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THE HAGUE CONVENTION ON CHOICE OF COURT
AGREEMENTS: CREATING AN
INTERNATIONAL FRAMEWORK FOR RECOGNIZING
FOREIGN JUDGMENTS

*Matthew B. Berlin**

I. INTRODUCTION

Until recently, with a few specialized exceptions, the United States was not a party to any treaties or agreements governing the recognition and enforcement of foreign judgments.¹ Generally, the lack of an international agreement has not caused problems for foreign parties seeking to enforce a judgment in the United States because U.S. courts employ a liberal approach to recognizing and enforcing foreign judgments.² Other countries, however, do not extend the same treatment to U.S. judgments.³

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¹ Russell J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 *BROOK. J. INT'L L.* 167, 167–168 (1998); see also William W. Park, *The Relative Reliability of Arbitration Agreements and Court Selection Clauses*, in 14 *INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION* 3, 8–9 (J.L. Goldsmith, ed., 1997) (“[T]he United States is not a party to a single treaty providing for enforcement of judgments”); R. Doak Bishop & Susan Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 *INT'L L.* 425, 427 (1982) (observing that the Convention Between the United Kingdom and the United States for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, 16 *I.L.M.* 71 (1977), would have been the United States’ first treaty concerning the recognition and enforcement of foreign judgments, if it had been agreed upon).

² See Robert B. von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 *VA. J. INT'L L.* 401, 401, 408–09 (1976–77) (arguing that the “constitutional necessity of giving effect to ‘foreign’ state judgments” probably led to a more generous approach in recognizing foreign state judgments as compared to the civil law systems of Europe).

³ See *ALI/UNIDROIT Principles and Rules of Transnational Procedure*, in *THE FUTURE OF TRANSNATIONAL LITIGATION: ENGLISH RESPONSES TO THE ALI/UNIDROIT DRAFT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE* 177, 204 (Mads

However, after more than ten years of negotiating a treaty governing the recognition and enforcement of foreign judgments, the United States can finally celebrate. On June 30, 2005, the United States, along with the other sixty-four member states⁴ of the Hague Conference on Private International Law (Hague Conference), concluded the Hague Convention on Choice of Court Agreements (Hague Convention).⁵ Unfortunately, problems plagued negotiations from the beginning, making consensus on a larger convention seem impossible.⁶ But, instead of abandoning the project when disagreement threatened to end negotiations, the member states limited the Hague Convention's scope to international cases between businesses that had agreed to a choice of forum⁷—an area already widely accepted internationally.⁸ In anticipation of U.S. acknowledgement of the Hague Convention (whether ratified or not), the American Law

Andenas, Neil Andrews, Renato Nazzini eds., 2004) [hereinafter UNIDROIT PRINCIPLES] (emphasizing other countries' disapproval of the U.S. concept of long-arm and tag jurisdiction).

⁴ See Hague Conference on Private International Law, Member States, http://www.hcch.net/index_en.php?act=states.listing (last visited Nov. 21, 2006) (providing a list of current member states, the date of their membership, and the agreements each has adopted).

⁵ Convention on Choice of Court Agreements, *concluded* June 30, 2005, 44 I.L.M. 1294 [hereinafter Hague Convention].

⁶ See, e.g., *infra* notes 64–65 and accompanying text (describing the difficulties faced by the Preliminary Draft Convention because of its expansive scope). Compare Hague Convention, *supra* note 5, art. 1(1) (applying the Hague Convention in international cases to exclusive choice of court agreements concluded in civil or commercial matters), with Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *adopted* by the Special Commission on Oct. 30, 1999, art.1(1) [hereinafter Preliminary Draft Convention] (stating that the Preliminary Draft Convention applies to civil and commercial matters generally).

⁷ See Hague Convention, *supra* note 5, art. 1(1)–(3), art. 2(1)(a) (setting forth which civil and commercial matters are included as well as those explicitly exempted from coverage under the Hague Convention).

⁸ See, e.g., *Bremen v. Zapata*, 407 U.S. 1, 16–20 (1972) (holding that a forum-selection clause negotiated at arm's length by experienced businessmen providing for the treatment of any disputes should be enforced by the courts in absence of some compelling and countervailing reason making enforcement unreasonable); Frank Vischer, *Forum Selection and Arbitration Clauses Under the Brussels and Lugano Conventions and Under Swiss Law*, in 14 INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 73, 85 (J.L. Goldsmith ed., 1997) (expressing the European courts' favorable treatment of forum-selection clauses and the lack of any provision in either the Brussels or Lugano Conventions permitting the courts to disregard such agreements).

Institute (ALI) has drafted a proposed federal statute⁹ to implement the Convention's policies.¹⁰

This comment focuses on the Hague Convention's effect, not only on member states, but also on the United States' domestic approach to the recognition and enforcement of foreign judgments. Currently, U.S. jurisprudence on the subject is piecemeal at best, with each state adopting different standards.¹¹ This comment argues that the United States should ratify the Hague Convention because it promotes U.S. interests abroad by allowing U.S. businesses to seek enforcement of judgments in foreign countries. Ratification will also create a single national standard for the treatment of foreign judgments that is similar to those standards currently used by state governments¹² and consistent with the legal policy already in place.¹³ Furthermore, this comment argues that Congress should implement the Hague Convention through compatible legislation that mirrors the agreement rather than adding provisions that disagree with the majority of U.S. jurisprudence and render U.S. law incompatible with the Hague Convention, as the ALI proposes.

Part II will discuss the background of U.S. law on forum-selection clauses and the current state of U.S. jurisprudence on the recognition and enforcement of foreign judgments in the United States. Part II will also introduce the Hague Convention, past and present, to get a better sense of the Convention's scope, followed by an examination of the ALI's proposed federal statute.

Part III will begin by analyzing the key provisions of the Hague Convention and the certainty they provide to the international business

⁹ See generally American Law Institute, Publications Catalog, <https://www.ali.org/ali/712.htm> (last visited Nov. 2, 2006) (stating that the American Legal Institute has begun the task of drafting a separate federal statute in the case that the U. S. Senate does not ratify the Hague Convention).

¹⁰ See discussion *infra* Part II.C.

¹¹ LOUISE ELLEN TEITZ, TRANSNATIONAL LITIGATION: A GUIDE TO LITIGATING HERE AND ABROAD 257–58 (1996).

¹² See discussion *infra* Part II. See generally *United States v. Belmont*, 301 U.S. 324, 328–332 (1937) (delineating the distribution of power within the United States between the federal and state government, and affirming the exclusive control of the federal government over external affairs).

¹³ See generally U.S. CONST. art. VI, cl. 2 (“all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby....”).

arena. Part III will then compare the United States' approach to forum-selection clauses with the Hague Convention's obligatory treatment of choice of court agreements. Part III will also show that the Hague Convention does little more than codify U.S. law, especially because the choice of court agreement settles personal jurisdiction questions. Part III will then conclude with an analysis of the ALI's proposed federal statute, arguing that the inclusion of reciprocity as a requirement for recognition is contrary to U.S. recognition jurisprudence and harmful to international trade.

Part IV will recommend that the U.S. Senate ratify the Hague Convention, but will suggest that the U.S. Congress should refrain from adopting the ALI proposed federal statute as a model for implementing legislation. It also will argue that the United States should pursue bilateral negotiations with other nations after ratification to increase the acceptance of U.S. judgments abroad.

II. HISTORY AND DEVELOPMENT OF FORUM-SELECTION CLAUSES IN THE UNITED STATES

A. U.S. Approach to Forum-Selection Clauses

Until the U.S. Supreme Court's decision in *Bremen v. Zapata*,¹⁴ U.S. courts typically refused to recognize forum-selection clauses as dispositive.¹⁵ In *Bremen*, the Court decided that forum-selection clauses would be dispositive, absent a showing of unreasonableness. The Court apparently reasoned that parties to an international business contract¹⁶ want to avoid uncertainty by including such clauses after

¹⁴ *Bremen v. Zapata*, 407 U.S. 1 (1972).

¹⁵ See *Nute v. Hamilton Mut. Ins. Co.*, 72 Mass. 174, 183–85 (1856) (nullifying the effect of a forum-selection clause in an insurance contract because disturbing the symmetry of law by upsetting the rules regarding jurisdiction was against public policy); Harold G. Maier, *The U.S. Supreme Court and the "User-Friendly" Forum-selection clause: The Effect of Carnival Cruise Lines on International Contracts*, in 14 INTERNATIONAL DISPUTE RESOLUTION: THE REGULATION OF FORUM SELECTION 53, 56–57 (J.L. Goldsmith, ed. 1997) (relying on *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963), and *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), to argue that the judiciary, as an "arm of the sovereign," could not permit private persons to determine where suits could or could not be brought).

¹⁶ See Park, *supra* note 1, at 4–8 (discussing the international business person's fear of biased foreign courts, strange legal practices, and unenforceable judgments to

negotiating a contract at arm's length,¹⁷ and insert forum-selection clauses to avoid uncertainty in the litigation forum. After the Court's decision in *Bremen*, the Court let the circuits define "reasonableness," but the circuits disagreed about whether to apply federal or state substantive law to choice of court agreements.¹⁸ Federal courts enforce forum-selection agreements,¹⁹ but the extent to which federal courts would enforce such agreements was unclear until *Carnival Cruise Lines v. Shute*.²⁰

In *Carnival Cruise Lines*, the Supreme Court upheld a forum-selection clause between the consumer-petitioner and Carnival Cruise Lines because a form passage contract stipulating the resolution of all disputes in Florida was reasonable even though it required a petitioner from Washington to bring a claim in Florida. The Court reasoned that passengers who purchase tickets that include a forum-selection clause should be bound to such contracts because they benefit from lower prices as a result of the cruise line's ability to lower operating costs by stipulating a forum for litigation in the passage contract.²¹ The Court noted, however, that courts would only enforce reasonable forum-selection clauses.²²

Courts have looked at several factors when determining if a forum-selection clause is reasonable. These factors include the following: (1) the identity of the law which governs the contract; (2) the place of execution of the contract; (3) the place of performance; (4) the availability of remedies in the enumerated forum; (5) the public policy of the chosen forum state; (6) the location of the parties, witnesses, and evidence; (7) the relative bargaining power of the parties when the forum was chosen; (8) the use of fraud, undue

highlight the reason that the majority of business managers will either elect to settle disputes through arbitration or agree to submit to a particular jurisdiction).

