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Violeta I. Balan

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UNITED STATES: THE NEED FOR FEDERAL LEGISLATION

VIOLETA I. BALAN*

I. MEET JEAN-PIERRE

Imagine a cool spring day, a day when everyone enjoys the crisp weather before the arrival of a torrid summer. You look out the window and envy the people walking along Lake Michigan. Your family and friends have taken the boat out for a ride. On this beautiful weekend day, you are stuck in the office resolving some boring, but important tasks. Just as you are staring at a blank point on the wall, the phone unexpectedly rings. Jean-Pierre, a French lawyer who you met during your last trip to Côte D'Azur, asks you for advice regarding the enforcement of a French judgment in the American courts.

Excited to finally discuss something other than wills and estates, you start by asking Jean-Pierre, "In what state would you like to enforce the judgment?" Puzzled, he replies, "Why does it matter?" You explain that a judgment originating in a foreign country may be enforceable in Illinois or New York, but not in Ohio or Georgia. "Mais, comment c'est possible?"[1] You do your best to explain the current law in the United States dealing with the enforcement and recognition of foreign judgments. However, at the end of a two-hour conversation, you are not sure if Jean-Pierre comprehends what he must do to collect on the judgment. Over the course of the next few weeks, your thoughts continue to return to your frustrating conversation with Jean-Pierre.

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* J.D. Candidate, 2004; B.A. International Relations and French, Lake Forest College, 1998. The author would like to thank Professors Michael P. Seng, Walter J. Kendall, III and Mark E. Wojcik for their valuable comments and guidance throughout law school and Professors Ghada Talhami and Cynthia Hahn for their time and expertise during my undergraduate studies. Special thanks to Mark Lichtenwalter and the entire John Marshall Law Review editorial staff. The author is also grateful to Anna Kempisty and Ryan Keintz for their constant friendship and to George Agirbicean for his patience and unfailing support. I dedicate this comment to my parents, for their ingrained love of life and for never once losing faith in me.

1. French for "But, how is that possible?"

Convinced that the efforts of the international community will fail to create a treaty establishing uniform enforcement of foreign judgments, you decide to begin lobbying for federal legislation concerning the recognition and enforcement of foreign money judgments.

This Comment begins with a short overview of the international and United States law concerning recognition and enforcement of foreign monetary judgments. Part II first discusses the current status of international law and various international legal instruments. Part II continues with an overview of various sources of United States law regarding this issue, such as the seminal case *Hilton v. Guyot*,[2] the Uniform Foreign Money-Judgments Recognition Act,[3] and the Uniform Enforcement of Foreign Judgments Act.[4] Part III provides an analysis of some controversial issues in both international and United States law. Part III first analyzes two main problems facing a proposed multinational Convention on the recognition and enforcement of foreign judgments. Part III then discusses three particular aspects of the United States approach. Finally, Part IV proposes a uniform Federal statute intended to regulate the enforcement of foreign money judgments.

II. CURRENT INTERNATIONAL AND UNITED STATES LAW

A. International Law

While the United States is not a party to any bilateral treaty[5] or multilateral international convention governing reciprocal recognition and enforcement of foreign judgments, other countries have entered into such reciprocal agreements.[6] In Europe, three multilateral money judgment conventions are currently in force:

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

3. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 Part II U.L.A. 39 (2002).

4. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT (revised 1964), 13 Part I U.L.A. 155 (2002).

5. *See* Joseph J. Simeone, *The Recognition and Enforceability of Foreign Country Judgments*, 37 ST. LOUIS U. L.J. 341, 362 (1993) (noting the failed attempt of the United States and United Kingdom to negotiate a bilateral treaty in the 1970s).

6. *See* Dennis Campbell & Dharmendra Popat, *Strategies for Effective Management of Crossborder Recognition and Enforcement of American Money Judgments*, 56 AM. JURISPRUDENCE TRIALS 529, 541 n.8 (1995) (stating that the United States is not a member to any treaty or multinational convention assisting with recognition and enforcement of judgments abroad); *see also* Matthew H. Adler, *If We Build It, Will They Come?–The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79, 80 (1994) (stating that opposing attitudes about the existence of a treaty regarding enforcement of foreign judgments is by no means a product of the twentieth century).

the Brussels Convention,[7] the Lugano Convention,[8] and the San Sebastian Convention.[9] Most Latin American countries are also parties to similar multilateral conventions.[10] Collaboration in the

7. European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O. J. Spec. Ed. (L 229) 32; 8 I.L.M. 229 (1969) [hereinafter "Brussels Convention"] as amended by the Denmark - Ireland - United Kingdom: Convention on Accession to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Oct. 9 1978, 1978 O. J. (L 304) 1; 18 I.L.M. 8 (1979). A consolidated and updated version of the 1968 Brussels Convention and the Protocol of 1971, following the 1989 accession of Spain and Portugal, appears at 1990 O.J. (C 189) 2, 29 I.L.M. 1413 (1990), *available at* http://curia.eu.int/common/recdoc/convention/en/c-textes/brux-textes.htm (last visited Oct. 7, 2003). The purpose of the Brussels Convention was to synchronize the domestic law on jurisdiction and enforcement of judgments of the member countries and to promote trade within the European community. *See* John Fitzpatrick, *The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States*, 8 CONN. J. INT'L L. 695, 699 (1993) (citing to the Preamble of the Brussels Convention).

8. European Communities–European Free Trade Association: Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O. J. (L 319) 9; 28 I.L.M. 620 (1989), *available at* http://www.curia.eu.int/
common/recdoc/convention/en/c-textes/_lug-textes.htm (last visited Oct. 7, 2003). The Lugano Convention is a companion instrument to the Brussels Convention that extends the principles of the latter convention to European countries that are not part of the European Union. Jeffrey D. Kovar, *Negotiations at the Hague Conference for a Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments*, § Background, United States Department of State, *available at* http://www.house.gov/
judiciary/kova0629.htm (last visited Oct. 7 2003).

9. Convention on the Accession of the Kingdom of Spain and the Portuguese Republic to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice with the Adjustments Made to Them by the Convention on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland and the Adjustments Made to Them by the Convention on the Accession of the Hellenic Republic, May 26, 1989, 1989 O.J. (L 285) 1, *available at* http://www.curia.eu.int/
common.recdoc/convention/en/c-textes/brux06c-idx.htm (last visited Oct. 7, 2003). In May of 1989, the San Sebastian Convention allowed the "accession of Spain and Portugal to the Brussels Convention." Fitzpatrick, *supra* note 7, at 698. Together with the Brussels Convention and the Lugano Convention, these three instruments unify European Law regarding jurisdiction and enforcement of judgments. *Id.* The substantive differences between the three conventions concern employment contracts, choice of forum clauses, and short-term tenancies. *Id.* at 709.

10. *See* James O. Ehinger, *How to Help Insure that a U.S. Judgment Will Be Enforceable Overseas: Pre-litigation Planning in Multinational Cases,* 33 ARIZ. ATT'Y 20, 22 n.1 (1997) (referring to "the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, promulgated on May 8, 1979 at Montevideo, Uruguay and the Inter-American

area of international litigation is difficult to achieve, but it is possible nonetheless.[11] Such collaboration is illustrated by the negotiation of international treaties that have already codified the service of process,[12] the taking of evidence,[13] and the enforcement of foreign arbitral awards.[14]

Since 1993, approximately fifty countries[15] have been negotiating a worldwide Convention on Jurisdiction and Recognition of Foreign Judgments in Civil and Commercial Matters under the auspices of the Hague Conference on Private International Law ("Convention").[16] This Convention[17] is based on

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Convention on Jurisdiction in the International Sphere for Extraterritorial Validity of Foreign Judgments, promulgated on May 24, 1984 at La Paz, Bolivia").

11. *See* Adler, *supra* note 6, at 81 (noting an increased level of cooperation in certain areas of international litigation).

12. Convention on the Services Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, *available at* http://www.hcch.net/e/conventions/text14e.html (last visited Oct. 6, 2003).

13. Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, *available at* http://www.hcch.net/e/conventions/
text20e.html (last visited Oct. 6, 2003).

14. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, *available at* http://www.uncitral.org/english/texts/arbitration/
NY-conv.htm (last visited Oct. 6, 2003).

