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BANK FRAUDS AND TRACKING THE HIDDEN ASSETS

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INTRODUCTION

Each year banks are the targets of insider and outsider fraudulent activity. Borrowers overstate their assets and holdings in order to obtain loans for which they would never otherwise qualify.[1] Employees embezzle, steal, or conspire with crooked clients for a kickback, and billions are lost.[2] Law enforcement agencies around the world are reporting increased instances of corporate, mortgage, and bank fraud. For example, the United States Federal Bureau of Investigations ("FBI") in its FY2007 Financial Crimes Report states that its corporate fraud cases doubled from five years earlier.[3] Through FY2007, U.S. Grand Juries returned 183 indictments resulting in 173 convictions.[4] Securities and commodities fraud cases increased from 937 cases in 2002 to 1,217 in 2007.[5] With the increased attention, mortgage fraud is getting in the wake of the mortgage default crisis, the FBI in FY2008 had 1,204 cases under investigation, got 321 indictments, and 260 convictions.[6] The number of mortgage fraud investigations has tripled over the last five-year period.[7] In FY2007, the FBI's health care fraud cases alone produced $1.12 billion in restitution orders.[8] Corporate fraud alone in the United States amounts to over $1 billion per year.[9]

Denying the criminal the fruits of his unlawful enterprise is one of law enforcement's main deterrents. To accomplish this, financial institutions, regulators, and law enforcement must be able to follow and find the ill-gotten assets and get them back, which is not an easy task. Even when assets are found, stumbling blocks often keep private parties from seizing them.

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1. *See generally* Bank Fraud Act, 18 U.S.C. § 1344 (2000) (enacted in response to fraud committed on financial institutions by borrowers who misstate information in order to obtain loans).

2. J. Alex Heroy, *Other People's Money: How a Time-Gap in Credit Reporting May Lead to Fraud*, 12 N.C. BANKING INST. 321, 322 (2008). Mortgage fraud alone in 2006 has been estimated to cost $4.2 billion, and the numbers are rising each year. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Financial Crimes 2008*, FBI, https://www.fbi.gov/stats-services/publications/fcs_report2008 (last visited Sep. 21, 2017).

7. *Id.*

8. *Financial Crimes Report 2007*, FBI, https://www.fbi.gov/stats-services/publications/fcs_report2007 (last visited Sep. 21, 2017).

9. *Id.* This estimate is separate and in addition to mortgage fraud, health care fraud and securities fraud. *Id.*

I. BANK FRAUD LAWS IN THE UNITED STATES AND BEYOND

The primary law regulating bank fraud in the U.S. is the Bank Fraud Statute.[10] Four other U.S. laws dealing with bank fraud are the Racketeer Influenced and Corrupt Organization Act, the Foreign Corrupt Practices Act ("FCPA"), the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA")[11] and the Bank Secrecy Act ("BSA").

The Bank Fraud Statute ("BFS") criminalized a variety of schemes intended to defraud federally insured financial institutions.[12] The BFS covers numerous offenses against banks and lending institutions including check-kiting, check forging, false statements, non-disclosures and misrepresentations on loan applications, stolen checks, unauthorized use of ATMs, credit card fraud, student loan fraud, false transactions between offshore "shell" banks and domestic banks, submission of fraudulent credit card receipts, and false statements intended to induce check cashing.[13] Yet, the BFS is not without its limitations as it does not cover money laundering, bribery of bank officials, and fraud committed by financial institutions to its customers.[14] Convictions under the BFS carry a fine of up to one million dollars and a maximum term of imprisonment of thirty years.[15]

In 1970, the U.S. Congress enacted the Bank Secrecy Act ("BSA").[16] The BSA requires financial institutions to maintain reports or records useful in criminal, tax or regulatory investigations or proceedings, in the conduct of intelligence or counterintelligence operations, and regarding international terrorism.[17] The BSA was enacted out of concern for the increase in the use of financial institutions to launder income used to finance criminal and terrorist activities.[18] Like the International Money Laundering Abatement and Financial

10. 18 U.S.C. § 1344 (2000).

11. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989).

12. Adam Fischer & James Sheppard, *Financial Institutions Fraud*, 45 AM. CRIM. L. REV. 531, 533 (2008).

13. *Id.*

14. *Id.*

15. *Id.*

16. 31 U.S.C. §§ 5311-5314, 5316-5326, 5328-5330. The Currency and Foreign Transactions Reporting Act is the formal name of what is now commonly known as the Bank Secrecy Act. *Id.*

17. 31 U.S.C. § 5311.

18. Fischer & Sheppard, *supra* note 12, at 558.

Anti-Terrorism Act,[19] the BSA ensures that the financial services industry reports potential money laundering transactions.[20]

In 1970, Congress also passed the Racketeer Influenced and Corrupt Organization Act ("RICO").[21] Cases arising under RICO involve, but are not limited to, mail fraud, wire fraud, bank fraud, and money laundering.[22] Criminals adjudicated guilty of RICO violations face longer jail sentences than if convicted only of the underlying criminal offense.[23]

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") targets insiders who manage, or attempt to manage, a financial institution in a fraudulent manner,[24] and provides for criminal as well as civil sanctions.[25] Criminal defendants can face fines of up to one million dollars or a prison term of up to five years.[26]

In 1977, Congress enacted the Foreign Corrupt Practices Act ("FCPA").[27] Under that act, publicly traded companies must meet certain accounting practices and impose certain internal controls, the expectation being that more rigorous accounting standards will reduce the fraudulent misrepresentations that lead to bank fraud.[28] The FCPA does not impose liability for commonplace accounting deficiencies such as technical or insignificant accounting errors.[29] Individuals who violate the accounting or internal control provisions can face fines of up to five million dollars or imprisonment for a maximum of twenty

19. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272, Title III. (2001).

20. *Id.* §§ 301-377.

21. 18 U.S.C. §§ 1961-1968 (1970).

22. Peter Johnstone & George Brown, *International Controls of Corruption: Recent Responses From the USA and the UK*, 11 J. FIN. CRIME 217, 220 (2004).

23. *Id.* The criminal offenses that must be first violated in order to trigger a RICO conviction are known as "predicate offenses" or "racketeering activities." A list of (replace said with "these" or "the aforementioned") offenses is contained in 18 U.S.C. § 1961(1).

24. 12 U.S.C. § 1818 (West 2017).

25. This duality of sanctions has raised concerns about double jeopardy. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.").

26. 12 U.S.C. § 1818(j).

27. Foreign Corrupt Practices Act of 1977, Pub. L. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1, 78dd-2, 78dd-3, 78ff (2000)), *amended by* Foreign Corrupt Practices Act Amendment of 1988, Pub. L. 100-418, 102 Stat. 1107, 1415 (1988) (codified at 15 U.S.C. §§ 78dd-1-78dd-3, 78ff (2000)), and the International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366, 112 Stat. 3302 (1998) (codified at 15 U.S.C. §§ 78dd-1-78dd-3, 78ff).

28. *Id.*

29. 15 U.S.C. § 78m(b)(4).

years.[30] The maximum penalty for corporations is twenty-five million dollars.[31]

To promote financial stability and reduce financial crime, countries across the world have shown a willingness to enact financial regulations. Increased globalization[32] in the late 1990s fostered increased transnational expansion and deregulation of financial markets.[33] As countries moved toward removing restrictions on capital transactions and banks assumed a more international dimension, the potential for international financial crises caused by the destabilizing effect of criminal activity and the movement of illicit proceeds has increased.[34] In 1997, the Asian banking turmoil was attributable in part to a weak banking system and endemic bank fraud.[35] If the honest goal is preventing international financial crimes, then financial institutions, law enforcement, and regulators must exponentially increase cooperation among them.[36]

In addition to expanding financial markets, globalization and deregulation have also created a need for banks to adopt international standards in addition to following domestic regulations.[37] Interna-

30. 15 U.S.C. § 78ff(a).

31. *Id.*

32. *See* Dani Rodrik, *Sense and Nonsense in the Globalization Debate*, FOREIGN POL'Y, Summer 1997, at 19, 22; George Soros, *Toward a Global Open Society*, ATLANTIC MONTHLY, Jan. 1998, at 20, https://www.theatlantic.com/past/docs/issues/98jan/opensoc.htm; Peter F. Drucker, *The Global Economy and the Nation-State*, FOREIGN AFFAIRS, Oct. 1997, at 159; Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L. J. 429, 433-39 (1997) (expressing the idea that globalization is moving into many kinds of industries and service areas).

33. The liberalization of international trade and the development of technology furthers the globalization of financial markets. The globalization of financial markets shapes deregulation, promotes the removal of barriers, and enhances the flow of capital. *See* A. T. Aburachis, *International Financial Markets Integration: An Overview*, INTERNATIONAL FINANCIAL MARKET INTEGRATION 26, 37 (Stanley R. Stansell ed. 1993).

34. *See* Stephen L. Harris & Charles A. Pigott, *Regulatory Reform in the Financial Services Industry: Where Have We Been? Where Are We Going?*, 67 OECD FIN. MKT. TRENDS 31, 41 (1997), http://www.keepeek.com/Digital-Asset-Management/oecd/finance-and-investment/financial-market-trends/volume-1997/issue-2_fmt-v1997-2-en (analyzing the global liberalization of financial services).

35. *See And South-East Asia Thinks It's All Over*, ECONOMIST, Nov. 8, 1997, at 41 (indicating that one cause of Asia's financial crisis is the lack of an effective banking supervision system rather than an unstable economic system).

36. *See Survey of Banking in Emerging Markets*, ECONOMIST, Apr. 12, 1997, at 17 (emphasizing the potential establishment of a financial cross-border patrol, similar to global policing).

37. *See* Andrew Crockett, *Global Capital Markets and the Stability of Banking and Financial Systems, in* BANKING SOUNDNESS AND MONETARY POLICY, ISSUES AND EXPERIENCES IN THE GLOBAL ECONOMY 89, 91 (Charles Enoch & John H. Green eds., 1997).

tional financial meltdowns and collapses[38] have underscored the importance of coordination and communication of information for financial institutions and regulatory and enforcement authorities.[39] The challenge is to devise global banking standards that promote accountability, international financial integration, transparency, and security while respecting privacy in *bona fide* transactions and political and territorial boundaries.[40] From this focus on international rather than domestic regulations, international financial standards (commonly known as "soft law") have arisen.[41] In this case, soft law allows banks

38. *See* Michael P. Malloy, *Financial Institutions and Regulations, The S & L Crisis: Death and Transfiguration: Foreword: . . . and Backward: Death and Transfiguration among the Savings Associations,* 59 FORDHAM L. REV. 1 (1991) (banking regulators realized the importance of banking supervision through a series of international banking scandals, which started with the American $50 billion savings and loan disaster in the late 1980s); Colin P.A. Jones, *Japanese Banking Reform: A Legal Analysis of Recent Developments,* 3 DUKE J. COMP. & INT'L L. 387, 430 (1993) (Japan's bad-debt mountain). *See generally* ETHAN B. KAPSTEIN, GOVERNING THE GLOBAL ECONOMY: INTERNATIONAL FINANCE AND THE STATE 155–76 (1994) (renowned financial banking collapses have included Luxembourg's Bank of Credit and Commerce International in 1990); Symposium, *The Transformation of French Corporate Governance and United States Institutional Investors,* 21 BROOK. J. INT'L L. 1 (1995) (discussing France's Credit Lyonnais' $4 billion loan loss); Andrea M. Corcoran, *Markets Self-Assessment and Improvement of Default Strategies after the Collapse of Barings,* 2 STAN. J. L BUS. & FIN. 265, 265-271 (1996) (discussing British Barings' ill-advised derivatives deals); Cynthia C. Lichtenstein, *The Mexican Crisis: Who Should be a Country's Lender of Last Resort?,* 18 FORDHAM INT'L L. J. 1769 (1995) (discussing the Mexican crisis in 1995).

39. *See* RICHARD DALE, INTERNATIONAL BANKING DEREGULATION: THE GREAT BANKING EXPERIMENT 15 (1992).

40. The World Trade Organization's ("WTO") negotiations on financial services concluded successfully on December 12, 1997 after 70 WTO Members reached a multilateral agreement to open their financial services sectors. The landmark agreement brings trade in this sector—worth trillions of dollars-under the WTO's multilateral rules on a permanent and full most-favored nation basis. The agreement covers more than 95 percent of trade in banking, insurance, securities and financial information. The results of the latest round of talks are part of a protocol which will be open for governments to accept until January 29, 1999. *See* WORLD TRADE ORG., WTO ACHIEVED LANDMARK AGREEMENT ON FINANCIAL SERVICES 1-2 (1997), https://www.wto.org/english/res_e/focus_e/focus25_e.pdf.