¹⁷ *Bremen*, 407 U.S. at 12–14.

¹⁸ *Park*, *supra* note 1, at 10.

¹⁹ *See, e.g., Stewart Org., Inc., v. Ricoh Corp.*, 487 U.S. 22, 31–32 (1988) (affirming the enforcement of a forum-selection clause). *But see Park*, *supra* note 1, at 9 (stating that, from a state perspective, only New York treats forum-selection clauses as dispositive). *See generally* N.Y. GEN. OBLIG. § 5-1402 (2006) (elaborating New York law on the enforcement of forum-selection clauses).

²⁰ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

²¹ *Id.* at 594.

²² *Id.* at 595.

influence, or other extenuating circumstances; and (9) the conduct of the parties.²³

Typically, if a U.S. federal court finds that a forum-selection clause is reasonable, the court will honor it by granting a defendant's motion to dismiss the action or stay proceedings until the court in the forum of choice renders a judgment.²⁴

B. U.S. Approach to Recognizing Foreign Judgments

Although U.S. federal courts have enforced international forum-selection clauses since the Supreme Court's decision in *Bremen*, they have not developed a unified approach when it comes to the recognition and enforcement of foreign judgments.²⁵ Until it signed the Hague Convention, the United States, with a few special exceptions,²⁶ was not party to any treaty governing the recognition and enforcement of foreign judgments.²⁷ Furthermore, Congress has never passed a law dictating when federal courts should recognize foreign judgments.

²³ *E.g.*, *D'Antuono v. CCH Computax Sys., Inc.*, 570 F.Supp. 708, 715–16 (D.R.I. 1983).

²⁴ *See, e.g., id.* (upholding a forum-selection clause between two businesses after the defendant, who had successfully removed the case from state superior court, moved to transfer venue from the U.S. District Court of Rhode Island to the District Court for the Southern District of California because the defendant failed to prove that the forum was unreasonable). *But see Dart v. Balaam*, 953 S.W.2d 478, 481–482 (Tex. App. 1997) (recognizing that provisions of a forum-selection clause, like any other contractual right, can be waived).

²⁵ *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1987) (asserting that the prevalent statutory and common law on the matter of recognition and enforcement generally separates the process into two steps: recognition followed by enforcement); *see also* Willis L. M. Reese, *Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 788 (1950) (discussing the value of a national standard as opposed to current inconsistent state standards).

²⁶ The United States joined the international community in regulating the enforcement of arbitral awards when it acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") in 1970. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (mandating that members States must recognize and enforce a decision between parties to arbitrate disputes, as well as treat arbitral awards as binding, and enforce them in accordance with the applicable rules of procedure).

²⁷ *See supra* note 1 and accompanying text.

Congress' inaction has left the decision of whether to recognize and enforce foreign judgments to the federal courts.

1. Recognition under federal common law

In 1895, the U.S. Supreme Court established the basis of federal common law policy for the recognition and enforcement of foreign judgments when it ruled against French foreign judgment creditors in *Hilton v. Guyot*.²⁸ The Court relied on comity and reciprocity as the major factors in determining whether it should give force to the foreign judgment.²⁹ The Court noted that comity is neither an obligation imposed upon States nor is it a display of courtesy between them, but it is the recognition that one nation gives to the acts of another government as consideration to the nation's international duty and the rights of its citizens.³⁰

The Court continued by enumerating a more specific list of factors that a foreign judgment should meet before becoming enforceable. First, the judgment must be the result of a fair trial in a court of competent jurisdiction within a judicial system that will not discriminate against citizens of other countries.³¹ A judgment obtained through fraud will not satisfy these conditions.³² Second, the defendant must either receive due notification of the suit or appear voluntarily.³³

While finding that the French judgment met these requirements, the Court declined to recognize the judgment due to a lack of

²⁸ *Hilton v. Guyot*, 159 U.S. 113 (1895).

²⁹ *See id.* at 143–44, 168; *see also* AM. BAR ASS'N SECTION OF INT'L LAW AND PRACTICE, ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 3 (Ronald A. Brand ed., 1992) [hereinafter AM. BAR ASS'N SECTION OF INT'L LAW AND PRACTICE] (granting that most courts begin with a comity analysis as enunciated by *Hilton* even though state law is supposed to be controlling); *see also* Reese, *supra* note 25, at 790 (examining *Hilton* in order to detail the history of the reciprocity requirement in the recognition and enforcement of foreign judgments because it remains the “most detailed exposition” of the controlling principles).

³⁰ *Hilton*, 159 U.S. at 163–64 (defining comity, the Supreme Court asserted that recognition and enforcement was a matter of public international law).

³¹ *See id.* at 123.

³² *See id.*

³³ *See id.* at 201 (contemplating the international use of comity and the requirements set forth by other countries to announce the set of factors U.S. comity analyses would consider).

reciprocity,³⁴ meaning that France would not have enforced a U.S. judgment under the same circumstances. The federal common law approach has not changed a great deal since *Hilton*, but a majority of the circuits and states no longer apply the reciprocity requirement in the recognition process.³⁵

Hilton dealt with the recognition and enforcement of foreign judgments as a matter of public international law, but this is not surprising considering the decision's lengthy discussion of comity. *Johnston v. Compagnie Generale Transatlantique* changed all of this in 1926.³⁶ The New York Court of Appeals held that the recognition and enforcement of foreign judgments was a matter of state law. The effect of *Johnston* increased with the decision in *Erie R.R. v. Tompkins*, which nullified *Hilton's* effect by eliminating the federal common law.³⁷ These cases, therefore, have eliminated the national standard for recognition and enforcement of foreign judgments and left

³⁴ See *id.* at 227–29.

³⁵ See, e.g., *Mata v. Am. Life Ins. Co.*, 771 F. Supp. 1375, 1382 (D. Del. 1991) (interpreting the Delaware Supreme Court's criticism of the reciprocity rule in *Bata v. Bata*, 163 A.2d 493 (Del. 1960), to mean that Delaware no longer required reciprocity as a prerequisite to recognition of a foreign judgment). While Delaware recognition law mirrored *Hilton*, *Mata*, 771 F. Supp. at 1382, Delaware adopted the Uniform Foreign Money-Judgment Recognition Act in 1997, 10 DEL. CODE ANN. tit. 10, §§ 4801–08 (2005). Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 33 (1988) (noting that the reciprocity requirement established in *Hilton* became obsolete as the recognition process became state-centered because an increasing number of states continued to adopt the Uniform Foreign Money-Judgments Act that omits that requirement).

³⁶ See *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926) (holding that that it was the settled law of New York that a foreign judgment is conclusive upon the merits). The court held that foreign judgments can only be impeached by proof that the court in which it was rendered did not have subject matter jurisdiction over the action, personal jurisdiction over the defendant, or that a decision was procured by means of fraud. *Id.*

³⁷ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); see also AM. BAR ASS'N SECTION OF INT'L LAW AND PRACTICE, *supra* note 29, at 7 (explaining the effects of *Erie* in that it created four different sources of law for federal district courts: (1) enactment of the Uniform Foreign Money-Judgments Act, (2) prior state court decisions, (3) prior federal court decisions saying what law the state would have applied, and (4) state statutes or case law requiring the court to reference sources outside the state); *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1003 (5th Cir. 1990) (construing *Erie* in a recognition and enforcement proceeding in Texas of an Abu Dhabi judgment to require the application of state law in the proceeding).

the states to decide how and when they would deal with foreign judgments.

2. *Effects of U.S. jurisprudence on recognition and enforcement of foreign judgments*

As a result of the Court's decisions in *Johnston* and *Erie*, foreign lawyers and their clients have trouble deciding where to seek recognition of a foreign judgment in the United States because the requirements vary from forum to forum. Some states still require reciprocity from the country of origin.³⁸ However, the situation is more difficult for parties seeking to enforce a U.S. judgment abroad.³⁹ When the enforcing court requires reciprocity from the original U.S. court, American judgment creditors⁴⁰ carry the burden of proving that reciprocity exists in the state or district court that decided the case.⁴¹

Luckily, most states have either followed the Restatement (Third) of Foreign Relations Law, which closely mirrors the federal common law standard adopted in *Hilton*, or have adopted some form of the

³⁸ See TEITZ, *supra* note 11, at 273 (1996) (articulating the usefulness of maintaining reciprocity as a defense in the seven states that still require it).

³⁹ See *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (characterizing the application of comity to foreign judgments as a relatively simple matter except in cases where the country's judgments are "the result of outrageous departures from our own notions of civilized jurisprudence"); see also *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 141–42 (2d Cir. 2000) (elaborating on the evidence produced by Citibank, which included U.S. State Department Country reports, used to prove that the Liberian judicial system was in a state of chaos and failed to meet due process standards at the time of their trial). Citibank's evidence persuaded the Second Circuit Court of Appeals to affirm the trial court's decision to reject the judgment creditor's motion for summary judgment and grant summary judgment sua sponte in favor of Citibank. *Id.* at 139–43.

⁴⁰ In this comment "judgment creditor" denotes a party that has successfully litigated a case and has been awarded a money-judgment. The party is a creditor in the sense that the judgment imposes an obligation on the opposing party to pay the judgment. Conversely, a judgment debtor is another name for the defendant in the original action against whom the court ruled.

