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Abstract

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KEYWORDS: comity, international, law

THE DOCTRINE OF COMITY AND THE RECOGNITION OF FOREIGN DECISIONS IN THE UNITED STATES

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I. INTRODUCTION

María José Carrascosa is a Spanish citizen who fell in love and subsequently married Peter W. Innes, a citizen from the United States.[1] A

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year after their marriage they had a daughter, Victoria, and for five years they lived together in New Jersey.[2] In early 2004, Carrascosa and Innes decided to put an end to their marital relationship.[3] That same year the parties signed "an agreement . . . concerning parenting time, restrictions, and the appointment of a third-party parenting coordinator."[4] Moreover, the parties agreed that Victoria could not travel outside of the United States without the written permission of the other parent.[5] Despite this restrictive clause, "Carrascosa and Victoria traveled to Spain without the . . . knowledge of Innes."[6] Given these circumstances, each party decided to appeal to a different justice system—Carrascosa appealed to the Spanish justice seeking a civil annulment of her marriage, and Innes filed a complaint for a divorce, equitable distribution, and joint legal custody in New Jersey.[7] While the case was legally pending in Spain, Judge Parsons of the Superior Court of New Jersey established that the Spanish court did not have the required jurisdiction over the parties, granted Innes temporary custody of Victoria, and ordered the return of the minor to the United States within three weeks.[8] On the other hand, the Spanish court considered that Carrascosa did not remove her daughter wrongfully under the Hague Convention on the Civil Aspects of International Child Abduction, and therefore, there was not a legal obligation to return the minor to the United States.[9] As a consequence of violating the New Jersey court orders, Carrascosa was arrested in New York and incarcerated.[10] Since 2006, Victoria has been living with her maternal grandparents in Valencia.[11] Over all these years, she has not seen her father or her mother who was incarcerated in the Bergen County jail.[12] As Judge Lyons states in the opinion of the Superior Court of New Jersey, this heartbreaking case greatly affected the life of a child who has grown up without the affection of her mother or father.[13]

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1. Innes v. Carrascosa, 918 A.2d 686, 691 (N.J. Super. Ct. App. Div. 2007).
2. *See id.*
3. *Id.*
4. *Id.* at 692.
5. *Id.*
6. *Innes*, 918 A.2d at 692.
7. *Id.*
8. *Id.* at 693.
9. *Id.* at 694–95; The Hague Convention on the Civil Aspects of International Child Abduction, art. 4, Oct. 25, 1980, T.I.A.S. No. 11670.
10. *Innes*, 918 A.2d at 702.
11. *Id.* at 692.
12. *See id.* at 691, 702.
13. *Id.* at 691.

International private law—also called conflict of laws—can be interpreted as the protection of the rights that a nation grants to its citizens through its enforcement within the territory and the dominions of another nation.[14] This body of rules is also considered part of the laws governing within the territory of each country.[15] For that reason, they "must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation."[16] Each country has its own rules regarding the legal proceedings that are going to take place in its own court.[17] This circumstance that causes the relationship among citizens from different states triggers unusual problems: Which court has personal jurisdiction over the defendant and subject matter jurisdiction to hear the case, which law must be applied, and would the decision be recognized and enforced in a foreign country?[18] It has been considered a problematic area for decades, and those parties involved in international disputes have to face more difficulties.[19] The presence of international private law has increased exponentially during the twenty-first century, in which citizens around the world interact with each other through the newest technology or by traveling to foreign countries.[20] It is surprising that despite its complexity and importance in our modern society, there are few articles that deal with the difficulty of the international private law.[21] Indeed, the difficulty of the subject matter regarding the recognition and enforcement of foreign decisions is *scholarly desert*.[22]

Taking as an example the *Carrascosa* case, the purpose of this Comment is to analyze the endeavor of the international community to codify international private law through the work of the Hague Conference

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14. Hilton v. Guyot, 159 U.S. 113, 163 (1895).
15. *Id.*
16. *Id.*
17. *See Overview*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=text.display-tid=26 (last visited Mar. 29, 2016).
18. S.L. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 49, 61, 84 (2014).
19. *Id.* at 49; Hans Smit, *International Control of International Litigation: Who Benefits?*, 57 LAW & CONTEMP. PROBS. 25, 25 (1994).
20. *See* Smit, *supra* note 19, at 28; *Foreign-Country Money Judgments Recognition Act Summary*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/ActSummary.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act (last visited Mar. 29, 2016).
21. Strong, *supra* note 18, at 49.
22. *Id.*

and evaluate the American system of recognition and enforcement of foreign countries' decisions.23

II. THE PROMOTION OF THE CODIFICATION OF PRIVATE INTERNATIONAL LAW: THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

As stated before, the presence of international private law is continuous in our current and interconnected society, but it also involves huge difficulties in its enforcement.[24] In order to provide an answer to all those questions resulting from the application of the conflict of laws, several states have voluntarily signed different treaties and conventions where guidelines are set forth.[25] In the context of unification and codification of international private law, the role of the Hague Conference of International Private Law and its conventions stand out.[26] The Hague Conference has created a body of normative material through its intense work during more than a century that applies to its eighty members.[27]

In order to provide a better knowledge of the Hague Conference, I will proceed to the examination of its background and how the organization was created.28 Moreover, the analysis of its statute and the way this international organization operates will reveal a solid structure based on a democratic system where its members maintain part of their sovereignty while they cooperate in order to reach the aim of unifying the rules of international private law.[29]

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23. *See* Innes v. Carrascosa, 918 A.2d 686, 694, 709 (N.J. Super. Ct. App. Div. 2007); *The Hague Conference on Private International Law*, THE HAGUE, http://www.denhaag.nl/en/residents/to/The-Hague-Conference-on-Private-International-Law.htm (last visited Mar. 29, 2016); Strong, *supra* note 18, at 50–51; *infra* Parts II–III.

24. *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895); Smit, *supra* note 19, at 25; *supra* Part I.

25. *See Overview*, *supra* note 17; *The Hague Conference on Private International Law*, *supra* note 23.

26. *See The Hague Conference on Private International Law*, *supra* note 23.

27. *Overview*, *supra* note 17.

28. *See infra* Sections II.A–B.

