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# RECOGNITION OF FOREIGN MONEY JUDGMENTS: A GOAL-ORIENTED APPROACH

ALAN E. GOLOMB \*

## INTRODUCTION

The first purpose of conflicts law, as of all law, is to introduce order, or at least that minimum which is necessary if basic human values are not to be unduly sacrificed or subjected to discrimination.<sup>1</sup>

If this basic purpose is accepted, it is clear that conflicts problems must be studied in terms of social policies, rather than as exercises in deductive logic.<sup>2</sup> The increase of international trade and travel and, of particular import to this study, the increase in commercial operations by American business abroad, will involve American courts in many situations with international implications, in which it is to be hoped that the relevant social policies will be considered. One such situation certain to confront American courts in increasing number will be claims involving the recognition of foreign money judgments.

The perennial casebook introduction to judgment recognition claims is *Buchanan v. Rucker*.<sup>3</sup> Plaintiff sued on a judgment of the Island Court in Tobago. The defendant had never been to the island, and service was effected by nailing the summons to the courthouse door, as authorized by Tobago law. Lord Ellenborough asked: "Can the island of Tobago pass a law to bind the rights of the whole world?" Although recognition was refused through a

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<sup>1</sup> Yntema, *The Objectives of Private International Law*, 35 CAN. BAR. REV. 721, 736 (1957).

<sup>2</sup> *Id.* at 731.

<sup>3</sup> 9 East 192 (K.B. 1808).

restrictive interpretation of the Tobago statute, the only inference to be drawn from the opinion is in the negative.

A more contemporary situation involves the famous French skier, Jean Claude Killy. As a jurisdictional basis for a paternity suit against Killy, an Austrian court ordered the seizure of some underwear allegedly left by Killy in an Austrian hotel.<sup>4</sup> The Austrian Code provides for in personam jurisdiction over a defendant who owns assets of any value in Austria.<sup>5</sup> Austria's assertion of power to render such a judgment may be termed an initial claim to competence; when it seeks to have other states defer to that adjudication, it is making a secondary claim to competence. What reception such a secondary claim might be accorded in France or another country where Killy might own property presents an interesting question. Resolution of this and other problems will be the subject of this paper.

Due to limitations upon time and expertise, emphasis will be placed on the law of the United States. The study will attempt to resolve, first, under what circumstances should a foreign judgment be recognized and, second, how can desired recognition policies be attained in a federal system such as ours. The primary concern of this paper will be money judgments. Since in rem and status judgments involve special considerations,<sup>6</sup> it is thought wiser to leave a detailed analysis to another paper.

A cursory description of present American policy concerning foreign judgment recognition, and how it com-

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<sup>4</sup> Ski News Int'l., Feb. 3, 1968, at 1.

<sup>5</sup> See Nadelmann, *Non-recognition of American Money Judgments Abroad And What To Do About It*, 42 IOWA L. REV. 236, 261 (1957).

<sup>6</sup> For example, the interest of a nation in real property located within its territory raises special problems. Similarly, determinations concerning the marital status of nationals are felt more vital to the home state than resolutions of money disputes. Also relevant is the obviously greater need for security when the ownership of land or, especially, the status of a marriage or an adoption is in issue. Due to this special need for certainty, the tendency of most nations is towards recognition of foreign decrees as to status and land, unless clearly in violation of the public policy of the recognizing state. See Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44 (1962).

parens with the policies of other members of the world community, would seem helpful at this point.

As a general rule, American courts will recognize judgments of foreign nations to the same extent as they defer to sister-state judgments. Despite the absence of a full faith and credit mandate,<sup>7</sup> there is a carryover of rules developed within our own federal system,<sup>8</sup> often without an independent evaluation of policy.<sup>9</sup> The Restatement finds that "a valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned."<sup>10</sup> A judgment is usually considered valid if

(a) the state in which it is rendered has jurisdiction to act judicially in the case; and (b) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and (c) the judgment is rendered by a competent court; and (d) there is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.<sup>11</sup>

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<sup>7</sup> See *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185 (1912).

<sup>8</sup> See von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1695 (1968). See also J. CASTEL, *PRIVATE INTERNATIONAL LAW* 258 (1960).

<sup>9</sup> See Smit, *supra* note 6, at 44.

<sup>10</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS §98 (Proposed Official Draft, 1967).

<sup>11</sup> *Id.* §92. This test seems more liberal than the test stated in *Hilton v. Guyot*, 159 U.S. 113 (1895), generally considered to be a progressive approach, that a foreign judgment will be recognized where there was jurisdiction and:

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 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 is sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect. . . .

*Id.* at 202. One "special reason," lack of reciprocity, will be considered later in the text.

Ordinarily, therefore, a foreign judgment will be held conclusive, despite alleged errors of law or fact.<sup>12</sup>

With the most notable exception of England,<sup>13</sup> American courts accord far better treatment to foreign judgments than do other nations. Many nations, of which France is the most notorious, maintain a general review for any error of law or fact—the so-called “*revision au fond*.”<sup>14</sup> Possibly a majority of the world community, led by Germany, requires reciprocity as a basic prerequisite to recognition of a foreign nation’s judgment.<sup>15</sup>

Further treatment of the subject requires clarification of the distinction between “recognition” and “enforcement” of a judgment.

A foreign judgment is recognized . . . when it is given the same effect that it has in the state where it was rendered with respect to the parties, the subject matter of the action and the issues involved. A foreign judgment is enforced when, in addition to being recognized, a party is given the affirmative relief to which the judgment entitles him. Recognition of a judgment is a condition precedent to its enforcement.<sup>16</sup>

An example of recognition without enforcement is where a victorious defendant in the first action asserts that judgment as a “bar” to a subsequent suit on the same cause of action by plaintiff. However, unlike American

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<sup>12</sup> Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 789 (1950).

<sup>13</sup> English courts reach results similar to American courts. However, current English authority finds a “legal obligation” to recognize a foreign judgment, negated only by lack of jurisdiction, fraud, or public policy. The “ups and downs” of foreign judgment recognition history in England are traced in A. DICEY & J. MORRIS, *CONFLICT OF LAWS* 967 (8th ed. 1967).

<sup>14</sup> The 1964 decision by the Cour de Cassation, the highest civil court in France, in *Munzer v. Munzer*, may indicate a relaxation of review by French courts. See Nadelmann, *French Courts Recognize Foreign Money Judgments: One Down and More to Go*, 13 AM. J. COMP. L. 72 (1964). One jurisdiction which allows reargument of all issues, Quebec, is of particular annoyance to Americans. See J. CASTEL, *supra* note 8, at 271. Other jurisdictions traditionally harsh to foreign judgments include Belgium, the Netherlands, Denmark, and Sweden (although the latter nation may be liberalizing its attitude). Surveys of other nations appear in Nadelmann, *supra* at 78-80 and Comment, *Reciprocal Enforcement of United States and Foreign Judgments*, 2 TEX. INT’L L.F. 75, 87-97 (1966).

<sup>15</sup> Nadelmann, *supra* note 14, at 78.

<sup>16</sup> RESTATEMENT § 98, *supra* note 10, at 342.

law for domestic judgments, a cause of action does not "merge" into the judgment, so that a victorious plaintiff may elect to sue on the judgment or on the underlying cause of action.<sup>17</sup> The basic question that an American court must confront is whether to recognize a foreign judgment. Once it is concluded that the judgment will be recognized, it will be enforced in the same manner as a sister-state judgment.

The aim of this paper is to seek a recognition policy that will suffer neither from provincial intolerance nor unthinking generosity, but, rather, will balance conflicting interests in furtherance of the common interest of all mankind. The perspectives will be that of an impartial observer. The first step is to clarify the basic goals that this writer considers relevant to claims for or against recognition of foreign judgments. These goals include:

(1) Fairness to litigants. This is probably the most important goal and becomes a factor in various contexts, *e.g.*, claims of lack of jurisdiction over the defendant, claims of unfairness of the first proceeding, claims that the first judgment was fairly rendered and, therefore, it would be unfair to compel the winner to relitigate.

(2) Avoidance of international conflicts. This may occur, *e.g.*, when there is a claim that the rendering state's judgment was an infringement upon another state's policies or nationals.

(3) Avoidance of duplication of effort and waste. This, along with fairness to the litigants, is the basic rationale supporting claims for *res judicata*.

(4) Encourage convenient forum to try a lawsuit. The likelihood of accurate fact-finding, reduced expenses, and convenience to parties and witnesses will be facilitated by such a policy.

(5) Security in international transactions. By this, it is meant that questions should be settled in accordance

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<sup>17</sup> Smit, *supra* note 6, at 55.

with a rule of law and that a given situation should have equal legal treatment everywhere. While many claims in which this goal will be relevant will also involve fairness to litigants, this goal is more directly aimed at unification of the world community.

(6) Encourage international trade and travel. This goal is pertinent to claims that an alien is unreasonably subjected to the jurisdiction of a court or that an alien was not fairly treated by a court, as well as to claims that a valid cause of action should receive satisfaction.<sup>18</sup>

It is clear that various goals become increasingly relevant depending upon the underlying cause of action. As previously mentioned, security is essential when marital status is in issue. Similarly, encouragement of trade becomes significant when the action is based upon contract. However, since this study is focused on money judgments, and it is believed that no operative difference in relevant goals is usually apparent whether the money claim was in contract or tort (the basic possibilities), claims will be treated without reference to the underlying cause of action. The possibility of distinguishing between underlying money claims should, however, be kept in mind.

The goals outlined above, as an impartial observer would see them, may be defined as interests of the general community of nations, or "inclusive" interests. Also to be recognized, however, in furtherance of the common interest, are the *valid* claims of particular states, *i.e.*, "exclusive" interests. Exclusive interests may be asserted by the rendering state (F1) or the recognizing state (F2). Exclusive interests relevant to the recognition of foreign judgments include: (a) control over events which affect a state's territory, people, or institutions; (b) fulfillment of the public policies of a particular state; (c) conservation of judicial resources of the particular state; and (d) securing favorable treatment abroad for a state's own

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<sup>18</sup> Some of the goals are discussed in von Mehren & Trautman, *supra* note 8, at 1603-05 and Yntema, *supra* note 1, at 735.

judgments. To be disapproved are the "special" interests of particular states, antagonistic to the common interest, such as that of favoring nationals despite fair treatment abroad.

In many instances, the various inclusive and exclusive interests will conflict. For example, recognition of a judgment rendered by a forum with no contacts with the dispute would further some inclusive and exclusive interests at the expense of others. When such conflict arises, there must be a careful analysis of the goals involved, and then a balancing of the interests to determine which should control.

#### WHAT JUDGMENTS SHOULD BE RECOGNIZED

##### *Factors Not Related to Fairness in the Individual Case*

###### 1) International Law

The first issue to be considered is whether recognition of foreign judgments is dictated by present notions of what represents international law. For an affirmative answer, it must appear that there is applicable either customary law or treaty obligation. Clearly, there is no internationally acknowledged customary rule of international law that a state must recognize any judgment.<sup>19</sup> This lack of customary law is evident from the practice of the majority of states not to recognize foreign judgments absent a treaty. In addition, although there are some bilateral and even multilateral treaties on judgment recognition, the United States is not a party to any of these. Therefore, American courts are free from any world community regulation in their decisions on recognition.