⁴¹ See *Hilton v. Guyot*, 159 U.S. 113, 167–68 (1895) (addressing the recognition and enforcement of foreign judgments for the first time, the U.S. Supreme Court crafted a rule based on comity); see also TEITZ, *supra* note 11, at 253, 257 (restating that the common law approach to recognition and enforcement is based on the U.S. Supreme Court decision in *Hilton*).

Uniform Foreign Money-Judgments Act.⁴² In fact, a quick comparison of the three bodies of law shows that they are not that different.⁴³

3. *Uniform Foreign Money-Judgments Act and the Restatement (Third) of Foreign Relations Law*

The Restatement (Third) of Foreign Relations Law (Restatement),⁴⁴ which mirrors federal common law, and the Uniform Foreign Money-Judgments Act are very similar to each other, but with one major exception.⁴⁵ The Uniform Foreign Money-Judgments Act,⁴⁶ as suggested by its name, governs only the recognition and enforcement of foreign money judgments, while the Restatement covers the recognition and enforcement of any type of foreign judgment.⁴⁷ Although the Restatement embodies the approach of many states with slight variations, the Uniform Foreign Money-Judgments Recognition Act has been more successful in creating a single

⁴² See Andreas F. Lowenfeld & Linda J. Silberman, *United States of America*, in ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 123 (Charles Platto & William G. Horton eds., 2d ed. 1993) (admitting that while no federal law governs the recognition and enforcement of foreign judgments, the practice among the 50 states does not vary widely).

⁴³ See *id.* at 124 (insisting that the practice of recognizing foreign judgments does not differ a great deal among the 50 states, partly because of the reliance upon common law); see also *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 141 (2d Cir. 2000) (overlooking the district court's incorrect decision to apply New York law instead of the federal standard because the fundamental similarities removed any chances of that decision having a material effect on the outcome); discussion *infra* part III.B (grouping the three approaches together because of their similarities for the purposes of comparing the Hague Convention with current U.S. law in order to illustrate their minor differences, and to encourage ratification of the Hague Convention).

⁴⁴ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW §§ 481–83 (1987).

⁴⁵ See AM. BAR ASS'N SECTION OF INT'L LAW AND PRACTICE, *supra* note 29, at 10 (observing that the Uniform Recognition Act and the Restatement “codify the comity analysis” of *Hilton*, and, in general, provide the same grounds for refusing to recognize foreign judgments). By comparing the two on the chart provided, it becomes clear that the only major distinction is the inclusion of the lack of subject matter jurisdiction as mandatory grounds for non-recognition under the Uniform Recognition Act, while the Restatement treats it as discretionary. *Id.*

⁴⁶ UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 274 (1986).

⁴⁷ See *id.* § 1(2) (defining “foreign judgment” as any judgment of a foreign country for a sum of money).

approach to the recognition and enforcement of foreign money judgments.⁴⁸ More simply, the Restatement's approach has slowly given way to the Uniform Foreign Money-Judgments Recognition Act's approach.⁴⁹

Both sources require that the judgment for which the parties seek recognition be final,⁵⁰ but allow a stay in the proceedings if the foreign judgment is under appeal.⁵¹ The Uniform Foreign Money-Judgments Recognition Act and the Restatement also require the non-recognition of foreign judgments when there is a lack of due process or when the originating court lacked personal jurisdiction.⁵² They differ slightly, however, over the question of subject matter jurisdiction. The Uniform Foreign Money-Judgments Recognition Act makes the lack of subject matter jurisdiction a mandatory reason for non-recognition while the Restatement makes it optional.⁵³

⁴⁸ See *infra* note 50 and accompanying text (stating that thirty-two of the fifty states have adopted the Uniform Foreign Money-Judgments Recognition Act).

⁴⁹ See, e.g., DEL. CODE ANN. tit. 10, §§ 4801–08 (1997) (codifying the Uniform Foreign Money-Judgments Recognition Act for use in Delaware). Thirty-two states have adopted the UFMJRA in some form, twelve of which have joined since 1990. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 264 (1986).

⁵⁰ See UNIF. FOREIGN MONEY-JUDGMENTS ACT § 2; RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 481 cmt. e (1986).

⁵¹ See AM. BAR ASS'N SECTION OF INT'L LAW AND PRACTICE, *supra* note 29, at 10 (illustrating the approach of the UFMJRA and the Restatement with regard to the requirement of finality in recognizing and enforcing foreign judgments).

⁵² See UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1)–(2); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 482(1)(a)–(b); see also *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1972) (refusing to accept a due process complaint against an English default judgment because of the rule from *Morris v. Jones*, 329 U.S. 545 (1947), in which the U.S. Supreme Court ruled that a default judgment would be treated just as judgment on the merits when the defendant is afforded proper notice). *But see* *Dart v. Balaam*, 953 S.W.2d 478, 480 (Tex. App. 1997) (indicating that the due process exception of the Texas Uniform Foreign Country Money-Judgment Act does not require that the procedures taken in the foreign country, in this case, Australia, be identical to those established in the United States). The court also prohibited the judgment debtor from attacking the Australian judgment on a matter already litigated, holding that “grounds for non-recognition may be waived” if a party fails to assert the defense in the original proceeding despite the opportunity to do so. *Id.*

⁵³ See UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(3); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 482(2)(a) (“A court in the United States need not recognize a judgment of the court of a foreign state if the court that rendered the judgment did not have jurisdiction of the subject matter of the action.”).

The Restatement lists the following six discretionary grounds for non-recognition: (1) the foreign court lacks jurisdiction over the subject matter of the case, (2) the defendant is unable to defend the case due to insufficient notice, (3) either party uses fraud to obtain the judgment, (4) the cause of action is repugnant to U.S. public policy, (5) the foreign judgment conflicts with another judgment entitled to recognition, and (6) the judgment was rendered in a court contrary to an agreement between the parties to litigate in a particular forum.⁵⁴

The Uniform Foreign Money-Judgments Act allows courts to consider six factors as well, but they vary slightly from those listed in the Restatement.⁵⁵ The most notable of these differences is the inclusion of *forum non conveniens*⁵⁶ in the Uniform Foreign Money-Judgments Act's list of discretionary factors.⁵⁷ While both of these sources are widely used, it is important to remember that each state

⁵⁴ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 482(2)(a)–(f) (1987).

⁵⁵ See UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT §4(b)(1)–(6) (holding that subject matter jurisdiction is required, not optional, and permitting denial of recognition when “the foreign court was a seriously inconvenient forum for the trial of the action”); see also *Telnikoff v. Matusevitch*, 702 A.2d 230, 236–37, 238 n.12 (Md. 1997) (employing § 10-704 of the Maryland Uniform Foreign-Money Judgments Recognition Act, which specifies that a foreign judgment may be refused recognition when the cause of action upon which it is based is repugnant to the public policy of the state, to deny recognition to a British libel judgment). *But see* *Ackerman v. Levine*, 788 F.2d 830, 842–43 (2d Cir. 1986) (emphasizing that the public policy exception to the recognition of foreign judgments should be construed narrowly, especially when it is possible to recognize and enforce a foreign judgment based on a cause of action that does not exist in the United States); *Southwest Livestock & Trucking Co. v. Ramon*, 169 F.3d 317, 321 (5th Cir. 1999) (reiterating that recognition of a foreign judgment in Texas will not be denied on public policy grounds unless it would significantly conflict with Texas law). The court continues by saying that the narrowness of the public policy exception results from a compromise between the principles of res judicata and fairness to litigants. *Id.*

⁵⁶ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (holding that courts can use a *forum non conveniens* motion to deny a plaintiff's forum choice). Courts claim that it increases judicial efficiency and decreases inconvenience to the parties, but opponents of *forum non conveniens* argue that foreign plaintiffs typically bring cases against corporate defendants with ties to the United States, so the United States has a substantial interest in adjudicating these disputes. John R. Wilson, Comment, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 662 (2004).

⁵⁷ UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(6).

can modify the approach it chooses.⁵⁸ For example, some of the states following the Restatement's approach also require reciprocity, even though the majority of them feel that they no longer need it.⁵⁹

C. Hague Convention on the Choice of Court Agreements

The United States persuaded the Hague Conference on Private International Law to begin working on a convention for the recognition and enforcement of foreign judgments in the early 1990s.⁶⁰ The Preliminary Draft Convention included a broader scope than the Hague Convention, and had aspirations of becoming the larger international cousin of the Brussels⁶¹ and Lugano Conventions.⁶² The

⁵⁸ Cf. *id.*, Commissioner's Prefatory Note (requesting states to adopt the Uniform Foreign Money-Judgments Recognition Act because codification will increase the likelihood that foreign courts will recognize state judgments).

⁵⁹ See *Tahan v. Hodgson*, 662 F.2d 862, 868 (D.C. Cir. 1981) (construing federal and District of Columbia law to no longer require reciprocity). The court, in line with this comment, also suggests that any type of reciprocity requirement should be applied nationally because any decision regarding the effect of a foreign nation's scrutiny of a U.S. decision is political in nature. *Id.* See also *In re Colo. Corp. v. Lam*, 531 F.2d 463, 469 (10th Cir. 1976) (finding that the bankruptcy court abused its discretion in denying comity to the orders of a foreign court when no evidence was presented on whether a U.S. judgment would be granted comity). The appellant's failure to prove that Luxembourg and Netherlands Antilles would grant comity to U.S. judgments was made immaterial by the appellee's failure to prove the lack of comity. *Id.* Interestingly, the court in *In re Colo. Corp.* was not questioning whether to grant comity on the basis of reciprocity in Luxembourg and Netherlands Antilles, but the lack of reciprocity in Canada. *Id.* at 468. The court acknowledged that reciprocity was a concern, but concluded that denying comity on such grounds was a "misdirected use of the reciprocity consideration." *Id.*

⁶⁰ See Hugh F. Bangasser & Toussant Myricks, *Procedural Aspects of International Civil Litigation: Selected Issues Relating to Service of Process, Foreign Discovery for U.S. Litigation and Enforcement of Judgments*, in INTRODUCTION TO TRANSNATIONAL LEGAL TRANSACTIONS 1, 17 (Marylin J. Raisch & Roberta I. Shaffer eds., Oceana Publications, Inc. 1995) (articulating the United States' willingness in becoming a signatory to a convention covering the recognition and enforcement of foreign judgments in its proposal to the Hague Conference on Private International Law in May of 1992).