15. James Love, *What You Should Know about The Hague Conference on Private International Law's Proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, § How Does The Treaty Work, Project on Technology, (2001), *available at* http://www.cptech.org/ecom/jurisdiction/whatyoushouldknow.html (last visited Oct. 6, 2003). There are currently at least forty-nine members of the Hague Conference. *Id.*

16. Michael Traynor, *An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: U.S. and European Perspectives*, 6 ANN. SURV. INT'L & COMP. L. 1, 5 (2000).

17. The preliminary draft Convention was revised by a Special Commission at a meeting held at The Hague in October 1999. *Future Hague Conventions on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, *available at* http://www.hcch.net/e/workprog/jdgm.html (last visited Sept. 7, 2003). Part One of the Nineteenth Diplomatic Session, which was held in June 2001, drafted a new version of the interim text. *Id.* Commission 1 of the Nineteenth Session was held in the course of 2002. *Id.* From April 22 to 24, 2002, the Commission "met in The Hague in order to decide . . . about the future direction" of the Convention. Andrea Schulz, *Preliminary Document No. 19– Reflection Paper to Assist in The Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, Hague Conference on Private International Law, 5 (2002), *available at* ftp://ftp.hcch.net/doc/jdgm_pd19e.doc (last visited Oct. 6, 2003). The informal working process will continue and the Permanent Bureau will prepare a final text for submission to a special commission during the first

principles similar to the Brussels and Lugano Conventions, but it would be open to a much greater number of countries, and it would not have an ultimate tribunal such as the European Court of Justice or the United States Supreme Court.[18]

Currently, there are at least six major areas where a lack of consensus exists: 1) "the Internet and e-commerce," 2) "patents, trademarks, copyrights and other intellectual property rights," 3) "activity based jurisdiction," 4) "consumer contracts . . . and employment contracts," 5) "the relationship with other instruments or . . . Conventions," (i.e. the Brussels and Lugano Conventions), and 6) "bilateralisation."[19]

There are also a number of international agreements in force dealing with the recognition and enforcement of arbitral awards.[20] The most significant treaty in international arbitration is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, also known as the New York Convention.[21] Other important multilateral arbitration treaties are the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established the International Centre for the Settlement of Investment Disputes ("ICSID"),[22] and the Inter-American Convention on International Commercial Arbitration.[23]

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half of 2003 followed by a Diplomatic Conference at the end of 2003. *Id.*

18. Traynor, *supra* note 16, at 6.

19. *See* Permanent Bureau, *Preliminary Document No. 16: Some Reflections on the Present State of Negotiations on the Judgments Project in the Context of the Future Work Programme of the Conference*, Hague Conference on Private International Law, ¶ 5 (2002), *available at* ftp://hcch.net/doc/gen_pd16e.doc (last visited Oct. 6, 2003) [hereinafter "Preliminary Document 16"] (noting that while the concerns are seemingly interrelated, they do not necessarily affect the proposed Hague Convention in the same way).

20. *See Conventions*, *at* http://www.kluwerarbitration.com/arbitration/arb/conventions/ (last visited Oct. 6, 2003) (mentioning the most important conventions dealing with arbitration).

21. Over 125 countries have signed this arbitration treaty. Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 TEX. INT'L L.J. 43, 46 (2002). Before the New York Convention, the Geneva Protocol of 1923 set up the framework for the enforcement of arbitral awards. *Id.* at 54.

22. More than one hundred thirty countries have signed the ICSID Convention. ICSID, *List of Contracting States*, (2003), *at* http://www.worldbank.org/icsid/constate/constate.htm (last visited Sept. 11, 2003). Although ICSID arbitration has not been employed very often in the past, it is anticipated to become more important in the future because of the North American Free Trade Agreement. ICSID, *About ICSID*, *at* http://www.worldbank.org/icsid/about.htm (last visited Sept. 11, 2003).

23. SICE, *Dispute Settlement: Commercial Arbitration, The Inter-American Convention on International Commercial Arbitration*, *at*

As a result of most countries' pervasive use of these arbitration treaties, particularly the New York Convention, it is less difficult to enforce a foreign arbitration award than a foreign court judgment.[24] Paradoxically, an individual who seeks resolution of a dispute in court receives "more protection from an enforcement perspective than an individual who proceeds outside of the national court system and instead elects arbitration."[25]

B. United States Law

Unlike judgments delivered in other states, judgments rendered in foreign countries are not entitled to the benefit of the Full Faith and Credit Clause of the United States Constitution.[26] No law of the United States bars enforcement or recognition of foreign judgments;[27] however, there is no national law requiring enforcement or recognition of foreign judgments.[28] In the absence of national legislation or a treaty, the issue of enforcement of foreign judgments is left to the common law[29] and the laws of each individual state.[30] Under the current law, if an individual seeks to enforce or recognize a foreign judgment in the United States, he or she must file suit before a court of competent jurisdiction.[31] The court will then decide whether to enforce or recognize the foreign judgment.[32]

1. The Starting Point: Hilton v. Guyot

The English common law rule was that a foreign judgment

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http://www.sice.oas.org/dispute/
comarb/ iacac2e.asp (last visited Sept. 11, 2003). The United States and eighteen other countries have signed this treaty. *Id.* The instrument is significant because it provides for default application of the rules of procedure of the Inter-American Commercial Arbitration Commission, unless the parties' express agreement provides the contrary. *Id.*

24. Adler, *supra* note 6, at 82.

25. *Id.*

26. Ronald A. Brand, *Enforcement of Foreign-Money Judgments in the United States: In Search of Uniformity and International Acceptance,* 67 NOTRE DAME L. REV. 253, 258 (1991) (citing U.S. CONST. art. IV, § 1).

27. RALPH H. FOLSOM, MICHAEL WALLACE GORDON, & JOHN A. SPANOGLE, JR., INTERNATIONAL BUSINESS TRANSACTIONS 1109 (2d ed. 2001).

28. *See generally* Rachel B. Korsower, *Matusevitch v. Telnikoff: The First Amendment Travels Abroad, Preventing Recognition and Enforcement of a British Libel Judgment,* 19 MD. J. INT'L L. & TRADE 225, 237 (1995) (noting the absence of a national standard).

29. Brand, *supra* note 26, at 258.

30. Korsower, *supra* note 28, at 232; *see also* Department of State, *Enforcement of Judgments*, § Enforcement of a Foreign Judgment in the U.S., *available at* http://travel.state.gov/enforcement_of_judgments.html (last visited Oct. 6, 2003) (noting that a letter rogatory in the United States under 28 U.S.C. § 1782 cannot carry out enforcement of a foreign judgment).

31. Department of State, *supra* note 30.

32. *Id.*

was only "*prima facie* evidence of the matter decided" and was therefore not conclusive of the merits of the dispute between the parties.[33] In 1895, the United States Supreme Court rejected the English rule in the seminal case of *Hilton v. Guyot*.[34] Under the *Hilton* rule, a procedurally regular and non-fraudulently obtained foreign judgment enjoyed conclusive effect.[35] This new rule was based on comity.[36] After recognizing that "international law, in its widest and most comprehensive sense . . . is part of [the United States] law,"[37] Justice Gray defined comity as follows:

> 'Comity' . . . is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[38]

After engaging in a detailed analysis of the law of other nations,[39] the court concluded that "the rule of reciprocity has worked itself firmly into the structure of international jurisprudence."[40] The court held that foreign judgments, rendered in a country that reviews United States judgments on the merits, were "not entitled to full credit and conclusive effect" in the United

33. Folsom, *supra* note 27, at 1109.

34. *Hilton*, 159 U.S. at 113.

35. *Id.* at 202-03. The court enumerated specific requirements that allow recognition and enforcement of foreign judgments: the foreign court rendering the judgment must have had jurisdiction over the cause of action and the judgment "must have been rendered . . . upon regular proceedings and due notice." *Id.* at 166-67. The foreign court must have had a system of jurisprudence that would assure an "impartial administration of justice" between the parties. *Id.* at 202. Absence of prejudice in the court or in the system of laws and lack of fraud in procuring the judgment are also essential factors. *Id.* The court held that if all of these requirements were met, and in the absence of any other special reason, then the merits of the case should not be tried again upon the simple assertion of one party that the original judgment was incorrect "in law or in fact." *Id.* at 203.

36. Folsom, *supra* note 27, at 1109.

37. *Hilton*, 159 U.S. at 163.