###### 2) Act of State

A second doctrine which may be argued to impose a duty upon American courts to recognize foreign adjudi-

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<sup>19</sup> Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe*, 12 INT'L & COMP. L.Q. 367, 374 (1963). See A. A. EHRENZWEIG, *A TREATISE ON THE CONFLICT OF LAWS* 48 (1962).



cations is the act of state concept. As stated by Chief Justice Fuller in *Underhill v. Hernandez*:<sup>20</sup>

Every 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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

This doctrine was recently reaffirmed by the Supreme Court, though under different circumstances, in the controversial decision of *Banco Nacional de Cuba v. Sabbatino*.<sup>21</sup> The Court held that the uncompensated seizure of sugar by the Cuban government was an act of state, the legality of which could not be challenged in an American court.<sup>22</sup> While the doctrine was found not to be a requirement of international<sup>23</sup> or constitutional law,<sup>24</sup> it did have "‘constitutional’ underpinnings."<sup>25</sup> Basically, the rationale was one of separation of powers, *i.e.*, judicial scrutiny of the sovereign acts of another nation within its own territory could interfere with the handling of the problem by the executive branch.<sup>26</sup>

Theoretically, any deference to secondary claims to competence can be considered an application of the act of state doctrine. However, it would seem that most foreign judgments will not be accorded "act of state" treatment, as that term is used in the *Sabbatino* opinion and in the Restatement. This was the opinion of the circuit court in *Sabbatino*,<sup>27</sup> where it was stated that since court judgments ordinarily involve the resolution of private disputes and do not ordinarily reflect high state policy, they most

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<sup>20</sup> 168 U.S. 250, 252 (1897).

<sup>21</sup> 376 U.S. 398 (1964).

<sup>22</sup> Soon after the decision, Congress overruled the Court's holding, in part, by providing that the courts shall examine an act of state to determine whether it is in violation of international law. The Foreign Assistance Act of 1964, 78 Stat. 1009, 1013 (1964), *as amended*, 22 U.S.C. § 2370(e) (2) (Supp. 1965).

<sup>23</sup> 376 U.S. at 421.

<sup>24</sup> *Id.* at 423.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 431-33.

<sup>27</sup> 307 F.2d 845 (2d Cir. 1962).

often will not fall within the act of state category. The Restatement of Foreign Relations Law explains that an act of state involves the public interests of a state beyond its interest in providing the means for adjudicating disputes within its territory.<sup>28</sup> The branch of government taking the action is not as important as the nature of the action taken. However, a court adjudication is not the ordinary way for a state to effectuate its essential public interests. For example,

In a suit in tort brought by X against Y, a court of state A decides that X is entitled to a specified amount of damages. This decision is not an act of state. . . . State A obtains by eminent domain proceedings title to an electric utility system in its territory. The vesting of title is an act of state. . . .<sup>29</sup>

If the aims sought to be accomplished by the act of state doctrine are analyzed in the context of an ordinary contract or tort judgment situation, it seems that the fairness to litigants goal outweighs the potential impairment of the other relevant goals, *viz.*, avoidance of international conflicts, security in international transactions, and encouragement of trade and travel. Even the *Sabbatino* majority indicated that a court judgment re-examination is not very sensitive politically.<sup>30</sup> The security goal of a universal rule of law is not so impaired when the rule of law asserted would be unfair to the parties involved. Additionally, the purpose served by the act of state doctrine of facilitating international trade is not as applicable when the reliance of the world business community is allegedly being placed only upon a court judgment. The tremendous impact that a general nationalization of an industry by a sovereign has upon the international business community will not be found in the case of a simple money judgment in which only a few parties are likely to be affected. An act of state contention should, therefore, ordinarily be rejected.

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<sup>28</sup> RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, comment d (1965 rev. ed.).

<sup>29</sup> *Id.*

<sup>30</sup> 376 U.S. at 412.

## 3) Comity

Another doctrine which may be asserted to govern recognition of foreign judgments, without consideration of the fairness of the judgment, is that of comity. This

is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. . . .<sup>31</sup>

The concept of comity was derived from the writings of Grotius and Vattel, who distinguished between rules springing from the Law of Nature and rules belonging to the Voluntary Law. Unlike natural law, voluntary law was changeable and dependent upon the consent of individual nations. This theory laid the foundation for the distinction made by American writers, most notably Story, between obligations of right and concessions of comity.<sup>32</sup> The earliest Supreme Court decision espousing this distinction was *Bank of Augusta v. Earle*,<sup>33</sup> where comity was identified as part of the voluntary law of nations.

However, the comity doctrine is incurably deficient as a guide to recognition policy. It has been accurately observed that the definition of comity "says in fact only that *recognition will be given when it will be given.*"<sup>34</sup> The uselessness of the term probably is reflected by its decreasing appearance as the underlying rationale in recent cases.<sup>35</sup> Nevertheless, while the comity doctrine will

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<sup>31</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

<sup>32</sup> Lenhoff, *Reciprocity: The Legal Aspects of a Perennial Idea*, 49 Nw. U. L. Rev. 752, 753-54 (1954-55). See also A. A. EHRENZWEIG, *supra* note 19, at 45.

<sup>33</sup> 38 U.S. (13 Pet.) 519, 589 (1839).

<sup>34</sup> Smit, *supra* note 6, at 54.

<sup>35</sup> *Id.* As previously noted, the doctrine of comity in England was superceded by the doctrine of legal obligation set forth in *Russell v. Smyth*, [1842] 9M & W. 810, 819, that a judgment of a court of competent jurisdiction imposes a duty upon a defendant to pay the sum declared due, which English courts are bound to enforce unless the duty is negated by lack of jurisdiction, fraud, or violation of public

not prove much help to the judge trying to decide a particular case, it does reflect a generally desirable propensity of American courts to recognize a foreign judgment which is not objectionable for some cogent reason. Notions of comity, when due consideration is given to fairness of the judgment, serve to implement goals of lessening conflict among nations, conservation of judicial resources, and security in international transactions.

#### 4) Reciprocity

These attributes of comity sentiment were severely limited by the case of *Hilton v. Guyot*,<sup>36</sup> in which the concept of comity was inextricably linked to reciprocity. In *Hilton*, plaintiff was a French firm suing American citizens on a judgment of a French court. Action was commenced in a federal court, which entered judgment for the plaintiff, without examining the merits. The Supreme Court, after setting forth a very enlightened and liberal position on recognition of foreign judgments, noted that France would not accord recognition to an American judgment, and, accordingly, reversed the judgment for plaintiff. The Court explained:

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.<sup>37</sup>

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policy. In practice, the legal obligation theory in most cases does not result in a greater degree of recognition than does the comity theory. In one area, fraud, an English court is even more likely to refuse recognition. See A. DICEY & J. MORRIS, *supra* note 13, at 967, 1009.

<sup>36</sup> 159 U.S. 113 (1895).

<sup>37</sup> *Id.* at 228. Under this rationale, in *Ritchie v. McMullen*, 159 U.S. 235 (1895), a case decided the same day as *Hilton*, a Canadian judgment was found conclusive, since Canadian courts gave conclusive effect to American judgments.

The dissenting opinion, by Chief Justice Fuller, reasoned that the doctrine of *res judicata* is just as applicable to foreign judgments as to domestic judgments, resting on the same public policy ground that there should be an end to litigation. It was argued that it is for the government, not the courts, to adopt the principle of retorsion.<sup>38</sup>

The majority was correct in its statement that mutual-ity and reciprocity are the foundations of international law, though in a less specific sense.<sup>39</sup> It is often only the underlying though unexpressed threat of retaliation that induces a nation to defer its special interests in favor of the interests of other nations.<sup>40</sup> The doctrine of reciprocity is clearly the basis of judgment recognition practice in most of the world today.<sup>41</sup> However, the use of the reciprocity doctrine by the *Hilton* Court has met with the practically unanimous disapproval of American commentators.<sup>42</sup>

The primary reason for this disapprobation has been the realization that the reciprocity requirement operates mainly at the expense of the judgment creditor, who clearly is not to blame for the rulings of his own nation's courts. The legitimate expectations of creditors deserve protection across state lines. Further analysis of *Hilton* reveals that it achieves neither of its two probable major goals. The Court limited its holding to cases in which a citizen of F1 receives a judgment in a suit brought by him in F1 against a citizen of F2, and then attempts to to enforce such judgment in F2. It was indicated that an F1 judgment deciding a controversy between two F1 citizens, or one in which the action was commenced and won by a foreigner against an F1 citizen, would be conclusive.<sup>43</sup> Since the Court's policy of non-recognition

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<sup>38</sup> 159 U.S. at 229-34.

<sup>39</sup> See Lenhoff, *Reciprocity: The Legal Aspects of A Perennial Idea*, 49 Nw. U. L. Rev. 619 (1954).

<sup>40</sup> See Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 TEMP. L. Q. 295, 315-16 (1959).

<sup>41</sup> See Graupner, *supra* note 19, at 369-79.

<sup>42</sup> See Smit, *supra* note 6, at 50.

<sup>43</sup> *Hilton v. Guyot*, 159 U.S. 113, 170-71 (1895).

without reciprocity was primarily aimed at judgments rendered by foreign courts against American defendants, it has been concluded by some commentators that protection of Americans was one underlying reason for the holding.<sup>44</sup> However, if this were true, the Court overlooked the question of fairness of the F1 judgment. While protecting nationals from unfair treatment abroad is a valid exclusive interest of a state, favoring nationals despite fair treatment abroad should not be commended.

If *Hilton* is regarded as an attempt by the Supreme Court to secure recognition for American judgments abroad, not an unreasonable state interest, the decision has not achieved its desired effect. American judgments fare very badly abroad, even today.<sup>45</sup> Possibly the limited application of *Hilton* to judgments rendered against American defendants in favor of F1 nationals, when compared to the sweeping reciprocity policies of other nations, reduces its effectiveness as a means of persuading other states to recognize American judgments.<sup>46</sup> The *Hilton* decision did not induce France to relax in its *révision au fond*. Apparently, the strict reciprocity doctrine of Germany was the motivating factor.<sup>47</sup> Probably more damaging, however, to the fate of American judgments abroad is that foreign nations with reciprocity rules look at *Hilton*, and conclude that the United States would not recognize one of their judgments. The *Hilton* rule then leads American courts to refuse recognition to judgments of those countries. This circularity does not further any of the relevant goals of judgment recognition policies. It would seem that a clear renunciation of the reciprocity doctrine by American courts might be a more effective

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<sup>44</sup> See Reese, *supra* note 12, at 793; Smit, *supra* note 6, at 49; Comment, *supra* note 14, at 80.

<sup>45</sup> See Nadelmann, *supra* note 5; Nadelmann, *Reprisals Against American Judgments*, 65 HARV. L. REV. 1184 (1952).

<sup>46</sup> See Reese, *supra* note 12, at 793.

