Chicago Journal of International Law

Volume 10 | Number 2 Article 7

1-1-2010

The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments

Yaad Rotem

The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments

Yaad Rotem*

Conventional law and economics analysis overlooks a significant feature of the law of recognition of foreign country judgments—an area of the law that regulates the private local practical use of such judgments. The existing literature on the topic currently describes two competing economic hypotheses as relevant to modeling the incentives of countries to recognize foreign country judgments. The first describes a (repeated) prisoner's dilemma game. An alternative economic hypothesis argues that countries envisage cooperation as a weakly dominant strategy. This Article offers a new economic rationale based on an asymmetric information explanation. I argue that no country can identify, at any given moment, whether or not another given country is applying a recognition regime that is as cooperative as the regime applied by it, or whether the foreign jurisdiction is applying a less receptive regime. Each country therefore fears that the foreign jurisdiction is implementing either a "selective" recognition regime, under which the relative lack of cooperation with the forum is driven by a deliberate agenda, or a "sporadic" recognition regime, under which the foreign country turns out to be less receptive to the forum's judgments as a result of mere coincidence.

The new economic rationale has several positive and normative implications, relating to cooperation between countries. Four are discussed in this Article. First, registration of foreign judgments, as a method for localizing foreign judgments, is shown to be superior to mere recognition, inasmuch as cooperation with other countries is the goal. Second, attempts to form inter-country recognition agreements (conventions and treaties) that ignore the problem of private information are exposed as futile. Third, the reciprocity requirement, the relevance of which as a prerequisite for recognition is currently the subject of heavy debate in the US, is also shown to be unnecessary. Fourth, countries should in limited, enumerated circumstances, concede to the local legal effect of certain unrecognized foreign judgments.

---

* Assistant Professor, Center of Law & Business, Ramat-Gan (email: rotem@clb.ac.il). The Article benefitted from the comments of Yuval Procaccia, Pablo Lerner, Maya Goldring and Uri Ben-Oliel. I thank Gabriel Rosenberg for excellent editing.

Table of Contents

I. INTRODUCTION

The most fundamental tenet of the law of recognition of foreign country judgments—an area of the law that regulates the private practical[1] use[2] of foreign[3] judgments—prescribes that foreign judgments have no local legal

---

1 Recognition of foreign judgments concerns the practical, rather than the academic, use of foreign judgments. A foreign judgment is used "academically" when it serves for comparative purposes, the classic example being of a court referring to the foreign judgment as a precedent rendered by another legal system. A practical use of foreign judgments envisions a change in legal entitlements, the classic example being of a creditor enforcing a foreign judgment on a debtor, thus forcing the debtor to make good on an obligation pronounced by the foreign judgment.

2 A foreign judgment can be used in at least three contexts, depending on the relevant circumstances: first, for enforcement of in-personam judgments against local assets by any way of a levy of execution (such as obtaining a writ of execution and delivering it to the local marshal for execution); the classic example being a money judgment. Second, for res judicata purposes in civil proceedings. The foreign judgment is utilized in this context to create a preclusive effect, either claim preclusion or issue preclusion. See Eugene F. Scoles, et al, *Conflict of Laws* 1264–67 (West 4th ed 2004). Third, as evidence before an administrative agency which contemplates the relevant factual basis upon which to render its decision. The foreign judgment serves as evidence to prove a fact which has already been established by the judgment.

3 "Foreign" shall be defined in the international sense, as in judgments rendered by the courts of another country.

effect.[4] The prevailing party cannot use it in any way to the detriment of the opposing party.[5] A formal legal process[6] of recognition[7] by the local forum[8] is required in order to make a foreign judgment legally effective in the forum.[9] Such a formal recognition process entails an examination of several peripheral issues, including the jurisdiction of the foreign court to give the judgment,[10] the finality of the judgment,[11] compliance of the proceedings in which the foreign judgment was obtained with the forum's principles of natural justice and due

---

4 See, for example, *Hilton v Guyot*, 159 US 113, 163 (1895) ("No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' Although the phrase has been often criticized, no satisfactory substitute has been suggested."); Scoles, et al, *Conflict of Laws* at 1268 (cited in note 2); Lawrence Collins, et al, eds, *Dicey, Morris and Collins on the Conflict of Laws*, 567 (Sweet & Maxwell 14th ed 2006). In the US, the Constitution mandates extraterritorial recognition and enforcement of sister state and federal judgments. It is a mandate embodied in the full faith and credit clause. See Lea Brilmayer, *Conflict of Laws* 297-98 (Little, Brown 2d ed 1995). The US Constitution does not, however, address judgments obtained in other countries, and does not accord full faith and credit to such judgments. See *Aetna Life Insurance Co v Tremblay*, 223 US 185, 190 (1912).

5 I also refer to these, respectively, as the foreign-judgment creditor and the foreign-judgment debtor.

6 I am using the term "process" to emphasize that recognition sometimes occurs as a part of an ongoing legal proceeding, and does not always require a separate legal proceeding.

7 There is in fact a difference between enforcement and recognition. While recongition is declaratory, enforcement requires recognition and the forum to exert its powers of executing judgments. Enforcement cannot be accomplished absent recognition but recognition does not necessarily entail enforcement. As not all foreign judgments require enforcement, only the term recognition shall be used in this Article. For the difference between enforcement and recognition of foreign judgments, see *Guinness PLC v Ward*, 955 F2d 875, 889 (4th Cir 1992).

8 The forum country is the local country in which recognition of the foreign judgment is sought.

9 US law of foreign judgments is mostly state law. See *Erie v Tompkins*, 304 US 64 (1938) (finding, not in the specific context of foreign judgments recognition, that in the absence of a federal statute or treaty or some other basis for federal jurisdiction, state law applies). Thus, arguments raised in this Article shall refer mostly to the Restatement (Third) of Foreign Relations Law §§ 481–86 (1987 & Supp 2007) or to a model statute—the Uniform Foreign Money-Judgments Recognition Act, which was approved in 1962 by the National Conference of Commissioners on Uniform Country Laws and the American Bar Association. The latter Act codifies the common law applied by the majority of courts in the US, although many states have enacted changes and additions. In 2005 the Act was revised and was renamed the Uniform Foreign-Country Money Judgments Recognition Act. The 2005 Act introduces several important changes, which shall also be discussed. Note, however, that a recent American Law Institute initiative is proposing that recognition of foreign judgments be regulated by a federal statute. See Am Law Inst, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* 3–6 (2006) ("ALI Proposal").

10 See, for example, The Uniform Foreign Money-Judgments Recognition Act of 1962, § 4(a)(2–3); Restatement (Third) of Foreign Relations Law §§ 482(1)(b), 2(a).

11 See, for example, The Uniform Foreign Money-Judgments Recognition Act of 1962 at § 2.

process,[12] and lack of contradiction between the foreign judgment and the forum's principles of public policy.[13] The examination deliberately ignores the merits of the dispute as the dispute has already been litigated before the foreign forum.[14]

Understanding the incentives of countries to allow recognition of foreign judgments is crucial to understanding the law in this area. The law concerning recognition of foreign country judgments, much like other conflict of laws (private international law) rules, regulates a dispute that, in essence, is private. In the classical scenario, a private entity or person seeks to enforce locally a foreign judgment against another private entity or person. However, each nation is, through its sovereignty, able to unilaterally decide whether and how it will use the judgments of another nation's courts. Nations will only give effect to foreign judgments if doing so is in the nation's best interest. Understanding the incentives of countries to allow recognition of foreign judgments, as distinguished from the incentives of individuals to seek or avoid recognition of a particular foreign judgment, is therefore very much relevant, as each forum can ease or impose attempts to locally use foreign judgments, hence improving or undermining cooperation with other countries. The case of the People's Republic of China provides an interesting case study. China's laws formally entertain the possibility of recognizing foreign judgments, but in reality foreign judgments have rarely been recognized by its courts.[15] Such a state of affairs can hardly be attributed to the incentives of foreign-judgment creditors but rather to a policy decision made by the state.

Despite its importance, the question of incentives of countries has not been adequately explored in the literature. There are currently two competing hypotheses.[16] The first analogizes countries to captured criminals in the canonical prisoner's dilemma.[17] Each individual country prefers that its own

---

12 See id at § 4; Restatement (Third) of Foreign Relations Law §§ 482(1)(a), (2)(b).

13 See, for example, The Uniform Foreign Money-Judgments Recognition Act of 1962 § 4(b)(3); Restatement (Third) of Foreign Relations Law § 482(2)(d).

14 See *Johnston v Compagnie Generale Transatlantique*, 152 NE 121, 123 (NY 1926).

15 See Lu Song, *The EOS Engineering Corporation Case and the* Nemo Debet Bis Vexari Pro Una et Eadem Causa *Principle in China*, 7 Chinese J Intl L 143, 156 (2008); Eu Jin Chua, *The Laws of the People's Republic of China: An Introduction for International Investors*, 7 Chi J Intl L 133, 167 (2006); Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a US Judgment Creditor's Perspective*, 36 Geo Wash Intl L Rev 757, 758–759 (2004).

16 See Michael J. Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 Melb U L Rev 416, 420–28 (1999). See also Michael J. Whincop and Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* 157–60 (Ashgate 2001).