⁶¹ Council Regulation 44/2001, 2000 O.J. (L 12) 1 (EC).

⁶² See Andreas F. Lowenfeld, *Setting the Stage*, in THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS: RECORDS OF THE CONFERENCE HELD AT NEW YORK UNIVERSITY SCHOOL OF LAW ON THE PROPOSED CONVENTION 1, 3 (Andreas F. Lowenfeld & Linda J. Silberman eds., 2001) (proffering that the Hague Convention drew inspiration from the Brussels Convention and the Lugano Convention just as

Preliminary Draft Convention covered international litigation involving civil and commercial matters, except those proscribed by paragraph two of article one,⁶³ which includes tort actions and consumer contracts.⁶⁴ However, the project was put on hold because of major disagreements over jurisdictional issues,⁶⁵ and the Hague Convention was subsequently trimmed down, giving the courts of member States jurisdiction over “international cases to exclusive choice of court agreements concluded in civil or commercial matters.”⁶⁶

they drew inspiration from the U.S. Full Faith and Credit Clause); *see also* Hague Conference on Private Int’l Law, *International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, at 8, Prelim. Doc. No. 7 (Apr. 1997) (drawn up by Catherine Kessedjian), http://www.hcch.net/upload/wop/jdgm_pd7.pdf (examining the Brussels and Lugano Conventions’ successful recognition and enforcement schemes to illustrate that the Preliminary Draft Convention should continue to embody the principles of a double convention. Why? Because defining the direct jurisdiction of courts in member States is as important to reaching a meaningful agreement as establishing a consensus on the effects of that judgment in the territory of the other member States).

⁶³ *See* Preliminary Draft Convention, *supra* note 6, art. 1, ¶ 2 (removing the status and legal capacity of persons, matrimonial property regimes, wills and succession, insolvency, social security, arbitration and related proceedings, and admiralty and maritime matters from the scope of the Preliminary Draft Convention); *see also id.* art. 1, ¶ 1 (excluding revenue, customs, and administrative matters from the scope of the Preliminary Draft Convention).

⁶⁴ *See id.* arts. 7, 10 (creating jurisdiction for a court to hear tort and personal contract cases when the court resides in the same State in which the occurrence giving rise to the tort action occurred, and/or personal contract cases where the consumer took the steps necessary to conclude the contract in the State of the court where the suit is brought).

⁶⁵ *See* Hague Conference on Private Int’l Law, *Preliminary Draft Convention on Exclusive Choice of Court Agreements*, at 4, Prelim. Doc. No. 26 (Dec. 2004) (prepared by Trevor C. Hartley & Masato Dogauchi), http://www.hcch.net/upload/wop/jdgm_pd26e.pdf [hereinafter *Draft Report*] (noting that the 1999 Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters was abandoned because its expansive scope made reaching an agreement seemingly impossible); *see also* Mehren, *supra* note 2, at 192 (introducing a letter from Jeffrey Kovar, Assistant Legal Adviser and Head of the U.S. Delegation, to the Secretary General of the Conference, which decried the current negotiation method and its inability to address serious defects in the Preliminary Draft Convention, in order to illustrate the United States’ unease with proceeding in scheduling the next step for the Preliminary Draft Convention).

⁶⁶ Hague Convention, *supra* note 5, art. 1.

The Hague Convention on Choice of Court Agreements consists of a number of key articles that can be broken down for clarity.⁶⁷

Articles one and two establish the scope of the Hague Convention.⁶⁸ Article one states that the convention shall cover international cases involving choice of court agreements in civil or commercial matters.⁶⁹ Article two, on the other hand, is proscriptive. It removes a list of civil or commercial subjects that some nations could consider, such as anti-trust matters, insolvency, employment contracts, tort claims, and personal contracts. This provision narrowed the focus of the Hague Convention to subject matter upon which the members of the Hague Conference on Private International Law could agree. Notably, this included business contracts to which a State was a party.⁷⁰ Paragraph five of article two includes a provision that expressly permits suits against foreign sovereigns by businesses from other countries.

Article three is important in that it sets forth the requirements that govern the choice of court agreement and includes factors that will have an appreciable impact on companies involved in international contracting.

Article five states that a court or forum chosen in a choice of court agreement shall have jurisdiction over the dispute.⁷¹ Paragraph two of

⁶⁷ See *id.* at art. 7 (excluding interim measures from the scope of the Convention); see also Hague Conference on Private Int'l Law, *Comments from the United States of America on the December 2004 Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements*, at 5, Prelim. Doc. No. 29 Addendum 1 (June 2005), http://www.hcch.net/upload/wop/jdgm_pd29_add.pdf (responding to the draft report, the U.S. delegation stated that in order to best understand the Hague Convention, the report should begin with an overview of articles five, seven (now six), and nine, as opposed to beginning with article one).

⁶⁸ See *infra* notes 69, 70 (elaborating on articles 1 and 2 of the Hague Convention).

⁶⁹ Hague Convention, *supra* note 5, art. 1; see also Draft Report, *supra* note 65, ¶ 63 (asserting that while the Hague Convention will predominantly affect the original parties to the agreement, it will, in some cases, bind third parties when their right to bring the proceedings depends on an assignment from one of the original parties).

⁷⁰ Hague Convention, *supra* note 5, art. 2(5) (allowing application of the Hague Convention to States). *But see* Draft Report, *supra* note 65, ¶¶ 58–60 (narrowing the application of the Hague convention to those instances when a State is party. Those instances being when a State is exercising powers similar to those of private individuals; this avoids interference with governmental immunity).

⁷¹ Hague Convention, *supra* note 5, art. 5(1).

article five, however, warrants special attention because it proscribes the use of *forum non conveniens* to thwart the choice of court agreement. It reads, “A court that has jurisdiction under paragraph one shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.”⁷²

Article six establishes a second set of obligations equally as important. It requires courts not selected by the choice of court agreement to suspend or dismiss proceedings to which an exclusive choice of court agreement applies. This requirement is waived when any of the four following conditions are met: (1) the agreement is null and void under the law of the State of the chosen court; (2) one of the parties lacked the capacity to conclude the agreement under the law of the State seized; (3) dismissing the proceedings would lead to injustice or contradict the law of the State seized; or (4) the court chosen by the parties to hear the case has refused.⁷³

Articles eight and nine move from the jurisdictional issues covered in earlier articles to the recognition and enforcement of foreign judgments resulting from choice of court jurisdiction.⁷⁴ Article eight requires the courts to enforce the judgment without reviewing the merits of the case where a judgment creditor has filed suit, unless the foreign judgment was a default judgment.⁷⁵ Article nine, on the other hand, lists seven reasons why a court of a member State could deny

⁷² *Id.* art. 5(2).

⁷³ *Id.* art. 6.

⁷⁴ *Id.* art. 8(1)–(5).

⁷⁵ See Hague Convention, *supra* note 5, art. 8 (allowing courts to review judgments on the merits in cases they are being asked to recognize when the rendering court’s judgment is based on a default by one of the parties); *id.* art. 14 (allowing States that have ratified the Hague Convention to establish separate procedures for recognizing and enforcing foreign judgments within their nation so long as they act expeditiously); see also *MacDonald v. Grand Trunk Ry. Co.*, 52 A. 982, 985, 987 (N.H. 1902) (holding that a judgment on the merits, in an action for a loss instituted and litigated to its conclusion in a Canadian court of general jurisdiction having jurisdiction of the parties, was a conclusive defense to a subsequent action for the same loss instituted in New Hampshire, regardless of whether the stipulation against liability was void or not under the laws of New Hampshire). The concept of *res judicata* has been applied to foreign judgments by U.S. courts for quite a long time in certain areas of the law. Lowenfeld & Silberman, *supra* note 42, at 123, 126, 132. U.S. courts have also accepted the use of foreign judgments as a defense against new claims, giving life to the collateral estoppel effect of foreign judgments. Reese, *supra* note 25, at 788.

the recognition and enforcement of a foreign judgment from a court in another member State.⁷⁶ These factors include the invalidity of the choice of court agreement, a party's incapacity to conclude such an agreement, insufficient service to the judgment debtor, fraud, and instances where recognizing the foreign judgment is incompatible with public policy of the requested State.⁷⁷

The remaining articles of the Hague Convention, such as provisions for the severability of the choice of court agreement, transitional application, and the inclusion of regional economic integration organizations like the European Union, are important but do not merit inclusion here because they deal more with the procedural aspects of the Hague Convention as opposed to the substantive issues of jurisdiction and recognition.⁷⁸

D. ALI Proposed Federal Statute

The ALI began preparing a proposed statute for the U.S. Congress to implement the convention in the event that the President signed the treaty and the Senate ratified it.⁷⁹ The ALI was forced to change focus when the original convention was scrapped by the Hague Conference on Private International Law, and then replaced with the Hague Convention on Choice of Court Agreements.⁸⁰ The ALI continued work on the project but decided to draft a statute that Congress could adopt even in the absence of a Hague Convention.⁸¹

⁷⁶ See Hague Convention, *supra* note 5, art. 9(a)–(g) (using “may” to condition the decision to apply any of the factors listed as opposed to “shall” or “must”).

⁷⁷ See *id.* (enumerating factors that a court can consider in determining whether a foreign judgment should be recognized, including two possibilities in which the foreign judgment in question would be inconsistent with a prior judgment between the parties in the same State, or inconsistent with a prior judgment from a different State that fulfills the requirements for recognition in the requested State).

⁷⁸ *Id.* arts. 15, 16, 29.

