Buffalo Law Review

Volume 16
Number 1 *The Common Law and the Civil Law: Some Encounter, Influences and Comparisons—Essays in Honor and Memory of Arthur Lenhoff (1885-1965)*

Article 9

10-1-1966

Some Aspects of Enforceability of Foreign Judgments: A Comparative Summary

Barbara Kulzer
University at Buffalo School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Civil Procedure Commons, Conflict of Laws Commons, and the International Law Commons

Recommended Citation
Barbara Kulzer, *Some Aspects of Enforceability of Foreign Judgments: A Comparative Summary*, 16 Buff. L. Rev. 84 (1966).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol16/iss1/9

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

SOME ASPECTS OF ENFORCEABILITY OF FOREIGN JUDGMENTS: A COMPARATIVE SUMMARY

BARBARA KULZER*

From the standpoint of international relations, nothing could be more advantageous than the recognition of foreign judgments; but this ideal goal cannot be attained until the various states achieve some agreement on the principles controlling the distribution of civil jurisdiction. At present each nation is at liberty to determine not only the limits upon the exercise of jurisdiction by its own courts, but also the range of jurisdiction which it is willing to concede to foreign states.[1]

I. INTRODUCTION

IN recent years, steps have been taken both in this counrty and abroad toward achieving "some agreement on the principles controlling the distribution of civil jurisdiction," and toward assuring that domestic judgments will receive recognition and enforcement in other countries. Certainly the growth of international business contacts (due in large part to the success of the European Economic Community) makes such developments highly desirable, since the expected corollary of increased business activity is an increase in the incidence of litigation with international aspects.[2] The enforcement of foreign money judgments has not as yet kept pace with economic activity although the prevailing rules, problems and deficiencies have long been the subject of much criticism and commentary.[3] This failure of enforcement is particularly

* LL.B, Rutgers; Candidate for LL.M., Columbia; Assistant Professor of Law, School of Law, State University of New York at Buffalo.

1. Lenhoff, *International Law and Rules on International Jurisdiction*, 50 Cornell L.Q. 5, 22-23 (1964).

2. In 1941, Professor Nussbaum, believing that conflicts cases of an international type were rare in the United States, consulted the American Digest System for the period 1896-1936 and found, aside from divorce matters, 63 cases involving foreign judgments, only 26 of which sought recognition and enforcement. Nussbaum, *Jurisdiction and Foreign Judgments*, 41 Colum. L. Rev. 221, 237-38 (1941). A check of the Decennial Digests from 1936 to 1966 for in personam judgments from courts of foreign countries shows fewer than 100 judgments, including divorces, and not limited to those for which recognition and enforcement were sought. Apparently, questions of recognition and enforcement are still "much rarer, indeed, than one should expect in view of the size of the country and its tremendous international activities in industry, commerce and financing." *Id.* at 237. The rarity may be explained in part by the difficulties of obtaining recognition and enforcement. See also Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783 (1950).

3. See, *e.g.*, Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe*, 12 Int'l & Comp. L.Q. 367 (1963); Lorenzen, *The Enforcement of American Judgments Abroad*, 29 Yale L.J. 188 (1919); Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It*, 42 Iowa L. Rev. 236 (1957); Nussbaum, *Jurisdiction and Foreign Judgments*, 41 Colum. L. Rev. 221 (1941); Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783 (1950); Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 Mich. L. Rev. 1129 (1935). For articles dealing with the problems in a larger or a more specific context, see, *e.g.*, Smit & Miller, International Cooperation in Civil Litigation: A Report on Practices and Procedures Prevailing in the United States (1961); Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 La. L. Rev. 465 (1956); Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619 (1955); Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. Rev. 44 (1962).

detrimental to United States interests. The commentators agree that, although United States state and federal courts grant enforcement to qualifying money judgments obtained abroad (whether by an American or a foreign plaintiff), many civil law countries have been most reluctant to accord similar treatment to judgments obtained in the United States.[4] Such a situation poses serious difficulties for a plaintiff in a United States action who seeks enforcement of his judgment in the country where the defendant has assets. If the judgment is not granted conclusive effect abroad, the plaintiff is faced with the prospect of a reexamination of his case on the merits, involving loss of time, increased expenses, and an uncertain outcome due to differences in substantive and procedural law. Among civil law countries, differing national laws and a network of bilateral conventions have tended to create an equally undesirable situation.

Measures taken within the United States have been to a great extent aimed at procuring more favorable treatment of domestic judgments abroad. Although the success of these efforts is still undetermined, evaluations can be made of the Uniform Foreign Money-Judgments Recognition Act, now adopted by two states,[5] and the unprecedented participation by the United States Government in international conferences for cooperation in private international law.[6] Although not directly connected with the enforceability of judgments abroad, the long-arm and single-act statutes typified by the enactments of New York and Illinois also bear on the problems under consideration.[7]

In contrast to the outward-looking developments in the United States, a proposed multilateral treaty under discussion in the Common Market countries emphasizes relations among themselves. The proposal was drawn up pursuant to the mandate of Article 220 of the Treaty of Rome, which exhorts member states of the Community to negotiate with each other to insure for the benefit of their nationals. Among the things they are to consider is "the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and arbitral awards."[8] A unification of the various

4. See generally Smit & Miller, *op. cit. supra* note 3, at 28-40; Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It*, 42 Iowa L. Rev. 236, 240-41 (1957).

5. 9B Uniform Laws Annotated [hereinafter cited U.L.A.] (Supp. 1964, at 27). Illinois and Maryland enacted the Uniform Act in 1963.

6. The United States Government was authorized by Congress to participate in the Hague Conference on Private International Law and the International (Rome) Institute for the Unification of Private Law by S. Res. 781, H. R. J. Res. 778, 88th Cong., 1st Sess. (1963).

7. N.Y. CPLR § 302; Ill. Rev. Stat., ch. 110, §§ 16, 17 (1963). Similar statutes are found in other states: see, *e.g.*, Conn. Gen. Stat. Ann. § 33-411 (1960); Idaho Code Ann. § 5-514 (Supp. 1965); Wis. Stat. § 262 (Supp. 1966). See also the Uniform Interstate and International Procedure Act, 9B U.L.A. (Supp. 1964, at 74). See Smit, *The Uniform Interstate and International Procedure Act Approved by the National Conference of Commissioners on Uniform State Laws: A New Era Commences*, 11 Am. J. Comp. L. 415 (1962). See also Ginsburg, *The Competent Court in Private International Law: Some Observations on Current Views in the United States*, 20 Rutgers L. Rev. 89, 96-97 (1965). Fed. R. Civ. P. 4d (7) authorizes actions in which jurisdiction is based upon long-arm statutes to be brought in the United States District Courts.

8. See the Preliminary Draft Convention Relating to the Jurisdiction of Courts; the

national laws of the member states may ultimately prove a step toward unified cooperation with nonmember states. Indeed, the Europeans have long participated in international conferences designed to achieve uniformity and cooperation. Of more immediate interest is a 1964 decision of the French Cour de Cassation by which that country extended conclusive effect to all foreign money judgments, a move intended to obtain more favorable extraterritorial treatment for French judgments.[9]

This article is primarily concerned with the trends respecting recognition and enforcement of in personam money judgments. "Recognition" and "enforcement" are terms sometimes used interchangeably. However, "recognition" implies the standards to be applied in determining whether individual foreign judgments are entitled to extraterritorial effect, while "enforcement" connotes the methods by which this extraterritorial effect is to be given.[10] There may be "recognition" of a foreign judgment without "enforcement" of it, the latter term referring to the granting of compulsory execution.[11]

II. Policies Underlying Recognition and Enforcement

While the importance of granting conclusive effect or compulsory execution to foreign judgments is evidenced by the number of unilateral, bilateral and multilateral efforts to assure it, these give little indication of the underlying policies favoring such results. Res judicata is presently suggested as the proper rationale in the United States.[12] The current English rationale, that foreign judgments create binding legal obligations, enforceable as any other debt, has had some favor with American courts.[13] On the other hand, the theory that the judgment is prima facie evidence of the underlying claim no longer finds acceptance.[14] The notions of comity and reciprocity (especially popular with some civil law countries) have been discussed in some opinions in the United States.[15] However, it would appear that res judicata, the doctrine that "seeks

Recognition and Enforcement of Decisions in Civil and Commercial Matters, and the Enforcement of Public Documents which has been submitted to the governments of the member states of the European Economic Community. An English translation has been published in 2 CCH Common Market Rep. ¶ 6003.

9. See Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 Am. J. Comp. L. 72 (1964).

10. Yntema, *supra* note 3, at 1132.

11. Nussbaum, *supra* note 3, at 222-23. Although outside the scope of this paper, it should be noted that foreign judgments enjoy the effects of bar and collateral estoppel, besides being capable of enforcement. Reese, *supra* note 2, at 788-89; see generally Smit, *Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. Rev. 44 (1962). For a judicial discussion of collateral estoppel and res judicata with respect to foreign judgments, see Bata v. Hill, 35 Del. Ch. 407, 139 A.2d 159 (1958), *aff'd sub nom.* Bata v. Bata, 39 Del. Ch. 258, 163 A.2d 493 (Sup. Ct., 1960), *cert. denied*, 366 U.S. 964 (1961).

12. See Smit & Miller, *op. cit. supra* note 3, at 32; Reese, *supra* note 2, at 784-85. See Smit, *supra* note 3, for a comprehensive analysis of the doctrine as applied to foreign judgments.

13. See Smit & Miller, *op. cit. supra* note 3, at 32; Reese, *supra* note 3, at 784; Smit, *supra* note 3, at 54; Yntema, *supra* note 3, at 1130-31, 1142-48.

14. The rule is apparently now defunct. Smit, *supra* note 3, at 49.

15. Reciprocity has been described as an expression of "the desire that judgments rendered in this country should be held conclusive on the merits throughout the world,

to prevent duplication of litigation that is unfair and harassing to individual litigants"[16] presents the best justification.[17] But it should not be supposed that the doctrine should simply be transplanted from the domestic to the international field. On the contrary, its limitations with respect to foreign judgments have been recognized and analyzed.[18]

III. Some General Aspects of the Common and the Civil Law

Although there is general agreement on the end to be achieved, the choice of a method seems to present some substantial problems. Because to a large extent the recent developments perforce reflect the divergent and traditional attitudes of the common and the civil law, not only as to procedure and jurisdiction generally, but also as to recognition and enforcement specifically, a brief preliminary examination of but two of the many differences seems appropriate: the approach of each system to legal problems in general; and their concepts of jurisdiction and competence.

A. *Sources and Attitudes*

The hallmark of the common law is that it has been historically judge-made, and in the United States the rules concerning the status of decisions rendered

---

coupled with the thought that the best way to attain this end is to grant the judgment of a particular nation no more effect than the courts of that nation accord to one of American origin." Reese, *supra* note 2, at 785. As to the undesirability of reciprocity, see Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619, 752 1955); Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 La. L. Rev. 465 (1956); Smit, *International Cooperation in Civil Litigation: Some Observations on the Roles of International Law and Reciprocity*, 9 Neth. Int'l L. Rev., 137, 147-49 (English reprint 1962).

Comity, by contrast, has been said to be:

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

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). For criticisms of comity, see Smit & Miller, *op. cit. supra* note 3, at 31-32; Reese, *supra* note 3, at 784 (stating that "Comity, a word of loose and uncertain meaning at best, has little significance in this context other than as a statement of the conflict of laws of the forum."); Yntema, *supra* note 3, at 1146. The comity doctrine has met with little success in England. Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619, 756-58 (1955).

16. Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. Rev. 44, 58 (1962).

17. See, *e.g.*, Smit & Miller, *op. cit. supra* note 3, at 32; Reese, *supra* note 3, at 784-85: "This conclusion follows because the policy behind res judicata certainly applies to all judgments, whether local or foreign; . . . and, quite simply, there is no other satisfactory explanation for the fact that such judgments are usually enforced."

18. Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. Rev. 44, 61-75 (1962). A foreign judgment may have been rendered under a system differing considerably in its laws of substance, procedure and evidence from those of the second state, so that a second lawsuit would not be a mere duplication of the first. *Id.* at 62. Since a variety of circumstances may render unfair the granting of binding effect to a foreign judgment, the existing rules of disqualification—lack of judicial jurisdiction of the first court, extrinsic fraud, violation of public policy or natural justice—should be maintained. *Id.* at 63-64.

abroad have not been an exception.[19] By contrast, the distinguishing characteristic of a civil law system is its reliance upon codes and a resulting deemphasis on the role of the judiciary as a law-creating force.[20] Although both of these generalizations are properly subject to qualification, it is nevertheless true that in the United States there is no federal statute dealing with the status of foreign judgments, and among the states, only five have relevant statutory enactments.[21] On the other hand, in Western Europe the legislatures play the leading role. With respect to recognition and enforcement, the pattern has been restrictive internal legislation which has in many instances been mitigated by conventions.[22] Great Britain has, to some extent, adapted its law to the Continental approach, having had since 1933 a Foreign Judgments (Reciprocal Enforcement) Act upon which six conventions have been based.[23]

This basic difference in approach has been one source of the reluctance of the civil law countries to grant to American judgments conclusive effect, especially in those nations requiring reciprocal treatment of their own judgments.[24] Such states, largely unfamiliar with the common law principle of stare decisis, have disqualified American judgments on the ground that United States courts do not accord conclusive effect to their own judgments.[25]

Reciprocity is an important concept on the Continent. It is said to have originated as a retaliatory measure aimed at France and others who refused conclusive effect to foreign judgments.[26] It was not, however limited to

19. Smit & Miller, *op. cit. supra* note 3, at 28-29. By contrast, legislation to facilitate the recognition and enforcement of the judgments of sister states (which are encompassed by the term "foreign judgments" in American law but not within the scope of this paper) is typical. However, doctrines relating to extra-national judgments and sister state judgments have mutually influenced each other. Yntema, *supra* note 3, at 1133-34.

