COMMENT

Foreign Judgments in American and English Courts: A Comparative Analysis

*Brian Richard Paige**

I. INTRODUCTION

Judgment recognition and enforcement are typically not topics of much concern where the parties, the claim, the court, the laws, and the assets are located within the same country. In such cases, the laws of that country will govern the process by which judgments are obtained and executed.

These issues take on paramount importance, however, where the judgment creditor must execute a judgment against assets located in a foreign country. Where domestic judgments transcend the realm of the sovereign, their fate becomes uncertain. Notions of international comity have supplemented and stabilized foreign judgments to some degree.[1] Yet, for many years, countries such as England have sought to increase the currency of their domestic judgments by entering into and maintaining reciprocal foreign judgment recognition and enforcement treaties with other signatory countries.[2] Under these treaties, judgments may be registered within the courts of foreign signatory countries and given reciprocal effect if certain minimal statutory requirements are met.[3]

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* J.D. Candidate 2003, Gonzaga University School of Law; B.A., Eastern Washington University, *magna cum laude*. The author is an Associate Editor with the Gonzaga Law Review. The author dedicates this Comment to his mother, Barbara, and to the memory of his father, Michael.

1. *See infra* Part II.A.
2. *See infra* Part III.A.
3. *Id.*

The United States is not a party to any such treaty.[4] Nor is there any federal law that recognizes and enforces foreign nation judgments by way of registration.[5] Surprisingly, individual states currently possess the exclusive authority to shape foreign judgment recognition and enforcement procedures within their respective borders. Consequently, to enforce a foreign judgment within American courts, a judgment creditor must file a fresh cause of action against the judgment debtor pursuant to the laws of the recognizing state.[6] The resulting patchwork of varying state approaches is confusing to the average foreign judgment creditor[7] and deficient when compared to the efficiency of the English scheme.

Recently, attempts to cure this deficiency via international convention have taken a back seat as the United States shifts its attention toward the enactment of federal legislation that would significantly reshape the American scheme of foreign judgment recognition and enforcement. If enacted, such legislation would dispense with the necessity of filing a fresh cause of action to enforce a foreign judgment and provide foreign judgment creditors with the option of enforcing their judgments by way of registration.

Part II of this Comment provides some background on the current American scheme of foreign judgment recognition and enforcement by comparing and contrasting its three major components—American common law, the Restatement (Third) of Foreign Relations Law, and the Uniform Foreign Money-Judgments Recognition Act. Part III tracks the English scheme of foreign judgment recognition and enforcement from its common law origin to its more sophisticated and streamlined foreign judgment registration system. Finally, Part IV suggests that the United States could benefit from the implementation of federal legislation that would bring foreign judgment registration procedures to American courts and provide for the recognition and enforcement of foreign judgments on a national level.

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4. Juan Carlos Martinez, *Recognition and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted—A Call for Revised Legislation in Florida*, 4 J. TRANSNAT'L L. & POL'Y 49, 50 (1995).

5. *See id.* at 51.

6. Andreas F. Lowenfeld & Linda J. Silberman, *United States of America*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 123 (Charles Platto & William G. Horton eds., 2nd ed. 1994).

7. *See* Linda J. Silberman et al., *A Different Challenge for the ALI: Herein of Foreign Country Judgments, An International Treaty, and An American Statute*, 75 IND. L. J. 635, 636 (2000).

II. FOREIGN JUDGMENTS IN THE UNITED STATES

While U.S. law clearly recognizes and enforces sister-state judgments, the law concerning most foreign judgments is less uniform. The United States Constitution provides that "Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State . . . ."[8] The protection this clause provides, however, is accorded only to sister-state judgments. There is no constitutional requirement that states extend similar recognition or enforcement to the decisions of foreign tribunals.[9] It may also surprise many to "learn that no federal law governs the enforcement of foreign-country judgments, and indeed that even in federal courts, state law rather than federal law applies to this subject."[10]

Despite the lack of a federal treaty or constitutional mandate addressing the issue, the United States is perceived as among the more liberal countries with regard to enforcing foreign nation judgments.[11] This status has been achieved largely though well founded notions of international comity and a national willingness to enforce foreign judgments "grounded on principles of justice similar to those recognized under United States laws."[12]

A. The Current American Scheme

While the current American scheme consists of an enigmatic patchwork of various common law and state statutory regimes,[13] the basic principles of recognition and enforcement are substantially the

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8. U.S. CONST. art. IV, § 1.

9. Martinez, *supra* note 4, at 51. It is worth noting here that the concepts of recognition and enforcement are not synonymous. *Id.* at 49. If a judgment is fairly litigated in the rendering state it will generally be considered ("recognized") as conclusive on the issue tried. *Id.* Once a foreign judgment is "recognized," it will become enforceable pursuant to the laws of the recognizing forum. *Id.* Thus, recognition and enforcement, though interrelated, are two independent steps that the judgment creditor must take in order to execute a foreign judgment. However, for the purpose of this Comment, the terms shall be used interchangeably.

10. Lowenfeld, *supra* note 6, at 123.

11. *Id.* "Ordinarily, a final judgment issued by a foreign-country court can be recognised (sic) without any special proceedings, and can be enforced by a simple action against a judgment debtor, typically by motion for summary judgment in lieu of complaint." *Id.* *See also Enforcing Foreign Judgments in the United States and Obtaining United States Judgments That Are Enforceable Abroad*, *in* 1 ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 2 (Ronald A. Brand ed., 1992) [hereinafter ENFORCING FOREIGN JUDGMENTS].

12. Gregory S. Paley, *Judgments in the United States*, *in* 2202.001 INTERNATIONAL RECOGNITION AND ENFORCEMENT OF MONEY JUDGMENTS 2202.009 (Gregory S. Paley ed., 1994). "The principle of comity is somewhat akin to full faith and credit except that, rather than being governed by statute, the application of comity lies solely within the discretion of the trial judge." *Id.*

13. *See infra* Part II.A.

same throughout the United States.[14] The next section discusses these principles, beginning with their origin, in order to delineate and examine the current American approach to foreign judgment recognition.

1. American Common Law

Few, if any, state or federal cases addressing the issue of foreign judgment recognition fail to cite the 1895 United States Supreme Court decision in *Hilton v. Guyot*.[15] In *Hilton*, the Supreme Court established the basic United States common law principles pertaining to enforcement of foreign nation judgments.[16] The case involved a French judgment rendered against two United States citizens.[17] Writing for the majority, Justice Gray noted that in the absence of a "treaty or a statute of this country," the "duty still rests upon the judicial tribunals of ascertaining and declaring what the law is . . . ."[18]

Recognizing that concepts of sovereignty place limits on the extraterritorial effect of a nation's judgment, Justice Gray asserted:

> 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."[19]

According to Justice Gray, a fundamental prerequisite to the exercise of comity is the requirement that the judgment be "rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice."[20] Justice Gray went on to frame the general American rule of comity as follows:

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14. *See infra* Part II.A–B.

15. ENFORCING FOREIGN JUDGMENTS, *supra* note 11, at 3.

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

17. *Id.* at 114. In *Hilton*, two United State citizens were successfully sued in a French court by an official liquidator of a French firm. *Id.* The plaintiff then sought enforcement of the judgment in the defendants' home state of New York. *Id.* The District Court directed a verdict in favor of the plaintiff in the sum of $277,775.44. *Id.* at 122.

18. *Id.* at 162.

19. *Id.* at 163. Justice Gray added the following:

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

Id. at 163–64.

20. *Id.* at 166–67. According to Justice Gray, "such jurisdiction, proceedings, and notice will be assumed." *Id.* at 167. "It will also be assumed that they are untainted by fraud . . . ." *Id.*

> When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proof, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.[21]

Ultimately, the *Hilton* Court refused to domesticate the French judgment on the ground that there was no showing that French courts would grant reciprocal treatment to judgments of the United States.[22] As such, "the comity of our nation" did not require the Court "to give conclusive effect to the judgments of the courts of France."[23]

Following a lengthy exploration of the rules of reciprocity as they pertain to the enforcement schemes of various nations, Justice Gray concluded that:

> The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim.[24]

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21. *Id.* at 205–06. Justice Gray added, "[T]here is no doubt that . . . a foreign judgment may be impeached for fraud." *Id.* at 206.

22. *Id.* at 161.

23. *Id.*

24. *Id.* at 227. Justice Gray added that:

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

Id. at 228.

Finding no statute or treaty to the contrary, Justice Gray asserted that it was "unwarrantable to assume that the comity of the United States requires anything more."[25]

In the many years following the Court's decision in *Hilton*, most courts, both state and federal, have adhered to and echoed the Court's basic holding.[26] However, despite the Court's unequivocal mandate that reciprocity be established as a precondition to the domestication of a foreign nation judgment by an American court, the vast majority of states have refused to recognize lack of reciprocity as a defense to recognition.[27] Nevertheless, as the next few sections illustrate, the Restatement (Third) of Foreign Relations Law, judicial decisions, and state statutes "have continued to be built upon the other requirements extracted from the comity analysis in *Hilton*."[28] While a state-by-state analysis is beyond the scope of this Comment, a basic overview is helpful in understanding the fundamental components of the American approach to foreign judgment recognition and enforcement.

2. Restatement (Third) of Foreign Relations Law

The Restatement (Third) of Foreign Relations Law and the Restatement (Second) of Conflicts of Law reflect the majority common law approach regarding the recognition and enforcement of foreign nation judgments within the United States.[29] However, for the purposes of this Comment, discussion will be limited to the provisions of the Restatement (Third) of Foreign Relations Law.[30] Thus, all references to the Restatement will be references to the Restatement (Third) of Foreign Relations Law.

As mentioned, the Restatement encapsulates "the prevailing common and statutory law of the States of the United States, not rules of federal or international law."[31] As comment *a* to section 481 of the Restatement points out:

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25. *Id.* at 228.