29. *See* Statute of The Hague Conference on Private International Law art. 1 *adopted* Oct. 31, 1951, 15 U.S.T. 2228 (entered into force Oct. 15, 1964).

A. *History and Role of the Hague Conference on Private International Law*

Faced with the challenges that rise up in a globalized world, the Hague Conference on Private International Law was created during the nineteenth century to provide a solution to those challenges and respond to the new needs of citizens.[30] It is considered one of the most important and influential organizations with eighty members representing all continents, one of them being the European Union.[31] However, the Hague Conference did not obtain its status of permanent intergovernmental organization until its seventh session in 1951.[32] This new era for the Hague Conference began with the creation and the enforcement of its statute in July of 1955.[33] The statute, which is composed of fifteen articles, establishes the central principles and values that govern the Hague Conference.34 As recognized in Article 1 of the statute, the Hague Conference has the main mission "to work for the progressive unification of the rules of private international law."[35] Therefore, it is the only intergovernmental organization that has a *legislative goal*.[36] In order to provide a higher level of security to individuals and companies when acting in a foreign country, several methods and instruments were created by this leading intergovernmental organization.[37] To overcome those legal impediments that individuals and companies face when cross-border relations and transactions are established, the methods of negotiation and drafting of the Hague Conventions stand out.[38] These conventions developed by the Hague Conference are considered multilateral treaties and deal with diverse fields of private international law, such as

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30. *Overview*, *supra* note 17.
31. *Id.*
32. *More About HCCH*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=text.display&tid=4 (last visited Mar. 29, 2016).
33. *Id.*
34. *See* Statute of The Hague Conference on Private International Law, *supra* note 29.
35. *Id.*, art. 1.
36. *Overview*, *supra* note 17. With these words, The Hague Conference on Private International Law expressed its mission:

> The statutory mission of the Conference is to work for the *progressive unification* of these rules. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.

Id.

37. *The Hague Conference on Private International Law*, *supra* note 23.
38. *See id.*

"international judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; recognition of companies; [and] jurisdiction and enforcement of foreign judgments."[39] Through the signature and following ratification of these multilateral treaties, the members of the Hague Conference encourage and promote the construction of bridges between the different existing legal systems while respecting their diversity.[40] The active role of the Hague Conference in the unification and codification of the different international private law rules governing in each state facilitates all civil and commercial situations that connect more than one country since the conventions progressively resolve all those differences regarding the jurisdiction of the courts, applicable law, and recognition and enforcement of foreign decisions.[41]

The first session of the Hague Conference on Private International Law took place in August of 1893 by the convening of the Netherland's government.[42] This first session basically consisted of the discussion of family law and general principles of the conflicts of law topics.[43] It had as an outcome the drafting of the first Hague Convention—referred to as the Convention on Civil Procedure with Additional Protocol.[44] The commission decided to write several articles regarding the service of process, taking evidence abroad, deposits for costs, legal aid, and physical detention of foreign debtors.[45] This first Hague Convention, signed on November 14, 1896, and entered into force on May 23, 1899, was considered a huge success due to the ratification by fourteen European countries.[46] Between the first session of the organization and 1904, seven international conventions were adopted by the Hague Conference.[47] Six of these treaties were replaced by modern instruments, including the New Convention on Civil Procedure on March 1, 1954.[48] Following these first conventions, the broad subject of civil procedure was broken down through the drafting of three treaties: the 1965 Convention about service of documents abroad;, the 1970 Convention covering taking of evidence abroad; and the 1980 Convention on

39. *More About HCCH*, *supra* note 32.
40. *See id.*
41. *See id.*
42. *See* Georges A.L. Droz, *A Comment on the Role of The Hague Conference on Private International Law*, 57 LAW & CONTEMP. PROBS. 3, 3 (1994).
43. *Id.*
44. *Id.*
45. *Id.* at 3–4.
46. *Id.* at 3.
47. *More About HCCH*, *supra* note 32.
48. *Id.*; Droz, *supra* note 42, at 3.

International Access to Justice regarding "legal aid, deposits for costs, safe conduct of witnesses, and detention of foreign debtors."[49] These modern conventions are the reflection of the main objective of the Hague Conference to create a close relationship and a bridge between those civil law countries—that is to say those thirty states that signed the Convention on Civil Procedure of 1954 [50] and those countries having common law procedural systems.[51]

Nowadays, the Hague Conference on Private International Law is also aware of the importance of providing to all citizens a constantly updated source of information.[52] For the purpose of keeping individuals informed of the activity and work of the Hague Conference, the Permanent Bureau is in charge of frequently publishing and maintaining a collection of conventions and of creating handbooks that clearly explain the operation of a particular convention.[53] Additionally, the Secretariat edits the proceedings of each session that may be available on CD-ROM or microfiches.[54] Furthermore, the development and new advances of technology have had a substantial impact on this intergovernmental organization.[55] Currently, the Hague Conference makes available three free electronic channels to all citizens interested in the Hague Conference.[56] Through the main webpage of the Hague Conference, general information concerning the international organization may be found.57 Besides this basic information, the different texts of the conventions have also been uploaded: "full status reports, bibliographies, information regarding the authorities designated under the [c]onventions on judicial and administrative co-operation, explanatory

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49. Droz, *supra* note 42, at 4.
50. *Id.* at 3–4. The following forty-two countries have signed the Civil Procedure Convention of 1954: Albania, Argentina, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, People's Republic of China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Finland, France, Germany, Hungary, Iceland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, and Ukraine. *Status Table: 02: Convention of 1 March 1954 on Civil Procedure*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=33 (last updated Sept. 17, 2015).
51. Droz, *supra* note 42, at 4.
52. *Overview*, *supra* note 17.
53. *Id.*; *see also infra* Section II.B.
54. *Overview*, *supra* note 17.
55. *See id.*
56. *See id.*
57. *Id.*

reports."[58] The development of INCADAT, the International Child Abduction Database, facilitated the access to important judicial decisions taken by national courts regarding the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[59] Finally, the electronic statistical database called INCASTAT—created by the Annual Statistical Forms—is only available for those Central Authorities designated under the 1980 Child Abduction Convention, and it contains return and access applications.[60]