20. See generally Schlesinger, Comparative Law 287-89 (2d ed. 1959).

21. Illinois and Maryland have enacted the Uniform Foreign Money-Judgments Recognition Act; 9B U.L.A. (Supp. 1964, at 27). Cal. Code Civ. Proc. § 1915 provides that final judgments of foreign courts having jurisdiction according to the laws of their countries "shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this State." Montana and Oregon provide that foreign judgments against a thing are conclusive, but as against a person, the judgment only creates a presumption rebuttable by evidence of want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact; Mont. Rev. Codes Ann. §§ 93-1001-27 (1947); Ore. Rev. Stat. § 43.190 (1953). *But cf. supra* note 14 and accompanying text, and Reese, *supra* note 3, at 789 (generally foreign judgments "will not be denied effect merely because the original court made an error either of fact or of law").

22. See Graupner, *supra* note 3, at 377-79. See generally Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It*, 42 Iowa L. Rev. 236 (1957).

23. See Graupner, *supra* note 3, at 376; Graveson, *The Tenth Session of the Hague Conference of Private International Law*, 14 Int'l & Comp. L.Q. 528, 530 (1965); Note, *The Enforcement of Judgments: A Convention with Germany*, 36 Brit. Yb. Int'l L. 359 (1960).

24. Nadelmann, *supra* note 22, at 252.

25. *Id.* at 251-52, 253-54.

26. French courts, until 1964, had discretion to review the merits of foreign judgments, a practice known as *revision au fond.* See Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 Am. J. Int'l L. 72 (1964). For a description of the practice, see Delaume, American-French Private International Law 161-65 (2d ed. 1961).

retaliatory use, but became a general rule, and even a statutory requirement.[27] The creators of the codes, it has been observed, were "ready enough to confer a wide jurisdiction on their own courts, but showed a deep mistrust of the administration of justice in other countries."[28]

Also responsible for the reciprocity imbroglio is the fact that under common law there is no device (in the absence of statute) for summary enforcement of foreign judgments similar to the *exequatur* proceeding familiar in France and other civil law countries.[29] The reason given for the refusal of enforcement to American judgments in such countries has been "that before execution on foreign judgments can be had in [the United States,] a domestic judgment must be obtained in a competent State court. By contrast, in those countries, immediate execution on a foreign judgment, once the requirements including that of reciprocity have been met, can be had as if it were a domestic judgment."[30]

In Great Britain and the United States, on the other hand, whatever may have been the historical antecedents to the current practice,[31] the prevailing rule (in the absence of a modifying or countervailing statute) is that reciprocity is not a condition to the enforceability of foreign judgments. Great Britain at present makes, by statute, reciprocal treatment as assured by treaty a "prerequisite for the statute-created direct executability upon registration," but this is not the case for "mere recognition."[32] With respect to reciprocity in the United States, some states and the federal courts have flirted with the doctrine at one time or another. The most noteworthy instance, and the most important statement, of reciprocity as a requirement was the "magnificent dictum" of *Hilton v. Guyot*,[33] a Supreme Court case which denied enforcement to a

27. Nadelmann, *supra* note 22, at 249; Graupner, *supra* note 3, at 270-71. For a discussion of the sources of and reasons for reciprocity in Europe with particular emphasis on foreign judgments and international judicial assistance, see Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 La. L. Rev. 465 (1956).

28. Graupner, *supra* note 3, at 368.

29. Nadelmann, *supra* note 22, at 259. *Exequatur* in French law is a writ which, when issued in respect of a foreign judgment, renders the judgment executory—*i.e.*, subject to execution in the same manner as a judgment of a French court. The proceeding is instituted in a civil tribunal where the plaintiff must allege, *inter alia*, jurisdiction; correct procedure; and proper application of foreign law. He must prove the judgment by producing the original copy authenticated by the foreign judge and recording officer whose signatures are verified by the proper French officials. Judgments not in French are accompanied by a translation under oath. The defendant may deny plaintiff's allegation or plead affirmatively, and the proceeding goes forward much like an ordinary action. Katz & Brewster, Cases in International Transactions and Relations 442 (1960). Under French law, the *exequatur* is not considered as a new judgment, but merely as a recognition of the validity of the original judgment. Delaume, *op. cit. supra* note 26, at 160.

30. Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619, 763 (1955).

31. For a discussion of reciprocity in Anglo-American law, see *id.* at 752-65.

32. *Id.* at 758.

33. 159 U.S. 113 (1895). The opinion was referred to as a "magnificent dictum" by Judge Pound in Johnston v. Compagnie Générale Transatlantique, 242 N.Y. 381, 388, 152 N.E. 121, 123 (1926), the decision which started a movement among the state courts, away from reciprocity. *Hilton v. Guyot* was an appeal from a lower federal court and the Supreme Court did not purport to lay down a rule of law binding on state courts. Reese,

French judgment because France did not give conclusive effect to American judgments. *Hilton v. Guyot*, insofar as it concerned comity and reciprocity, did not attain a wide following among state courts, and its binding force for federal courts has probably been laid to rest by *Klaxon Co. v. Stentor Elec. Mfg. Co.*,[34] requiring federal courts (in diversity cases) to apply the conflicts rule operative in the states in which they sit.[35]

Reciprocity is considered by American commentators[36] and by some European jurists[37] as patently undesirable. Its postulates have been exposed as false: the first premise, the belief that the interests of non-resident nationals would be advanced by the recognition of judgments rendered in their fatherland, was erroneous because it confused a national judgment with a judgment for a national; while the second premise, the principle of equality among states with its claims for equal treatment in the name of national dignity, wrongly assumes that states should not differ on questions of policy.[38] Among the reasons urged for the elimination of reciprocity are the injustice of holding the individual foreign litigant responsible for the policies of his country and the fact that the doctrine has failed to insure desired laws in other countries.[39]

---

supra note 3, at 790. The case in any event placed a number of limitations on the reciprocity requirement. The Court stated that foreign in rem, quasi in rem and status judgments should ordinarily be granted conclusive effect, and an in personam judgment should be regarded as conclusive—not merely prima facie evidence of the underlying claim—if the person invoking the foreign claim was the defendant in the first proceeding. For discussions of *Hilton*, see Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619, 760-63 (1955); Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 La. L. Rev. 465, 471-74 (1956); Nussbaum, *supra* note 3, at 235; Reese, *supra* at 790-93. Ehrenzweig, Conflict of Laws 165 (rev. ed. 1962) lists states that have rejected and states that still accept the *Hilton* rule of reciprocity.

34. 313 U.S. 487 (1941).

35. Smit & Miller, *op. cit. supra* note 3, at 29; Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It*, 42 Iowa L. Rev. 236, 241 (1957).

36. See Goodrich, Conflict of Laws 392-93 (4th ed. 1964); Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619 (1955); Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 La. L. Rev. 465 (1956); Nadelmann, *supra* note 35, at 249-54; Reese, *supra* note 3, at 790-93; Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. Rev. 44, 49-50 (1962). *Cf.* Reese, *supra* note 3, at 793, suggesting that reciprocity might provide a useful bargaining weapon for the United States Government in negotiating treaties; Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 La. L. Rev. 465, 469 (1956), suggesting that reciprocity might be useful in the area of international judicial assistance, but not in recognition and enforcement.

37. See Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 Am. J. Comp. L. 72, 74 (1964).

38. Lenhoff, *Reciprocity: The Legal Aspect of a Perenial Idea*, 49 Nw. U.L. Rev. 619, 764 (1955). See also Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 La. L. Rev. 465, 473 (1956), noting that if reciprocity were intended to further the interests of nationals, Germany, *e.g.*, would always enforce an American judgment in favor of a German, but, in fact, it denies enforcement regardless of the nationality of the party seeking it.

39. Reese, *supra* note 3, at 793 (also suggesting that the requirement places a burden on the courts which must determine whether the country of the judgment in issue grants conclusive effect to the enforcing state's judgments); Smit, *International Cooperation in Civil Litigation: Some Observations on the Roles of International Law and Reciprocity*, 9 Neth. Int'l L. Rev. 137, 147-48 (English reprint 1962). *But see* Nadelmann, *supra* note 37, at 78 (noting the effect of the German requirement of reciprocity on the French court's decision to grant conclusive effect to foreign judgments).

As a precondition to enforcement, reciprocity tends to restrict liberal developments by encouraging retaliation instead of liberalization of enforcement. Even where this is not the case, compliance with the requirement of reciprocity is often difficult because of the differences in national laws.[40]

B. *Jurisdiction and Competence*

Whether a judgment will be enforced by a second state depends everywhere upon whether or not the court of the second state deems the court of the first state to have been competent to render the judgment (assuming, of course, that reciprocity is not a bar). This decision is generally reached on the basis of enforcing state's own rules with respect to competence and jurisdiction.[41] A comparison of the common and civil law rules is complicated somewhat by the differing conceptual implications of jurisdictional terms in the two systems. For example, in civil law, authority to adjudicate a matter is regarded as preexisting the bringing of a suit, whereas in the common law, the traditional rule is that the power commences with service of process.[42]

Moreover, jurisdiction and competence tend to be confused, although they represent different aspects of the power of a political body to render a judicial judgment.[43] "Jurisdiction," in Anglo-American terminology, has several meanings, but for purposes of comparative law it has been suggested that it should be used "only to describe the power of a political body, as determined by its own higher (constitutional) law, the law of a superior political body, or the law of a foreign state (indirect jurisdiction), to refer a given controversy to its courts."[44] "Competence," a term not in general usage in the United States,[45] should describe the power that the political body has in fact permitted its courts to exercise.[46] In the United States and other federal systems, reference must be had to both jurisdiction and competence, but within his own system a Continental jurist normally "need not look beyond the rules of competence indicating whether and which domestic courts have been authorized by the legislature to deal with the case."[47]

Indirect jurisdiction or *compétence générale indirecte*—describing the power of a political body by the law of a foreign state—is a term subject to still further confusion. Frequently used in connection with the recognition of foreign judgments, it is often considered synonymous with "jurisdiction in the international

40. Smit, *supra* note 39, at 148.

41. Nussbaum, *Jurisdiction and Foreign Judgments*, 41 Colum. L. Rev. 221, 223 (1941).

42. Ginsburg, *The Competent Court in Private International Law: Some Observations on Current Views in the United States*, 20 Rutgers L. Rev. 89, 90 (1965).

43. See *id.* at 91-92; see generally Smit, *The Terms Jurisdiction and Competence in Comparative Law*, 10 Am. J. Comp. L. 164 (1961), on the undesirability of the unselective use of the term "jurisdiction" to denote the various forms of judicial jurisdiction and competence in comparative law.

44. Ginsburg, *supra* note 42, at 92.

45. Nussbaum, *supra* note 41, at 221.

46. Ginsburg, *supra* note 42, at 92.

47. *Ibid.* See also Nussbaum, *supra* note 41, at 221.

sense."[48] Indirect jurisdiction denotes "judicial authority as determined under the law of the state in which application is made for the enforcement of a judgment rather than for initial adjudication of a claim."[49] Jurisdiction in the international sense properly applies to competence in cases with international aspects.[50]

Under the common law, the traditional basis for a court's exercise of judicial authority (competence) in in personam actions has been the presence of the defendant within the territorial ambit of the court,[51] together with personal service of process upon him, often called the "transient rule."[52] Such a notion is totally foreign to Continental jurists, who regard it on a par with such exorbitant bases for in personam judgments as Article 14 of the French Code Civil and Article 23 of the German *Zivilprozessordnung* (Code of Civil Procedure).[53] Judgments based solely on an exorbitant rule are generally not recognized, nor are they expected to be.[54]

The exorbitant bases on the Continent vary from country to country; by contrast, the basic general rules exhibit some similarity and can be generalized as follows. The plaintiff must bring his suit in the court of the defendant's domicile in matters involving persons and movables (*actor sequitur forum rei*),[55] or in the court of the place where an obligation arose or where it has been

48. For discussions of these terms, see Ginsburg, *supra* note 42, at 92-93; Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe*, 12 Int'l & Comp. L.Q. 367, 372-74 (1963); Nussbaum, *supra* note 41, at 225; Smit, *supra* note 43, at 166.

49. Ginsburg, *supra* note 42, at 93 n.18.

50. *Ibid.* Public international law has not developed rules for delimitation of judicial jurisdiction among nations. The term "jurisdiction in the international sense" or "international jurisdiction" refers merely to jurisdiction with international elements, not to the source of the jurisdiction exercised. Lenhoff, *International Law and Rules on International Jurisdiction*, 50 Cornell L.Q. 5 (1964).

51. In this context, "jurisdiction" refers to the "territorial area . . . within which a given power may be exercised." Ginsburg, *supra* note 42, at 91.

52. For discussions of the transient rule, see Ehrenzweig, Conflict of Laws 103-07 (rev. ed. 1962); Goodrich, Conflict of Laws 115-17 (4th ed. 1964); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956).

53. Article 14 of the French Code Civil and the similar Article 14 of the Luxembourg Code Civil allow a French or Luxembourg national to sue in his national courts a foreigner on "the sole ground that he is a foreigner, and this even when the litigation has no connection with the country where the proceedings take place." Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 Am. J. Comp. L. 323, 324 (1961). Article 23 of the German *Zivilprozessordnung* (Code of Civil Procedure) allows a suit in German courts against any defendant who has assets in Germany, provided he is neither domiciled nor resident there. *Id.* at 327. For a description of other exorbitant bases, see *infra*, note 182.

54. Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It*, 42 Iowa L. Rev. 236, 261 (1957). It has been pointed out that if the United States were to enter a treaty on the recognition and enforcement of judgments, it is highly probable that the transient rule would be excluded as an acceptable basis of jurisdiction. Lenhoff, *International Law and Rules on International Jurisdiction*, 50 Cornell L.Q. 5, 8 (1964).

55. Weser, *supra* note 53, at 328. The rule is not uniform among the Common Market countries, however. If a defendant has no domicile in the country, suit may be brought at his residence, but France and Germany allow this alternative basis only where the defendant has no domicile in any country. With respect to corporations, suit may be brought at the *siege social;* the definition of the *siege* varies. *Id.* at 329-30.

or must be performed (*forum contractus*).[56] Attitudes toward *forum contractus* differ among the Common Market countries to a somewhat greater extent than *actor sequitur forum rei*; in the Netherlands, for example, it does not obtain at all.[57] If the cause is in tort, besides the defendant's domicile suit may be brought in the court of the place where the act occurred, although the rationale for the rule varies and the rule itself is not always explicit.[58] It can be seen that, with the exception of the exorbitant rules, Continental procedure[59] is concerned primarily with some nexus between the forum and the act sued upon, or with the defendant. Such a nexus is regarded as missing from the transient rule of Anglo-American law, at least where there is no other connection between the defendant, the cause of action and the forum state.

However, there are other bases for the exercise of jurisdiction in the common law which more closely resemble the European non-exorbitant rules—a fact which has significance for the recognition and enforcement of United States judgments abroad because of the application of indirect jurisdiction. Among those recognized by both systems are: consent; domicile; citizenship; ownership of property within the state, where the cause of action arises from and is reasonably related to the defendant's ownership of the property; and certain activities within the state with regard to causes arising out of such activities.[60] This last basis is in abrogation of the traditional common law rule which does not recognize contract, tort or economic activity as jurisdiction-conferring acts.[61] Statutes in several of the states in the United States have expanded the reach of their courts which may thus obtain in personam jurisdiction over persons outside the state, provided always that the requirements of due process have been met.[62]

---

56. *Id.* at 331.

57. Belgium, Germany and Italy recognize it in all types of cases, but in Germany suit can be brought only at the place of performance; Belgium and Italy provide a choice between place of contract and place of performance. France and Luxembourg recognize *forum contractus* only in commercial cases. *Ibid.*

58. Only France and Germany have a specific provision. *Id.* at 332. Other fundamental bases of jurisdiction are described *id.* at 333-36.

59. Besides the exorbitant and fundamental bases, special rules govern, *e.g.*, patents and trademarks. *Id.* at 337-38.

60. Ginsburg, *supra* note 42, at 94-95, also noting the similarity of these bases to those listed in a prior draft Hague Conference Convention on Recognition and Enforcement of Foreign Judgments, the draft convention of the Common Market states, and the Uniform Foreign Money-Judgments Recognition Act. The International Law Association has approved a Model Act Respecting the Recognition and Enforcement of Foreign Money-Judgments which contains a non-exclusive catalogue of similar bases but does not mention ownership of property. International Law Association, Report of the Fifty-First (Tokyo) Conference xvii, xix-xx (1964).

61. Goodrich, *op. cit. supra* note 52, at 124.

62. See *supra* note 7 for citations to representative state statutes. On the requirements of due process, see, *e.g.*, Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 Buffalo L. Rev. 61 (1965) (the test is whether the contacts with the forum are such as make it reasonable to require the defendant to defend); Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249-58 (1959) (reviewing U.S. Supreme Court cases).

IV. THE EFFECT OF FOREIGN JUDGMENTS IN THE UNITED STATES

Because the common law generally accords conclusive effect to final foreign judgments, the developments under discussion will have little actual effect on the treatment of such judgments in the United States except to the extent that they affect methods of enforcement. In order to assess these measures, it seems appropriate to begin with a discussion of the common law rules prevailing in most states.

A. *Indirect Jurisdiction*

Although final foreign judgments are usually granted conclusive effect without a review of the merits, no such certainty exists as that which surrounds the judgments of sister states.[63] But like the judgments of sister states, a foreign judgment will not be granted more extensive effect than it enjoys in the place of rendition. If lack of competence of the rendering court makes the judgment unenforceable in the first state, it will not be recognized in the United States.[64] The ultimate reference, however, is not to foreign law but to American concepts. United States due process standards apparently affect the determination of whether the jurisdictional nexus and the method of notification were sufficient to justify recognition of the adjudication abroad.[65] A corollary of indirect jurisdiction is that "the findings of the foreign court in respect to jurisdiction are not binding upon the forum."[66] And testing the jurisdiction of the first court according to the forum's own conceptions[67] may result in a denial of recognition even though in the same circumstances the forum court would have had jurisdiction.[68]

Whether the foreign court had jurisdiction over the person of the defendant

---

63. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783 (1950). That foreign judgments are generally granted conclusive effect, see generally Smit & Miller, International Cooperation in Civil Litigation: A Report on Practices and Procedures Prevailing in the United States 28-40 (1961); Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It*, 42 Iowa L. Rev. 236, 240-41 (1957).

64. Smit & Miller, *op. cit. supra* note 63, at 39; Nussbaum, *supra* note 41, at 231-34.

65. Reese, *supra* note 63, at 789-90 (stating that the same standards are apparently applied in determining jurisdiction or adequacy of notice as are applicable to domestic judgments, although if questioned, the foreign judgment may be subject to closer scrutiny). *But see* Smit & Miller, *op. cit. supra* note 63, at 36-37 (noting the influence of the law concerning sister state judgments on foreign judgments, and the fact that different considerations are relevant, which has led some courts to deny recognition to foreign judgments although the first court had, under traditional rules, jurisdiction). *Cf.* Cal. Code Civ. Proc. § 1915. However, the California courts have applied American standards of jurisdiction. Smit & Miller, *op. cit. supra* note 63, at 29 n.104.

66. Nussbaum, *supra* note 41, at 224.

67. *Id.* at 222.

68. *Id.* at 223. Thus, an English court has held that a French judgment against a non-resident obtained after extraterritorial service on the defendant, valid under French law, is not recognizable even though English law gave English courts jurisdiction over non-residents under substantially the same theory. The court noted that a United States court would not recognize such an English judgment. *Id.* at 223-24. See also Castel, *Jurisdiction and Money-Judgments Rendered Abroad: Anglo-American and French Practice Compared*, 4 McGill L.J. 152, 174-79 (1958).

is perhaps the most important—and the most troublesome—question.[69] Judgments grounded on exorbitant bases are not recognized and therefore cannot be enforced in the United States.[70] But even if the basis is not exorbitant, if it is one not recognized in the United States recognition may be denied[71] because the American court tests, in its own terms, whether or not res judicata effect will be given to the judgment beyond the borders of the jurisdiction of its origin.[72] At present, bases acceptable in the United States for the exercise of in personam jurisdiction by a foreign court include: the defendant's domicile or nationality in the foreign state at the commencement of the action; consent; doing business in the foreign state; doing an act in the foreign state out of which the cause arose; and the ownership of property within the foreign state with respect to causes of action against the owner.[73] The evolution of these bases in the United States, brought about in part through long-arm legislation, has resulted in the enforceability of judgments previously not recognized. Two New York cases illustrate this development.

Ross v. Ostrander[74] involved an American defendant who had resided in England for several years. During the course of his residence there, he entered into a seven-year lease but left England before the term was up. An action was brought in England for arrears in rent, the defendant having been personally served in New York pursuant to Order XI of the Rules of the High Court, which provides for service outside the jurisdiction against a nonresident in a suit respecting the breach of a contract which was made in England. In an action brought to have the English default judgment enforced in New York, the defendant's motion for summary judgment was granted on the ground that the New York requirements of jurisdiction were not met. The court noted, *inter alia,* that the judgment would not have been valid if obtained in a sister state, citing *Pennoyer v. Neff.*[75]

The second case, *Plugmay Ltd. v. National Dynamics Corp.*,[76] enforced an English default judgment similarly based on Order XI. The New York court declined to follow *Ross,* noting that *Pennoyer* was "practically overruled" by *McGee v. International Life Ins. Co.*,[77] and that New York's new long-arm

69. As to the difficulties presented by jurisdictional requirements in efforts to secure reciprocal enforcement of foreign judgments, see Nadelmann, *supra* note 63, at 261-62.

70. Nussbaum, *supra* note 41, at 226.

71. See generally Smit & Miller, *op. cit. supra* note 63, at 33-37.

72. Nussbaum, *supra* note 41, at 225.

73. Smit & Miller, *op. cit. supra* note 63, at 34; Nadelmann, *supra* note 63, at 261-62. See the Uniform Foreign Money-Judgments Recognition Act § 5(a)(1) providing that a foreign judgment shall not be refused recognition if the defendant was served personally within the state. 9B U.L.A. (Supp. 1964, at 27).

74. 192 Misc. 140, 79 N.Y.S.2d 706 (Sup. Ct. 1948).

75. 95 U.S. 714 (1878). The Supreme Court stated that service of process within the state was essential for a valid personal judgment. 95 U.S. at 727 (dictum).

76. 48 Misc. 2d 913, 266 N.Y.S.2d 240 (N.Y. City Civ. Ct. 1966).

77. 355 U.S. 220 (1957).

statute[78] permitted New York courts to acquire in personam jurisdiction in a manner similar to that provided under Order XI.[79]

Competence of the foreign court with respect to the subject matter of the action does not appear to fall within the scope or the purpose of indirect jurisdiction. Indeed, it is generally presumed that a foreign court of record is a court of "general jurisdiction" although proof to the contrary may be offered.[80] If the enforcing court decides that the foreign court was not competent to act with respect to the matter in litigation, however, the judgment will be neither recognized nor enforced.[81] This was one of the issues in the incredibly long and complicated *Bata* litigation.[82] In the New York proceedings in that case, and in one of the Delaware proceedings, a decision of the District Court at Zlin, Czechoslovakia, was denied res judicata effect because, *inter alia*, the subject matter of the litigation exceeded the amount of money as to which the court was competent under Czechoslovakian law, which the New York court examined at length.[83]

B. *Defenses to Recognition or Enforcement*

Even if the foreign judgment meets the tests of indirect jurisdiction and is enforceable in the first state, it may still be denied conclusive effect on the ground of extrinsic fraud,[84] violation of natural justice,[85] or violation of the public policy of the second state.[86] Extrinsic fraud deprives the aggrieved party of an adequate opportunity to present his case to the court.[87] The grounds for finding violations of natural justice or the public policy of the forum are less

78. N.Y. CPLR § 302.

79. Under § 313 of the CPLR a defendant may be served without the state and made subject to the jurisdiction of the state on the basis of an act committed there as enumerated ing § 302. At the time of the *Plugmay* decision, jurisdiction could be based on the commission of a tortious act within the state; the owning, use or possession of any real property within the state; the transaction of any business within the state. The section was later amended to provide that the commission of tortious acts without the state which cause injury within the state is, under certain circumstances, a basis for personal jurisdiction. N.Y. Sess. Laws 1966, ch. 590.

There is some rather confusing language in *Plugmay* which seems to indicate that the question of the English court's jurisdiction over the defendant involved the public policy of New York. See 48 Misc. 2d at 916, 917, 266 N.Y.S.2d at 244-45. The Common Market Preliminary Draft Convention provides that the question of jurisdiction is not one of public policy, which seems to be the proper view; 2 CCH Common Market Rep. ¶¶ 6003, 6032. See *infra*, text at notes 91-93.

80. Goodrich, *op. cit. supra* note 52, at 396. See also Nussbaum, *supra* note 41, at 231-34.

81. *Ibid.* See also Smit & Miller, *op. cit. supra* note 63, 33-34, 37.

82. The litigation involved cases in Czechosolovakia (in 1933), Holland, Switzerland, Delaware and New York. See Bata v. Bata, 39 Del. Ch. 548, 555, 170 A.2d 711, 715 (Sup. Ct. 1961).

83. *Id.* at 556-57, 170 A.2d at 717; Bata v. Chase Safe Deposit Co., 99 N.Y.S.2d 535, 571-75 (Sup. Ct. 1950), *aff'd sub. nom.* Bata v. Bata, 279 App. Div. 182, 108 N.Y.S.2d 659 (1st Dep't 1951), *aff'd*, 306 N.Y. 96, 115 N.E.2d 672, 108 N.Y.S.2d 659 (1953).

84. Goodrich, *op. cit. supra* note 52, at 397-98; Reese, *supra* note 63, at 793-94.

85. Smit & Miller, *op. cit. supra* note 63, at 33; Reese, *supra* note 63, at 795-96.

86. Ehrenzweig, Conflict of Laws 202-05 (rev. ed. 1962); Goodrich, *op. cit. supra* note 52, at 398-400; Smit & Miller, *op. cit. supra* note 63, at 33; Reese, *supra* note 63, at 796-98.