26. ENFORCING FOREIGN JUDGMENTS, *supra* note 11, at 5–6.

27. Lowenfeld, *supra* note 6, at 124. However, there are at least seven states (Florida, Georgia, Idaho, Maine, Massachusetts, North Carolina, and Texas) that continue to insist that reciprocity be established. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4, Action in Adopting Jurisdictions, 13 U.L.A. 261 (2001), [hereinafter "the Uniform Act"]. For a recent detailed analysis of why the Court's reciprocity holding in *Hilton* should be overruled see Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: the Next Time You Get a Chance, Please Look at* Hilton v. Guyot*; We Think it Needs Repairing*, 5 J. INT'L LEGAL STUD. 1 (1999).

28. ENFORCING FOREIGN JUDGMENTS, *supra* note 11, at 5–6.

29. Martinez, *supra* note 4, at 64–65.

30. *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481–86 (1987) [hereinafter "the Restatement"].

31. The Restatement, *supra* note 30, § 481 cmt. a.

> Since *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), it has been accepted that in the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign country judgments is a matter of State law, and an action to enforce a foreign country judgment is not an action arising under the laws of the United States. Thus, State courts, and federal courts applying State law, recognize and enforce foreign country judgments without reference to federal rules.[32]

While the Uniform Foreign Money-Judgments Recognition Act, by its own statutory text covers only judgments denying or granting a "sum of money,"[33] the Restatement may be applied to domesticate final foreign judgments "establishing or confirming the status of a person, or determining interests in property" as well as those granting or denying monetary awards.[34] However, the Restatement and the Uniform Act are similar in that they both expressly exclude tax and penal judgments,[35] as well as judgments for support in matrimonial or family matters[36] from their scope of application.

For example, if the judgment debtor fails to raise a recognized ground for non-recognition,[37] such a judgment "is conclusive between the parties, and is entitled to recognition in courts in the United States."[38] Once the judgment is domesticated under section 481(1) of the Restatement, section 481(2) provides that the judgment "may be enforced by any party or its successors or assigns against any other party, its successors or assigns, in accordance with the procedures for enforcement of judgments applicable where enforcement is sought."[39]

However, unlike the current English scheme,[40] neither the Uniform Act nor the Restatement provides for the enforcement of foreign judgments by way of judgment registration.[41] As a result, "enforcement of a debt arising out of a foreign judgment must be initiated by civil action, and the judgment creditor must establish a basis for the

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32. *Id.*

33. *See infra* Part II.A.3. "Although [the Uniform Act] is limited to money judgments, nothing in the Act or in the practice of courts in the United States prevents recognition of other kinds of judgments." The Restatement, *supra* note 30, § 481 Reporters' Notes, 2.

34. The Restatement, *supra* note 30, § 481(1). It is also important to note that the practical impact is that "as to the matters actually litigated and determined between the parties, the judgment precludes relitigation (claim preclusion)." *Id.* Reporters' Notes, 3.

35. *Compare* Uniform Act, *supra* note 27, § 1(2) *and* the Restatement, *supra* note 30, § 483.

36. *Compare* Uniform Act, *supra* note 27, § 1(2) *and* the Restatement, *supra* note 30, § 486.

37. *See infra* Part II.B.

38. The Restatement, *supra* note 30, § 481(1).

39. The Restatement, *supra* note 30, § 481(2).

40. *See infra* Part III.A.

41. The Restatement, *supra* note 30, § 481 cmt. i.

exercise of jurisdiction by the enforcing court over the judgment debtor or his property."[42]

As the following section illustrates, the language, as well as the scope, of the Restatement closely mirrors that of the Uniform Foreign Money-Judgments Recognition Act. While both the Restatement and the Uniform Act seek to distil and unify the comity analysis established in *Hilton*,[43] the Uniform Act takes the additional step of being subject to legislative enactment.

3. Uniform Foreign Money-Judgments Recognition Act

In an attempt to distil the common law practice of U.S. foreign judgment recognition into a workable statutory construct, the National Conference of Commissioners on Uniform and the American Bar Association approved the Uniform Foreign Money-Judgment Recognition Act in 1962.[44] The purpose of the Act is to "make it more likely that judgments rendered in a state that adopted the Act will be recognized abroad, since in a large number of civil-law countries, the granting of conclusive effect to money judgment from foreign courts is made dependent on reciprocity."[45] The Act was also intended to provide uniformity among enacting states.[46] By establishing a set list of criteria to help guide a court's decision whether to grant or deny conclusive effect to a foreign judgment within its jurisdiction, the Act seeks to:

> balance each state's desire to enforce only those judgments that accord with its own specific laws, with the understanding that the world contains many different cultures and legal systems, whose judicial decisions and legislative enactments may be completely unlike American court determinations and state statutes and regulations, but that court rulings emanating therefrom may nonetheless be worthy of recognition.[47]

Since its inception, twenty-nine states have adopted the Uniform Act,[48] making it the majority approach to foreign judgment domestica-

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42. The Restatement, *supra* note 30, § 481 cmt. g.

43. ENFORCING FOREIGN JUDGMENTS, *supra* note 11, at 10.

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

45. *Id.*

46. *See generally* Uniform Act, *supra* note 27, § 8 ("This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.").

47. Zitter, *supra* note 44.

48. These states are Alaska, ALASKA STAT. §§ 09.30.100–.180 (Michie 2001); California, CAL. CIV. PRO CODE §§ 11713–1713.8 (West 2001); Colorado, COLO. REV. STAT. §§ 13-62-101 to–109 (2001); Delaware, DEL. CODE ANN. Tit. 10, §§ 4801–08 (2001); Florida, FLA. STAT. ch. 55.601–607 (2001); Georgia, GA. CODE. ANN. §§ 9-12-110 to–117 (2001); Hawaii,

tion within the United States. To understand its scope of application, it is useful to examine various judicial decisions that have sought to interpret the Act's statutory text.

Section one of the Act defines "foreign judgment" as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters."[49] The term "foreign state" is broadly defined to encompass "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands."[50]

In order for a foreign judgment to fall within the ambit of the Uniform Act, section two requires that it be "final and conclusive and enforceable where rendered even though an appeal therefrom is pend-

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HAW. REV. STAT. §§ 658C-1--C-9 (2001); Illinois, 735 Ill. COMP. STAT. 5/12-618 to–626 (2001); Iowa, IOWA CODE §§ 626B.1--B.8 (2001); Maine, ME. REV. STAT. ANN. tit. 14, §§ 8501–09 (West 2001); Maryland, MD. CODE ANN., CTS. & JUD. PROC. §§ 10-701 to-709 (West 2001); Massachusetts, MASS. GEN. LAWS ch. 235, § 23A (2001); Michigan, MICH. COMP. LAWS §§ 691.1151–59 (2001); Minnesota, MINN. STAT. § 548.35 (2001); Missouri, MO. REV. STAT. §§ 511.770–.787 (2001); Montana, MONT. CODE ANN. §§ 25-9-601 to–609 (2001); New Jersey, N.J. STAT. ANN. §§ 2A:49A-16–A-24 (West 2001); New Mexico, N.M. STAT. ANN. §§ 39-4B-1-- B9 (Michie 2001); New York, N.Y C.P.L.R §§ 5301–09 (McKinney 2001); North Carolina, N.C. GEN. STAT. §§ 1C-1800–08 (2001); Ohio, Ohio REV. CODE ANN. §§ 2329.90–.94 (Anderson 2001); Oklahoma, OKLA. STAT. tit. 12, §§ 710–718 (2001); Oregon, OR. REV. STAT. §§ 24.200–.255 (2001); Pennsylvania, 42 PA. STAT. ANN. TIT. 42 §§ 22001–09 (2001); Texas, TEX. CIV. PRAC. & REM. CODE ANN. §§ 36.001–.008 (Vernon 2001); Virginia, VA. CODE ANN. §§ 8.01-465.6–465.13 (Michie 2001); and Washington, WASH. REV. CODE §§ 6.40.010–.915 (2001). The Act has also been adopted in the District of Columbia, D.C. CODE ANN. §§ 15-381 to–388 (2001); as well as the Virgin Islands, 5 V.I. CODE ANN. §§ 561–569 (2001).

49. Uniform Act, *supra* note 27, § 1(2). Applying this definition literally, one court concluded that a judgment that merely rendered a contract void did not constitute a "recovery for a sum of money" and therefore was not entitled to recognition under the Act. *See* Allstate Ins. Co. v. Adminstratia Asigurarilor de Stat, 962 F. Supp. 420 (S.D.N.Y. 1997). On the other hand, section one's exemption for taxes, fines, and penalties has been given a slightly more liberal construction. So long as the judgment can be classified as remedial, rather than punitive, it will generally be recognized. *See* Chase Manhattan Bank, N.A. v. Hoffman, 665 F. Supp. 73 (D. Mass. 1987); Desjardins Ducharme v. Hunnewell, 585 N.E.2d 321 (Mass. 1992). The court in *Hoffman* concluded that "whether a judgment is a 'fine or other penalty' depends on whether its purpose is remedial in nature, affording a private remedy to an injured person, or penal in nature, punishing an offense against the public justice." *Hoffman*, 665 F. Supp. at 75–76.