17 Whincop, 23 Melb U L Rev at 421–22 (cited in note 16). For an explanation of the game in a different context of international law, see Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* 30–32 (Oxford 2008).

judgments be recognized whenever possible, since extensive worldwide recognition generates an incentive for litigants to choose that country as a litigation venue and ensures that the legal outcome pronounced by the forum's judgments becomes truly relevant and effective.[18] For the international legal system as a whole, an agreement to enforce foreign judgments seems ideal. Such cooperation would engender cooperation and reduce the overall costs of litigation.[19] However, no country rushes to recognize foreign judgments.[20] Countries are reluctant to recognize foreign judgments in order to protect local defendants, to encourage an incoming transfer of assets and capital, and to allow additional litigation and increased income for certain influential groups.[21] As a sovereign entity, no country can be compelled to recognize foreign judgments. Moreover, in this game, even a formal commitment to cooperate cannot be credible. Thus, each country is rationally driven in this game by an incentive to "defect."[22] However, since recognition of foreign judgments is in fact an iterated, repetitive game, with an indefinite horizon, long-term incentives outweigh short-term ones.[23] Cooperation between countries is readily induced under such circumstances, as countries can punish one another for defection.[24] Consequently, sovereign countries around the world have accepted the obligation of effecting foreign judgments and have constituted their legal regimes accordingly.[25]

---

18 See Whincop, 23 Melb U L Rev at 421–23 (cited in note 16).

19 See id at 421–22.

20 See id.

21 Id.

22 Whincop, 23 Melb U L Rev at 422 (cited in note 16). In a prisoner's dilemma game, mutual cooperation can maximize the parties' payoff but each player does better by defecting. See Guzman, *Rational Choice* at 30 (cited in note 17) (discussing an example in the international context).

23 See Whincop, 23 Melb U L Rev at 419 (cited in note 16).

24 This is an implementation of Robert Axelrod's famous insight. See Robert Axelrod, *The Evolution of Cooperation* 4 (Basic 1984). See also Guzman, *Rational Choice* at 41 (cited in note 17). One such strategy is "tit-for-tat." For an explanation, see Eric Rasmusen, *Games and Information: An Introduction to Game Theory* 130–31 (Blackwell 4th ed, 2007).

25 See, for example, Uniform Foreign Money-Judgments Recognition Act of 1962, Prefatory Note (cited in note 10) ("In a large number of civil law countries, grant of conclusive effect to money-judgments from foreign courts is made dependent upon reciprocity. Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a country of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the country will be recognized abroad.").

An alternative hypothesis argues that countries recognize at least some foreign judgments because it directly benefits them through economic savings rather than only through inducement of similar behavior from other nations.[26] Recognizing foreign judgments decreases litigation costs for the parties and relieves the forum's overcrowded courts. The relevant assumption is that recognition of a foreign judgment would be a cheaper process by which to settle the dispute than litigating the dispute to its merits the second time.[27] The effect of recognition by other countries is appreciated, but secondary. Recognition is thus a weakly dominant strategy—in other words, one that is always at least as good as any other strategy, but may be better than other strategies depending on how the other player acts.[28] Thus, even if the other country does not cooperate, the forum is still better off recognizing certain foreign judgments from that country.

Neither of these hypotheses has won the day; conflicting evidence supports both.[29] For example, the prisoners' dilemma hypothesis is undermined by the demise of the reciprocity requirement, which suggests that countries do not attempt to punish one another for non-recognition.[30] On the other hand, countries do try to "cheat" one another by expanding their jurisdiction on occasion.[31]

This Article provides a new hypothesis, which presents the issues of recognition as a problem of asymmetric information.[32] A forum would prefer that its judgments always be recognized abroad while retaining the ability to pick and choose which foreign judgments it itself recognizes. The worst-case scenario for a forum in this regard is to recognize foreign judgments but have its own

---

26 See Whincop, 23 Melb U L Rev at 422 (cited in note 16).

27 See id. Of course, it is an assumption that in some cases could be refuted. Consider for example a case in which the dispute itself is simple to adjudicate, but as it was litigated in a certain foreign country, complex questions arise regarding the recognition of a foreign judgment from that country. For economic analysis purposes suffice to assume that in most disputes, recognition of the foreign judgment would be a cheaper way to settle the dispute than to relitigate it to its merits.

28 Andreu Mas-Colell, Michael D. Whinston and Jerry R. Green, *Microeconomic Theory* 237–38 (Oxford 1995). Consider an example for a weakly dominant strategy, as demonstrated in the famous "beauty contest" game. In this game, two people are asked to choose simultaneously a number between zero and 100, while they are told that the winner will be the one to choose the number closest to two-thirds of the average of the two numbers. The weakly dominant strategy in this game is to choose the number zero.

29 See Whincop, 23 Melb U L Rev at 424–28 (cited in note 16).

30 Id at 424.

31 Id at 425.

32 Consider George A. Akerlof, *The Market For Lemons: Qualitative Uncertainty and the Market Mechanism*, 84 Q J Econ 488 (1970) (providing an overview of the concept of asymmetrical information, and demonstrating how asymmetric information can impact decision-making).

judgments ignored abroad. In order to prevent this last situation, and to still ensure that its own judgments are recognized abroad, some form of cooperation of the forum with the foreign country is therefore inevitable.

The problem, however, is one of private information. This problem emanates from the forum's inability to compare the recognition regime applied by the foreign country, the judgments of which are considered by the forum for cooperative recognition, to the forum's own regime. As a result, the forum cannot identify at any given moment whether or not any particular foreign country is applying a recognition regime that is as cooperative as the regime it itself applies, or whether the foreign jurisdiction is applying a less receptive regime. When faced with a foreign jurisdiction rejecting one of its judgments, the forum must decide whether the recognition regime is "selective," meaning it is driven by a deliberate agenda, or "sporadic," a result of mere coincidence relating to the judgment itself rather than inter-country relationships. The information is asymmetric. Any country knows what rubric it is truly applying (rather than just professing to apply) when deciding whether to accept a foreign judgments, while the rest of the world does not.

The new economic rationale offered here provides several normative and positive implications for countries interested in cooperation. This Article focuses on four ongoing policy debates that are currently troubling lawmakers considering reform in the law of foreign country judgments.

The first policy debate upon which this Article sheds new light concerns the question of recognition versus registration. A survey of common law jurisdictions reveals that recognition of foreign judgments is in fact available either in a "registration" track or in a "recognition" track. The difference between these two tracks turns on whether the foreign-judgment creditor is placed with any burden, including the relatively costly burden of proof with regard to any facts, prior to having the foreign judgment accepted into the forum's legal system (the recognition track), or not (the registration track). Countries that need a solution to the problem of private information described in the Article can find it by devising a signaling mechanism. The law fills an important role here, as the necessary signal can only be devised if the law of foreign judgments entertains it. I argue that resorting to registration rather than to recognition serves as an observable and costly signal that provides other countries with a credible commitment of the forum's interest in cooperation.[33]

Second, the pursuit of inter-country foreign judgments recognition agreements—conventions and treaties—that aim to ensure mutual recognition

---

33 See Section III.A.

of foreign judgments, is, for the most part, pointless.[34] Under conditions of asymmetric information, formal commitments to recognize foreign judgments do not yield optimal cooperation. The new rationale can thus explain why so few such conventions and treaties exist, something not adequately explained by previous theories. In particular, it can explain why the US is not a party to even one such agreement.[35]

Third, the reciprocity requirement—the decision of the forum to recognize only foreign judgments rendered in countries that recognize the forum's judgments—is also revealed as an empty constraint.[36]

Fourth, instead of adhering to a rule which always treats unrecognized foreign judgments as devoid of any legal effect pending formal recognition, unrecognized foreign judgments, in regard to which the forum would like to induce cooperation with the foreign country, should *sometimes* be accorded a certain legal effect.[37] In other words, such unrecognized foreign judgments should be considered by default as having the same effect as local judgments, until a court of the forum rules otherwise. In order to moderately fit the forum's recognition regime, I argue that lawmakers should consider forming an exception to the rule always mandating a formal recognition process prior to allowing any use of a foreign judgment. Indeed, sometimes it is necessary to urgently use the foreign judgment—consider, for example, a scenario in which recognition of a foreign judgment is sought, and certain provisional measures against the foreign-judgment debtor to secure execution of the foreign judgment are necessary—but the formal recognition process may take too long. In such a case, adhering to the no-legal-effect rule, under which there is no legal status for the foreign judgment until it is officially recognized, undermines efforts to cooperate with the foreign country.[38]

Section II of this Article discusses the incentives of countries to recognize foreign judgments, introduces the asymmetric information problem, and describes "selective" and "sporadic" recognition regimes. Section III explores several of the legal implications of the asymmetric information view. A conclusion follows.

---

34 See Section III.B.

35 See id.

36 See Section III.C.

37 See Section III.D.

38 See id.

II. THE PROBLEM OF SELECTIVE OR SPORADIC RECOGNITION

A. Recognition Incentives

The question of recognizing foreign judgments concerns a conflict-of-laws issue that is separate from the two other classic conflict-of-laws issues—jurisdiction and choice of law—which chronologically arise earlier (if at all) in any given private dispute.[39] Indeed, it is sufficient to understand the following two basic facts. First, debtors can move their assets from one country to another.[40] They can often do so even after a lawsuit was brought against them.[41] Thus, the mere fact that the plaintiff was capable of bringing a claim in Country A, and of acquiring jurisdiction upon the defendant there, does not mean that the plaintiff would not require beforehand that the judgment rendered by the courts of Country A be recognized in Country B, as the defendant's assets were transferred to that country. Second, one purpose for which recognition of foreign judgments might be sought is the creation of a res judicata effect.[42] A party to a factual or legal claim of whom has been accepted in a judgment that was rendered in Country A might still need to use that judgment in Country B in order to create a preclusive effect and prevent the other party from re-litigating the claim. Hence, assuming that each country can affect the extent to which foreign judgments can be utilized in its territory,[43] examining the incentives of countries to recognize foreign judgments, as this Article has resolved to do, is very much relevant.