41. Soft law refers to a set of legal terms or informal duties adopted under formal or informal treaties or multilateral agreements. The emergence of soft law results from the inadequacy of hard law, which cannot overcome deadlocks in international relations that result from economic or political differences. A soft law's guidelines will presume consent to basic principles of law or convention, especially in rapidly developing fields such as international financial regulation or free trade. Based on these characteristics, a soft law is defined as an international rule created by a group of specific national authorities and adopted into their nations' laws or administrative codes. Notably, once a country implements a soft law's principles, the soft law often attains legally binding force and becomes hard law within that country. As an example, a soft law may be used to allow banks from different countries with different domestic banking regulations to work together under one set of international banking standards. Due to the nature of a soft law, the banks of two different nations may do business with one another without one insisting that the other follow an unfamiliar foreign law. Because of this advantage, international banking regulators recognize the benefit

from different countries with different domestic banking regulations to work together under one set of international banking standards. Banks of different nations may now do business with one another without insisting the other follow unfamiliar foreign law. This advantage has accelerated the acceptance of soft law in establishing a global banking supervisory regime.

The main promoter of soft law has been the Basel Committee on Banking Supervision ("Basel Committee") formed in 1974.[42] The Basel Committee did not draw international attention until the early 1980s.[43] Its charter was designed to achieve an international agreement on the proper standards for banking supervision.[44]

The Basel Committee's recommendations became known as the Basel Accords. These are recommendations on how to properly supervise financial transactions. As soft law, they lack the binding force of

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of soft law in establishing a global banking supervisory regime. The term hard law defines a signed treaty or agreement which is precisely worded and specifies the exact obligations undertaken or the rights granted. *See* C.M. Chinkin, Abstract, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 851 (1989).

42. The Basel Committee on Banking Supervision ("Basel Committee") was established at the end of 1974 at the Bank for International Settlements at Basel, Switzerland. The Basel Committee is endorsed by the Central Bank Governors of the Group of Ten (now eleven countries) comprised of Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom, the United States, and Switzerland plus Luxembourg. The goal of the Basel Committee is to achieve an international agreement on standards of good practice and collaboration in international banking supervision. Additionally, the Basel Committee has created a body of recommended banking supervisory standards, known as the Basel Accords ("Basel Accords"). However, since the Basel Accords lack legal validity or binding force, the effective enforcement of the Basel Accords depends on each authority's enforcement. *See* ETHAN B. KAPSTEIN, SUPERVISING INTERNATIONAL BANKS: ORIGINS AND IMPLICATIONS OF BASLE ACCORD 185 (1991).

43. While the media often identifies the countries participating in the Basel meetings as the G-10, eleven countries were actually present: Belgium, Canada, France, Italy, Japan, Luxembourg, The Netherlands, Sweden, United Kingdom, United States, and West Germany. The Basel Committee was established at the end of 1974 at the Bank for International Settlements at Basel, Switzerland. The Basel Committee is endorsed by the Central Bank Governors of the Group of Ten (now eleven countries) comprised of Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom, the United States, and Switzerland plus Luxembourg. The goal of the Basel Committee is to achieve international agreement on standards of good practice and collaboration in international banking supervision. Additionally, the Basel Committee has created a body of recommended banking supervisory standards, known as the Basel Accords. However, since the Basel Accords lack legal validity or binding force, the effective enforcement of the Basel Accords depends on each authority's enforcement. *See id.*

44. Lawrence Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 Va. J. INT'L L. 1, 5 (1998). The Basel Committee is endorsed by the Central Bank Governors of the Group of Ten which is comprised of Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, Switzerland, the United Kingdom, and the United States, plus the countries of Luxembourg and Spain. *Id.*

hard law.[45] The Basel Committee also worked to raise the level of awareness of the interdependence among financial institutions and financial supervisors. This mutual dependency has developed close personal contacts and has greatly helped the handling and resolution of problems affecting particular financial institutions. In part because of this success, the Basel Accords have become widely accepted in the international financial arena.

Included in the Basel Accords are recommendations designed to improve banks' "early-warning" systems to discover the potential risks of a system-wide financial crisis. Such systems include monitoring of capital adequacy, currency movement and consolidation, internal risk management supervision, information exchange by bankers and regulators alike, and international financial regulations. The Basel Accords also promote competitive equality among banking institutions from different nations by systematizing capital requirement analysis.[46] The Basel Accords recommend stringent supervisory measures for financial institutions. They attempt to reduce the risk of banking failures and to minimize competitive inequality among the different nations' banking regulations.[47]

The Basel Accords have become the standard for trans-national financial services regulations throughout the industrialized world, and often play a vital role in the enactment of national legislation.[48] Recent revisions of the Basel Accords prod financial institutions to have robust risk management programs to reduce the risk of internal and external fraudulent behavior.[49] Not only have the Basel Accords have been adopted in the European Union ("EU") and the United States, but also in over a hundred other countries including India, Thailand, Hong Kong, Australia, Ireland, and New Zealand.[50]

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45. Lee, *supra* note 44, at 7.

46. *See* JOHN H. FRIEDLAND, THE LAW AND STRUCTURE OF THE INTERNATIONAL FINANCIAL SYSTEM 187, 189-90 (1994) (describing that the Basel Committee strengthened banking supervision and created competitiveness for international banking operations through various compliance methods).

47. *See* W. Peter Cooke, *Supervising Multinational Banking Organizations: Evolving Techniques for Cooperation Among Supervisory Authorities*, 3 J. COMP. CORP. L. & SEC. REG. 244, 246 (1981) (summarizing the Basel Concordat).

48. *Id.* at 6.

49. *See* Tarisa Watanagase, Governor, Bank of Thailand, Mitigating Fraud in Financial Institutions 1-2 (Apr. 29, 2008) (transcript available at http://www.bis.org/review/r080429d.pdf).

50. Lee, *supra* note 44, at 28. *See* Daniel E. Ho, Abstract, *Compliance and International Soft Law: Why do Countries Implement the Basle Accord?*, 5 J. OF INT'L ECON. L. 647 (2002).

Due to the accelerated trend toward globalization of banking activities, the Basel Committee, in addition to the Accords, developed guidelines for banks operating in foreign countries. These focus on the respective roles of the home and host country in ensuring adequate financial supervision. The guidelines were issued as the Basel Concordat of 1975 (the "Concordat").[51] It sets five basic principles[52] outlining the responsibilities of home and host countries' regulators in the monitoring of international institutions.[53] The Concordat recommends that the home country's supervisory authority be primarily responsible for the solvency of the home country's bank, and leaves the supervision of liquidity to the host authorities.[54] Because of the need for the exchange of information within the foreign bank and the cooperation between the host and home countries' supervisory authorities,

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51. Cooke, *supra* note 47, at 246.

52. The Basel Concordat of 1975 provided five basic principles to banking regulators for international banking supervision. They are as follows:
(1) The supervision of foreign banking establishments should be the joint responsibility of host and parent authorities;
(2) No foreign banking establishment should escape supervision, each country should ensure that foreign banking establishments are supervised, and supervision should be adequate as judged by both host and parent authorities;
(3) The supervision of liquidity should be the primary responsibility of host authorities since foreign establishments generally have to conform to local practices for their liquidity management and must comply with local regulations;
(4) The supervision of solvency of foreign branches should be essentially a matter for the parent authority. In the case of subsidiaries, while primary responsibility lies with the host authority, parent authorities should take account of the exposure of their domestic banks' moral commitment in this regard; and
(5) Practical cooperation would be facilitated by transfers of information between host and parent authorities and by the granting of permission for inspections by or on behalf of parent authorities on the territory of the host authority. Every effort should be made to remove any legal restraints (particularly in the field of professional secrecy or national sovereignty) which might hinder these forms of cooperation. *Id.*

53. The Basel Concordat was a set of guidelines on bank supervision reached by consensus among banking regulators from many nations. The Basel Committee entitled the document a "concordat" to indicate that the agreement did not have the legal force of a treaty. *See* COMMITTEE ON BANKING REGULATIONS AND SUPERVISORY PRACTICES, BS/75/44e, REPORT TO THE GOVERNORS ON THE SUPERVISION OF BANKS' FOREIGN ESTABLISHMENTS (1975) (the original Basel Concordat was not released to the public until March 1981). *See* R. C. WILLIAM & G. G. JOHNSON, INTERNATIONAL CAPITAL MARKETS: RECENT DEVELOPMENTS AND SHORT-TERM PROSPECTS 29-32 (1981) (reproducing the original Basel Concordat, which was released to the public in March 1981, as an Annex (Supervision of Banks' Foreign Establishments)), *reprinted in* Revised Basel Concordat, *Principles for the Supervision of Banks' Foreign Establishments*, 22 I.L.M. 900, 900-908 (1983) [hereinafter *The Committee Report*] (The Revised Concordat of 1983 was circulated in April 1990, as well as in July 1992).

54. The Concordat takes this approach because foreign financial institutions generally have to conform to and comply with local regulations and practices for their liquidity management. *See* Autar Krishen Koul & Mihir Chatterjee, *International Financial Institutions and Indian Banking: A Legal Profile*, 2 INDIA INT'L L. 207, 209 (2008).

the fifth principle of the Concordat recommends abolishing the restraints on the transfer of information.

The Committee recognized the need to develop more specific supervisory standards.[55] As a result, the Committee in 1983 enacted the Basel Concordat on Principles for the Supervision of Banks' Foreign Establishments (the "Revised Concordat").[56] The Revised Concordat established more detailed principles for the allocation of bank regulatory responsibilities between home and host authorities.[57] In an effort to ensure that no bank operating in a foreign country would escape adequate supervision, the Revised Concordat developed the concepts of "consolidated supervision",[58] and "dual key" supervision.[59]

Consolidated supervision expands the home country's regulatory authority responsibilities. The home country's regulators are required to monitor the total risk exposure and capital adequacy of the home country's bank by reviewing the bank's total operations. Where a home country has inadequate supervision, the Revised Concordat proposes two options: the host country can deny entry approval, or the host country can impose specific conditions governing the conduct of the foreign bank's business.[60] "When a host country does not have adequate supervision, the Revised Concordat urges the home country's regulatory authorities to discourage the home country's bank from expanding operations into the host country."[61] The rationale behind the dual key approach is to prevent countries from lowering supervisory practices in order to attract foreign investment and capital.[62]

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55. The Committee recognized this need after the financial crisis that arose from the sovereign debt crisis that occurred in Latin America and the financial scandal which involved Banco Ambrosiano. Kern Alexander, *The Basel Committee and Global Governance*, CAMBRIDGE ENDOWMENT FOR RES. IN FIN. 8 (Apr. 11, 2003), https://www.g24.org/wp-content/uploads/2016/01/THE-BASEL-COMMITTEE-AND-GLOBAL-GOVERNANCE.pdf.

56. *See id.*

57. *Id.*

58. "Consolidated supervision" means monitoring the risk exposure (including the concentrations of risk, the quality of assets, and the capital adequacy) of the banking groups for which the home authority bears responsibility, on the basis of the totality of the business, wherever conducted. *See The Committee Report*, *supra* note 53, at 905.

59. "Dual key supervision" means that the regulatory authority of each nation concurrently assesses the other's ability to supervise and carry out its respective responsibilities. Alexander, *supra* note 55.

60. According to the Revised Concordat, the primary purpose of the Basel Committee is to examine the totality of each bank's worldwide business on the basis of consolidated supervision. *See The Committee Report*, *supra* note 53.

61. Alexander, *supra* note 55, at 8-9.

62. *See id.* at 9.

II. A DIFFERENT APPROACH

The U.S. Federal government's ability to undertake or assume responsibility over an expanding catalog of criminalized conduct is questionable. There are reports stating that the Congressional Research Service cannot account for the current number of federal crimes.[63] The American Bar Association reported in 1998 that there were in excess of 3,300 separate criminal offenses.[64] More than forty percent of these laws have been enacted in just the past thirty years as part of the growth of the regulatory state.[65] And these laws are scattered in over fifty titles of the United States Code, encompassing roughly 27,000 pages.[66] Worse yet, the statutory code sections often incorporate, by reference, the provisions and sanctions of administrative regulations promulgated by various regulatory agencies. Estimates of how many such regulations exist are even less well settled, but the A.B.A. thinks there are nearly 10,000.[67] The appetite for more federal criminal laws is driven principally by political consideration,[68] and not by any consideration of whether particular laws are intrinsically federal in nature.[69] The growth of public welfare offenses will, therefore, be restrained only by a public or court system educated as to the need for restraint. Nor is the growth in the number of federal criminal statutes merely an academic question, without real world effects. To the contrary, between March 2001 and March 2002, federal prosecutors commenced 62,157 cases, involving 83,809 individual de-

63. *Before the U.S. H.R. Comm. on Educ. & the Workforce Subcomm. on Emp'r-Emp. Relations Regarding Union Reporting and Disclosure: Legislative Reform Proposals – Consideration of H.R. 4054 and H.R. 4055* (2002) http://archives.republicans.edlabor.house.gov/archive/hearings/107th/eer/lmrdatwo62702/rosenzweig.htm.