<sup>47</sup> Nadelmann, *supra* note 14, at 75; von Mehren & Trautman, *supra* note 8, at 1661; Schaaf, *The Recognition of Judgments from Foreign Countries: A Federal State Clause for an International Convention*, 3 HARV. J. LEGIS. 379, 382 (1966).

method of obtaining recognition for American judgments in many other nations.<sup>48</sup>

A goal oriented approach to judgment recognition clearly indicates that reciprocity, though proper in other areas of international relations, should be excluded as a consideration in this area. The *Hilton* doctrine has hampered the fulfillment of several of the relevant goals, while proving a very unsuccessful weapon for achieving any proper exclusive interests. Because of this, as will be seen later, most American courts have refused to follow *Hilton*.<sup>49</sup>

### 5) Res Judicata

The fundamental reason that foreign money judgments generally receive the same conclusive effect as sister-state judgments is the doctrine of res judicata. While the full faith and credit clause adds constitutional compulsion to res judicata applicability between sister-states,<sup>50</sup> the rationale behind res judicata has been considered equally applicable to judgments of foreign nations. A brief consideration of the effect of res judicata on each of the relevant goals should indicate the validity of this approach.

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<sup>48</sup> The possibility of a "clear" renunciation of reciprocity by American courts is not as simple as it may appear. Most American state courts facing the problem have refused to follow *Hilton*. However, since *Hilton* is a decision of the highest court in the land, other nations seeking to ascertain reciprocity will often look to *Hilton*. Unless recognition of foreign nation judgments is found to present a federal question or is found to be governed by federal rules in diversity cases (and present authority would answer both in the negative), it is difficult to see how the Supreme Court can get an opportunity to overrule *Hilton*. These problems will be discussed later in the paper.

<sup>49</sup> Even the courts that follow *Hilton* have circumscribed its application by requiring it to be pleaded and proved by the party attacking the foreign judgment. See *Gull v. Constem*, 105 F. Supp. 107 (D. Colo. 1952).

<sup>50</sup> In the opinion of this writer, the doctrine of res judicata, per se, is not constitutionally necessary. For example, it is doubtful that F1 law must provide that its money judgments may not be collaterally attacked in F1. If F1 law allowed such attack, clearly F2 could also allow it. However, since the opinion that public policy requires there be an end to litigation has resulted in res judicata doctrines as to most money judgments, full faith and credit extends the doctrine to interstate applicability. An examination of some opinions on child custody decrees and their effect might shed light on the above.

The first goal to consider is that of avoidance of duplication and waste. When authorities state that "public policy requires that there be an end to litigation,"<sup>51</sup> this goal is a major rationale. Significantly, this concern for the limitation of duplication is more manifest in the United States than on the Continent. It is the motivating force behind rules of compulsory counterclaim, against splitting causes of action, permitting impleader, intervention, class actions, etc.<sup>52</sup> However, it is not certain that a second trial on the same cause of action will merely involve a duplication of the first. Differences between juries, different choices of law by the judges, or alterations in the detected demeanor of a key witness might result in a completely contradictory second judgment even among sister-states. When the first judgment followed a trial in a foreign nation, particularly if a civil-law nation, the possibility of major differences in procedure, rules of evidence, choice of law, and general outlook of the judicial system makes such a result far from unlikely.<sup>53</sup> On the other hand, to contend that contradictory results will occur in a substantial number of cases involves a denial of the validity of at least one legal system (a flip of a coin might suffice just as well). Therefore, if the formal trial of issues is to remain as a legal institution, it is necessary to assume that such a process ordinarily finds the proper result. A limiting factor, which will serve fairness as well as ensure the likelihood of similar results if there had been a second trial, is the assurance that the procedures used in F1 were reasonably calculated to ascertain the truth and that F1 applied a fair rule of law to the facts as discovered.

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<sup>51</sup> See *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931), where the Court stated:

Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.

See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98, comment b (Proposed Official Draft, 1967).

<sup>52</sup> See von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1604 (1968).

<sup>53</sup> See Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44, 61-62 (1962).



Other goals are also involved in international *res judicata*, though to a lesser extent. International conflicts might be avoided by recognizing a foreign nation's judgments, although a cogent argument could be made that non-recognition of unfair judgments will discourage their rendition and in turn reduce potential conflict situations in the future. Similarly, a refusal to grant *res judicata* might reduce the number of judgments rendered by an inconvenient forum. Additionally, *res judicata* might discourage or encourage international trade and travel, depending upon the perspectives of the individuals and the consideration given to the fairness of the first judgment. Clearly, however, security in international transactions will be accelerated by recognition of foreign judgments.

Fairness to the litigants is a goal that is directly related to *res judicata* doctrines. It is considered unfair to require a party who has expended time and money in proving his cause of action or defense to go through the whole process again. This consideration, together with conservation of judicial resources, forms the basis for *res judicata*.<sup>54</sup> However, where there is a serious question as to whether the first judgment was unfair, for one of several possible reasons, the fairness to litigants goal would be served by examining the validity of the F1 judgment. A goal-oriented analysis, therefore, indicates that the doctrine of *res judicata* should be enforced, unless for some reason it would be unfair to bind a party to the judgment in question. Some of the contexts in which a fairness claim must be balanced against a *res judicata* claim are considered in the next section.<sup>55</sup>

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<sup>54</sup> The breakdown of the rule of mutuality of estoppel in the area of collateral estoppel indicates that conservation of judicial resources is of greater importance than prevention of the harassment of victorious litigants. See 42 ST. JOHN'S L. REV. 150 (1967).

<sup>55</sup> This article is concerned with the *res judicata* aspect of judgments, *i.e.*, when there is a second attempt to enforce or defend the original cause of action. To be distinguished is the doctrine of collateral estoppel, which prohibits the relitigation of issues that have already been determined between the parties, even when the first action was different from the second, and *res judicata* inapplicable. A strong argument can be made against the extension of collateral estoppel to foreign-nation judgments. See Smit,

*Factors Relating to Fairness in the Individual Case*

## (1) Competence of Court

The Restatement of Conflicts asserts that "a judgment rendered by a court lacking competence to render it and subject to collateral attack for that reason in the state of rendition will not be recognized or enforced in other states."<sup>56</sup> This is generally known to American lawyers as subject-matter jurisdiction. The issue might arise, for example, where F1 had special courts to deal with commercial matters and a general court improperly rendered judgment, or where a monetary limitation on a lower-echelon court was exceeded by the judgment. This situation relates to fairness considerations, since the F1 legislature has deemed the rendering court to be unqualified to hear a case of that nature or significance. An additional factor militating towards a subject-matter jurisdictional test is that recognizing judgments deemed void in F1 would encourage disregard of F1 procedures, and could theoretically cause ill feeling between F1 and F2.

However, there are serious drawbacks to such a test. It would often be extremely difficult for an F2 court to ascertain whether the F1 court acted beyond its competence, and, even if it did, whether such defect rendered the judgment void under F1 law. Obviously, the F1 court is in a better position than any F2 court to decide questions of its own jurisdiction. Re-examination elsewhere could be regarded as a lack of respect for F1 institutions.<sup>57</sup> Additionally, the F1 hearing might have been perfectly fair, and it would be a waste of judicial resources to compel retrial.

It would seem that the most effective policy, arrived at by balancing the interests, consists of, first, placing the burden on the objecting party to prove that a substantial

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*supra* note 53, at 57-61. The problem was noted by the Delaware Supreme Court in *Bata v. Hill*, 39 Del. Ch. 258, 163 A.2d 493, 505-06 (1960), where the court concluded that considerations of fairness should be decisive.

<sup>56</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 105 (Proposed Official Draft, 1967).

<sup>57</sup> *Cf.* RESTATEMENT FOREIGN RELATIONS, *supra* note 28, at § 41, comment f.

question of F1 competence exists, and, second, staying enforcement of the judgment while the objectant seeks to attack the judgment in F1.

## (2) Jurisdiction Over the Parties

The question of what are the acceptable bases of jurisdiction to apply law to a particular situation and particular parties has created the greatest amount of controversy in international judgment recognition policy. International law does not proscribe the arbitrary creation by a state of competence to apply law to persons unrelated to the state in any substantial way.<sup>58</sup> However, a judgment rendered upon an exercise of "judicial jurisdiction" unacceptable to F2 will not be recognized. In the United States, it would seem unconstitutional to recognize a judgment rendered without any substantial contacts with defendant.<sup>59</sup> A recent article lists the functions thought to be served by such a policy.<sup>60</sup> The basic function of imposing a judicial jurisdictional test is to assure that it was fair that defendant was required to litigate the issues in the courts of F1. An examination of the types of contact that F1 deems sufficient to give its courts jurisdiction over foreigners also might serve as an indication of the general fairness of F1 adjudicatory procedure. An added factor, not generally considered, is that judgments rendered against defendants with whom the state had only slight contact are apt to be default judgments. Of course, a recognition test based on judicial jurisdiction carries the added dividend of being fairly easy to administer, *i.e.*, no need to go into the merits or rule of law applied in the particular case. The F2 court need only investigate whether there was a sufficient nexus between the defendant and F1 to justify its assumption of jurisdiction to apply, and, if so, F2 will recognize the

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<sup>58</sup> See Graupner, *supra* note 19, at 374.

<sup>59</sup> In *Griffin v. Griffin*, 327 U.S. 220, 229 (1946), the Court stated that "due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process." See Sedler, *Recognition of Foreign Judgments and Decrees*, 28 Mo. L. Rev. 432, 447 (1963).

<sup>60</sup> von Mehren & Trautman, *supra* note 52, at 1610

judgment unless there is another ground to deny conclusiveness.

In making its determination of the validity of F1's jurisdiction, there are four tests which F2 might provide: (1) satisfaction of F1's jurisdictional requirements; (2) satisfaction of the requirements imposed by F2 upon its own courts for their assumptions of jurisdiction over persons; (3) satisfaction of both; or (4) satisfaction of an international standard of jurisdiction. The Restatement of Conflicts apparently adopts the fourth test, by its assertion that "a state has power to exercise judicial jurisdiction over a person if the person's relationship to the state is such as to make the exercise of such jurisdiction reasonable."<sup>61</sup> This seems the most effective means of achieving most of the relevant goals at the least expense to the fairness goal. However, an added requirement that the judgment would not be considered void in F1 should be added for the same reasons stated in the discussion of competence of the F1 court.

Obviously, the major difficulty in applying an international standard is in determining the standard to be applied.<sup>62</sup>

What can be stated with some confidence are certain secondary claims to judicial jurisdiction clearly acceptable to the world community, and certain claims to judicial jurisdiction almost definite to cause difficulty with other states. Among the former are continuous residence of defendant, contractual agreement on court, and jurisdiction

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<sup>61</sup> RESTATEMENT OF CONFLICTS, *supra* note 56, at § 24(1).

<sup>62</sup> RESTATEMENT OF CONFLICTS, *supra* note 56, at § 27, provides:

(1) A state has power to exercise judicial jurisdiction over an individual on one or more of the following bases:

(a) presence; (b) domicile; (c) residence; (d) nationality or citizenship; (e) consent; (f) appearance in an action [as a defendant or as a plaintiff]; (g) doing business within the state; (h) an act done in the state; (i) causing an effect in the state by an act done elsewhere; (j) ownership, use or possession of a thing in the state; (k) other relationships to the state which make the exercise of judicial jurisdiction reasonable.