Countries do have an interest in sometimes recognizing foreign judgments. One reason mentioned earlier concerned the need to settle disputes in the cheapest way possible.[44] Nonetheless, since private international law seeks to regulate private disputes,[45] considerations of justice between the disputed parties

---

39 See Peter Hay, Russell J. Weintraub, and Patrick J. Borchers, *Conflict of Laws: Cases and Materials* 1–2 (Foundation 12th ed, 2004).

40 See, for example, *Gryphon Domestic VI, LLC v APP International Finance Company BV*, 41 AD3d 25, 31 (NYAD 2007) (court enjoining the debtors from transferring their assets to Indonesia); *Elgin Sweeper Co v Melson Inc*, 884 F Supp 641, 645–46 (NDNY 1995) (creditor alleging that debtor fraudulently conveyed assets to a third party in Canada).

41 Whincop, 23 Melb U L Rev at 421 (cited in note 16) (rules prescribing the jurisdiction of courts usually do not make the location of the defendant's assets a basis for jurisdiction and therefore create "a substantial need" for foreign recognition).

42 See Hay, Weintraub, and Borchers, *Conflict of Laws* at 214 (cited in note 39).

43 See note 15.

44 See note 27.

45 See *Johnston*, 152 NE at 123 (cited in note 14).

themselves might necessitate—from the forum's point of view—the recognition of certain foreign judgments.[46]

Still, any country would prefer to choose, on a case-by-case basis, whether or not to recognize any particular foreign judgment or refrain from doing so.[47] Free choice in this context would allow the forum to address its own needs first, rather than those of a foreign country or of an external legal system. Consider an example: suppose the forum is a country that does not acknowledge a right to exclusivity in distributing products—a property-like entitlement that could be enforced on third parties. Further, assume that a resident of the forum sells on the internet a certain product to residents of a foreign country, the laws of which respect such exclusivity rights. This appears to violate the entitlements of a resident of that foreign country.[48] Imagine that the forum resident is sued in the foreign country. A foreign judgment, either enjoining the defendant from further violating the rights of the plaintiff or requiring the defendant to compensate the plaintiff, is rendered by a court of the foreign country.[49] This foreign judgment is then brought to the forum for recognition, in order to prevent the defendant—a resident of the forum—from further infringing upon the rights of the plaintiff. Non-recognition of this particular foreign judgment would allow the forum both to protect its own resident and to preserve its policy regarding non-exclusivity in distribution. Moreover, non-recognition of the foreign judgment in this example could attract to the forum an incoming flow of businesses and capital, all of which would come in search of the forum's protection.

Since the forum and the foreign country can each choose to recognize all judgments or not, the best situation for the forum is that the foreign country is obliged to recognize the forum's judgments, but that the forum is not similarly obliged (although it may choose) to recognize that foreign country's judgments. For the discussion that follows, imagine this provides a payoff of three to the forum. Slightly worse for the forum is if both the foreign country and the forum are obliged to recognize each other's foreign judgments. Assume this has a payoff of two to the forum. Next, both the foreign country and the forum may be under no obligation to recognize each other's foreign judgments. Consider this to have a payoff of one to the forum. The worst case for the forum is where the foreign country is not obliged to recognize the forum's judgments (although

---

46 See *Recent Important Decisions, Judgment: Of Foreign Country: Conclusiveness*, 7 Mich L Rev 339, 350–51 (1908–09) (arguing that principles of right and justice rather than reciprocity should dictate the effect of foreign judgments).

47 See notes 20–22.

48 See, for example, *Ahava (USA), Inc v JWG, Ltd*, 286 F Supp 2d 321, 323 (SDNY 2003).

49 See id at 322.

it may choose to do so), but the forum is obliged to recognize the judgments of the foreign country. Imagine this has a payoff of zero to the forum.

We can describe the interaction between a country's courts and a foreign nation's legal system as a prisoner's dilemma using a typical payoff table:

Foreign Country Does Not Cooperate	Foreign Country Cooperates	
F=0, FC=3	F=2, FC=2	Forum Cooperates
F=1, FC=1	F=3, FC=0	Forum Does Not Cooperate

Table 1: Payoff Table for Judgment Recognition Scenarios

If Foreign Country decides not to cooperate, then Forum is better off choosing not to cooperate as well. If Foreign Country decides to cooperate, then Forum is still better off choosing not to cooperate. In other words, Forum's strictly dominant strategy is to not cooperate. Foreign Country faces the same payoff, and thus the result of the game is both countries choose not to cooperate.

However, the countries will interact more than once; the interaction repeats indefinitely, and thus the solution to this problem is a cooperative equilibrium.[50] Such equilibrium is manifested in a legal regime in which each country is maintaining a *formal* legal arrangement for the recognition of foreign judgments.[51] Cooperation in this game is the result of rational behavior; the game repeats itself, and each country fears the reaction of the other if the former does not recognize foreign judgments of the latter. Thus, each country adopts a cooperative strategy.[52]

---

50 See note 23.

51 See note 25.

52 Some explain the prevalence of formal foreign judgments' recognition scheme with the tools of psychology. Indeed, empirical research has shown that humans tend to react positively to a behavior perceived to be positive, and negatively to a behavior perceived to be negative. Consider Armin Falk and Urs Fischbacher, *A Theory of Reciprocity*, 54 Games and Econ Beh 293 (2006); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 Mich L Rev 71 (2003) (proposing that any particular individual's willingness to positively contribute to collective action is determined by whether the particular individual perceives the other participants as contributing to the collective action). Humans actually prefer cooperation. See James Andreoni and Larry Samuelson, *Building Rational Cooperation*, 127 J Econ Theory 117, 145 (2006) (demonstrating that people will, at times, choose cooperation despite economic incentives to the contrary).

B. Selective/Sporadic Recognition

Contrary to prevailing perception, formal legal arrangements for the recognition of foreign judgments cannot suffice to ensure cooperation between countries. Indeed, the mere existence of a formal legal arrangement for the recognition of foreign judgments cannot ensure the forum that its judgments would be recognized by a foreign country—any foreign country for that matter—with the same zealousness, diligence, and receptiveness with which the forum would recognize the foreign judgments of that country. In fact, the problem contemplated by each forum is not: "Does the foreign country, the judgment of which I am asked to recognize, recognize my own judgments?"; but rather: "To what extent does the foreign country, the judgment of which I am asked to recognize, refrain—*unjustifiably, from my point of view*—from recognizing my judgments?"

Given the realities of the global marketplace, the forum does not have to fear that a foreign country would *systematically* refrain from recognizing the forum's judgments or formally legislate not to recognize the forum's judgments. Such behavior would stigmatize the foreign country in the global market as a non-cooperative country. Instead, the real fear that undermines cooperation between countries concerns the possibility that the foreign country would recognize the forum's judgments only *sporadically* or *selectively*. "Sporadic recognition" means that the choice of whether or not to recognize the forum's judgments, from the forum's point of view, is relatively random without pure policy backing. "Selective recognition" means that the foreign country, from the forum's point of view, purposely chooses specific forum judgments to recognize or not to recognize in harmony with its own policies. In other words, from the forum's point of view, a selective/sporadic recognition regime is a regime less cooperative than the one applied by the forum. It is a regime under which the foreign country is not as receptive to the forum's judgments as the forum is receptive to the foreign country's judgments.

Why does a foreign country adhere to a sporadic or selective recognition regime? A sporadic recognition regime is the result of mere coincidence. A sporadic recognition regime might ensue even without judges or legislators of any particular country coordinating their moves. The constant fear of the forum is that it is more zealous and more receptive to the foreign judgments of Country A than Country A is towards the forum's judgments.[53] Such a situation

---

[53] See, for example, Russel J. Weintraub, *How Substantial is Our Need For a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 Brooklyn J Intl L 167, 170 (1998) ("The conventional wisdom driving the U.S. initiative for a judgments convention is that American states freely recognize and enforce foreign judgments, but that other countries do not accord reciprocal treatment to U.S. judgments.").

could be caused by mere happenstance, without any deliberate, or concentrated, attempt by the foreign country to do so. For example, a different set of values to be associated by the foreign country with its public policy can work to drain the set of potential judgments rendered by the forum that could be recognized by the foreign country. Unfortunately, even if mere coincidence leads to less receptiveness of the foreign country to judgments of the forum, the harmful incentive driving the forum's reaction is nevertheless generated. Indeed, the forum's fear falls back on the ranking of preferences mentioned before.[54] To be direct, that ranking reveals that the forum strongly dislikes the possibility of being the loser in the recognition game.

Sometimes, the recognition regime is not sporadic, but selective. A selective recognition regime could be motivated by a specific agenda, such as the desire of the foreign country to encourage defendants to transfer assets into that country, increasing tax revenues. However, it is hard to find evidence of such an agenda, and there are few ways for judges acting independently to make such a concerted effort. And legislative guidance to that end is certainly nonexistent. Still, the possibility that each judge at the forum carries with her, perhaps even unconsciously, the specific agenda baton seems remote.

A general agenda driving selective recognition seems more plausible. A general agenda is driven by each country's preference to have the foreign country obliged to recognize its judgments, but not be obliged to recognize that foreign country's judgments. Such a general agenda can spring into existence in a number of ways. First, certain countries might develop rules regarding recognition of foreign judgments that are simply stricter than the equivalent set of rules applied by the foreign country. To the extent that the foreign country cannot ascertain such an agenda, the forum would want its courts to develop a more demanding set of rules than the one adopted by the foreign country.

Consider an example. Suppose a claim was filed in Country A against a defendant from Country B, leading to a judgment in favor of the plaintiff. When the judgment is brought to Country B for execution, the debtor argues that Country A has rendered its judgment without jurisdiction. In other words, the debtor argues that the judgment ought not to be enforced in Country B, since under the jurisdictional rules of Country B, Country A had no right to assume jurisdiction in the first place and thus should not have considered itself competent to litigate the dispute. The forum's general agenda (stricter jurisdictional rules) leads to non-recognition of the foreign judgment.