50. Uniform Act, *supra* note 27, § 1(1). Section one's use of the phrase "other than the United States" has been interpreted as excluding judgments of sister states from the scope of the Act. *See* G&R Petroleum, Inc. v. Clements, 898 P.2d 50 (Idaho 1995); Krontiz v. Fifth Ave. Dance Studio, Inc., 249 S.E.2d 80 (Ga. 1978); Mueller v. Payn, 352 A.2d 895 (Md. App. 1976). *Contra* Elkhart Co-op. Equity Exch. v. Hicks, 823 P.2d 223 (Kan. App 1991); Jacoby v. Jacoby, 258 S.E.2d 534 (Ga. App. 1979).

ing or is subject to appeal."[51] Neither the Restatement nor the Uniform Act distinguishes between adversarial and default judgments.[52] Whether or not a foreign judgment is "final and conclusive and enforceable where rendered" under section two of the Uniform Act is an issue that must be resolved by applying the law of the foreign country.[53]

If the foreign judgment is found to have met section two's conclusiveness requirements (and barring any statutory ground for non-recognition),[54] section three provides that the judgment will be considered "conclusive between the parties to the extent that it grants or denies recovery of a sum of money."[55] Such a finding renders the foreign judgment "enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."[56]

As previously mentioned, notions of international comity rather than constitutional obligation supplement the recognition of foreign nation judgments at American common law.[57] As such, the Uniform Act should be viewed as the floor, rather than the ceiling, for the purpose of foreign judgment domestication.[58] As the Fourth Circuit noted in *Guiness PLC v. Ward*, the Uniform Act:

> [D]elineates a *minimum* of foreign judgments which *must* be recognized in jurisdictions which have adopted the Act, and in no

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51. Uniform Act, *supra* note 27, § 2. However, where the court is satisfied that either an appeal is pending, or that the defendant is both entitled to and plans to appeal from the foreign judgment, section 6 provides that proceedings may be stayed "until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal." *Id.* at § 6. In light of section two's conclusive implications, two courts have found the Act's lack of a statutory mechanism for providing a judgment debtor notice or the ability to establish grounds for non-recognition violates due process. *See* Plastics Eng'g Inc. v. Diamond Plastics Corp., 764 S.W.2d 924 (Tex. App. 1989); Detamore v. Sullivan, 731 S.W.2d 122 (Tex. App. 1987).

52. *Compare* New Cent. Jute Mills Co. v. City Trade and Indus., Ltd., 318 N.Y.S.2d 980 (1971) *and* the Restatement, *supra* note 30, § 481 cmt. i.

53. Hernandez v. Seventh Day Adventist Corp., 54 S.W.3d 335 (Tex. App. 2001); S.C. Chimexim S.A. v. Velco Enter. Ltd., 36 F. Supp. 2d 206 (S.D.N.Y. 1999) (citing Dear v. Russo, 973 S.W.2d 445, 446 (Tex. App. 1998)). In *Hernandez*, a Texas Court of Appeals declared that "[i]f the judgment is not facially final, the judgment creditor bears the burden of producing evidence demonstrating the judgment is final." *Hernandez*, 54 S.W.3d at 337 (citing *Russo*, 973 S.W.2d at 446). Finding such evidence to be lacking from the case at hand, the plaintiff's facially valid judgment was sufficient to support the decision of the court to affirm the trial court's judgment in plaintiff's favor. *Id.*

54. *See infra* Part II.B.

55. Uniform Act, *supra* note 27, § 3.

56. *Id.* The Comment to § 3 states that the "method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 in a state having enacted that Act." Uniform Act, *supra* note 27, § 3 cmt.

57. *See supra* Part II.A.1.

58. *See* Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992).

> way constitutes a *maximum* limitation upon foreign judgments which *may* be given recognition apart from the Act.[59]

The flexibility necessary to apply this concept has been codified in the Act's "Savings Clause," which provides, "[t]his Act does not prevent the recognition of a foreign judgment in situations not covered by this Act."[60] What results is a liberal statutory construct that tempers the drafters' desire for uniformity against the courts' need for judicial discretion. However, neither the Uniform Act nor the Restatement alleviates the necessity of a formal judicial proceeding prior to the domestication of a foreign judgment. Moreover, the Act's flexibility might also contribute to substantial variances among the states regarding its construction and application.[61]

While the Uniform Act and the Restatement parallel one another in terms of their liberal scope of application, both continue to reinforce many of the common law restraints on foreign judgment recognition.[62] The following section delineates and compares these limitations as set forth in both the Uniform Act and the Restatement in light of the judicial decisions that have strengthened and defined their parameters.

B. Attacks on Foreign Judgments in U.S. Courts

An American court's review of a foreign judgment can be seen as a balanced inquiry into concepts of international comity and fundamental notions of Americanized due process. While the former sets the proverbial floor for analysis, the latter establishes the ceiling. Thus, while American courts are generally willing to recognize foreign judgments out of respect for the court of origin, recognition will be denied where the judgment was obtained in a manner repugnant to American jurisprudence.

The Restatement and the Uniform Act "codify the comity analysis of *Hilton v. Guyot* in providing grounds for non-recognition of a foreign judgment."[63] While the grounds for non-recognitions are substantially the same under both the Restatement and the Uniform Act,

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59. *Id.* at 884 (emphasis in original).
60. Uniform Act, *supra* note 27, § 7.
61. *See generally* Silberman, *supra* note 7, at 636–37.
62. *See infra* Part II.B.
63. ENFORCING FOREIGN JUDGMENTS, *supra* note 11, at 10.

some receive different treatment.[64] The following chart provides a helpful comparison:[65]

	Uniform Foreign Money-Judgments Recognition Act	Restatement (Third) of Foreign Relations Law
Foundational Requirements for Recognition	Final and conclusive and enforceable where rendered	Final judgment
Mandatory Grounds for Non-Recognition	Lack of due process	
	Lack of personal jurisdiction	
	Lack of subject matter jurisdiction	
Discretionary Grounds for Non-Recognition		Lack of subject matter jurisdiction
	Insufficient notice to defendant	
	Fraud	
	Cause of action contrary to public policy	
	Judgment conflicts with another final judgment	
	Proceedings contrary to agreement of parties	
	'Seriously inconvenient forum' with jurisdiction based only on personal service	

The first ground for non-recognition is lack of due process. As the chart above illustrates, lack of due process is a ground for mandatory non-recognition common to both the Restatement and the Uniform Act.[66] On the one hand, the judgment need only comport with general principles of due process. The mere fact that procedures implemented in the foreign tribunal were not identical to that employed in American courts will not render the judgment void under either recognition scheme.[67] On the other hand, domestication will be denied where the procedure implemented in the foreign court denied the

64. *Compare* the Restatement, *supra* note 30, § 482 *and* The Uniform Act, *supra* note 27, § 4.

65. This chart is based on a chart created by Professor Ronald A. Brand. *See* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 266 (1991).

66. *Compare* the Restatement, *supra* note 30, § 482(1)(a) *and* The Uniform Act, *supra* note 27, § 4(a)(1).

67. Brand, *supra* note 65, at 271.

defendant such fundamental American rights as access to counsel, discovery, impartial tribunals and judicial review.[68]

The second ground for non-recognition is lack of personal jurisdiction. Lack of personal jurisdiction over the judgment debtor is the most commonly employed grounds for mandatory non-recognition under the Uniform Act and the Restatement.[69] The foreign judgment debtor may successfully attack personal jurisdiction in two ways. First, neither the Uniform Act nor the Restatement allows recognition where the foreign court lacked personal jurisdiction over the defendant pursuant to the laws of the foreign country.[70] Second, even where the foreign court's personal jurisdiction over the defendant comports with the foreign country's laws, recognition will be denied if the defendant lacked "minimum contacts" within the forum state and reasonable notice of the pendency of the action.[71]

The third ground for non-recognition is lack of subject matter jurisdiction. While lack of subject matter is treated as a ground for mandatory non-recognition under the Uniform Act, "it seldom provides the basis for denial of the requested use of the foreign judgment."[72] Often, subject matter is presumed, and the burden lies with the judgment debtor to establish the lack of subject matter "by application of the jurisdictional rules of the foreign court."[73] Adhering to

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68. *See* The Restatement, *supra* note 30, § 482 cmt b; Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000); Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995).

69. *Compare* The Restatement, *supra* note 30, § 482 cmt. c *and* Brand *supra* note 65, at 271.

70. *See* Brand, *supra* note 65, at 271.

71. *See* Canadian Imperial Bank of Commerce v. Saxony Carpet Co., Inc., 899 F. Supp. 1248 (S.D.N.Y. 1995). *However, section* 5(a) *of the* Uniform Act *limits the court's discretion to* deny recognition based on lack of personal jurisdiction, and states:

> (a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if
>
> (1) the defendant was served personally in the foreign state;
>
> (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
>
> (3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
>
> (4) the defendant was domiciled in the foreign state when the proceedings were instituted or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
>
> (5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign state; or
>
> (6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a [cause of action] [claim for relief] arising out of such operation.

The Uniform Act, *supra* note 27, § 5(a).

72. Brand, *supra* note 65, at 273.

73. *Id.*

this rationale, the Restatement diverges from the Uniform Act by listing lack of subject matter as a discretionary, rather than mandatory, ground for non-recognition.[74]

The fourth ground for non-recognition is insufficient notice to the defendant. Insufficient notice is treated as ground for discretionary non-recognition under both the Uniform Act and the Restatement.[75] Invocation of the court's discretion under either scheme is clearly warranted where the judgment debtor received no notice of the pendency of the action.[76] Consistent with the liberal American scheme, however, this discretionary ground for non-recognition has been narrowly construed. For example, one court recognized a foreign judgment despite alleged defects in the service of process on the basis that the defendant was able to submit an answer and was represented by counsel.[77]

The fifth ground for non-recognition is fraud. American courts addressing allegations of fraud as a defense to domestication of a foreign judgment have generally limited non-recognition to instances of extrinsic fraud.[78] Extrinsic fraud occurs where "the unsuccessful party has been prevented from exhibiting fully his case as by keeping him away from court or where the defendant never had knowledge of the suit."[79] Alternately, intrinsic fraud, which relates to issues, that were or could have been litigated before the foreign court, cannot be used to impeach a foreign judgment.[80]

The sixth ground for non-recognition may be invoked where the cause of action is contrary to the public policy of the recognizing jurisdiction. Public policy is a discretionary ground for non-recognition common to both the Restatement and the Uniform Act.[81] There is no requirement that judicial procedures between different nations must be identical, or that an analogous cause of action exists between the

74. *See* the Restatement, *supra* note 30, § 482(2)(a).

75. *Compare* the Restatement, *supra* note 30, § 482(2)(b) *and* The Uniform Act, *supra* note 27, § 4(b)(1).