Subsequent sections explain that the question of reasonableness is to be superimposed on each of the above potential bases for assertion of jurisdiction to apply.

over plaintiff on defendant's counterclaim.<sup>63</sup> To these could probably be added the commission of a tort or doing business within a state, for causes of action arising from such activities.<sup>64</sup> Deserving of more attention, because of the problems that they create are some of the more arbitrary initial and secondary claims to judicial jurisdiction, in which unfairness to the defendant and inconvenience of trial are likely to result.

The foremost, in notoriety, of such claims arises from Article 14 of the French Civil Code. The Civil Code was drafted at a time when France was at war with the rest of Europe, and reflects the unfriendly sentiments felt then toward foreigners.<sup>65</sup> Accordingly, Article 14 provides that French courts have jurisdiction to hear *any* action brought by a Frenchman against anyone, no matter where the defendant resides or where the relevant acts occurred.<sup>66</sup> A second such claim, referred to in the discussion of Jean Claude Killy's predicament, most notably asserted by the German Civil Procedure Code, grants unlimited jurisdiction over a non-resident who owns assets of any amount located in Germany.<sup>67</sup> Though the initial reaction of American lawyers to this obviously unreasonable claim to jurisdiction would be one of resentment, closer examination reveals some similarity to the quasi-in-rem jurisdiction available in American state courts. While theoretically quasi-in-rem jurisdiction is only up to the amount of the property attached at the initiation of the action, in practice it often works the other way. This is due to the general absence of provisions for a limited appearance, *i.e.*, a rule that

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<sup>63</sup> See Graupner, *supra* note 19, at 375.

<sup>64</sup> Cf. Graupner, *supra* note 19, at 377; N.Y. CIV. PRAC. § 302.

<sup>65</sup> R. AGHION, FRENCH LAW AS APPLIED TO BRITISH SUBJECTS & COMPANIES 92 (1935).

<sup>66</sup> *Id.* at 91. At one time, Article 14 was available in Belgium, the Netherlands, Luxembourg, parts of Italy, and parts of Germany, as well as France. Today, it finds general application only in France, Luxembourg, and, with slight modification, the Netherlands. However, reciprocity clauses in Belgium and Italy provide for jurisdiction over a foreigner on any basis available under the national law of the foreigner, and thus Article 14 is still available for retaliation. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995, 998-99 (1967).

<sup>67</sup> Nadelmann, *supra* note 66, at 999.

would allow the defendant to participate on the merits without thereby subjecting himself to full jurisdiction in personam.<sup>68</sup> Faced with the practicality of forfeiting the seized property, defendants often are coerced into defending on the merits, with in personam consequences, in an unreasonable forum.<sup>69</sup> The third, and most familiar, problematical claim to judicial jurisdiction is that arising from service on defendant within the state. While this is the traditional basis for judicial jurisdiction under the common law, based upon conceptions of power, it is clearly alien to the civil law. This is because jurisdiction in civil-law countries is conceived as pre-existing the formal commencement of the action. Service of process is necessary only to ensure notification, and does not affect jurisdiction over the controversy.<sup>70</sup> When it is realized that the "power" claim to judicial jurisdiction, pursued to its logical limits, would permit the assertion of jurisdiction over an alien served with process on board an airplane passing over a state's territory, it becomes apparent why civil-law countries are skeptical.<sup>71</sup>

The possibility of developing concepts of judicial jurisdiction which could find support among the entire world community will be considered later.

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<sup>68</sup> The quasi-in-rem type of jurisdiction is no longer available in England, and the distinction between in personam and quasi-in-rem judgments is little known abroad. See Nadelmann, *supra* note 66, at 1005. Where attachment of an alien's property causes him to appear and defend on the merits, probably the resulting in personam judgment would receive treatment similar to that accorded other American judgments. Also, where the assets seized are tangible property located within F1, little difficulty is likely to arise. However, where intangible property, such as contract claims, tort claims, and interests in corporations, are "seized" and there is no defense on the merits, the judgment would seem in trouble if a situation were to arise for challenge abroad. Seizure of intangibles as a basis for quasi-in-rem jurisdiction is condoned by *Harris v. Balk*, 198 U.S. 215 (1905).

<sup>69</sup> For a controversial holding on seizure of an intangible, see *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), where the obligation of a liability insurer, which did business in New York, to defend and indemnify the insured, was deemed attachable for purposes of quasi-in-rem jurisdiction. See generally *RESTATEMENT OF CONFLICTS*, *supra* note 56, at §§ 65-68.

<sup>70</sup> See A. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 193 (1943).

<sup>71</sup> See *Grace v. McArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

### (3) Conduct of the F1 Proceedings

An initial consideration is the question of notice and opportunity to defend. The Restatement of Conflicts provides:

A state may not exercise judicial jurisdiction over a person, although he is subject to its judicial jurisdiction, unless a reasonable method is employed to give him notice of the action and unless he is afforded a reasonable opportunity to be heard.<sup>72</sup>

In the United States, a judgment against a defendant who was not notified of the action or was not given the opportunity to defend is precluded by the due process clause from recognition.<sup>73</sup> Obviously, a goal-oriented approach would also dictate a policy of non-recognition—the fairness to litigants goal easily outweighing any other goals that might be served by recognition.

Notice need not be identical to American modalities, but should be reasonably calculated to apprise defendant of the action in ample time to prepare his defense. However, even the relatively simple question of what notice would be reasonable in a particular case may present difficulties. A case in point is *Boivin v. Talcott*.<sup>74</sup> There the court refused to recognize a Quebec default judgment against an Ohio domiciliary, although the Quebec court had exercised its discretion to direct personal service on defendant, since the only service *required* under the Quebec statute was publication.<sup>75</sup>

Another factor to be considered is the fairness of F1 procedure in general. While an American court may be more reluctant to recognize the judgment of a foreign court with significant differences in procedure from American courts, this fact alone will not result in non-recognition.<sup>76</sup>

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<sup>72</sup> RESTATEMENT OF CONFLICTS, *supra* note 56, at § 25.

<sup>73</sup> See Sedler, *supra* note 59, at 450.

<sup>74</sup> 102 F. Supp. 979 (N.D. Ohio 1951).

<sup>75</sup> The court reasoned along the lines of *Wuchter v. Pizzuti*, 276 U.S. 13 (1928). Distrust of service by publication is manifest in the Supreme Court's decision in *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).

<sup>76</sup> *Hilton v. Guyot*, 159 U.S. 113 (1895).

Provisions regarding trial by jury, rules of evidence, etc., will not affect the conclusiveness given to the F1 determination. If the F1 procedure is so arbitrary a method of fact-finding as to offend our sense of "natural justice," recognition will be denied.<sup>77</sup> Since most judgments for which enforcement is sought in the United States were rendered in nations with well-developed legal systems, this type of claim is unlikely to arise often.

However, a similar claim, more likely to be made, is that the F1 procedure was unfair in this particular case. There may be allegations of perjury, bribery of the judge or jury, or misleading the defendant into not adequately presenting his case. In England, fraud will be considered a defense to such judgments,<sup>78</sup> and most other European nations would deem it contrary to public policy to recognize such judgments.<sup>79</sup> Unlike English courts, American courts will ordinarily enforce a foreign judgment where the fraud alleged is deemed intrinsic, *i.e.*, where the F1 court had the opportunity to pass upon it.<sup>80</sup> For example, objections that perjured testimony or falsified documents were presented to the court will not be considered. Only allegations of extrinsic fraud, where the court could not pass upon the facts, will suffice if proven to negate the judgment.<sup>81</sup> For example, if plaintiff misled defendant into believing he had discontinued the action, the judgment could be attacked.<sup>82</sup>

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<sup>77</sup> In *Banco Minero v. Ross*, 106 Tex. 522, 172 S.W. 711 (1915), a Mexican judgment rendered after a very summary proceeding, in which appeal was blocked due to a failure to affix a stamp to defendant's papers, was refused recognition. A similar English case is *Nouvron v. Freeman*, 15 App. Cas. 1 (1889).

<sup>78</sup> A. DICEY & J. MORRIS, *CONFLICT OF LAWS* 1009-11 (8th ed. 1967).

<sup>79</sup> Lorenzen, *The Enforcement of American Judgments Abroad*, 29 *YALE L.J.* 268, 278 (1920).

<sup>80</sup> See Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 *COLUM. L. REV.* 783, 794 (1950).

<sup>81</sup> It is uncertain whether the Uniform Foreign Money-Judgments Recognition Act, adopted by several states, continues the intrinsic-extrinsic dichotomy. 9B *U.L. ANN.* §27 (Supp. 1964). For an opinion that it does, see Note, *The Uniform Foreign Money-Judgments Recognition Act*, 64 *MICH. L. REV.* 308, 311 (1965).

<sup>82</sup> It has been held that if the foreign court has had the opportunity to consider the merits of the claim of extrinsic fraud, the judgment is conclusive. *Harrison v. Triplex Gold Mines, Ltd.*, 33 F.2d 667 (1st Cir. 1929) (Canadian decree).



In the opinion of this writer, the distinction between intrinsic and extrinsic fraud is a rational one. In fact, where the extrinsic fraud has deprived defendant of a real opportunity to present his case, due process would probably require a new trial. Where the party objecting to the F1 judgment presents clear and convincing evidence of intrinsic fraud, the suggested approach is to stay enforcement, pending application for relief in F1. If this fails, and the objecting party has a valid claim, it may be best to allow him opportunity, through foreign office negotiation, to persuade F1 to look into the matter. The extreme difficulty involved in any attempt by F2 to examine claims of perjury should preclude such attempts. The witness is likely to be unavailable; the trial record, if there is one, is likely to be in a foreign tongue. The fact that F1 had an opportunity to hear the evidence, and the adoption of the policy described above which may secure a second consideration of the claim by F1, would seem to weigh the scale in favor of recognition if the F1 judgment remains unchanged.

An additional question is the treatment to accord to foreign default judgments. Since the possibility of unfairness is much greater where defendant did not appear in F1, courts are less likely to grant conclusive effect to the judgment.<sup>83</sup> Clearly, F2 should carefully examine the propriety of and factual support for the F1 assertion of judicial jurisdiction. In addition, plaintiff should be made to prove that F1 required him to present some proof of damages suffered. If both requirements are met, a proper accommodation of the relevant goals militates towards recognition. A contrary policy would encourage aliens not to appear in actions brought against them even in convenient and reasonable forums.<sup>84</sup>

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<sup>83</sup> See Lorenzen, *supra* note 79, at 281. In the recent case of Falcon Mfg. (Scarborough) Ltd. v. Ames, 53 Misc. 2d 332, 278 N.Y.S.2d 684 (N.Y.C. Civ. Ct. 1967), the court stated that a Canadian default judgment was not as persuasive as a litigated judgment would have been.

<sup>84</sup> For default judgments, as for other judgments, there should be no recognition in F2 unless the judgment is final in F1. This is clearly the law for foreign and sister-state judgments. Recognition, or at least enforcement, should similarly be stayed for a reasonable time when a serious possibility of collateral attack in F1 exists.