38. *Id.* at 163-64. The term "recognition" mentioned in this part of the opinion does not mean recognition of foreign judgments. Brand, *supra* note 26, at 259 n.18. Recognition means the acknowledgment that the laws of another nation should receive some deference. *Id.*

39. *See Hilton*, 159 U.S. at 206-27 (mentioning the laws of England, Russia, France, Holland, Belgium, Denmark, Germany, Switerzland, Poland, Romania, Bulgaria, Austria, Italy, Monaco, Spain, Portugal, Greece, Egypt, Cuba, Puerto Rico, Mexico, Peru, Chile, Brazil, Argentina, and Norway).

40. *Id.* at 227. The court found that in the majority of countries "the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed." *Id.*

States courts.[41] However, such judgments could be "prima facie evidence . . . of the justice of the plaintiff's claim."[42]

Even though *Hilton* "was ultimately decided on the issue of reciprocity," this requirement has been either abandoned or overlooked by subsequent decisions.[43] Most European countries, though, still require reciprocity.[44] However, most of the other elements of the comity analysis have found their way into judicial decisions, statutes, and Restatements.[45]

2. *Current Sources of United States Law: Complete Confusion for the Foreign Lawyer*

Under the United States Constitution, both Congress and the Executive have the authority to develop "a truly national approach to the recognition and enforcement of foreign money-judgments," as Congress has the power to regulate foreign commerce, and the Executive has the power to handle foreign relations matters.[46] Neither the Congress nor the Executive has yet chosen to act.[47] The issue therefore remains a matter of state law, regardless of whether the cause of action for enforcement is sought in federal or state court.[48] From the perspective of a foreign lawyer or foreign court, there is the "appearance of . . . fifty-one separate 'United States policies' on the enforcement of foreign judgments."[49]

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41. *Id.*

42. *Id.*

43. Brand, *supra* note 26, at 261. The reciprocity requirement continues to be a mandatory ground in some states, for example, Georgia, and a discretionary standard in other states, such as Idaho, Massachusetts, Ohio, and Texas. *Id.* at 263 n.35; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. d (1987) (asserting that United States courts have by and large abandoned the requirement of reciprocity); Linda Silberman, *Enforcement and Recognition of Foreign Country Judgments in the United States*, 648 PLI/LIT 255, 260 (2001) (giving examples of cases in which recognition was refused because of lack of reciprocity).

44. *See* Korsower, *supra* note 28, at 236-37 (noting that because many countries still require reciprocity before recognizing a foreign judgment, "the fact that the United States does not have a uniform federal law in this area makes it difficult for an American litigant to satisfy foreign reciprocity requirements" in other countries).

45. Brand, *supra* note 26, at 261; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481-82 (1987); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1989).

46. *See* Brand, *supra* note 26, at 257 (referring to U.S. CONST. art I, § 8 and U.S. CONST. art. II, § 2).

47. *See* Korsower, *supra* note 28, at 237 (noting the absence of a national standard).

48. *See* Brand, *supra* note 26, at 262-63 (applying the Erie doctrine, even if a lawsuit is filed in a federal court on diversity grounds, federal courts must determine the applicable state law on recognition and enforcement of foreign judgments).

49. Adler, *supra* note 6, at 85.

a. The Uniform Acts

"In 1948 the National Conference of Commissioners on Uniform State Laws approved the original Uniform Enforcement of Foreign Judgments Act" ("Enforcement Act").[50] This Act was revised in 1964[51] to introduce a registration procedure for enforcement of sister-state judgments, similar to the inter-district registration procedure under federal statute.[52]

As for foreign-country money judgments, in 1962 the National Conference of Commissioners on Uniform State Laws approved the Uniform Foreign Money-Judgments Recognition Act ("Recognition Act").[53] While there are differences in detail, as a whole, the rules for recognition of foreign judgments under the Brussels and Lugano Conventions are similar to the provisions of the Recognition Act, the Enforcement Act,[54] and the rules of the Restatement (Third) of Foreign Relations Law.[55]

Confining itself to foreign-country money judgments, the Recognition Act provides for treatment equivalent to that of sister-

50. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT (revised 1964) Prefatory Note, 13 Part I U.L.A. 156 (2002). The 1948 Act provided for a summary judgment procedure; the Act as amended in 1964 provides for a "speedy and economical" enforcement procedure for foreign judgments based on similar procedures used in federal courts. *Id.* at 156-57.

51. *Id.* at 157.

52. *Id.* *See also*, Korsower, *supra* note 28, at 233-34 (stating that the Enforcement Act implements the Full Faith and Credit Clause and allows for recognition of sister-state judgments and judgments rendered in the United States federal courts; however, the Enforcement Act does not by itself apply to foreign judgments).

53. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 Part II U.L.A. 39 (2002).

54. *See* Fitzpatrick, *supra* note 7, at 721 (noting that the Brussels/Lugano Convention's regime is comparable to the United States law under the Due Process and Full Faith and Credit Clauses). Nevertheless, instead of simply defining the limits of due process, the European countries have "explicitly formulated the bases of jurisdiction." *Id.* Also, under the Brussels/Lugano Convention, the fact that a defendant is a domiciliary in a signatory country is very significant. *Id.* at 722. If the defendant to the original lawsuit is domiciled in Europe, "jurisdictional tests are permitted only when the limited exceptions apply . . . . [I]f the original defendant is not domiciled in Europe, jurisdictional tests are not permitted . . . ." *Id.* It also seems that Europe and the United States are moving in opposite ways regarding "exorbitant assertions of jurisdiction over foreign defendants." *Id.* at 726. The main reasons for these divergent views are (1) the United States "due process clause that applies equally to Americans and foreigners not domiciled in the United States," and (2) the forum non conveniens doctrine. *Id.*

55. *See* Brand, *supra* note 26, at 268 (noting that "there are only two significant differences between the Recognition Act and the Restatement": (1) the Recognition Act considers "lack of subject matter jurisdiction as a mandatory ground for non recognition," while the Restatement treats it only as a discretionary ground, and (2) the Recognition Act includes a limited forum non conveniens ground as a discretionary ground for non-recognition).

state judgments: "The foreign judgment is enforceable in the same manner as the judgment of a sister-state which is entitled to full faith and credit."[56] "Those states that have not adopted the [Recognition Act] either reject judgments and require a de novo trial, or they recognize and enforce judgments after applying tests" similar to those employed in *Hilton*.[57]

The recognition process has two parts: (1) determining whether the foreign judgment must or may be recognized, and (2) describing how recognition must or may be sought.[58] The Recognition Act deals with the first part, the substantive "if," and the Enforcement Act deals with the second part, the procedural "how."[59] While a recognition action is generally the foundation for an enforcement action, one may seek recognition of a foreign judgment without enforcement.[60]

b. The Recognition Act

At least thirty-one states have adopted the Recognition Act.[61] Section 1 of this Act defines a foreign state and a foreign judgment.[62] Section 2 outlines the scope of the Act.[63] The Recognition Act applies to "any foreign judgment that is final and conclusive and enforceable" where originally rendered.[64] Generally, a foreign judgment is deemed conclusive when it

56. 13 Part II U.L.A. 49, § 3.

57. Folsom, *supra* note 27, at 1110.

58. Jerome A. Hoffman, *Recognition by Courts in the Eleventh Circuit of Judgments Rendered by Courts of Other Countries*, 29 CUMB. L. REV. 65, 69-70 (1998-1999). The "if" and the "how" of recognition have not been generally distinguished. *Id.* at 70. The "how" is mistakenly applied to the concept of enforcement, rather than seeing it as an essential part of the recognition process. *Id.*

59. *See id.* at 67-71 (noting that while enforcement looks more like an executive function, recognition seems to be more of a judicial function).

60. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. b (1987) (noting that the purposes for which one may want a foreign judgment recognized, but not enforced, include: res judicata, reliance on a prior determination of law or fact, seeking an injunction, declaring rights, determining status, or the attachment of property).

61. 13 Part II U.L.A. 39, Table of Jurisdictions Wherein Act Has Been Adopted.

62. *Id.* at 43-44, § 1. A "foreign state" is defined as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands." *Id.* at 43. A "foreign judgment" is defined as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." *Id.* at 44.

63. *Id.* at 46, § 2.