76. *See* Gondre v. Silberstein, 744 F. Supp. 429 (E.D.N.Y. 1990) (applying New York Law).

77. *See* Farrow Mortg. Serv. Pty. Ltd. v. Singh, 1995 WL 809561 (Mass. Super. Ct. 1995).

78. Brand, *supra* note 65, at 274.

79. United States v. Throckmorton, 98 U.S. 61, 65–66 (1878). However, "[i]f the foreign court has actually considered and determined the question of fraud, whether 'extrinsic' or 'intrinsic,' the facts bearing on that issue may not be subject to reexamination when enforcement is sought in the United States." Brand, *supra* note 65, at 275.

80. *See* Bank of Nova Scotia v. Tschabold Equip. Ltd., 51 Wash. App. 749, 754 P.2d 1290 (1988); Brand, *supra* note 65, at 274.

81. *Compare* the Restatement, *supra* note 30, § 482(2)(d) *and* The Uniform Act, *supra* note 27, § 4(b)(3).

recognizing state and the rendering foreign country.[82] However, a judgment rendered by a foreign court, which is either unknown or flatly rejected by the recognizing court, will likely be rejected as against public policy.[83]

The seventh ground for non-recognition is available where the foreign judgment conflicts with a prior, inconsistent judgment.[84] Such judgments may arise "either in the context of two conflicting foreign judgments or of a foreign judgment in conflict with a judgment from another United States court."[85] While the latter of the two judgments is likely to be preferred, the presiding court has discretion to recognize the former or neither.[86] Indeed, such judicial discretion may sit uneasy with some foreign judgment creditors. It may be equally unsettling, particularly for the holder of a prior inconsistent American judgment, to learn that no principle or law requires "automatic preference" by U.S. courts for the judgments of sister states.[87]

The eighth ground for non-recognition may be invoked where the proceedings that led to the foreign judgment were contrary to an agreement of the parties. Both the Restatement and the Uniform Act provide courts with the discretion to deny recognition to a foreign judgment obtained in violation of a preexisting contractual agreement between the parties.[88] As such, if the parties have previously agreed to resolve disputes within a particular forum or manner, American courts will generally respect that agreement.[89]

The ninth ground for non-recognition is available where the foreign court was a seriously inconvenient forum and jurisdiction was based only on personal jurisdiction.[90] Inconvenient forum is a discre-

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82. Dart v. Balaam, 953 S.W.2d 478 (Tex. App. 1997); the Restatement, *supra* note 30, §482 cmt. f.

83. *See* Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997); Neprany v. Kir, 173 N.Y.S.2d 146 (App. Div. 1958).

84. *Compare* the Restatement, *supra* note 30, § 482(2)(e) *and* The Uniform Act, *supra* note 27, §4(b)(4).

85. Brand, *supra* note 65, at 276.

86. The Restatement § 482, *supra* note 30, cmt. g.

87. Ackerman v. Ackerman, 517 F. Supp. 614, 623–26 (S.D.N.Y. 1981). *See also* the Restatement, *supra* note 30, § 482 cmt. g; Brand, *supra* note 65, at 276.

88. *Compare* the Restatement, *supra* note 30, §482(2)(f) *and* The Uniform Act, *supra* note 27, § 4(b)(5).

89. *See* M/S Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972). Comment *h* to section 482 of the Restatement points out that "[p]arties may, however, waive the forum selection clause, either expressly or by implication. If waiver was found by the rendering court, that determination ordinarily is binding on the court where recognition is sought." The Restatement, *supra* note 30, § 482 cmt. h.

90. The Uniform Act, *supra* note 27, § 4(b)(6). As Professor Brand notes:

> This does not require that the foreign jurisdiction recognize the doctrine of forum non conveniens as it is applied in United States courts. It rather allows the enforcing court

tionary ground for non-recognition unique to the Uniform Act.[91] The exception section 4(b)(6) provides "is both discretionary and limited."[92] Even where the foreign court proves to be a "seriously inconvenient forum," recognition will not be withheld if jurisdiction is effectuated by means other than personal service.[93]

While the basic components of the American scheme were no doubt intended to create an efficient, uniform method of foreign judgment recognition and enforcement, efficiency and uniformity have never truly been realized. First, actions to enforce a foreign judgment within the United States must be initiated by filing a fresh cause of action, thus reducing efficiency in terms of time and cost. Second, while the majority of states have adopted the Uniform Act, the Act itself has not been uniformly applied by the states.[94] Unfortunately, absent a single national process by which foreign judgments may be recognized and enforced without the added cost of initiating a fresh cause of action, the American scheme cannot hope to be either uniform or efficient.

The next section analyzes how such a national scheme has been applied successfully to increase the efficiency and uniformity of foreign judgment recognition and enforcement procedures in English courts.

III. FOREIGN JUDGMENTS IN ENGLAND

While sharing many of its core principles with America, the English scheme diverges from the American scheme by elevating the process of foreign judgment recognition and enforcement through the implementation of international treaties. The next section analyzes the English scheme, from its common law roots to its current, more sophisticated, judgment registration system.

A. The Current English Scheme

Depending upon the country in which the court of original jurisdiction is situated, a judgment creditor seeking to enforce a foreign

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to determine whether, if the foreign court did recognize the doctrine, the foreign court should have dismissed on grounds of serious inconvenience.

Brand, *supra* note 65, at 277.

91. The Uniform Act, *supra* note 27, § 4(b)(6). *See also* Brand, *supra* note 65, at 277.

92. Brand, *supra* note 65, at 277.

93. The Uniform Act, *supra* note 27, § 4(b)(6). *See also* CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 743 N.Y.S.2d 408 (App. Div. 1st Dep't 2002); Farrow Mortg. Serv. Pty. Ltd. v. Singh, 1995 WL 809561 (Mass. Super. Ct. 1995); Manches & Co. v. Gilbey, 646 N.E.2d 86 (Mass. 1995).

94. *See* Silberman, *supra* note 7, at 636–37.

judgment in England[95] may encounter any of five separate sets of rules relating to foreign judgment recognition and enforcement.[96] These rules may require the judgment creditor to either initiate a fresh action at common law or simply register the judgment pursuant to the provisions of bilateral or multilateral treaties.[97] The following chart provides a simple illustration of the five methods of enforcing foreign judgments in England.

	Application	Recognition Method
English Common Law	Judgments from any country that has no treaty with England	Summary judgment proceedings
Administration of Justice Act 1920	Judgments from current and former commonwealth countries	Judgment registration
Foreign Judgments (Reciprocal Enforcement) Act 1933	Judgments from various "recognized courts"	
1968 Brussels Convention	Judgments from members of the European Union	
1988 Lugano Convention	Judgments from members of the European Union and the European Free Trade Association	

At this point it may be helpful to clarify two issues that may be raised by the above chart. First, to the extent that the provisions of the Brussels or Lugano Convention apply, all earlier enforcement regimes are displaced.[98] In situations where both the Brussels *and*

95. This Comment will focus on England. However, it should be noted that the United Kingdom is divided into three separate jurisdictions: England and Wales, Scotland, and Northern Ireland. *See* Robert Lee & Nicholas Lee & Edwards, *Recognition and Enforcement in English Law of Money Judgments from Outside the UK, Supplement* to I.B.F.L. 12(10), 1 (March 1994).

96. *Id.* at 1.

97. *See infra* Part III.A.1–3.

98. Judy Dennis, *Money Judgments in the United Kingdom, in* 2201.001 INTERNATIONAL RECOGNITION AND ENFORCEMENT OF MONEY JUDGMENTS 2201.007-008 (Gregory S. Paley ed., 1994).

Lugano Conventions apply, the Brussels Convention takes precedence in all but a few instances.[99] Second, while each treaty is reciprocal and provides for like treatment of English judgments within the various courts of signatory countries, this Comment will focus solely on the process by which foreign judgments are recognized and enforced in England.

With this in mind, the next section illustrates the English scheme of foreign judgment recognition and enforcement in a more focused and coherent manner.

1. English Common Law

English common law governs the recognition and enforcement of all judgments rendered by countries, such as the United States, that have not yet entered into a reciprocal enforcement treaty with England.[100] Similar to the American common law scheme, English courts treat foreign judgments as recognized debts at English common law, which may be enforced through a simple summary judgment proceeding.[101] Generally speaking, a judgment will be recognized and enforced at English common law if it is:

> a debt or definite sum;
>
> not payable in respect of taxes, fines or penalties;
>
> not discredited on grounds of fraud or contrary to overriding considerations of public policy; and
>
> final and conclusive.[102]

As the above list indicates, English and American common law closely mirror one another with respect to the criteria necessary to do-

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> The other regimes apply where the subject matter of the judgment falls outside the scope of the Convention. Furthermore, the Convention is only applicable when the treaty was in force in both England and the adjudicating country at the time proceedings were instituted . . . . If, however, the foreign proceedings commenced before the Brussels Convention was in force in both countries but it came into effect in both by the time judgment was given, there are transitional provisions which may make the treaty applicable.

Id. at 2201.007.

99. *See* Lee & Edwards, *supra* note 95, at 5. In cases where the Brussels Convention displaces the Lugano Convention, the distinction is only slight as both Conventions are substantially the same. *See* Dennis, *supra* note 98, at 2201.008.

100. Dennis Campbell & Dharmendra Popat, *Enforcing American Money Judgments in the United Kingdom and Germany*, 18 S. ILL. U. L.J. 517, 528 (1994).

101. *Compare* Lee & Edwards, *supra* note 95, at 1, *and supra* note 5.