## (4) Choice of Law

The primitive idea that a forum always should apply its own law prevailed until about the year 1200, when the doctrine emerged that the applier of law should look to the law which is most convenient and reasonable to apply to the situation.<sup>85</sup> However, there is still widespread confusion between the concept of jurisdiction to apply, *i.e.*, judicial jurisdiction, and jurisdiction to prescribe, or legislative jurisdiction.<sup>86</sup> It is still unclear whether a state should have more contacts with the controversy and the parties when it claims competence to legislate the rule of law to be applied to given situations or when it claims competence to adjudicate a controversy as to the merits and as to the rule of law to be applied to the facts as ascertained. For example, assume a sales contract negotiated in New York to be performed in Ontario. The seller defendant sends defective goods into Ontario, but does not allow himself or his agent to set foot in Ontario. The decision-maker, either F1 or, upon review, F2, might well conclude that the rule of law to govern the action should be Ontario's; however, the Ontario court did not have jurisdiction to apply its law to the defendant for lack of contact with Ontario. However, since this paper is suggesting a limited choice of law test for recognition *in addition* to a test of F1's judicial jurisdiction, there seems no need to draw a precise line between the quantum or type of contact to be required by one test as compared with the other.

More relevant is a pointing out of the different considerations involved in reviewing the choice of law by F1 from those involved in attempting a review of the findings of fact. The primary distinction is that a choice of law review would be a much simpler process. The basic goals served by *res judicata*, *viz.*, conservation of judicial resources and prevention of harassment of victorious litigants, would not be much hindered by such a test since no new trial

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<sup>85</sup> Yntema, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721, 722 (1957).

<sup>86</sup> See von Mehren & Trautman, *supra* note 52, at 1637.

would be necessary unless the choice of law is found, upon motion before the court, to have been sufficiently erroneous to justify non-recognition. In fact, it might in some cases be possible to accept the fact-findings as conclusive, while modifying the judgment itself by changing the law to be applied. Another benefit of a choice of law test is that not all cases in which it is decided by F2 that F1's choice of law was erroneous will require non-recognition. If the law applied by F1 (usually its own) is basically identical to the law(s) of the state(s) whose law F2 might well determine should have been applied, the propriety of F1's choice of law would be academic.

A different type of consideration which must be mentioned is that valid exclusive interests of F2 are more likely to be adversely affected by an arbitrary choice of law by F1, than by a possible error in its findings of fact.

The usual situation in which a choice of law test becomes relevant is where there is a claim that F1 chose an improper law to apply. There are nations in which the courts prefer to apply forum law even when an examination of contacts reveals that forum policies were not really involved in the controversy.<sup>87</sup> The "public policy" of F2 would probably dictate a refusal to recognize such a judgment, particularly where it is thought F2 law was the proper law to be applied. Moreover, since application of an improperly chosen rule of law is a denial of due process,<sup>88</sup> recognition of such a judgment would probably involve a denial of due process. Here a distinction between sister-state and foreign judgments is urgent. Full faith and credit requires recognition of sister-state judgments despite clear mistake in the law chosen, even if the first choice of law was unconstitutional.<sup>89</sup> Aside from the argument that

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<sup>87</sup> France, once again, is the prime example. See Castel, *Jurisdiction and Money Judgments Rendered Abroad: Anglo-American and French Practice Compared*, 4 MCGILL L. REV. 152 (1958). Even the supposedly progressive New York Court of Appeals occasionally displays some of this tendency. See *Wyatt v. Fulrath*, 16 N.Y.2d 169, 211 N.E.2d 637, 264 N.Y.S.2d 233 (1965).

<sup>88</sup> *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

<sup>89</sup> *Cf. Fauntleroy v. Lum*, 210 U.S. 230 (1908).

such a limitation is only required by the internal functioning of a federal system, it is a vital consideration that there is a United States Supreme Court available to review an unconstitutional finding of legislative jurisdiction.<sup>90</sup> Apart from its own due process implications, an examination of the choice of law made by F1 could be a helpful aid in ascertaining the overall fairness of F1's treatment of foreigners.

Of course, our goal-oriented approach precludes too expansive a choice of law test. A test which required the choice of law by F1 to be the same that F2 would have made would be too great a hindrance to the goals of avoidance of conflict and security of transactions, not justified by considerations of fairness to litigants or the exclusive interests of a state in controlling events which affect its own territory, people, and institutions or of fulfilling its particular public policies. The optimum policy would require the F1 choice of law to have a rational basis. Since contacts relevant to judicial jurisdiction generally will also provide legislative jurisdiction, such a denial of recognition to a judgment rendered on adequate judicial jurisdiction will be exceptional. However, this may occur if judicial jurisdiction was based on service within the state or on appearance, and accepted as valid by F2. A general test would be to determine whether the situation out of which the cause of action arose involved a serious impact upon the state's control over its people, territory, or institutions. Naturally, the mere fact that a national of F1 was involved in the controversy would not suffice. On the other hand, if all parties are F1 nationals, the result might be different.

A second choice of law problem can arise where F1 decides to apply F2 law, and then misapplies it. Since states can and do apply foreign law, and since they do have difficulty in determining what such law actually is, this situation is not a freak. A balancing of the interests

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<sup>90</sup> A similar position was taken by the Supreme Court in *Treinius v. Sunshine Mining Co.*, 308 U.S. 66 (1939). This caused some embarrassment, since certiorari had been denied despite an unconstitutional judgment.

indicates a greater amount of review by F2 would be desirable here. Less problems of conflict between different exclusive interests or justified reliance on F1's judgment are involved than in the prior situation. Once there is general agreement (by F1 and F2) that F2 law should apply, clearly the courts of F2 are most qualified to determine what that law is.

Another issue related to choice of law problems arises when the claim is made that recognition of the F1 judgment would violate F2's public policy due to the nature of the underlying cause of action. For example, a French judgment ordering a man to support his son-in-law was denied recognition.<sup>91</sup> Similar results might obtain where the F1 judgment was based on gambling or usurious transactions.<sup>92</sup> Obviously, the F1 judgment will not be so treated when the underlying cause of action is recognized under F2 substantive law. In fact, the general policy is to recognize foreign judgments, at least where the F1 choice of law was reasonable, unless the cause of action fundamentally offends F2 concepts of what is just.<sup>93</sup>

When the F2 court is faced with this type of a public policy claim, it has three alternatives. It may enforce the judgment for plaintiff,<sup>94</sup> refuse to entertain the action at all,<sup>95</sup> or apply its own law to the controversy, with or with-

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<sup>91</sup> DeBrimont v. Penniman, 7 F. Cas. 309 (No. 3715) (C.C.S.D.N.Y. 1873).

<sup>92</sup> See Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 268, 279-80 (1920). These examples should be distinguished from those in which, for example, recognition is denied a foreign judgment rendered in disregard of American anti-trust legislation. The latter case would present considerations of improper choice of whose law should apply, not upon inherent repugnancy of the underlying cause of action.

<sup>93</sup> In *Neporany v. Kir*, 5 App. Div. 2d 438, 173 N.Y.S.2d 146 (1st Dep't 1958), a Canadian judgment for alienation of affections was recognized despite a New York statute forbidding such a cause of action.

<sup>94</sup> In these cases, the F1 plaintiff is relying on the judgment.

<sup>95</sup> This is the usual procedure in the analogous area of treatment of foreign penal and revenue judgments. Since these cases involve a foreign sovereign or political subdivision as a party, different considerations are present. This is reflected by the rationale asserted by courts in refusing to entertain such suits that this policy is most likely to avoid offending foreign nations. All tax and penal judgments, whether fair or arbitrary, rendered by a friendly nation or a foe, are treated "equally" by the courts, i.e., refused enforcement. See Stoel, *The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States*, 16 INT'L & COMP. L.Q. 663 (1967).

out a new examination of any controverted facts, and render a new judgment.<sup>96</sup> The alternative that F2 should follow depends primarily upon the relationship that F1 and F2 have to the controversy. For example, where F2 precludes tort actions by a wife against her husband, but both parties are domiciliaries of F1 where such actions are permitted, the judgment should be recognized. Similarly, a French judgment ordering a man to support his son-in-law should be recognized if the parties are French. Obviously, the analysis presented in the choice of law discussion becomes relevant. Once again, where F2 is an American court, application of its public policy, and rendition of a new judgment thereunder, may violate due process where the dispute was essentially foreign.<sup>97</sup>

#### HOW TO ORDER RECOGNITION POLICY

##### *The Present Predicament*

The method of attaining desired recognition policies presents special problems where a federal system is involved. Claims of competence to prescribe recognition policies are made by courts of the several states, as well as by courts of the federal government. Generally, the policies adopted by the various courts have been very similar, probably because the full faith and credit clause and notions of *res judicata* are held in common. Long before the Supreme Court in *Hilton v. Guyot*<sup>98</sup> announced the liberal treatment it would accord foreign judgments (though subject to a reciprocity test), state courts were giving conclusive effect to fairly-rendered judgments of foreign countries.<sup>99</sup> However, the exposition of the reciprocity test by the *Hilton* Court caused a distinct split in recognition

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<sup>96</sup>In this type of case, F2 may deem summary judgment for defendant proper, finding no recognized cause of action existing.

<sup>97</sup>*Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

<sup>98</sup>159 U.S. 113 (1895).

<sup>99</sup>The commercial state of New York led the way. See *Dunstan v. Higgins*, 138 N.Y. 70, 33 N.E. 729 (1893); *Lazier v. Wescott*, 26 N.Y. 146 (1862); Comment, *Reciprocal Enforcement of United States and Foreign Judgments*, 2 TEX. INT'L L.F. 75-82 (1966).

policy in American courts. The dichotomy was made possible by the prevailing opinion that recognition of foreign-nation judgments does not present a federal question, and state courts are therefore free to formulate their own policies.<sup>100</sup>

California was among the first states to assert this autonomy. In 1907, California passed a statute in response to the refusal of German courts to recognize California state and federal court judgments against a German insurance company after the San Francisco earthquake and fire of 1906. Germany, a strict reciprocity state, did not consider the United States to accord sufficient deference to German or other foreign judgments.<sup>101</sup> The basic purport of the California statute was to attempt to secure favorable treatment of California judgments abroad by renouncing the reciprocity test of *Hilton*. In New York, where a large proportion of these proceedings are brought, the Court of Appeals went out of its way to disapprove the *Hilton* holding.<sup>102</sup> The Uniform Foreign Money-Judgments Recognition Act, adopted by several states, does not require reciprocity.<sup>103</sup> Other states apparently have adopted the reciprocity requirement of *Hilton*; in many states, particularly

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<sup>100</sup> This view finds support in *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185 (1912), where appeal from a state court was denied for want of a federal question.

<sup>101</sup> CAL. CODE CIV. PROC. §1915. See Nadelmann, *Non-Recognition of American Money Judgments Abroad and What To Do About It*, 42 IOWA L. REV. 236, 252-54 (1957). According to the commentary to the German Civil Procedure Code, the United States is not included on the list of countries considered to satisfy reciprocity because:

Foreign judgments are to a large degree recognized by the decisions of the courts—which, in the main, constitute the sole source of law—but a possibility for re-examining the substance remains to a certain extent. Reciprocity, therefore, cannot be considered as guaranteed.

*Id.* at 253-54. See Comment, *supra* note 99, at 82.

