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The Public Policy Exception to the Recognition of Foreign Judgments

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NOTES

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ABSTRACT

This Note examines the public policy exception to the recognition and enforcement of foreign judgments. The author first examines other grounds that a United States court can use to refuse to recognize a foreign judgment. An analysis of several cases construing the public policy exception follows. The author concludes with a suggested analysis for courts faced with the public policy exception.

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I. INTRODUCTION

While United States courts generally recognize and enforce judgments issued by the courts of foreign states, there are several grounds on which a United States court can refuse to recognize and enforce such judgments. The public policy exception to the recognition and enforcement of foreign judgments is perhaps the least well-defined of these exceptions. In almost any case in which a party seeks recognition and enforcement of a foreign judgment,[1] the public policy exception may be raised in opposition; yet United States courts rarely find that the exception warrants non-recognition of the judgment. This Note examines the requirements for recognition and enforcement of foreign judgments in Part II and discusses the particular workings of the public policy exception in Part III. The Note concludes with a proposed analysis for determining the applicability of the public policy exception.

II. UNITED STATES RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

A. *Recognition versus Enforcement*

Courts and litigants often use the terms "recognition" and "enforcement" interchangeably, but there is an important distinction between the two. Recognition of a foreign judgment occurs when a United States court finds that a matter has been adequately decided by a foreign court and does not need to be further litigated in a United States court.[2] Enforcement occurs when a United States court grants the relief ordered by the foreign judgment.[3] Although recognition is a prerequisite to enforcement,[4] it does not guarantee enforcement.[5] In many cases, a party only

1. "Foreign judgment" refers to a "foreign state judgment" as employed in this Note and does not refer to a judgement issued by a state court of one of the United States.

2. von Mehren & Patterson, *Recognition and Enforcement of Foreign Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37, 38 (1974); *see* Note, *Recognition of Foreign Country Judgments—A Case for Federalization*, 22 TEX. INT'L L.J. 331, 332 (1987).

3. Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW, 425, 428 (1982); von Mehren & Patterson, *supra* note 2, at 38.

4. *See, e.g.*, Mandel-Mantello v. Treves, 103 Misc. 2d 700, 702, 426 N.Y.S.2d 929,

seeks recognition of the foreign judgment. For example, a defendant in a lawsuit may seek recognition of a foreign judgment against a plaintiff prior to seeking a dismissal of the plaintiff's claim on res judicata grounds.[6] Likewise, a plaintiff may seek recognition of a foreign judgment so that he may use the judgment as "offensive" collateral estoppel against a defendant.[7] In most cases, once a United States court recognizes a foreign judgment, the judgment is entitled to the same enforcement as a judgment rendered by a United States court.[8]

B. *The Rationale Behind Recognition*

The leading United States precedent on recognition and enforcement of foreign judgments is the 1895 case of *Hilton v. Guyot*.[9] In *Hilton*, the United States Supreme Court held that while no state is required to give effect to the judgments of foreign states, United States courts shall recognize foreign judgments under the principle of comity.[10] Although most subsequent recognition and enforcement cases rely on the comity rationale of *Hilton*,[11] some rely on res judicata as a policy reason for recogni-

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931 (N.Y. Sup. Ct. 1980) ("[O]nly after [recognition can] the question of enforceability . . . be addressed."); von Mehren & Patterson, *supra* note 2, at 38 ("No foreign judgment can be enforced until it has been recognized . . . .").

5. Curacao v. Solitron Devices, Inc., 489 F.2d 1313, 1321 n.8 (2d Cir. 1973) (noting that while the court felt compelled to recognize the foreign judgment, it felt no such compulsion to enforce the judgment), *cert. denied*, 416 U.S. 986 (1974); Victrix Steamship S.S. Co. v. Salen Dry Cargo, 65 Bankr. 466, 470 (S.D.N.Y. 1986) (holding that recognition of a foreign state judgment does not require enforcement), *aff'd*, 825 F.2d 709 (2d Cir. 1987).

6. *See, e.g.*, Sangiovanni Hernandez v. Dominicana de Aviacion, C. por A., 556 F.2d 611 (1st Cir. 1977) (allowing defendant in lawsuit in Puerto Rico to use settlement of plaintiff's claim by a Dominican court to bar plaintiff's suit on res judicata grounds).

7. *See, e.g.*, Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610, 616-17 (S.D.N.Y. 1979) (allowing defendant to use foreign judgment as "offensive" collateral estoppel in counter-claim against plaintiff).

8. *See, e.g.*, UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3, 13 U.L.A. 261, 265 (1986) [hereinafter UNIFORM RECOGNITION ACT] ("The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."); *see also* Bishop & Burnette, *supra* note 3, at 429. Recognition, however, does not always mean that the foreign judgment will be enforced. *See supra* note 5.

9. 159 U.S. 113 (1895).

10. *Id.* at 163-64.

11. *See, e.g.*, Clarkson Co. v. Shaheen, 544 F.2d 624, 629 (2d Cir. 1976) (recognizing a Canadian bankruptcy proceeding based on comity); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); *see also* von Mehren & Patterson, *supra* note 2, at 45 ("Most [courts] are content simply

tion.[12] One court noted that recognition of foreign state judgments may be "motivated by a desire for reciprocal treatment of American judgments abroad."[13]

At least one commentator proposes additional arguments in favor of recognizing foreign judgments, including (1) the protection of a successful foreign litigant from harassment or evasive maneuvers; (2) the implementation of a policy that does not make the plaintiff's choice of forum depend upon the availability of local enforcement; (3) the promotion of a stable and uniform international order; and (4) the belief that a foreign forum may be the more appropriate one.[14] Whatever the rationale, United States courts rarely refuse to recognize foreign judgments if the requirements for recognition are met.[15]

C. *State Law versus Federal Law*

The Supreme Court has not decided whether federal or state law governs the recognition of foreign judgments.[16] While most United States federal[17] and state[18] courts have held that state law applies to the recognition of foreign judgments, this rule could change with the enactment of a statute by the federal government or a decision by the United States Supreme Court.[19] It is important to note that if the foreign judgment

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to cite the general principles of comity identified in *Hilton* . . . .").

12. *See* Sangiovanni Hernandez v. Dominicana de Aviacion, C. por A., 556 F.2d 611, 614 (1st Cir. 1977) (United States courts recognize foreign judgments to promote the policy behind res judicata "that there must be some end to litigation."); Hunt v. BP Exploration Co. (Libya), 580 F. Supp. 304, 310 (N.D. Tex. 1984) (recognizing English judgment on res judicata grounds); *see also* Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220, 239-40 (1972).

13. *Sangiovanni Hernandez*, 556 F.2d at 614.

14. Note, *supra* note 2, at 333; *see also* von Mehren & Trautman, *Recognition of Foreign Adjudications: Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1603-04 (1968).

15. *See* von Mehren & Patterson, *supra* note 2, at 46 (noting that courts, no matter what their particular reason, tend to recognize foreign judgments).