87. Reese, *supra* note 63, at 784. Intrinsic fraud, by contrast, involves matters passed upon by the first court. *Ibid.*

clear. It appears that natural justice is denied if the proceedings departed rather flagrantly from generally accepted notions of fairness,[88] but that only an extreme deviation warrants denial of recognition; a marked difference in procedure is not enough,[89] and a strict application of domestic due process standards is uncalled for.[90] Public policy, on the other hand, is said to be offended if the subject matter of the judgment arouses local opposition to enforcement.[91] However, the "opposition policy should need to be particularly violent to overcome enforcement. There is a wider public policy in favor of recognition . . . ."[92] Within this limitation, the defense may be directed at the nature of the cause of action underlying the judgment, or it may be based upon a domestic policy requiring reexamination of the merits in order to protect the citizens or institutions of the second state.[93]

Underlying these defenses are certain attitudes regarding private rights as opposed to public relations.[94] It will be recalled that the arguments against reciprocity are in part founded on the desire to deal justly with individual litigants who should not be punished for the inadequate recognition rules of their countries. Similarly, the defenses of fraud and violation of natural justice are designed to protect the litigants. On the other hand, the public policy exception is designed to safeguard the citizens or institutions of the second state.[95]

With respect to these defenses, a court in the United States is not unlikely to depart from the standards of full faith and credit as applied to sister state judgments.[96] Thus, when a foreign judgment is at issue, the question of fraud will probably be decided under the law of the second state rather than the first[97] because "it seems unlikely that an American court would permit the issue of fraud to be settled conclusively by a foreign law which might be based upon conceptions of fairness and justice at substantial variance with those prevailing in this country."[98] Moreover, the defense of public policy is unavailable with respect to sister state judgments.[99]

---

88. Smit & Miller, *op. cit. supra* note 63, at 33; Reese, *supra* note 63, at 795-96.
89. Reese, *supra* note 63, at 796.
90. *Ibid.*
91. Smit & Miller, *op. cit. supra* note 63, at 33; Reese, *supra* note 63, at 796-98.
92. Goodrich, *op. cit. supra* note 52, at 399.
93. Reese, *supra* note 63, at 797-98.
94. Judge Pound, in refusing to follow Hilton v. Guyot, 159 U.S. 113 (1895), said in part: ". . . the question is one of private rather than public international law, of private right rather than public relations, and our courts will recognize private rights acquired under foreign laws and the sufficiency of evidence establishing such rights." Johnston v. Compagnie Générale Transatlantique, 242 N.Y. 381, 387, 152 N.E. 121, 123 (1926). See also Reese, *supra* note 63, at 785.
95. Reese, *supra* note 63, at 796-98. American and English courts do not make a practice of discriminating in favor of their nationals, but they might question a judgment where there is substantial reason to believe they may have been seriously prejudiced at the hands of the foreign court. *Id.* at 785.
96. That despite the influence the law concerning sister states has had on foreign judgments, different considerations do and should prevail, see Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. Rev. 44, 45-46 (1962).
97. Reese, *supra* note 63, at 794.
98. *Ibid.* Other aspects of the defense, however, resemble the treatment given to

Other defenses may be briefly noted. The general rule with respect to judgments based upon penal and fiscal claims is that they are not enforceable. Payment or other discharge of the obligation created by the judgment prevents enforcement, as does a showing that the foreign judgment was not on the merits. Judgments that are not final where rendered are not enforceable, but the fact that an appeal is pending does not preclude the granting of conclusive effect unless the effect of appeal in the rendering state is to vacate or suspend judgment. Finally, it should be noted that error of fact or law by the first court is no defense.[100]

C. *Consequences of Recognition*

The effect of recognition of a foreign judgment is not, under the common law, immediate execution in its character as a judgment.[101] As to foreign judgments, there is no "merger" of the original claim in the judgment.[102] Thus, unless provision for enforcement is made by statute, the plaintiff must bring a new action on the foreign judgment; for the obligation which it is deemed to impose must be reduced to a judgment in the forum by a new action in order to be executed.[103] It is said that this particular treatment of foreign judgments under the common law is an attempt to reconcile the principle of territorial jurisdiction of courts—which demands that the enforcement of a judgment outside the territory of the rendering court must be placed upon some other basis than the authority of the rendering court which ceased at its jurisdictional limits—and the principle of res judicata.[104]

The practical effect of the non-merger rule is that the plaintiff seeking to enforce the judgments may sue either on the judgment itself or on the original claim. The option is of scant importance as between the parties to the suit: even if the suit is on the original claim, the foreign judgment is normally conclusive upon the issues involved.[105] As to civil law countries, however, almost

---

sister-state judgments. It has been held, for example, that if the foreign court actually passed on the question of fraud, that issue will not be reexamined on the merits. *Ibid.*

99. Ehrenzweig, *op. cit. supra* note 86, at 203; Goodrich, *op. cit. supra* note 52, at 400.

100. As to penal and fiscal claims, see Ehrenzweig, *op. cit. supra* note 86, at 205; Goodrich, *op. cit. supra* note 52, at 402-03; *cf.* Reese, *supra* note 63, at 797. As to payment or other discharge, see Reese, *supra* note 63, at 798-99. As to the foreign judgment not being on the merits, see Goodrich, *op. cit. supra* note 52, at 405-06. As to the finality of foreign judgments, see Note, *The Finality of Judgments in the Conflict of Laws*, 41 Colum. L. Rev. 878 (1941); see also Abmatielos v. Foundation Co., 203 Misc. 470, 116 N.Y.S.2d 641 (Sup. Ct. 1952) (also dealing with two conflicting judgments from two foreign countries, and holding that the one later in time prevails); Ehrenzweig, *op. cit. supra* note 86, at 221-22; *But see* Bata v. Bata, 39 Del. Ch. 258, 163 A.2d 493 (Sup. Ct. 1960), *cert. denied*, 366 U.S. 964 (1961). As to error of fact or law, see Goodrich, *op. cit. supra* note 52, at 404.

101. Smit & Miller, *op. cit. supra* note 63, at 38; Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 Mich. L. Rev. 1129, 1135-42 (1935).

102. This is in contrast to judgments of sister states entitled to full faith and credit. Yntema, *supra* note 101, at 1136, 1139-40.

103. *Id.* at 1144.

104. *Ibid.* With respect to the enforcement of sister state judgments, see *id.* at 1148-50.

105. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 788 (1950).

all of which provide by statute for a summary proceeding for enforcement, the common law enforcement practice is a source of much complaint.[106]

D. *Recent Developments*

The adoption of recent measures relevant to the enforcement of foreign judgments generally indicate that the United States has found internal development inadequate, not because justice has been denied to those seeking to have their foreign judgments enforced here, but because United States judgments have been accorded less than favorable treatment abroad. Since United States citizens tend to be creditors, action to rectify the prevailing situation has been deemed unlikely to originate abroad.[107]

The measures taken have been both unilateral and internal, and multilateral and external. On the internal side, the Uniform Foreign Money-Judgments Recognition Act codifies the common law rules on recognition in the hope that American law on the subject will thus be more comprehensible—and perhaps more readily available—to the civil law courts.[108] The external developments have been the recent congressional authorizations for the participation by the United States in The Hague Conference on Private International Law and the International (Rome) Institute for the Unification of Private Law.[109] Hitherto, the United States had remained aloof from such multilateral efforts, an attitude which may have been detrimental to its own interests.[110]

Finally, the relevance of long-arm statutes should be noted. These enactments affect both the enforceability of foreign judgments in this country and the treatment accorded United States judgments abroad. The first aspect has already been briefly touched upon. The major portion of the second aspect is deferred to the section on enforceability in the Common Market countries.

1. *The Uniform Foreign Money-Judgments Recognition Act*

The Uniform Foreign Money-Judgments Recognition Act is in large part intended to attain for United States judgments general recognition and enforcement abroad. Especially in those states conditioning conclusive effect upon reciprocity, judgments of American origin have been denied recognition either

106. Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619, 763 (1955); Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It*, 42 Iowa L. Rev. 236, 259 (1957).

107. Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619, 763 (1955).

108. See Nadelmann, *supra* note 106, at 252.

109. S.Res. 781, H.R.J. Res. 778, 88th Cong., 1st Sess. (1963). Steps toward international cooperation have been taken on other fronts as well, and all should go far in creating a proper climate for improved relations generally in private international law. See, *e.g.*, the new law to improve judicial procedures for serving documents, obtaining evidence and proving documents in litigation with international aspects, 78 Stat. 995 (1964) (codified in scattered sections of 18 U.S.C. and 28 U.S.C.), discussed in detail in Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015 (1965).

110. Nadelmann, *supra* note 106, at 257. Since 1874 the United States had often been invited to participate in such efforts but declined on the ground that its federal system raised great difficulties in carrying such projects into effect. *Ibid.*

because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved, or because no certification of the existence of reciprocity could be obtained.[111] Codification, it was thought, would render it more likely that such countries could satisfy themselves that their judgments are enforceable in the United States.

The act purports to codify, but not to limit, the case law on recognition. It provides that a judgment rendered abroad which qualifies for recognition is to be treated in the same manner as a judgment of a sister state entitled to full faith and credit.[112] The recognition act provides for summary denial of recognition in only three situations: when the court of rendition is a part of a system which does not provide impartial tribunals or a procedure compatible with the requirements of due process; when the court lacked personal jurisdiction over the defendant; and when subject matter jurisdiction was absent. The subject matter jurisdiction requirement is not more particularly stated, but section 5 of the act sets forth, without limiting, acceptable bases of personal jurisdiction.

Section 5 provides that recognition shall not be refused for lack of personal jurisdiction if: the defendant was served personally within the foreign state or voluntarily appeared (other than for limited purposes); or if the defendant consented to the jurisdiction of the foreign court with respect to the subject matter involved; or if he was a domiciliary of the foreign state at the time of institution of the action; or if he had a business office in the state and the proceedings involved a claim arising out of business done through that office; or if he operated a motor vehicle or airplane in the foreign state out of which the action arose. The bases listed are more particularly defined than those in the typical long-arm statutes,[113] but the recognition act specifically provides that the courts of the enacting state may recognize other bases of jurisdiction.

Permissive grounds for denying recognition are: lack of notice to the defendant in time for him to defend; fraud; repugnance of the claim to the public policy of the second state; conflict with another final and conclusive judgment; violation of an agreement between the parties under which the dispute was to be settled other than by the court of rendition; and, in the case of jurisdiction based solely on personal service, serious inconvenience of the forum for the trial of the action.[114] Finally, if the defendant shows that an appeal is pending or intended, the second court may stay recognition proceedings.[115]

111. Commissioners' Prefatory Note to the Uniform Foreign Money-Judgments Recognition Act, 9B U.L.A. (Supp. 1964, at 27). In some countries the government advises the courts whether reciprocity exists; in others, the courts themselves make this determination. Nadelmann, *supra* note 106, at 249-54.

112. 9B U.L.A. (Supp. 1964, at 27, 28). For a discussion of the powers of Congress with respect to the enforcement of sister state judgments, see Yntema, *supra* note 101, at 1148-50.

113. Commissioners' Note to § 3, 9B U.L.A. (Supp. 1964, at 27, 28). The Uniform Enforcement of Foreign Judgments Act is found at 9A U.L.A. 475. For a discussion of the enforcement of sister state judgments, with comments on the Uniform Enforcement of Foreign Judgments Act, see Paulsen, *Enforcing the Money Judgment of a Sister State*, 42 Iowa L. Rev. 202 (1957).

114. Uniform Enforcement of Foreign Judgments Act (Rev. 1964), 9A U.L.A. 486.

The Commissioners anticipate that the method of enforcement will be that provided in the Uniform Enforcement of Foreign Judgments Act[116] in a state having enacted that Act, but this is not specifically stated in the text. Nor does their comment mention the 1964 Revision of the Enforcement Act, and it is not clear whether under the terms of the Revision it is available to extra-national judgments.[117] Indeed, the lack of textual reference to either enforcement act may mitigate the salutory effect abroad that the recognition act is hoped to have. However, it should go a long way toward clarifying recognition law in the United States.

2. *The Uniform Enforcement of Foreign Judgments Act*

The Uniform Enforcement of Foreign Judgments Act of 1948, adopted by eight states, provides for a summary judgment procedure for judgments of sister states or federal courts. After registration of the judgment in accordance with the act, the petitioner is entitled to have service of process upon the judgment debtor as in an action brought upon the foreign judgment; if in personam jurisdiction cannot be obtained, provision is made for quasi in rem jurisdiction. If, after in personam jurisdiction is acquired, the judgment debtor fails to plead, the registered judgment becomes a final personal judgment of the court in which it is registered. If quasi in rem jurisdiction is obtained and the judgment debtor has not acted to set aside the registration, the registered judgment becomes a final judgment quasi in rem of the court in which it is registered. If the judgment debtor asserts any defense permissible under the law of the registering state, the issues raised are to be tried and determined as in local civil actions.

The 1948 Act was revised in 1964, but thus far, no states have adopted the Revision.[118] In their prefatory note to the 1964 Revision, the Commissioners note that although the 1948 Act was a distinct improvement over the prior procedure, it fell short of the method provided by Congress for the inter-district enforcement of judgments of the federal district courts,[119] the practice of which is adopted by the Revision. The foreign judgment, properly authenticated under federal or state law, may be filed in the office of the clerk of a specified state

115. 28 U.S.C. § 1963 (1964). See Note, *Registration of Federal Judgments*, 42 Iowa L. Rev. 285 (1957).

116. Uniform Enforcement of Foreign Judgments Act (Rev. 1964) § 2.

117. The Model Act provides for a stay in enforcement proceedings under these conditions, International Law Association, Report of the Fifty-First (Tokyo) Conference xxiii, as do the 1948 Uniform Enforcement of Foreign Judgments Act § 9 and the 1964 Revision § 4.

118. The definition of scope varies, § 1 of the 1948 Uniform Enforcement of Foreign Judgments Act applying to "any judgment . . . of a court of the United States or of any State or Territory which is entitled to full faith and credit in this state." By contrast, § 1 of the 1964 version reads ". . . any judgment . . . of a court of the United States or of any other court which is entitled to full faith and credit in this state."

The Model Act Respecting the Recognition and Enforcement of Foreign Money-Judgments of the International Law Association provides for registration or *exequatur* in accordance with the procedure of the enacting state, rather than a summary judgment procedure. International Law Association, *supra* note 117, at xvii, xxi-xxiii.