<sup>102</sup> *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926). Since *Johnston* involved an American plaintiff who lost in France to a French defendant, and who tried to sue again in New York, the Court of Appeals did not have to expressly repudiate *Hilton*. In any event, the holding a year later in *Cowans v. Ticonderoga Pulp & Paper Co.*, 219 App. Div. 120, 219 N.Y.S. 284 (3d Dep't), *aff'd on opinion below*, 246 N.Y. 603, 159 N.E. 669 (1927), directly rejected *Hilton*. See Comment, *The Present Status of the Doctrine of Hilton v. Guyot*, 6 S. TEX. L.J. 129, 135-36 (1962).

<sup>103</sup> 9B U.L. ANN. §27 (Supp. 1964). See Note, *supra* note 81, at 308.

inland, the question has never arisen.<sup>104</sup> The point to be made is that there is no uniformity among states at least as to the reciprocity issue.

An additional effect of state competence is that federal courts in diversity cases, under *Erie R.R. Co. v. Tompkins*<sup>105</sup> and *Klaxon Co. v. Stentor Elec. Mfg. Co.*,<sup>106</sup> are apparently required to follow the recognition policies of the states in which they sit. This is the general assumption of courts and commentators, though this writer has found no federal decision directly in point.<sup>107</sup> An argument could be made, under the recent decision of *Hanna v. Plummer*,<sup>108</sup> that state law should not be controlling in federal courts. The Supreme Court, in holding that the Federal Rules govern service of summons in diversity cases, stated:

The "outcome-determination" test . . . cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.<sup>109</sup>

Obviously, the applicability of the reciprocity rule, *if in issue* in federal court, will affect the outcome of the suit on the foreign judgment, *i.e.*, the result would be different from that which would have occurred had a state court (in a state which does not require reciprocity) decided the litigation. However, it is possible that application of a federal rule, *viz.*, reciprocity, in diversity cases would not violate the more sophisticated test of *Hanna*. In the rare case that parties on both sides of the foreign judgment are domiciliaries of the same American state, the *Hilton* doctrine probably does not apply. In other cases, there will be federal diversity jurisdiction, directly or by removal,

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<sup>104</sup> Surveys of the positions of the various states are attempted in Comment, *supra* note 102, at 135 and Note, *The Enforceability of Foreign Judgments in American Courts*, 37 NOTRE DAME LAW. 88, 92 (1961).

<sup>105</sup> 304 U.S. 64 (1938).

<sup>106</sup> 313 U.S. 487 (1941).

<sup>107</sup> See Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44, 47-48 (1962). *Gull v. Constam*, 105 F. Supp. 107 (D. Colo. 1952), was not in point since Colorado had not taken a position either way.

<sup>108</sup> 380 U.S. 460 (1965).

<sup>109</sup> *Id.* at 468.



so that forum-shopping would not avail plaintiff anything. However, the primary flaw in this argument is the limitation on removal from state courts where the defendant is a domiciliary.

In any event, at present, state law dominates the area of recognition of foreign judgments. In fact, the prevailing opinions that recognition policy does not present a federal question and that state law governs in a federal diversity litigation combine to render it apparently impossible for the Supreme Court to find an opportunity to pass once again on the matter. This situation results in several difficulties.

If the *Hilton* Court was correct in its opinion that reciprocity is a valid policy in this area, the effect of such a policy is clearly frustrated by the abolition of the doctrine in several states.<sup>110</sup> If, as believed by this writer, reciprocity is an unwise policy in these cases, individual state action is a poor way to rescind it. Stability in international transactions, *i.e.*, that a given situation receive the same legal treatment everywhere, is hampered with no compensating gain in other relevant goals. It is obviously undesirable to make a judgment creditor's legal rights depend upon the particular American state in which he locates the person or assets of his judgment debtor.

Of perhaps greater importance to the interests of the United States, the present system is unlikely to secure recognition for American judgments abroad. As previously discussed, despite the fact that in general American courts accord conclusive effect to foreign adjudications, our judgments are treated shabbily in other nations, with the notable exceptions of England and most Canadian provinces. Several reasons have been suggested for this unhappy plight. Consider a hypothetical New York judgment rendered against an F2 national. When the victorious

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<sup>110</sup> There remains a substantial amount of opinion, particularly abroad, that reciprocity is a valuable weapon with which to negotiate with other nations to secure favorable treatment for a nation's own judgments. See Nadelmann, *Reprisals Against American Judgments*, 65 HARV. L. REV. 1184, 1186-87 (1952).

litigant seeks recognition in F2, the court is likely to overlook the New York decisions favoring foreign judgments and base its conclusion upon *Hilton v. Guyot*.<sup>111</sup> Such a procedure is not necessarily arbitrary, since foreign courts are aware that the Supreme Court is the highest American tribunal, and even American authorities are uncertain as to the extent of *Hilton's* viability. Even if F2 were willing to examine the particular position of the rendering American state (assuming it had taken a position), in New York's case a rejection of *Hilton*, F2, especially if it is a civil-law nation, may refuse recognition due to the absence of a *statute* in F1 mandating recognition of F2 judgments.<sup>112</sup> Possibly if New York were to adopt the Uniform Act, this objection would be thwarted. However, recognition still might well be refused due to the procedural requirement prevailing in American states that execution can be availed of only after the F1 judgment is converted to an F2 judgment.<sup>113</sup> Under the concept of *exequatur*, as developed in France, the F2 proceeding merely declares the F1 judgment to be entitled to execution, there being no need for a formal F2 judgment.<sup>114</sup> Obviously, this distinction is more apparent than real. Even sister-state judgments must be converted before they may be executed in F2.<sup>115</sup> The F2 procedure, even where foreign nation judgments are involved, is usually summary and does not entail any re-examination of the merits.<sup>116</sup> However, a foreign court may not see it this way. As has been seen, while the state dominance in recognition of foreign judgments is not the sole cause of poor treatment

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<sup>111</sup> See Schaaf, *The Recognition of Judgments from Foreign Countries: A Federal-State Clause for an International Convention*, 3 HARV. J. LEGIS. 379, 384 (1966); Comment, *supra* note 99, at 98; Note, *supra* note 81, at 309.

<sup>112</sup> See Nadelmann, *supra* note 110, at 1188; Note, *supra* note 81, at 308.

<sup>113</sup> See Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. REV. 752, 763 (1955); Nadelmann, *supra* note 110, at 1188.

<sup>114</sup> See R. AGHION, *FRENCH LAW AS APPLIED TO BRITISH SUBJECTS & COMPANIES* 102 (1935).

<sup>115</sup> This conversion is not necessary among federal courts. A district court judgment rendered in one state may be registered in any other district court and thereby become worthy of execution.

<sup>116</sup> See N.Y. CIV. PRAC. § 313.

of American judgments abroad, it is a contributing and limiting factor. In any event, even if foreign nations were willing to examine the statutory or common law of particular American states, the result would be recognition of some American judgments but not others, though equally valid.<sup>117</sup> The desirability of this is doubtful.

### *Constitutionality of State Control*

Despite an antiquated Supreme Court holding<sup>118</sup> and the general opinion of state courts, the present constitutionality of state control over judgment-recognition policy is in doubt. The possibility of constitutional infirmity may be inferred from a reading of two recent Supreme Court decisions, *Banco Nacional de Cuba v. Sabbatino*<sup>119</sup> and *Zschernig v. Miller*,<sup>120</sup> which may manifest a new attitude against the validity of state claims to competence to dictate policy when foreign relations are involved.

In *Sabbatino*, a Cuban corporation largely owned by Americans contracted to sell sugar to an American commodity broker. Thereafter, motivated by the United States Government's reduction of the Cuban sugar quota, the Cuban Government seized the corporation's sugar in Cuban territory. The Cuban Government allowed the sugar to be shipped to New York, under the expectation that it would now receive the proceeds. When the commodity broker refused to pay, the New York supreme court prepared itself to adjudicate the question of title. However, the matter was removed from the state court's authority when the Cuban Government sued for conversion in federal district court in New York. The eventual opinion of the Supreme Court, that the act of state

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<sup>117</sup> Federal diversity suit judgments will cause even greater confusion. Since the rendering court was apparently bound by the conflicts law of the state in which it sits, it would seem that it should be treated in the same fashion as would that state. Yet, the fact remains that such court is under the supervisory authority of the Supreme Court, and must therefore pay homage, though probably not obedience, to *Hilton v. Guyot*.

<sup>118</sup> *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185 (1912).

<sup>119</sup> 376 U.S. 398 (1964).

<sup>120</sup> 389 U.S. 430 (1968).

doctrine precludes American courts from examining the propriety of the taking, will not be further discussed here. Rather, the statements by the majority on one particular point will be highlighted. The Court stated:

We could perhaps in this diversity action avoid the question of deciding whether federal or state law is applicable to this aspect of the litigation. New York has enunciated the act of state doctrine in terms that echo those of federal decisions. . . . However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.<sup>121</sup>

If *Sabbatino* is seen as a harbinger of a federal coup of state power in the foreign-judgment area, the *Zschernig* decision is a more convincing omen. Oregon officials petitioned the state probate court for escheat of an estate, the sole heirs of which resided in East Germany. The petition was based upon an Oregon statute requiring as a prerequisite for an alien to inherit, first, that there be a reciprocal right of an American citizen to inherit property in the alien's country, second, that American citizens have the right to receive payments in the United States of funds from estates in such country, and, third, that the foreign heirs have the right to receive the proceeds without confiscation.<sup>122</sup> Although there was a substantial question as to whether a 1923 treaty with Germany precluded the operation of the state provision in this case, the Court declined to consider the matter, since the "history and operation of this Oregon statute make clear that it is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."<sup>123</sup> Despite an amicus curiae brief by the Justice Department to the effect that the Oregon statute did not in this case interfere with foreign relations, the Court condemned the manner in which this

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<sup>121</sup> 376 U.S. at 424-25.

<sup>122</sup> ORE. REV. STAT. § 111.070 (1968).

<sup>123</sup> 389 U.S. at 432.

type statute "launched inquiries into the type of governments that obtain in a particular foreign nation."<sup>124</sup> The Court continued:

As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts.<sup>125</sup>

The Court consequently overruled *Clark v. Allen*,<sup>126</sup> the authority of which apparently had been reaffirmed as late as 1962 by the dismissal of an appeal for want of a substantial federal question in *Ioannou v. New York*.<sup>127</sup>

Mr. Justice Harlan, in a concurring opinion, would have preferred the Court to have based its holding upon the treaty.

If the flaw in the Oregon statute is said to be that it requires state courts to inquire into the administration of foreign law, I would suggest that the characteristic is shared by other legal rules which I cannot believe the Court wishes to invalidate. For example, the Uniform Foreign-Money Judgments Act provides that a foreign-country money judgment shall not be recognized if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of Due Process of law."<sup>128</sup>

Clearly, state courts are not only empowered, but required, to impose a due process criterion on foreign judgments. This would probably be so even if the United States entered into a treaty forbidding states from such inquiry.<sup>129</sup> However, other criteria which states might impose upon foreign judgments, beyond a simple due process requirement, might conceivably be affected by the wrath of the

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<sup>124</sup> *Id.* at 434.

<sup>125</sup> *Id.* at 437-38.

<sup>126</sup> 331 U.S. 503 (1947).

<sup>127</sup> 371 U.S. 30 (1962).

<sup>128</sup> 389 U.S. at 461.

<sup>129</sup> While the treaty power is quite broad, the consensus is that it could not allow what the Constitution expressly proscribes.