64. J. A. Strazzella, *Federalization of Criminal Law*, AM. BAR ASS'N 91 app. C (1998), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf; *see also* Symposium, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 46, 53 (1998) [hereinafter *Federal Criminal Code*].

65. STRAZZELLA, *supra* note 64, at 7-9.

66. *Federal Criminal Code*, *supra* note 64, at 53.

67. STRAZZELLA, *supra* note 64, at 10.

68. JAMES D. CALDER, THE ORIGIN AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY, 20-24, 198-203 (1983) (describing events leading to enactment of criminal laws in the 1920s and early 1930s); *See* Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 30 (1996) (recounting events leading to passage of federal carjacking legislation).

69. *See* Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 20-21 (1996).

fendants.[70] More than 3,100 of these defendants were charged with crimes categorized as violations of "federal statutes" - a category broadly congruent with charges reflecting violations of a regulatory program.[71] This number exceeds the number of federal prosecutions during the same year for a host of traditional criminal law offense categories, including murder, robbery, embezzlement, bank fraud, forgery, and sex offenses.[72] Put another way, more federal resources are invested in regulatory prosecutions than in the prosecution of embezzlement charges.[73]

This continued trend of over-criminalization will further siphon off investigatory and prosecutorial resources into nontraditional criminal areas, leaving financial institutions on their own and powerless to deal with fraud. Rather than trying to solve the bank fraud problem by relying on the government's resources, financial institutions should request authorization to exercise some of the government's investigatory powers. Judicious use of these powers will allow financial institutions to make an informed decision of whether civil legal action is warranted or financially justified.

Once a financial institution determines that legal action is warranted and is financially justified, it proceeds to litigation under a statute similar to Florida's Civil Remedies for Criminal Practices Act ("Act").[74] Under the Act, any financial institution that proves by clear and convincing evidence that it has been injured in any fashion by the commission of two or more connected predicate offenses or by a theft may recover threefold the actual damages sustained.[75] It may also recover reasonable attorney's fees and court costs in the trial and appellate courts.[76] In awarding attorney's fees and costs under the Act, the courts cannot consider the ability of the defendant to pay such fees and costs.[77]

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70. *Table D-2–U.S. District Courts - Criminal Federal Judicial Caseload Statistics*, U.S. CTS. (Mar. 31, 2002), http://www.uscourts.gov/statistics/table/d-2/federal-judicial-caseload-statistics/2002/03/31.

71. *Id.* at Table D-3.

72. *Id.*

73. All categories pale, however, in comparison to the principal area of federal effort—the prosecution of drug offenses, which resulted in more than 32,000 individuals being charged. *Id.*

74. *See* FLA. STAT. §§ 772.101 - 772.19 (2008).

75. FLA. STAT. § 772.11(1).

76. *Id.*

77. Because of the initial "probable cause" determination by an independent and impartial judge or magistrate, the notice requirement of the Act should be rescinded.

III. PRE-FILING TRACKING OF ASSETS

Once a debtor has absconded with funds, the creditor will seek repayment of the fraudulent loan. Locating assets of debtors is often one of the most difficult areas of asset recovery. Asset transfers have become common.[78]

Creditors will certainly want to know whether sufficient assets exist prior to spending the money necessary to bring an action against a debtor. Sometimes, the level of "indebtedness does not warrant the expenditure of legal and accounting fees to pursue the matter aggressively."[79] It would not make sense to spend substantial sums of money if there are minimal chances of recovery. Therefore, determining whether sufficient assets exist to cover the loss and costs of obtaining a judgment and making a recovery is an essential question that must be addressed prior to filing suit.[80]

With the ubiquitous personal computer and internet access, it is possible to search hundreds of public records databases across the world.[81] Fraudulently obtained funds are often used to purchase property in the debtor's name, in the spouse's name, or in the names of friends or relatives.[82] Many times, titles to real and personal property must be recorded and may be located in public records' databases.[83] Another starting point are the statements and records submitted along with a loan application.[84] Debtor-submitted bank statements may reveal other accounts or movement of funds offshore.[85] Cancelled checks can also lead to hidden assets by showing where funds are being directed.[86] Debtors may attempt to conceal assets by purchasing insurance policies, annuities or bearer instruments, or may place the funds in another financial institution's safe deposit box.[87]

Regardless of the above-mentioned alternate discovery avenues, financial institutions will need enabling legislation in order to do effec-

78. Richard P. Finkel & Dominic Fulco, III, *Financial Statements, The Revealing Story on Hidden Assets*, 13-10 AM. BANKR. INST. J. 15 (1994).
79. *Id.* at 21.
80. *See Id.* at 15.
81. *Id.*
82. *Id.*
83. *Id.*
84. *See* Finkel & Fulco, *supra* note 78.
85. *Id.*
86. *Id.*
87. *Id.*

tive pre-filing discovery.[88] Pre-filing discovery is not novel or revolutionary. The government, in exercising its investigatory powers, has the authority to engage in extensive pre-filing or pre-charging discovery by providing incentives for information and through the use of "probable cause" search warrants, grand jury subpoenas, and/or administrative subpoenas.[89] A financial institution that finds itself a victim of fraud could be permitted to obtain "disclosure orders" after establishing probable cause to an independent and impartial judge or magistrate. These disclosure orders would be the creature of statute, and by statutory fiat would fall under the same body of law that govern "probable cause" search warrants. Judicial oversight should prevent or minimize abuse, while allowing financial institutions to decide whether further civil legal action is warranted or financially justified.

IV. Post-Filing of Assets

A number of agreements allow residents of one country to obtain information on residents of another country post-filing for use in litigation or arbitration. Some of these agreements are covered below as a non-exhaustive list.

A. The Hague Convention

Established in 1970, the Hague Convention ("Convention") provides for a system that facilitates the transmission of requests for taking evidence via central authorities designated by each party to the

88. Because it is often overly burdensome to collect information at the outset of the loan process, financial institutions should consider obtaining a general authorization (granted for consideration) to review financial records pre-and post-loan. Said authorization should be drafted to allow the creditor to obtain information from other financial institutions, businesses and individuals. The creditor will find that without an authorization it is difficult if not impossible to obtain debtor-related financial information from third parties. Even with a debtor's authorization, there may still be limitations on obtaining the information needed. Absent a court order, privacy concerns prohibit third parties from conducting pre-or post-loan discovery about a debtor and its assets. *See, e.g.*, The Right to Financial Privacy Act, 15 U.S.C. § 6801(a) (2000); Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

89. An important tool in the government's investigatory arsenal is the ability to pay or provide consideration in exchange for information. There is no logical reason why defrauded financial institutions, after a determination of probable cause, should be prohibited from paying or providing consideration in exchange for information. Just like in the criminal arena, the ability to pay for information in the civil arena will promote a fraud-free financial environment by driving fraudsters and tricksters out of the market place.

convention.[90] An important limitation to the availability of the Convention is Article 23, which states that a contracting state may declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents.[91] Accordingly, obtaining evidence in many countries may only be permitted once litigation has started. This limitation defeats the Convention's utility to determine the feasibility of post-litigation recovery.

Requests for taking evidence under the Convention are forwarded by the central authority in the requestor's country to the central authority of the country where the evidence is to be taken.[92] The receiving central authority will then transmit the request to the appropriate judicial body to execute the request.[93] Although forty-four countries are parties to the Convention,[94] those signatory countries, part of the EU, have agreed among them to be bound by a different agreement.[95]

A letter of request, unless otherwise agreed to by the originating and executing states, must specify:

1. The authority requesting its execution and the authority requested to execute it (if known);
2. The names and addresses of the parties to the proceeding and their representatives, if any;
3. The nature of the proceedings for which the evidence is required; and
4. The evidence to be obtained or other judicial act to be performed.

Where appropriate, the letter must also specify:

1. The names and addresses of person to be examined;
2. The questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

90. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters art. 23, July 27, 1970, 23 U.S.T. 2555.

91. *Id.* at art. 23.

92. *Id.* at art. 1.

93. *Id.* at art. 2.

94. The contracting parties to the Convention included Argentina, Australia, Barbados, Belarus, Bulgaria, China, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Israel, Italy, Kuwait, Latvia, Lithuania, Luxembourg, Mexico, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Seychelles, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States and Venezuela.

95. This EU agreement will be discussed later. See *Infra*, pg. 18.

3. The documents or other property, real or personal, to be inspected;
4. Any requirement that the evidence is to be given under oath or affirmation and any special form to be used; and
5. Any particularly special method or procedure to be followed.[96]

The letter of request must be written in or translated into either

1. the language of the executing authority,
2. English, or
3. French.[97]

A state is permitted to require that a letter be in a specified language, and may refuse a letter written in another language.[98] A state that receives a request that is not in the appropriate language may have the letter translated and charge the costs thereof to the originating state.[99] With the exception of fees paid to experts and interpreters, the actual execution of the letter will not give rise to any reimbursement of costs.[100]

Furthermore, if the executing authority does not feel that the letter complies with the requirements of Article 3, it must promptly inform the originating authority of its objections.[101] Execution of a letter of request may be refused only to the extent that the letter does not fall within the jurisdiction of the judiciary, or when the executing state believes that its sovereignty or security would be prejudiced.[102] If the letter of request is transmitted by the executing authority to a party incompetent to execute it (*i.e.*, a court not having jurisdiction over the person to be examined), the letter must be sent to a party that is competent to do so.[103] If the letter of request is not executed in whole or in part, the requesting authority will be informed immediately and advised of the reasons for non-execution.[104]

Members of the original state's judiciary and the parties to the proceedings may be informed as to the time, date, and location of the examination and may be permitted to attend the taking of evidence if

96. 23 U.S.T. 2555 art. 3.
97. *Id.* at art. 4.
98. *See* 23 U.S.T. 2555 art. 4. This includes English and French, even though the use of them is permitted by the Convention. *Id.*
99. *Id.*
100. *Id.* at art. 14.
101. *Id.* at art. 5.
102. *Id.* at art 12.
103. *See* 23 U.S.T. 2555 art. 6.
104. *Id.* at art. 13.

the law of the executing state permits.[105] The party executing the request should apply its own laws as to the methods and procedures, including the appropriate methods of compulsion. The executing party should, however, follow any requests by the originating authority regarding methods and procedures so long as they are consistent with local laws.[106]

The party requested to provide evidence may refuse to do so insofar as they have a privilege or duty to refuse to give evidence under the laws of the state of execution or under the laws of the state of origin. The privilege or duty must either be specified in the letter of request or confirmed by the requesting authority to the executing authority.[107]

While the Convention theoretically provides an avenue for the discovery of assets in foreign jurisdictions, the effort and cost to serve letters of request from one nation to another are only feasible if a creditor suspects or knows that assets exist in a particular jurisdiction. Use of the Convention is not suited for blanket searches to locate hidden assets.

B. Multilateral and Bilateral Agreements

1. Europe

The EU replaced the Convention with another regulation in 2001 concerning cooperation between the courts of member states in the taking of evidence in civil or commercial matters ("Regulation").[108] The Regulation was meant to simplify the taking of evidence in member states and create a uniform process for the taking of such evidence.[109] The application of the Regulation has improved, simpli-

105. 23 U.S.T. 255 art. 7 and 8.

106. *See* 23 U.S.T. 2555 art. 9-10.

107. *Id.* at art. 11.

108. Council Regulation 1206/2001 of 28 May 2001 On Cooperation Between The Courts Of The Member States In The Taking Of Evidence In Civil Or Commercial Matters, art. 21, 2001 O.J. (L174/1) ("This Regulation shall . . . prevail over . . . the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters . . . .") The Regulation has been accepted by all EU members, with Denmark as the only exception. The members of the European Union are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. There are three candidate countries who would likely be required to abide by the regulation if admitted to the European Union. These countries are Croatia, the Former Yugoslav Republic of Macedonia, and Turkey.