16. Bishop & Burnette, *supra* note 3, at 429.

17. *See, e.g.*, Her Majesty, Queen of British Columbia v. Gilbertson, 597 F.2d 1161, 1163 (9th Cir. 1979); Sangiovanni Hernandez v. Dominicana Aviacion, C. por A., 556 F.2d 611, 614 (1st Cir. 1977); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

18. *See, e.g.*, Hyde v. Hyde, 562 S.W.2d 194, 198 (Tenn. 1978); Nicol v. Tanner, 310 Minn. 68, 75-76, 256 N.W.2d 796, 800 (1976); Johnston v. Compagnie Générale Transatlantique, 242 N.Y. 381, 152 N.E. 121 (1926).

19. The Supreme Court could decide that foreign judgment recognition affects United States foreign relations to the extent that it must be governed by a uniform federal law. von Mehren & Patterson, *supra* note 2, at 39-40. Several commentators call for

relates to a federal question, a federal court may be required to apply federal law.[20] In most cases, however, state law will control.

D. *Requirements for Recognition and Enforcement*

State recognition laws derive from the principles laid out in *Hilton v. Guyot*.[21] Even though the holding in *Erie Railway Co. v. Tompkins*,[22] which did away with federal common law in diversity cases,[23] nullified *Hilton*'s precedential value as federal common law, many domestic states have adopted the law of *Hilton*.[24]

In addition to utilizing common law derived from *Hilton*, some United States states have adopted the Uniform Recognition Act,[25] the relevant provisions of which do not differ greatly from the rule of *Hilton*. The sources of recognition law in the United States, therefore, are the state common law derived from *Hilton* and the Uniform Recognition Act.

1. Recognition of Foreign Judgments under *Hilton* and Subsequent State Common Law

Early United States decisions on the recognition of foreign judgments held that a foreign judgment was prima facie evidence of the underlying claim and that all defenses that were or could have been raised in the foreign action could be relitigated in a United States action.[26] Gradually, United States courts began to recognize foreign judgments as conclusive on the merits as long as basic requirements were met.[27] The United States Supreme Court set out these requirements in *Hilton v. Guyot*:[28]

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administra-

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the federalization of foreign judgment recognition law. *See, e.g.*, Note, *supra* note 2, at 343-49.

20. von Mehren & Patterson, *supra* note 2, at 39 nn.6-7.

21. 159 U.S. 113 (1895). For a description of these principles, see *infra* notes 27-37 and accompanying text.

22. 304 U.S. 64 (1938).

23. *Id.* at 76-78.

24. Bishop & Burnette, *supra* note 3, at 430 ("[T]he *Hilton* language still remains the predominant statement of the elements which must exist before a foreign-country judgment will be recognized in the United States.").

25. UNIFORM RECOGNITION ACT, *supra* note 8.

26. von Mehren & Patterson, *supra* note 2, at 43.

27. *Id.* at 44.

28. 159 U.S. 113 (1895).

> tion of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[29]

In addition to these elements, the *Hilton* Court also required reciprocity in the recognition of judgments and refused to recognize the French judgment at issue in *Hilton* because a United States judgment would not be given conclusive effect in France.[30] Commentators criticize[31] and subsequent United States courts usually reject this additional requirement as a requisite for recognition.[32] Only a few United States states retain the reciprocity requirement.[33]

The Court in *Hilton* also made it clear that it would not enforce a foreign judgment that contravenes the public policy of the United States.[34] United States courts have universally adopted this requirement.[35]

In addition to the elements presented in *Hilton*, most United States courts require a foreign judgment be final in order to be recognized.[36]

Under the common law developed in *Hilton* and subsequent cases, a litigant must show the following elements before a United States court will recognize a foreign judgment:

1) jurisdiction of the foreign court over the parties and subject-matter;
2) timely and proper notice of the proceedings;
3) regular proceedings conducted according to a system of impartial, civi-

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29. *Id.* at 202-03.

30. *Id.* at 228.

31. *See, e.g.*, Bishop & Burnette, *supra* note 3, at 435-36; von Mehren & Trautman, *supra* note 14, at 1660-62.

32. *See, e.g.*, Tahan v. Hodgson, 662 F.2d 862, 867 (D.C. Cir. 1981); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 n.8 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

33. *See, e.g.*, Royal Bank of Canada v. Trentham Corp, 665 F.2d 515, 516-19 (5th Cir. 1981) (noting that under Texas law, reciprocity is still a requirement for recognition of foreign judgments).

34. *Hilton*, 159 U.S. at 164-65.

35. von Mehren & Patterson, *supra* note 2, at 61.

36. *See* Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974); Coulborn v. Joseph, 195 Ga. 723, 733, 25 S.E.2d 576, 581 (1943); Kordoski v. Belanger, 52 R.I. 268, 160 A. 205 (1932); *see generally* von Mehren & Patterson, *supra* note 2, at 69-72.

lized jurisprudence;
4) absence of fraud in procuring the foreign judgment;
5) finality of the foreign judgment; and
6) no contravention of the public policy of the state in which enforcement is sought by the foreign judgment.[37]

2. Recognition of Foreign Judgments under the Uniform Act

Seventeen states have adopted[38] the Uniform Recognition Act.[39] The purpose of the Uniform Recognition Act is to codify the common law and to increase the likelihood that United States judgments will be recognized abroad in states with reciprocity requirements.[40]

The Uniform Recognition Act applies only to foreign judgments that grant or deny recovery of a sum of money, other than a tax judgment or other penalty, or that are for support in matrimonial or family matters.[41] The Act codifies the requirement of finality of the foreign judgment.[42] The Act further provides that a foreign judgment is not conclusive if the foreign court was not impartial,[43] did not have personal jurisdiction over the defendant,[44] or did not have jurisdiction over the subject-matter at issue in the case.[45] The Act also provides that a foreign judgment need not be recognized if the defendant did not have notice of the suit and an opportunity to defend against any claims,[46] if the judgment was obtained by fraud,[47] or if the underlying cause of action or claim for relief is repugnant to the public policy of the United States state.[48] The Uniform Recognition Act does not therefore differ greatly from the common law developed under *Hilton*.

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37. *See generally* von Mehren & Patterson, *supra* note 2, at 43-63.

38. 13 U.L.A. 19 (Supp. 1989). As of this writing, the Uniform Recognition Act has been adopted by Alaska, California, Colorado, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Texas, and Washington. *Id.*

39. UNIFORM RECOGNITION ACT, *supra* note 8.

40. *See* Prefatory Note, 13 U.L.A. 261 (1986); *see also* von Mehren & Patterson, *supra* note 2, at 42.

41. UNIFORM RECOGNITION ACT, *supra* note 8, § 1.

42. *Id.* § 2.

43. *Id.* § 4(a)(1).

44. *Id.* § 4(a)(2).

45. *Id.* § 4(a)(3).

46. *Id.* § 4(b)(1).

47. *Id.* § 4(b)(2).