*Zschernig* majority.<sup>130</sup> An examination of the recent New Hampshire recognition statute lends support to this view. Apparently, the statute was enacted in angry response to poor treatment accorded by Quebec to New Hampshire judgments. The statute reads:

In suits on judgments rendered in the courts of the Dominion of Canada or any province thereof, said judgments shall be given such faith and credit as is given in the courts of the Dominion of Canada or any province thereof to the judgments rendered in the Courts of New Hampshire.<sup>131</sup>

It is hard to characterize this piece of legislation as something other than an instance in which an individual state has formulated its own foreign policy. Statutes or cases requiring reciprocity, without singling out any particular foreign state, are less obvious though probably no less invidious state formulations of foreign policy. The Restatement of Foreign Relations Law defines the foreign relations law of the United States as

- (a) international law . . . ;
- (b) that part of the domestic law of the United States by which it gives effect to rules of international law;
- (c) any other part of the domestic law of the United States [including state law] that involves matters of significant concern to its foreign relations.<sup>132</sup>

Although recognition of foreign judgments, strictly speaking, does not present questions of international law, a

<sup>130</sup> The opinions which assert that state law can govern recognition questions have often used as authority for this proposition Supreme Court cases whose continued vitality is doubtful after *Sabbatino* and *Zschernig*, particularly *Clark v. Allen*, 331 U.S. 503 (1947), which condoned state alien inheritance laws. See Schaaf, *supra* note 111, at 383.

<sup>131</sup> N.H. REV. STAT. ANN. § 524:11 (Supp. 1967). Massachusetts enacted the uniform act, but added a general reciprocity requirement. MASS. GEN. LAWS ANN. ch. 235, § 23A (Supp. 1968).

<sup>132</sup> RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 2(1) (1965 rev. ed.). See Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939), where the learned author states:

Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power. . . . It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.

cogent argument can be made that such matters are of significant concern to foreign relations. Approaching the problem from the point of view of valid state interests to be protected, it would appear that the individual American state has a more significant interest in determining the distribution of its domiciliaries' estates than it has in deciding questions of judgment recognition. If the Supreme Court may interfere with the state's inheritance laws, why should states be permitted greater freedom in formulating judgment recognition policies?

However, though the question should be posed, it seems doubtful that the Supreme Court would hold *unconstitutional* state formulations of recognition policy, at least under the present condition of state law on the subject. Judgment recognition does not involve issues which are as sensitive diplomatically as the issues involved in *Sabbatino* or even *Zschernig*. This is reflected by the following language in the *Sabbatino* opinion:

Whether a foreign sovereign will be permitted to sue involves a problem more sensitive politically than whether the judgments of its courts may be re-examined, and the possibility of embarrassment to the Executive Branch in handling foreign relations is substantially more acute. Re-examination of judgments, in principle, reduces rather than enhances the possibility of injustice being done in a particular case. . . .<sup>133</sup>

In addition, the two major reasons why a state might deny recognition do not seem likely to warrant Supreme Court disapprobation. The first such possibility would be an examination of the procedural fairness in F1. However, primarily since almost all recognition claims made in American courts come from civilized and "friendly" nations, a *general* examination of the fairness of F1 procedure is rare. This is to be contrasted with the relatively large number of instances in which aliens from "iron-curtain" nations claim inheritances in the United States. While an examination of F1's procedural fairness (including basis of jurisdiction) in a *particular* case is

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<sup>133</sup> 376 U.S. at 412.

likely to occur fairly often, this is a requirement of federal constitutional law.

The other major instance in which state courts may deny recognition is when Fl flunks its reciprocity test. Theoretically, a state which refuses to follow a reciprocity criterion is making an independent formulation of foreign policy. However, the resulting recognition of foreign judgments is unlikely to be considered an interference with foreign relations. This is due, in part, to the general disapproval of the reciprocity requirement by American commentators. On the other hand, a denial of recognition by a state for lack of reciprocity, although more likely to stir up diplomatic tremors, would probably not be disturbed, since the state was only following the lead of the Supreme Court itself.

However, despite this writer's opinion that state control over recognition policy is not unconstitutional, it is believed that federal control is more likely to attain the inclusive and exclusive interests being sought. This follows from the probably tautologous conclusion that federal control will alleviate the problems discussed above which are created by state control.

Since the conclusion is easily reached that a reasoned uniform recognition policy will be more successful than fifty (or fifty-one) reasoned recognition policies, the sole remaining rationale against federal control must find its roots in tenth amendment doctrine. However, it is very doubtful that the states would resent the deprivation of control over foreign judgments, especially if the projected federal rule abrogates the reciprocity requirement. The great majority of actions on money judgments, *viz.*, on sister-state judgments, are under federal control via the full faith and credit clause. It would not be particularly earth-shaking to subject the remainder to like authority:

#### THE MEANS OF FEDERAL CONTROL

Absent congressional and executive action in the area, the Supreme Court would be required to formulate recognition policies. This eventually is undesirable in several



respects. First, assumption by the Supreme Court of recognition-policy control must rest upon a finding that state determinations are unconstitutional. Such a finding would be of dubious propriety. Of greater disturbance is the fact that the judicial branch is the least qualified institution to assess the relevant goals and formulate optimum policies. The Supreme Court would be ill-equipped to ascertain which foreign legal systems are of sufficient integrity to warrant a presumption of conclusiveness and which are not. Obviously, a branch of government with general investigatory power and ability would be more capable. Similarly, the Supreme Court is out of its element when it decides or attempts to avoid deciding issues affecting foreign relations. This becomes apparent when one notes the reception accorded to the Court's solutions in two such instances, *Hilton* and *Sabbatino*. Questions concerning the particular practicality of retorsion or involving examination of the likelihood of international conflict are beyond the competence of the Supreme Court.

Consequently, the conclusion that is reached is that some mode of joint action by the executive and legislative branches would be preferable. Admittedly, there is no express constitutional authority for such action. However, the federal government has been conceded extensive powers to act where foreign affairs are concerned. As expounded by Mr. Justice Frankfurter:

Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation. The States that joined together to form a single Nation and to create, through the Constitution, a Federal Government to conduct the affairs of that Nation must be held to have granted that Government the powers indispensable to its functioning effectively in the company of sovereign nations. The Government must be able not only to deal affirmatively with foreign nations, as it does through the maintenance of diplomatic relations with them and the protection of American citizens sojourning within their territories. It must also be able to reduce to a minimum the frictions that

are unavoidable in a world of sovereigns sensitive in matters touching their dignity and interests.<sup>134</sup>

"In view of the present unsatisfactory state of the law, with its potentialities for injustice to Americans seeking recognition for American judgments abroad, a congressional finding of need for national legislation would probably not be overturned by the courts."<sup>135</sup> And once it is concluded that Congress has power to legislate in the area, it follows a fortiori that a treaty, as well as a congressional-executive agreement, would be within the Government's constitutional authority.<sup>136</sup>

A federal statute would probably alleviate several of the problems presently in existence. First, such legislation would enable foreign courts, applying reciprocity standards to American judgments, to determine where we stand on foreign judgment recognition. Many nations are apt to pay more attention to a federal statutory overruling of *Hilton v. Guyot* (assuming that decision is presently a ground for refusing recognition to American judgments) than would be paid to the case-law encroachments upon the doctrine. In fact, a congressional-executive act, whether statute or treaty, may well be the only available means of abrogating the *Hilton* doctrine; the Supreme Court will never get an opportunity to reconsider the reciprocity doctrine unless it concludes either that foreign judgment recognition is constitutionally a federal question (unlikely) or that federal courts in diversity cases must follow federal law on this matter (equally unlikely). In addition, a federal statute, prescribing a uniform rule for the entire nation, would serve to ensure that the treat-

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<sup>134</sup> *Perez v. Brownell*, 356 U.S. 44, 57 (1957).

<sup>135</sup> Schaaf, *supra* note 111, at 388. Mr. Schaaf examines the various possible sources of constitutional authority for federal legislation. *Id.* at 385-91.

<sup>136</sup> *Missouri v. Holland*, 252 U.S. 416 (1920). The term "congressional-executive agreement" is used to describe an executive agreement between the President and a foreign government which is supported by congressional legislation. It would appear that this method may be used interchangeably with the treaty method, which requires consent of two-thirds of the Senate. For purposes of this paper, "congressional-executive agreements" may be substituted whenever the use of the treaty power is discussed.

ment of an American judgment abroad will not depend upon the particular state which rendered it. Conversely, foreign judgments will be similarly treated in every American court. There would thus be a beneficial effect on security in international transactions, as well as a desirable decrease in forum shopping.

An additional advantage of this approach is that a congressional-executive combination (the usual means of enacting a statute) is most qualified to determine the standards for recognition. An evaluation of the judicial systems of various countries could be most effectively made. In addition, these branches can best decide the propriety of a reciprocity rule.

However, it would appear that the treaty method would be the most beneficial means of ordering judgment recognition. This approach seems likely to reap all the benefits that a federal statute would attain, as well as several other dividends. First, proceeding by treaty appears to be a more tactful manner of selecting the nations whose judgments are deemed fair and reliable. A statutory prescription on recognition which listed the nations whose judgments should be recognized would be likely to offend those nations omitted from such list, the obvious implication being either that the judicial system of an omitted nation is untrustworthy or that it is unworthy for some other reason, *e.g.*, that it does not give due deference to the judgments of others. Germany has such a list, supplementing several treaties, from which the United States is excluded, and a scanning of American commentators reveals the ill-feeling that this has aroused.<sup>137</sup> If, instead, Germany denied recognition to American judgments for lack of a treaty on the subject between Germany and the United States, protest would be lessened. In addition to serving the inclusive interest of minimizing international discord, the treaty approach seems clearly best calculated to advance the exclusive interest of the United States in securing recognition abroad for its own judg-

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<sup>137</sup> See, *e.g.*, Nadelmann, *supra* note 101, at 253-57.

ments. The majority of nations with which Americans have substantial contact, and consequently in which recognition of American adjudications is likely to be sought, have sufficiently advanced and reliable judicial systems as to justify a mutual-recognition treaty. Upon conclusion of a treaty, the contracting nations are bound by international law to recognize judgments rendered in accordance with its terms.

Obviously, a multilateral convention would be best calculated to achieve stability and uniformity in international judgment recognition. The Hague Conference unsuccessfully sought such a treaty in 1925, and a second attempt is presently in progress.<sup>138</sup> The European Economic Community is also working on a multilateral convention, in conformance with the design of Article 220 of the Treaty of Rome which established the Community.<sup>139</sup> However, principally due to the disparity in concepts of jurisdiction to apply, multilateral conventions have been difficult to attain.<sup>140</sup> The need has been partially met through a number of bilateral treaties. Several recent treaties among the members of the European Economic Community have led to recognition never before possible, through a substantial alteration of the various domestic laws.<sup>141</sup> Of more significance to the American dilemma are the several treaties entered into by England with civil-law neighbors. Prior to the treaties England completed in 1934 with France and Belgium, the general opinion was that the differences in concepts of jurisdiction between common and civil-law nations made agreement on

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<sup>138</sup> See Schaaf, *supra* note 111, at 379-80; Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 AM. J. COMP. L. 72, 80 (1964).

<sup>139</sup> See Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 COLUM. L. REV. 995, 996 (1967); Nadelmann, *supra* note 138, at 80.