102. Lee & Edwards, *supra* note 95, at 1.

mesticate a foreign nation judgment.[103] In addition to the prerequisite that the judgment involve "a debt or definite sum" of money, both the American and English schemes are uniform in their refusal to recognize and enforce foreign judgments involving taxes, fines or penalties.[104] Lord Tenterden, in *James v. Catherwood*, found this principle of private international law "too plain for argument."[105] Lord Tenterden went on to state, "[i]t has been settled, ever since the time of Lord Hardwicke that in a British court we cannot take notice of the revenue laws of a foreign state."[106]

An English common law cause of action to enforce a foreign judgment is a fairly straightforward procedure. While enforcement is not automatic and requires a "fresh proceeding," a judgment creditor may institute such an action by applying for summary judgment pursuant to Rule of Supreme Court Order 14.[107] The majority of such actions are often informally disposed of "in chambers," where "evidence is on affidavit and there is no prior discovery."[108]

While the English common law scheme provides foreign judgment creditors a relatively streamlined process by which they may seek to enforce and execute their judgment, this process lacks the predictability and procedural ease provided under England's system of judgment registration. As the next section illustrates, judgment registration is the preferred method of foreign judgment recognition and enforcement within English courts.

2. Administration of Justice Act 1920 and Foreign Judgments (Reciprocal Enforcement) Act 1933

Through a process of judgment registration, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 added greater predictability and fluidity to the English practice of foreign judgment enforcement.[109] Based on principles of English common law, these two so-called "common law" statutes "remove the necessity to bring any fresh action against the judgment debtor."[110] In their simplest terms, both treaties allow certain judgments to be registered within foreign signatory countries, where they

103. *See supra* Part II.

104. *Compare* Lee & Edwards, *supra* note 95, at 1, *and supra* Part II.

105. James v. Catherwood, 3 Eng. Rep. 190, 191 (K.B. 1823).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Jeremy Carver & Christopher Napier, *United Kingdom*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 231 (Charles Platto & William G. Horton eds., 2nd ed. 1994).

will be given reciprocal effect if certain minimal statutory requirements are met.[111]

The Administration of Justice Act 1920 governs the registration and enforcement of foreign money-judgments[112] between the United Kingdom and current or former Commonwealth countries.[113] The Act, at section nine, sets out the basic rule as follows:

> Where a judgment has been obtained in a superior court in any part of His Majesty's dominions outside the United Kingdom to which this Part of this Act extends, the judgment creditor may apply to the High Court in England or [Northern Ireland]. . .or to the Court of Session in Scotland, at any time within twelve months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if all the circumstances of the case, they think it just and convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly.[114]

It should be noted that registration under the 1920 Act is discretionary.[115] If the above requirements are met (and no bar to registration exists),[116] the court may order the judgment registered, thereby giving it "the same force and effect. . .as if it had been a judgment

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111. Lee & Edwards, *supra* note 95, at 3.

112. *See* Administration of Justice Act, 1920, c. 81. § 12(1) [hereinafter AJA]. According to section 12(1):

> The expression "judgment" means any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.

Id.

113. AJA, *supra* note 112, §§ 9–10, 13. These countries are: Anguilla, Antigua and Barbuda, Australia (save for the Australian Capital Territory), Bahamas, Barbados, Belize, Bermuda, Botswana, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Christmas Islands, Cocos (Keeling) Islands, Republic of Cyprus, Dominica, Falkland Islands, Fiji, The Gambia, Ghana, Gibraltar, Grenada, Guyana, Hong Kong, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, New Zealand, Nigeria, Territory of Norfolk Island, Papua New Guinea, St. Christopher and Nevis, St. Helena, St. Lucia, St. Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Solomon Islands, Sovereign Base Area of Akrotiri and Dhekelia in Cyprus, Sri Lanka, Swaziland, Tanzania, Tasmania, Trinidad and Tobago, Turks and Caicos Islands, Tuvalu, Uganda, Zambia, and Zimbabwe. Dennis, *supra* note 98, at 2201.004.

114. AJA, *supra* note 112, § 9(1).

115. *See* AJA, *supra* note 112, §9(1). *See also* Lee & Edwards, *supra* note 95, at 4; Carver & Napier, *supra* note 110, at 232.

116. *See infra* Part III.B.

originally obtained. . .in the registering court."[117] Unlike the 1933 Act,[118] parties to the 1920 Act are not prohibited from opting to enforce their judgments at English common law.[119]

The Foreign Judgments (Reciprocal Enforcement) Act 1933 is patterned closely after the 1920 Act.[120] It governs reciprocal enforcement procedures between the United Kingdom and the various "recognised courts" of foreign countries.[121] The 1933 Act diverges from the 1920 Act, however, in that "enforcement by registration under this scheme is mandatory rather than discretionary . . . . "[122] In addition, the 1933 Act supersedes any common law cause of action to enforce a foreign judgment to the extent that it falls within the provisions of the Act.[123]

The basic rule of the 1933 Act has been summarized as follows:

> Any judgment of a court to which the 1933 Act extends (the 'recognised court') which is final and conclusive between the parties and payable for a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a penalty, and which can be enforced by execution in the country of the original courts *shall* be registered with the High Court or Court of Session in Scotland or High Court in Northern Ireland upon application of the judgment creditor within six years of the judgment, or if there have been proceedings by way of appeal, after the date of the last judgment, unless:
>
> (*a*) the judgment is one made by the recognised court on appeal from a court which is not a recognised court;

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117. AJA, *supra* note 112, § 9(3)(a).

118. *See* Foreign Judgments (Reciprocal Enforcement) Act, 1933 c. 13, §6 [hereinafter FJREA] ("No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this Part of this Act applies, other than a proceedings by way of registration of the judgment shall be entertained by any court in the United Kingdom.").

119. Dennis, *supra* note 98, at 2201.005.

120. Lee & Edwards, *supra* note 95, at 4. *See also* FJREA, *supra* note 118, §§ 1–10. It is worth noting that the FJREA has been rendered less important since the enactment of the Brussels Convention, *infra* Part III.A.3, which "supersedes the FJREA in the case of Belgian, Dutch, French, German, and Italian judgments to the extent that such judgments fall within the provisions of that treaty." Dennis, *supra* note 98, at 2201.005–06.

121. Dennis, *supra* note 98, at 2201.005. These countries are: Austria, The Austrian Capital Territory, Belgium, Canada (save for Quebec), France, Germany, Guernsey, India, Isle of Man, Israel, Italy, Jersey, The Netherlands, Norway, Pakistan, Surinam, and Tonga. *Id.*

122. *Id.* at 2201.005. *See also* FJREA, *supra* note 118, § 2. However, the 1933 Act does grant courts the discretion to set aside or adjourn registration where "an appeal is pending," or the judgment debtor "is entitled and intends to appeal against the judgment . . . . " FJREA, *supra* note 118, § 5(1).

123. *See* FJREA, *supra* note 118, § 6.

(*b*) the judgment of the recognised court is founded on a judgment made or given in another country.[124]

A "judgment" is defined as "a judgment given or made by a court in any civil proceedings, or a judgment or order given or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party."[125] If the foreign judgment meets the above listed criteria (and no bar to registration exists),[126] it shall be registered, and thereby obtain the "same force and effect" as a judgment originally rendered by the recognizing High Court.[127]

The procedures for registration under both the 1920 Act and the 1933 Act are identical and established by Order 71 of the Rules of the Supreme Court.[128] Application for registration can be made *ex parte* to the High Court via supporting affidavit.[129] The affidavit must contain, *inter alia*, the judgment and order of the issuing court,[130] and in cases in which "a sum of money is payable," the name, occupation, and last known "abode or business of the judgment debtor . . . ."[131]

If the court issues an order granting leave to register, the judgment creditor must then serve notice of registration on the judgment debtor.[132] This notice will inform the judgment debtor of his option to contest the order, as well as the statutory time frame within which to object.[133] If the judgment debtor wishes to have the order set aside, he "must issue a summons within the prescribed or extended period,

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124. Carver & Napier, *supra* note 110, at 232. *See also* FJREA, *supra* note 118, §§ 1–2.

125. FJREA, *supra* note 118, § 11(1).

126. *See infra* Part III.B.

127. *See* FJREA, *supra* note 118, § 2(2)(a)–(d).

128. *See* Rules of the Supreme Court, 1972, ord. 71 (Eng.) [hereinafter RSC]; Carver & Napier, *supra* note 110, at 233.

129. RSC, *supra* note 128, ord. 71, r. 8, para. 18(1).

130. If the judgment or "order is not in the English language, a translation into English certified by a notary public or authenticated by affidavit" must also be provided. RSC, *supra* note 128, ord. 71, § 18(1)(b).

131. RSC, *supra* note 128, ord. 71, r. 8, para 18(2)(a). Para. 18(2) also requires, in cases "under which a sum of money is payable," that the affidavit state:

> (b) to the best of the deponent's information and belief that at the date of the application the European Court has not suspended enforcement of the judgment and that the judgment is unsatisfied or, as the case may be, the amount in respect of which it remains unsatisfied; and
>
> (c) where the sum payable under the judgment is not expressed in the currency of the United Kingdom, the amount which that sum represents in the currency of the United Kingdom, calculated at the rate of exchange prevailing at the date when the judgment was originally given.

RSC, *supra* note 128, ord. 71, r. 8, para. 18(2)(b)–(c).

132. Carver & Napier, *supra* note 110, at 233; Lee & Edwards, *supra* note 95, at 4–5.

133. Carver & Napier, *supra* note 110, at 233; Lee & Edwards, *supra* note 95, at 4–5. *See also infra* Part III.B.

supported by an affidavit setting out his reasons for objecting to the order."[134] A hearing will then be held "before a master of the Queen's Bench Division, with rights of appeal the same as [at English common law]."[135]

If no objection is raised, and the statutory period runs against the judgment debtor, "the judgment may be executed by production to the court of an affidavit of service of the notice of registration of the judgment and of any subsequent order."[136]

The judgment registration procedures established by the 1920 and 1933 Acts marked a significant step in England's evolution toward a more efficient and uniform foreign judgment recognition and enforcement scheme. England's accession to the Brussels Convention marked another step. As the next section reveals, the Brussels and Lugano Conventions added even greater efficiency to the English practice of foreign judgment recognition and enforcement.

3. 1968 Brussels Convention and 1988 Lugano Convention.