A second source for a general agenda involves the way judges make decisions. Any judge prefers an ex post "just" decision over an ex ante

---

54 See Section II.A.

commitment to recognize foreign judgments. A judge in a forum court will refuse the recognition of a foreign judgment when recognition would infringe, unjustifiably from the judge's point of view, upon the entitlements of the foreign judgment debtor. As soon as a possible conflict arises between the need to recognize a foreign judgment as part of an ex ante commitment by the forum and the need to make an ex post fair decision—mind you, not necessarily in favor of a local forum resident—the judge would prefer accomplishing ex post justice. Indeed, this preference of the forum judge emanates from her indifference to a situation in which a foreign judgment which should have been recognized is not accorded any legal effect, in order to reach a more just result in the specific case at hand.

Consider an example. Suppose a tort claim was filed in Country A against a defendant from Country B, based on an injury in Country B. Imagine that the defendant argues that Country A is an incompetent forum based on a treaty executed between Country A and Country B, according to which tort claims should always be filed at the place in which the harmful event occurred. The judge in Country A may refuse the defendant's forum non conveniens argument if she considers it more just to litigate the dispute in Country A than in Country B. For example, let us assume that as a result of the harm, the plaintiff is in need of daily medical treatment, making it hard for the forum to force him to litigate abroad, in Country B. Nevertheless, the judgment needs to be executed in Country B, where the defendant holds her assets. Thus, one can expect that Country B would decline to recognize the foreign judgment, to the extent that pronouncing it is considered by Country B as unjustifiable and a violation of the treaty between the two countries. Note that it does not matter whether or not Country B is entitled to respond that way. The only important issue is that Country B would now certainly prefer ex post justice towards the foreign judgment debtor (resulting in non-recognition of the foreign judgment) over its ex ante obligation to recognize judgments pronounced by Country A (if such an obligation exists at all, as the claim was not filed in Country B, to begin with). Indeed, in such a situation, despite the existence of a treaty, two things are bound to happen. First, each country shall view its own decision as correct. Country B will likely see Country A's decision as blatantly violating the treaty between the two countries. Country A, however, will likely believe it cannot hold to a position according to which its own courts were wrong—it simply is not logical (by definition, the final legal result obtained following any litigation is, from each country's viewpoint, the "correct" result; if it had not been "correct", it would not have been the result). Second and consequently, Country B's decision not to recognize the judgment rendered by Country A *might certainly* be perceived by Country A as being a defection from full cooperation.

C. Recognition of Foreign Judgments as a Problem of Asymmetric Information

The problem of sporadic or selective recognition is a problem of asymmetric information. To understand why, assume that the forum is contemplating whether or not to recognize a foreign judgment and is interested in knowing whether or not the foreign country is as receptive to the forum's judgments as the forum is receptive to that foreign country's judgments. If the forum could simply observe the formal legal arrangements prepared by the foreign country for the recognition of foreign judgments, and decide accordingly whether or not the foreign country is fully cooperating—no problem would have ensued. In such a world, it would suffice for the forum to formally enact legal arrangements for the recognition of foreign judgments, in order to induce cooperation with the foreign country. The formal legal arrangement, coupled with the repeating nature of the game, would induce the desired cooperation.

But the forum cannot identify or verify, merely by examining the foreign country's formal legal regime, whether or not the foreign country, or any foreign country for that matter, is applying a selective or sporadic recognition regime. In order to ascertain whether the foreign country is as receptive to the forum's judgments as the forum is receptive to foreign judgments of that country, the forum needs to extensively oversee the manner in which the forum's judgments are recognized by the foreign country. Written policies are not enough, as unwritten policies may supplant them. However, countries are simply not interested in making such an effort, as the necessary information is complex and obtaining it is considerably costly.[55]

Sometimes it is impossible for the forum to decide whether the foreign country is fully cooperating. Recall the example mentioned in the previous Section. A tort claim that was litigated in Country A, seemingly in violation of a treaty between Country A and Country B. Recall the sequence of events: Country A decided to adjudicate the dispute and Country B decided not to recognize the foreign judgment rendered by Country A because it seemingly violated the treaty. Each country has reached its decision based on what might be termed "ex post justice considerations." Indeed, each country chose to move

---

55 Consider the comparison to academic surveys: In 1988 Professor Friedrich Juenger conducted a survey of the treatment of foreign judgments by various countries. Consider Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 Am J Comp L 1, 4 (1988). For an extensive bibliography of sources examining the treatment of US judgments in foreign courts, consider Robert E. Lutz, *Enforcement of Foreign Judgments, Part II: A Selected Bibliography on Enforcement of US Judgments in Foreign Countries*, 27 Intl Lawyer 1029 (1993). Still, even such a wide scope survey cannot supply the information necessary for the forum, as the survey depicts any legal regime in general formal terms only.

towards the result that it viewed as just rather than adhere to its "ex ante obligation" under the treaty. But each country's preference for ex post justice over its ex ante obligation generates an impenetrable smoke screen. Indeed, as Country A does not acknowledge its own defection (Country A cannot admit that its courts were wrong—it is not logical: from each country's viewpoint, final judgments rendered by its courts are by definition "correct"), it cannot tell whether or not Country B's reaction is a defection or not. One can thus conclude that often ex post considerations of justice make it impossible for countries to fully cooperate with regard to recognition of foreign judgments.

Sometimes it is possible for the forum to identify whether or not the foreign country is fully cooperating with it, but it is *relatively* too costly to do so. In such cases, a simple expert legal opinion produced by someone proficient in the law of the foreign country cannot reveal the necessary information. Such opinions do not, and cannot, address each and every case that was ever litigated by the courts of the foreign country. And even if the expert opinion did cover all known cases, it would still not suffice. Consider the reasons.

First, in order to ascertain whether the foreign country is as receptive to the forum's judgments as the forum is receptive to foreign judgments of the foreign country, the forum needs to consider information about *hypothetical* cases. Indeed, at any given moment, there is no guarantee that each case litigated at the forum has an identical equivalent that was already litigated at the foreign country. Thus, the forum needs to concern itself with questions such as "what would happen if . . ." regarding the law of foreign judgments of the foreign country, or regarding the law of foreign judgments of the forum. Obviously, it is an analysis that is very difficult to accomplish. If it were not difficult, law schools would probably cease to exist. In each and every course in law school students and law professors are actually trying to "guess" what the law is (based upon an understanding of the rationales driving the law, as such rationales are derived from existing case law). Imagine the forum having to do so—guess what the law is in a hypothetical case—with regard to foreign law.

Second, in order to ascertain receptiveness, the forum needs to examine not only the judicial decisions rendered in cases in which recognition of particular foreign judgments was discussed, but also the context and perhaps the hidden agenda behind these decisions. It is well known that judges do not always expose the true agenda that drove them to reach the decision. Thus, the effort to ascertain the foreign country's receptiveness is to a large extent a *subjective* endeavor. If a foreign country denies a judgment of the forum, the forum must decide if it is a defection, a one-time exception, or a new policy. Again, this is very difficult to discern.

Third, the forum needs to oversee the manner in which the foreign country's judgments are recognized by the forum itself. Recall, that the forum is interested in a quid pro quo bargain. The forum only cares about the *relative*

receptiveness of the foreign country to its own judgments. Thus, what is required here is a comparative systematic analysis—both factual and legal—of each case in which the recognition of the forum's judgments was sought at the foreign country or the recognition of the foreign country's judgments was sought at the forum. Such an analysis needs to analytically compare similar and different cases that ran through the systems of both the forum and the foreign country.

There seems to be no one poised to conduct these inquiries. Governments are unlikely to allocate the large amount of required public resources needed to explore all cases heard in all foreign countries. The recognition of foreign judgments thus becomes a private matter, which concerns the two litigating parties. Governments generally do not perceive these as questions of international relationships. Due to the limited resources allocated to resolve private disputes, one cannot expect the government to sponsor the effort to ascertain the foreign country's relative cooperation with the forum.

Private parties are also unlikely to provide this information. Even if the necessary information concerns only one foreign country, a private party often does not have the required resources to conduct such a comprehensive inquiry. Moreover, a private party is driven by a sub-optimal incentive to invest in obtaining such information, as such information also benefits others, who are not participating in financing its discovery.

Even if private parties have the resources to do such research, they will present only a partial picture that bolsters their own argument. If asked to describe whether or not the foreign country is as receptive to the forum's judgments as the latter is receptive to foreign judgments of the former, a private party would supply an answer that promotes his own interest, and would back it up with partial evidence. Resorting to an adversarial solution, which would confront each party's evidence with that of the other, will obviously carry with it duplicative, and thus wasteful, efforts.

In sum, the relative cooperativeness of the foreign country—its receptiveness to the forum's judgments—is a data point that is expensive for the forum to identify, thus creating a problem of private information, which severely burdens any attempt by the two countries to cooperate.

III. IMPLICATIONS

The new economic rationale presented in the previous section generates several legal arguments, both positive and normative. This section shall explore a number of them.

A. Recognition or Registration?

To a large extent, accepting foreign judgments into the local legal system can be accomplished in two different ways: one is "recognition" of the foreign judgment and the other is "registration" of that judgment. The difference between these two methods turns on whether the foreign-judgment creditor, seeking the foreign judgment to be formally accepted by the forum, has the burden of proving certain preconditions prior to the foreign judgment being eligible for local use. Registration is of an administrative nature, and in its pure form hardly imposes any such burden upon the foreign-judgment creditor, who only needs, in the context in which she seeks the foreign judgment to create a legal effect, to comply with technical (and relatively cheap) requirements, such as introducing an authenticated copy of the foreign judgment[56] and producing a sworn statement.[57] In contrast, recognition involves a process of judicial review, and mandates that the foreign-judgment creditor bring an action on the foreign judgment, and meet the burden of proving such preconditions as competence of the foreign court to have issued the judgment and jurisdiction of the local court required to recognize the foreign judgment.