119. For example, the Illinois and New York long-arm statutes provide generally for the commission of a tortious act within the state. N.Y. CPLR § 302(a)(2); Ill. Rev. Stat. ch. 110, § 17(1)(b) (1963).

court, who is to treat the foreign judgment in the same manner as domestic judgments. A judgment so filed is to have the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of the court in which it is filed, and may be enforced or satisfied in like manner.[120] The clerk is to notify the judgment debtor of the fact of filing and the debtor may show, in addition to the defenses permissible under the law of the state, that an appeal is pending or to be taken, or that a stay has been granted. Enforcement in the second state, in that event, is stayed upon proof that the debtor has furnished security for satisfaction of the judgment as required by the first state. The debtor may also show grounds upon which enforcement of a judgment of the state of filing would be stayed.

Neither version affects the right of the judgment creditor to have his judgment enforced by an action thereon.

Only Illinois has enacted both the 1948 Uniform Enforcement of Foreign Judgments Act and the recognition act. As to states which adopt the recognition act but which have not also adopted one of the enforcement acts, and which have no other statute providing for the enforcement of foreign judgments, it may be questionable whether their own judgments will be viewed in a more favorable light than is currently said to shine abroad.[121]

3. *The British Foreign Judgments (Reciprocal Enforcement) Act*

In connection with the United States Uniform Acts, a summary of the British Foreign Judgments (Reciprocal Enforcement) Act, 1933,[122] may be

120. With respect to the doctrine of forum non conveniens in an era of expanded bases of personal jurisdiction, see Ehrenzweig, *op. cit. supra* note 86, at 122-23; Ginsburg, *The Competent Court in Private International Law: Some Observations on Current Views in the United States*, 20 Rutgers L. Rev. 89, 98-100 (1965).

Recognition under the International Law Association Model Act is subject to somewhat more particularized conditions than under the Uniform Act. The first court must have had jurisdiction, which may have been based upon: (i) voluntary, and not limited, appearance by the judgment debtor in the first proceeding; (ii) the judgment debtor expressly agreeing to the first court's jurisdiction; (iii) his ordinarily residing in the first state or being plaintiff or counterclaimant in the first action; (iv) if a corporation, its having its seat or principal place of business in the first state; (v) or the judgment debtor maintaining a commercial establishment or branch in the first state with respect to which the cause arose. If the action was in contract and the parties had different residences, the first court had jurisdiction if the contract was to be performed in that place; in tort, if the act which caused the injury or the last event necessary to render the defendant liable occurred there. This last provision apparently goes beyond even the recent amendment to the New York long-arm statute, which provides for personal jurisdiction for tortious acts committed without the state causing injury within the state, under certain circumstances. See *infra* note 165; see also Homburger & Laufer, *Expanding Jurisdiction over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute*, *supra* p. 67.

Recognition is to be denied if a default judgment was rendered without sufficient notice to the defendant; if natural justice (due process) was violated; if the strong public policy of the second state would be violated; if a res judicata judgment in the matter exists in the second state; or if the foreign judgment was obtained by fraud. International Law Association, *op. cit. supra* note 117, at xviii-xxi.

121. *But see* Steefel, *Enforcement of Judgments Obtained Under Statutes Typified by the "Long Arm" and "Single Act" Statutes—Germany*, Am. Bar Ass'n, Section of Int'l & Comp. L., 1964 Proceedings 239, 240.

122. 23 & 24 Geo. 5, c. 13. For background, see Yntema, *supra* note 101, at 1150-63.

instructive. The development of the common law in England as to recognition and enforcement of foreign judgments has been similar, but not identical, to that in the United States.[123] The common law rule that a fresh action against the judgment debtor must be instituted to obtain enforcement, however, is the same. Similarly, the English courts treat the foreign judgment itself as a cause of action, so that in practice, no great hardship is imposed upon the judgment creditor. It was recognized, however, that this procedure was somewhat less satisfactory than the summary proceedings available on the Continent, and further, "that the absence of any provision at common law for the direct enforcement of foreign judgments makes it very difficult to secure abroad the enforcement of English judgments, since foreign courts, which require reciprocity, are not easily assured of the efficacy of the common law's indirect procedure."[124]

The act, as its name indicates, emphasizes enforcement rather than recognition, although its provisions do reach the latter. As to enforcement, there are three requirements. When a judgment of a superior court of a foreign country which accords substantial reciprocity of treatment to British judgments (by the terms of a convention) is final and conclusive between the parties, and given after the entry into force of an Order of the Council extending the provisions of the act to that foreign country, and requires the payment of money (other than for fines or taxes), the judgment creditor may within six years apply to the High Court for registration of the judgment. Unless the judgment has been satisfied or is unenforceable by execution in the country of rendition, the High Court must order the judgment to be registered. A registered judgment is generally capable of execution in England as if it were a judgment originally given in the court of registration.[125]

A judgment debtor may have the registration set aside if, *inter alia*, the first court had no jurisdiction "in the circumstances of the case" or if notice of the original proceedings was not received in time to enable the defendant to defend and he did not appear, notwithstanding that service may have been made in accordance with the law of the first state. Other mandatory grounds for setting aside a registration are: fraud; violation of the public policy of the forum; and the fact that the registrant is not the one in whom rights under the judgment are vested. A registration may be set aside upon a showing that the matter in dispute, prior to the judgment of the original court, had been the subject of a final and conclusive judgment by another competent court.[126]

123. For discussions in a comparative context, see Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 Nw. U.L. Rev. 619, 752-58 (1955); Nadelmann, *supra* note 106, at 237-42. For a discussion of the English law in the context of that of the Common Market countries, see Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe*, 12 Int'l & Comp. L.Q. 367 (1963).

124. Note, *The Enforcement of Judgments: A Convention with Germany*, 36 Brit. Yb. Int'l L. 359 (1960).

125. *Id.* at 360-61.

126. Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 & 24 Geo. 5, c. 13, § 4(1).

The act also sets out criteria under which the original court shall be deemed to have had jurisdiction and when it shall be deemed not to have had jurisdiction.[127] Notably, the act makes no provision for jurisdiction based on personal service within the territorial ambit of the first court, or for citizenship, although judgments based on either may come within the clause providing that the first court shall be deemed to have had jurisdiction if the basis is one recognized by the law of the registering court.[128] Also, since the act makes no provision for competence based upon a tortious act committed within the jurisdiction of the first state, or a contract broken there, unless the defendant was a resident of or personally served within the territory of the first state, a judgment founded on those bases cannot be enforced in England.[129]

The British practice does not stop with the 1933 Act. It had been recommended by the drafters that conventions be concluded, and the recommendations have been followed. However, after thirty years, Britain has treaties with only six countries, including France, Belgium, and West Germany, although conventions with several other European countries have been contemplated.[130] The conventions in force assure, *inter alia*, the existence of a suitable degree of reciprocity between the parties, making detailed provision for the recognition of judgments. The effect is that qualifying judgments are to be enforced in Britain by the method provided in the 1933 Act;[131] the treaty partner is to use its own method of enforcement.[132] However, the emphasis of the conventions, unlike that of the act, is on recognition rather than enforcement.[133]

The provisions for jurisdiction in the conventions are no more liberal than those mentioned in the act,[134] because England cannot enter a convention beyond the authority granted by the act.[135] This has been compared unfavorably to the Continental convention practice which is not limited by, and often goes beyond, internal legislation on the subject.[136]

4. *The United States Uniform Acts and the British Act Compared*

There are a number of flaws in the British system, which have been criticized by both scholars and the bench;[137] nevertheless, it is thought to be an

127. 23 & 24 Geo. 5, c. 13, § 4(2), (3). For a summary, see Yntema, *supra* note 101, at 1162-63.
128. Yntema, *supra* note 101, at 1163.
129. Graupner, *supra* note 123, at 381. See also Campbell, *Jurisdiction Over Absent Defendants in English and United States Law: The Formulation of Jurisdictional Principles*, 38 Tul. L. Rev. 317, 323-25 (1964).
130. Graveson, *The Tenth Session of the Hague Conference of Private International Law*, 14 Int'l & Comp. L.Q. 528, 530 (1965); Note, *The Enforcement of Judgments: A Convention with Germany*, 36 Brit. Yb. Int'l L. 359, at 370 (1960).
131. Note, *id.* at 361.
132. In the treaty with Germany, *e.g.*, enforcement in Germany is to be by the German method of an executory declaration. *Id.* at 368.
133. *Id.* at 364.
134. *Id.* at 365.
135. Graupner, *supra* note 123, at 380.
136. *Id.* at 381.
137. *Id.* at 373.

improvement over the common law. It might be worthwhile, then, to determine whether anything instructive can be gleaned from the British experience, for application in the United States.[138]

As has been noted, practice in the United States is sought to be accommodated to some extent to that of the civilians by a proposed non-restrictive codification—the Uniform Foreign Money-Judgments Recognition Act. It has been suggested that the Uniform Enforcement of Foreign Judgments Act and the 1964 Revision (if intended to be applicable to extra-national judgments) might, perhaps, be more explicitly related to the Recognition Act. Whether such enactments alone will mitigate the present unsatisfactory conditions is at least open to question in the light of the British experience of codification plus treaty. Indeed, it has been said that "the very existence of the numerous conventions . . . is the best proof that legislation in the mere domestic field has been unable to solve the problems inherent in the recognition of foreign judgments."[139] Contributing to the inherent problems are the differences between the codes and the common law and the apparent paucity of exhaustive official and semi-official publications in the United States on recognition and enforcement. Surely both factors complicate proof of American law,[140] a situation which codification would go far toward rectifying. But the same may be said of conflict of laws questions generally; in this larger area the situation has not been so noticeably bad that wholesale codification of the common law has been suggested as a desirable course.[141] The reason may lie in latent notions of sovereignty and the dignity of nations that are more closely identified with a country's judgments than with its law in general.[142] Whatever the reason, however, it seems that the civilians do not like, and some countries may not accept as sufficient, anything short of mutual assurances of recognition and enforcement by treaty.[143] If this is the case, however, accession to the Continental viewpoint has been said to be rendered difficult by the federal system of the United States.[144]

The United States has entered no treaties with respect to recognition and

138. For a comparison of United States and British law, which does not include the Uniform Acts, see Campbell, *Jurisdiction Over Absent Defendants in English and United States Law: The Formulation of Jurisdictional Principles*, 38 Tul. L. Rev. 317 (1964).

139. Graupner, *supra* note 123, at 368.

140. Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It*, 42 Iowa L. Rev. 236, 255-56 (1957).

141. *Cf.*, on the unification of private law, Am. Bar Ass'n, Special Committee on Unification of Int'l Private Law, Report (1961).

142. Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 La. L. Rev. 465, 473, 478-80 (1956).

143. Graupner, *supra* note 123, at 368. *But see* Nadelmann, *supra* note 140, at 258, stating that resort to the treaty-making power is not necessary as to all countries and that statutory enactments may sometimes suffice. Germany, it has been said, is now likely to grant recognition and enforcement to New York judgments, even in the absence of both statute and treaty. Steefel, *supra* note 121, at 240.

144. For a discussion of constitutional problems with respect to the treaty-making power as it affects the states regarding the unification of private law, see Am. Bar Ass'n, Special Committee on Unification of Int'l Private Law, *supra* note 141, at 39-44 (concluding that while there is a constitutional limit to the treaty-making power, that power is susceptible of much more extensive use).

enforcement; indeed the ability of the federal government to conclude such an agreement that would bind the states does not seem to be settled. Signposts in Supreme Court decisions have been pointed out that may afford an "adequate basis for a future ruling by the Court that 'state lines would disappear' in situations involving the judgments of foreign nations . . . ."[145] And it has been suggested that constitutional complications would be avoided if treaties were concluded by the federal government for the benefit of those states desiring to take advantage of their provisions. To benefit from such a treaty, a state would have to pass legislation in accordance with its provisions.[146] Presumably, the same result could be achieved if uniform legislation were first enacted by a number of states. The federal government could then proceed to enter conventions designed to assure recognition abroad of the judgments of American states adopting the uniform law, while guaranteeing to the civil law countries conclusive effect for their judgments in a manner acceptable and familiar to them.[147]

5. *The Hague Conference on Private International Law*

In connection with the question of treaties, it would appear to be an auspicious sign that the United States Government now participates in the Hague Conference on Private International Law and the International (Rome) Institute for the Unification of Private Law. Because a number of reports regarding the Hague Conference are available, it alone will be considered here, and the International Institute's activities will not be discussed.

One of the topics on the agenda of the Hague Conference was "recognition and enforcement of foreign judgments." A draft convention on this subject was prepared by a special commission, on which neither the United States nor Great Britain was represented. The result was that the draft "was prepared without regard to any American point of view."[148] But during the committee discussions of the draft, "common law systems were adequately represented."[149] The United Kingdom, which took a very active part in the committee deliberations, proposed a multilateral convention which would contain general rules binding upon all signatories, who would not thereafter be able to act contrary to them. But no contracting party would be bound to recognize or enforce a judgment of another unless the two had concluded a bilateral agreement to that effect.[150] The United Kingdom, basing its position on its own experience, strongly favored such a

145. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 788 (1950).

146. Nadelmann, *supra note* 140, at 259-60.

147. *Id.* at 260.

148. Nadelmann & Reese, *The Tenth Session of the Hague Conference on Private International Law*, 13 Am. J. Comp. L. 612 (1964).

149. Graveson, *supra* note 130, at 530. The article includes, as an appendix, the English text of the Final Act of the Conference.

