense. They will enforce almost any judgment that is brought from a court that they believe has done its job properly in obtaining personal and subject matter jurisdiction, and in observing the minimum standards of due process.

Thus, to repeat my two major messages: 1) the enforcement of foreign judgments is a matter of state law, even though most of the cases are decided in federal courts, and 2) with the exception of default judgments,[49] the actual case decisions show that foreign judgments are being enforced in the U.S. courts.

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47. TEX CONST. art. XVI, § 11. ("...in the absence of legislation fixing maximum rates of interest all contracts for a greater rate of interest than ten per centum (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six per centum (6%) per annum").

48. "A person engaged in the business of making loans for which the rate is authorized under this chapter must obtain a license under Chapter 342 unless the person is not required to obtain a license under Section 342.051." Tex. Fin. Code Ann. § 303.201 (West 2005).

49. *See* Koster v. Automark Indus., Inc. 640 F.2d 77 (7th Cir. 1981).