64. *Id.*

"grants or denies recovery of a sum of money."[65] If recognized, the foreign judgment is enforceable in the same manner as the judgment of a sister-state.[66]

Section 4 of this Act states the basis for non-recognition.[67] First, the Act establishes the mandatory criteria for non-recognition: (1) the judgment was not rendered by an impartial tribunal or the procedures did not satisfy due process; (2) the court that issued the judgment did not have personal jurisdiction; or (3) the court did not have subject matter jurisdiction.[68] Second, the Act enumerates the discretionary grounds for non-recognition: (1) "the defendant . . . did not receive notice of the proceedings in sufficient time to enable him to defend;" (2) fraud; (3) public policy; (4) conflict with another final judgment; (5) the foreign proceeding was contrary to a dispute resolution agreement between the parties; or (6) the foreign proceeding was held in a "seriously inconvenient forum."[69] Reciprocity is generally not required, although a few states have added this requirement.[70]

c. The Enforcement Act

A judgment delivered in a foreign country is not enforceable unless it is recognized.[71] When a foreign country judgment is recognized under a state's Recognition Act, it is then entitled to full faith and credit as outlined in the state's Enforcement Act.[72] The Enforcement Act does not outline a new enforcement proceedings process.[73] The Enforcement Act deals with the enforcement procedure by providing states a "speedy and economical method of doing that which [they are] required to do by the Constitution of the United States."[74] Because the Enforcement Act applies to sister-state judgments, forty-eight jurisdictions have adopted a version of it.[75]

Section 1 of this Act defines a foreign judgment as "any judgment, decree or order of a court of the United States or of any

65. *Id.* at 49, § 3.

66. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3, 13 Part II U.L.A. 49 (2002).

67. *Id.* at 58-59, § 4.

68. *Id.* at 58-59, § 4(a).

69. *Id.* at 59, § 4(b).

70. Traynor, *supra* note 16, at 5.

71. Korsower, *supra* note 28, at 234. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987) (explaining the grounds for non-recognition of foreign judgments).

72. Korsower, *supra* note 28, at 234.

73. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT (revised 1964) Prefatory Note, 13 Part I U.L.A. 157 (2002). This Act merely "adopts the practice which, in substance, is used by Federal courts." *Id.*

74. *Id.*

75. *Id.* at 155-56, Table of Jurisdictions Wherein the 1964 Act Has Been Adopted.

other court which is entitled to the full faith and credit" in the enacting state.[76] Section 2 provides an expedited procedure for registration: parties must file an authenticated copy of the judgment, together with the motions papers, with the clerk of the Circuit (or District) Court.[77] The clerk is then obliged to treat the foreign judgment in the same manner as a domestic judgment of the enforcing state.[78] Therefore, such judgment is enforceable and satisfiable in the same fashion as the judgment of a sister-state.[79]

Section 3 requires that at the time of filing the foreign judgment, the holder of the judgment must file "an affidavit setting forth the name and last known post office address of the judgment debtor, and the judgment creditor."[80] The clerk of the respective court will mail the notice of filing to the judgment debtor.[81] The debtor has a certain number of days to comply before an execution or another enforcement proceeding is commenced.[82] Section 4 indicates when a stay should occur, and section 5 specifies the fee to be paid at the time of filing.[83]

III. EXISTING PROBLEMS AND UNPREDICTABILITY ISSUES

The Hague delegations currently drafting the proposed Convention on recognition and enforcement of foreign judgments fail to agree on several issues.[84] Two main areas of concern are the Internet and intellectual property.[85] In addition, current United States law deals with certain issues in a different manner than other countries, which creates unpredictability.[86]

A. The Proposed Hague Convention's Main Problems

1. Internet and Electronic Commerce

The area of electronic commerce ("e-commerce") is of crucial

76. *Id.* at 160, § 1.

77. *Id.* at 163, § 2.

78. *Id.* A judgment filed in this manner "has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment" of the enforcing state. *Id.*

79. UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT § 2 (revised 1964), 13 Part I U.L.A. 163 (2002).

80. *Id.* at 226, § 3(a).

81. *Id.* at § 3(b).

82. *Id.* at § 3(c).

83. *Id.* at 234-39, §§ 4-5.

84. *See supra* note 19 and corresponding text.

85. *See id.* (noting that the other areas of concern include jurisdictional activities, consumer contracts, employment agreements, the relation with other instruments or conventions, and bilateralisation).

86. *See infra* Part III B of this Comment for a discussion of some of these issues: the public policy exception, the statute of limitations, and the treatment of default judgments.

importance for the Convention.[87] The Internet has become a vital part of many people's lives and it is an essential component of the economic and cultural development of a country.[88] However, e-commerce has created novel and multifaceted issues for the drafters of the Convention.[89] Nevertheless, it has been argued, e-commerce should be an integral part of the Convention.[90]

While delegations seem to agree that the Convention should deal with e-commerce, there is no consensus on exactly how the Convention should do this.[91] Past negotiations have illustrated the difficulties and complexities encountered when dealing with this issue.[92] International groups and experts representing the private sector have made their anxieties known.[93] These groups opine that the Convention, as currently drafted, would harm the growth of the e-commerce industry.[94] Moreover, the law regarding Internet issues is still fluctuating in many countries.[95]

One area of concern is the situation in which disputes occur

87. *See* Preliminary Document 16, *supra* note 19, at ¶ 5 (stating that the issue deserves special attention because of its double impact on the Convention). On the one hand, e-commerce increases the intricacies of the issues addressed in specific provisions. *Id.* On the other hand, e-commerce underlines the common need for a predictable global framework of the issue. *Id.*

88. *Id.* at ¶ 6.

89. Mary Shannon Martin, *Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT'L L.J. 125, 126-27 (2002).

90. Preliminary Document 16, *supra* note 19, at ¶ 8. *See also* Avril D. Haines, *Preliminary Document No 17: The Impact of the Internet on the Judgments Project: Thoughts for the Future*, Hague Conference on Private International Law, ¶ 4 (2002), *available at* http://hcch.net/doc/gen_pd17e.doc (last visited Oct. 17, 2002) (noting that if the issue is not addressed, the current legal uncertainty could have economic costs).

91. *See, e.g.*, Catherine Kessedjian, *Preliminary Document No 12: Electronic Commerce and International Jurisdiction*, Hague Convention on Private International Law, Conclusion, *available at* http://hcch.net/doc/gen_pd12e.doc (last visited Sept. 22, 2002) (stating that "everything possible should be done to adapt the Convention to the needs of electronic commerce").

92. "The Hague Conference held a roundtable workshop in Geneva in September 1999," and a special experts meeting in Ottawa in February 2000, dedicated solely to electronic commerce issues raised by the proposed draft. Kovar, *supra* note 8, at § Electronic Commerce and Intellectual Property Issues.

93. Haines, *supra* note 90, at ¶ 5. *See also* Martin, *supra* note 89, at 139-41 (noting the consumer advocate reactions as voiced by the Consumer Project on Technology and the Trans Atlantic Consumer Dialogue, and arguing that the views of such groups should be given more weight in the negotiations of the proposed Hague Convention).

94. Haines, *supra* note 90, at ¶ 5.

95. *See id.* at ¶ 18 (illustrating how the courts and the legislative bodies of the United States, Canada, Germany, Italy, France, China, and Australia have struggled to translate traditional jurisdictional principles into doctrines which can be effectively applied to Internet-related matters).

over an Internet transaction, but the parties to the transaction did not take the preventative measure of drafting a choice of court clause that is valid under the Convention.[96] While the European Union's solution to these concerns provides an example of how these issues are resolved, it also illustrates how the road to agreement is difficult and bumpy.[97]

Based on the Brussels and Lugano Conventions, the Brussels Regulation[98] undertakes a country-of destination approach.[99] Moreover, member states of the European Union enacted legislation meant to synchronize choice of law legislation and substantive law where possible and necessary.[100] In certain instances, the result was a mixed approach combining country-of-destination principles with country-of origin principles for the regulatory regime.[101]

After answering policy questions and before drafting the appropriate Internet provisions, there are other issues that require consideration.[102] Some of the questions in great need of answers are: (1) whether the supply of information on a website is deemed to be "frequent [and or] significant activity," thereby subjecting the provider of the information to jurisdiction under Articles 6 and 7; (2) whether information such as downloaded software is considered a "good" or a "service" and whether that is enough for the assertion of jurisdiction under Articles 6 and 7; (3)

96. Permanent Bureau, *supra* note 19, at ¶ 8(1). *See also* Haines, *supra* note 90, at ¶ 7 (stating that consumers and businesses support opposite jurisdiction rules: consumers want jurisdiction to be based on country-of-destination principles, while businesses support country-of-origin principles).