<sup>140</sup> The Bustamante Code was a noteworthy attempt at a multilateral convention by South American civil-law countries. 86 LEAGUE OF NATIONS TREATY SERIES 111 (1928). See Castel, *Jurisdiction and Money Judgments Rendered Abroad; Anglo-American and French Practice Compared*, 4 MCGILL L. REV. 152, 195 (1958).

<sup>141</sup> See Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe*, 12 INT'L & COMP. L.Q. 367, 379-80 (1963); Comment, *supra* note 99, at 87-97.

judgment recognition impossible.<sup>142</sup> Those and subsequent British treaties were admittedly made possible by limiting the coverage to judgments rendered on jurisdictional bases acceptable to both.<sup>143</sup> However, their apparent success should encourage a change in attitude by the United States, which has been reluctant to conclude any such agreements.

The treaty solution, like most panaceas, is not so easily achieved. Many of the benefits which would flow, as suggested above, from the conclusion of treaties, particularly that of security of international transactions, can not be secured unless the entire world community enters into judgment recognition conventions with similar provisions (or a sufficient number do so as to create new customary international law). Several difficulties militate against this possibility. First, the persistence of unreasonable claims to judicial and, to a lesser extent, legislative jurisdiction provides a number of judgments which many nations would deem fundamentally unfair to enforce. A related and more difficult problem is the absence of generally accepted international rules on jurisdiction to apply and prescribe. Remedial action is hampered by the lack of concern for the problem in some nations, which consequently reduces the likelihood of effecting a change in their internal procedures.<sup>144</sup>

However, the unlikelihood of achieving an optimum public order in the recognition of judgments sphere should not discourage attempts to achieve improvements upon the present situation. Even if the above-mentioned difficulties are impossible to completely obviate, treaties should

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<sup>142</sup> See Nadelmann, *supra* note 101, at 260.

<sup>143</sup> England has a statute dealing with recognition of foreign judgments which has facilitated the creation of treaties. Foreign Judgments (Reciprocal Enforcement) Act, 23 Geo. 5, c. 13 (1933). However, the act limits the substance of treaties created under its authority. As regards jurisdiction to apply, common-law rules based on effective power and submission are barely extended. See A. DICEY & J. MORRIS, *CONFLICT OF LAWS*, 967 (8th ed. 1967); Graupner, *supra* note 141, at 330-81.

<sup>144</sup> A nation might reason, not without logic, that, for example, the occasions in which one of its nationals will be seeking to enforce one of its judgments in an American court will be rare, and, consequently, not worth the effort of altering its internal law as to recognizing American judgments or as to rendition of its own judgments.

be sought which will establish recognized minimum standards of jurisdiction to prescribe and apply, so that at least some judgments will be assured favorable treatment abroad. This has been the British approach. In addition, "the mere process of seeking agreement is valuable. It often sharpens the real area of dispute, making partial agreement possible elsewhere, and perhaps encouraging a compromise of the dispute itself."<sup>145</sup>

#### TYPE OF TREATY SUGGESTED

A proposed convention should seek to ascertain which of the various claims to jurisdiction are acceptable to the world community. In many situations, diverse concepts of jurisdiction will yield the same result for different reasons. Take, for example, Jean Claude Killy. While a common-law jurist would rebel against an assertion of unlimited personal jurisdiction based on the location of an asset within the state, he might readily in opposite circumstances claim judicial jurisdiction based upon the commission of a tortious act within the state. A system should be devised that will ensure recognition to judgments in which the exercise of judicial or legislative jurisdiction was reasonable, despite the disparity between the rationales for the assumption of such jurisdiction. It is submitted that certain common denominators are available to make feasible an international accord on jurisdiction.

One such common denominator would seem to be the concept of *forum non conveniens*. Most American courts will dismiss an action with which the state had little connection, other than the mere presence of defendant within the state at the time of service of summons. This is despite the technical presence of "judicial jurisdiction" by common-law though not civil-law criteria. If, on the other hand, not only was defendant served within the state but the contract underlying the dispute was to be

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<sup>145</sup> Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*, 32 *TEMP. L.Q.* 295, 319 (1959).

performed within the state, an American court would assert and exercise jurisdiction to apply, and this secondary claim to jurisdiction would not be "alien to the civil law." In short, a treaty ordaining initial and secondary claims to judicial jurisdiction should include a general provision of the following type:

A state has jurisdiction to apply law in any case in which it is not unreasonable to require the defendant to litigate the particular dispute in that forum.

This is similar to the view taken by the Restatement of Conflicts,<sup>146</sup> and is ordinarily the result in common-law jurisdictions anyway, despite the "power" concept, through use of *forum non conveniens*.<sup>147</sup> Both common and civil law recognize the utility of litigating where the facts in issue occurred. Consequently, there should be specific provisions describing the instances in which the exercise of jurisdiction would not be unreasonable, *e.g.*, the place in which the tort was committed or the contract performed. The treaty would provide that the contacts deemed to support judicial jurisdiction should relate to that aspect of the intercourse between the litigants which is in issue. For example, the jurisdiction in which the contract was negotiated should not be an operative consideration when the question of the formation of a contract is not disputed, the controversy involving questions of proper performances.

Another factor which is apparently a common denominator, *i.e.*, one which practically every nation would agree is not an unreasonable basis for a claim of jurisdiction to apply, is that of consent. Naturally, guidelines for determining what constitutes consent would be set forth. The basic instances which this test would cover include contractual agreement on jurisdiction, voluntary appearance, and counterclaim against a plaintiff.

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<sup>146</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS §24 (Proposed Official Draft, 1967).

<sup>147</sup> The general American rule that a case will not be dismissed for *forum non conveniens* if the plaintiff is a domiciliary of the state would have to be restricted when the treaty is applicable.

Another potential common denominator could be domicile or nationality. Since domicile has peculiar connotations in the common law, and nationality is of much greater import to the civil law, perhaps a compromise term acceptable to both systems could be formulated. One such possibility is the concept of "habitual residence," developed in a recent convention on adoption.<sup>148</sup> In fact, claims that nationality of defendant per se is a sufficient basis of jurisdiction to apply are unlikely to arouse discord, since traditionally nations have been accorded wide powers over their nationals.<sup>149</sup>

The proposed treaty should also contain choice of law guidelines. In this area, the fundamental concepts of jurisdiction, *i.e.*, legislative, are not as diverse as in the jurisdiction to apply area. There are two alternative choice of law mandates which may properly be made part of the convention. The first is the grouping of contacts doctrine, which has ascended in American law in recent years. This mandate would direct a *particular* law to be applied. The second possibility would be to require merely legislative jurisdiction, *i.e.*, that the law chosen by F1 should be a reasonable law to apply under the circumstances of the particular case. The famous New York case of *Babcock v. Jackson*,<sup>150</sup> may be slightly altered to furnish a hypothetical which hopefully will explain the difference. Plaintiff accompanied defendant and his wife on a weekend trip to Canada. All the parties were New Yorkers, and the trip began and was to end in New York. While defendant was driving his car in Ontario, he lost control and crashed into a stone wall. Under the Ontario guest statute, plaintiff would be precluded from recovering. However, the Court of Appeals held that New York law should apply, *vis.*, no guest statute, since the interest of New York in this issue was much greater than that of

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<sup>148</sup> See Lipstein, *The Tenth Session of the Hague Conference on Private International Law, 1964, 1965* CAMBRIDGE L.J. 224.

<sup>149</sup> Such claims have even been asserted by the United States, where nationality is less emphasized than in Europe. *Blackmer v. United States*, 284 U.S. 421 (1932).

<sup>150</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d (1963).



Ontario. Assume, however, that the action had been commenced in an Ontario court. If such court were to follow the grouping of contacts principle, it would probably apply New York law, since the decision of New York to refuse immunity to its domiciliaries is of concern mainly to New York. However, it would not be unreasonable, under the territoriality principle of jurisdiction to prescribe, for Ontario to have applied its own law. In the former case, the result would be the same as actually occurred in the New York litigation; in the latter case, defendant would have escaped liability completely.

Security in international transactions, through the utilization of a uniform rule of law, might be equally achieved by a ubiquitous use of a third approach—strict, inflexible choice of law rules, *e.g.*, place of tort, place where contract completed (to govern issues concerning formation), place where contract to be performed (to decide questions of performance). While this approach fits within the “reasonable” category,, *i.e.*, territoriality being a reasonable basis of jurisdiction, it is more calculated to assure identity of result despite the forum chosen than a general admonition to apply a reasonable prescription. In the latter case, a forum could and often would apply its own law if it has substantial, though not the greatest, contacts. This is likely to lead to different rules of law applied by different forums, although it would not be fundamentally unfair to the parties. While the use of inflexible rules would achieve uniformity, a general adoption of the grouping of contacts doctrine would effectuate other inclusive and exclusive interests, with only minor hindrance to uniformity. The nation most concerned with the issue should be the nation to prescribe governing rules of law, to be applied without reference to the actual forum.

Since the grouping of contacts approach requires more of a surrender of a forum state’s autonomy, it might be more difficult to achieve general acquiescence to such a rule. However, the benefits likely to accrue justify efforts to incorporate it into a convention.

Another, less troublesome, provision of the proposed treaty would state that F1 will agree to reconsider its judgment if F2 refers the case back. This might arise, for example, where there are serious questions of perjury in the F1 hearing.

It should also be recognized that a state need not alter its domestic principles of jurisdiction when there is no potential impact beyond its own borders. Hopefully, this provision would decrease the reluctance of some nations to enter into a treaty.

Possibly of equal importance to the substantive provisions of the proposed treaty are the procedural terms. Clearly, a multilateral treaty would best achieve stability and uniformity in international transactions. However, it would be difficult for the United States to exclude nations whose judicial systems are suspect. The suggested solution is for bilateralization of a multilateral convention. In other words, the multilateral accord as to standards of recognizing initial and secondary claims of jurisdiction will not become effective, *as between two nations*, until they have concluded an agreement to that effect.

An additional procedural device, suggested by several recent commentators, is a federal-state clause for any treaty, multilateral or bilateral, entered into by the United States. Under this suggestion, the treaty would allow each American state the choice of assuming its benefits and burdens.<sup>151</sup> Such a provision would result in increased recognition of the judgments of states consenting to the treaty, while obviating any contentions of federal interference with state courts. However, it is the opinion of this writer that the two-way loss of uniformity which would result outweighs the dubious benefit.

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<sup>151</sup> Schaaf, *supra* note 111, at 385; Nadelmann, *supra* note 101, at 259.

## CONCLUSION

Obviously, a treaty such as suggested above would be an effective step toward achieving the goals relevant to judgment recognition. However, it must be realized that, absent an international decision-maker with effective vertical control of initial and secondary claims to jurisdiction, voluntary self-restraint by individual states is necessary to enable the world community to create and implement agreements on judgment recognition. In addition, such restraint will facilitate and encourage the movement of goods, services, and people across national boundaries.

The essence of horizontal order is the rational self-delimitation of competence by each State. The process of self-delimitation should seek to take maximum account of the existence of other States and give effect to a mutually satisfactory standard of reciprocity.<sup>152</sup>

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<sup>152</sup> Falk, *supra* note 145, at 320.