⁷⁹ See George Slyz, *International Law in National Courts*, in INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS (Thomas M. Franck & Gregory H. Fox eds., 1995) 71, 85–88 (iterating that U.S. courts have established that federal statutes and self-executing treaties are of equal status, but, in practice, implementing legislation is required because Congress finds most treaties to be non-self-executing).

⁸⁰ See *infra* note 82 and accompanying text.

⁸¹ See Lance Liebman, *Foreword* to AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE, xi (Proposed Final Draft 2005) (emphasizing that the ALI project on the recognition

The ALI proposed statute is notable for two reasons: (1) it retains a scope similar to that of the Preliminary Draft Convention,⁸² and (2) it imposes a reciprocity requirement.⁸³ However, the future of the ALI proposed statute and its impact upon federal legislation are uncertain. Although members of the ALI approved the proposed final draft at the 82nd Annual Meeting, held from May 16–18, 2005, despite motions to quash the project,⁸⁴ the Hague Convention was not signed until June 30, 2005.⁸⁵ The ALI apparently foresaw the problem of drafting a proposed federal statute because it amended the introduction of the proposed final draft while negotiations within the Hague Conference on Private International Law were still underway.⁸⁶ The introduction now states that the proposed statute “serves as a concrete expression” of the ALI’s stance on the recognition and enforcement of foreign judgments, abandoning any pretense of codifying the Hague Convention.⁸⁷

III. ANALYSIS

Even though the Hague Convention is limited in scope compared to the Preliminary Draft Convention, the United States should ratify it

and enforcement of foreign judgments would continue despite roadblocks at the Hague Conference in order to present a model federal statute for Congress to adopt).

⁸² FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 1(a) (Proposed Final Draft 2005) [hereinafter FOREIGN JUDGMENTS ACT] (providing that the Act shall apply to all foreign judgments other than judgments for divorce, support, maintenance, division of property, custody, adoption, other matters of domestic relations, bankruptcy, liquidation, and foreign arbitral awards).

⁸³ *Id.* § 7 (resurrecting the reciprocity requirement imposed in *Hilton* by allowing judgment debtors to use the lack of reciprocity as a defense as long as they can prove there is substantial doubt that the courts of the state of origin would enforce a comparable U.S. judgment).

⁸⁴ AM. LAW INST., ACTIONS TAKEN WITH RESPECT TO DRAFTS SUBMITTED AT 2005 ANNUAL MEETING 6, <https://www.ali.org/ali/AM05ActionsTaken.pdf> (last visited Nov. 17, 2006) (disregarding a motion to reject the statute and approving the proposed final statute as amended).

⁸⁵ Hague Convention, *supra* note 5.

⁸⁶ AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE 6 (Amended Proposed Final Draft 2005).

⁸⁷ Am. Law Inst., *Members OK Bylaw Amendment, Approve Final Drafts for Agency Restatement and Foreign Judgments Project*, A.L.I. REP., Summer 2005, at 2, available at https://www.ali.org/ali/R2704_03-OKBylaw.htm (confirming ALI’s position that the final proposed statute would serve as an important guide in the legislative and judicial process, even if it’s never adopted by Congress).

for two reasons: (1) the Hague Convention will create certainty in the United States with regards to dispute resolution within the international business arena,⁸⁸ and (2) adopting the Hague Convention as a national standard for recognizing and enforcing foreign judgments would not require a drastic change from the United States' current approach.⁸⁹ The United States will not achieve these benefits, however, if it implements the Hague Convention by adopting the ALI's proposed statute and its requirement of reciprocity.

A. Creating Certainty in the International Business Arena

The Hague Convention creates certainty in the international business arena in several different ways. First, the Hague Convention's scope is clearly defined. Article one states that the Hague Convention is limited to exclusive choice of court agreements in international cases involving civil or commercial matters. Article two contains further limiting language that makes the scope of the Hague Convention even clearer. By setting forth more than fifteen areas that are expressly exempted from the Hague Convention, article two prevents inconsistency of coverage between signatory States by preventing them from disputing the civil or commercial nature of certain areas of the law such as anti-trust matters,⁹⁰ insolvency,⁹¹ and the carriage of passengers and goods. These exclusions most likely represent the areas in which earlier international agreements have been

⁸⁸ See Patrick J. Borchers, *The Triumph of Substance Over Rules of Choice in International Commercial Transactions: From the Lex Mercatoria to Modern Standards*, in INTRODUCTION TO TRANSNATIONAL LEGAL TRANSACTIONS 139–40 (Marylin J. Raisch & Roberta I. Shaffer eds., Oceana Publications, Inc. 1995) (criticizing the current approach of U.S. courts in resolving choice of law problems in disputes arising from international business transactions because such a stance jeopardizes business interests in the billions of dollars); see also discussion *infra* Part III.A (assessing the impact of the Hague Convention's provisions on international business).

⁸⁹ See discussion *infra* Part III.C (comparing and contrasting the Hague Convention with the three current U.S. approaches to the recognition and enforcement of foreign judgments).

⁹⁰ Hague Convention, *supra* note 5, art. 2(2)(h) (prohibiting the inclusion of antitrust matters).

⁹¹ *Id.* art. 2(2)(e).

reached,⁹² as well as the States' unwillingness to compromise important national concerns.⁹³

Article two further imposes three important limitations, not mentioned in the list, that emphasize the nature and extent of the Hague Convention's commitment to creating certainty within the international business arena with respect to the litigation of disputes in a chosen forum.⁹⁴ Paragraph three of article two mitigates paragraph two's list of exclusions, and prevents civil or commercial cases from exclusion because of preliminary matters included on paragraph two's list.⁹⁵ Paragraph four of article two, on the other hand, acts as an equalizer by excluding arbitration proceedings, an area governed by the New York Convention.⁹⁶

Paragraph five of article two is the true indicator, however, of the contracting States' commitment to the success of the Hague Convention.⁹⁷ It includes a provision that expressly permits suits against foreign sovereigns by businesses from other countries. This is crucial to the Hague Convention's success because a great number of international contracts involve national governments.⁹⁸ Excluding national governments from the scope of the treaty would cause

⁹² Compare *id.*, art. 2(2) (excluding maintenance obligations from the Hague Convention), with Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Port.-Czech.-Switz., Oct. 2, 1973, 1021 U.N.T.S. 15001 (establishing common provisions to govern the reciprocal recognition and enforcement of decisions relating to maintenance obligations of adults).

⁹³ See, e.g., *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 158–69 (2004) (interpreting the Sherman and Clayton Acts in conjunction with the Foreign Trade Antitrust Improvements Act of 1982 to establish the U.S. position on allowing suits against U.S. businesses for violations of U.S. antitrust laws, which precluded claims, in this instance, against a U.S. business for actions that adversely affected only foreign markets).

⁹⁴ Hague Convention, *supra* note 5, art. 2(3)–(6) (ensuring that government contracts in civil or commercial capacity are not exempted from inclusion, allowing any of the issues listed as reason for exclusion in section two of article two to be duly considered within the Hague Convention's scope so long as they are preliminary matters, and removing arbitration from the Hague Convention).

⁹⁵ *Id.* art. 2(3).

⁹⁶ *Id.* art. 2(4).

⁹⁷ *Id.* art. 2(5) (dismissing sovereign immunity claims for government contracts in civil and commercial matters).

⁹⁸ E.g., *Hunt v. BP Exploration Co.*, 492 F. Supp. 885, 892 (N.D. Tex. 1980) (denying the *res judicata* effect of an English judgment against a U.S. business whose assets were appropriated by Libya).

corporations contracting with those governments to rely on arbitration clauses instead of the Hague Convention, depriving the Hague Convention of a chance to reach maximum efficiency.⁹⁹

In article three, the Hague Convention further creates certainty by defining the requirement for choice of court agreements. The first section of article three defines an exclusive choice of court agreement, while section (c) sets forth how an exclusive choice of court agreement concludes.¹⁰⁰ Section (b) states that a choice of court agreement gives exclusive jurisdiction to the chosen forum,¹⁰¹ and section (d) states that exclusive choice of court agreements are independent of other contractual terms.¹⁰² These provisions provide international businesses with the necessary information to write an exclusive choice of court agreement enforceable through the Hague Convention.

Articles five and six embody the core of the Hague Convention's treatment of forum-selection clauses.¹⁰³ The jurisdictional clause for the court named in the choice of court agreement is the bedrock of the Hague Convention, but it is unquestionably augmented by the explicit proscription of forum non conveniens as a defense to the agreement, as well as article six's requirement that courts not chosen as the forum of choice refrain from hearing the case. If parties to a choice of court agreement were allowed to bring a case in any court of their choice, or if they undermine the choice of court agreement by moving to dismiss for forum non conveniens,¹⁰⁴ the effectiveness of the Hague

⁹⁹ Hague Conference on Private Int'l Law, *The Future Convention on Exclusive Choice of Court Agreements and Arbitration*, at 4, Prelim. Doc. No. 32 (June 2005) (prepared by Andrea Schulz), http://www.hcch.net/upload/wop/jdgm_pd32e.pdf (indicating that a majority of parties to international contracts enter into arbitration agreements).

¹⁰⁰ See Hague Convention, *supra* note 5, art. 3(c)(i)–(ii) (requiring a choice of court agreement to be in writing, but allowing it to consist of any method “which renders information accessible so as to be usable for subsequent reference”).

¹⁰¹ See *id.* art. 3(b) (providing that a choice of court agreement that specifies a court, or the courts of a contracting State, is presumed to be exclusive).

¹⁰² See *id.* art. 3(d).

¹⁰³ Tycho H.E. Stahl, *Problems with the United States Anti-Dumping Law: The Case for Reform of the Constructed Value Methodology*, 11 INT'L TAX & BUS. LAW. 1 (1993) (discussing the advantages that large multinational corporations have over smaller, less experienced international firms in international business contracts because of their ability to retain permanent legal staff).