97. Haines, *supra* note 90, at ¶ 12.

98. *See id.* (citing to the Council Regulation 44/2001/EC of 22 Dec. 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 5, 2001 O.J. (L 12/1) 16).

99. *Id.* The Brussels Regulation allows consumers within the European Union to bring suit in their home country courts against foreign operators of e-commerce sites, where those sites have targeted the consumer's home country by direct marketing. Martin, *supra* note 89, at 142. The consumer's right to bring a cause of action in his or her home country is limited to situations where the dispute involves "active" Internet sites. *Id.*

100. Haines, *supra* note 90, at ¶ 12 (referring to a number of examples such as the "Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167/10); the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, 1999 O.J. (L 13/12) . . . .").

101. Haines, *supra* note 90, at ¶ 12. However, it must be noted that countries outside the European Union that "favour self-regulation and freedom of speech" do not necessarily share the European Union's solutions in relation to consumers and privacy. *Id.* at ¶ 13.

102. *See id.* at ¶¶ 16-17 (pointing out some of the difficulties and complexities that have been raised during various stages of the negotiations).

whether a website is considered "regular commercial activity" under Article 9, therefore allowing for a finding of jurisdiction; and (4) whether the "foreseeability" provision in Article 10 requires an all or nothing approach, or whether the introduction of a new concept such as "targeting"[103] is advisable.[104]

2. *Intellectual Property*

Intellectual property ("IP") has its own set of complex issues.[105] The World Intellectual Property Organization ("WIPO") recently convened experts to discuss the potential effects of the current draft Convention on international litigation involving patent, trademark, and copyright issues.[106] Under the Brussels Convention, and in the current text of the preliminary draft Convention, "jurisdiction over certain types of claims involving registered intellectual property rights is limited to the country of registration."[107] This requirement has led to major divergent opinions, with the United States delegation seeming to have the most concerns.[108]

The comments presented at the 2001 expert meeting in the United States focused on two points: (1) "almost uniform opposition in the private sector to the current text [of the Convention] as it applies to intellectual property rights," and (2) considerable confusion regarding the structure of the draft Convention text.[109] The main objection was that the United States "could not accept [personal] jurisdiction in infringement on IP rights cases over a defendant who had no relation to the jurisdiction."[110]

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103. "Targeting" occurs when "the enterprise has specifically targeted consumers in a particular country." *Id.* at ¶ 9 n.27. When businesses do this, "it would be consistent to decide that the courts of that country have jurisdiction for consumers residing on its territory." *Id.*

104. *Id.* at ¶ 17.

105. Recognizing that special attention should be paid to IP issues, several meetings were held to discuss these issues in Washington, D.C., Geneva, Ottawa, and Edinburgh over the course of the last three years. Marc E. Hankin, *Proposed Hague Convention Would Help IP Owners*, THE NAT'L L.J., July 23, 2001, at C20.

106. Kovar, *supra* note 8, at § Electronic Commerce and Intellectual Property Issues.

107. *Id.*

108. *See* Permanent Bureau, *Preliminary Document 13: Report of the experts meeting on the intellectual property aspects of the future Convention on jurisdiction and foreign judgments in civil and commercial matters*, Hague Conference on Private International Law, § 1 (2001), *available at* http://hcch.net/doc/jdgmpd13.doc (last visited Oct. 17, 2002) (stating that the United States could not become a member country as long as the Convention remained structured along the lines of the preliminary draft Convention).

109. *Id.*

110. *Id.* The United States delegation also raised questions about the need for exclusive jurisdiction, and questioned whether the real concern was

In addition, there were also procedural disagreements regarding future efforts to resolve these IP concerns. On one hand, the French delegation proposed that the 1999 preliminary draft Convention should be used as a starting point to deal with the controversial IP issues.[111] On the other hand, the United States delegation objected to this suggestion, opposed engaging in a debate regarding a non-consensus text, and preferred that all delegations start from scratch and work together to "build up a convention text on which broader agreement exists."[112]

B. The Unpredictability of the American Approach

1. The Public Policy Exception

Most countries will not recognize or enforce a foreign judgment if it is contrary to their own public policy.[113] This provision appears in the Brussels Convention[114] and in the proposed Hague Convention.[115] In the United States, the public policy exception is a discretionary ground of non-recognition in both the Recognition Act[116] and the Restatement (Third) of Foreign Relations.[117] Generally, in the United States, the provision has

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exclusivity or concentration of jurisdiction. *Id.* at § 2.

111. *Id.* at § 6.

112. *Id.*

113. Korsower, *supra* note 28, at 238. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 cmt. f (1987) (stating that "[c]ourts will not recognize or enforce foreign judgments based on claims perceived to be contrary to fundamental notions of decency and justice"). *See also* The Committee on Foreign and Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 THE RECORD 378, 380 (2001) (noting the results of a survey on recognition of United States money judgments abroad in response to a request by the Department of State). Within the context of public policy of other foreign nations, four principal reasons have emerged for refusal of enforcement of United States judgments: "(a) judgments awarding multiple or punitive damages; (b) judgments deemed to have the effect of unacceptably restraining trade; (c) judgments based on decisions grounded in novel causes of action; and (d) judgments deemed to be based on U.S. public law or having a criminal or quasi-criminal nature." *Id.* at 391.

114. *See* European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *supra* note 7, at art. 27 (stating that "[a] decision shall not be recognized . . . if it is contrary to public policy in the State in which recognition is sought").

115. *See Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, The Hague Conference on Private International Law, art. 28(1) (1999), *available at* http://www.hcch.net/e/conventions/draft36e.html#text (last visited Nov. 9, 2002) (stating that "[r]ecognition or enforcement of a judgment may be refused if . . . recognition or enforcement would be manifestly incompatible with the public policy of the State addressed").

116. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3), 13 Part II U.L.A. 59 (2002).

117. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE

been construed narrowly[118] and rarely has led to denial of recognition or enforcement of foreign judgments.[119] Nevertheless, defining what is encompassed by public policy is problematic.[120]

Since the Recognition Act separately lists specific grounds for resisting recognition of a foreign judgment, such as lack of due process or lack of personal jurisdiction, clearly those grounds fall outside the public policy exception.[121] If a particular cause of action no longer exists in the recognizing state, such as a suit for breach of promise to marry, this does not mean that recognition of such a judgment would violate public policy.[122] Moreover, the fact that the United States courts would have dealt with the dispute in a different manner than a foreign court is not dispositive of the recognition or enforcement issue.[123] Contrary to the practice in some European states, the fact that a foreign legal judgment is

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UNITED STATES § 482(2)(d) (1987) (stating that a United States court does not need to recognize a foreign judgment if "the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought").

118. Korsower, *supra* note 28, at 239.

119. Brand, *supra* note 26, at 275. *See* The Soc'y of Lloyds v. Webb, 156 F. Supp. 2d 632, 642-43 (N.D. Tex. 2001) (finding that a default judgment entered by an English court requiring an American member of an English insurance syndicate to immediately fund the reinsurer, and to litigate the claims against the overseer of the syndicate, was not repugnant to Texas public policy against judgments obtained through cognovits); *see also* Guinness PLC v. Ward, 955 F.2d 875, 886 (4th Cir. 1992) (holding that a cause of action brought in Great Britain by a corporation against a former director alleging breach of fiduciary duty was not repugnant to Maryland's public policy); Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 688-89 (7th Cir. 1987) (rejecting the argument that a Belgian judgment was contrary to the public policies of Illinois regarding freedom of contract and extensive regulation of employment relationships).

120. Korsower, *supra* note 28, at 239.

121. *Id.* Because most of the non-recognizable cases generally fit at least one of the enumerated grounds, few judgments would actually fall in the category of judgments that are not recognizable because they violate domestic public policy. *Id.*

122. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 cmt. f (1987). *See* Neporany v. Kir, 173 N.Y.S.2d 146, 147-48 (N.Y. App. Div. 1958) (enforcing a Quebec judgment based on a claim for seduction and criminal conversation, though such cause of action abolished in New York); *see also* Compania Mexicana Rediodifusora Franteriza v. Spann, 41 F. Supp. 907, 909 (N.D. Tex. 1941), *aff'd*, 131 F.2d 609 (5th Cir. 1942) (awarding costs, including attorney's fees, against an unsuccessful plaintiff in a Mexican action, though costs and attorneys fees would not be granted by the forum state in similar circumstances).