48. *Id.* § 4(b)(3).

E. *Current Recognition Practice in the United States*

1. Jurisdiction

Under *Hilton v. Guyot*, a foreign court rendering the judgment must have "jurisdiction over the cause" if the foreign judgment is to be recognized by a United States court.[49] When a foreign judgment is rendered against an United States national, United States courts have held that "jurisdiction . . . should be determined by our own standards of judicial power as promulgated by the Supreme Court under the due process clause of the Fourteenth Amendment."[50] This jurisdictional test is the same as that used by United States courts to determine if a United States state judgment is entitled to full faith and credit. Courts have adopted this "minimum contacts" test, which is set out in *International Shoe v. Washington*[51] and its progeny,[52] to test foreign jurisdiction.[53] Courts typically find "minimum contacts" exist when the defendant conducted business in the foreign jurisdiction[54] or shipped products to the foreign jurisdiction.[55]

The defendant may consent to the foreign court's jurisdiction. This consent may be explicit in a prior agreement between the parties[56] or it may be implied if the defendant appears and participates in the foreign proceeding.[57] United States courts recognize jurisdiction based on consent, even though the foreign court may not have any other basis for

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49. 159 U.S. 113, 167 (1895).

50. Hunt v. BP Exploration Co. (Libya), 492 F. Supp. 885, 895 (N.D. Tex. 1980) (quoting Cherun v. Frishman, 236 F. Supp. 292, 296 (D.D.C. 1964)); *see also* von Mehren & Patterson, *supra* note 2, at 48-49 (noting that United States courts will not recognize foreign judgments unless jurisdiction over the parties was acquired in a manner "consonant with U.S. concepts of due process").

51. 326 U.S. 310 (1945).

52. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958).

53. *See* Ackermann v. Levine, 788 F.2d 830, 838 (2d Cir. 1986) (applying "minimum contacts" test of *International Shoe*).

54. *See, e.g.*, *Ackermann*, 788 F.2d at 838.

55. *See, e.g.*, Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir 1971), *cert denied*, 405 U.S. 1017 (1972).

56. *See, e.g.*, Curacao v. Solitron Devices, Inc., 489 F.2d 1313, 1315 (2d Cir. 1973) (finding consent to Netherland Antilles law and jurisdiction as part of the contract between the parties), *cert. denied*, 416 U.S. 986 (1974).

57. *See, e.g.*, Ingersoll Milling Mach. Co. v. Granger, 631 F. Supp. 314, 317 (N.D. Ill. 1986), *aff'd*, 833 F.2d 680 (7th Cir. 1987); Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610 (S.D.N.Y. 1979); Ramm v. Ramm, 34 A.D.2d 667, 310 N.Y.S.2d 111 (1970), *aff'd*, 28 N.Y.2d 892, 271 N.E.2d 558, 322 N.Y.S.2d 726 (1971); *see also* von Mehren & Patterson, *supra* note 2, at 54.

jurisdiction.[58] A United States court will not deem the defendant to have consented to the foreign court's jurisdiction if the defendant's appearance in the foreign court was solely to contest the foreign court's jurisdiction.[59] If the defendant loses the jurisdictional argument abroad, most United States courts hold that he may not re-litigate the jurisdictional issue in the United States.[60] This is consistent with the United States practice that prevents a defendant from re-litigating a jurisdictional issue if he goes to another United States state to challenge that state's jurisdiction and loses.[61] At least one United States court allowed the defendant to re-litigate the foreign court's jurisdiction,[62] possibly out of concern that deferring to the foreign court's determination of jurisdiction would mean that United States due process standards for determining jurisdiction would not be met.[63]

Under the Uniform Recognition Act, a foreign judgment is not conclusive if the rendering court did not have jurisdiction over the defendant.[64] The Uniform Recognition Act lists six instances in which a United States state court must recognize a foreign court's jurisdiction.[65] These instances are limited to those in which the defendant (1) was personally served in the foreign jurisdiction;[66] (2) appeared voluntarily in the foreign proceeding other than to contest jurisdiction;[67] (3) agreed to submit to the jurisdiction of the foreign court prior to the action;[68] (4) was domiciled in the foreign state;[69] (5) had a business office in the foreign state and the suit arose out of the conduct of that business;[70] or (6) operated a

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58. *See* von Mehren & Patterson, *supra* note 2, at 54.

59. *See, e.g.*, Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404, 406 (S.D. Tex. 1980), *vacated on other grounds*, 665 F.2d 515 (5th Cir. 1981).

60. *See, e.g.*, Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, *cert denied*, 405 U.S. 1017 (1972); Fairchild, Arabatzis & Smith, Inc. v. Prometco (Prod. & Metals) Co., 470 F. Supp. 610 (S.D.N.Y. 1979).

61. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931). The court in *Somportex* relied on *Baldwin* in refusing to allow the defendant to relitigate the jurisdictional issue in the United States courts. *Somportex*, 453 F.2d at 441 n.9.

62. Hunt v. BP Exploration Co. (Libya), 492 F. Supp. 885, 895-97 (N.D. Tex. 1980).

63. *See* Bishop & Burnette, *supra* note 3, at 433.

64. UNIFORM RECOGNITION ACT, *supra* note 8, § 4(a)(2).

65. *Id.* § 5(a).

66. *Id.* § 5(a)(1). *But see id.* § 4(b)(6) (allowing the court not to recognize jurisdiction based solely on personal service if the foreign forum was "seriously inconvenient").

67. *Id.* § 5(a)(2).

68. *Id.* § 5(a)(3).

69. *Id.* § 5(a)(4).

70. *Id.* § 5(a)(5).

motor vehicle or aircraft in the foreign jurisdiction and the suit arose out of that operation.[71] It seems clear that the jurisdiction contemplated by the Act is jurisdiction according to United States principles,[72] especially since the Uniform Recognition Act also provides that a United States court can recognize the foreign judgment on grounds for jurisdiction not specified in the Act.[73]

2. Notice and Opportunity to Be Heard

The United States Supreme Court required in *Hilton v. Guyot* that there be "due citation" of the defendant in a foreign action before the judgment would be recognized by United States courts.[74] Courts have construed this requirement to mean that the defendant must receive such notice of the foreign action as would give him an opportunity to defend the action.[75] This issue only arises in the case of default judgments because a defendant's appearance in a foreign action is conclusive proof of sufficient notice. While the rule seems to be that "effective service of process" is required for adequate notice,[76] United States courts are primarily concerned with whether the defendant had actual notice and do not generally consider the sufficiency of the foreign state's statutory notice provisions.[77] United States courts also do not require that the service of process comply with United States statutory notice provisions.[78]

In a case before the United States Court of Appeals for the District of Columbia Circuit, the court held that personal service on a defendant in Israel was sufficient even though the service papers were in Hebrew, a language which the defendant did not understand.[79] The defendant in that case had done business in Israel for a number of years and the facts indicated that he was aware of the legal nature of the papers.[80] The court held that under those circumstances the defendant "should have surmised that the papers being served upon him were legal in nature and that he could ignore them only at his own peril."[81] Consequently, the