B. *Organization and Operation of the Hague Conference*

The Netherland State Commission, "established by royal decree [on] February 20, 1897, for the purpose of promoting the codification of [P]rivate [I]nternational [L]aw," has the duty to guarantee the correct operation of the Hague Conference through a Permanent Bureau.[61] The Permanent Bureau—also known as Secretariat—has its headquarters at The Hague, Netherlands, and it is "composed of a Secretary General and two Secretaries, of different nationalities, who . . . [are] appointed by the Government of the Netherlands upon presentation by the State Commission . . . [and] have the proper legal knowledge and practical experience."[62] This multinational Secretariat communicates directly with the members of the conference through the experts and central authorities designated by each member.[63] Moreover, the Permanent Bureau also establishes and maintains contacts with international organizations and with any national organ of the member states.[64] The main task adjudicated to the Permanent Bureau by Article 5 of the statute is to prepare and organize the sessions of the Hague Conference and the several

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58. *Id.*
59. *Overview*, *supra* note 17; *see also infra* Section II.B.
60. *Overview*, *supra* note 17.
61. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 3.
62. *Id.* art. 4–5; *see also More About HCCH*, *supra* note 32.
63. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 6; *see also More About HCCH*, *supra* note 32.
64. *See* Statute of The Hague Conference on Private International Law, *supra* note 29, art. 5; *More About HCCH*, *supra* note 32. Among the international organizations to whom The Hague Conference maintains continuing contact are:

> [T]he United Nations—particularly its Commission on International Trade Law (UNCITRAL), UNICEF, the Committee on the Rights of the Child (CRC), and the High Commissioner for Refugees (UNHCR)—the Council of Europe, the European Union, the [Organization] of American States, the Commonwealth Secretariat, the Asian-African Legal Consultative [Organization] (AALCO), the International Institute for the Unification of Private Law (Unidroit) . . . .

More About HCCH, *supra* note 32.

meetings of the special committees that take place.[65] These special committees are established in those periods in which there is no ordinary session of the Hague Conference "for the purpose of preparing draft conventions or studying any questions of private international law that comes within the purpose of the [Hague] Conference."[66] In order to organize both meetings, the members of the Secretariat have the duty to execute the basic research needed for any subject discussed by the Hague Conference.[67]

The statute also establishes two different procedures to obtain the status of a member of the Hague Conference.[68] The first procedure automatically granted the condition of member to those states that had met the following requirements before the drafting of the Statute of the Hague Conference in 1951: (1) participation and attendance to at least one session of the Hague Conference; and (2) signature of the aforementioned multilateral agreement.[69] However, the statute does not bar other states that did not meet with the conditions established on the first procedure to become a member.[70] This status will be conceded to any state as long as its "participation . . . is of judicial interest to the work of the [Hague] Conference."[71] The state concerned will not become a member immediately.[72] Its admission will be contingent upon the decision of the government of the participating states: The new member should be approved by a majority vote on its proposal.[73] This vote must take place "within six months from the day on which [they] have been informed of such proposal."[74] Nevertheless, the admission as a member will only become definitive with the signature of the Statute of the Hague Conference on Private International Law by the state concerned.[75]

The organization functions through the assistance of its members at a periodical and mandatory meeting every four years in plenary session.[76] The

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65. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 5.
66. *Id.* art. 7; *see also More About HCCH*, *supra* note 32.
67. *More About HCCH*, *supra* note 32.
68. *See* Statute of The Hague Conference on Private International Law, *supra* note 29, art. 2.
69. *Id.*
70. *See id.*; *More About HCCH*, *supra* note 32.
71. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 2.
72. *See id.*
73. *Id.*; *see also More About HCCH*, *supra* note 32.
74. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 2.
75. *Id.*
76. *Id.* art. 3; *see also More About HCCH*, *supra* note 32.

statute foresees the call of an extraordinary session in case of need.[77] In this situation, the special meeting of the Hague Conference will be called by the Government of Netherlands upon the requesting of the State Commission, with the approval of the members.[78] It is in the plenary sessions where the different countries discuss and adopt the draft of conventions and recommendations that have been prepared by the Special Commissions.[79] Each state has only one vote and all decisions are adopted through obtaining the majority of the votes by the delegations of the member states that have attended the session.[80] The ordinary meeting concludes with the delegations of the member states signing a Final Act where all the texts have been brought together.[81]

Regarding the expenses of the ordinary session of the Hague Conference, the Statute establishes the following in Article 10:

> The expenses resulting from the regular sessions of the [Hague] Conference shall be borne by the Government of the Netherlands. In the event of a special session, the expenses shall be apportioned among the [m]embers of the [Hague] Conference who are represented at the session. In any case, compensation for the travel and living expenses of the [d]elegates shall be paid by their respective [g]overnments.[82]

The state members not only have the right and the duty to assist the mandatory plenary session, but they are also responsible for the correct functioning of the organization.[83] Although the Statute vested the power to ensure the organization of the Hague Conference to the Netherlands Standing Government Committee, in practice, due to a tendency and natural evolution towards constitutionalism and democracy, the member states have a decisive role and influence on the decision-making of the direction the Hague Conference is taking.[84]

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77. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 3; *see also More About HCCH*, *supra* note 32.
78. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 3.
79. *Id.* art. 7; *More About HCCH*, *supra* note 32.
80. *More about HCCH*, *supra* note 32.
81. *Id.*
82. Statute of The Hague Conference on Private International Law, *supra* note 29, art. 10.
83. *More About HCCH*, *supra* note 32.
84. *Id.*; *see also* Statute of The Hague Conference on Private International Law, *supra* note 29, art. 3.