The 1968 Brussels Convention (Brussels Convention) regulates "the recognition and enforcement of foreign judgments" among all members of the European Union (EU), including the United Kingdom.[137] The 1988 Lugano Convention (Lugano Convention) created a "parallel regime" among members of the European Free Trade Association (EFTA), as well as certain members of the EU.[138] The purpose underlying both Conventions is to "prescribe a uniform regime

134. Carver & Napier, *supra* note 110, at 233–34.

135. *Id.* at 234.

136. Lee & Edwards, *supra* note 95, at 5.

137. Dennis, *supra* note 98, at 2201.006. These members are: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Austria, Portugal, Finland, Sweden, and the United Kingdom. *See* http://europa.eu.int/abc-en.htm (last visited Nov. 20, 2002).

138. Lee & Edwards, *supra* note 95, at 5. Because of England's dual membership, a situation may arise where the registration of a judgment from another Contracting State within an English court may trigger simultaneous application under both Conventions. If such a conflict should arise, Article 54B of the Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [hereinafter the Lugano Convention] provides:

> (a) The Lugano Convention shall not prejudice the application of the Brussels Convention by [EU] States; but
>
> (b) The Lugano Convention will prevail where:
>
> (i) the defendant is domiciled in an EFTA State or an EFTA State has exclusive jurisdiction under Action 16 or 17; or
>
> (ii) *'lis pendens'* or related proceedings are instituted in both an [EU] and an EFTA State.

Lee & Edwards, *supra* note 95, at 5.

for jurisdiction and the enforcement of judgments in the courts of contracting states."[139]

The United Kingdom is a contracting state under both Conventions. The Brussels Convention became enforceable within the United Kingdom on January 1, 1987, pursuant to the Civil Jurisdiction and Judgment Act 1982.[140] The Civil Jurisdiction and Judgments Act 1991 amended the 1982 Act to bring the Lugano Convention into force within the United Kingdom as of May 1, 1992.[141]

The enforcement procedures established by the Conventions are far more streamlined than those existing under the earlier English scheme. Absent from the Conventions are many of the common law-based obstacles to enforcement, which were codified under the 1920 and 1933 Acts. This radical departure was due in part to a communal desire among Contracting States to facilitate the "free movement" of judgments.[142] The result is a regime that favors liberal enforcement by lowering the threshold for recognition and limiting the judgment debtor's arsenal of defenses to enforcement.

Consistent with this approach, the general rule regarding foreign judgment recognition is that a judgment rendered within a contracting

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139. Carver & Napier, *supra* note 110, at 234. A "Contracting State" is defined as:

> (a) one of the original parties to the 1968 Convention (Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and The Netherlands); or
>
> (b) one of the parties acceding to that Convention under the Accession Convention (Denmark, the Republic of Ireland and the United Kingdom), or under the 1982 Accession Convention (the Hellenic Republic) or under the 1989 Accession Convention (Spain and Portugal), or under the 1996 Accession Convention (Austria, Finland and Sweden) being a state in respect of which the Accession Convention has entered into force in accordance with Article 39 of that Convention, or being a state in respect of which the 1982 Accession Convention has entered into force in accordance with Article 15 of that Convention, or being a state in respect of which the 1989 Accession Convention has entered into force in accordance with Article 32 of that Convention, or being a state in respect of which the 1996 Accession Convention has entered into force in accordance with Article 16 of that Convention, as the case might be.

Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [hereinafter the Brussels Convention] Part I, §3. A "Lugano Contracting Party" is defined as:

> (a) one of the original parties to the Lugano Convention, that is to say Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, the Hellenic Republic, Iceland, the Republic of Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and the United Kingdom; or
>
> (b) a party who has subsequently acceded to that Convention, that is to say, Poland.

Id.

140. *See* Civil Jurisdiction and Judgments Act, 1982, c. 27 (Eng.).

141. *See* Civil Jurisdiction and Judgments Act, 1991, c. 12 (Eng.). The Lugano Convention is by and large a replica of the Brussels Convention. Lee & Edwards, *supra* note 95, at 5. Thus, for the purposes of this Comment, both Conventions will be referred to as simply "the Conventions."

142. Dennis, *supra* note 98, at 2201.011.

state, "shall be recognized in the other Contracting States without any special procedure being required" regardless of the domicile of the parties.[143] Furthermore, enforcement must be granted where the judgment is enforceable under the laws of the contracting state in which it was given.[144]

The term "judgment" is broadly defined to include "any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer or the court."[145] Unlike at English common law or under the 1920 or 1933 Acts, there is no requirement that the foreign judgment be final and conclusive.[146] Moreover, unlike the American scheme, the jurisdictional competency of the original court is generally not subject to review.[147] Article 29 also provides, "under no circumstances may a foreign judgment be reviewed as to its substance."[148]

Once a judgment has been recognized under either Convention, "enforcement proceedings may begin."[149] Similar to the earlier statutory regime, the procedure for foreign judgment enforcement under the Conventions is by way of registration.[150] Reference to Order 71 of the Rules of the Supreme Court must be made in substantially the same manner as under the 1920 and 1933 Acts.[151]

The Conventions' judgment-friendly approach to foreign judgment recognition and enforcement is a slight departure from English common law, as well as from the 1920 and 1933 Acts. By lowering the threshold necessary to find recognition, the Conventions would serve the dual purposes of enhancing "the worth and enforceability" of foreign judgments and affording "legal certainty" among contracting states.[152] As the next section illustrates, the Conventions also depart from the earlier English scheme by dispensing with some of the de-

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143. *Compare* The Brussels Convention, *supra* note 139, Art. 26 *and* The Lugano Convention, *supra* note 138, Art. 26. *See also* David Perkins et al., *Discovery in Foreign Jurisdictions; Enforcing Judgments Abroad*, SE32 ALI-ABA 191, 214 (1999);

144. *Compare* The Brussels Convention, *supra* note 139, Art. 31 *and* The Lugano Convention, *supra* note 138, Art. 31. *See also* Perkins, *supra* note 143, at 214.

145. *Compare* The Brussels Convention, *supra* note 139, Art. 25 *and* The Lugano Convention, *supra* note 138, Art. 25.

146. Lee & Edwards, *supra* note 95, at 5.

147. Kathryn A. Russell, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE L. REV. 57, 76 (1993).

148. *Compare* The Brussels Convention, *supra* note 139, Art. 29 *and* The Lugano Convention, *supra* note 138, Art. 29.

149. Russell, *supra* note 147, at 77.

150. Lee & Edwards, *supra* note 95, at 8.

151. *See* RSC, *supra* note 128, ord. 71, rr. 26, 27–28, 32.

152. *See generally* Martinez, *supra* note 4, at 70–78.

fenses to recognition commonly employed at English common law and under the 1920 and 1933 Acts.

B. Attacks on Foreign Judgments in English Courts

The purpose of this section is to analyze and compare the various grounds for non-recognition available under England's five methods of foreign judgment recognition and enforcement—English common law, the 1920 and 1933 Acts, and the Brussels and Lugano Conventions.

As previously mentioned, the findings necessary to domesticate a foreign judgment under English common law are substantially the same as under the American common law. Such threshold findings will not, however, prevent the judgment debtor from attacking the judgment "on grounds of fraud on the part of the party obtaining judgment."[153] In general, in an action to enforce a foreign nation judgment, an English court will not re-try the merits of the underlying case.[154] Nevertheless, recognizing that a court "cannot go into the alleged fraud without going into the merits," an English court of appeal in *Syal v. Heywood* carved out the following exception:

> [I]f the fraud upon the foreign court consists of the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, [the judgment debtor] can reopen the whole case even although [the judgment debtor] will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court.[155]

Thus, unlike the American scheme, which prohibits the use of intrinsic evidence of fraud as a ground for non-recognition,[156] evidence capable of supporting an allegation of fraud under the English scheme may consist entirely of "evidence, made available to [the judgment debtor] before the date of the . . . judgment."[157] Such evidence may be fraudulent on the part of the plaintiff or on the part of the court.[158]

Public policy as a defense to foreign judgment recognition and enforcement is seldom invoked at English common law.[159] Nevertheless, an English court will not enforce a foreign judgment that "is con-

153. Lee & Edwards, *supra* note 95, at 2.
154. Syal v. Heyward, [1948] 2 K.B. 443, 448 (Eng. C.A.).
155. *Id.*
156. *See supra* Part II.B.
157. Syal v. Heyward, [1948] 2 K.B. 443, 449 (Eng. CA).
158. Lee & Edwards, *supra* note 95, at 2.
159. *Id.*

trary to or inconsistent with English policy."[160] The standard for this defense is somewhat high, requiring the judgment to outrage the court's "sense of justice or decency."[161] As with the American scheme,[162] the mere fact that English law lacks an analogous cause of action to that underlying the initial judgment will not necessarily render the judgment void against English public policy.[163]

In addition to the court's public policy analysis, English courts make a second-step inquiry into whether enforcement of the foreign judgment would breach concepts of natural justice.[164] Overlapping with public policy considerations, and diverging somewhat from the American scheme,[165] this seldom-invoked defense to foreign judgment domestication, like the public doctrine, is reserved for only the most egregious cases.[166]

Conclusiveness and finality of judgment are necessary prerequisites to the enforcement of the foreign judgment by an English court.[167] However, similar to the American scheme,[168] English courts retain discretion to stay common law enforcement proceedings during an appeal of the underlying action.[169]

Finally, the English court must be satisfied that the rendering court possessed competent jurisdiction over the defendant prior to the English domestication of a foreign judgment.[170] In determining whether personal jurisdiction exists, the controlling issue is not whether the English court would have claimed jurisdiction in the particular case.[171] Rather, jurisdiction will generally exist only if the judgment debtor either (1) was subject to the jurisdiction of the rendering foreign court at the time proceedings were initiated;[172] or (2) otherwise "submitted to the jurisdiction of the foreign court."[173]

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160. *Id.* No doubt of interest to the American lawyer is the practice among English courts of treating punitive damages as a matter of public policy. *Id.*

161. *Id.*

162. *See supra* Part II.B.