150. *Id.* at 531. See also Report of the U.S. Delegation to the Tenth Session of the Hague Conference on Private International Law [hereinafter cited U.S. Delegation Rep.], 52 Dep't State Bull. 265, 271-72 (1965).

system of bilateral treaties, and its suggestions are reflected in Part B of the final draft[151] of the session in which it is stated that "bilateralism" is worthy of further study.[152]

Although no agreement was reached, largely because of lack of time,[153] the first six articles of a proposed convention also appear in the final draft.[154] These represent some signgificant developments.[155] For example, the convention rules as to jurisdiction are to apply irrespective of the nationality of the parties, a departure from some of the exorbitant rules on the Continent. Also, the last article which provides that "recognition and enforcement may not be refused for the sole reason that the court of the State of origin has applied a law other than that which would have been applicable according to the rules of private international law in the State addressed" is a reversal of the French law on this subject.[156] It may be recalled, however, that civil law countries do not consider remarkable a convention that mitigates or even derogates internal legislation and, indeed, enter into such conventions frequently.[157]

Also of special interest is a provision according to which signatories may reserve the right not to recognize judgments rendered in a proceeding in which the requirements of natural justice, or due process of law, were not satisfied. No such requirement had ever appeared in bilateral treaties.[158]

Although current reports on the work of the Tenth Session reflect British predominance as the representative of the common law, American participation has only begun, and the influence of the United States delegation is more likely to be felt during the next session. Indeed, the possibility that the question will be raised of incorporation of a federal-state clause allowing a federal system to

151. The work of the Hague Conference is traditionally presented in the form of a draft convention, referred to as a "Final Act." During the Tenth Session, the American delegates urged that the conference also present its work in the form of model laws, but the suggestion was not adopted. However, in accordance with a 1960 decision, the Final Act of the session directs the permanent bureau to present the substance of the conventions in the form of model laws. Nadelmann & Reese, *supra* note 148, at 614. Presumably the American suggestion was an attempt to accommodate the results of the conference to a form compatible to both the American and Continental systems. Uniform laws are the exception on the Continent. Nadelmann, *supra* note 140, at 249. By contrast, the International Law Association presented its work on recognition and enforcement in the form of a model act. International Law Association, *op. cit. supra* note 117, at xvii.

152. Graveson, *supra* note 130, at 575-76. See also U.S. Delegation Rep. at 271-72.

153. U.S. Delegation Rep. at 271.

154. Graveson, *supra* note 130, at 575. These articles deal with (1) scope of application (status, succession, bankruptcy, social insurance, taxes and penalties excluded); (2) definition of "decisions"; (3) application irrespective of nationality; (4) conditions for recognition and enforcement (jurisdiction of the first court, res judicata effect in first state, enforceable in first state, and a provision for bilateral treaties respecting jurisdiction); (5) denial of recognition and enforcement (violation of public policy, fraud, same or prior suit pending in second state, reservation of right to deny recognition for denial of natural justice or due process); (5 bis) provision for default judgments; (6) recognition and enforcement not to be denied because of application of different conflicts rule from that of second state. *Id.* at 575-77.

155. *Id.* at 532.

156. *Ibid.* See also *infra*, text at note 210.

157. Graupner, *supra* note 123, at 380-81.

158. U.S. Delegation Rep. at 272. The International Law Association Model Act, § 4(c) also includes a due process provision. See *supra* note 120.

ratify the convention with the reservation that it will not apply to any of its states until the federal government has given notice of extension thereto has already been mentioned.[159]

6. Long-Arm Statutes

Long-arm statutes, unlike other developments in this area, pertain only indirectly to the problems of enforceability. However, their influence is probably more immediately felt.[160] The effect on the recognition and enforcement of foreign judgments in New York has already been briefly noted.[161] In addition, it is very likely that judgments based on such legislation will reach foreign courts for enforcement.[162] Although long-arm statutes are properly a subject for study in themselves,[163] for purposes of this treatment nothing more ambitious than a very brief description of the bases of jurisdiction set out in the typical statutes will be attempted.

The internal validity of long-arm statutes is fairly well settled: "decisional and statutory law have given the courts a free hand to exercise jurisdiction over nonresident individuals and foreign corporations. This result has been reached by a construction of the due process clause which requires, for the assertion of jurisdiction in personam over such defendants, only that they have certain minimum contacts with the territory of the forum."[164] Generally, long-arm legislation confers upon the courts of the enacting state competence to decide cases involving defendants not located within the state where (1) the cause of action arises from the transaction of "any business" within the state; (2) where the cause of action arises from the commission of a tortious act within and, in New York, under certain circumstances without the state;[165] and (3) where the cause of action arises from the ownership or use of real property by the defendant within the state.[166]

---

159. U.S. Delegation Rep. at 272.
160. Nadelmann, *supra* note 140, at 257.
161. See *supra*, text at notes 74-79.
162. See Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 Buffalo L. Rev. 61, 64 (1965); Am. Bar Ass'n, Section of Int'l & Comp. L., *Report of Committee on European Law*, 1964 Proceedings 207-42.
163. See, *e.g.*, Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow*, 15 Buffalo L. Rev. 61 (1965); Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction*, 44 Iowa L. Rev. 249 (1959); *Symposium—Jurisdiction, Current Problems and Legislative Trends*, 44 Iowa L. Rev. 345 (1959); *Developments in the Law—State-Court Jurisdiction*, 73 Harv. L. Rev. 909 (1960).
164. Lenhoff, *International Law and Rules on International Jurisdiction*, 50 Cornell L.Q. 5, 9 (1964).
165. New York has recently amended its statute to provide for personal jurisdiction over any non-domiciliary who commits a tortious act without the state which causes injury to a person or property within the state, if the tortfeasor

> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

N.Y. CPLR § 302(a)(3).
166. N.Y. CPLR § 302 (excluding defamation from tortious acts); Ill. Rev. Stat. ch.

Underlying such enactments, and the decisions supporting them, is the consideration that residents should not have to seek redress in a distant jurisdiction for injuries suffered in the forum caused by non-resident defendants.[167] Counterbalancing the desire to protect residents is the due process requirement that the defendant's contact with the forum be consonant with notions of fair play and substantial justice.[168] The doctrine of *forum non conveniens* is likely to receive increased emphasis as these two interests are sought to be reconciled.[169]

Relevant to the present consideration, however, is whether judgments based on long-arm statutes will receive recognition and enforcement abroad. This question is more properly treated in the context of the various laws in the Common Market countries under consideration.

V. The Effect of Foreign Judgments in the Common Market Countries

In the Common Market countries, whether a foreign judgment (either of a member or of a nonmember nation) will be recognized and enforced depends upon whether it comes within the provisions of the relevant code or of a convention between the states involved. The conventions, which generally insure reciprocal recognition and enforcement, mitigate restrictive national laws, many of which were enacted in retaliation to the French refusal to grant conclusive effect to foreign judgments.[170] The French practice—the *revision au fond*[171] was finally ended in 1964.[172] The demise of the *revision au fond* in France may signal a reexamination of the national laws on recognition and enforcement throughout Europe.[173] However, it may be that the tendency toward convention-making, especially as exemplified by the draft multilateral convention on jurisdiction, recognition and enforcement proposed in accordance with Article 220 of the Treaty of Rome, may more accurately foreshadow the shape of the law

---

110, § 17 (1963) (including contracting to insure persons, property and risks within the state).

167. Weinstein, *Trends in Civil Practice,* 62 Colum L. Rev. 1431, 1435 (1962).

168. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

169. See Ginsburg, *The Competent Court in Private International Law: Some Observations on Current Views in the United States,* 20 Rutgers L. Rev. 89, 98-100 (1965).

170. See Graupner, *supra* note 123, at 379-81; Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It,* 42 Iowa L. Rev. 236, 256 (1957). See also Weser, *Litigation on the Common Market Level,* 13 Am. J. Comp. L. 44 (1964) for an analysis of problems of bringing a lawsuit in one member state for which enforcement will be sought in another member state under both the codes and the existing treaties and also under the proposed multilateral treaty (draft as of June 8, 1964).

171. See authorities cited *supra* note 26.

172. Munzer v. Jacoby-Munzer, Cour de Cassation, (Ch. Civ., 1re sect.), Jan. 7, 1964, [1964] Bulletin des arrêts de la Cour de Cassation I. No. 15, at 11; [1964] Dalloz Jurisprudence, [1964] Juris-Classeur Périodique II. 13590, with a comment by Judge Ancel (the judge to whom the case was assigned for report), analyzed in Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go,* 13 Am. J. Comp. L. 72 (1964).

173. Nadelmann, *supra* note 172, at 78-79. The laws of some countries have been undergoing examination for some time. In the Netherlands, work has been going on on revision of the codes, Nadelmann, *supra* note 170, at 244, but no change seems imminent with respect to foreign judgments, Nadelmann, *supra* note 172, at 79. In Germany a study is under way with respect to the reciprocity requirement. Steefel, *supra* note 121, at 240.

to come on the Continent.[174] In either event, as to outsider nations having no treaty with Common Market countries, the codes will continue to be applicable.

A. *Internal Rules on Recognition and Enforcement*

1. *Indirect Jurisdiction* (Compétence Générale Indirecte)

In the Common Market countries, as in the United States and England, recognition of foreign judgments is conditioned upon the proper competence of the court of rendition. Among the members of the European Economic Community the position as to indirect jurisdiction varies. The Netherlands Code of Civil Procedure forbids the enforcement of foreign judgments, so that the plaintiff must start a new suit in which the court is not bound by the findings of the first;[175] thus the question of jurisdiction does not arise.[176] Belgian law, like that of the Netherlands, requires a treaty to exist before according conclusive effect to foreign judgments, but only stipulates that the competence of the foreign court must not have been founded solely upon the nationality of the plaintiff, imposing no other requirements as to jurisdiction except that the rights of the defense must have been safeguarded.[177] The remaining countries, Germany, Italy, France and Luxembourg,[178] apply the standards of indirect jurisdiction.[179] Views on these standards have gradually approached uniformity[180] and generally agreed upon bases may be listed as including the residence of the defendant, the court agreed upon by the contesting parties, the presence of a res within the court's territorial ambit when the claim relates to that res, and competence with respect to the defendant's counterclaim.[181] On the other hand, certain bases

174. For discussions of various aspects of the drafts as they became known, see Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe*, 12 Int'l & Comp. L.Q. 367 (1963); Nadelmann, *Common Market Assimilation of Laws and the Outer World*, 58 Am. J. Int'l L. 724 (1964); Weser, *Conflicts of Jurisdiction in the Common Market*, 1963 J. Bus. L. 298; Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 Am. J. Comp. L. 323 (1961); Weser, *supra* note 170.

175. Nadelmann, *supra* note 170, at 244.

176. Graupner, *supra* note 174, at 373. The Netherlands has, however, entered conventions under which foreign judgments are recognized and enforced. *Id.* at 379. For a discussion of foreign judgments in the Netherlands, see Kollewijn, American-Dutch Private International Law 34-38 (2d ed. 1961); see also Smit, *International Res Judicata in the Netherlands: A Comparative Analysis, infra* page 165.

177. *Id.* at 374. See Bachrach, *Enforcement of Judgments Obtained Under Statutes Typified as "Long Arm" and "Single Act" Statutes—in Belgium*, Am. Bar Ass'n, Section of Int'l & Comp. L., 1964 Proceedings 208.

178. Recognition and enforcement in Luxembourg have not received much attention from the commentators. Whether the first court will be deemed to have had jurisdiction is apparently conditioned upon the residence of the defendant in the first state or his submission to the competence of its court. See Graupner, *supra* note 174, at 379. The *revision au fond* has been abandoned by Luxembourg courts Nadelmann, *supra* note 172, at 78.

179. Graupner, *supra* note 174, at 374. Germany and Italy apply the "legislative fiction of the identical norm" (indirect jurisdiction). In France and Luxembourg the principle is of secondary importance because of the practical limitations on recognition due to Articles 14 and 15 of their respective codes. *Id.* at 378-79.

180. Nadelmann, *supra* note 170, at 261.

181. These are bases of judicial jurisdiction so frequently found in laws and conventions that they might be regarded as internationally unobjectionable, desirable or relevant. Graupner, *supra* note 174, at 374-75. See also *supra*, text at note 60.

are generally regarded as insufficient and will not meet the tests of indirect jurisdiction: the exorbitant bases of all the Common Market countries,[182] competence conferred on a court to adjudicate the claim of a main defendant against a third party,[183] and the transient rule of the Anglo-American systems.[184]

2. *Specific Internal Rules with Special Emphasis on Judgments Based on Long-Arm Statutes in the United States*

The practical importance of the personal service (transient) rule as an undesirable basis may be reduced by the acceptance of "doing acts" and "transacting any business" within the fora of common law jurisdictions as jurisdictional acts.[185] The question is whether these new bases will be acceptable under the indirect jurisdiction rules of the Common Market countries. A consideration of this question provides a context in which to examine in more detail the laws of the individual countries.[186]

Belgium,[187] as has been noted, requires a treaty based upon reciprocity to avoid a review of the merits. If there is such a treaty, the judgment sought to be enforced will be examined only with respect to whether: (1) it conflicts with the Belgian *ordre public* (public policy); (2) it is res judicata in the rendering state; (3) it is properly authenticated under the law of the rendering state; (4) the rights of the defense have been safeguarded; (5) the foreign court had jurisdiction solely by reason of the nationality of the plaintiff (in which case *exequatur* will not issue). Since the United States has no treaty with Belgium, an American judgment will be examined under the five listed requirements and will also be subject to a review of the merits, as to which the Belgian courts have the widest discretion, thus retaining the practice of *revision au fond*.[188]

As to whether a judgment based upon a long-arm statute will pass the

182. Article 14 of the French Code Civil and the Luxembourg Code Civil is described in *supra* note 53. The Belgian and Italian retaliatory measures are aimed at protecting their nationals against countries in which they are subject to exorbitant rules. The Netherlands' equivalent of Article 14 is not without practical significance but still in force is the provision that a defendant without domicile or residence in the Netherlands may be sued in the court of the plaintiff's domicile whether or not the defendant's country has or enforces exorbitant bases. The German forum of the presence of assets is also described in *supra* note 53. Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 Am. J. Comp. L. 323, 324-28 (1961).