In our current days, where there is a constant flow of international transactions, the importance of the Hague Convention on International Private Law is indisputable.[85] With more than forty conventions drafted and signed by countries from all continents, the Hague Conference has developed a crucial instrument to guard the rights of the citizens when confronting a lawsuit in a foreign country, as seen in the Convention of 1965, as well as to erase any doubt regarding the authority of the court, the governing law, and the recognition and enforcement of foreign decisions through the unification of the private international rules of every state.[86]

C. *The Hague and the United States of America*

The system of treaties institutionalized by the Hague Conference has been seen from the internationalist's point of view as a functional instrument to achieve international cooperation.[87] There is no dispute on the fact that each country has ancient roots in its judicial system that defines the country's systems of procedural law.[88] These differences among countries cause many lawyers that deal exclusively with domestic litigation to see rules of procedure from other systems of law as objectionable, which appear to be reasonable and logical in their own country.[89] From the United States approach, the impression that the United States presents "the best possible model for emulation by foreign countries"[90] regarding procedural laws leads to the idea that the treaties created by the Hague Conference do not improve international cooperation in litigation.[91] Therefore, this objective may be achieved through the work of each state in improving its domestic procedures.[92]

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85. *See The Hague Conference on Private International Law*, *supra* note 23.
86. *See Conventions*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=conventions.listing (last visited Mar. 29, 2016); *The Hague Conference on Private International Law*, *supra* note 23.
87. *See* Cornelis D. van Boeschoten, *Hague Conference Convention and the United States: A European View*, 57 LAW & CONTEMP. PROBS. 47, 50–51 (1994).
88. *Id.* at 48.
89. *Id.* at 50–51.
90. Smit, *supra* note 19, at 34.
91. *See id.* at 44–45.
92. *Id.* at 33.

1. The Influence of the United States of America in the International Organization

The influence of the United States in the work of the Hague Conference to harmonize rules of procedure is palpable since its entry as a member in 1964.[93] Following the inspiration of the common law system, there was a replacement of diplomatic and consular channels with judicial and administrative channels when establishing and maintaining relationships with foreign countries.94 This change was possible thanks to the creation of a *central authority* mechanism.[95] Each member of the Hague Conference has the obligation to designate a central governmental authority, and the states must commit themselves to effectuate and return service abroad through that central authority when required to do so.[96] The designation of central authorities had as another consequence the addition of two new tasks to the work of the Permanent Bureau: circulating information regarding recent changes in the central authorities and observing how those conventions that involved international and central authorities are functioning.[97] The importance of both assignments has substantially increased during the last fifteen years.[98] However, part of this shift was also consequence of the growth of the relationships among private individuals after World War II that increased the international civil procedural traffic.[99] Another example of the effect that the incorporation of the United States had in the heart of this international organization was the drafting of Articles 15 and 16 of the 1965 Convention.[100] Both provisions were inspired by the Fifth and Fourteenth Amendments of the U.S. Constitution, where the due process requirement is established.[101] The implementation of these articles provide all defendants

93. Droz, *supra* note 42, at 4.
94. *Id.*
95. *Id.*
96. *Id.* at 5.
97. *Id.* at 8.
98. Droz, *supra* note 42 at 8.
99. *Id.* at 4.
100. *Id.*; *see also* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Feb. 10, 1969, 20 U.S.T. 1965, 364–65.
101. U.S. CONST. amends. V, XIV.
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

from the United States the protection required to not suffer any kind of injustice that might take place in a lawsuit in any of the twenty-one countries that signed and ratified the Convention of 1965.[102] Specifically, Article 15 reads as follows:

> Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that (a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or (b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend. Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled (a) the document was transmitted by one of the methods provided for in this Convention, (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, (c) no

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U.S. CONST. amend. V.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

102. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 100, at 364–65; *Status Table 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, HAGUE CONF. ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last updated June 17, 2015). The following fifty-four countries have signed the Convention of 1965: Albania, Argentina, Armenia, Australia, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, People's Republic of China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Lithuania, Luxembourg, Malta, Mexico, Monaco, Montenegro, Morocco, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom of Great Britain and Northern, United States of America, and Venezuela. *Id.*

> certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed. Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.[103]

The inclusion of this article in the convention gives all defendants whose lawsuits are filed abroad to not face a judgment against them if the defendant did not appear during the process after the correct service of the summons or an equivalent document.[104] Therefore, the court will only be authorized to render a judgment if the conditions established in the article take place.[105] However, the judge will have discretion to order provisional or protective measures every time that extraordinary circumstances occur.[106] Hence, this method has the goal of requiring the compliance of a standard of international procedural due process in all judicial proceedings involving private individuals.[107] The safety measure of procedural due process of Article 15 is complimented by the requirement of substantive due process of Article 16.[108]

> When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled (a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and (b) the defendant has disclosed a prima facie defense to the action on the merits. An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment. Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than

103. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 100, at 364.
104. *Id.*
105. *Id.*
106. *Id.*
107. *See id.*
108. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *supra* note 100, at 364–65.

one year following the date of the judgment. This article shall not apply to judgments concerning status or capacity of persons.[109]

As seen in Article 15, when procedural due process has not been violated, the judge has the ability to issue a judgment against an absent defendant.[110] If due cause is shown, any defendant has the possibility to file a bill of review to reopen a default judgment pursuant to Article 16 of the Convention of 1965.[111]

During the 1990s, the U.S. Government realized that its citizens had to overcome a big obstacle when enforcing a valid judgment in the context of civil international litigation since foreign countries were reticent to enforce and recognize judgments from United States courts.[112] In light of this reality, Cornelis D. van Boeschoten, member of the Netherlands delegations to sessions and special commission meeting of the Hague Conference on Private International Law from 1972 to 1989, foretold that "[t]he better solution [] for the United States [is] to become a party to a convention on jurisdiction and enforcement."[113] On May 5, 1992, the United States formally proposed that the Hague Conference should end this unfair legal situation through the creation of a new multilateral treaty that will lead to the implementation of a worldwide system of recognition and enforcement.[114] This proposed convention had, as a main objective, to regulate the bases of judicial jurisdiction and the recognition and enforcement of foreign judgments.[115] It was based on the annexation of a *white list* with internationally acceptable and approved jurisdictional bases.[116] The assumption of jurisdiction of a court, pursuant one of the grounds of this detailed white list, would have provided full and valid recognition and enforcement of its judgment abroad.[117] The United States was also willing to establish a *black list* containing those grounds for jurisdiction categorized as

109. *Id.* at 364–65.
110. *See id.* at 364.
111. *See id.* at 364–65.
112. Eric B. Fastiff, Note, *The Proposed Hague Convention on the Recognition and Enforcement of Civil and Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems*, 28 CORNELL INT'L L.J. 469, 471–73 (1995).
113. *See* van Boeschoten, *supra* note 87, at 52.
114. Fastiff, *supra* note 112, at 470.
115. Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 324 (2002).
116. van Boeschoten, *supra* note 87, at 53.
117. Fastiff, *supra* note 112, at 480.