Note, however, that the foreign-judgment debtor can vacate either the recognition of the foreign judgment or its registration. Still, defeating the foreign judgment in the registration track requires the foreign-judgment debtor to argue and prove one of the grounds for non-recognition, while in the recognition track the foreign-judgment debtor may also enjoy non-recognition simply because the foreign-judgment creditor failed to carry the burden to prove the prerequisites for recognition.

Except in a few states,[58] US law currently does not entertain registration,[59] and only allows recognition of foreign country judgments.[60] Thus, foreign-

---

56 See, for example, 28 USC § 1963 (registration in any federal district court of a judgment rendered in any other district); 28 USC § 2508 (registration in any district court of a judgment entered in the US Court of Federal Claims in favor of the US). See also Hay, *Conflict of Laws* at 229–30 (cited in note 39).

57 See, for example, ALI Proposal, §§ 10(b)–(c).

58 For example, Florida and Hawaii have integrated a registration track in their versions of the Uniform Foreign Money-Judgments Recognition Act of 1962. See Fla Stat Ann § 55.604 (West 2009); Hawaii Rev Stat § 658C-4 (2009). However, Hawaii has recently repealed its registration track. See 2009 Haw Sess Laws, Act 34, § 2, effective April 30, 2009. In Texas, acceptance of a foreign judgment can be accomplished via a single procedural step, in accordance with the Uniform Foreign Money-Judgments Act of 1962. See *Don Docksteader Motors, Ltd v Patal Enterprises, Ltd*, 794 SW2d 760, 761 (Tex 1990). In Illinois, the existence of an administrative-like recognition track is unclear. Compare *Society of Lloyd's v Ashenden*, 233 F3d 473, 475–76 (7th Cir 2000) (foreign-judgment creditor filed the foreign judgment in a district court and then issued "citations" pursuant to the Illinois procedure for executing a judgment) with *Bianchi v Savino De Bene Intl Freight Forwarders, Inc*, 770 NE2d 684, 684 (Ill 2003) (foreign-judgment creditor filed the

judgment creditors often hold the burden of proof regarding several matters, including the jurisdiction of the foreign court to issue the judgment.[61] Fighting this burden of proof may be costly. For example, establishing the foreign court's competence to deliver the judgment may necessitate a legal opinion on the foreign law.[62]

Should lawmakers prefer recognition or registration? The American Law Institute's recent initiative calls for adopting registration as a method for accepting into the local legal system certain foreign judgments. The particular judgments involved are money judgments not subject to appeal issued by courts of countries that have entered into an agreement with the US for reciprocal recognition of judgments and which were not rendered by default or upon confession.[63] The new rationale introduced in this Article can solve the problem, as it requires that for purposes of cooperation with a foreign country registration be preferred.

Consider the economic explanation. Since the problem that threatens cooperation among countries is a problem of asymmetric information,[64] one

---

foreign judgment and initiated both citation proceedings and a complaint to recognize the foreign judgment pursuant to the Uniform Foreign Money-Judgments Recognition Act).

59 See *Renoir v Redstar Corp*, 20 Cal Rptr 3d 603, 607–08 (Cal App 2004) (finding that California had explicitly excluded foreign judgments from its adoption of a mere registration requirement); *Bergen Industries and Fishing Corp v Joint Stock Holding Co*, 2002 WL 1587179 (WD Wash 2002); Restatement (Third) of Foreign Relations Law § 481 cmt g (1987) (cited in note 9). Note, however, that registration is the method for according full faith and credit to sister state judgments and federal judgments.

60 For example, an action to enforce a foreign judgment is a separate civil action imposing its own jurisdictional requirements. See Restatement (Third) of Foreign Relations Law § 481 cmt g (1987) (cited in note 9). The Uniform Foreign Money-Judgments Recognition Act allows an expedited procedure such as summary judgment to enforce a foreign money judgment, but also places a certain burden of proof upon the judgment creditor. Uniform Foreign Money-Judgments Recognition Act of 1962, § 3 (cited in note 10) (stating that a foreign money judgment is enforceable in the same manner as "judgment[s] of a sister state which [are] entitled to full faith and credit").

61 See, for example, *Farrow Mortgage Services Pty Ltd v Singh*, 3 Mass L Rptr 552 (Mass 1995) (finding that the plaintiff sustained the burden of proving personal jurisdiction in the Australian court which rendered the foreign judgment).

62 See, for example, *Mayekawa Mfg Co v Sasaki*, 888 P2d 183, 185–86, 188–89 (Wash App 1995) (involving a foreign-judgment creditor that submitted an expert opinion on Japanese law).

63 See ALI Proposal, §§ 7(c), 10(a), (b)(ii), (c)(2). According to the ALI Proposal, while the recognition track places the burden of proof with regard to most issues on the foreign judgment debtor, the registration track is a simpler procedure. It is modeled on the procedure provided for registration in federal courts of judgments of other federal courts pursuant to 28 USC § 1963 and on the registration procedure of judgments of state and federal courts in another state court. See ALI proposal, §§ 9(a) & cmt, 10(a)–(c) & cmts.

64 See Section II.C.

solution would be for the forum to signal its willingness to cooperate with the foreign country.[65] The forum can do so by deciding that judgments of a certain type and from specific countries with which the forum would like to induce cooperation will be registered rather than simply recognized. Such a foreign judgment could be subjected, of course, to the usual defenses that apply to foreign judgments. This is not to say that unrecognized foreign judgments should be treated as local judgments altogether. Rather, the burden of proof—with regard to the local validity of a foreign judgment rendered in a country with which the forum would like to establish cooperation—should shift from the foreign-judgment creditor to the foreign-judgment debtor (the former being interested in the forum accepting the foreign judgment, the latter being interested in non-acceptance).

Deciding in advance which countries will have their judgments enjoy in the forum an ad-hoc status of a local judgment—pending proof to the contrary by the foreign-judgment debtor—serves as a signal to those countries. First, it is an observable gesture by the forum. The forum only needs to publish a list of judgments, according to the judgment's type and country of origin, which will be accorded the ad-hoc legal effect of any other local judgment. The forum can therefore choose to cooperate with countries with regard to only specific types of judgments, meaning that the forum is not forced to make a strictly binary choice between cooperation and non-cooperation with any single foreign country. For example, the forum can choose to cooperate with the foreign country with regard to money judgments only, but not with regard to judgments that concern personal status.

Second, the signal sent by the forum is costly enough to create a separating equilibrium.[66] The signal is costly because it *threatens* the forum with having to accord legal effect to judgments that the forum would not have recognized otherwise, for instance, if the foreign judgment would enter an orderly process of recognition prior to being accorded any legal effect. Thus, any attempt by the forum to behave selectively towards foreign judgments—a behavior which, as already explained, the foreign country dreads—is undermined by the ad-hoc status of a local judgment which is accorded to the foreign judgment. In other words, the signal sent by the forum is convincing because it takes away from the

---

65 Consider Michael A. Spence, *Job Market Signaling*, 87 Q J Econ 355 (1973) (developing a signaling equilibrium game within the context of asymmetrical information problems in job markets, and proposing that the underlying framework can explain other market phenomena).

66 In a signaling model a separating equilibrium is formed as each type of informed agent chooses a different action and the informed agent is thus able to convey its type to the uninformed agent. In contrast, in a pooling equilibrium, both types of the informed agent choose the same action, and thus no information is conveyed to the uninformed agent. See Mas-Colell, Whinston, and Green, *Microeconomic Theory* at 450–57 (cited in note 28).

forum, at least to some extent, the ability to decide which foreign judgments shall be recognized and which shall not. Under a registration regime the forum faces the risk that any certain judgment would be accepted into the forum even though that judgment, from the forum's viewpoint, should not be recognized. The cost imposed upon the forum by this signal is too high to be borne by non-cooperating forums, that is, by forums interested in a selective recognition regime. Indeed, if a forum would like to adhere to a selective recognition regime, it cannot allow mere happenstance to regulate which foreign judgments are accorded legal effect and which are not. The foreign country understands the risk to which the forum exposes itself, and can now distinguish between a cooperating forum and one which is not cooperating.

There are three specific determinants of the cost of this signal to the forum. The first situation in which the signal sent by the forum becomes an actual burden on the forum is a situation in which the foreign-judgment debtor does not raise any defense argument against the foreign judgment. Consider, for example, the defense of lack of jurisdiction of the rendering court. If the foreign-judgment debtor does not raise a defense that she could raise, the foreign-judgment continues to maintain, following its registration, its local legal effect; despite the fact that it is not a judgment. Note that several of the defenses to be raised are certainly costly, as they must be backed up with expensive evidence, usually an expert legal opinion on the foreign law.

The second situation is one in which the judgment debtor does raise a defense argument, but fails to prove it. Again, a foreign judgment that should not have been accepted into the local legal system, maintains its status as a registered judgment, and generates a legal effect within the local legal system.

The third situation is one in which the foreign-judgment debtor raises a defense argument against the foreign judgment, but judicial error causes the argument to be denied.

In each of these three situations, the forum finds itself recognizing and according legal effect to foreign judgments that it otherwise would not have been recognized. The final result of recognition or non-recognition is beyond the forum's control. Indeed, the end result depends upon other variables such as the cost for the foreign judgment debtor to defend against the judgment, the extent to which judicial errors occur, etcetera.