109. *Id.* at § 2.

fied, and accelerated the cooperation between the courts of the various EU countries on the taking of evidence.[110] For example, instead of requiring that documents be sent from one country's central authority to another country's central authority, as required by the Convention, the Regulation allows for the courts in one country to directly request the taking of evidence from a court in a different country.[111] This difference thus simplifies the process of obtaining evidence by making it more efficient and expedient. Also making the process more efficient is Council Decision 2001/470/EC, signed into law the same day as the Regulation. The Council Decision established a European Judicial Network ("Network") to assist in the facilitation of requests between member states.[112] The Network facilitates contacts between the authorities of the member states, organizes regular meetings, and establishes a system of public information on judicial cooperation.

The Regulation can be used to obtain evidence pre- or post-commencement of judicial proceedings.[113] The Regulation also calls for specific forms to be used uniformly throughout the member states.[114] The forms for requesting the taking of evidence require that the request "contain the following details:"

1. the requesting and the requested courts;
2. "the names and addresses of the parties to the proceedings;"
3. the nature of the case and a "brief statement of the facts;"
4. "a description of the taking of evidence to be performed;"
5. if a person is to be the subject of the request, "the name(s) and address(es) of the person(s) to be examined, the questions to be put to the person(s) . . . , a reference to any rights to refuse to testify" (privilege or duty) under the law of the requesting court's country, and any requirement that the testimony "is to be carried out under oath or affirmation", and
6. if the request is for any other form of taking of evidence, "the documents or other objects to be inspected."[115]

110. Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the application of the Council Regulation (EC) 1206/2001 of 28 May 2001.

111. *Id.* at art. 2.

112. *See* Council Decision (EC) No 2001/470 of 28 May 2001 Establishing a European Judicial Network in Civil and Commercial Matters, 2001 O.J. L174/25, 25. The official website for the European Judicial Network is http://ec.europa.eu/civiljustice/index_en.htm. The Network meets at least once every six months.

113. Council Regulation (EC) 1206/2001 of 28 May 2001 at art. 1.

114. *Id.* at art. 4.

115. Council Regulation 1206/2001, *supra* note 108, art. 1 (EC).

Similar to the provisions of the Convention, any requests for the taking of evidence under the Regulation must be made in the language of the requested country.[116] When a request cannot be completed because it does not contain the information requested above, the requested court shall inform the requesting court of the deficiencies within thirty (30) days of receipt of the request.[117] If the request is complete, it should be executed expeditiously and completed no later than ninety (90) days after receipt.[118] If the requested court is unable to execute the request within ninety (90) days of receipt, it must inform the requesting court of its delay.[119]

If the request form contains the required information, a requested court can only refuse to take evidence when: (1) the request does not pertain to a civil or commercial matter; (2) the execution of the request does not "fall within the functions of the judiciary" of the country of the requested court; or (3) the requesting court has not paid the costs of experts or translators within sixty (60) days of the request of payment by the requested court.[120]

The execution of a request to take evidence may not be refused on the ground that the requesting country's court has exclusive jurisdiction over the matter, or that the law of that country would not admit the right of action on it.[121] If refusal of the execution request is warranted, the requested court must notify the requesting court of its refusal within sixty days of receiving the request.[122]

The parties to the proceedings, as well as representatives of the requesting court, have a right to attend the taking of evidence by the requested court.[123] The parties also have a right to conduct the taking of evidence directly, instead of having the evidence gathered by the requested court, so long as the direct taking of evidence is not contrary to the fundamental principles of law in the requested court's country.[124]

2. Central and South America

In January of 1975, a number of Central and South American countries met in Panama to establish the Inter American Convention

116. Council Regulation 1206/2001, *supra* note 108, art. 5.
117. *Id.* art. 8, §1.
118. Council Regulation 1206/2001, *supra* note 108, art. 10 (EC).
119. *Id.* art. 15.
120. *Id.* art. 14, §2.
121. *Id.* art. 14, §3.
122. *Id.* art. 14, §4.
123. *Id.* art. 11, 12.
124. *Id.* art. 17.

on the Taking of Evidence Abroad ("CIDIP I").[125] This convention was eventually signed by eighteen countries.[126] CIDIP I established a framework applicable to letters rogatory for the purpose of taking evidence or obtaining information abroad in civil or commercial matters.[127]

CIDIP I requires that the letters rogatory contain:

1. "[a] clear and precise statement of the purpose of the evidence requested;
2. [c]opies of the documents and decisions that serve as the basis and justification of the letter rogatory . . . [;]
3. such interrogatories and documents as may be needed for its execution; [and
4. the] [n]ames and addresses of the parties to the proceeding, as well as of witnesses, expert witnesses, and other persons involved and all information needed for the taking of the evidence."[128]

The requesting procedure must not be contrary to local public policy.[129] The interested party must remit any financial means necessary to comply with the request to the authority of the requested state. The letters rogatory must be legalized or be transmitted by consular agent, diplomatic agent, or through the designated central authority.[130] Lastly, the letters rogatory must be translated into the language of the requested state, and the request must comply with procedural laws and rules of the requested state.[131]

The responding state may refuse to carry out the letter rogatory if contrary to applicable law,[132] public policy,[133] or if the request is

125. CIDIP is an acronym for the Spanish term *Conferencia Inter-Americana de Derecho Internacional Privado*, which means the Inter-American Conference of Private International Law.

126. Signatories include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela. However, CIDIP I has not been ratified by Bolivia, Brazil, or Nicaragua.

127. Inter-American Convention on the Taking of Evidence Abroad, Jan. 30, 1975, 1438 U.N.T.S. 389, art. 2. Department of International Affairs, *Inter-American convention on convention on letters rogatory*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/CIDIPI_convention_evidenceabroad.htm (last visited Oct. 31, 2017).

128. *Id.* art. 4.

129. *Id.* art. 16.

130. Inter-American Convention on the Taking of Evidence Abroad, *supra* note 127, art. 13. The term legalization refers to the certification as to the authenticity and legitimacy of documents, typically by the affixation of a seal on the letters rogatory by the requesting country.

131. *Id.* art. 10.

132. *Id.* art. 6.

133. *Id.* art. 16.

made for pretrial discovery purposes.[134] The unavailability of pretrial discovery in some countries makes it substantially more difficult to determine whether litigation against an insolvent debtor is financially prudent. Likewise, a person called to give evidence may refuse to do so under an impediment exception or duty to refuse under the law of either country.[135]

Compliance with a letter rogatory under CIDIP I does not imply ultimate recognition of the issuing authority's jurisdiction or a commitment to recognize the validity of the judgment in the relevant matter.[136] Nor does compliance imply enforcement of any award.[137] The execution of a letter rogatory and the execution of a judgment are deemed to be two entirely different matters. Accordingly, even though a letter rogatory may not be recognized, a subsequent judgment may still be enforceable in that jurisdiction. The Convention and the Regulation do not permit the taking of evidence to give rise to any obligations of payment, with the exception of costs to obtain experts or to translate documents.[138] CIDIP I, to the contrary, specifically calls for the costs to be borne by the party requesting the evidence.[139]

In May 1984, thirteen countries adopted the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad (CIDIP III[140] or the "Additional Protocol").[141] The Additional Protocol was designed to strengthen and facilitate international cooperation in judicial procedures as provided for in CIDIP I.[142]

CIDIP III specifies that a letter rogatory must be processed if it meets the following criteria:

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134. Inter-American Convention on the Taking of Evidence Abroad, *supra* note 127, art. 9.

135. *Id.*art.12.

136. *Id.* art. 8.

137. *See id.*

138. Inter-American Convention on the Taking of Evidence Abroad, *supra* note 127, art. 8.

139. *Id.* art. 7.

140. CIDIP II took place in May of 1979. However, CIDIP II involved the validity of foreign judgments. *Private International Law*, DEP'T OF INT'L L., http://www.oas.org/dil/CIDIPII_home.htm.

141. The Additional Protocol was signed by Argentina, Bolivia, Brazil, Chile, Colombia, the Dominican Republic, Ecuador, Mexico, Nicaragua, Paraguay, Peru, Uruguay, and Venezuela. However, only Argentina, Ecuador, Mexico, and Venezuela have ratified and are bound by the Additional Protocol. See Department of International Law, *Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/juridico/english/sigs/b-51.html (last visited Sep. 20, 2017).

142. *See* Inter-American Convention on the Taking of Evidence Abroad, *supra* note 127. Information on the Additional Protocol is available at, Department of International Law, *supra* note 141.

1. "The proceeding(s) have been initiated.
2. The documents are reasonably identified by date, contents, or other appropriate information.
3. The letter rogatory specifies those facts and circumstances causing the requesting party reasonably to believe that the requested documents are or were in the possession, control, or custody of, or are known to the person from whom the documents are requested."[143]

Likewise, the person from whom documents are requested may deny that it has possession, control, or custody of the requested documents, or may object to the production or copying of the documents.[144]

CIDIP I and the Additional Protocol, like the Convention, call for the transmission of documents between countries through designated central authorities which are typically diplomatic governmental offices.[145] The central authority of each country is responsible for receiving letters rogatory from requesting courts and also for delivering letters rogatory to their courts in order to fulfill the requests.[146] Subject to the laws of the country of destination, the parties in the proceedings may attend the execution of the letter rogatory.[147] While there is no cost for the processing of the letters rogatory by the central authorities or by its judicial authorities, the destination central or judicial authority may seek payment for services that are required to be paid directly by the party requesting the evidence in accordance with local law.[148] Furthermore, the destination judicial authority shall honor any requests as to special procedures to be followed unless the procedures are incompatible with the fundamental principles of law or the mandatory rules of the country of destination.[149] The additional requirement that evidence be taken only for proceedings that have been commenced eliminates the allowable pre-filing discovery originally permitted by CIDIP I.[150] This restriction effectively precludes the use of discovery in order to determine the practicality of initiating litigation against the debtor.

143. Department of International Law, *supra* note 141, art. 16.
144. *Id.* art. 16.
145. Department of International Law, *supra* note 141, art. 3.
146. *Id.*
147. *Id.* art. 5.
148. *Id.* art. 6.
149. *See id.* art. 15.
150. *Id.* art. 16.

3. Africa

Judicial cooperation among the region's members is still in its infancy. While there is no treaty among the African nations regarding the taking of evidence in sister states, a number of countries have shown a willingness to work together.

In 1993, the Treaty on Harmonization of Business Law in Africa was signed into law by sixteen countries.[151] The Organization for the Harmonization of Business Law in Africa ("OHADA"),[152] was a direct result of this treaty. OHADA's purpose is to standardize the law as it relates to business transactions in the member countries.[153] The judicial cooperation brought about by uniform application of business law may eventually cross over into other areas of law. The Common Court of Justice and Arbitration, a permanent body of OHADA, rules on matters of treaty and uniform act interpretation and has high court jurisdiction on all business law disputes.[154] OHADA is tasked with creating uniform business laws, directly applicable and enforceable in all OHADA member states, which laws take precedence over domestic law.[155] By enacting regional legislation confirming the supremacy of OHADA in matters of business law, Africa is paving the road for an economic community.

In 1999, a treaty was signed establishing the East African Community ("EAC"). The EAC currently has six members. Their common goal is to enhance cooperation in various areas, including in the judicial arena.[156] Appropriately, the EAC treaty established the East African Court of Justice, a judicial body created to promote a uniform interpretation and compliance with the treaty.[157] Like OHADA, the EAC treaty requires that the judgment of the court take precedence

151. The current members are the countries of Benin, Burkina Faso, Cameroon, the Central African Republic, Comoros, Congo, Cote d'Ivoire, Gabon, Guinea-Bissau, Guinea, Equatorial Guinea, Mali, DR Congo, Niger, Senegal, Chad, and Togo. See OHADA, http://www.ohada.org/index.php/fr/ (last visited Sep. 20, 2017).

152. OHADA is an acronym for the French phrase "Organisation pour l'Harmonisation en Afrique du Droit des Affaires", meaning the Organization for the Harmonization in Africa of Business Law. *Id.*

153. Treaty on Harmonization of Business Law in Africa, art. 1, http://www.ohadalegis.com/anglais/traiteharmonisationgb.htm (last visited Oct. 24, 2017).

154. *Id.* art. 3, art. 14.

155. *Id.* art. 5 & 10.

156. The members of the EAC are currently Kenya, Tanzania, Uganda, Rwanda, South Sudan, and Burundi. See EAST AFRICAN COMMUNITY, https://www.eac.int/eac-organs (last visited Sep. 20, 2017).

157. The Treaty for the Establishment of the East African Community art. 23 & 27, Nov. 30, 1999, 2144 U.N.T.S. 255.

over the rulings of national courts.[158] The EAC treaty calls for the standardization of law in order to create a seamless judiciary between the partner states.[159]

The enactment of community judiciaries for OHADA and the EAC indicates that discovery requests from one party under the respective treaties would be honored in the courts of another member state. Any difficulties in obtaining discovery would be reviewed by the treaty-created high court.