¹⁰⁴ See *Draft Report*, *supra* note 65, at 22–23 paras. 91–97 (explaining that the Hague Convention does not preclude transfer of the proceedings from one court in the

Convention would be seriously limited.¹⁰⁵ In this respect, the two provisions are mutually required for the Hague Convention to achieve any degree of success. What remains to be determined, however, is the effect of cases filed in the courts of States that are not members of the Hague Convention. Article seven may provide a degree of relief for parties under the burden of dual proceedings in the courts of a member State and a non-member State, but there is no guarantee that a court of a non-member State would give any effect to the judicial order of the court chosen in the original agreement.¹⁰⁶

The Hague Convention's goal of ensuring the mobility of judgments in commercial or civil matters rests upon the language of articles 8 and 9.¹⁰⁷ Although these two articles specify which judgments will be recognized and enforced,¹⁰⁸ they do not mention whether third parties can use a foreign judgment's preclusive effect as a defense in a separate suit.¹⁰⁹ If *res judicata* does apply for a foreign judgment, it would lead to greater certainty for international

chosen forum to another in the same forum. But where a choice of court agreement lists the courts of a state, transfer of the proceeding to a different State would be precluded by the Hague Convention); *see also* Hague Convention, *supra* note 5, art. 3(b) (considering a choice of court agreement that lists the courts of one State as presumptively exclusive).

¹⁰⁵ *See generally* Hague Conference on Private Int'l Law, *Note on the Question of "Forum Non Conveniens" in the Perspective of a Double Convention on Judicial Jurisdiction and the Enforcement of Decisions*, Prelim. Doc. 3 (Apr. 1996) (drawn up by the Permanent Bureau), [http://www.hcch.net/upload/wop/jdgm_pd03\(1996\).pdf](http://www.hcch.net/upload/wop/jdgm_pd03(1996).pdf) (arguing for the removal of forum non conveniens as a method of undermining the Hague Convention).

¹⁰⁶ *See generally* *Hilton v. Guyot*, 159 U.S. 113 (1895) (noting that nations are not obligated to uphold or enforce the judicial actions of other nations even though comity strongly supports respecting foreign decisions).

¹⁰⁷ Hague Convention, *supra* note 5, arts. 8–9; *see* Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing A Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 312 (2004) (stressing the importance of a "stable legal infrastructure" for the "rapid and predictable recognition and enforcement of foreign judgments" because of its impact on the pace of trade and foreign investment). Businesses are driven by profit. By removing the hidden costs of legal systems, especially the cost of re-litigating a dispute, such profit determinations would be less complicated, and hopefully spur an increase in the pace of international trade. *Id.*

¹⁰⁸ *See* discussion *supra* Part II.C (explaining that articles 8 and 9 contain provisions for refusing recognition of a foreign judgment based on the jurisdiction created by previous articles).

¹⁰⁹ *See* Hague Convention, *supra* note 5, arts. 1–15 (neglecting to include a provision on the ability of third parties to enforce foreign judgments).

businesses facing suit in a number of different contracting States. Articles eight and nine are successful to the extent that they ensure a decision made on the merits in a foreign court will be recognized and enforced in most situations,¹¹⁰ but fail in clarifying whether foreign judgments constitute *res judicata*.¹¹¹

Article eleven defines the exact scope of the Hague Convention's treatment of damages.¹¹² The text of paragraph one of article eleven makes it quite clear that damages awarded for anything other than an actual loss suffered can be refused in a foreign State under the Hague Convention.¹¹³ When taken in conjunction with paragraph two, article eleven firmly deals with the possibility of seeking any sort of damage beyond that needed to compensate the party for a loss. In the end, this means that parties seeking to enter an international contract will have no incentive to choose a forum that allocates attorney's fees to the victor when the parties' home States do not allow such awards. In addition, article fifteen removes any incentive parties may have to choose a forum for its generous awards because it allows severable parts of a foreign judgment to be recognized and enforced when the whole foreign judgment may have been unrecognizable.¹¹⁴

¹¹⁰ *Id.* art. 8(2); *see also* UNIDROIT Principles *supra* note 3, at 205 (expanding on the role of judicial review in civil law systems). Typically, judgments in the court of first instance in civil law systems are subject to a re-examination of the facts and the law, whereas in common law systems, the court of second instance is generally limited to a review of the law. *Id.* *But see* Lowenfeld & Silberman, *supra* note 42, at 123 (contending that U.S. law does not readily distinguish between contested judgments and default judgments for the purposes of determining *res judicata*).

¹¹¹ *See* PETER R. BARNETT, RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW 35 (P.B. Carter ed., Oxford Univ. Press 2001) (suggesting that there are two types of preclusive pleas that parties are typically allowed to make with a final foreign judgment). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. g (1988 Rev.) (conceding that it is uncertain whether U.S. courts will give foreign rules of privity the same treatment as that received by foreign judgments after recognition).

¹¹² *See* Hague Convention, *supra* note 5, art. 11 (lambasting the United States' use of punitive damages by excluding them from recognition).

¹¹³ *Id.* art. 11(1).

¹¹⁴ *Id.* art. 15 (settling the question of whether a choice of court agreement in a contract with provisions ruled null and void can be severed in the affirmative).

B. Weaknesses in the Hague Convention Approach

Even though the Hague Convention will provide a great deal of certainty in the currently confusing international business arena, it still has some shortcomings. First, by limiting its scope to civil and commercial matters, the Hague Convention does not affect international cases involving choice of court agreements that do not concern civil or commercial matters.¹¹⁵ Simply put, all of the benefits created by the Hague Convention in unifying the U.S. standard and ensuring a degree of reciprocity in foreign countries are inapplicable to any case that cannot be classified as civil or commercial. This gives rise to the second limitation on the Hague Convention—the lack of clarity as to what constitutes a civil or commercial matter due to the different legal systems of the member States.¹¹⁶ Article one does not define “civil or commercial matter,” leaving each foreign court with the discretion to determine whether a transaction is a “civil or commercial matter.” Therefore, a foreign State court rendering a judgment in an international case dealing with an exclusive choice of court agreement might classify the parties’ dispute as either a civil or a commercial matter. But the rendering court may find its decision thwarted by the enforcing court’s decision not to recognize the judgment because of a contrary interpretation of the dispute’s nature.¹¹⁷

¹¹⁵ *Id.* art. 1 (limiting the Hague Convention to international cases involving choice of court agreements in civil or commercial matters).

¹¹⁶ See Gerhard Walter & Samuel P. Baumgartner, *General Report Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS* 1, 12–14 (Gerhard Walter & Samuel P. Baumgartner eds., 2000) (discussing the difficulty English courts have had with the term “civil and commercial matters”). The courts of continental Europe, however, have little difficulty determining which matters fall under the scope of civil and commercial matters because they have a long history of distinguishing between public law and private law. *Id.* Most civil law nations will recognize and enforce a judgment they consider to be commercial or civil matters even if the original nation does not consider it as such. *Id.*

¹¹⁷ See Hague Convention, *supra* note 5, art. 23 (insisting that courts apply the Hague Convention with “regard...to its international character and the need to promote uniformity”); see also Lowenfeld, *supra* note 62, at 5 (referring to questions to be presented at the conference, including whether or not the Proposed Convention could succeed with the same amount of success as the Brussels Convention without some sort of international institution to regulate its application); *cf.* Volkswagenwerk

The Hague Convention also falls short because it allows “any other means of communication which renders information accessible so as to be usable for subsequent reference” to be used as evidence of an exclusive choice of court agreement.¹¹⁸ This provision could surprise a number of companies involved in international contracting that are unaware of the details of the Hague Convention.

These shortcomings, although important, do not completely undermine the benefits of the Hague Convention. Furthermore, as member States begin to ratify and apply the Convention, they will likely solve these problems—if the member States can meet again to try to reach consensus on the issues. Either way, the member States would be shortsighted not to ratify the Hague Convention, notwithstanding its shortcomings.

C. The Hague Convention Will Not Require Drastic Changes

The Hague Convention differs little from current U.S. law; therefore, Congress will not have to implement drastic changes to confirm the convention, though it will result in many benefits. The Hague Convention’s dual nature¹¹⁹ requires a two-step comparison of its provisions with the current recognition regimes to demonstrate clearly that ratifying the Hague Convention will not require drastic changes. First, this section compares the jurisdictional provisions of the Hague Convention with U.S. law on forum-selection clauses. Second, this section addresses the similarities and differences of the Hague Convention, and the three existing approaches on the recognition and enforcement of foreign judgments.

Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988) (interpreting the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters in a manner that permitted U.S. plaintiff to bypass the Hague Service Convention’s requirements for service abroad by mailing service of process to the foreign corporation’s domestic subsidiary).

¹¹⁸ See Hague Convention, *supra* note 5, art. 3(c)(ii).

¹¹⁹ See discussion *supra* Part I.C (admitting that the Hague Convention has two principle purposes—to create jurisdiction through choice of court clauses and to guarantee the recognition of judgments in foreign countries).

1. *Forum-selection*

Given the United States' respect for forum-selection clauses,¹²⁰ article five of the Hague Convention is not a far stretch from current U.S. law.¹²¹ In light of the Supreme Court decisions in *Bremen v. Zapata*¹²² and *Carnival Cruise Lines v. Shute*,¹²³ which extend the obligatory reach of forum-selection clauses to include inconvenient forums when such an inconvenience was a factor in the parties' negotiation, the Hague Convention's exclusion of forum non conveniens as a defense is not troublesome.¹²⁴ It is no different than what the U.S. Supreme Court held in *Carnival Cruise Lines*, in which the Court held a consumer to a forum-selection clause printed on the back of a form passenger contract even though the selected forum was far from the consumer's home, and therefore, conceivably an inconvenient place for the consumer to pursue a claim.¹²⁵ The Hague Convention deals only with international business contracts.¹²⁶ Thus, it is safe to assume that both parties are negotiating at arm's length in selecting a particular forum for litigation. The negotiating means that both parties have considered what acquiescing to a particular forum means for their overall negotiations and costs. In *Carnival Cruise Lines*, the Court clearly stated that a consumer's benefit indirectly related to the forum-selection clause of the contract and was a factor weighing against dismissal of the claim on a forum non conveniens

¹²⁰ See discussion *supra* Part II.A (asserting that forum-selection clauses are generally accepted in the United States).