163. Lee & Edwards, *supra* note 95, at 2.

164. *Id.*

165. *See supra* Part II.A–B.

166. Lee & Edwards, *supra* note 95, at 2. This reluctance to invalidate a foreign judgment on the ground that it would be a breach of natural justice is the result of judicial deference to the decisions of foreign tribunals. *Id.*

167. *Id.*

168. *See supra* Part II.A.

169. Lee & Edwards, *supra* note 95, at 2. "What is important is that all the issues concerning the parties to the action have been conclusively dealt with at the first instance hearing." *Id.*

170. *Id.*

171. *See id.* (citing *Schibsby v. Westenholtz*, [1870] L.R. 6 Q.B. 155).

172. *Id.* at 3. Lee & Edwards go on to note:

Ordinarily this will require either residence or presence in the foreign country. For an individual, residence in the jurisdiction is generally required . . . but this may be deemed if

Defenses to recognition available under the 1920 and 1933 Acts are substantially the same as those existing at English common law. Once notice of registration is served on the judgment debtor under either the 1920 or 1933 Act, the judgment debtor may request a hearing be held to challenge enforcement of the judgment.[174] Similar to the American scheme,[175] both the 1920 and 1933 Acts contain a litany of grounds upon which a judgment falling within their provisions may be attacked by a judgment debtor.[176] Consistent with English common law, both Acts recognize the original court's lack of jurisdiction as sufficient ground to deny foreign judgment registration.[177] Fraud and insufficient notice to a default judgment debtor are common grounds for

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that individual has his residence (ie principal home) in that country. . . . Mere presence of an individual in the foreign country is now accepted as sufficient to found (sic) jurisdiction. . . . Registration of a company will establish residence and jurisdiction, but a company may be resident though not registered. The company must be carrying on business from a permanent base. This may take the form of a branch office, an appointed representative, or a subsidiary.

Id.

173. Lee & Edwards, *supra* note 95, at 3. Lee & Edwards further note:

> This may be:
>
> (a) as plaintiff or counterclaimant in the proceedings, or
>
> (b) by way of a voluntary appearance to contest proceedings on their merits; or
>
> (c) by way of an agreement to submit to that jurisdiction prior to commencement of the foreign proceedings.

Id.

174. *See supra* Part III.A.2.

175. *See supra* Part II.2–3.

176. *Compare* AJA, *supra* note 112, § 9(2)(a)–(e) *and* FJREA, *supra* note 118, § 4(1)(a)(i)–(vi).

177. *Compare* AJA, *supra* note 112, § 9(2)(a) *and* FJREA, *supra* note 118, § 4(1)(a)(ii). FJREA, *supra* note 118, §4(2) provides, in pertinent part:

> For the purposes of this section the courts of the country of the original court shall, subject to the provisions of subsection (3) of this section, be deemed to have had jurisdiction—
>
> (a) in the case of a judgment given in an action in personam—
>
> (i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or
>
> (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the original court; or
>
> (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
>
> (iv) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place . . . .

FJREA, *supra* note 118, § 4(2)(a)(i)–(v).

denial as well.[178] Finally, a foreign judgment will not be registered under either Act if to do so would be contrary to public policy.[179]

The 1920 and 1933 Acts are not, however, uniform in their treatment of foreign judgments subject to judicial review in the rendering country.[180] While the 1933 Act grants the registering court discretion to stay proceedings if the court is satisfied that "an appeal is pending, or that [the judgment debtor] is entitled and intends to appeal against the judgment,"[181] the 1920 Act requires that registration be denied in such cases.[182]

Thus, while the 1920 and 1933 Acts diverge from one another in some regards, both statutes provide the judgment debtor with a similar array of potential defenses to the enforcement of a foreign judgment.

A judgment debtor's defenses to recognition and enforcement under the Brussels and Lugano Conventions, on the other hand, are much narrower than those provided by either English common law or the 1920 and 1933 Acts.[183]

Similar to the preexisting English scheme, a judgment falling under the Conventions will not be recognized if "such recognition is contrary to public policy in the State in which recognition is sought."[184] While this language appears on its face to be directly analogous to that used at English common law, "its intended operation is more circumscribed."[185] In *Hoffman v. Krieg*, the European Court of Justice limited the scope of this exception to only exceptional circumstances.[186]

Both Conventions forbid recognition of a default judgment where the defendant was not "duly served" in sufficient time to mount

178. *Compare* AJA, *supra* note 112, § 9(2)(a) *and* FJREA, *supra* note 118, § 4(a).

179. *Compare* AJA, *supra* note 112, § 9(2)(d) *and* FJREA, *supra* note 118, § 4(a)(v). It should be noted that the public policy exception is arguably broader under the 1920 Act than under the 1933 Act as the 1920 Act states that denial is warranted "for reasons of public policy *or for some other similar reason* could not have been entertained by the registering court." AJA, *supra* note 112, § 9(2)(f) (emphasis added).

180. *Compare* AJA, *supra* note 112, § 9(2)(e) *and* FJREA, *supra* note 118, § 5(1).

181. FJREA, *supra* note 118, §5(1).

182. AJA, *supra* note 112, § 9(2)(e).

183. Dennis, *supra* note 98, at 2201.014.

184. *Compare* The Brussels Convention, *supra* note 139, Art. 27(1) *and* The Lugano Convention, *supra* note 138, Art. 27(1). While neither Convention expressly mentions fraud as a ground for non-recognition, the European Court of Justice in *Owens Bank v. Bracco* held that this defense was encompassed within the Convention's public policy exception. Lee & Edwards, *supra* note 95, at 5–6 (citing *Owen Bank v. Bracco*, [1994] 1 ALL ER 336).

185. Dennis, *supra* note 98, at 2201.015.

186. *Id.* (citing Jenard Report No. C59/44 and Hoffman v. Krieg, [1988] E.C.R. 645); Perkins, *supra* note 143, at 215.

a defense against the action.[187] However, the recognizing court, rather than the court of original jurisdiction, makes the final determination concerning sufficiency of notice and is not bound by the factual findings of the original court in this regard.[188]

The Conventions also contain provisions that prohibit the recognition of conflicting judgments in two scenarios.[189] Specifically, if the judgment is irreconcilable with (1) "a judgment given in a dispute between the same parties in the State in which recognition is sought,"[190] or (2) "an earlier judgment given in a non-contracting State involving the same cause of action and between the same parties,"[191] it will not be recognized under either Convention.

Certain primary questions as to status constitute mandatory grounds for denial of recognition under the Conventions as well.[192] The Conventions, at Article 27(4), require non-recognition:

> if the court of the State of origin, in order to arrive at its judgment, has decided a preliminary question concerning the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills or succession in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State.[193]

Finally, unlike the earlier English scheme, attacks based on jurisdictional defects in the rendering court rarely give rise to non-recognition under the Conventions. Subject to limited exceptions, the general rule is that "the jurisdiction of the court of the State of origin

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187. *Compare* The Brussels Convention, *supra* note 139, Art. 27(2) *and* The Lugano Convention, *supra* note 138, Art. 27(2). *See also* Dennis, *supra* note 98, at 2201.015.

188. Carver & Napier, *supra* note 110, at 237. "However, the enforcing court must apply the law of the state in which the judgment originated and the provisions of any international conventions in that state." *Id.* (citing Noirhomme v. Walklate [1992] 1 Lloyd's Rep. 427; Isabelle Lancray SA v. Peters und Sickert KG [1991] ILPr99, ECJ; Debaecker v. Bouwan [1986] 2 CMLR 400, ECJ; Pendy Plastics Products BV v. Pluspunkt [1983] 1 CMLR 665, ECJ; Klomps v. Michel [1982] 2 CMLR 773, ECJ). *See also* Perkins, *supra* note 143, at 215.

189. *Compare* The Brussels Convention, *supra* note 139, Art. 27(3),(5) *and* The Lugano Convention, *supra* note 138, Art. 27(3),(5).

190. *Compare* The Brussels Convention, *supra* note 139, Art. 27(3) *and* The Lugano Convention, *supra* note 138, Art. 27(3). This defense applies regardless whether the judgment of the enforcing court is given prior to or subsequent to that of the original court. Dennis, *supra* note 98, at 2201.015.

191. *Compare* The Brussels Convention, *supra* note 139, Art. 27(5) *and* The Lugano Convention, *supra* note 138, Art. 27(5).

192. *Compare* The Brussels Convention, *supra* note 139, Art. 27(4) *and* The Lugano Convention, *supra* note 138, Art. 27(4).

193. *Compare* The Brussels Convention, *supra* note 139, Art. 27(4) *and* The Lugano Convention, *supra* note 138, Art. 27(4).

may not be reviewed" by the recognizing court.[194] Even where an exception exists, the recognizing court "shall be bound by the findings of fact on which the court of the State of origin based its jurisdiction."[195] Moreover, the Convention's public policy exception "may not be applied to the rules relating to jurisdiction." This rejection of jurisdictional incompetence as a ground for non-recognition is perhaps the Conventions' greatest departure from the earlier English practice of foreign judgment recognition and enforcement.

Indeed, the methods by which foreign judgments are recognized in England via international treaties, particularly the Brussels and Lugano Conventions, stand in stark contrast to the enigmatic patchwork of various state approaches existing under the American scheme. These treaties teach us that a foreign judgment recognition and enforcement scheme that is both uniform and efficient can be achieved through an international treaty that reduces the number of hurdles to enforcement and provides for recognition by way of judgment registration procedures.

While the United States has not overlooked this valuable lesson, efforts to reshape the American scheme have shifted, at least temporarily, toward a domestic, rather than international, resolution to the issue of foreign judgment recognition and enforcement. Currently, a proposed Foreign Judgment Recognition and Enforcement Act is taking shape that, if enacted, would federalize foreign judgment recognition procedures and bring the benefits of foreign judgment registration to American courts. The next section discusses the positive implications of the proposed act against a backdrop of international negotiations that have both influenced and redirected its purpose and direction.