4. Hong Kong and China

In 2006, Hong Kong and China reached an agreement regarding reciprocal enforcement of judgments.[160] However, there is still no agreement in place regarding the taking of evidence between the parties. Nonetheless, Macao and Hong Kong, as a Special Administrative Region of China, are signatories to the Convention.[161] Therefore, the provisions of the Convention may be applicable between the two judicial systems. However, the numerous exclusionary provisions of the Convention could be used as grounds to deny discovery requests between the two states.

C. Safe Havens

Notwithstanding the numerous regional agreements permitting discovery, there remain a number of countries that act as "safe havens" for those assets that debtors wish to put beyond the reach of their creditors.[162] Debtors will often establish offshore asset protection trusts ("OAPT") to shield funds from creditors in these particular countries. Debtors establish these OAPTs because the legal environment favors

158. The Treaty for the Establishment of the East African Community art. 33, Nov. 30, 1999, 2144 U.N.T.S. 255.

159. *Id.* art. 126, § 2(b).

160. *Id.* art. 33.

161. *See, e.g.*, Matthew B. Kutac, *Reallocating the Burden of Persuasion Under the Aérospatiale Approach to Transnational Discovery*, 24 REV. LITIG. 173, 179 n.19 (2005); Randy Wilson & Suyash Agrawal, *Practical Issues When Litigating the Trans-Border Dispute in Texas*, 70 TEX. B. J. 130, 132 n.20 (2007).

162. The "safe haven countries" include the Cayman Islands, the Cook Islands, the Channel Islands, the Bahamas, the Isle of Man, Bermuda, the British Virgin Islands, Turks, Caicos, St. Kitts, Nevis, Lichtenstein, Mauritius, and Barbados. *See* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1037 (2000); Susanna C. Brennan, Comment, *Changes in Climate: The Movement of Asset Protection Trusts from International to Domestic Shores and Its Effect on Creditors' Rights*, 79 OR. L. REV. 755, 766 (2000); David D. Beazer, *The Mystique of "Going Offshore"*, 9 UTAH B. J. 19, 19-20 (1996).

the debtor and makes it relatively easy to shield funds from creditors.[163] The use of an OAPT is not illegal.[164] However, the fraudulent conveyance of assets into an OAPT is illegal in most countries.[165] Before determining whether the conveyance of the assets is legal, the critical issue that must be resolved first is whether the assets have been moved into an OAPT.

The safe haven countries are generally not signatories to any treaties or agreements with regard to the taking of evidence.[166] Their laws often make it a criminal offense to disclose any information regarding the settlors, beneficiaries, trustees, or assets of the trust.[167] Accordingly, banks and individual trustees are reluctant to disclose any information regarding an OAPT. Any requests to a safe haven country's judiciary would likely be found contrary to said country's public policy.[168]

Moreover, the trusts themselves often contain flight clauses and anti-duress clauses which are enforced by the safe haven country's courts.[169] A flight clause calls for the transfer of the assets to another jurisdiction if any event threatens the trust or its assets.[170] Examples of events that could threaten a trust include the commencement of creditors' actions, unfavorable changes in the law of the governing location, or the entry into a treaty with another country that lessens the protection of the OAPT.[171] Once assets are discovered by the creditor, the trustee will move the assets to another jurisdiction and the creditors must start the process of locating the assets all over again.

Anti-duress clauses are often used when the settlor retains management or control over the trust.[172] An anti-duress clause permits the settlor to remove and replace a trustee in the event that the trustee becomes subject to coercive measures designed to force the

163. *See generally* Sterk, *supra* note 162, at 1048. *See also* Stacey Lee, *Piercing Offshore Asset Protection Trusts in The Cayman Islands: The Creditors' View*, 11 TRANSNAT'L L. 463, 480 (1998).

164. Brennan, *supra* note 162, at 765.

165. *Id.*

166. The only exception is that Barbados has agreed to the provisions of the Hague Convention in matters with Singapore and Australia. However, the discovery of information pertaining to offshore asset protections trusts would be contrary to the fundamental principles of law in Barbados and evidence would not be able taken regarding those trusts. *Id.*

167. *See generally* Lee, *supra* note 163, at 495.

168. *See generally id.*

169. *Id.* at 477-79.

170. *Id.*

171. *Id.*

172. *Id.* at 479.

trustee to repatriate the assets to an unfavorable jurisdiction.[173] Accordingly, the creditor may not be able to require the trustee to deliver any information regarding the trust as the trustee would no longer have access to the information.

While there are a number of agreements and treaties between countries allowing for the taking of evidence in other jurisdictions, debtors will often move assets between jurisdictions that do not have evidence agreements in order to make it substantially more difficult to locate the assets. Even between countries that have enacted evidence agreements, many countries require that litigation be commenced before parties can request discovery. Such jurisdictions will not permit discovery merely to determine whether litigation would be cost effective. Creditors would be required to initiate litigation in order to determine whether any assets exist and, if so, where the assets are located. The expense involved in commencing litigation where there is only a suspicion of assets could result in the needless expenditure of funds that could be better utilized elsewhere.

Lastly, even where litigation has commenced and assets are tracked to a particular jurisdiction, various legal systems view the discovery process differently. What would be acceptable in one jurisdiction may be contrary to the public policy or fundamental principles of law in another, thereby eliminating or, at a minimum, reducing the effectiveness of the discovery request. While a court's request for evidence may not be given effect in another jurisdiction, the foreign jurisdiction may still honor an authorization by the debtor to release information to the creditor. However, even this authorization may be deemed contrary to the public policy, and therefore unenforceable.

V. Enforcing Judgments Against Assets Overseas – The Hague Conventions

After a judgment has been entered, the creditor faces the difficult task of enforcing it against the assets of the debtors. A judgment is only enforceable in the jurisdiction in which it is granted unless it is specifically recognized in a foreign jurisdiction.[174] Therefore a number

173. Lee, *supra* note 163, at 479.

174. An exception to this rule are judgments obtained from a United States District Court. These can be enforced by any other United States District Court anywhere in the United States, its territories or possessions, the Commonwealth of the Northern Mariana Islands or the Commonwealth of Puerto Rico. Judgments from the courts of one state in the United States, its territories or possessions, the Commonwealth of the Northern Mariana Islands or the Commonwealth of Puerto Rico can be enforced by the courts of another state of the United States, its territories or possessions, the Commonwealth of the Northern

of treaties and agreements call for the recognition and enforcement of judgments between countries.

In 1971, the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (the "1971 Convention") was concluded.[175] However, it was ratified by only four countries, three of which have since renounced it.[176] Although it never became law, it still gives insight into possible solutions to the problem of enforcing judgments in foreign courts.

In 2005, the international community again tried to find a solution to the problem of enforcing judgments in foreign courts by drafting the Convention on Choice of Court Agreements (the "2005 Convention").[177] Because of the failure of the 1971 Convention to gather signatories, the 2005 Convention limited jurisdictional concerns by applying the provisions of the conventions only to judgments from a court agreed upon by the parties.[178] Thus the 2005 Convention requires contracting states to enforce only the judgments of an agreed-upon court. Even after this major concession and more than three years after its drafting, only one country is a party to it.[179]

Both the 1971 and the 2005 Conventions require that the judgment be rendered by a court having proper jurisdiction and that said

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Mariana Islands or the Commonwealth of Puerto Rico only after said judgment has been domesticated before the enforcing court. *See generally* Melinda Luthin, *U.S. Enforcement of Foreign Money Judgments and the Need for Reform*, 14 U.C. DAVIS J. INT'L & POL'Y 111 (2007).

175. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb.1, 1971, 1144 U.N.T.S. 249, http://www.hcch.net/index_en.php?act=conventions.pdf&cid=78 [hereinafter *Convention on the Recognition and Enforcement of Foreign Judgments*].

176. The convention was originally signed by Cyprus, the Netherlands, Portugal, and Kuwait. Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 UNTS 271, https://www.hcch.net/en/instruments/conventions/status-table/?cid=79 [hereinafter Supplementary Protocol]. Cyprus, the Netherlands, and Portugal denounced their participation in the convention when they signed Brussels I. *Infra* p. 32. Accordingly, Kuwait, which acceded to the convention on May 8, 2002, is the only party still a signatory to the convention. *See* Supplementary Protocol, *supra* note 176.

177. *See* Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M.1294, http://www.hcch.net/index_en.php?actconventions.text&cid=98 [hereinafter Convention on Choice of Court Agreements].

178. *See id.*

179. Mexico acceded to the convention on September 26, 2007. HCCH, 2005 Choice of Court Convention to enter into force on 1 October 2015 following the approval by the European Union, HCCH (June 25, 2015), https://www.hcch.net/en/news-archive/details/?varevent=412.

judgment be final.[180] Both Conventions prohibit the enforcing court from reviewing the judgment sought to be enforced on its merits,[181] and both allow the refusal of enforcement if; the judgment is contrary to public policy of the enforcing state; the judgment is procured by fraud; the defendant was not notified of the proceedings; or the notice does not comport with the concept of due process in the enforcing state.[182]

Additionally, the 2005 Convention denies enforcement of a judgment awarding compensatory, exemplary, or punitive damages that do not compensate a party for actual loss suffered.[183]

Under the 1971 and the 2005 Conventions, a party seeking enforcement of a judgment must submit:

1. A complete and certified/authenticated copy of the judgment.
2. All documents required to establish that the judgment is final and conclusive in the original jurisdiction.
3. The originals or certified copies of the documents establishing that the defendant was duly notified of the proceedings, if the judgment was rendered by default.
4. A certified translation into an official language of the enforcing court, if the judgment is not in the official language of the enforcing state.[184]

While neither of these two Conventions have any force at present, some of their provisions have been integrated into the various regional agreements discussed below. They have also laid the framework for other international agreements.

A. Europe

In December of 2000, the EU established a regulation ("Brussels I") that expanded on the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commer-

180. Convention on the Recognition and Enforcements of Foreign Judgments, *supra* note 175, at art. 4; Convention on Choice of Court Agreements, *supra* note 177, at art. 8, §4 & art. 9.

181. Convention on the Recognition and Enforcement of Foreign Judgments, *supra* note 175, at art. 8; Convention on Choice of Court Agreements, *supra* note 177, at art. 8.

182. Convention on the Recognition and Enforcement of Foreign Judgments, *supra* note 175, at art. 5 & 6; Convention on Choice of Court Agreements, *supra* note 177, at art. 9.

183. Convention on Choice of Court Agreements, *supra* note 177, at art. 11.

184. Convention on the Recognition and Enforcement of Foreign Judgments, *supra* note 175, at art. 13; Convention on Choice of Court Agreements, *supra* note 177, at art. 13.

cial Matters (the "Brussels Convention").[185] Brussels I governs the jurisdiction of the EU courts in commercial and civil matters.[186] It requires that a judgment given in one member state be recognized automatically in another member state. The recognizing jurisdiction cannot review the judgment for its merits, and must be enforced immediately. However, the foreign judgment may be reviewed:

1. for legal authenticity,
2. for *in personam* jurisdiction,
3. to determine if the judgment to be enforced is manifestly contrary to the enforcing state's public policy,
4. to determine if the doctrine of estoppel requires non-enforcement,
5. if there is a prior judgment that is *res judicata vis-à-vis* the judgment to be enforced, or
6. to determine if the defendant was not given sufficient time and notice to allow the defendant to arrange for his defense.[187]

In order to submit a judgment for recognition or enforcement, a party must produce a copy of the judgment and include a certificate of authenticity from the court of the member state where the judgment was given.[188] The procedures to apply for enforcement are governed by the law of the state in which enforcement is sought.[189] No legalization or other similar formalities are required of the judgment or certificate presented.[190] As long as a settlement is approved by the court in the litigation jurisdiction, and is enforceable in said jurisdiction, they are enforceable in the courts of other member states.[191]

In 2007, a council decision (the "Lugano Convention of 2007") extended the provisions of the Brussels Convention to Norway, Iceland and Switzerland. The Brussels Convention, as the precursor to Brussels I, contained substantial similarities to the provisions of Brussels I.

185. *See* Council Regulation 44/2001 of Dec. 22, 2000, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 1, 2000 O.J. (L12) 3 (EC). Denmark was not a party to the regulation until July 1, 2007 when an agreement between Denmark and the European Union, entered into in October of 2005, went into effect.

186. *Id.*

187. *See* Council Regulation 44/2001 of Dec. 22, 2000, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 33, 34, 36, 41, 57. 2000 O.J. (L12) 3 (EC).

188. *See id.* art. 53, 54.

189. *See id.* art. 40.

190. *See id.* art. 56.

191. *See id.* art. 57 – 58.