The signal described here can be improved. The forum can change its rules of evidence or require a higher standard of proof in order to establish a defense against a foreign judgment that was accorded an ad-hoc status of a local judgment. Requiring more evidence or a higher standard of proof in order to attack a foreign judgment which was accorded an ad-hoc status of a local judgment makes challenging more expensive and thus increases the risk faced by the forum that unwarranted foreign judgments will become operative. Any effort

exerted by the forum to behave selectively in recognizing foreign judgments is also curtailed.

B. Inter-Country Recognition Agreements

The pursuit of recognition agreements seems to be considered by various countries as productive.[67] However, few recognition agreements have thus far been executed by countries. The US is not a party to any such agreement;[68] and several attempts to form such agreements to which the US would be a party have failed.[69] Those countries that are party to such agreements are generally parties to only a few.[70] A small number of multilateral recognition agreements exist worldwide: two in the EU,[71] the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments,[72] and three conventions for the recovery abroad of maintenance.[73] A recent famous attempt to produce a multilateral recognition agreement, by the Hague Convention on Private International Law—in which the US participated—has also failed.[74]

---

67 See, for example, Weintraub, 24 Brooklyn J Intl L at 167 (cited in note 53).

68 See Brian R. Paige, Comment, *Foreign Judgments in American and English Courts: A Comparative Analysis*, 26 Seattle U L Rev 591, 621–22 (2003).

69 For example, negotiations for a convention with the UK in the mid-1970s ultimately failed in 1981. See Restatement (Third) of Foreign Relations Law, Introductory Note to Foreign Judgments and Awards, n 1; Peter Hay and Robert J. Walker, *The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom*, 11 Texas Intl L J 421 (1976); Paige, 26 Seattle U L Rev at 622 (cited in note 68).

70 Some countries, such as the UK, Australia, and Canada, adopt a registration track for foreign-judgments coming from countries which are considered to be reciprocating countries; but not each country the judgments of which are eligible for registration in these fora is a party to a respective agreement with the forum. Australia, for example, considers thirty-six countries to be reciprocating countries, but does not have an agreement with all of them.

71 Council Regulation 44/2001, OJ 2001 (L 12) 1 ("Brussels I"); and Council Regulation 1347/2000, OJ 2000 (L 160) 19 ("Brussels II"). See also Matthew H. Adler, *If We Build It, Will They Come? The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 L & Policy Intl Bus 79, 91–92 (1994).

72 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, 24 ILM 468 (1985).

73 1956 UN Convention on the Recovery Abroad of Maintenance, the 1958 Hague Convention Concerning the Recognition and Enforcement of Decisions Concerning Maintenance Toward Children, and the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relative to Maintenance Obligations. See David F. Cavers, *International Enforcement of Family Support*, 81 Colum L Rev 994, 996, 999 & n 24, 1000–13 (1981).

74 See Scoles et al, *Conflict of Laws* at 1324 (cited in note 2); Paige, 26 Seattle U L Rev at 623 (cited in note 68); Ralf Michaels, *Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions*, in Eckart Gottschalk, et al, eds, *Conflict of Laws in a Globalized World* 29, 29–31 (2007).

Indeed, as far as recognition of most foreign judgments is concerned, many countries around the world appear to be relying solely upon unilateral legal arrangements, meaning they decide on their own.

While there has been little success in executing recognition agreements, the situation is quite different in other contexts. Indeed, in the context of judgments rendered and recognized within the EU, or even in the context of foreign arbitral awards, countries do cooperate by joining multilateral conventions. Examples of such conventions include the Brussels I and II Regulations applying to EU countries, and the New York Convention, which applies to foreign arbitral awards[75] and is considered a fairly successful multilateral convention.[76]

This brings the obvious question: What is the explanation for the fact that the US is not a party to any agreement with a foreign country regarding the recognition of foreign judgments? How is it possible that there is a treaty for the recognition of foreign judgments between EU countries, while such treaties are usually hard to find elsewhere? What is the difference between recognition of foreign judgments and recognition of foreign arbitral awards?

Conventional wisdom—at least with regard to the case of the US—usually points to the difference in domestic laws as a possible reason.[77] The punitive, multiple, and excessive damages awarded by US courts are disliked by several countries.[78] Thus, it is argued, cooperation in the design of recognition agreements between these countries and the US is undermined by the need to agree on the appropriate treatment of US judgments in these countries.

---

75 Arbitral awards are decisions rendered by foreign private arbitrators to end disputes brought before them by parties who are bound to an arbitration agreement.

76 See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1959, 330 UN Treaty Ser 38. As of now, the New York Convention has 142 signatories. See also Martin L. Roth, *Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments Under the Parallel Entitlements Approach*, 92 Cornell L Rev 573, 575–77 (2007); Lawrence S. Schaner and John R. Schleppenbach, *Looking Back at 2007: Another Good Year for the Enforcement of International Arbitral Awards in the US*, 63 Disp Resol J 80, 80 (2008) ("In 2007, the parties challenging enforcement were remarkably unsuccessful. US district courts confirmed international arbitration awards almost across the board.").

77 See Hay, *Conflict of Laws* at 221–22 (cited in note 39); Scoles et al, *Conflict of Laws* at 1269–70 (cited in note 2).

78 See, for example, *Lewis v Eliades* [2004] 1 WLR 692, ¶¶ 41, 47–49 (UK); Peter Hay, *The Recognition and Enforcement of American Money-Judgments In Germany*, 40 Am J Comp L 729, 746–47 (1992) (describing the German approach); Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 Brooklyn J Intl L 111, 113 (1998) (describing the British approach); Weintraub, 24 Brooklyn J Intl L at 181–82 (cited in note 53) (describing the German approach). But see Scott R. Jablonski, *Enforcing US Punitive Damages Awards in Foreign Courts: A Recent Case in the Supreme Court of Spain*, 24 J L & Comm 225, 227–30 (2005) (describing a Spanish decision to enforce an American judgment in its entirety even though the plaintiff won punitive damages as part of its award).

The asymmetric information problem discussed in this Article offers another explanation and a consequent recommendation for lawmakers. To be sure, the new theory can supply an explanation, which concerns the fact that the New York and EU Conventions actually operate, even if unconsciously, to confront the problem of asymmetric information. Entering mutual recognition agreements does not guarantee the forum that its preferences regarding mutual judgment recognition will be met. Because of the problem of asymmetric information, even with regard to a country with which the forum has a formal recognition agreement, the forum still has to be troubled by the possibility that the foreign country is less receptive to the forum's judgments than the forum is to the foreign country's judgments. This can occur either as a selective recognition regime or a sporadic recognition regime. Of course, the main theme concerns the forum's inability to identify whether or not the foreign country is applying a less receptive recognition regime.

The normative recommendation for lawmakers is therefore clear. Instead of putting an emphasis on drafting and concluding recognition agreements per se, lawmakers interested in optimal cooperation need to shift attention to the problem of asymmetric information. Lawmakers need to resort to *unilateral* moves that could strengthen the level of mutual cooperation with regard to foreign judgments, taking into account the problem of asymmetric information described here.[79]

Alternatively, lawmakers need to focus upon recognition agreements that adhere to this problem by carefully following the paradigm of conventions such as the Brussels I and II or the New York Convention. Understanding how the signaling solution offered in the previous section works can help explain the relative success of recognition regimes such as those applied with regard to EU countries' judgments within any other EU country, under the Brussels Convention, or with regard to foreign arbitral awards under the New York Convention. Indeed, both the Brussels Conventions and New York Convention shift the burden of proof with regard to any preconditions or defenses against the foreign judgment (or arbitral award) to the foreign-judgment debtor.[80] Thus,

---

79 For an example of such a move, see Section III.A.

80 See Brandon B. Danford, *The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?*, 23 Rev Litig 381, 390 (2004), citing Lee S. Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention of Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 Intl & Comp L Q 44, 59–60 (1975) (discussing how the Brussels Convention has created within the European Community an essentially federal system of recognition of judgments that has been likened to the "full faith and credit" afforded sister-state judgments within the US); Schaner and Schleppenbach, 63 Dispute Resolution J at 82 (cited in note 76) ("The New York Convention, which is celebrating its 50th anniversary, liberalized the procedures for enforcing foreign arbitration awards by shifting the

even if inadvertently, lawmakers have devised signaling solutions that may help overcome the problem of sporadic or selective recognition.

C. Should Reciprocity be a Formal Requirement?

The pursuit of recognition agreements is sometimes accomplished ex post via the reciprocity requirement.[81] Indeed, reciprocity is in fact an examination initiated by the forum of whether the foreign country is actually enforcing an implicit, silent, agreement between the foreign country and the forum to recognize each other's judgments. To be sure, the reciprocity requirement explores whether or not the foreign country that rendered the foreign judgment that is currently up for recognition by the forum, actually recognizes judgments pronounced by the forum. When reciprocity is established, it means that although a formal recognition agreement has not been executed between the two countries, it is actually unnecessary, as all parties know and understand the terms to which they should submit. The problem, as discussed above, is how to verify and react to defection or breach of this implicit agreement. Reciprocity, continues the argument, serves as the retaliatory framework. It creates an incentive for foreign countries to adopt recognition of the forum's judgments as a strategy.[82]

US law is divided over the necessity of the reciprocity requirement. While most states have rejected the reciprocity requirement,[83] seven have authorized, but have not mandated, their courts to deny recognition on the grounds of lack of reciprocity.[84] Two states have made reciprocity a mandatory prerequisite to recognition.[85] Furthermore, a recent initiative by the American Law Institute advocates the reestablishment of lack of reciprocity as a non-discretionary

---

burden of proof to the party opposing enforcement and expressly limiting the available defenses to enforcement.").

