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Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities

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I. INTRODUCTION

The United States is currently facing a period of intense interest in transnational litigation.[1] Not only has the U.S. Supreme

1. The Federal Judicial Center, which is the research and education arm of the U.S. federal judiciary, is in the process of publishing a series of judicial guides on various aspects of international litigation. For some examples of its

Court become increasingly active in this field,[2] but the American Law Institute (ALI) is also in the process of revising and drafting a number of Restatements concerning international law.[3] The United States also recently signed the Hague Convention on Choice of Court

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publications, see LOUISE DECARL ADLER, MANAGING THE CHAPTER 15 CROSS-BORDER INSOLVENCY CASE: A POCKET GUIDE FOR JUDGES (2011); RONALD A. BRAND, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS (2012); SAMUEL L. BUFFORD ET AL., INTERNATIONAL INSOLVENCY (2001); JAMES D. GARBOLINO, THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION: A GUIDE FOR JUDGES (2012); S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES (2012). The Federal Judicial Center makes all of its publications freely available online at http://www.fjc.gov. More international litigation guides are currently in progress, including TIM HARKNESS ET AL., DISCOVERY IN INTERNATIONAL CIVIL LITIGATION: A GUIDE FOR U.S. JUDGES (forthcoming 2014).

2. The Court has recently heard a number of cases involving international substantive and procedural law. *See, e.g.*, Lozano v. Alvarez, 134 S. Ct. 1224 (2014) (involving the Hague Convention on the Civil Aspects of International Child Abduction); BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) (involving bilateral investment treaties); Walden v. Fiore, 134 S. Ct. 1115 (2014) (involving personal jurisdiction); Daimler AG v. Bauman, 134 S. Ct. 746 (2014) (involving the Alien Tort Statute and the Torture Victims Protection Act); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (involving the Alien Tort Statute); Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351 (2013) (involving international copyright); Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (involving standing in international disputes); Goodyear Dunlop Tires Operations, S.A., v. Brown, 131 S. Ct. 2846 (2011) (involving general jurisdiction in multijurisdictional matters); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (involving jurisdiction in international disputes).

3. RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (forthcoming); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (forthcoming); George A. Bermann, *Restating the U.S. Law of International Commercial Arbitration,* 42 N.Y.U. J. INT'L L. & POL. 175, 175–99 (2009). The forthcoming Restatement relating to Native American law also carries international implications, particularly in the area of recognition and enforcement of judgments. *See* RESTATEMENT (THIRD) OF THE LAW OF AMERICAN INDIANS (forthcoming) (covering federal–tribal relations, state–tribal relations, tribal jurisdiction and authority, and Indian Country business law); *see also* Sandra Day O'Connor, Remarks, *Lessons From the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997) ("Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes."); *infra* note 186 and accompanying text (noting the forthcoming Restatement's effect on the 565 Native American nations recognized by the federal government).

Agreements (COCA),[4] although the instrument has not yet been ratified.[5]

COCA is an interesting treaty with a long and storied history dating all the way back to 1992.[6] The convention was initially part of a larger project organized by the Hague Conference on Private International Law that was meant to address jurisdiction as well as the enforcement and recognition of foreign judgments.[7] When the larger instrument proved impossible to enact, the Hague Conference focused its efforts on choice-of-court agreements and promulgated COCA as a second-best alternative to the combined convention.[8] While COCA addresses a number of important issues relating to

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4. Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, *available at* http://www.hcch.net/index_en.php?act=conventions.text &cid=98 [hereinafter COCA]. Although COCA has been finalized, it has not yet come into force. *Id.*

5. Ratification in the United States has been delayed pending debate about the nature of the implementing legislation. U.S. Department of State Advisory Committee on Private International Law: Study Group on the Hague Convention on Choice of Court Agreements, 77 Fed. Reg. 72904 (Dec. 6, 2012); Memorandum of the Legal Adviser Regarding Implementation of the Hague Convention on Choice of Courts Agreement (Jan. 19, 2013), http://www.state.gov/s/l/releases/2013/206657.htm.