¹²¹ Compare discussion *supra* Part II.A (delineating U.S. jurisprudence on forum-selection clauses and their enforceability), with discussion *supra* Part II.C (clarifying the impact of article five of the Hague Convention).

¹²² *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1971) (enforcing an agreement between two "sophisticated" businesses to resolve disputes in the United Kingdom).

¹²³ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing a form passage contract's forum-selection clause between a consumer and a large corporation).

¹²⁴ Hague Convention, *supra* note 5, art. 5(2).

¹²⁵ *Carnival Cruise Lines, Inc.*, 499 U.S. at 595 (holding that a forum-selection clause in a cruise line's passage contract ticket, requiring litigation of all disputes in Florida, was reasonable and enforceable because Florida was not a "remote alien forum").

¹²⁶ See discussion *supra* Part II.C (discussing the Hague Convention, specifically articles 1 and 2, articles which limit the Hague Convention to international business contracts).

motion.¹²⁷ Furthermore, the forum-selection clause upheld in *Carnival Cruise Lines* was not negotiated at arms length but was part of boilerplate language printed on the back of a ticket stub, giving even more weight to the evidence that an inconvenient forum is not contrary to U.S. jurisprudence. If we extend the Court's logic from *Bremen* in forum-selection cases to *Carnival Cruise Lines*, it is reasonable to expect that the Supreme Court would not dismiss an international case between businesses arising from a choice of court agreement because both parties likely considered the convenience and costs of litigation in a variety of forums before agreeing to the contract.¹²⁸

A non-selected court's decision to honor a choice of court agreement by dismissing a suit brought in an improper forum is as important to the function of choice of court agreements as the chosen court's decision to adjudicate the parties' dispute.¹²⁹ Enacting article six of the Hague Convention would create only minor problems, if any, because it does not require U.S. courts to do anything more than consider the same factors for non-recognition of forum-selection clauses as set forth in *Bremen*. Thus, the Hague Convention serves the purpose of honoring forum-selection clauses just as well as U.S. courts' current practice.

2. Recognition: a limited national codification

The U.S. Senate should ratify the Hague Convention because it allows judges to utilize the same factors in determining whether to recognize and enforce a foreign judgment as those currently permitted by the three bodies of law discussed in Part II.¹³⁰ The three different approaches, while under different names, are substantially similar in

¹²⁷ *Carnival Cruise Lines*, 499 U.S. at 592–95 (stressing the importance of considering the parties' negotiated costs in determining whether a motion to dismiss on forum non conveniens was appropriate).

¹²⁸ See also Maier, *supra* note 15, at 60 (insisting that U.S. courts will enforce negotiated forum-selection clauses in international contracts after the Supreme Court's decision in *Carnival Cruise Lines*).

¹²⁹ See Hague Convention, *supra* note 5, art. 6 (requiring a court not selected to refrain from exercising jurisdiction over the case so that the Hague Convention will achieve its goal of unifying international practice).

¹³⁰ See discussion *supra* Part II.B.1–3 (elaborating on U.S. law governing the recognition of foreign judgments in the United States, including federal common law, the Restatement, and the Uniform Foreign Money-Judgments Recognition Act).

the way they treat the factors judges are required to consider in determining how to treat foreign judgments.¹³¹

A U.S. judge's ability to refuse recognition and enforcement under either the Hague Convention or the current recognition and enforcement regimes undermines any argument that recognizing and enforcing judgments contrary to U.S. public policy, or those that fall short of due process standards, pose a serious problem.¹³²

The Hague Convention, once ratified and executed, would codify the federal common law factors for refusing recognition and enforcement and create a single national standard.¹³³ A number of the Hague Convention's key articles dealt with the requirements of the *Hilton* standard. It replaces the full and fair trial, as well as the neutrality requirements of *Hilton* with articles eight and nine.¹³⁴ The Hague Convention specifically mentions the lack of procedural fairness as one reason for not recognizing a judgment.¹³⁵ Paragraph two of article eight also guarantees a fair trial by allowing the requested court to review the foreign default judgment on the merits.¹³⁶

¹³¹ See *supra* note 45 and accompanying text (viewing the three as substantially similar). See generally discussion *supra* Part II.B.1–3 (articulating the requirements set forth by each of the approaches for the recognition of foreign judgments in the United States).

¹³² See *Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1163 (9th Cir. 1979) (reviewing the basic exceptions to U.S. recognition law that prevent U.S. courts from recognizing foreign judgments when they are a matter of foreign tax or penal law). The court relies on a decision by Judge Learned Hand in which he specifies the reasons for U.S. courts to refuse recognition of revenue rulings of other nations. *Id.* at 1164. According to Judge Learned Hand, such rulings should be beyond the power of the court because they affect “matters as vital to [the nation’s] existence as its criminal laws.” *Id.*

¹³³ See *infra* note 147 and accompanying text (restating the impact on the states of the Supremacy Clause in applying a treaty ratified by the U.S. Senate and signed by the President).

¹³⁴ Compare Hague Convention, *supra* note 5, arts. 8–9 (establishing the grounds for both recognition and non-recognition), with discussion *supra* Part II.B.1–3 (reviewing the grounds for recognition and non-recognition under U.S. law).

¹³⁵ Hague Convention, *supra* note 5, art. 9(e).

¹³⁶ Hague Convention, *supra* note 5, art. 8(2) (“The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.”). This provision is contrary to current U.S. civil procedure practice. In the United States, the Constitution’s full faith and credit clause

The Hague Convention also promotes the fair treatment of foreign parties in an original suit based on a forum-selection clause because unfair treatment of a foreign party in that case would lead to the denial of recognition—a consequence that penalizes the judgment creditor and stigmatizes the court that permitted the unfair treatment.¹³⁷

The Hague Convention deals with the federal common law's reciprocity requirement enunciated in *Hilton* by equally applying the convention to every contracting State.¹³⁸ This ensures that courts of member States will consider recognizing and enforcing U.S. judgments within the scope of the Hague Convention's articles instead of declining to recognize them due to non-reciprocity.¹³⁹ In light of the comity considerations regarding foreign laws, parties to the original suit and legal commentators cannot expect a treaty that specifically allows for the refusal of recognition upon certain grounds to guarantee recognition and enforcement in every case.¹⁴⁰ At the very least, the Hague Convention establishes a mandatory framework for every contracting State to use when considering such issues.¹⁴¹

D. The ALI Proposed Statute and the Specter of Reciprocity

The ALI's decision to reintroduce reciprocity as a requirement for the recognition and enforcement of foreign judgments in the proposed federal statute as an incentive for other States to negotiate an agreement with the United States regarding recognition is contrary to

precludes an enforcing court from examining the merits of a case when the rendering court entered judgment by default. U.S. CONST. art. IV, § 1.

¹³⁷ See Hague Convention, *supra* note 5, art. 9(e) ("Recognition or enforcement may be refused if: recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.").

¹³⁸ See *infra* note 141.

¹³⁹ See *supra* notes 3, 41 (highlighting the inequity that U.S. judgment creditors face in enforcing a judgment abroad because of reciprocity requirements in other countries).

¹⁴⁰ See *supra* note 75 and accompanying text (announcing the different grounds upon which a court can refuse to recognize a foreign judgment under the Hague Convention).

¹⁴¹ See generally Hague Convention, *supra* note 5 (creating an international framework for the exercise of jurisdiction by the courts of member States, and the recognition of judgments based on a court's exercise of jurisdiction in foreign countries).

the majority of U.S. recognition jurisprudence, and it ignores the need for a predictable recognition regime.¹⁴²

Judgment creditors seeking recognition of a foreign judgment in the United States benefit from the three approaches' liberal treatment of foreign judgments. The three approaches reduce the necessity of re-litigating and hinder a judgment debtor's ability to avoid enforcement.¹⁴³ A liberal approach is also beneficial because it conserves judicial resources.¹⁴⁴ Reinstating reciprocity as a requirement would undermine this liberal approach and change the nature of rights awarded to judgment creditors. The concept of *res judicata* as applied by U.S. courts specifies that a final judgment between parties bestows certain rights upon the judgment creditor.¹⁴⁵ A reciprocity requirement negates these rights by denying a judgment creditor, typically a private citizen or corporation, the means to enforce these rights when the judgment creditor is a citizen of a country that does not guarantee the reciprocal treatment of U.S. judgments. It is not fair to say that a successful litigant's right to a money judgment should depend upon U.S. relations with the creditor's home country.¹⁴⁶ However, theoretically, each signatory of the Hague

¹⁴² See FOREIGN JUDGMENTS ACT, *supra* note 82, § 7 cmt. b (voicing the opinion of the ALI that requiring reciprocity as a precondition to the recognition of a foreign judgment is not only in line with the practice of many countries, but would act as an incentive for other countries to negotiate agreements with the United States to guarantee the recognition and enforcement of judicial decisions flowing from that country).

¹⁴³ See *supra* Parts II.B, III.B.1–2 (explaining how recognizing a foreign judgment as *res judicata* reduces re-litigation); Miller, *supra* note 107, at 287–89 (explaining that forcing a foreign judgment creditor to relitigate a case that has already been concluded by a foreign court of competent jurisdiction is a waste of both the foreign litigant and the court's resources).

¹⁴⁴ See *supra* note 143.

¹⁴⁵ Homer D. Schaaf, *The Recognition of Judgments from Foreign Countries: A Federal-State Clause for an International Convention*, 3 HARV. J. ON LEGIS. 379, 381–82 (1966) (advancing the belief that the reciprocity rule from *Hilton* was, and continues to be, disfavored because it violates the principles of *res judicata* by forcing parties from certain States to relitigate).