IV. RESHAPING THE AMERICAN SCHEME

As Justice Gray noted over 100 years ago in *Hilton v. Guyot*, "The most certain guide, no doubt, for the decision of [foreign judgment recognition and enforcement] is a treaty or a statute of this country."[196] Despite this open invitation by the Court, the United States has yet to enact a federal statute or enter into a treaty that would govern and prescribe foreign judgment recognition and enforcement pro-

194. *Compare* The Brussels Convention, *supra* note 139, Art. 28 *and* The Lugano Convention, *supra* note 138, Art. 28.

195. *Compare* The Brussels Convention, *supra* note 139, Art. 28 *and* The Lugano Convention, *supra* note 138, Art. 28.

196. Hilton v. Guyot, 159 U.S. 113, 163 (1895).

cedures on a national level.[197] Unfortunately, the decision to create and enter into an international treaty is a complex one—one that cannot be made in a vacuum. As the next sections illustrate, while the formulation of an acceptable treaty is an appropriate goal, the United States could at least benefit in the interim by enacting federal legislation that would reshape the American scheme and create a system of foreign judgment registration similar to that existing under the English scheme.

A. Reconstruction Through International Treaty

To date, American attempts at entering into an international reciprocal treaty governing the recognition and enforcement of foreign judgments have proven less than fruitful. In 1976 the United States and the United Kingdom initiated a "Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters," but negotiations over the final text broke off in 1981.[198] More recently, the Hague Convention on Private International Law (Hague Convention), of which both England and the United States are members,[199] produced a proposed Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[200] Implementation of the Hague Convention would have had the effect of harmonizing jurisdictional requirements among Contracting States as well as creating a uniform system of foreign judgment recognition and enforcement similar to those existing under the Brussels and Lugano Conventions.[201]

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197. *See supra* Part II. Arguably, the power to enact such a statute is vested in Congress by the Commerce Clause, *Introduction* to INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, DISCUSSION DRAFT (March 29, 2002) [hereinafter Discussion Draft] (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 70-71 (2d ed. 1996)) and any treaty made "under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Thus, constitutionally speaking, the United States had only to find an appropriate conduit through which to exercise its powers—whether by international treaty, federal legislation, or both.

198. *See* Recognition and Enforcement of Foreign Money Judgments, *at* http://www.lectlaw.com/files/bul12.htm (last visited Jan. 20, 2003).

199. *See* Hague Member States, *at* http://www.hcch.net/e/members /members.html (last visited Oct. 31, 2002).

200. *See* Future Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *at* http://www.hcch.net/e/workprog/jdgm.html (last visited Oct. 22, 2002) [hereinafter "Draft Convention"].

201. *See* Draft Convention, *supra* note 200, Ch II–III. *See also* Michael Traynor, *An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: U.S. and European Prespectives*, 6 Ann. Surv. INT'L & COMP. L. 1, 5–11 (2000).

As of the spring of 2001, however, negotiations under the Hague Convention have been less than encouraging.[202] Several topics, including "e-commerce, jurisdiction based on activity, consumer and employment contracts, IP rights, and the relationship of the proposed convention to regional regulations on jurisdiction" were considered "so controversial that they threatened the possibility of an agreement."[203] Currently, "it remains doubtful that a convention acceptable to the United States will be agreed on."[204]

B. Reconstruction Through Federal Legislation

With the possibility of a consensus among members of the Hague Convention looming far in the distance, efforts to unify the American scheme have shifted toward the construction of a federal statute, which would operate independently of any international treaty.[205] This section briefly discusses those efforts as reflected in the American Law Institute's (ALI) recent International Jurisdiction and Judgments Project[206] and suggests that the success of this project would provide a much-needed overhaul to the current American scheme.

1. Proposed Foreign Judgments Recognition and Enforcement Act

In May of 1999, the American Law Institute (ALI) undertook the grand task of drafting "legislation to be submitted to Congress at the same time that the [Hague] Convention was submitted to the Senate."[207] The draft was to consist of two parts: "Title I to translate into domestic law at the federal level the obligations undertaken in the Convention; and Title II to provide for the recognition and enforcement of foreign-country judgments of countries that have not joined the convention."[208] However, rather than completely abandon the project after the deadlock at the Hague Convention, "the Council in December 2000 and the Annual Meeting of the Institute in May 2001

202. E-mail from Manon Anne Ress, Ph.D., Research Associate, Essential Information, to Brian Paige, Law Student, Gonzaga University School of Law, (Nov. 9, 2002, 17:34 PST) (on file with author) ("Last spring, to avoid a deadlock over issues affecting electronic Commerce, the conference decided to start from scratch with a new informal working group charged with exploring the possibilities of a narrower treaty."). *See also* Discussion Draft, *supra* note 197, at 2.

203. *Id.* For more information concerning the current status of the Hague Conference on Private International Law visit http://www.hcch.net.

204. Discussion Draft, *supra* note 197, at 1.

205. Discussion Draft, *supra* note 197, at *Reporters' Memorandum*, xvii.

206. For further information on the American Law Institute's International Jurisdiction and Judgments Project visit http://www.ali.org.

207. Discussion Draft, *supra* note 197, at 1. *See also* Silberman, *supra* note 7, at 635–36.

208. *Id.* at 2.

decided to ask the Reporters to go forward with what would have been Title II of the proposed legislation, that is a federal Foreign Judgments Recognition and Enforcement Act."[209] After thorough discussion and revision, the ALI Reporters recently completed a December 2002 council draft of the proposed act.[210]

A final revision of the proposed act has yet to be approved by both the Council and the membership of the ALI. Moreover, the provisions of the proposed act will no doubt remain transitory until they are solidified by Congressional enactment. The next section will discuss the current draft of the proposed act in terms of its potential impact upon the American scheme and will make reference to specific provisions only as necessary to place the analysis in its proper context.

2. Benefits of the Proposed Act

The enactment of federal legislation based on the December 2002 council draft of the proposed act would result in a positive change in the American scheme of foreign judgment recognition and enforcement. The following are just a few examples.

At present, "the United States is in the anomalous position that a judgment of the court of a foreign country may be recognized or enforced in one state of the United States, but not in another."[211] Federal legislation would resolve this oddity by replacing the enigmatic patchwork system existing among the states with a single national scheme.

Such unification would also increase the likelihood that American judgments will be recognized and enforced abroad. Throughout the international community, several countries make recognition and enforcement contingent upon a finding of reciprocity.[212] As such, "a national standard would make the foreign court's inquiry substantially easier."[213]

In addition to uniformity, federal legislation modeled on the December 2002 proposed act would give judgment creditors the option of proceeding in state or federal court. As section 8(a) of the December 2002 draft provides:

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209. *Id.* at 1–2.

210. INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, COUNCIL DRAFT NO. 3 (December 2002) [hereinafter Council Draft]. The author would like to personally thank Michael Greenwald, Deputy Director of the American Law Institute, for providing me with this draft.

211. INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, REPORT 1 (April 14, 2000).

212. Zitter, *supra* note 44.

213. INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, REPORT 5 (April 14, 2000).

> The district courts of the United States shall have original jurisdiction, concurrently with the courts of the States, over an action brought to enforce a foreign judgment or to secure a declaration with respect to recognition under this Act, without regard to the citizenship or residence of the parties or the amount in controversy.[214]

The judgment creditor's options would also extend to the manner of enforcement procedures. In addition to enforcement through the initiation of a civil action, foreign judgments would also be enforceable by way of registration procedures resembling those employed under the English scheme.[215] Thus, for the first time, judgment creditors seeking to enforce foreign judgments in American courts would be permitted to do so without the added expense of filing a fresh cause of action.[216]

Finally, while a federal statute based on the proposed act would operate independently of any Convention or treaty, "it could be modified to accommodate a Convention if one were to come to pass."[217] Thus, such a federal statute would serve as an appropriate interim step as negotiations continue under the Hague Convention.

C. Conclusion

The United States and England currently stand on opposing ends of the foreign judgment recognition and enforcement spectrum. Both systems originate from similar common law.[218] However, from that point forward, the two countries have charted different routes. While the American scheme has yet to evolve past the state level, the English scheme has grown to an international level through a series of reciprocal foreign judgment recognition and enforcement treaties. As

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214. Council Draft, *supra* note 210, §8(a).

215. *Compare* Council Draft, *supra* note 210, §§ 9–10, *and supra* Part III.A.2–3. Section 10(a) provides:

> A money judgment entitled to recognition and enforcement under this Act, other than a judgment rendered by default or a judgment subject to appeal, may be registered by filing a certified copy of the judgment, together with a certified translation, as appropriate, in any district court of the United States, in accordance with the provisions of 28 U.S.C. § 1963. A judgment so filed shall have the same effect as a judgment of a United States court, and may be enforced in like manner, except that the defenses to enforcement are those stated in this Act.

Council Draft, *supra* note 210, §10(a).

216. *Compare* Proposed Act §10 *and* Part III.A.2-3. Comment (b) to §10 of the Proposed Act states that "[t]he rationale for registration is that one court has heard both sides and made a final determination, and that all that remains is collection of the sum awarded to the prevailing party." Council Draft §10 cmt. b.

217. Discussion Draft *supra* note 197, at 2.

218. *Compare supra* Part II.A.1 *and supra* Part III.A.1.

a result, England now possesses a foreign judgment and recognition scheme that far exceeds that of the United States in terms of efficiency and predictability.

Although the prospects of a treaty that would align the United States with the English scheme remain in doubt, the United States nonetheless would profit in the interim by enacting federal legislation that would control the issue of foreign judgment recognition and enforcement on a national level.[219] Not only would the implications of such legislation greatly improve the American scheme, it would also bring the United States one step closer to realizing the ultimate goal—the United States' integration into an international, reciprocal foreign judgment recognition and enforcement treaty.

219. *See* Discussion Draft *supra* note 197, at 3.