81 See Whincop, 23 Mel U L Rev at 424 (cited in note 16) (describing reciprocity as a threat that enshrines a tit-for-tat strategy).

82 See Richard W. Hulbert, *Some Thoughts on Judgments, Reciprocity, and the Seeming Paradox of International Commercial Arbitration*, 29 U Pa J Intl L 641, 645 (2008).

83 For a detailed description of the relevant legal history, see id at 643–44; Vishali Singal, *Preserving Power Without Sacrifying Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments*, 59 Hastings L J 943, 947–54 (2008).

84 These are Florida, Idaho, North Carolina, Maine, and Texas; and New York and California, when the defendant is a US Citizen.

85 These are Georgia and Massachusetts. Colorado requires in its version of the Uniform Foreign Money-Judgments Recognition Act, an agreement with the foreign country on reciprocity, and therefore does not enforce foreign judgments in accordance with the Uniform Act. However, Colorado recognizes and enforces foreign judgments under the common law doctrine of comity. See *Milhoux v Linder*, 902 P2d 856, 860 (Colo App 1995).

defense against recognition of a foreign judgment.[86] The declared purpose of such a move is "not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States."[87] According to the proposed amendment, foreign judgments will not be enforced if the court finds that comparable judgments of courts in the US would not be recognized or enforced in the courts of the state of origin. The foreign-judgment debtor, in order to avoid recognition of the foreign-judgment against him, carries the burden of proof; he needs to prove that there is "substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments of courts in the United States."[88] To do this, the debtor may rely upon expert testimony, or judicial notice "if the law of the state of origin or decisions of its courts are clear" to satisfy this burden of proof.[89] However, the court must conduct an inquiry concerning comparable judgments and needs to address a long list of factors.[90] According to the American Law Institute proposal, denial by courts of the foreign country of recognition of judgments for punitive, exemplary, or multiple damages is not to be regarded as denial of reciprocal recognition as long as the foreign country recognizes the compensatory portion of such judgments.[91] Finally, lack of reciprocity cannot serve as a defense if the Secretary of State has negotiated an agreement with the foreign country on reciprocal practices.[92]

The new theory presented here can help solve the dispute between advocates of the reciprocity defense and those who advocate abandoning reciprocity as a requirement. The economic rationale presented in this Article, which focuses on understanding a problem of asymmetric information, brings about the conclusion that reciprocity is irrelevant at best and misleading at worst. Indeed, because of the problem of asymmetric information, the forum cannot ascertain whether or not the foreign country, a judgment of which it is considering for recognition, is applying a selective or sporadic recognition regime with regard to judgments rendered by the forum. In other words, the forum cannot ascertain in any given moment, whether or not that foreign country is actually less receptive to the forum's judgments then the forum is to

---

86 ALI Proposal, § 7(a)–(b) (cited in note 9). See also Hulbert, 29 U Pa J Intl L at 646 (cited in note 82).

87 ALI Proposal § 7 cmt (b).

88 Id § 7(b).

89 Id.

90 Id § 7(c).

91 ALI Proposal § 7(d).

92 Id § 7(e).

that country's judgments, and whether or not the foreign country has taken such an uncooperative position intentionally or unintentionally. The reciprocity defense can only accurately block those cases in which the foreign country refrains altogether from recognizing the forum's judgments—a rare occurrence.[93] In all other cases, proving the reciprocity defense can be accomplished only by anecdotal evidence that does not necessarily reflect the foreign country's actual recognition regime. It thus also makes no difference who carries the burden of proof—the judgment creditor or the judgment debtor.

It comes as no surprise, then, that it has been recently suggested that the reciprocity requirement should only be considered as satisfied if the foreign country has entered a formal recognition agreement with the forum.[94] This suggestion actually admits to the fact that ex post recognition agreements—via the reciprocity requirement—are futile; and that only ex ante agreements ought to be considered. Of course, the previous section has explained the futility of making formal inter-country recognition agreements.[95]

D. The Legal Effect of Unrecognized Foreign Judgments

What is the legal effect of an *unrecognized* foreign judgment or a foreign judgment that has not been recognized or registered yet? This question differs from the recognition/registration selection contemplated in a previous section.[96] The recognition/registration choice did not undermine any of the foreign-judgment debtor's defenses, as she could halt the process of utilizing the foreign judgment, even if that foreign judgment was registered, and force the adjudication of the defense. The legal effect of unrecognized foreign judgments concerns a situation in which the foreign judgment must be put to an immediate practical use, although a possible defense is raised by the judgment debtor, which has not been adjudicated yet. In other words, the foreign-judgment creditor needs the foreign judgment to be used instantaneously, even before courts of the forum can have a chance to decide whether the challenged foreign judgment at hand qualifies for recognition (or registration).

Many common law jurisdictions have a simple answer for this question: Unrecognized foreign judgments have no local legal effect whatsoever.[97] In

---

93 One country which used to come close to applying such a unique regime is the People's Republic of China. See note 15 for a list of authorities.

94 See Singal, 59 Hastings L J at 969–70 (cited in note 83).

95 See Section III.B.

96 See Section III.A.

97 See note 4. See also Peter Barnett, *Res Judicata, Estoppel, and Foreign Judgments*, 25, 32 (Oxford 2001) (describing UK law).

these countries, a foreign judgment is meaningless prior to being formally recognized by the courts or the government. A formal process of recognition is needed, in which certain preconditions for recognition, or registration, must be met.[98]

Conventional wisdom derives the legal effect of an unrecognized foreign judgment from a territorial rationale. Such an explanation considers any act rendered by a foreign sovereign, foreign judgments included, as having no legal operation within the territorial borders of the forum.[99] Indeed, such an act is considered to have binding legal effect only within the territorial borders of the country issuing it. The territorial rationale is founded upon the understanding that the forum cannot trust any foreign judgment in the same manner in which it trusts local judgments. The foreign judgment might have been issued at the foreign country as a result of a legal proceeding that violated the rules of natural justice, it might have been issued by an incompetent court, or the judgment might be in contravention of the forum's public policy. Moreover, a no-legal-effect rule gives the forum a tool that allows it to examine whether or not a specific foreign country is cooperating with it before the forum decides to reciprocate.[100] Each foreign judgment is regarded has having no local legal effect, and a formal process of recognition, during which the foreign country's cooperation is examined, is necessary.

An exception to this no-legal-effect rule exists in countries that allow foreign-judgment creditors to use the unrecognized foreign judgment in order to obtain provisional relief against the foreign-judgment debtor, pending a thorough judicial examination of the foreign-judgment recognition question.[101] This is relatively common. Nevertheless, the question of unrecognized foreign judgments can arise in other contexts as well, in which the legal effect of such foreign judgments is less clear. In these contexts the asymmetric information explanation offered in this Article can help determine the appropriate legal regime.

Consider, for example, a need to utilize an unrecognized foreign judgment in order to impose an immediate automatic stay upon creditors' attempts to collect their debt through all means of collection possible. Suppose a Canadian company in bankruptcy is facing a lawsuit in the Eastern District of New

---

98 See note 9.

99 See note 4.

100 See Whincop, 23 Melb U L Rev at 424 (cited in note 16).

101 Consider ALI Proposal § 12 (provisional measures in aid of foreign proceedings); *Littleton v Moss*, 914 S2d 51 (La App 2005) (finding that a writ of attachment in aid of a sister state judgment with regard to which an exception is still pending was enforceable).

York.[102] While a US bankruptcy filing would have imposed an automatic stay on the estate, preventing the corporation's debtors from engaging in any collection efforts in the US,[103] such a stay is not automatic when the bankruptcy procedure is initiated abroad. The Bankruptcy Code does deal with international filings, in Chapter 15.[104] According to the Bankruptcy Code, this chapter aims "to provide effective mechanisms for dealing with cases of cross-border insolvency."[105] Relief under Chapter 15 "is available only after a foreign representative commences an ancillary proceeding for recognition of a foreign proceeding before a bankruptcy court."[106] Absent such recognition, or at least a petition for such recognition,[107] courts have no authority to consider requests for a stay.[108] To the extent that obtaining recognition, or filing a petition for recognition, does not impose a heavy burden upon the petitioner,[109] the forum is actually allowing the practical use of an unrecognized foreign judgment. As will immediately be explained, the new rationale offered in the Article justifies such a regime.

Consider a second example, which (for practical reasons) is less important in the American context but is nevertheless relevant in other jurisdictions. The typical scenario concerns a situation in which the foreign-judgment creditor needs to use an unrecognized foreign judgment to initiate an involuntary bankruptcy proceeding at the forum against the foreign-judgment debtor.[110]

---

102 See *United States v J.A. Jones Construction Group, LLC*, 333 BR 637, 638–639 (EDNY 2005) (without commencing an ancillary proceeding before an American bankruptcy court for the recognition of a Canadian bankruptcy proceeding, a Canadian interim receiver for a parent company that was put in bankruptcy proceedings in Canada sought a stay of an action filed in the US against the Canadian company's subsidiary. The District Court held that it had no authority to consider this request, but agreed to stay the action for 60 days so that the receiver could seek appropriate relief).

103 11 USC § 362.

104 11 USC §§ 1501–1532.

105 11 USC § 1501(a).

106 *Jones*, 333 BR at 638.

107 See 11 USC § 1519 (relief that may be granted upon filing petition for recognition).

108 *Jones*, 333 BR at 639. See also Justin Luna, *Thinking Globally, Filing Locally: The Effects of the New Chapter 15 on Business Entity Cross-Border Insolvency Cases*, 19 Fla J Intl L 671, 689–92 (2007).

109 See 11 USC § 1515(b) ("A petition for recognition shall be accompanied by (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative; (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.").