unacceptable.[118] If a contracting member would have assumed jurisdiction based on impermissible jurisdictional bases or grounds of jurisdiction not specified in the convention, the decision could have been recognized under the domestic law of the country where the enforcement was sought.[119] Therefore, this mixed convention would have allowed the contracting members to maintain part of their sovereignty with the impediment that the decision would not have been automatically recognized and enforced.[120] However, the European countries expressed their discontent at the 17th Hague Conference session.[121] This opposition was the result of the different perspective that each country has regarding the assumption of jurisdiction.[122] For example, European countries have, as a main objective, to diminish the possibilities of implementing a forum shopping system and do not recognize the exercise of personal jurisdiction based on the presence of the defendant within the boundaries of the state, no matter how temporary his or her presence is.[123] This first draft did not prosper and was followed by a second attempt of creating a multilateral agreement regarding required jurisdictions on June of 2001.[124] Although the Hague Conference expressed its interest in the project submitted by the United States, the lack of agreement among its members has discouraged the idea of an appropriate compromise regarding a universal system of jurisdictions and recognition and enforcement of judgments.[125] In 2012, the Hague Conference reconsidered creating a group which special task was to reflect on the system proposed by the United States at the beginning of 1990s.[126] However, no new convention has been adopted concerning the recognition and enforcement of judgments decided by foreign judicial authorities, and, as occurred in the previous attempts, there is no guarantee that the project would finalize successfully with the draft of a new multilateral treaty.[127] Still, there are great hopes regarding a future coordination of the efforts of the United States with the work of the international community.[128]

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118. *Id.* at 483.
119. *See id.* at 482–83.
120. *See id.* at 483.
121. *Id.* at 480. *See generally* Hague Conference on Private International: Final Act of the 17th Session, 32 I.L.M. 1134 (1993).
122. *See* Fastiff, *supra* note 112, at 480.
123. Silberman, *supra* note 115, at 328; *see also* Fastiff, *supra* note 112, at 483.
124. Silberman, *supra* note 115, at 331.
125. Fastiff, *supra* note 112, at 480, 482–83.
126. Strong, *supra* note 18, at 48, 51.
127. *Id.* at 51–52.
128. *See id.* at 51.

2. The Supreme Court of the United States' Perspective Concerning the Hague Conventions

Regarding the relationship between the conventions redacted by the Hague Conference and the domestic rules governing in the United States, the Supreme Court of the United States has determined the scope of application of the multilateral treaties drafted by this important international organization.[129]

In *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*,[130] the Supreme Court defined the scope of the application of the Hague Convention of March 18, 1970, on the taking of evidence abroad in civil and commercial matters in relation to the applicability of the Federal Rules of Civil Procedure.[131] The United States as contracting member of the Hague Evidence Convention had accepted the rules contained in that international treaty as the law of the land.[132] However, the Court considered that the signature of this multilateral convention does not preempt the application of domestic rules to civil procedures within the United States jurisdiction.[133] All nine Justices of the Supreme Court of the United States believed that Evidence Convention merely sets forth "optional procedures that would facilitate the taking of evidence abroad."[134] Therefore, the signature of this Convention does not force the United States to modify the Federal Rules of Civil Procedure or to use first the permissible procedures of the Evidence Convention.[135]

Since the Supreme Court issued this opinion, trial courts have a tendency to use the Federal Rules of Civil Procedure instead of the proceedings drafted by the Hague Conference.[136] This decision has not only been seen as a loss of influence of the Permanent Bureau but also, as a digression from the international will of a "multinational *comity analysis* that

129. *See* Droz, *supra* note 42, at 8.
130. 482 U.S. 522 (1987).
131. *Id.* at 524, 529–30, 533.
132. *See id.* at 529, 533.
133. *Id.* at 537.
134. *Id.* at 538.
135. *Société National Industrielle Aérospatiale*, 482 U.S. at 534, 537–38. "The text of the Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures." *Id.* at 534.
136. *See* Droz, *supra* note 42, at 9.

should facilitate international evidence-taking with a minimum of friction."[137]

III. THE RECOGNITION OF FOREIGN DECISION IN THE UNITED STATES: THE DOCTRINE OF COMITY

For those lawyers not familiarized with the United States legal system, its enforcement regime, the doctrine of comity, may appear problematic, odd, and confusing.[138] This method appears to be a challenging and complex system that causes legal insecurity and several difficulties to foreign and U.S. citizens.[139] The numerous problems created by this current method of enforcement and recognition of judgments of foreign states or nations advocates a review of the enforcement regime governing in the United States.[140]

A. *The Comity of the Nations*

The recognition and enforcement of foreign judgment deals with the idea of how far a foreign law or decision shall have on another nation, which has its own sovereignty.[141] It is well recognized that the effect of a law derives from the legality and authority that has been granted to the organization or person that created it.[142] Therefore, "[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."[143] In the United States, the decision to give effect to foreign laws or judgments rests exclusively "on the express or tacit consent of that State."[144] A state will expressly give its authorization to allow a foreign law to be applied in its territory through the signature of international

137. *Id.*
138. *See id.*
139. Strong, *supra* note 18, at 50.
140. *Id.* at 51.
141. *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895).
142. *Id.* In the preamble of the U.S. Constitution, it is established that individuals are the source of legitimacy of the power given to the Government through the constitutional text.

> We the People of the United States, in [o]rder to form a more perfect [u]nion, establish [j]ustice, insure domestic [t]ranquility, provide for the common defen[s]e, promote the general [w]elfare, and secure the [b]lessings of [l]iberty to ourselves and our [p]osterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

143. *Hilton*, 159 U.S. at 163.
144. *See id.* at 166.

treaties or the draft of an act by its legislative authority.[145] In those situations where no treaty or international agreement must be applied, a law of a foreign nation will operate and trigger its effects within the boundaries of the United States depending upon the comity of the nations.[146] Consequently, the decisions of its courts will be the ones that manifest the tacit consent of the state concerned.[147]

For the purposes of this Comment, it is convenient to clarify the difference between the doctrine of comity and the system of full faith and credit.148 The U.S. Constitution, in its first section of Article IV, requires all states to automatically recognize and give effect to sister-states judgments in their territory.[149] However, there is no provision in the supreme law of the land or in any federal statute that imposes such an obligation regarding the recognition of judgments of foreign courts.[150] Hence, the constitutional text implicitly considers a decision rendered by a foreign court "as prima facie evidence, and not conclusive," in the absence of any statute or treaty.[151] Therefore, any foreign country's decision based on its own laws, which are considered reviewable upon the merits by the highest court of the United States, is not entitled to full credit and conclusive effect.[152]