All of the exorbitant bases are proscribed under the preliminary draft of the Common Market multilateral treaty on recognition and enforcement. 2 CCH Common Market Rep. ¶¶ 6003, 6007. Even without such a provision, however, Article 7 of the Treaty of Rome would operate to proscribe such bases insofar as they result in discrimination based on nationality. Nadelmann, *supra* note 174, at 726; Weser, *supra* at 328.

183. Graupner, *supra* note 174, at 375.

184. Nadelmann, *supra* note 170, at 261.

185. See Ginsburg, *supra* note 169, at 95; Nadelmann, *supra* note 170, at 261.

186. This was the topic of the Am. Bar Ass'n, Section of Int'l and Comp. L., Committee on European Law, in 1964, before the amendment of § 302 of the N.Y. CPLR. See *supra* note 165. The findings of the A.B.A. committee are digested below.

187. The following discussion, unless otherwise noted, is digested from Bachrach, *supra* note 177.

188. Nadelmann, *supra* note 172, at 78.

preliminary examination on the points listed, it would appear that only point (4) might be troublesome, at least where a default judgment is in issue. Belgian courts have held with respect to default judgments that where there are compelling indications that the defendant has not been enabled to present its defense, or has not actually received notice, the judgment is not enforceable.[189]

In Italy,[190] an *exequatur* will issue upon the institution of proceedings in the court of appeals having jurisdiction where enforcement is contemplated, provided that the following conditions are met: (1) the first state was qualified to decide the case according to the principles of jurisdiction prevailing in the Italian system; (2) service was made according to the law of the rendering state and adequate time allowed for appearance by the defendant; (3) the parties appeared in accordance with the law of the first state, or a default judgment was validly issued according to the law of the first state; (4) the judgment was res judicata in the first state; (5) the judgment is not contrary to another decision by an Italian court; (6) no action is pending before an Italian court involving the same parties and subject matter; (7) the judgment does not violate Italian public policy.[191] Since the Italian rules of competence include as bases domicile, consent, maintenance of a place of business within the forum, property situated in the forum to which the cause of action relates, and obligations which have arisen or which must be performed in Italy,[192] there appears to be no serious incompatibility of the long-arm statutes with Italian laws of competence.[193] Thus, an *exequatur* should issue provided the other requirements are met.

Italy appears to be particularly liberal in the matter of enforceability, having granted conclusive effect to all qualifying foreign judgments.[194] Review of the merits is allowed only at the request of a default defendant or if Italian law

---

189. The slight possibility that a Belgian court might consider long-arm jurisdiction as based upon the plaintiff's nationality, in which event the judgment would not be enforced, is mentioned in Bachrach, *supra* note 177, at 210.

190. See generally Gori-Montanelli & Botwinik, *Enforcement in Italy of Judgments Obtained Under "Long-Arm" and "Single Act" Statutes*, Am. Bar Ass'n, Section of Int'l & Comp. L., 1964 Proceedings 227. For a more extensive treatment of the recognition of judgments generally, see Cappelletti & Perillo, Civil Procedure in Italy 367-95 (1965).

191. These requirements are listed in Article 797 of the Code of Civil Procedure, and whether they are met may be determined by the Italian court on its own motion. Cappalletti & Perillo, *supra* note 190, at 371.

192. *Forum contractus* obtains in both civil and commercial cases. Weser, *supra* note 182 at 331. "Obligations," however, refers also to obligations of a financial nature arising from tort and quasi-contract. Generally, an obligation is deemed to arise in Italy if the act that gave rise to it occurred in Italy. Cappalletti & Perillo, *supra* note 190 at 88. "A tort is deemed to have taken place in Italy, if any element, including the element of loss of profit, occurred in Italy." *Ibid.* This would appear to be not incompatible with § 302(a)(3) of the N.Y. CPLR. See *supra* note 165.

193. The prevailing view in Italy is said to be that if an Italian court, under circumstances similar to those confronting the foreign court, could have exercised jurisdiction, the requirements of indirect jurisdiction are satisfied. Cappalletti & Perillo, *supra* note 190, at 373.

194. Even where Italy has entered treaties, if its legislation is more liberal than the treaty provisions, the legislation prevails. Cappelletti & Perillo, *supra* note 190, at 370, 391.

would permit a judgment to be reopened,[195] the burden being upon the judgment defendant to raise both issues.[196]

Germany,[197] by contrast, requires by statute substantial reciprocity of treatment as a condition for recognition of all foreign judgments. United States judgments, to date, have not met that requirement even though, in fact, German judgments are recognized and enforced in the United States. Indeed, even California, which has long had a statute providing for the granting of conclusive effect to foreign judgments, has found its judgments unenforceable in Germany because the degree of reciprocity was not deemed high enough.[198] It is not surprising, then, that New York, which does not have such a statute, has found its judgments faring poorly in Germany. However, it has been said that if the question arose today, "all indications are that Germany would now regard reciprocity with New York as guaranteed, as a matter of German law, which, in turn, would open the door to the recognition of New York judgments in Germany,"[199] provided the usual minimum requirements are met.

The minimum requirements in Germany, as elsewhere, have to do with the necessary jurisdiction of the foreign court,[200] proper service of process, and non-violation of German public policy. As to jurisdiction,[201] the German code predicates, *inter alia,* the place of performance of an obligation,[202] or the place of commission of any act in the chain of causation of a tort.[203] As to jurisdiction, the conclusion is, therefore, that judgments based on long-arm statutes would be enforced by German courts if reciprocal treatment were deemed assured.

Since Germany and France have concluded no convention pertaining to the reciprocal enforcement of judgments, Germany has not enforced French judgments because of the French practice of *revision au fond.* Among the many

195. See Cappelletti & Perillo, *supra* note 190, at 382-83. Italian treaties on reciprocal enforcement contain neither of these provisions. Nadelmann, *supra* note 170, at 245.

196. Gori-Montanelli & Botwinik, *supra* note 190, at 230.

197. The following discussion unless otherwise noted, is digested from Steefel, *Enforcement of Judgments Obtained Under Statutes Typified by the "Long Arm" and "Single Act" Statutes—Germany,* Am. Bar Ass'n, Section of Int'l & Comp. L., 1964 Proceedings 239. For a summary of and a commentary on the provisions of the *Zivilprozessordnung* [hereinafter cited ZPO] with respect to foreign judgments, see II Foreign Office (Gr. Brit.), Manual of German Law 12-14 (1952).

198. Nadelmann, *Non-Recognition of American Money-Judgments Abroad and What to Do About It,* 42 Iowa L. Rev. 236, 254-55 (1957).

199. Steefel, *supra* note 197, at 240.

200. If, under German law, German courts have exclusive jurisdiction over the matter, the foreign judgment is not enforceable in Germany. II Foreign Office (Gr. Brit.), *supra* note 197, at 12.

201. The principal basis is, of course, domicile. Germany permits suit at the defendant's residence only in the absence of any domicile, either in Germany or abroad. Weser, *supra* note 182, at 329. Of course, a defendant may also be sued where he has assets if he is neither domiciled or resident in Germany. *Id.* at 327.

202. This basis obtains in both civil and commercial cases. *Id.* at 331.

203. Germany, like France, expressly provides for jurisdiction with respect to torts. *Id.* at 332. The relevant provision is ZPO § 32, which has been liberally construed by the German courts. Steefel, *supra* note 197, at 239. Like the Italian courts, German courts will enforce a foreign judgment if a German court would have taken jurisdiction under similar circumstances, regardless of the basis on which the foreign judgment is founded. *Ibid.* See *supra* note 201.

reasons urged for ridding French law of the practice, the fact that it made French judgments unenforceable in Germany was presumably of no little consequence.[204] Developments in France had pointed for some time in this direction, money judgments being the last area in which the practice was applied; it had disappeared with respect to status judgments early in this century..[205] The Cour de Cassation decision of *Munzer v. Jacoby-Munzer*[206] abolished it in non-status matters as well.

The *revision au fond* first appeared in the seventeenth century code, but it was not incorporated into the Napoleonic Codes which superseded earlier laws. However, French courts had continued to apply the law as a part of the *jurisprudence* (case law) of France.[207] An attempt eleven years ago to codify both reciprocity and the *revision au fond* was rejected.[208] The courts proceeded to overturn the rule—an illustration both of the underlying practical tenacity of stare decisis in France and the ability of civil law courts to change the law.[209]

With *revision au fond* out of the way, the question arises whether reciprocity-requiring states will now recognize French judgments. One difficulty still standing is the apparent retention in the *Jacoby-Munzer* opinion of the French rule that, in order for an exequatur to issue, the court of rendition must have applied the governing law according to the French conflicts law. This, it is pointed out, results in a limited *revision au fond* which may yet haunt French judgments abroad; moreover, this peculiarity of French law has been criticized in France as having no place in non-status matters, as demonstrated by the conventions under which it has been limited to status judgments.[210]

Within the above limitations, France[211] will now grant conclusive effect to

204. *Revision au fond* was the reason for the refusal to grant conclusive effect—on reciprocity principles—to a French judgment in Hilton v. Guyot, 159 U.S. 113 (1895). Professor Nadelmann has noted that the German code had accomplished what American case law could not. Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More to Go*, 13 Am. J. Comp. L. 72, 78 (1964).

205. Nadelmann, *supra* note 204, at 73. A lower court decision had forecast the end to the practice in non-status matters in 1955. Charr v. Hazim Ulusahim, Cour d'Appel de Paris (1re Ch.), Oct. 21, 1955, [1956] Juris-Classeur Juridique II. 9047; noted in Nadelmann, *Recognition of Foreign Judgments in France*, 5 Am. J. Comp. L. 248 (1956). See Nadelmann, *supra* note 204, at 74.

206. Cited *supra* note 172.

207. See Nadelmann, *supra* note 198, at 238, 242-44. For a discussion of the history of the *revision au fond* to 1965, see Nadelmann, *Recognition of Foreign Money-Judgments in France*, 5 J. Comp. L. 248 (1956).

208. For a discussion of the proposed codification of the French private international law, see Delaume, *A Codification of French Private International Law*, 29 Can. Bar Rev. 721 (1951); Loussouran, *French Draft on Private International Law and the French Conference on Codification of Private International Law*, 30 Tul. L. Rev. 523 (1956); Nadelmann & Von Mehren, *Some Remarks on the Proposed Codification: The Draft of the Commission for the Reform of the Civil Code*, 1 Am. J. Comp. L. 407 (1952) (including an English translation of the Draft Law on Private International Law).

209. Nadelmann, *supra* note 204, at 74, 76.

210. *Id.* at 77. See also the final draft of the Hague Conference on Private International Law, which contains a provision contrary to the French practice; see text accompanying *supra* notes 145-56.

211. The following discussion, unless otherwise noted, is digested from Freed, *The En-*

judgments. However, foreign judgments, including those based upon long-arm statutes, must pass a scrutiny of the type generally imposed: the foreign court must meet the French tests of jurisdiction,[212] the procedure must have been regular according to the law of the rendering state, the judgment must be in conformity with French public policy, and there must have been no evasion of the law.

The competence of a foreign court is determined by French law. Articles 14 and 15 of the Code Civil confer exclusive competence upon the French courts whenever the plaintiff or the defendant is a national of France. Waiver of these privileges is, however, commonplace and is recognized by French law. Moreover, there are exceptions to the scope of Articles 14 and 15, *e.g.*, where the subject matter of a lawsuit involves real property situated outside of France.[213] Other areas of exclusive French competence include actions in which French public or police law is at issue; or personal property located in France is sought to be recovered; certain suits regarding business associations and insurance matters; suits involving a promise made, goods to be delivered, or payment to be made in France. French courts are also exclusively competent where the parties to a suit have elected France as the domicile of one or both, and where the defendant was domiciled in France at the time the action was instituted.[214]

If a judgment is without the area of exclusive French competence, before an *exequatur* can issue the French court will determine whether the requirements of indirect jurisdiction have been met.

The basic French rule is that suit is to be brought at the defendant's domicile, or if none, at his place of residence.[215] He may also be sued at the place where a tort was committed[216] or, if the suit is in contract, where the promise was made, or the goods were to be delivered, or payment to be made.[217] Where there are several defendants, all may be sued at the residence or domicile in

---

forceability in France of American Judgments Obtained Under American "Long Arm" or "Single Act" Statutes, Am. Bar Ass'n, Section of Int'l & Comp. L., 1964 Proceedings 212.

212. See Lorenzen, *The French Rules of the Conflict of Laws*, 36 Yale L.J. 731, 738-56 (1926). For a comparative study, see Castel, *Jurisdiction and Money Judgments Rendered Abroad: Anglo-American and French Practice Compared*, 4 McGill L.J. 152 (1958).

213. If the real property is located within France, however, French courts are exclusively competent. Freed, *supra* note 211, at 215.

214. On areas of exclusive French competence, see also Castel, *supra* note 212, at 180-85.

215. Suit may be brought at the defendant's residence only in the absence of any domicile, either in France or elsewhere. Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 Am. J. Comp. L. 323, 329 (1961). This rule is peculiar to France and Germany, the other Common Market countries permitting suit to be brought at the defendant's residence within the country, even if he is domiciled elsewhere.