71. *Id.* § 5(a)(6).
72. von Mehren & Patterson, *supra* note 2, at 49 n.58.
73. UNIFORM RECOGNITION ACT, *supra* note 8, § 5(b).
74. 159 U.S. 113, 202 (1895).
75. *See* Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981).
76. *Id.*
77. von Mehren & Patterson, *supra* note 2, at 58.
78. *Tahan*, 662 F.2d at 866 ("It would be unrealistic for the United States to require all foreign judicial systems to adhere to the Federal Rules of Civil Procedure.").
79. *Id.*
80. *Id.* at 865.
81. *Id.*

court found that the defendant was provided sufficient notice.[82]

The Uniform Recognition Act provides that a court may, at its discretion, refuse to recognize a foreign judgment if there is insufficient notice of the foreign action to the defendant.[83] Despite the discretionary nature of this provision, it seems unlikely that any United States court would recognize a foreign judgment when there has been lack of notice.[84]

3. "Civilized Jurisprudence"

The United States Supreme Court noted in *Hilton v. Guyot* that the court rendering the foreign judgment must operate under an impartial civilized system of jurisprudence before a United States court will recognize the foreign judgment.[85] In practice, however, United States courts rarely examine a foreign state's judicial system for fairness and impartiality.[86] One case in which a federal court did make such an examination involved the recognition of an East German judgment.[87] The United States court refused to recognize the judgment because "East German courts do not speak as an independent judiciary"[88] and "any logical analysis [in East German judicial decisions] is obfuscated by their obvious political mission."[89]

The Uniform Recognition Act provides that a foreign judgment is not conclusive if the judicial system rendering it does not provide impartial tribunals or procedures compatible with the requirements of due process.[90] The official comment to this section indicates that a "mere difference in the procedural system is not a sufficient basis for non-recognition."[91] A federal court applying Illinois law recently held that mere allegations that the foreign court was "biased" or denied the defendant a "full and fair opportunity to present its claims" are insufficient to render a foreign judgment inconclusive under the Uniform Recognition Act.[92]

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82. *Id.*

83. UNIFORM RECOGNITION ACT, *supra* note 8, § 4(b)(1).

84. von Mehren & Patterson, *supra* note 2, at 57 n.102.

85. 159 U.S. 113, 202-03 (1895); *see* von Mehren & Patterson, *supra* note 2, at 59.

86. von Mehren & Patterson, *supra* note 2, at 59.

87. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

88. *Id.* at 906.

89. *Id.* at 907.

90. UNIFORM RECOGNITION ACT, *supra* note 8, § 4(a)(1).

91. *Id.* § 4 comment.

92. Ingersoll Milling Mach. Co. v. Granger, 631 F. Supp. 314 (N.D. Ill. 1986), *aff'd*, 833 F.2d 680 (7th Cir. 1987). Under the Uniform Recognition Act, *supra* note 8, a foreign judgment must be conclusive before a United States court will recognize and

4. Absence of Fraud

In *Hilton v. Guyot*, the United States Supreme Court held that a foreign judgment is not entitled to recognition if the judgment was procured by fraud.[93] United States courts distinguish between intrinsic and extrinsic fraud. If the fraud in procuring the foreign judgment is intrinsic—that is, if the fraud is "relate[d] to matters . . . that [were or] could have been litigated"[94] in the foreign proceeding"—then United States courts generally will recognize the foreign judgment.[95] If, on the other hand, the fraud is extrinsic—that is, if the "fraud . . . deprives a party of an opportunity to present adequately his claim or his defense"[96]—United States courts will bar recognition of the foreign judgment.[97] At least one court held that extrinsic fraud must also be a "fraud on the [foreign] court" in order to bar recognition of the foreign judgment.[98] The burden is on the defendant to prove fraud in the procurement of the foreign judgment by "clear and convincing evidence."[99] The Uniform Recognition Act provides that a court may deny recognition of a foreign judgment if the judgment was "obtained by fraud."[100] Most courts construe this language to mean extrinsic fraud.[101]

5. Finality of Foreign Judgment

A foreign judgment must be final and conclusive in order to be enforced in the United States.[102] A United States court, therefore, will not recognize a foreign interlocutory judgment or any foreign judgment not

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enforce the judgment. *See supra* notes 41-48 and accompanying text.

93. 159 U.S. 113, 205 (1895); *see* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 442 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); von Mehren & Patterson, *supra* note 2, at 59 ("United States courts uniformly state that recognition of a foreign country judgment will be denied if the judgment was procured by fraud.").

94. Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610, 615 (S.D.N.Y. 1979) (quoting Overmyer v. Eliot Realty, 83 Misc. 2d 694, 705, 371 N.Y.S. 2d 246, 258 (1975)).

95. von Mehren & Patterson, *supra* note 2, at 60.

96. Bishop & Burnette, *supra* note 3, at 434.

97. von Mehren & Patterson, *supra* note 2, at 60.

98. *Fairchild*, 470 F. Supp. at 615.

99. Clarkson Co., v. Shaheen, 544 F.2d 624, 631 (2d Cir. 1976).

100. UNIFORM RECOGNITION ACT, *supra* note 8, § 4(b)(2).

101. *See, e.g., Fairchild*, 470 F. Supp. at 615.

102. *See, e.g.*, Curacao v. Solitron Devices, Inc., 489 F.2d 1313, 1323 (2d Cir. 1973); *see also* von Mehren & Patterson, *supra* note 2, at 69.

final in the foreign court.[103] If, however, the foreign judgment is final in the rendering forum but is merely amenable to appeal, most United States courts will recognize the judgment unless an appeal is actually pending.[104] The Uniform Recognition Act allows recognition of a foreign judgment "that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal."[105] Under the Uniform Recognition Act, if a defendant satisfies a United States court that an appeal in the foreign jurisdiction is pending or that the defendant intends to appeal the foreign judgment, the United States court may stay the recognition and enforcement proceedings until after the appeal has been decided or the time to appeal has expired.[106] The Uniform Recognition Act also allows a United States court to refuse to recognize a foreign judgment if it "conflicts with another final and conclusive judgment."[107] The Uniform Recognition Act does not specify, however, which of the two judgments, if any, a United States court should recognize.[108] The few courts that have addressed this issue have applied the United States rule applicable to judgments of domestic states,[109] which mandates that the last in a series of inconsistent judgments prevails.[110]

6. The Public Policy Exception

The United States Supreme Court made it clear in *Hilton v. Guyot* that it would not recognize a foreign judgment if doing so contravenes the public policy of the United States.[111] The public policy exception is not very well-defined. Theoretically, a defendant could claim a violation of public policy any time there is a variance between the procedure or result in a foreign court and in a United States court. Courts seldom find public policy violations, however, and defendants are rarely able to block recognition of a foreign judgment on public policy grounds.[112] Even if a

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103. von Mehren & Patterson, *supra* note 2, at 69.