110 An involuntary bankruptcy case can be commenced "by three or more entities, each of which is either a holder of a claim against such person *that is not contigent as to liability or the subject of a bona fide dispute as to liability or amount.*" 11 USC § 303(b)(1) (emphasis added). The petitioning creditors in an involuntary bankruptcy bear the burden of proving one of the statutory grounds for

Suppose the involuntary proceeding is required as it is the only way in which the foreign-judgment creditor can retrieve into the estate assets that have been fraudulently removed, or assets that were transferred to certain creditors in an unlawful preference. An involuntary bankruptcy often seeks to recover debts, as certain doctrines can only be evoked once a formal bankruptcy procedure commences: creation of the bankruptcy estate, which comprises the debtor's property at the time of filing;[111] imposition of the automatic stay, which prevents other creditors from taking collection actions against the debtor, in a manner that reduces the value remaining for the foreign-judgment creditor;[112] or the trustee's avoiding powers, which enable to avoid preferential or fraudulent dispositions of the debtor's property.[113] Indeed, it is possible that even standard intermediate provisional measures, such as attachment of the debtor's assets, cannot suffice, and that the only way in which the foreign-judgment creditor could recover the debt is through an involuntary bankruptcy initiated against the foreign-judgment debtor.[114] But consider what happens if the existence of a debt which qualifies its holder as a petitioning creditor—a prerequisite for

---

commencing the procedure, that "the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount . . . ." 11 USC § 303(h)(1). The Bankruptcy Code does not define "contingent" or "bona fide dispute." A contingent claim is one that is conditional on a future uncertain event. The debtor is potentially liable because of a contract or a tortious act, but will only become liable if a future uncertain event occurs. See Brian A. Blum, *Bankruptcy and Debtor/Creditor: Examples and Explanations* 210 (Aspen 4th ed 2006). A tort claim not yet reduced to a judgment is contingent. See *In re All Media Properties, Inc*, 5 BR 126, 133 (Bankr SD Tex 1980), affd 646 F2d 193 (5th Cir 1986).

111 11 USC § 541(a).

112 11 USC § 362(a).

113 11 USC §§ 544–51. Consider Charles Jordan Tabb, *The Law of Bankruptcy* ch 6 (Foundation 1997). These powers enable the trustee, inter alia, to reach back into the past and invalidate an already completed transfer of value or transaction concluded by the debtor prior to the commencement of the bankruptcy proceeding.

114 A foreign-judgment creditor may initiate a foreign bankruptcy proceeding against the debtor and then commence a proceeding for the recognition in the US of a "foreign proceeding." See 11 USC § 1515. A "foreign proceeding" is defined as "collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 USC § 101(23). The foreign representative may apply for "any appropriate relief" where such relief appears "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors." 11 USC § 1521(a). However, this solution has several shortcomings: First, it mandates a second involuntary proceeding that needs to be initiated in the foreign country. This foreign proceeding is unnecessary and wasteful. Second, the "foreign representative" does not possess the ability to remit assets abroad for distribution in the foreign case unless "the interests of creditors in the United States are sufficiently protected." 11 USC § 1521(b).

commencing an involuntary bankruptcy[115]—can be established only by reference to the foreign judgment. Assume the creditor won a tort judgment against that debtor in a foreign forum and now wishes to have the debtor abide by that foreign judgment,[116] but the foreign-judgment debtor's last assets have been recently transferred to other creditors in an apparent unlawful preference.[117] In such a case, the judgment creditor cannot initiate an involuntary bankruptcy proceeding until the foreign judgment is recognized following a (sometimes lengthy) court hearing. Of course, by the time the foreign judgment is officially recognized, it is possible that the time limit for avoiding a preference has expired, and avoidance is no longer possible.[118]

Forcing the foreign-judgment creditor to wait until the debtor's defenses against the foreign judgment are adjudicated and examined—besides being unfair to the judgment creditor, and unbalanced, as far as the conflicting interests are concerned—can also thwart attempts by the forum and the foreign country to cooperate. Indeed, if the foreign judgment is not respected in this case, what is the point in cooperating in general? If the foreign judgment does eventually qualify for recognition, it might be too late for the judgment creditor; the debtor does not have any more assets or the time for the trustee's avoiding powers may have elapsed. From the foreign country's point of view, refusal by the forum to allow the foreign-judgment creditor to use the unrecognized foreign judgment pending formal recognition can be construed as defection.

What happens if the foreign-judgment creditor has initiated a formal recognition process before the appropriate court at the forum, but at the same time files the bankruptcy court at the forum in order to initiate an involuntary bankruptcy proceeding against the debtor? Even if the foreign-judgment creditor can get what she wants—commencement of the two proceedings in parallel—there is a risk that the forum will have two conflicting judicial decisions; a recognition of the foreign judgment by the recognition court and a denial of the

---

115 See 11 USC § 303(b)(1).

116 Recall that 11 USC § 303(b)(1) requires, as a basis upon which an involuntary bankruptcy case can be commenced, "a claim against such person that is not contingent as to liability or the subject of a bona fide dispute." Divergent results have been reached regarding whether tort claims upon which judgment has yet to be rendered constitute contingent claims. Several courts have ruled that tort claims are dependent upon a judicial finding of liability against the alleged tortfeasor, so that such claims are considered contingent for purposes the statute. See, for example, *Boston Beverage Corp v Turner*, 81 BR 738, 750 (D Mass 1987).

117 See 11 USC § 547(b)(4) (authorizing the trustee to avoid such preferences, made "on or within 90 days before the date of the filing of the petition; or between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider . . .").

118 See id.

involuntary bankruptcy by the bankruptcy court. What happens if these decisions conflict as regards the recognition of the foreign judgment?

The new rationale introduced in this Article can solve these problems. Applying this rationale leads to the conclusion that the basic no-legal-effect rule for unrecognized foreign judgments should be relaxed, and that an exception to the rule should be introduced. Indeed, the signaling solution mandates that the foreign judgment be accorded a default status of a local judgment, at least until a court of the forum rules otherwise. This insight applies to "emergency" situations as well. According certain, though limited, legal effect to the unrecognized foreign judgment can signal to the foreign country in which the unrecognized judgment was pronounced that the forum is willing to cooperate with it. Indeed, according the unrecognized foreign judgment a default legal effect of a local judgment endangers the forum, which might actually be allowing a practical use for judgments that would not qualify for recognition if examined de novo. Such a signal is of course observable; but it is also costly and cannot be imitated by forum countries that prefer, for example, a selective recognition regime. Such countries cannot allow others to have control over people or property in their jurisdiction.

The asymmetric information rationale also solves the problem of conflicting judicial decisions. If the judgment creditor can use the foreign judgment without having to wait for the completion of the independent formal recognition procedure, no recognition petition will ever be filed. Moreover, even an ex post determination that the use of the unrecognized foreign judgment was inappropriate cannot undermine the decision in the first place to utilize the foreign judgment. Using foreign judgments that might later turn out as unsuited for recognition in emergency cases is a price the forum has to pay in order to induce cooperation with the foreign country under conditions of asymmetric information.

Factors other than the new economic rationale developed here might influence the forum's decision as to whether or not unrecognized foreign judgments are to be effected. For example, the forum might be reluctant to acknowledge legal effect with regard to judgments declaring a change in a person's personal status (for example, declaring the marital status of a lesbian couple); such a rule might threaten the forum's ability to block judgments that stand in contravention of the forum's public policy. Obviously, a person interested in having such a judgment recognized by the forum would turn to the de facto recognition option (contexts in which unrecognized foreign judgments are accorded legal effect) rather than to a formal recognition process, which entails an orderly examination of, inter alia, the public policy requirement. Of course, if the forum chooses this position, it means that the forum prefers to protect its public policy over promoting its interest in the maximum possible cooperation with the foreign country; but it is certainly a legitimate preference.

Be that as is it may, the involuntary bankruptcy example discussed above demonstrates well the possibility to enhance cooperation through evisceration of the no-legal-effect rule without having it heavily undermine other interests. To be sure, initiating an involuntary bankruptcy resembles interlocutory relief. The judgment creditor is allowed to enjoy the relief of involuntary bankruptcy proceedings, and the use of foreign judgment is not irreversible. The foreign-judgment debtor can still, if she wishes to do so, carry the burden to prove that the foreign judgment does not qualify for recognition by the forum, and have the involuntary bankruptcy brought to a stop.

IV. CONCLUSION

In this Article I have argued that attempts by countries to cooperate in recognizing each other's foreign judgments are undermined by a problem of asymmetric information. The forum does not know if the foreign country is less receptive to the forum's judgments than the forum is to the foreign country's judgments. The forum also cannot determine whether a foreign country, the judgments of which the forum is required to accept, adheres to a selective or sporadic recognition regime in assessing the forum's judgments. This problem of private information prevents countries from cooperating fully with regard to the recognition of each other's judgments.

Acknowledging that the core problem of the law of foreign judgments is a problem of asymmetric information not only enhances our understanding of this area of the law and also brings about several recommendations. First, a forum interested in cooperation with a certain foreign country should prefer, unilaterally, registration of that country's foreign judgments, as the way to locally effect these judgments, instead of recognition. Second, countries should refrain from the pursuit of recognition agreements, as such agreements, per se, cannot guarantee cooperation. Third, insisting on the reciprocity requirement does not do much to improve cooperation between countries as far as recognition of foreign judgments is concerned. Finally, the forum should consider developing an exception to the no-legal-effect rule applying to unrecognized foreign judgments.

However, further research is necessary in order to improve inter-country cooperation in recognition of foreign judgments. For example, while the problem of selective recognition can find its solution in each country adopting the signals described in the Article, a solution to the problem of sporadic recognition is still missing.

CJIL