Neither the Brussels Convention nor Brussels I apply to bankruptcy proceedings or their judgments.[192] Accordingly, if a creditor hopes to use a judgment to attach assets held in other member states, it must bring suit against the debtor directly and not through insolvency proceedings.

In the United Kingdom, a creditor may be able to obtain a freezing order at the onset of litigation as a protective measure against the debtor's attempts to transfer the assets beyond the reach of the court.[193] A freezing order is directed to the debtor personally and does not operate as an attachment or create security rights over the debtor's assets.[194] A worldwide freezing order prohibits a debtor from removing its assets or reducing the value of the assets below the amount indicated in the order.[195]

In order to obtain a freezing order, a creditor must establish that:

1. it has a strong case for an amount certain or for an amount that can be reasonably estimated,[196]
2. the debtor must have assets either within the jurisdiction or outside the jurisdiction if the local assets are insufficient to meet the amount of the claim,[197] and
3. there is an actual risk of dissipation of the assets if the order is not granted.[198]

If the freezing order is granted, the creditor may apply for recognition of the order in other member states.

Third parties in England must comply with the freezing order if they have notice of it.[199] Foreign parties will be affected by a recognized order only to the extent that it is enforced in the foreign jurisdiction.[200] However, due to the spirit of judicial cooperation in the EU, the order can be used to hold assets in place in a member state while litigation is pending. The threat of imprisonment for failing to

192. *See* Brussels Convention, art. 1; *see also* Brussels I, art. 1, § 2(b).

193. Laurence Katz, *United Kingdom: Asset Tracing: Getting Evidence and Injunctive Relief*, MONDAQ. (Feb. 26, 2008), http://www.mondaq.com/article.asp?articleid=57338 (last visited July 8, 2008).

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

198. Laurence Katz, *United Kingdom: Asset Tracing: Getting Evidence and Injunctive Relief*, MONDAQ. (Feb. 26, 2008), http://www.mondaq.com/article.asp?articleid=57338 (last visited July 8, 2008).

199. *See id.*

200. *See id.*

abide by the freezing order is a deterrent to the transfer of assets beyond the reach of the courts and creditors.[201]

B. *Central and South America*

In 1979, a number of Central and South American countries, as members of the Organization of American States ("OAS"), signed the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards in Montevideo, Uruguay ("CIDIP II").[202] CIDIP II lays the framework for the recognition of judgments in the courts of member states to the convention. Judgments, awards, and decisions are valid only if they meet a number of conditions.[203]

1. The judgments must fulfill all the formal requirements necessary for them to be considered authentic in the country that granted the judgment.[204]
2. The judgments and any accompanying documentation must be final, translated into the language of the country in which they are to be enforced, and duly legalized according to the laws of the enforcing state.[205]
3. The court rendering the judgment must be deemed competent to try and pass judgment on the matter according to the laws of the country of enforcement.[206]
4. The debtor against whom enforcement is sought must have been summoned in a manner substantially equivalent to that accepted by the enforcing jurisdiction
5. The debtor must have been afforded the opportunity to present its defense to the action.[207]

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201. Katz, *supra* note 198.

202. Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, 18 I.L.M. 1211, 1224-27. The countries that signed the convention are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. However, it has only been ratified by Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela. *Multilateral Treaties*, DEP'T OF INT'L L., OAS, http://www.oas.org/juridico/english/sigs/b-41.html (last visited Oct. 24, 2017).

203. *See id.* art. 2.

204. *See id.*

205. *See id.*

206. *See id.*

207. Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, *supra* note 202, art. 2.

6. The judgment must not be contrary to the principles and laws or the public policy of the enforcing country.[208]

The enforcing state's laws, not the rendering state's laws, govern the procedures for ensuring the validity of a foreign judgment.[209] Where two countries have different legal systems, what is adequate in one country to obtain the judgment may not be adequate in another to enforce the judgment. Alternatively, complying with the procedures called for in the country where enforcement is sought may result in dismissal for failure to follow proper procedures in the jurisdiction where the litigation is pending. In order for any resulting judgment to be enforceable, creditors must follow the procedures called for by both countries.

The judgment to be enforced must be accompanied by a number of documents to prove its validity. The creditor must submit a certified copy of the judgment and of the documents proving that the debtor was not denied due process (*i.e.,* proof of summons or subpoena) and that the debtor had an opportunity to present a defense, and a certified copy of the mandate stating that the judgment is final or has the force of *res judicata*.[210] If portions of the judgment are contrary to public policy or laws of the enforcing state, the judge or tribunal may agree to its partial execution if requested by the creditor.[211]

The most problematic issue in CIDIP II is the requirement that the court issuing the judgment be competent to hear and rule on the matter. Because of numerous "subject matter" jurisdictional disputes among member states, the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments ("CIDIP III") was signed.[212] CIDIP III severely limits the ability to obtain enforcement of foreign judgments. CIDIP III requires the individual debtor to actually reside or be domiciled in the territory of the state in which judgment was rendered.[213] If the debtor is a legal entity or business organization, then its principal place of business

208. *See id.*

209. *Id.* art. 6.

210. *Id.* art. 3.

211. *Id.* art. 4.

212. The current signatories to CIDIP III are Bolivia, Brazil, Chile, Colombia, the Dominican Republic, Ecuador, Haiti, Mexico, Nicaragua, Paraguay, Peru, Uruguay, and Venezuela. Note that Nicaragua is presently not a signatory to CIDIP II. Furthermore, six parties to CIDIP II did not participate in CIDIP III. These countries are Argentina, Costa Rica, El Salvador, Guatemala, Honduras, and Panama. *Multilateral Treaties*, *supra* note 202.

213. Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, art. 1, May 5, 1984, 24 I.L.M. 468.

must be in the territory where the judgment was rendered.[214] While serving the defendant in the state that rendered the judgment was sufficient under CIDIP II, this practice is no longer enough under CIDIP III. Also, if the action involves rights to personal or real property, the real or personal property must itself be found within the territory of the state in which the judgment is rendered.[215]

CIDIP III does not apply to cases involving bankruptcy, insolvency proceedings, assignments for the benefit of creditors, or torts.[216] CIDIP III has only been ratified by Mexico and Uruguay.

C. North America

1. The United States

The United States has not entered into any treaties or agreements with other countries for the recognition and enforcement of judgments.[217] The principal stumbling block appears to be the perception by many foreign states that money judgments granted by U.S. courts are excessive and contrary to the public policy of the country expected to recognize and enforce the U.S. judgment.[218] Therefore, the issue of whether a foreign court would enforce a U.S. judgment depends on the laws and policies of the foreign country and on international comity.[219] If a party anticipates enforcing a U.S. judgment abroad, it should obtain foreign counsel prior to filing the complaint.[220] Any failure to abide by the foreign court's interpretation of due process may result in the non-recognition of the U.S. judgment.[221] Brazil, Switzerland and France will refuse to enforce "a judgment against their nationals unless there is a clear indication that [the] national[s] intended to submit to the [U.S.] court's jurisdic-

214. Inter-American Convention on Jurisdiction, *supra* note 213.

215. *Id.*

216. *Id.* art. 6.

217. *Enforcement of Judgments*, TRAVEL.STATE.GOV, https://travel.state.gov/content/travel/en/legal-considerations/judicial/enforcement-of-judgments.html (last visited Sep. 20, 2017).

218. *Id.*

219. Comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

220. *Enforcement of Judgments*, *supra* note 217. *See also*, Waller, *Under Siege: United States Judgments in Foreign Courts*, 28 Tex. Int'l L.J. 427, 434 (1993).

221. Waller, *supra* note 220, at 429.

tion."[222] Furthermore, a number of states, including the Nordic countries, the Netherlands, and Saudi Arabia, will refuse to recognize a decision absent the existence of a judgment convention between the "rendering" and "recognizing" jurisdictions.[223]

The U.S. does not treat foreign judgments with the same disdain as its judgments are treated abroad. A party seeking to enforce a foreign judgment in the U.S. must file it in a U.S. jurisdiction. The U.S. court then determines whether to give effect to the foreign judgment.[224] Normally, these courts are quite liberal in enforcing foreign judgments.[225] To be recognized, the foreign judgment must be final, conclusive, and enforceable in the jurisdiction in which it was rendered.[226]

U.S. courts, however, will not recognize a judgment if it is rendered without providing the defendant due process of law.[227] A judgment does not provide due process if:

1. the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process, or
2. the foreign court does not have personal or subject matter jurisdiction.[228]

There is a presumption in favor of the rendering court having jurisdiction, and it is the debtor's burden to rebut it.[229]

Furthermore, U.S. courts have discretion to refuse recognition of the foreign judgment if:

1. the debtor did not receive notice of the proceedings in the foreign court with sufficient time to present a defense;
2. "the judgment was obtained by fraud;"

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222. Yuliya Zeylanova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, BERKELEY J. INT'L L., 150, 165 (2013), https://www.steptoe.com/assets/attachments/4571.pdf; *see also* Office of the Chief Counsel for International Commerce, *Recognition and Enforcement of Foreign Money Judgments*, DEP'T OF COM., http://www.osec.doc.gov/ogc/occic/refmj.htm (last visited July 8, 2008).

223. *Id.*

224. *Enforcement of Judgments*, *supra* note 217.

225. Office of the Chief Counsel for International Commerce, *supra* note *222*.

226. *Id.*

227. *See generally* Luthin, *supra* note 174, at 117 ("Despite the disjointed procedures for enforcement, the United States is generally considered one of the most receptive nations in recognizing and enforcing Foreign Money Judgments.").

228. *See* Luthin, supra note 174, at 119-120.

229. *See generally* the Uniform Foreign Money Judgments Recognition Act, §7 (1962) (adopted, in some form, by thirty-two U.S. states as of January 11, 2008).

3. the foreign cause of action is repugnant to U.S. public policy;
4. "the judgment conflicts with another final and conclusive judgment;"
5. there is an agreement between the parties that calls for resolution through a means other than proceedings in the foreign jurisdiction; or
6. the foreign court is a highly inconvenient forum if jurisdiction is based solely on personal service.[230]

Recognition of a foreign judgment does not require that the courts of a rendering country recognize U.S. judgments.[231] A U.S. determination that the foreign judgment is recognizable and enforceable binds all other U.S. courts.[232] However, if the foreign judgment is not recognized by the court before which it is presented, that court's adverse decision precludes recognition or enforcement of the foreign judgment anywhere else in the U.S.

2. Canada

In Canada, foreign judgments, by themselves, do not have a right to be recognized unless one of the various reciprocal enforcement acts has been enacted by a province.[233] The foreign judgment will only be given effect if the court determines that the judgment satisfies the rules of the forum in which recognition and enforcement is sought.[234] Similar to U.S. courts, there has been a recent trend towards a more

230. Luthin, *supra* note 174, at 119.

231. *Id.* at 118 ("U.S. courts began either to abandon the reciprocity requirement, or to use it as merely one factor in determining whether to enforce a judgment rendered in a foreign country.").

232. U.S. Const. art. IV, § 1.

233. Markus Koehnen & Nicole Vaz, McMillan LLP, *The Recognition and Enforcement of Foreign Judgments in Canada* 1 (February 2002), http://www.langmichener.ca/Files/The%20Recognition%20and%20Enforcement%20of%20Foreign%20Judgements_Koehnen_0202.pdf (last visited Oct. 31, 2017). *See also, e.g.*, British Columbia's *Court Order Enforcement Act*, RSBC 1996 Chap. 78 (establishing reciprocity with a number of U.S. and Australian states, Germany, Austria, and the United Kingdom); Alberta's *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6 (establishing reciprocity with three U.S. states and the Commonwealth of Australia); Manitoba's *Reciprocal Enforcement of Judgments Act*, C.C.S.M. c. J20 and *Reciprocal Enforcement of Judgments Regulations,* Man. Reg. 319/87 R (establishing reciprocity with a number of Australian states); and Prince Edward Island's *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1998, c. R-6 (establishing reciprocity with Washington State (USA)).