The absence of a uniform federal law about this topic is the product of the congressional choice of not exercising its authority to regulate decisions from a foreign nation.[153] Granted by the People through the Constitution of the United States, Congress has the "[p]ower [t]o regulate

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145. *Id.*

146. *Id.*

147. *See id.*

148. U.S. CONST. art. IV, § 1; *see also* Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912).

149. U.S. CONST. art. IV, § 1. "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records[,] and Proceedings shall be proved, and the Effect thereof." *Id.*

150. *Tremblay*, 223 U.S. at 190. "No such right, privilege, or immunity [of having full faith and credit], however, is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations, and we are referred to no treaty relative to such a right." *Id.*

151. Hilton v. Guyot, 159 U.S. 113, 228 (1895).

> It is not to be supposed that, if any statute or treaty had been [made] or should be made, it would recognize . . . conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

Id.

152. *Id.* at 227.

153. Fastiff, *supra* note 112, at 472 n.4.

Commerce with foreign Nations, and among several States, and with the Indian Tribes."[154] The scope of the Commerce Clause has been a topic extensively debated in the jurisprudence of the United States.[155] In our modern era, Congress has the same authority over all of those activities related with interstate commerce as it does through its regulation of foreign commerce.[156] This power granted to Congress regarding foreign commerce "would then, of itself, support legislation equivalent to a large part of the law 'enacted' by treaty."[157] Moreover, its scope is not exclusively limited to regulate the means of foreign commerce.[158]

> Congress can reach all interstate or foreign 'intercourse'; it can reach matter precedent to or subsequent to interstate or foreign commerce; it can reach what relates to or affects as well as what is commerce; it can reach strictly local commerce and activities when necessary to make effective a regulation of interstate or foreign commerce.[159]

The deficiency of not having a uniform federal and state regulation regarding this complex area of law negatively impacts the relations of the United States with foreign nations.[160] The absence of a federal statute on enforcement and recognition of foreign decision also increases the risk of possible alterations of the national policy as a consequence of the interference with local interests.[161]

B. *The Unifying Forces Present in the U.S. Enforcement Regime*

Although Congress decided not to create a unifying rule, it would be imprecise to affirm that there is no force promoting consistency in this subject matter in the United States.[162] In the enforcement and recognition of foreign judgments, each state is allowed to regulate and create its own

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154. U.S. CONST. art. 1, § 8, cl. 3.

155. *See* United States v. Morrison 529 U.S. 598, 607 (2000). "As we discussed at the length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed." *Id.*; United States v. Lopez, 514 U.S. 549 (1995).

156. Louis Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 915 (1959).

157. *Id.*

158. *Id.*

159. *Id.*

160. Strong, *supra* note 18, at 56–57.

161. *Id.* at 57.

162. *Id.* at 58.

rules.[163] That situation has not prevented the Uniform Law Commission in its endeavor to create a consistency across the rules of the different states.[164] Besides the attempts of the Uniform Law Commission to promote a uniform system of this topic, the Supreme Court of the United States has developed some common rules through its jurisprudence.[165]

1. The Uniform Law Commission

Two different approaches of legislation about the recognition and enforcement of foreign judgments have been proposed by the Uniform Law Commission.[166]

Since the creation of the Uniform Law Commission in 1982, many acts have been created in order to provide stability, guidance, and clarity to confusing areas of state law.[167] The first form is the 1962 Uniform Foreign Money-Judgments Recognition Act.[168] It was promulgated by this non-profit association composed of state commissioners from each state as a complement of the Uniform Enforcement of Foreign Judgment Act of 1948.[169] However, there are main differences between both texts.[170] While the Act drafted in 1948 addresses the issue of enforcing sister-states judgments through the Full Faith and Credit Clause of the U.S. Constitution, the Act of 1962 dealt with the conclusiveness and enforcement of judgment rendered by a foreign court.[171] Currently, thirty-two states have adopted the 1962 Act that recognizes the effect of all foreign judgments that fall within its scope, unless any of the factors for non-recognition established in section 4 are shown.[172]

Forty-three years later, the Uniform Law Commission decided to revise the 1962 Act.[173] The reformulated act was adopted by the District of

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163. *Id.* at 66.
164. *Id.*
165. Strong, *supra* note 18, at 58–59.
166. *Id.* at 66.
167. *About the ULC*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Narrative. aspx?title=About%20the%20ULC (last visited Mar. 29, 2016).
168. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (NAT'L CONFERENCE COMMR. UNIF. STATE LAWS 1962).
169. *Foreign-Country Money Judgments Recognition Act Summary*, *supra* note 20.
170. *Id.*
171. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 2 (1962).
172. *Id.* § 4.
173. Strong, *supra* note 18, at 67.

Columbia and eighteen states.[174] There are several elements incorporated in the 2005 Act that differentiate it from the 1962 Act.[175] First of all, it expresses the burden of proof that the party seeking the recognition must carry: The petitioner has the obligation to produce the evidence that the judgment is subject to the 2005 Act.[176] It also describes the specific procedure that must be followed and includes a provision relating to a statute of limitations.[177]

With no doubt, the important work carried by the Uniform Law Commission had a significant impact on the American judicial system since it provides unification of the rules and procedures of each state while encouraging international business transactions.[178]

2. The Supreme Court of the United States

In order to harmonize the different state laws regarding enforcement of foreign decisions, the Supreme Court of the United States has developed common rules through its jurisprudence.[179] However, as a result of the application of the Erie doctrine, the federal common law principles will only govern in cases involving a federal question.[180] In this context, the case of *Hilton v. Guyot*[181] is fundamental where the Supreme established the main six factors that courts must look at before giving effects to a foreign judgment through the doctrine of comity.[182] In addition to these requirements, the Court added the prerequisite of mutual comity and reciprocity on the part of the courts of the nation that desires the recognition.[183] However, the doctrine of reciprocity established in *Hilton* was extremely criticized and was applied reluctantly by the states.[184]

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174. Strong, *supra* note 18.

175. *Compare* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962), *with* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (2005); Strong, *supra* note 18, at 67.

176. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3(c) (2005).

177. *Id.* at § 6.

178. *Frequently Asked Questions*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions (last visited Mar. 29, 2016).

179. *See* Strong, *supra* note 18, at 58.

180. *Id.* at 63.

181. 159 U.S. 113 (1895).

182. *See id.* at 202–03.

183. *Id.* at 227–28.

184. Strong, *supra* note 18, at 58–59. "Commentators also have concluded that reciprocity rule[s] should be retired from our jurisprudence." de la Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1383 (D. Del. 1991); *see also Hilton*, 159 U.S. at 202–03.

a. *The Guidelines in* Hilton v. Guyot

In *Hilton*, the Court described the guidelines that most states follow when enforcing any judgment not decided within the boundaries of the United States.[185] The defendants, Henry Hilton and William Libbey—both American citizens—conducted business as merchants in the cities of New York and Paris and had a regular store and place of business in the capital of France.[186] They did a large amount of business with the plaintiffs—the surviving members of the firm of Charles Fortin & Co. and Gustave Bertin Guyot, its official liquidator.[187] The plaintiffs who were all citizens of the Republic of France brought five suits against the defendants for non-payment of sums due.[188] After a proceeding where apparently all due process requirements were respected, the Tribunal of Commerce of the Department of the Seine, sitting at Paris, rendered final judgment for the plaintiffs.[189] While the judgment of the French court was "still . . . in full force and effect,"[190] the plaintiffs filed an action at law against the defendants in the Circuit Court of the United States for the Southern District of New York.[191] In the answer of such complaint, Hilton and Libbey claimed that they discovered fraud on the accounts presented by the plaintiffs since they falsely made up and modified the accounts and statements of the firm.[192] Moreover, the defendants alleged that they did not have the opportunity to a "full and fair trial of the controversies before the arbitrator [during the French proceeding], [where] no witness was sworn or affirmed."[193] The answer further alleged that without the introduction of the false and fraudulent accounts given during the trial, the plaintiffs would have never obtained an award judgment against the defendants.[194] Given these circumstances, the circuit court decided not to admit any of the evidence introduced by the defendants regarding the fraudulent books and papers of Charles Fortin & Co., or any other proof showing irregularities of the trial at the French judicial system and gave a verdict for the plaintiffs in the same amount as the

185. *See Hilton*, 159 U.S. at 163.
186. *Id.* at 114.
187. *Id.*
188. *Id.*
189. *See id.* at 114–15.
190. *Hilton*, 159 U.S. at 115.
191. *Id.* at 114–15.
192. *Id.* at 117.
193. *Id.* at 114–15, 117.
194. *Id.* at 117–18.

one established in the foreign judgment.[195] The defendants appealed claiming that the court should have examined the merits of the case.[196]

The Supreme Court defines the doctrine of comity as a discretionary decision of a U.S. court to recognize a foreign decision where a matter does not need to be litigated any longer since it has already been decided in a foreign judgment.[197] The highest court of the American judicial system considers this choice as a "mere courtesy and good will" of the United States courts upon courts of other nations when such judgments are not prejudicial to the rights of their citizens or to their own interest.[198] Hence, in those situations in which the rights of individuals are concerned, the comity of nations will be applied as a voluntary act of the state where the foreign law seeks to have effect in order to promote justice and create a course of friendly international relations among nations.[199] However, not all judgments rendered by judicial authorities of other sovereignties are going to be recognized by the doctrine of comity.[200] In order to trigger the comity of the United States, different prerequisites must have been present in the foreign proceeding.[201] After a long analysis of the opinion of several authorities on the topic and the trend in the United States and in England, the Court described the requirements that all judgments rendered in another nation must meet in order to be recognized and reduced to a judgment in the enforcing U.S. court:

> [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 administration 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

195. *Hilton*, 159 U.S. at 121–22.
196. *Id.*
197. *Id.* at 163.
198. *Id.* at 163–64.
199. *Id.* at 164.
200. *Hilton*, 159 U.S. at 164.
201. *Id.* at 202–03.

or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[202]

Therefore, it can be concluded that judgments decided abroad will find comity in the United States as long as the they do not conflict with the six factors listed in *Hilton*: 1) defendants had the opportunity for a full and fair trial; 2) the court that heard the case had competent jurisdiction; 3) the foreign trial was considered a regular proceeding where all due process requirements where met; 4) the proceeding took place after the adverse party who was properly served or appeared voluntary; 5) an impartial administration of justice between the citizens of the country and aliens was secured during the trial through the national system of jurisprudence; and 6) there is no evidence that demonstrates either that the court was biased, the existence of fraud in obtaining the verdict, or the prejudice of the system of laws that are applied for resolving the case.[203] These criteria cannot be considered as a restricted list since a court can deny the permission of a judgment from a court of another nation to have full effect in the United States based on "any other special reason."[204]

Among all the requirements, it is of vital importance that there is an absence of any evidence showing fraud.[205] The Supreme Court of the United States often indicated that a party is not entitled to impeach the judgment and contest the validity or the effect of such judgment if that party only proves that false and fraudulent evidence was introduced to the tribunal.[206] In the opinion, the Court hesitated if the United States should follow the trend of the English courts where false and fraudulent representation, testimony, or documents would be a sufficient ground for impeaching a foreign judgment that was obtained through such erroneous evidence.[207] However, the Court did not give an answer to this issue since there is an independent basis that bars the recognition of the French decision.[208] Reciprocity is the last

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202. *Id.*
203. *Id.*
204. *Id.* at 202.
205. *Hilton*, 159 U.S. at 206. "There is no doubt that both in this country . . . and in England, a foreign judgment may be impeached for fraud." *Id.*
206. *Id.* at 207. "It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it." *Id.*
207. *Id.* at 207–210.
208. *Hilton*, 159 U.S. at 210.
But whether those decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud,

condition deeply explained in *Hilton* that must be met in order to conclusively recognize a judgment of a foreign court.[209] In this case, the Court considered that the requirement of a demonstration of reciprocity as a condition precedent to the enforcement of a foreign judgment is a common rule in the international jurisprudence.[210] In 1895, the French courts would have only considered the conclusiveness of a foreign judgment if it had been previously examined into its merits.[211] Founding its decision on this situation, the Supreme Court of the United States decided to reverse the judgment of the Circuit Court of the United States for the Southern District of New York and consider that the judgment Mr. Guyot obtained in France was not entitled to be considered conclusive.[212]

b. *The Criticism of* Hilton*'s Reciprocity Rule through* de la Mata

In *de la Mata v. American Life Insurance Co.*,[213] the federal court hearing the case decided to reject the application of the reciprocity doctrine set out in *Hilton* based on the criticism of commentators, the abandonment of the rule by New York's court, and the previous opinions of the Supreme Court of Delaware where the requirement was limited.[214]

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it is unnecessary in, this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

Id. at 210.