104. *Id.* at 69-70.

105. UNIFORM RECOGNITION ACT, *supra* note 8, § 2; *see* von Mehren & Patterson, *supra* note 2, at 70.

106. UNIFORM RECOGNITION ACT, *supra* note 8, § 6; *see* von Mehren & Patterson, *supra* note 2, at 70.

107. UNIFORM RECOGNITION ACT, *supra* note 8, § 4(b)(4).

108. von Mehren & Patterson, *supra* note 2, at 71.

109. *See* Treinies v. Sunshine Mining Co., 308 U.S. 66, 75-78 (1939).

110. von Mehren & Patterson, *supra* note 2, at 71.

111. 159 U.S. 113, 164-65 (1895); *see* von Mehren & Patterson, *supra* note 2, at 61.

112. Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 931 (D.C. Cir. 1984) ("The standard for refusing to enforce judgments on public policy grounds is

variance between the law or practice in the foreign jurisdiction and that in the United States is great, this difference generally will not cause a court to find a public policy violation.[113] Indeed, in *Hilton*, the Supreme Court found no violation when the foreign jurisdiction rendering the judgment did not allow cross examination of witnesses and permitted hearsay and unsworn testimony, all contrary to the practice of United States courts.[114] A court will refuse recognition on public policy grounds only if recognition "injure[s] the public health, the public morals, the public confidence in the purity of the administration of the law, or . . . undermine[s] that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."[115] The United States Court of Appeals for the District of Columbia Circuit held that, in order to violate public policy, the foreign judgment must be "repugnant to fundamental notions of what is fair and just."[116] While some courts use the public policy exception as a "catch-all" basis for denying recognition,[117] most courts find public policy violations only when recognition is "unfair to a party entitled to the protection of the policies of the [recognition] forum,"[118] or when "the recognition forum itself has an interest in the judgment other than that of protecting the litigants."[119]

The Uniform Recognition Act allows a United States court to refuse recognition if "the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of the state."[120] The Act's public policy exception to recognition is more restrictive than the common law public policy exception generally applied by the courts.[121]

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strict.").

113. von Mehren & Patterson, *supra* note 2, at 61.

114. 159 U.S. at 204-05; *see also* von Mehren & Patterson, *supra* note 2, at 61.

115. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161, 169 (E.D. Pa. 1970), *aff'd*, 453 F.2d 435, 443 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (quoting Goodyear v. Brown, 155 Pa. 514, 518, 26 A. 665, 666 (1893)).

116. Tahan v. Hodgson, 662 F.2d 862, 866 (D.C. Cir. 1981).

117. von Mehren & Patterson, *supra* note 2, at 61 (noting that the public policy exception has been used in cases of lack of jurisdiction, inadequate notice, and fraud).

118. *Id.* at 63.

119. *Id.*

120. UNIFORM RECOGNITION ACT, *supra* note 8, § 4(b)(3) (bracketed text in original).

121. von Mehren & Patterson, *supra* note 2, at 61 n.129.

III. Cases Construing the Public Policy Exception

Because the public policy exception is quite vague, it is tempting to use it as a "catch-all" objection to the recognition of any foreign judgment. The following cases illustrate the ways in which parties attempt to use the public policy exception to bar recognition of foreign judgments. This Part first discusses unsuccessful attempts to use the public policy exception and then discusses cases in which courts have applied the exception. This Part concludes with a summary of the factors courts consider in applying the exception.

A. *Public Policy Exception Not Recognized*

In *Curacao v. Solitron Devices, Inc.*, the defendant, a New York electronics manufacturer, sought non-recognition of a foreign arbitral award.[122] The defendant entered into a contract with the plaintiff, the government of Curacao, whereby the plaintiff would build an industrial park on the island and the defendant would operate a manufacturing plant in the industrial park that would provide at least one hundred jobs for citizens of the island.[123] The defendant never established a business on the island, and the dispute went into arbitration pursuant to the terms of the contract.[124] The defendant never took part in the arbitration proceedings, although it was informed of all dates of hearings and procedures followed.[125] The arbitral tribunal granted the plaintiff an award, and the plaintiff sought enforcement of the award in the United States District Court for the Southern District of New York.[126]

The defendant's defense was that it breached the contract because the wage rate on the island rose as a result of the plaintiff's actions and that such a wage rate rendered it impossible for the defendant to operate its business there.[127] In essence, the defendant claimed that the plaintiff, as a result of its own misconduct, derived an advantage in the form of the damages awarded in the arbitration.[128] The plaintiff's derivation of this advantage violated New York law, and the defendant claimed that recognition of the award would, accordingly, violate the public policy of New York.[129] The court rejected this argument, but never reached the issue of

122. 489 F.2d 1313, 1314 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).
123. *Id.* at 1315.
124. *Id.* at 1315-16.
125. *Id.*
126. *Id.* at 1314.
127. *Id.* at 1315-16.
128. *Id.* at 1322.
129. *Id.*

whether the defendant had stated grounds for the public policy exception to apply. The court instead found that the plaintiff and defendant never agreed that the plaintiff would keep the wage rate on the island constant.[130] Because the constant wage rate was not part of the contract, the plaintiff did not cause the defendant to breach the agreement. Since the plaintiff did no wrong, it could not derive an advantage from the alleged wrongdoing.[131]

This case illustrates that the party seeking non-recognition bears an initial burden of production. At a minimum, the party must show that there is a variance between the foreign jurisdiction's treatment of the party and the way a United States court would treat that party. If, as in *Curacao*, the United States court could reach the same result as the foreign jurisdiction, the United States court will not examine the foreign court's action.

An attempt to invoke the public policy exception may prove unsuccessful even if the United States court would reach a result different from that reached by the foreign court. This is especially true if the party seeking to invoke the public policy exception defaulted in the foreign court. In *Tahan v. Hodgson*[132] the defendant sought non-recognition of an Israeli default judgment against him. The United States District Court for the District of Columbia refused to recognize the Israeli judgment because it found that the judgment violated the United States policy in two ways.[133] First, the district court found that under the Federal Rules of Civil Procedure, the defendant would have been entitled to a "second notice" prior to the entry of a default judgment against him.[134] Since the Israeli court did not give the defendant a second notice, the Israeli judgment violated public policy in the United States.[135] Second, the district court held that because the Israeli court found the defendant personally liable for the actions of his corporation, the Israeli judgment violated United States policy against "piercing the corporate veil."[136]

The United States Court of Appeals for the District of Columbia Circuit reversed both of these district court findings. In reversing the district court's first finding, the court relied on *Hilton v. Guyot*[137] to hold that a "mere difference" in procedure does not constitute a violation of public

130. *Id.*
131. *Id.*
132. 662 F.2d 862 (D.C. Cir. 1981).
133. *Id.* at 866.
134. *Id.*
135. *Id.*
136. *Id.*
137. 159 U.S. 113 (1895).