234. *Id.*

liberal recognition and enforcement of foreign judgments.[235] Canadian courts will generally enforce a foreign judgment unless:

1. it was obtained by extrinsic fraud;
2. it violates Canadian public policy;
3. it is contrary to the ideals of natural justice;
4. it is for the payment of taxes or penalties;
5. it is granted under the foreign sovereign's "public laws"; or
6. it violates sovereign immunity.[236]

Extrinsic fraud, unlike intrinsic fraud, does not relate to the merits of the case, but instead has to do with fraud committed by the court hearing the action.[237] Before it can become the basis for refusing recognition of a foreign judgment, extrinsic fraud must be found to have deprived the aggrieved party of an adequate opportunity to present his or her case to the court.[238] If evidence of the fraud was already unsuccessfully presented to the foreign court, the debtor cannot make the argument again in the Canadian court.[239] Even when the debtor was not aware of the fraud, if the fraud could have been discovered with "reasonable" investigation, the foreign judgment will not be denied recognition. As a basis for refusing to enforce a judgment, fraud must be based on facts which came into existence after the foreign judgment was rendered or where the facts could not have been discovered through the exercise of reasonable diligence prior to the rendered decision.[240]

A foreign judgment may be set aside if it is contrary to the notions of "natural justice."[241] Natural justice is similar to the concept of due process in that a denial of natural justice generally relates to a fundamental flaw in the proceedings, such as inadequate notice, the right be heard, or bias on the part of the presiding tribunal.[242] The denial of natural justice must be pursuant to the laws of the foreign jurisdiction and not by a violation of Canadian procedural rules.[243]

A judgment will not be enforced if it is for the payment of taxes or penalties.[244] Since penal and revenue laws are thought to be sover-

235. Koehnen & Vaz, *supra* note 233, at 1.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id. See also* Beals v. Saldanha, [1998] 42 O.J. No. 4519 (Can.).
240. Koehnen & Vaz, *supra* note 233, at 18-19.
241. *Id.* at 1.
242. *See* Pyro-Air Ltee. v. Engelberg, 1990 CarswellOnt 2104 (Can. Ont. C.J.) (WL).
243. *Beals*, 42 O.R.3d 127.
244. *Id.*

eign acts, the enforcement of those laws in a foreign jurisdiction amount to permitting the foreign government to exercise its jurisdiction in a Canadian forum.[245] Punitive damages assessed against a private debtor are not penal judgments because the penalty is payable to an individual and not a foreign sovereign.[246] If the penalty is going to a foreign sovereign, then it is a penal judgment and unenforceable. If the judgment is for compensatory damages payable to the foreign sovereign, the judgment is not penal and will be enforced.[247] Canadian courts have not found treble damages penal and have enforced such judgments.[248]

Similar to the restriction on enforcing penal or tax judgments, Canadian courts will refuse to enforce judgments that relate to rights that only a sovereign state can exercise.[249] If only the foreign sovereign, and not its citizens, can bring the action, then it is a "public law" and a judgment obtained under it will not be enforced in Canada.[250]

While a judgment may not be recognized or enforced if the judgment is contrary to Canadian public policy, this defense is narrowly construed and rarely applicable.[251] A foreign judgment is denied recognition on public policy grounds only where it violates some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the Canadian forum.[252] A foreign judgment will not be rejected simply because it is contrary to Canadian law or because a Canadian court would have rendered a more lenient judgment.[253]

If the debtor feels that the foreign court reached the wrong decision, the error must be raised in the foreign court and not in Canada. Canada will not refuse to enforce a foreign judgment on the grounds that the foreign court made errors as to law or fact.[254] The correctness of a foreign judgment is irrelevant to its enforcement.[255]

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245. *Beals*, *supra* note 243.

246. *See* Huntington v. Attrill, [1893] A.C. 150 (Can.) (distinguishing between suits for penalty between a private individual in his own interest and a suit by a government for the vindication of law).

247. *See* United States v. Ivey, [1995] 26 O.R.3d 533, 548 (Gen. Div.); *affirmed* [1996] 30 O.R. 3d 370 (Can.).

248. Koehnen & Vaz, *supra* note 233, at 9.

249. *Id.*

250. *Id.*

251. *Id.* at 1.

252. *Id.*

253. *See* United States v. Ivey, [1995] 26 O.R.3d 533; *affirmed* [1996] 30 O.R. 3d 370 (Can.).

254. Beals v. Saldanha, [1998] 42 O.R.3d 127, 132-33 (Can.).

255. *Id.*

A foreign judgment is enforceable:

1. if it is final and conclusive;
2. if it is for a definite and ascertainable sum of money;
3. if it is not for taxes or penalties owed; and
4. if it is rendered by a court of competent jurisdiction.[256]

The test for competency will be satisfied if there was a real and substantial connection between the foreign jurisdiction and the subject matter of the proceedings or the debtor.[257] The connection need only be with the foreign state and not with the court which rendered the judgment.[258] Only foreign *in personam* judgments for a definite or ascertainable amount of money are enforceable.[259] Canada also requires that a judgment be final and conclusive in order to be enforceable. A judgment is final if the court which rendered the judgment no longer has the power to modify, rescind, or vary the judgment.[260] Yet, even if the judgment is being appealed, or can still be appealed, it is deemed to be final in Canada.[261] While a final judgment is being appealed, a Canadian court may stay enforcement proceedings pending the conclusion of the foreign appeal.[262]

In the event the enforcement of a foreign judgment is sought in more than one Canadian jurisdiction, the creditor must obtain recognition in each province.[263] All Canadian provinces, with the exception of Quebec, have established agreements where a judgment recognized in one province is automatically recognized in the other.

In 1984, Canada and the United Kingdom entered into the Convention between Canada and the United Kingdom for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters ("REJUKA").[264] REJUKA's provisions are substantially similar to the provisions and procedures for reciprocal enforcement of

256. *Beals*, 42 O.R.3d at 132-33.

257. *Id.*

258. *Id.*

259. Koehnen & Vaz, *supra* note 233.

260. *Id.*

261. *Id.*

262. McMickle v. Van Straaten, [1992] 93 D.L.R.4th 74 (Can.); Four Embarcadero Centre Venture et al. v. Kalen, [1987] 59 O.R.2d 236 (Can.).

263. *Id.*

264. *Reciprocal Enforcement of Judgements (U.K.) Act*, R.S.O. 1990, c. R-6 [hereinafter "*REJUKA*"]. *REJUKA* is the Ontario statute that brings into force in Ontario the *Convention between Canada and the United Kingdom For The Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 1984. It has been implemented in each of the common law Canadian provinces and territories. *See Canada-United Kingdom Civil and Commercial Judgments Convention Act*, R.S.C. 1985, c.C.-30.

judgments discussed above.[265] REJUKA applies to judgments rendered by the Federal Court of Canada and by all reciprocating common law provinces and territories.[266]

D. Africa

1. OHADA

Judgments of the Common Court of Justice and Arbitration are binding on the courts of all member states.[267] These judgments are binding even if contrary to local law or public policy.[268] According to the OHADA treaty, in no case may a decision contrary to a judgment of the Common Court of Justice and Arbitration be lawfully executed in a territory of a contracting state.[269]

Considering that one of the purposes of the OHADA treaty was to guarantee legal stability of economic activities, it is unlikely that the courts of a member state will refuse recognition and enforcement of judgments from other member states.[270] Only the decisions of the Common Court are binding on the member states and the court only hears disputes regarding the interpretation and enforcement of the treaty.[271] If a local court refused to recognize the judgment of another member state's court, then such refusal could be appealed to the Common Court as a violation of the policy and intent of the treaty. There are no provisions in OHADA that require the recognition of the judgments from the courts of non-member countries by the courts of OHADA members.

2. The East African Community[272]

Because EAC members want to build a cooperative economic community, the courts of member states will likely recognize the judgments rendered by other EAC members' courts. As such, the courts would likely recognize and enforce the judgments of its EAC sister

265. Koehnen & Vaz, *supra* note 233.

266. *Id.*

267. Treaty establishing the Organization for the Harmonization of Business Laws in Africa, art. 10, OHADA http://www.ohada.com/traite.php (last visited July 7, 2008).

268. *Id.*

269. *Id.*, art. 20.

270. *Id.* at preamble.

271. *Id.* art. 14.

272. East African Community Treaty, Preamble, Nov. 30, 1999 3-5 [hereinafter EAC Treaty], http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=173330 (recognizing failures of previous EAC and desire for economic development in region).

states. If a local court refused to recognize the judgment of another member state's court, then the refusal to recognize the judgment could be appealed to the East African Court of Justice.[273]

3. South Africa

Even though South Africa has not entered into any formal agreements with other countries regarding the recognition and enforcement of foreign judgments, it recognizes foreign judgments under certain conditions. South African courts will enforce a foreign judgment if the rendering court had jurisdiction under South African law.[274] There are three grounds for establishing such jurisdiction:

1. Jurisdiction is appropriate if the defendant resided in the territorial area of the court when the action commenced.[275]
2. Jurisdiction exists if the defendant submitted to the court's jurisdiction, such as by defending the matter in the foreign court.[276]
3. Jurisdiction exists if the defendant was within the territorial area of the court when the action started.[277]

The first two grounds of jurisdiction are very limiting, as debtors of all nationalities have a tendency to flee when the threat of litigation looms.[278] The third basis for jurisdiction is of recent vintage, and opens a door that was previously closed to foreign creditors.[279] Foreign courts are now deemed competent to pass judgment on the matter if the debtor was in the area of foreign jurisdiction when the action was initiated.[280]

Meeting the jurisdictional requirement is only the first obstacle in enforcing a judgment in South Africa. The foreign judgment, like in most other jurisdictions, must be final in the sense that the rendering court cannot alter or modify it.[281] Even though appealable in the original jurisdiction, the foreign judgment is still enforceable in South Africa.

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273. East African Community Treaty, *supra* note 272, 23.

274. Roger Wakefield, *Africa: An Unexpected Light*, LEGAL WEEK (Oct. 24, 2007), http://www.legalweek.com/sites/legalweek/2007/10/24/africa-an-unexpected-light/.

275. *Id.*

276. *Id.*

277. *See* Richman v. Ben-Tovim 2007 (2) SA 283 (SCA) (S. Afr.).

278. *Id.*

279. *See* Wakefield, *supra* 274.

280. *Id.*

281. *Id.*

Regardless of the jurisdictional issue, the foreign judgment cannot be contrary to the public policy of South Africa or contrary to the rules of natural justice to be enforced.[282] This means that the debtor must have had notice of the proceedings and afforded the opportunity to present a defense.[283] In order to conform to standard notions of "natural justice," the rendering tribunal must have been impartial in reaching its judgment.[284]

South Africa's Protection of Businesses Act of 1978 restricts the types of foreign judgments that can be enforced.[285] The enforcement of foreign judgments arising from product liability cases or the export of materials is prohibited.[286]

E. Asia

1. China and Hong Kong

In July of 2006, the People's Republic of China and the Hong Kong Special Administrative Region entered into an agreement for the reciprocal recognition and enforcement of judgments in civil and commercial matters.[287] After a court in Mainland China or Hong Kong enters a final judgment, any concerned party may apply to the Mainland's People's Court or a court in Hong Kong for enforcement of the judgment.[288] With the enactment of the agreement, Hong Kong became the first jurisdiction in the World whose court judgments are recognized in Mainland China.[289]

There are, however, a number of restrictions in the agreement. These limit the ability to have a judgment recognized in the other jurisdiction's courts.

The agreement only applies to judgments that have been rendered pursuant to a written contract by the parties in which either a court in the Mainland or a court in Hong Kong is designated as the

282. Wakefield, *supra* note 274.

283. *Id.*

284. *See id.*

285. Protection of Businesses Act 99 of 1978 (S. Afr.), https://www.thedti.gov.za/business_regulation/acts/protection_act.pdf.

286. *Id.*

287. Iain C.L. Seow, *China: Arrangements for Reciprocal Enforcement of Commercial Judgments Between Mainland China and Hong Kong* (Sep. 1, 2006), http://www.mondaq.com/article.asp?articleid= 42546.

288. *Id.*

289. *Id.*

court to have sole jurisdiction for resolving the dispute.[290] In order to avail themselves of the comity offered by the agreement, the parties must ensure that such a forum selection clause is incorporated into their contract. Also, the agreement only covers money judgments and cannot be applied to final judgments granting some form of injunctive or other equitable relief.[291]

The judgment must be final. To be final, the judgment must be granted by a District Court or higher in Hong Kong or by the Intermediate People's Courts or higher in China.[292] If the judgment is being appealed in Hong Kong or a retrial for new evidence is underway, the enforcement is stayed pending the outcome of the appeal or retrial.[293]

If either party is an individual, the application for enforcement must be brought within a year of the judgment being rendered.[294] If both parties are business entities, the limitation period is only six months.[295]

In addition to the above, there are a number of additional grounds for refusing enforcement.