209. *Id.* at 227.

210. *Id.* at 228.

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

Id.

211. *Hilton*, 159 U.S. at 215.

By the law of France, settled by a series of uniform decisions of the court of cassation, the highest judicial tribunal, for more than one century, no foreign judgment can be rendered executory in France without a review of the judgment au fond—to the bottom—including the whole merits of the cause of action on which the judgment rests.

Id.

212. *Id.* at 228.

213. 771 F. Supp. 1375 (D. Del. 1991).

214. *Id.* at 1382–83.

In this case, Victoria de la Mata Mendoza, a Bolivian citizen and widow of Eduardo de la Mata, sued ALICO, a life insurance company incorporated in Delaware and certified to do business transactions in the Republic of Bolivia since 1982, seeking payment under the life policy and two endowment policies purchased by her husband in 1982.[215] Three years after the death of her husband, de la Mata filed a complaint in the Superior Court of the Judicial District of Santa Cruz.[216] The complaint was forwarded to the Second Ordinary Court for Civil Matters in the Judicial District of Santa Cruz.[217] After the defendant had the opportunity for a full and fair trial, the district court granted judgment for the plaintiff and awarded her with a sum of three hundred thirty thousand dollars.[218] The fact that the Delaware company decided not to initiate an ordinary procedure provoked the Bolivian superior court to consider the decision of the district court as res judicata.[219] Later, the United States District Court for the District of Delaware received letters issued by the Bolivian court soliciting the recognition and enforcement of the Bolivian money judgment against ALICO in Delaware.[220]

In order to recognize the judgment for de la Mata, the district court followed the six requirement criteria listed by the Supreme Court in *Hilton*.[221] Nevertheless, the court decided not to consider the reciprocity of the Bolivian courts as a condition precedent to the recognition.[222] The district court identified two main objectives that the Supreme Court desired to achieve through the application of the reciprocity requirement: (1) the protection of American citizens when facing a trial in a foreign judicial system; and (2) the encouragement of other nations to give effect to United States judgments in their territory.[223] However, it is doubtful that *Hilton* reaches both goals.[224] To begin with, the interest of the federal government in protecting their citizens abroad, despite having a judicial proceeding pursuant with the requirements of due process, is not considered a valid interest.[225] Moreover, it is important to remember that international law is

215. *Id.* at 1377.
216. *Id.* at 1378.
217. *Id.*
218. *de la Mata*, 771 F. Supp. at 1378.
219. *See id.* at 1380.
220. *Id.*
221. *Id.* at 1381.
222. *Id.* at 1383.
223. *de la Mata*, 771 F. Supp. at 1383
224. *Id.* at 1383.
225. Nicol v. Tanner, 256 N.W.2d 796, 801 (Minn. 1976). "'[W]hile protecting nationals from unfair treatment abroad is a valid exclusive interest of a state,

based on a course of kind relations among sovereignties.[226] For that reason, the persuasion of the United States aimed at other countries to recognize the decisions of the American courts does not have its desired effect.[227] The thought of other nations that their judgments are not going to be recognized within the boundaries of the United States causes foreign courts to look with hostility at the enforcement of judgments rendered by the courts of the United States.[228] Therefore, as the Delaware court suggests while quoting the Minnesota Supreme Court, the elimination of the reciprocity as a precondition for applying the doctrine of comity "might be a more effective method of obtaining the recognition for American judgments in many other nations."[229]

Although de la Mata was not required by the court to demonstrate the reciprocity of Bolivian courts, the United States District Court for the District of Delaware declined to recognize the Bolivian judgment on the grounds that the defendant was not properly served pursuant to notions of constitutional due process or that the foreign judgment was obtained by fraud.[230]

IV. CONCLUSION

International private law has become an indispensable area of all legal systems as a result of the increase in international intercourse since the end of World War II.[231] By itself, it is considered a difficult topic; but also, the complexity of the doctrine of comity applied within the United States provokes strong negative comments from the international community, which demands a change in the enforcement regime governing in the United States.[232] It does not seem beneficial from the perspective of the United States to keep favoring and protecting its citizens facing a trial abroad, even though they do not suffer any injustice and despite the international treaties the country has signed.[233] The unification and consistency of rules of enforcement and recognition of foreign judgments through a multilateral treaty will be extremely valuable in simplifying individuals' lives and

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favoring national despite fair treatment abroad should not be commended . . . .'" *de la Mata*, 771 F. Supp. at 1378.

226. *See* Hilton v. Guyot, 159 U.S. 113, 164 (1895).
227. *de la Mata*, 771 F. Supp. at 1383.
228. *See id.* at 1383, 1389–90.
229. *Id.* at 1383.
230. *Id.* at 1390.
231. Smit, *supra* note 19, at 25.
232. *See* Strong, *supra* note 18, at 51.
233. *de la Mata*, 771 F. Supp. at 1383; *see also* Droz, *supra* note 42, at 9.

encouraging commercial transactions between countries.[234] Moreover, a wider enforcement of foreign judgments would not only have a local effect, but it would also give effect to certain international human rights norms.[235] The adoption of international treaties or the elimination of rules that are part of the law of the land of each nation cannot be reasonably expected to erase all kind of differences between nations.[236] However, the draft in the future of a convention about jurisdiction and enforcement regimes containing flexible provisions, such as the ones proposed by the United States at the end of 1990s, will have as a consequence the maximization of the recognition and enforcement of foreign judgments between countries with similar traditions and legal cultures.[237]

234. Droz, *supra* note 42, at 9.
235. Strong, *supra* note 18, at 57.
236. van Boeschoten, *supra* note 87, at 50, 52.
237. Silberman, *supra* note 115, at 349.