policy.[138] The court noted that the Israeli notice procedures are not "repugnant to fundamental notions of what is decent and just," and, therefore do not violate United States public policy.[139] In reversing the district court's second finding, the court held that Israel also has a policy against piercing the corporate veil.[140] The United States court held that because in the Israeli court the defendant could have claimed freedom from liability for the actions of the corporation,[141] the defendant "cannot fail to contest the Israeli plaintiff and then declare that he would have won."[142] The court, without saying so, hinted that a United States court faced with the same case might also have pierced the corporate veil.[143]

In *Tahan*, the defendant attempted to use the public policy exception to make an argument that he could have made in the foreign jurisdiction. The court found that the defendant had proper notice and an opportunity to defend the Israeli action.[144] The court, therefore, held that it would not examine the Israeli court's decision to pierce the corporate veil to determine whether it violated United States public policy.[145] It seems clear that had the defendant appeared in the Israeli action and lost an argument against "piercing the veil," the United States court would have made such an examination. The court noted that the Israeli court's decision to pierce the veil is "not repugnant" to United States public policy "particularly when it is borne in mind that defendant did not present a case at all [in the Israeli action]."[146] This dictum suggests that a United States court will not entertain a public policy defense when the defendant defaulted on the issue that is the basis of such defense in the foreign action. While not amounting to a general rule,[147] a defendant's default in a foreign adjudication should cut off his right to re-argue the merits of

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138. *Tahan*, 662 F.2d at 866 n.18.

139. *Id.* at 866.

140. *Id.* at 867.

141. *Id.*

142. *Id.*

143. *Id.* ("Our examination of the record . . . convinces us that the Israeli court's decision to pierce the corporate veil is not 'repugnant' under the facts of this case.").

144. *Id.* at 865. The defendant also argued that the United States court should not recognize the Israeli judgment because he did not receive effective notice of the action. For a discussion of the court's ruling on this argument, see *supra* notes 79-82 and accompanying text.

145. 662 F.2d at 867.

146. *Id.*

147. *See* Ackermann v. Levine, 788 F.2d 830, 842 (2d Cir. 1986) (rejecting the notion in *Tahan* that a defendant should not be allowed to raise a public policy defense if he defaulted on the same issue in the foreign action). For a discussion of *Ackermann*, see *infra* notes 179-196 and accompanying text.

the case in an enforcement proceeding in the United States. A defendant who defaults in the foreign proceeding should only be allowed to use the public policy exception if his appearance in the foreign action would not have given him the possibility of obtaining a result similar to that which a United States court could have reached.

In *Ingersoll Milling Machine Co. v. Granger*,[148] the plaintiff, who employed the defendant in Belgium, brought a declaratory judgment action in a United States state court seeking a declaration that it did not owe the defendant termination benefits. The defendant had the case removed to the United States District Court for the Northern District of Illinois and counterclaimed for enforcement of a Belgian judgment awarding him a sum of money for termination benefits.[149] The defendant had previously brought an action against the plaintiff in the Belgian courts seeking termination benefits from the plaintiff.[150] The plaintiff claimed that the Belgian judgment violated United States public policy because the Belgian court chose to apply Belgian, rather than Illinois, law to the dispute.[151] The plaintiff claimed that the choice of law violated public policy because the employment contract between the plaintiff and the defendant specified that Illinois law would govern the contract.[152] The plaintiff argued that since the public policy of Illinois favored freedom of contact, this action violated Illinois's public policy.[153] The district court found no violation of public policy because it was not clearly inappropriate for the Belgian court to apply Belgian law. Indeed, the district court noted, "[F]aced with the issue, this court may well have reached the same conclusion [on choice of law] as the Belgian courts."[154]

The United States Court of Appeals for the District of Columbia Circuit made it clear in *Tahan* that if a party defaults in a foreign judgment, United States courts will not hear the party's claim that the foreign court's judgment violated public policy if the party's appearance in the foreign action would have given it the opportunity to argue for a result similar to one which a United States court could reach.[155] The court in *Tahan* did not address the question of what would happen if the party invoking the public policy exception appeared in the foreign

148. 631 F. Supp. 314 (N.D. Ill. 1986), *aff'd*, 833 F.2d 680 (7th Cir. 1987).

149. *Id.* at 315. The Belgian court ruled in Granger's favor approximately seven months after this action was filed. *Id.* at 316.

150. 833 F.2d at 682.

151. 631 F. Supp. at 318.

152. 833 F.2d at 688-89.

153. *Id.*

154. 631 F. Supp. at 318.

155. Tahan v. Hodgson, 602 F.2d 862, 867 (D.C. Cir. 1981).

action and lost. As *Ingersoll* illustrates, such a party must be able to prove to the United States court that a United States court could not reach a result similar to the foreign court.

The public policy argument may fail even if the result obtained in the foreign action is one not obtainable in the United States. In *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*,[156] the plaintiff, a British corporation, and the defendant, a United States corporation, entered into an agreement whereby the plaintiff would distribute the defendant's bubble gum in Great Britain.[157] When the transaction fell through, the plaintiff sued the defendant in a British court for breach of contract.[158] The defendant was served in the United States under a British "long-arm" statute and the defendant appeared in the British action, but only to contest the British court's jurisdiction.[159] When the defendant lost on this issue, it did not participate further in the British proceedings, but instead withdrew from the case and presented no defense.[160] The British court then entered a default judgment against the defendant.[161] The plaintiff filed a diversity action in the United States District Court for the Eastern District of Pennsylvania, seeking enforcement of the British judgment. The district court granted the plaintiff's motion for summary judgment, and the defendant appealed.[162]

The defendant again argued that the British court did not have jurisdiction over it. In addition, the defendant claimed that the United States District Court for the Eastern District of Pennsylvania should not recognize the British judgment because it violated the public policy of Pennsylvania. The British court awarded damages for "loss of good will" and attorney's fees.[163] The defendant claimed that since Pennsylvania law does not permit recovery for "loss of good will" and attorney's fees, the British judgment awarding those damages violated the public policy of Pennsylvania and should not be recognized.[164]

The United States District Court for the Eastern District of Pennsylvania rejected both of these arguments, finding first that the British court had jurisdiction over the defendant by virtue of the defendant's initial appearance in the British proceeding, and, second, that the British

156. 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).
157. *Id.* at 436.
158. *Id.* at 437.
159. *Id.*
160. *Id.* at 438-39.
161. *Id.* at 439.
162. *Id.*
163. *Id.*
164. *Id.* at 443.

court's exercise of jurisdiction did not offend United States notions of due process.[165] The court dispensed with the defendant's public policy argument by noting simply that, although the damages awarded are not available under Pennsylvania law, recognizing them would not "injure the public health, the public morals [or] the public confidence in the purity of the administration of the law."[166]