1. The choice of court agreement is invalid under the law of the place chosen by agreement of the parties where the original trial was conducted.
2. The judgment has been fully executed.
3. The court of the place where enforcement is sought has exclusive jurisdiction over the case according to its laws.
4. The losing party has not been given sufficient time to defend against the matter.
5. The judgment was obtained by fraud.
6. The court of the place where enforcement is sought has made a prior judgment on the same cause of action.
7. Enforcement would be contrary to the social and public interest of the Mainland or the public policy of Hong Kong.[296]

Prior to its enactment, lenders in Hong Kong were reluctant to do business with debtors in China for fear they would not collect on

290. Seow, *supra* note *id.*

291. *Id.*

292. Certain judgments of the Basic People's Courts of China have been authorized to adjudicate foreign civil and commercial matters. These judgments are also available for recognition and enforcement under the agreement. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

judgments in the event of a default.[297] This is no longer the case. Now, Mainland borrowers commonly seek Hong Kong lenders.

2. Japan

Article 118 of Japan's Code of Civil Procedure ("CCP") lays out the requirements for the recognition of foreign judgments. Under CCP Art. 118, a final foreign judgment shall only be valid if:

1. the judgment is granted by a competent court;
2. the Japanese debtor received service or summons or appeared without such notice;
3. the judgment of foreign court is not contrary to public order or good morals;
4. the judgment is final;
5. the judgment is not for taxes, penalties or punitive damages; and
6. there is a "mutual guarantee."[298]

Japanese courts can grant an order for the payment of a certain sum of money, the delivery of property, or the performance or non-performance of a certain acts.[299] This allows for relief beyond what is typically allowed in other courts (in many jurisdictions foreign judgments are often limited to money judgments). Like in Canada, a judgment ordering the payment of taxes or penalties is not recognized because they are not considered civil judgments.[300] Likewise, a judgment including punitive damages is not recognized or enforced because it is contrary to public policy.[301]

Like in nearly all other countries, only those judgments that are final can be recognized and enforced.[302] A "final" judgment is one that can no longer be appealed. Therefore, a judgment cannot be enforced until the time in which to file an appeal has expired under the laws of the foreign jurisdiction.

Furthermore, the debtor must receive notice of the litigation in order for the foreign judgment to be recognized.[303] It is unlikely, how-

297. Seow, *supra* note 287.

298. MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996 [hereinafter Japan C. Civ. Pro.], art. 118 (Japan).

299. *See* Japan C. Civ. Pro, art. 118.

300. *See* Koehnen & Vaz, *supra* note 233, at 6.

301. Craig I. Celniker et al., *Litigation and enforcement in Japan: overview,* PRACTICAL LAW, *Country* Q&A 9-502-0319 (2012) ("Punitive damages are not allowed in Japan, and punitive damages awards from other jurisdictions are not enforceable.").

302. Id.

303. Japan C. Civ. Pro., art. 200(ii).

ever, that this requirement extends beyond the initiation of the litigation and therefore may not require that the debtor be given an opportunity to be heard.[304] The service of summons, if not otherwise agreed to by Japan in a treaty, requires compliance with the CCP.[305]

If a foreign judgment is obtained by fraudulent means, the judgment is unenforceable because it will be deemed against the public order.[306] The Japanese courts can look not only to the text of the foreign judgment but also to the underlying procedural facts on which it is based.[307] Any foreign judgment that conflicts with a judgment of a Japanese court over a case involving the same parties and facts is also contrary to the public order.[308] While there is no prohibition on instituting litigation in Japan and a foreign court at the same time, the foreign judgment will not be enforced if the Japanese litigation is still pending.[309]

The requirement of "mutual guarantee," means that reciprocity is likely between the rendering nation and Japan.[310] Reciprocity need not be expressly provided for in a treaty or international agreement between the two countries. It is sufficient if the "guarantee" is secured under the statutory law, the case law of the foreign country, or found in the judicial practices of the foreign country's courts.[311]

Under Art. 24 of the Civil Execution Law, a Japanese court cannot review the trial facts found by the foreign court.[312] Neither can the parties allege any fact or facts existing but not raised before the foreign court before the judgment was rendered.[313] Since Japanese law does not allow Japanese courts to go into the merits of a foreign judgment, foreign judgments from courts of countries that allow review into the

304. *See* Celniker, *supra* note 301.

305. *Id.*

306. Japan C. Civ. Pro., art. 118(iii).

307. *Id.*

308. *See id.*

309. *Id.*

310. *Id.* art. 118(iv).

311. Japan C. Civ. Pro, art. 118(iv). Japan has found that the requirements for enforcing foreign judgments in California, New York, Hawaii, and the Canton of Zurich, Switzerland were more lenient than those of Japan and therefore allowed for reciprocity. The Japanese courts refused to recognize a Belgian judgment because Belgium law allows Belgian courts to review foreign judgments on the merits or substance of the judgment.

312. The trial facts are those findings made by the trial court on which it bases its conclusions of law and its judgment. The procedural facts reviewable under CCP Art 200(2) are those that establish whether the service of the summons or other procedures initiating the foreign case complied with the procedures, if any, prescribed by any applicable treaty between Japan and the foreign court's country or whether said initiating process is contrary to CCP Art. 200(2). *See id.*

313. *Id.*

merits on a foreign judgment will be will not be recognized or enforced in Japan.[314]

F. The Middle East

Enforcing judgments in the Middle East poses special obstacles often not found in other jurisdictions. There are two regional treaties concerning the reciprocal enforcement of judgments, the 1983 Convention on Judicial Cooperation between States of the Arab League ("Riyadh Convention") and the 1995 Protocol on the Enforcement of Judgments, Letters Rogatory, and Judicial Notices issued by the Courts of the Member States of the Arab Gulf Cooperation Council ("GCC Protocol").[315]

Both treaties generally call for each signatory to recognize the judgment of a court of any other signatory where the court of the originating state had proper jurisdiction over the case, and where the judgment is final.[316] Like most agreements regarding the reciprocal enforcement of judgments, both the Riyadh Convention and the GCC Protocol permit a state to refuse to recognize the judgment where it is contrary to Islamic law, or the Constitution or the public order of the recipient state.[317] This "public policy" exception is often used by Middle Eastern courts to refuse enforcement of foreign judgments.[318]

Islamic law is generally based on the Shari'a, which is a set of laws prescribed in the Qur'an.[319] Before a foreign judgment can be enforced, it must meet the requirements of the Shari'a.[320] For example, Islamic law forbids the granting of interest as part of a judgment.[321] Accordingly, any judgment granting interest to a party is generally void as repugnant to Islamic law.[322] Islamic law also requires that the

314. *Id.* Japanese courts refused to recognize a Belgian judgment because Belgium law allows the Belgian courts to review foreign judgments on the merits or substance of the judgment.

315. Marwan Elaraby et al., *Saudi Arabia: Enforcement of Foreign Judgments and Arbitral Awards in the Kingdom of Saudi Arabia*, MONDAQ (Oct. 4, 2016), http://www.mondaq.com/saudiarabia/x/532728/Arbitration+Dispute+Resolution/Enforcement+Of+Foreign+Judgments+And+Arbitral+Awards+In+The+Kingdom+Of+Saudi+Arabia.

316. *Id.*

317. *Id.*

318. *Id.*

319. Mark Wakim, *Public Policy Concerns Regarding Enforcement of Foreign International Arbitral Awards in the Middle East*, 21 N.Y. INT'L L. REV. 1, 5 (2008).

320. Elaraby, *supra* note 315.

321. Wakim, *supra* note 319, at 8.

322. *Id.* at 10.

judge deciding a dispute must hear both sides.[323] If the debtor default is granted, the judgment will not be recognized as contrary to public policy.[324]

In Saudi Arabia, a party attempting to enforce a foreign judgment must satisfy two requirements. First, the party must show that the jurisdiction that is issuing the foreign judgment will reciprocally enforce the judgments of the courts of Saudi Arabia.[325] This alone has proven to be a difficult hurdle to overcome. The Saudi courts have refused to recognize judgments from foreign jurisdictions stating that they will generally enforce Saudi judgments, but fail to guarantee reciprocity for Saudi judgments.[326] Furthermore, the issue of reciprocity is examined on a case-by-case basis with no reference to prior cases.[327] A judgment from one country that was recognized in the past does not mean that a judgment from the same jurisdiction will be recognized in the future.

A creditor seeking enforcement must show that the foreign judgment is consistent with Islamic law as enforced in Saudi Arabia.[328] This requirement often cannot be met. Many commercial practices upheld in common law and civil law jurisdictions are forbidden and unenforceable under Islamic law.[329] Accordingly, meeting the requirements of consistency with Islamic law and reciprocity is difficult, and enforcing judgments in Islamic countries remains the exception rather than the rule.[330] If the target assets are held in a country that applies Islamic law, the collection suit should be brought in an Islamic nation with jurisdiction rather than attempting to enforce a foreign judgment.

G. Safe Havens

If the debtor has transferred his assets into an OAPT, the creditor will face a difficult task of persuading the government to give comity to the foreign judgment unless actual fraud can be proven.[331] The laws allowing for enforcement are often varied by OAPT friendly jurisdictions in favor of the trust settlor and against the creditor.[332]

323. Wakim, *supra* note 319, at 45.
324. *Id.* at 10.
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *See* Elaraby, *supra* note 315.
330. *Id.*
331. *See* Lee, *supra* note 163, at 480.
332. *Id.*

One way to obtain enforcement of a judgment against an OAPT is to file an involuntary bankruptcy petition against the debtor in the courts of the trust's jurisdiction.[333] However, the bankruptcy laws in these countries often require that the person be:

1. personally present in the jurisdiction;
2. ordinarily reside or have a place of residence in the jurisdiction;
3. carry on a business in the jurisdiction; or
4. be a member of a firm or partnership which carries on a business in the jurisdiction.[334]

Having assets in the jurisdiction alone is many times not sufficient to allow for a bankruptcy petition.

Due to the likelihood that the foreign judgment will not be recognized in the OAPT's jurisdiction, it would be wise to commence litigation in both jurisdictions simultaneously.[335] For example, the Cayman Islands apply common law rules in relation to the recognition and enforcement of foreign judgments.[336] The Cayman Islands will also require that the foreign judgment be (i) for a definite sum of money, irrespective of taxes and penalties, (ii) final and conclusive, and (iii) not impeachable by way of fraud, public policy, or natural justice.[337] Additionally, the creditor must demonstrate that the debtor was either physically present in the foreign jurisdiction at the commencement of litigation, or that the debtor submitted to the foreign court's jurisdiction.[338] However, the Cayman Islands courts, like the courts of many OAPT-friendly nations, may review a foreign judgment's merits and refuse to recognize the judgment as contrary to its laws and public policy.

The burden of proof often required in OAPT-friendly countries is considerably higher than in most other countries. For example, the Cayman Islands require that when a creditor attempts to pierce or gain legal access to an OAPT, it must prove that the transfer of assets into the OAPT was fraudulent.[339] The standard to which the creditor must prove the fraudulent transfer is beyond a reasonable doubt rather than the more common preponderance of the evidence standard

333. *See* Finkel & Fulco, *supra* note 78.
334. *See* Lee, *supra* note 163, at 481.
335. *Id.* at 492.
336. *Id.* at 483.
337. *Id.*
338. *Id.*
339. Lee, *supra* note 163, at 493.

employed elsewhere.[340] The creditor must prove intent to actually defraud at the time of the transfer of assets.[341] Proving such intent by such a high standard is nearly impossible. Even if the creditor has a strong case for showing an actual intent to commit fraud by the debtor, the action must be brought within the statutory limitation period of six years.[342] Moreover, the statute of limitations begins to run when the assets are transferred and not when the creditor discovers, or should have discovered, the fraud.[343]

The Cayman Islands and other OAPT-friendly jurisdictions require that the losing party pay for the prevailing party's legal fees.[344] Given the limited likelihood of success, it is clear to see why creditors often do not bring suit in the Cayman courts. The same logic applies to many of the other OAPT nations as well.

CONCLUSION

International organizations must accept the fact that there is no current national or transnational statutory scheme that addresses the very real need of *bona fide* private financial institutions before we can have true globalization. If this occurs, there will be the ability to trace the assets of debtors to determine the advisability of filing law suits, to verify financial information given by prospective debtors in loan application packages or to perform prospective client or transactional due diligence. This inability to obtain information puts financial institutions at a great disadvantage while trying to comply with ever prevalent "know-your-client" regulations and avoiding doing business with fraudsters, money launderers, and potential terrorists. True globalization requires seamless, efficient and inexpensive pre and post loan, pre and post filing, and post judgment transnational discovery, and equally seamless, efficient, and inexpensive transnational enforcement of all judgments. The present state of affairs is not acceptable. It favors the unscrupulous debtors and allows them to keep their ill-gotten gains while putting *bona fide* private financial institutions at a clear disadvantage.

340. Lee, *supra* note 163, at 493.
341. *Id.*
342. *Id.* at 493-94.
343. *Id.*
344. *Id.* at 496.