¹⁴⁶ See *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926) (construing the question of recognizing foreign judgments as a matter of private law rather than public international law, an issue of private right rather than public relations in its decision to enforce a French judgment, and in its disregard of the Supreme Court's opinion in *Hilton* that required reciprocity as a condition of recognition and enforcement in the United States).

Convention on Choice of Court Agreements would use the Convention guidelines in determining when to recognize a foreign judgment. This most likely will result in a form of reciprocity that is not as strict as the ALI provision, but nonetheless, provides for some uniformity in the recognition of foreign judgments.

IV. RECOMMENDATIONS

The U.S. Senate should ratify the Hague Convention on Choice of Court Agreements because it will nationalize the standard for recognizing and enforcing foreign judgments within the United States and promote the enforcement of U.S. judgments abroad. However, in legislating a statute to execute the Hague Convention, the U.S. Congress should look to the Uniform Foreign Money-Judgments Act as a model and not the ALI proposed federal statute.

A. National Standard for Recognition and Enforcement

By ratifying the Hague Convention, the U.S. Senate would create a national standard for the enforcement of forum-selection clauses and the recognition of foreign judgments, assuming the President signs the treaty.¹⁴⁷ Implementing a national standard would benefit foreign judgment creditors by reducing their confusion in deciding where to seek enforcement. In fact, a number of courts and commentators have suggested that the recognition and enforcement of foreign judgments in the United States should be a question of federal law because, among other things, using federal law would provide a consistent national standard.¹⁴⁸

¹⁴⁷ See U.S. CONST. art. VI, cl. 2 (declaring that all Treaties made under the Authority of the United States are binding upon every state and judge because they are the supreme law of the land); see also *Ackerman v. Levine*, 788 F.2d 830, 840 (2d Cir. 1986) (explaining that a treaty ratified after enactment of an inconsistent federal statute is controlling in a discussion of the Hague Service Convention). However, the court noted that when the Hague Service Convention is silent on a matter, federal law governs. *Id.*

¹⁴⁸ See John Norton Moore, *Federalism and Foreign Affairs*, 1965 DUKE L. J. 248, 258, 261–75 (arguing that the court in *Johnston* evaded applying the federal common law established in *Hilton* by characterizing the recognition of foreign judgments as a matter of private rights instead of a matter of foreign relations not because the *Johnston* court believed state law should control, but because the *Hilton* rule's use of reciprocity was unpopular despite the fact that the Constitution

B. U.S. Judgments Abroad

Ratifying the Hague Convention would also benefit U.S. litigants seeking the recognition and enforcement of U.S. judgments abroad by establishing an international mechanism for recognition of a particular class of judgments.¹⁴⁹ Instead of forcing U.S. judgment creditors to prove U.S. law in a foreign court, the Hague Convention would ensure that their case is not questioned on the merits or relitigated so long as it falls within the scope of the Convention.

U.S. businesses entering into international business contracts tend to rely on the New York Convention for resolving international disputes.¹⁵⁰ While this method may be effective, the lack of an international convention governing the recognition of foreign judgments hinders the United States' ability to protect businesses incorporated in the United States and discourages the continued flow of foreign direct investment into the United States.¹⁵¹ If U.S. businesses could conclude a choice of court agreement that designated a U.S. court without the fear of having to relitigate in a foreign

“contemplates exclusive federal control over foreign affairs”); Schaaf, *supra* note 145, at 389 (questioning the validity of states' decisions to localize the law on the recognition and enforcement of foreign judgment on the premise that Congress' power to regulate activity of the states includes public international law, but it does not include private international law); *see also* Hunt v. BP Exploration Co., 492 F. Supp. 885, 892 (N.D. Tex. 1980) (admitting that state law controls the recognition of foreign judgments, but questioning the reliance upon unclear state recognition jurisprudence considering that the recognition of foreign judgments is also a matter of U.S. foreign affairs); *Tahan v. Hodgson*, 662 F.2d 862, 868 (D.C. Cir. 1981) (iterating the importance of relying upon comity in recognition actions instead of denying recognition on comity grounds because of the decision's impact upon international relations). *See generally* U.S. CONST. art. I, § 8, cl. 3, 10; art. I, § 10, cl. 1, 3; art. II, §§ 2, 3; art. III, § 2; art. VI, cl. 2 (providing the means as well as the authority of the federal government to control the foreign relations of the United States).

¹⁴⁹ *See* Hague Convention, *supra* note 5, art. 8(1) (“A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognized and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.”).

¹⁵⁰ *See* Park, *supra* note 1, at 4, 29 (claiming that U.S. businesses, at least those run by sophisticated managers rely on arbitration clauses to ensure the enforcement of their successful arbitration awards).

¹⁵¹ *See also supra* Part II.B (reviewing the majority of states' decisions to omit reciprocity as a requirement for recognition in both the Restatement and the Uniform Foreign Money-Judgments Recognition Act).

country, U.S. businesses would almost certainly take advantage of the option.¹⁵²

C. Using the Uniform Act as a Model

The next issue to consider is whether the U.S. Congress should adopt the ALI's proposed federal statute as a means of executing the Hague Convention. The U.S. Congress should not model its implementing legislation on the ALI's proposed federal statute because it resurrects the reciprocity requirement.¹⁵³ The proposed federal statute would leave the United States in the same position as before with the U.S. offering a substantially more liberal approach to enforcing foreign judgments while other nations would deny U.S. judgments because of conflicts in jurisdictional practices and damage awards.¹⁵⁴

Instead of enacting a federal statute modeled on the ALI proposed statute, the U.S. Congress should adapt the Uniform Foreign Money-Judgments Recognition Act to the Hague Convention.¹⁵⁵ After restricting its application to international cases based on exclusive choice of court agreements concluded in civil or commercial matters, the Uniform Foreign Money-Judgments Recognition Act would be well suited to this task since it already has a great deal in common with the other U.S. approaches to the recognition of foreign judgments, and—most importantly—the Hague Convention.¹⁵⁶

Commentators' fears about the lack of reciprocity in the Hague Convention are unfounded. The Hague Convention would guarantee

¹⁵² See Park, *supra* note 1, at 5 (explaining that businesses need certainty to prepare pricing strategies and long-term business plans).

¹⁵³ See *supra* note 75 and accompanying text (establishing that the Foreign Judgments Act would include the recognition of foreign judgments in issues outside the scope of the Hague Convention such as tort claims).

¹⁵⁴ See discussion *supra* Part II.D. and III.C (denouncing the use of the ALI's proposed federal statute as a model for implementing the Hague Convention).

¹⁵⁵ See generally UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 274 (1986) (controlling the recognition and enforcement of foreign judgments in thirty-two of the fifty states).

¹⁵⁶ See discussion *supra* Part III.B.3 (determining that the Uniform Foreign Money-Judgments Recognition act and the Hague Convention address the recognition of foreign judgments in a similar manner after comparing the recognition and enforcement regimes embodied in federal common law, the Restatement, and the Uniform Foreign Money-Judgments Recognition act with the Hague Convention).

reciprocity among States that have already ratified it.¹⁵⁷ This type of "guaranteed" reciprocity as provided for in the Hague Convention would allow for a predictable system of foreign judgment recognition and enforcement in the United States as provided for in the Hague Convention. It will also replace the current system still used by some states, where recognition and enforcement is determined by U.S. foreign relations. Understanding that the Hague Convention began as a much larger project helps put its ratification in the right perspective. The Hague Convention is a stepping-stone on the path that leads to the creation of an international agreement on jurisdiction and the recognition of all foreign judgments.

D. After the Hague Convention

The United States should take advantage of the Hague Convention's success in creating an international consensus by continuing negotiations with other countries, not just members of the Hague Conference. The Hague Convention seems to support such a decision by allowing any other country to accede to its provisions.¹⁵⁸ Allowing other nations to join the Hague Convention without renegotiating will increase its application and usefulness world-wide. If ratifying the Hague Convention means that a U.S. business could enforce the judgment of a court in any member State in another State where the judgment debtor's assets are located, and the number of countries where enforcement is possible enlarges, arguments against ratification seem doomed to fail.

Paragraph four of article twenty-six of the Hague Convention specifically permits member countries to conclude a bilateral treaty affecting the recognition and enforcement of foreign judgments so long as judgments are not recognized to a lesser degree.¹⁵⁹ Bilateral

¹⁵⁷ See generally Hague Convention, *supra* note 5 (creating a binding international treaty among the member States once it is ratified by each in turn).

¹⁵⁸ See Hague Convention, *supra* note 5, art. 27(3) (permitting any country to accede to the Hague Convention, even those not members of the Hague Conference on Private International Law).

¹⁵⁹ See Hague Convention, *supra* note 5, art. 26(4) (embracing the attempts of countries to build on the Hague Convention by explicitly allowing two countries that are already parties to the Convention to negotiate subsequent treaties on the recognition and enforcement of foreign judgments, as long as foreign judgments are not recognized "to a lesser extent than under this Convention").

negotiations with other nations would allow the United States to construct agreements to the needs and goals of both nations instead of trying to carve out small areas of consensus in multilateral negotiations. When taken together, the provision on accession and paragraph four of article twenty-six would allow the United States to enter into bilateral agreements on the recognition of foreign judgments beyond the scope of the Hague Convention with, possibly, every country.

V. CONCLUSION

Conclusion of the Hague Convention earlier this year marked the success of the United States in negotiating a multilateral treaty on limited jurisdiction and the recognition of foreign judgments. In many respects, the current U.S. approach to recognizing foreign judgments is similar to the approach taken by the Hague Convention. The ratification of the Hague Convention would serve the interests of the United States by creating a uniform system that courts can use to determine when to recognize foreign judgments. Ratifying the Hague Convention would also protect the interests of U.S. businesses abroad as they attempt to enforce judgments in foreign jurisdictions. Without question, the Hague Convention would be a significant step forward for the United States.