123. *See* Brand, *supra* note 26, at 275 (noting that simple differences in policy or procedure between the United States and the foreign country will not necessarily be sufficient to satisfy the exception); *see also* Ackermann v. Levine, 788 F.2d 830, 842 (2d Cir. 1986) (quoting Judge Cardozo with approval: "[w]e are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home").

different than one a United States court would have made is not sufficient to prohibit its enforcement in the United States.[124]

The public policy exception applies when there is an "overriding public interest which outweighs comity principles."[125] One federal court of appeals applied the following test: a foreign judgment should not be enforced when doing so "tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel . . ."[126]

Therefore, a judgment involving implementation of laws intended to discriminate against racial minority groups would most likely not be recognized or enforced in the United States based on public policy grounds.[127] First Amendment libel issues would also be likely to invoke public policy defenses.[128] Lastly, causes of action involving payment of United States income taxes would fall within the public policy exception.[129]

2. *The Statute of Limitations*

Neither the Recognition Act nor the Enforcement Act provides a statute of limitations for recognizing and enforcing foreign judgments.[130] One leading scholar notes, "[a] forum may use its

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124. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 reporters note 1 (1987). *See, e.g.*, Ambatielos v. Found. Co., 116 N.Y.S.2d 641, 651 (N.Y. Sup. Ct. 1952) (noting that a British judgment on a contract asserted to be contrary to the public policy in Greece, where the contract was made, was enforced in New York because it was not contrary to New York's public policy).

125. Korsower, *supra* note 28, at 239.

126. Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 443 (3d Cir. 1971).

127. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 482, reporters note 1 (1987).

128. Silberman, *supra* note 43, at 264. *See, e.g.*, Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 663-64 (N.Y. Sup. Ct. 1992) (refusing to enforce an English judgment for libel brought by an Indian national against a New York news service, because the English libel law violated the First Amendment of the United States Constitution when the English courts did not require the plaintiff to prove falsity or that the news service was at fault in any degree in disseminating another news company's press report); Telnikoff v. Matusevitch, 702 A.2d 230, 258 (Md. 1997) (holding that an English libel judgment involving an English news report written by a Russian immigrant about another Russian immigrant was contrary to the public policy of Maryland).

129. Korsower, *supra* note 28, at 242. *See, e.g.*, Overseas Inns S.A. P.A. v. United States, 685 F. Supp. 968, 972 (N.D. Tex. 1988) (holding that a Luxembourg judgment that calculated an insolvent company's United States federal income tax debt at less than $200,000, when the Internal Revenue Service claimed that it was $1,000,000, violated the "public policy that favors payment of lawfully owed federal income taxes").

130. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 Part II

own statute of limitations to . . . prevent recognition or enforcement" beyond a certain number of years.[131] However, it is not always clear what statute of limitations applies when one seeks to recognize a foreign judgment under the Recognition Act.[132] Moreover, there is a great deal of dispute as to whether the statute of limitations for enforcement should also apply to the registration of a foreign judgment.[133]

Recently, the First District Illinois Appellate Court held that the seven-year statute of limitations that would normally limit the time to enforce a judgment entered in a foreign country does not apply to its registration.[134] In doing so, the court emphasized a distinction between the "registration" and "enforcement" of foreign judgments, and criticized an earlier ruling that failed to distinguish between the recognition of a foreign judgment and the enforcement of it.[135] The Court reasoned that the current Illinois Enforcement Act contains no provision limiting the filing of a petition to register a foreign judgment, while an earlier version of the Act contained such a limitation provision.[136] The Court found that the absence of a statute of limitations period in the current Act indicated that the legislature intended to change the law.[137]

Other countries have more clearly defined approaches to the

U.L.A. 39 (2002), UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT (revised 1964), 13 Part I U.L.A. 155 (2002) (lacking such a limitation).

131. Silberman, *supra* note 43, at 282.

132. *Id. See, e.g.*, Le Credit Lyonnais, S.A. v. Nadd, 741 So. 2d 1165, 1166 (Fla. Dist. Ct. App. 1999) (holding that the relevant statute of limitations is a twenty-year statute applicable to domestic judgments, rather than the five-year statute applicable to traditional common law actions to enforce judgments of another state).

133. *See* Robert D. Rightmyer, *Accrual of Time for Statute of Limitations Purposes on Foreign (Country) Money Judgments*, 7 U. MIAMI BUS. L. REV. 375, 377 (1999) (arguing that the Florida five year statute of limitations should apply to enforcement actions of foreign country money judgments, and that the Florida courts should rule that this five year limitations statute runs upon the rendering of the judgment by the foreign country court or tribunal).

134. Pinilla v. Harza Eng'g Co., 755 N.E.2d 23, 29 (Ill. App. Ct. 2001). Illinois provides that "no judgment shall be enforced after the expiration of 7 years from the time the same is rendered." 735 ILL. COMP. STAT. 5/12-108 (2002).

135. *Pinilla,* 755 N.E.2d at 28. The court stated that a 1994 decision, *Johnson v. Johnson*, 642 N.E.2d 190 (Ill. App. Ct. 1994), regarding this seven-year limitations period applied only to enforcement of a foreign judgment and not its registration. *Id.* The court also stated that a 1997 decision, *La Societe Anonyme Goro v. Conveyor Accessories Inc.*, 677 N.E.2d 30 (Ill. App. Ct. 1997), which applied the limitation period to both registration and enforcement, was actually a misreading of the 1994 decision. *Id.*

136. *Id.* The previous Act explicitly required the filing of a petition to register within a five-year period. *Id.*

137. *Id.* at 29. Note that The Illinois Supreme Court has granted leave for appeal in the *Pinilla* case. Pinilla v. Harza Eng'g Co., 763 N.E.2d 777 (Ill. 2001).

application of the statute of limitations to judgments rendered in United States or other foreign courts, but enforced in their own courts.[138] In Great Britain, recognition proceedings for United States judgments must be commenced within the British six year statute of limitation period, or within the United States statutory period for enforcement, whichever is shorter.[139] In the People's Republic of China, the statute of limitations for any foreign judgment is "one year for individuals, and six months for corporations . . . ."[140] In Spain, there is no statute of limitations on the recognition of any foreign judgments; however, due to the Spanish requirement of reciprocity, "if the law of the originating state . . . would render the judgment unenforceable due to the expiration of the applicable limitation period, then Spain will not enforce the foreign judgment."[141]

3. Default Judgments

Enforcement and recognition principles apply to default judgments and contested judgments in a similar manner.[142] The Restatement (Third) of Foreign Relations Law gives "the same direct effect to default judgments as to judgments following proceedings in which all parties participated."[143] The Recognition Act does not distinguish between default and contested judgments rendered abroad.[144] However, the Act does examine the jurisdictional grounds for non-recognition.[145]

For example, "since a judgment rendered by a court not having jurisdiction over the [defaulting] judgment debtor is not entitled to recognition . . . a [United States] court . . . will

138. *See* Committee on Foreign and Comparative Law, *supra* note 113, at 403-04 (outlining statute of limitations approaches in England, Hong Kong, Canada Japan, and Spain).

139. *Id.* at 403. Exceptions to this rule may occur on "public policy or undue hardship grounds." *Id.*

140. *Id.*

141. *Id.* at 404.

142. Silberman, *supra* note 43, at 261. Silberman cites *John Sanderson & Co. v. Ludlow Jute Co.*, 569 F.2d 696, 699 (1st Cir. 1978) which held that an Australian default judgment against an American seller was enforceable in Massachusetts, and that the seller's defense of illegality of contract was waived, as it was not raised in Australian proceedings. *Id.*

143. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. i (1987); *see Ackermann*, 788 F.2d at 842 (stating that foreign default judgments are considered as conclusive of an adjudication as a contested judgment); *see also Somportex*, 453 F.2d at 442 (stating that "[i]n the absence of fraud or collusion, a default judgment is as conclusive an adjudication . . . as when rendered after answer and complete contest in the open courtroom").

144. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 Part II U.L.A. 39 (2002) (lacking such a distinction).

145. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. i (1987).

scrutinize the jurisdiction of the rendering court when that issue has not been adjudicated or waived in the rendering forum."[146] However, if the defaulting debtor appeared in the foreign court to challenge its jurisdiction and that jurisdiction was upheld, he or she generally could not renew the challenge in the recognizing forum, unless he or she could demonstrate that the foreign proceeding was clearly unfair or that the asserted basis for jurisdiction was flawed.[147] Also, "[i]f jurisdiction of the foreign court . . . was based on concepts similar to long-arm jurisdiction in the United States," such default judgments would be entitled to recognition in the United States.[148]

The liberal approach the United States has adopted when dealing with foreign default judgments is not always replicated overseas.[149] For example, in regards to foreign judgments, "Great Britain does not recognize many of the bases on which its courts would exercise jurisdiction over absent defendants."[150] In Belgium, a court must make an independent examination of the merits of the case when the defendant fails to appear in court; a Belgian court will thus not recognize a default judgment rendered in the United States.[151]

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146. *Id.*

147. *Id. See* Citadel Mgmt. Inc. v. Hertzog, 703 N.Y.S.2d 670, 671-72 (N.Y. Sup. Ct. 1999) (denying enforcement as to one defendant because the foreign court did not obtain personal jurisdiction over that party, but enforcing the default judgment against a co-defendant even though it was conceded that the default judgment was entered one day before the response was due in the foreign court).

148. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 reporters note 4 (1987). *See* Bank of Montreal v. Kough, 612 F.2d 467, 468 (9th Cir. 1980) (enforcing a default judgment rendered by a British Columbia court and precluding counterclaims on res judicata grounds); Belle Island Inv. Co. v. Feingold, 453 So. 2d 1143, 1147 (Fla. Dist. Ct. App. 1984) (enforcing a default judgment rendered by the court of an independent state within the British Commonwealth); Tahan v. Hodgson, 662 F.2d 862, 864-68 (D.C. Cir. 1981) (examining defenses to enforcement, including adequacy of service, public policy, and reciprocity).

149. Ehinger, *supra* note 10, at 23 (noting that this is "not the result of any hostility toward the U.S. judicial system," but rather a different philosophy concerning default judgments).

150. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 481 reporters note 6(a) (1987). In Great Britain, default judgments are entitled to recognition only if (1) the defendant was, "according to British law, present in the foreign state" at the time when proceedings were commenced, or (2) the defendant "had submitted to the jurisdiction of the foreign court" by appearance or by a previous contract. *Id.* The second prong of the above test is also known as the "Doctrine of Submission." Ehinger, *supra* note 10, at 33. It requires that the defendant "submitted" to the court's jurisdiction. *Id.* This may occur either by voluntarily appearing in the proceedings or "by having contractually agreed to accede to that country's jurisdiction." *Id.*

151. *Id.* at 23.

IV. THE NEED FOR FEDERAL LEGISLATION

More than a decade ago, noting that the topic of recognition and enforcement was a scholar's delight, Professor Ronald Brand wrote that there is hardly any doctrine of law that "is in a more unreduced and uncertain condition."[152] Although there has been no shortage of commentators lamenting the need for uniformity as to recognition and enforcement of foreign judgments, a uniform policy is still lacking.[153] Enactment of the Uniform Acts through state legislation has failed to produce the necessary uniformity due not only to the relatively small number of adopting states, but also because of the tendency of individual states to vary certain provisions of the Uniform Acts.[154]

Negotiations and ratifications of bilateral treaties could provide a solution and help the disadvantaged American litigant, but there is no indication that the Unites States government is willing to undertake that task.[155] The remaining possibilities include enactment of a federal statute, which would preempt state law by making the issue a matter of federal law,[156] or the successful negotiation and ratification of a multilateral convention.[157]

A. The Proposed Hague Convention on Recognition and Enforcement of Foreign Judgments: A Thorny Option

The "on-going saga"[158] of the negotiations for a multilateral

152. Brand, *supra* note 26, at 255. Scholars of conflict of laws, constitutional law, comparative law, international law, and civil procedure have studied the topic of recognition and enforcement. *Id.*

153. *Id.* at 284. *See, e.g.*, William C. Honey and Marc Hall, *Bases for Recognition of Foreign Nation Money Judgments in the U.S. and Need for Federal Intervention*, 16 SUFFOLK TRANSNAT'L L. REV. 405, 421 (1993) (noting that the state of the law regarding the recognition and enforcement of foreign judgments in the United States "is in disarray," and arguing in favor of a federal statute similar to the New York Convention).

154. Brand, *supra* note 26, at 257.

155. *See* Posting of Manon Ress, mress@essential.org, to Hague-jur-commercial-law@lists.essential.org (Nov. 8, 2002), *Today on the Hague and Info on Next Week*, *at* http://lists.essential.org/pipermail/hague-jur-commercial-law/2002 November/000693.html (last visited Sept. 14, 2003) (noting that in response to a question regarding possible "bilateral negotiation as building blocks," Jeff Kovar, the head of the United States delegation, answered that "we tried that in the 70s with the UK, it did not work") [hereinafter "Ress 693"].

156. Brand, *supra* note 26, at 285. This approach provides "greater predictability by putting United States law in a code-type format more likely cognizable in the foreign courts" which require reciprocity. *Id.* at 300.

157. *Id.* at 285. A multilateral treaty would preempt state law and it would probably be the most efficient way to deal with the issue. *Id.* at 292-93.

158. *See* Posting of Manon Ress, mress@essential.org (Nov. 15, 2002), to Hague-jur-commercial-law@lists.essential.org, *Nov 14 PIL Meeting- Informal Notes*,

convention concerning recognition and enforcement of foreign judgments is far from over. The current ratification status of the treaty at the end of 2002 was not very different than it was in 1999.[159] While talks seemed to have been revived when Part Two of the Nineteenth Session took place during April of 2002,[160] it is doubtful that the delegations will ever be able to overcome the opposing policies of the parties involved in the negotiations.[161]

As evidenced by past negotiations, the delegations disagree not only on substantive issues, but also on the future direction of the Convention.[162] If reaching a consensus related to procedural aspects of future work poses problems, a consensus on complex and far reaching substantive issues will be even harder to attain. Moreover, there is currently little or no domestic consensus on the electronic commerce and intellectual property issues in the United States or anywhere else.[163] Therefore, a new and separate treaty governing these debated and controversial issues is desirable.[164]

The proposed Hague Convention should exclude these

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at http://lists.essential.org/pipermail/hague-jur-commercial-law/2002-November/000699.

html (last visited Sept. 14, 2003) (noting that the morning session of a meeting held by the Advisory Committee on Private International Law was spent discussing the "on-going saga of the Hague draft convention on jurisdiction and enforcement of foreign judgments").

159. Martin, *supra* note 89, at 158.

160. *See* Tanguy van Overstraeten & Sylvie Rousseau, *Drafters Revive Convention on Jurisdiction and Foreign Judgments*, WORLD E-BUSINESS L. REP., July 18, 2002, *available at* http://lists.essential.org/pipermail/hague-jur-commercial-law/2002-July/

000657.html (last visited Sept. 14, 2003) (noting that after suspending negotiations in June 2001, negotiations have been resumed as a result of the April 2002 meeting).

161. *See* Martin, *supra* note 89, at 158 (noting that the Convention's negotiations have brought to light the different priorities of the United States and the European Union).