216. *Id.* at 332. See also Lorenzen, *supra* note 212, at 740-41, 744-45. On the place of commission of a tort, see 6 Niboyet, Traité de droit international privé français § 1829 (1949) and 5 *id.* §§ 1427, 1428 (1948). In conflict of laws, French doctrine apparently favors the place of injury. See Loussouran, *supra* note 208, at 537. Article 59 of the French Code de Procédure Civil provides that actions in tort may be brought where "*le fait dommageable s'est produit.*"

217. This basis obtains only in commercial matters. *Id.* at 331. To mitigate the undesirable results of this restriction, France permits in certain cases that suit be brought at the place where the agreement has been contracted or performed if either of the parties is domiciled there. *Id.* at 332.

France of one of them. As to corporations, a domestic corporation must be sued at the *siege sociale* (its seat), while a foreign corporation with a branch or office in France may be sued where it is located as to causes of action arising from its activities in France. A foreign corporation may be sued in France for a tort occurring there whether or not it is located or does any business in France. There would thus seem to be little serious incompatibility between the provisions of the typical long-arm statutes and the French rules of competence. One unclear area is that of the "transacting any business" provisions of the American statutes, since the French law would appear, with the exception of torts, to require the maintenance of a branch or other establishment in the forum. But the making of a contract in France will subject any foreign corporation to French competence, as will the issuance of securities in France.

It would seem, then, that Italy, France and Germany (provided reciprocal treatment were assured in the United States) would probably not fail to recognize and enforce long-arm judgments for failure to meet their jurisdictional requirements.[218] Belgium and the Netherlands, on the other hand, would require a treaty in order to grant conclusive effect to any judgment.

3. *Treaties Among the Common Market Countries*

The trend toward uniformity with respect to views on indirect jurisdiction is due to a significant extent to the treaties concluded by European states among themselves which have been considered necessary to overcome the great difficulties involved in the recognition and enforcement of judgments.[219] Certainly the attitudes on reciprocity, especially of Germany and Belgium, have posed problems as has France's former practice of *revision au fond* which had generated those attitudes. It is perhaps noteworthy that France, Belgium and Germany are the three Common Market countries with whom Great Britain has concluded treaties under the 1933 Act.

The network of bilateral conventions among the members of the European Economic Community on recognition and enforcement does not include all members. Germany and France have no treaty, nor have Germany and the Netherlands, and Luxembourg is not a party to any convention.[220]

All of the conventions that have been concluded contain stipulations of the distinct competence of the first court.[221] In addition, other prerequisites for recognition have been specified. Fraud is sometimes set forth as a bar, as well as the condition that the second state's public policy must not be offended; sometimes it is provided that recognition must not be contrary to a judgment

218. Factors comprising the other requirements—such as public policy and fraud—are too variable to permit of meaningful treatment within the scope of this paper.

219. Nadelmann, *supra* note 198, at 261 (on the effect of treaties); Graupner, *supra* note 174, at 379 (on the necessity of treaties).

220. *Ibid.* For an analysis of some problems of litigation under some of the conventions on recognition and enforcement currently in force, see Weser, *Litigation on the Common Market Level*, 13 Am. J. Comp. L. 44 (1964).

221. Graupner, *supra* note 174, at 379.

between the same parties rendered by a court of the second state, or even deal with the effect of an action pending in the second state.[222]

Although the results achieved by treaty have not been uniform, they include no provisions not already found in the common law.[223] Of course, when no treaty is operative, restrictive legislation often continues to hinder recognition. This legislation and the lack of uniformity have led to the undesirable situation in the Common Market against which Article 220 of the Treaty of Rome is directed. The member states have been engaged in negotiations with a view to simplification of the formalities governing the recognition and execution of judicial decisions.

B. *The Draft Multilateral Convention*

Since 1959, a committee of experts from the six member states have been working on a draft multilateral convention on jurisdiction, recognition and enforcement.[224] Insofar as the draft concerns jurisdiction, it goes beyond the strict direction of Article 220, but enough has been said to indicate that some agreement on the principles concerning the distribution of jurisdiction is vital to recognition and enforcement.[225]

The preliminary draft, a translation of which has recently been published, was adopted in Brussels by the experts in December 1964 and was submitted to the governments of the member states and to interested parties in the community business world whose comments and opinions are expected to aid in the preparation of a final draft.[226] The provisions of the preliminary draft had to a large extent been included in prior drafts which had, over the years, become known and commented upon in England and this country. Many of the comments are relevant to the preliminary draft finally submitted.[227]

The preliminary draft, of course, refers to the member states vis-à-vis one another. It does not purport to affect the national laws of members with respect to outsiders so that the treaty itself will not affect the treatment accorded United States judgments under those laws. However, within the community, the preliminary draft proposes important changes in internal laws concerning jurisdiction with respect to persons domiciled in the other contracting states, thus propounding uniform rules of international jurisdiction. The result would be a harmonization of these rules with respect to original suits in matters covered by the treaty.[228] In addition, the draft would simplify recognition and enforcement

222. *Id.* at 380.
223. Nadelmann, *supra* note 198, at 256.
224. It is perhaps significant that although Article 220 of the Treaty of Rome does not specifically provide for a multilateral treaty, the member states have prepared one. By contrast, in the discussions of a draft convention during the Tenth Session of the Hague Conference (including both common law and civil law countries) the typical multilateral convention found no supporters. U.S. Delegation Rep. at 271.
225. Lenhoff, *International Law and Rules on International Jurisdiction*, 50 Cornell L.Q. 5, 22-23 (1964).
226. 2 CCH Common Market Rep. ¶ 6001.
227. See authorities cited in *supra* note 174.
228. Weser, *Conflicts of Jurisdiction in the Common Market*, 1963 J. Bus. L. 298, 299.

of judgments within its scope by setting forth uniform and concise rules both of substance and procedure.

There are six titles, a protocol and a common declaration. The first title deals with scope of application; the second concerns jurisdiction; the third relates to recognition and enforcement; the fourth deals with the enforcement of public documents; the fifth and sixth contain general and transitional provisions.[229]

The draft's scope includes all civil and commercial matters except those of the status and capacity of persons, legal representation, marital property systems, gifts, succession, bankruptcy and social security.

As to jurisdiction, domicile of the defendant, irrespective of nationality, is the basic rule. With respect to persons domiciled in a member state the rules applicable to nationals apply, but in no event may a domiciliary of a member state be subject to any of the exorbitant rules. As against persons not domiciled in a member state, jurisdiction is governed by national laws. Moreover, it is expressly provided—and this provision goes beyond the national rules on the subject—that as against defendants not domiciled in the Common Market, "persons domiciled in a Contracting State, regardless of their nationality, may—like nationals of that State—invoke the rules of jurisdiction applicable in that State, and particularly [the exorbitant rules of jurisdiction]."[230] Thus, an American national domiciled in France would be in the same procedural position as a French national and exorbitant jurisdictional rules could not be enforced against him.[231] However, the same American national could invoke Article 14, for example, against a domiciliary of New York and obtain a French judgment against him.[232] Presumably such a judgment would be enforceable in the other member state under the draft treaty, although probably not elsewhere.[233] The sanction thus given the exorbitant bases has evoked some pungent comment: "The reader may find this scheme fantastic, but who is the non-resident brother's keeper in this type of situation?"[234]

The other jurisdictional provisions are somewhat less startling. In addition to his domicile, a defendant domiciliary of a member state may also be sued in other member states when, *inter alia*, in cases of contract, the obligation was to be fulfilled there; in cases of tort, the injury occurred there;[235] or, in case

229. The Protocol contains some special provisions, while the Common Declaration expresses the readiness of the members to meet and explore methods of solving problems that may arise in the application of the convention. 2 CCH Common Market Rep. ¶¶ 6071-76.

230. Art. 4, 2 CCH Common Market Rep. ¶ 6008.

231. See Graupner, *Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe*, 12 Int'l & Comp. L.Q. 367, 382 (1963); Nadelmann, *Common Market Assimilation of Laws and the Outer World*, 58 Am. J. Int'l L. 724, 726 (1964).

232. Nadelmann, *supra* note 231, at 726.

233. *Id.* at 726-27 (noting also the possibility of recognition and enforcement of such a judgment outside of the Common Market under a treaty or by reason of differences in the rules of recognition).

234. *Id.* at 726.

235. The provisions respecting contract and tort make some changes in the national laws concerning contracts, and makes explicit, in the case of torts, the laws of Belgium,

of a dispute arising out of the operation of a branch or other establishment, the establishment is located there. Such a defendant may also be sued at the domicile of a co-defendant.[236]

Special provision is made for jurisdiction under multilateral treaties and treaties with third states. Insurance and installment contract claims are the subject of detailed provisions.[237] Other subject matters are relegated to designated courts having exclusive jurisdiction therefor. These include rights in rem and leases of real property; employment contracts; matters concerning the validity or dissolution of a company or legal person having its seat in a member state; matters concerning administrative decisions of a member state; public registers; patents; and in matters involving the enforcement of judgments the courts of the place of enforcement have exclusive jurisdiction. Aside from such cases, the right to contract that a certain court shall decide disputes between the parties is preserved, and the court agreed upon has exclusive jurisdiction. In addition, a court also has jurisdiction if the defendant appears before it other than to contest jurisdiction.

A court shall *ex officio* declare that it lacks jurisdiction if another court is exclusively competent, or if the defendant—domiciled in another member state—does not appear, unless jurisdiction is established according to the rules in the preliminary draft. Proceedings must be stayed to assure that a non-appearing defendant has had proper notice in sufficient time to defend himself.

As to recognition, the draft states that decisions rendered in one contracting state shall be recognized in the others without requiring a special proceeding. But recognition shall be denied if (1) the public policy of the forum is violated; (2) the defendant did not appear and was not properly served in time to defend; (3) the decision for which recognition is sought is incompatible with a decision concerning the same parties rendered in the forum; (4) a foreign decision on preliminary questions involving matters without the scope of the convention contravenes a provision of the international private law of the forum. Jurisdiction, which does not fall within public policy, is not to be examined unless the judgment involves insurance, installment contracts or a question of exclusive jurisdiction. The legality of a judgment may never be reviewed.

Enforcement may be denied only if recognition may be denied under the draft. Decisions enforceable in the first state are enforceable in other member states after a writ of execution has been issued upon the request of the interested

---

Luxembourg, the Netherlands and Italy. See *supra* notes 192, 203, and 217. It is perhaps noteworthy that the draft specifies the place of injury, rather than the place of commission of a tort or tortious act.

236. For an analysis of the problems of bringing suit against defendants domiciled in different Common Market countries, both at present and under Art. 6, para. 1 of the Preliminary Draft (a defendant domiciled in a contracting state may be sued "where there are several defendants, before the court of the domicile of one of them"), see Weser, *supra* note 220.

237. Insurance contracts and installment sales are currently the subject of "special jurisdictions" under the national laws of most of the member states. Weser, *supra* note 215, at 338.

party. Under the draft, the process for issuance of the writ for appeal is made uniform. Briefly, the person requesting enforcement applies to the appropriate court for a writ of execution. The petitioner must conform to the law of the enforcing state as to form and other requirements for the request even if he must establish domicile there or designate a representative. The requested court must rule without delay, the judgment debtor having no opportunity to plead at this stage. If the writ is granted, the defendant has a specific time in which to appeal to the court designated. Pending such appeal the plaintiff is limited as to the measures he can take against the defendant's property. If the defendant has taken an appeal in the state of rendition, proceedings in the second may be stayed. If enforcement is denied, the judgment plaintiff may appeal, at which time the defendant is heard. The rules respecting non-appearance of defendants are here applicable to all defendants, whether or not domiciled in in a member state.

The draft also sets forth uniform requirements concerning the documents to be submitted for recognition or enforcement, but if they are not submitted, the court has wide discretion with respect to the action it may take. But in no case may authentication or a similar formality be required.[238]

VI. Conclusion

Events in recent years evidence an accelerated effort to improve the recognition and enforcement of foreign judgments, both in the United States and abroad. France has changed its law and other countries are examining theirs. Proposals in the United States have led toward the codification of the law of recognition and more direct methods of enforcement; as yet, however, these are exceptional measures in view of the few states that have adopted the uniform laws. Another salutory development in this country is the more international outlook on the part of the government, demonstrated by its participation in multilateral conferences dealing with international cooperation in judicial matters.

Concurrently, views on jurisdictional bases have generally become more uniform—a most important development because jurisdiction is basic to recognition. Marring this, however, is the provision of the Common Market draft convention which not only retains exorbitant bases as against non-residents, but extends their availability to all domiciliaries of the member states. This is in contrast to the Anglo-American transient rule which, while it has been retained, has, as a practical matter, been de-emphasized.

Whether formal agreements—as distinct from and in addition to the internal evolution of national laws—should or can be obtained in this area poses yet further questions, not the least of which is the difficult question of form. Proposals have run the gamut from a model act to the draft multilateral treaty

238. Compare the current practice in France pertaining to *exequatur*, described in note 29, *supra*.

of the Common Market. The Common Market is, however, something of a special case and, as its draft now stands, it extends no direct benefits to non-member states' judgments. It will, however, eliminate the patchwork pattern of recognition and enforcement and unify the national laws respecting international jurisdiction among the members. Once having agreed among themselves, these countries may be more likely to reach agreement on these matters with non-members. And it is noteworthy that (with the glaring exception of the "exorbitant" provision) the rules of jurisdiction the draft propounds are not dissimilar to those generally agreed upon elsewhere.

Civil law countries both within and without the Common Market have tended toward a system of bilateral treaties to assure for their judgments conclusive effect elsewhere. This system has not been wholly satisfactory, however, and the delegates to the Hague Conference—including Great Britain which has also concluded several bilateral treaties—are exploring the possibility of a multilateral treaty on general principles upon which bilateral treaties would be based, thus retaining for the signatories some measure of national autonomy as to whose judgments would be recognized. As to any treaty, insofar as the United States is concerned, some problems relating to the federal system must be faced.