Courts seem particularly unwilling to entertain public policy arguments in cases where the party seeking application of the public policy exception initiated and participated in the foreign action. *Sangiovanni Hernandez v. Dominicana de Aviacion, C. por A.* provides a good example of this unwillingness.[167] In *Sangiovanni Hernandez*, the plaintiff sued the defendant in the United States District Court for the District of Puerto Rico, seeking damages for the wrongful death of his father resulting from the crash of an airliner operated by the defendant.[168] The defendant sought dismissal of the action on res judicata grounds, pointing out that the defendant paid the plaintiff $40,000 pursuant to a settlement before a court in the Dominican Republic.[169] The district court refused to dismiss the complaint on the ground that the foreign settlement was not recognizable since it violated the public policy of Puerto Rico.[170] The district court specifically found that Puerto Rico has a strong policy of protecting minors and that this policy is embodied in laws that govern the procedure used in settling lawsuits involving minors.[171] The district court went on to find that the plaintiff was a minor at the time of the Dominican settlement and that because the Dominican court did not follow the procedures required by Puerto Rican law, the settlement violated the public policy of Puerto Rico and, therefore, was not entitled to recognition.[172] The United States Court of Appeals for the First Circuit reversed, holding that the difference in procedures was insufficient to violate the public policy of Puerto Rico.[173] The court found that the procedures used by the Dominican court sufficiently protected the interests of the minor plaintiff.[174] Since the "heart of Puerto Rico's

165. *Id.* at 442, 444.
166. *Id.* at 443 (quoting Goodyear v. Brown, 155 Pa. 514, 518, 26 A. 665, 666 (1893)).
167. 556 F.2d 611 (1st Cir. 1977).
168. *Id.* at 612.
169. *Id.* at 612, 615.
170. *Id.* at 614-15.
171. *Id.*
172. *Id.*
173. *Id.* at 615.
174. *Id.*

policy" is to protect the interests of the minor, the court found that there was no public policy violation.[175]

The court had little sympathy for the plaintiff in this case, noting that the defendant had "in good faith entered into and fully complied with the [Dominican] settlement."[176] The Dominican court clearly had jurisdiction over the claim and the parties, and there was no allegation of fraud. The only reason that United States courts had jurisdiction over the claim was because the plaintiff moved to Puerto Rico prior to the crash.[177] At the time of the crash, all of the parties involved were citizens of the Dominican Republic.[178] After the crash, the plaintiff could have easily brought the action in United States federal district court in Puerto Rico, but instead chose to settle the case in the Dominican Republic. It was only after a voluntary settlement in the Dominican Republic that the plaintiff sought to try the case in a United States court. Allowing the suit would have violated the principles behind res judicata and would have created an inequity for the defendant, who had settled the case in good faith. But for the existence of the public policy exception, the plaintiff could not have made his claim. The public policy exception should not exist to allow a plaintiff "two bites at the apple." Because there was no unfairness to the plaintiff, the court refused to recognize the public policy exception in this case. As this case illustrates, courts should be particularly unwilling to apply the public policy exception when the party seeking to avoid recognition of the foreign judgment is the one who initiated the foreign proceedings.

B. *Public Policy Exception Recognized*

In *Ackermann v. Levine*, the plaintiff sought recognition and enforcement of a German default judgment against the defendant.[179] The defendant sought German financial backers for a real estate development in New Jersey.[180] The defendant hired the plaintiff, a German attorney, to negotiate with some potential investors in West Germany.[181] No fees were discussed for the plaintiff's services. The plaintiff later sent the

175. *Id.*
176. *Id.* at 615-16.
177. *Id.* at 612.
178. *Id.*
179. 610 F. Supp. 633, 635 (S.D.N.Y. 1985), *aff'd in part, rev'd in part*, 788 F.2d 830 (2d Cir. 1986).
180. 788 F.2d at 834-36.
181. *Id.*

defendant a bill for his work,[182] based on a West German statute that set out a permissible rate schedule.[183] The plaintiff won a default judgment in a West German court and subsequently sought enforcement of the judgment in the United States District Court for the Southern District of New York.[184] The district court held that New York policy requires attorneys to ensure full comprehension by the client of the fee agreement and that the statutory billing practice used in West Germany fails similarly to provide.[185] The court held that the West German judgment therefore violated the public policy of New York and refused to recognize the judgment.[186] The United States Court of Appeals for the Second Circuit reversed in part, holding that the statutory billing scheme was not so offensive to New York policy that it required nonrecognition.[187] The court further found that the defendant benefitted in part from the plaintiff's labor.[188]

The United States Court of Appeals for the Second Circuit did find a violation of New York's public policy in one respect. The court held that New York law required some evidence both that the client authorized and that the attorney actually performed the work for which the attorney sought payment.[189] Part of the German judgment included fees for "study of project files." The court found that there was no authorization for this study and that "there was not a scintilla of evidence of work product."[190] The court held that recognizing this aspect of the judgment would run the "risk that American courts could become the means of enforcing unconscionable attorney fee awards" and that this might "endanger[] 'public confidence' in the administration of the law."[191]

The court specifically rejected the dictum in *Tahan* which implied that a defendant who defaulted in a foreign action could not raise the public policy exception as a defense.[192] In this way, *Ackerman* is arguably distinguishable from *Tahan*. In *Tahan*, the defendant could have argued that the Israeli court should not have pierced the corporate veil; the court in *Tahan* found that the defendant could have made this claim

182. *Id.* at 835, 837.
183. *Id.* at 837.
184. *Id.*
185. *Id.* at 841.
186. *Id.*
187. *Id.* at 843.
188. *Id.* at 844.
189. *Id.* at 843-44.
190. *Id.* at 845.
191. *Id.* at 844.
192. *Id.* at 842.

as a matter of Israeli law.[193] In *Ackerman*, however, the court, by claiming that the plaintiff had no evidence of having performed the work, did not determine whether the defendant could have challenged the German judgment in German courts. The opinion does not reveal whether the court examined the German law to see if such a defense is allowable. If German law does not allow such a defense, the court was correct in finding a public policy violation.

In most cases in which courts find public policy violations, there is at stake some interest of the forum greater than merely protecting the litigant.[194] In *Ackerman*, the state of New York had a great interest in not enforcing unconscionable attorney fees. As the court noted, recognizing the foreign judgment would have "impose[d] upon American citizens doing business abroad a unique risk in dealing with foreign counsel."[195] Avoiding this risk was clearly worth non-recognition of this particular judgment; indeed, the court hinted that recognition of the judgment would hurt transnational legal relations.[196] The best interests of both the United States and West Germany arguably required non-recognition of the judgment.