162. *See, e.g.*, *supra* notes 111-12 and corresponding text (noting these difficulties). *See also* Anandashankar Mazumdar, *Hague Convention Negotiations Continue: Delegations Appear Ready to Begin Anew*, *available at* http://lists. essential.org/pipermail/hague-jur-commercial-law/2002-May/000588.html (last visited Sept. 14, 2003) (noting that the talks reached a standstill due to ongoing lack of consensus over how to proceed). The meeting of diplomatic delegation heads, which took place between April 22-24, 2002, began "with a bang" when the Australian and Japanese delegations asked to go back to the October 1999 draft of the convention, which had been already long rejected by United States officials. *Id.*

163. Kovar, *supra* note 8, at § Electronic Commerce and Intellectual Property Issues.

164. *See, e.g.*, *Provisional Agenda, Annotations Thereto and Scheduling of meetings of the Fortieth Session*, U.N. Commission on International Trade Law, 40th Sess., Agenda Item 5, at 3, U.N. Doc. A/CN.9/WG.IV/WP.97 (2002), *available at* http://www.uncitral.org/english/workinggroups/wg_ec/WP-97-e.pdf (last visited) (noting that the Working Group on Electronic Commerce is already working on an electronic contract formation instrument).

complicated issues and focus on finalizing a narrower treaty subject to later amendments.[165] Even if the delegations come to a final agreement, countries must ratify the treaty.[166] In the United States, that process requires the consent of the Senate and the approval of the President,[167] and the enactment of federal legislation[168] to implement the treaty. Considering the prevailing influence of consumer advocate groups or other entities representing various business interests, the road to a final resolution of these issues may prove even bumpier.

This does not mean that the United States delegation should recuse itself from future talks undertaken by the Hague forum. If the Hague negotiations are successful, and a sufficient number of countries agree on a final text, the resulting international convention could affect United States citizens or companies even if the United States does not sign the convention. For example, a United States citizen or corporation may be sued in Japan. The judgment rendered in Japan would later be enforceable in France if both Japan and France were parties to a Convention on Recognition and Enforcement of Foreign Judgments.[169] Also, the

165. *See* Overstraeten & Rousseau, *supra* note 160, at § Negotiations (noting that at the latest meeting of delegation heads in April 2002, the commission decided to establish a new drafting Committee in charge of preparing a new proposal which at the outset will exclude the most contentious issues; these issues will be addressed in the second stage of negotiations, and may be dropped if consensus cannot be reached). *See also* Ress 693, *supra* note 155, (noting that as a "'last gasp effort,' the Hague created a small informal group that would focus on a narrow treaty on choice of forum clause in business to business contract"). "The informal group met in The Hague October 22-25, 2002 and three other meetings" are scheduled to take place in 2003. *Id.* While at the October 2002 meeting the group concentrated on producing a draft "narrow" convention on business-to-business choice of court, not every member agreed with this new narrow approach. *Id.* In July 2003, Australia, Canada, China, Czech Republic, the European Community, Hungary, Japan, Mexico, New Zealand, Poland, Romania, Malaysia, Slovakia, Switzerland, and the United States sent letters to the Permanent Bureau showing various degrees of support for a narrower draft. Posting of Manon Ress, mress@essential.org (Aug. 20, 2003), *Negotiations scheduled for December 1-9, 2003 at* http://lists.essential.org/pipermail/hague-jur-commercial-law/2003-August/000814.html (last visited Oct. 15, 2003). In August 2003, the secretariat announced that a Special Commission would begin negotiations from December 1st to 9th, 2003 at the Peace Palace, The Hague, Netherlands. *Id.* Member countries were asked to submit "comments or observations on the substance of the text." *Id.*

166. "[R]atification means a country has all the implementing legislation and regulations in place and is ready to enforce the agreement." Helen Mark, *The Hague Convention and US Adoptions to Canada*, Adoptive Families Association of BC, *at* http://bcadoption.com/info/intercounrty/hagueandus.html (last visited Sept. 14, 2003).

167. U.S. CONST. art. II, § 2, cl. 2.

168. Mark, *supra* note 166.

169. Convention on the Recognition and Enforcement of Foreign Judgments

possibility exists that if such a Convention is signed by a great number of countries, except for the United States, and the Convention is in place for a sufficient number of years, the instrument could become part of the international customary law and the United States would thus be subject to it.[170]

B. A United States Federal Statute: A Viable Alternative

The American approach is currently inconsistent and provides little predictability to the outcome of enforcement or recognition proceedings. Moreover, the foreign countries that require reciprocity do not look favorably upon our fifty-one different policies on recognition and enforcement of the judgments rendered in their own countries.[171]

For example, the Chinese government considers reciprocity a matter of national sovereignty.[172] To complicate matters, there appears to be no written definition of what reciprocity actually means in the People's Republic of China; it is also unclear how a Chinese court would deal with a United States state court judgment, as opposed to a United States federal court judgment.[173] Spain also requires reciprocity of the originating jurisdiction.[174] For a Spanish court to grant recognition to a United States judgment, it is not sufficient that the courts of the originating forum "recognize foreign judgments in general; they must recognize Spanish judgments in particular."[175]

The enactment of federal uniform legislation will go a long way towards ensuring consistency and uniformity throughout the United States. Even if such a statute would not always result in recognition and enforcement of United States judgments abroad, a

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in Civil and Commercial Matters, Feb. 1, 1971, 5 I.L.M. 636, art 2.

170. The Basics of Treaty and Customary Law, UNICEF, *available at* http://coe-dmha.org/Unicef/HPT_Session3Reading3_1.htm (last visited Sept. 14, 2003). Under international customary law, states may be bound by international agreements they have not signed, if that agreement has become an international norm. *Id.*

171. Korsower, *supra* note 28, at 236-37.

172. *See* Committee on Foreign and Comparative Law, *supra* note 113, at 401 (noting that "the principle of reciprocity is written into almost every Chinese law and regulation dealing with foreigners").

173. *Id.* "To obtain recognition of a foreign judgment in China, either the requesting party may apply directly to the Intermediate People's Court with jurisdiction over the matter, or the originating court may . . . request that the Chinese court recognize and enforce the judgment or ruling." *Id.*

174. *Id.* at 402.

175. *Id.* "If the U.S. courts recognize certain Spanish judgments, but examine the merits of a case, a Spanish court will similarly examine the merits of the case" when deciding whether to grant recognition to the United States judgment. *Id.* Therefore, Spanish courts will consider whether "reciprocity is *actually*, *currently*, and *consistently* practiced in the originating state." *Id.*

preemptive federal statute is the most efficient and appropriate way to deal with the issue of internal uniformity. At the very least, it would create a greater likelihood that a United States judgment would be enforceable in the foreign countries that require reciprocity.

The federal statute should be modeled after the current text of the Recognition Act and Enforcement Act. Also, the federal legislation should borrow, to the extent possible, language and principles from the already existing Conventions on foreign judgments and treaties on foreign arbitral awards. The statute must also clarify what documents are needed,[176] how default judgments are to be treated,[177] and what the statute of limitations is for recognition[178] and enforcement.[179]

V. BYE-BYE JEAN-PIERRE

Regardless of how happy one will make his or her client by winning a money judgment, that judgment will have little or no value if it cannot be enforced in the United States or abroad. The enforcement of a judgment is therefore just as important as the litigation that led to the judgment. Consequently, the issue of enforcement should receive proper attention and adequate preparation prior to the outset of a trial.

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176. *See, e.g.*, European Communities Convention, *supra* note 7, at art. 46-48. The language might look something like this: To obtain recognition of a foreign judgment in the United States, the party applying for recognition shall, at the time of the application, supply: (a) a duly authenticated original judgment or a duly certified copy thereof, (b) if the judgment was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceedings or an equivalent document notified the defaulting party of the proceeding, (c) all documents required to establish that the judgment is final, conclusive and enforceable in the rendering country, and (d) if the judgment is not made in the English language, the party applying for recognition shall produce a translation of the above documents into English and made by an official or sworn translator or by a diplomatic or consular agent.

177. The language might look something like this: Enforcement and recognition principles shall apply to default judgments. A foreign default judgment shall be treated in the same manner as a contested judgment provided that the mandatory grounds of non-recognition and the fairness of the court proceedings are strictly scrutinized.

178. The language might look something like this: The statute of limitation for a foreign judgment to be recognized in the United States courts shall be ten (10) years since the time the judgment was rendered in the foreign court or ten (10) years from the time when no further review was available in the country of origin, whichever is longer.

179. The language might look something like this: The statute of limitation for a foreign judgment to be enforced in the United States shall be five (5) years since the time the judgment was rendered in the foreign court, or five (5) years from the time when no further review was available in the country of origin, whichever is longer.

A federal statute governing the recognition and enforcement of foreign judgments would preempt state law and offer foreign litigants the advantage of dealing with a uniform approach across the United States. Therefore, the next time the Jean-Pierres of the world call you on a cool and crisp spring day, you may not need to spend two hours on the telephone trying to explain why a foreign judgment is enforceable in Illinois or New York, but not in Ohio or Georgia.