The United States Court of Appeals for the District of Columbia Circuit faced similar concerns with the forum's interests in *Laker Airways v. Sabena, Belgian World Airlines*.[197] In *Laker Airways*, the plaintiff, a British airline, sought an injunction from the United States District Court for the District of Columbia enjoining the defendants KLM and Sabena—Dutch and Belgian airlines—from seeking an injunction against the plaintiff in the British courts.[198] The litigation arose out of Laker's antitrust suit against numerous other airlines.[199] Laker originally filed an antitrust action in the United States courts.[200] Certain British airlines, which were defendants in the United States anti trust action, then filed suit in the British courts seeking an injunction preventing Laker from pursuing its claims against them in the United States courts.[201] The injunction was ultimately granted.[202] In the meantime,

193. Tahan v. Hodgson, 662 F.2d 862, 867 (D.C. Cir. 1981).
194. von Mehren & Patterson, *supra* note 2, at 63.
195. 788 F.2d at 830, 844 (2d Cir. 1986).
196. *Id.*
197. 731 F.2d 909 (D.C. Cir. 1984), *aff'g* Laker Airways Ltd. v. Pan American World Airways, 559 F. Supp. 1124 (D.D.C. 1983).
198. 731 F.2d at 918.
199. *Id.* at 917-18.
200. *Id.* at 917.
201. *Id.* at 918.
202. *Id.* at 920.

Laker filed an action in the United States District Court for the District of Columbia seeking an anti-suit injunction which would prevent the remaining defendant airlines from seeking injunctions against Laker in the British courts.[203] This injunction was granted, and the defendants appealed.[204] Affirming the district court's grant of the injunction, the United States Court of Appeals for the District of Columbia Circuit held that the injunction was warranted on public policy grounds.[205]

Although the United States Court of Appeals for the District of Columbia Circuit did not refuse recognition of a foreign judgment, it held that the public policy concerns behind the issuance of an anti-suit injunction were the same as the concerns behind non-recognition of foreign judgments.[206] The court specifically held that the forum has a great interest in seeing that its important public policies are not evaded.[207] The court then held that the defendants in this case were attempting to "escape application of the antitrust laws to their conduct of business here in the United States."[208] Since the antitrust laws were "of admitted economic importance to the United States," the court held that United States interest and, hence, public policy, mandated issuance of the anti-suit injunction.[209]

In *Overseas Inns S.A. v. United States*,[210] the plaintiff sued the Internal Revenue Service to receive back taxes that it claimed were wrongfully collected.[211] The plaintiff's predecessor was found to owe back taxes to the IRS.[212] While the tax dispute was pending before the United States Tax Court, the plaintiff entered bankruptcy proceedings before a Luxembourg court.[213] The plaintiff and the IRS eventually settled the tax claim, with the plaintiff agreeing to pay approximately one million dollars in taxes.[214] The Luxembourg court, aware that the IRS was a creditor of the plaintiff, entered a reorganization plan for the plaintiff.[215] Under the terms of this plan, the IRS would receive approximately

203. *Id.* at 918.
204. *Id.* at 919.
205. *Id.* at 932.
206. *Id.* at 931.
207. *Id.*
208. *Id.* at 932.
209. *Id.* at 931-32.
210. 685 F. Supp. 968 (N.D. Tex. 1988).
211. *Id.* at 968.
212. *Id.* at 969.
213. *Id.*
214. *Id.*
215. *Id.*

$230,000.[216] The IRS did not appear in the Luxembourg bankruptcy proceeding, but it had notice of the proceedings and did not object to the reorganization plan.[217] The IRS later collected the additional money owed it by levying upon the plaintiff's property in the United States.[218] The plaintiff sued in the United States District Court for the Northern District of Texas, seeking summary judgment on the Luxembourg decree.[219]

The court refused to recognize the foreign decree on public policy grounds,[220] holding that the United States has an "inexpugnable public policy that favors payment of lawfully owed federal income taxes."[221] The plaintiff argued that the court should recognize the foreign judgment on the ground that the IRS would not have received any more money in bankruptcy proceedings in the United States.[222] The court held that, in order to prevail on this claim, the plaintiff needed to show that the IRS would have received comparable treatment under United States and Luxembourg law.[223] Because the plaintiff could not meet this evidentiary burden, the court denied summary judgment.[224]

The same concerns that motivated the court in *Laker Airways* motivated the court in *Overseas Inns*.[225] The *Overseas Inns* court was concerned that the plaintiff was seeking recognition of the foreign bankruptcy judgment for the distinct purpose of avoiding the United States tax laws.

C. *Suggested Analysis for a Court Faced with the Public Policy Exception*

A United States court asked to refuse recognition of a foreign judgment on the ground that it violates public policy first needs to decide whether the result reached in the foreign proceeding is in fact a different result than a United States court would reach if faced with the same issue.[226] If there is a variance in the anticipated United States result and the foreign judgment and if the foreign judgment was reached by default,

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216. *Id.*
217. *Id.*
218. *Id.* at 970.
219. *Id.*
220. *Id.*
221. *Id.* at 972.
222. *Id.* at 973-75.
223. *Id.*
224. *Id.* at 975.
225. 685 F. Supp. 968 (N.D. Tex. 1988).
226. *See supra* notes 122-31 and accompanying text.

the United States court must next decide whether the foreign court could have reached a result more in line with a United States result in a similar case. If this is the case, and if the party seeking non-recognition would have received a more favorable result by appearing in the foreign action, then the United States court should not refuse recognition of the judgment on public policy grounds.[227] Alternatively, if the foreign jurisdiction, as a result of its laws and practices, could not have reached a result consistent with that reached by a United States court faced with the same case,[228] further analysis is necessary.

When the potential results in the foreign and United States courts are different, the United States court must determine whether the foreign result is so inconsistent with United States law that the court should deny recognition. The variance must be great[229] and must generally affect some important United States interest.[230] For example, when recognition of the foreign judgment enables a party to escape the application of United States laws to the party's conduct, the United States has a great interest in applying its laws to that party's conduct.[231] Finally, courts should not entertain the public policy argument from a party who initiates a foreign proceeding and then seeks non-recognition of the resulting foreign judgment in a United States court.[232]

IV. CONCLUSION

There are many grounds for refusing to recognize and enforce foreign judgments. Most of these grounds are rather specific, but the public policy exception is potentially quite broad. United States courts, however, have applied the exception narrowly. In light of the myriad of policy reasons for recognizing foreign judgments,[233] courts construe grounds for non-recognition as narrowly as possible. Courts utilize the public policy exception as a "ground of last resort" for non-recognition, because the other grounds for non-recognition serve adequately to protect the parties

227. *See supra* notes 132-47 and accompanying text.

228. Arguably, this is what happened in *Ackermann*. *See supra* notes 179-96 and accompanying text.

229. *See supra* notes 156-66 and accompanying text.

230. *See* von Mehren & Patterson, *supra* note 2, at 63.

231. *See supra* notes 197-225 and accompanying text.

232. *See supra* notes 167-78 and accompanying text.

233. *See supra* notes 9-15 and accompanying text.

involved. Indeed, the public policy exception, unlike the other grounds for non-recognition, properly serves to protect the interests of the state where enforcement is sought, rather than the interests of the party seeking to invoke it. Viewed from this perspective, the limited application of the public policy exception is quite rational.

Jonathan H. Pittman