6. COCA, *supra* note 4; *see also* SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS (2003); Ronald A. Brand, *Access-to-Justice on a Due Process Platform,* 112 COLUM. L. REV. SIDEBAR 76, 81 (2012); Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law,* 49 AM. J. COMP. L. 203 (2001) [hereinafter Burbank, *Equilibration*]; Daniel H.R. Laguardia et al., *The Hague Convention on Choice of Court Agreements: A Discussion of Foreign and Domestic Points,* 80 U.S.L.W. 1803 (2012); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime,* 26 HOUS. J. INT'L L. 327, 337–39 (2004) [hereinafter Silberman, *Impact*]; Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflection on the Design of Recognition Conventions,* 24 BROOK. J. INT'L L. 17, 19–28 (1998).

7. *See The Judgments Project*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, http://www.hcch.net/index_en.php?act=text.display&tid=149 (last visited Oct. 30, 2013) (discussing the work of the Hague Conference since 1992 on international jurisdiction as well as the recognition and enforcement of foreign judgments).

8. *See* Yoav Oestreicher, *The Rise and Fall of "Mixed" and "Double" Convention Models Regarding Recognition and Enforcement of Foreign Judgments,* 6 WASH. U. GLOBAL STUD. L. REV. 339, 343 (2007) (discussing the failure of a comprehensive attempt at a convention on jurisdiction and judgments).

jurisdictional concerns, parties to international disputes still face difficulties with respect to the recognition and enforcement of foreign judgments.[9] This area of law has been problematic for decades,[10] although relatively little commentary exists due to the perceived complexity of the subject matter.[11] Indeed, "[c]ompared

9. COCA, *supra* note 4; *see infra* notes 13–15 and accompanying text.

10. *See* Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323, 361 (1954) (discussing longstanding issues relating to foreign judgments); Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments and Foreign Law,* 18 SW. J. INT'L LAW 31, 37 (2011) (discussing an overall increase in the number of cases involving foreign judgments from 1990 to 2009). There is an even earlier convention on recognition and enforcement of judgments from the 1970s that is currently in force, although it failed to find widespread acceptance. *See* Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, entry into force Aug. 20, 1979, 1144 U.N.T.S. 249, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=78 (listing five states parties).

11. Although some works are available, many discussions are somewhat out of date or relatively cursory. *See, e.g.,* GEORGE A. BERMANN, TRANSNATIONAL LITIGATION 328–64 (2003) (predating certain key legislation); GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1077–1155 (2011) (analyzing different elements of international civil law cases in U.S. courts); BRAND, *supra* note 1; DAVID EPSTEIN & CHARLES S. BALDWIN IV, INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY 375–93 (2010); 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 (1991) (predating certain key legislation); Melinda Luthin, *U.S. Enforcement of Foreign Money Judgments and the Need for Reform,* 14 U.C. DAVIS J. INT'L L. & POL'Y 111, 115–25 (2007) (summarizing state law provisions); David P. Stewart, *Recognition and Enforcement of Foreign Judgments in the United States,* 12 Y.B. PRIVATE INT'L L. 179 (2010).

with choice of law and jurisdiction, the recognition of judgments is a scholarly desert."[12]

However, this is not an issue that the United States can afford to ignore any longer. Experts forecast a significant increase in the number of foreign judgments that will be brought to the United States for recognition and enforcement in the coming years,[13] and the current U.S. approach to recognition and enforcement of foreign judgments involves a great deal of cost, complexity, and uncertainty, which creates numerous problems for both U.S. and foreign parties.

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12. Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments,* 23 MELB. U. L. REV. 416, 416 (1999) ("That is not to say that nothing is written on the topic—on the contrary, a good deal of literature exists. However, most writers focus only on the immediate pragmatic implications of particular laws or multilateral conventions on the recognition of judgments."); *see, e.g.*, Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective,* 29 PEPP. L. REV. 147, 148–62 (2001) (discussing state-law standards). Other authors refer to enforcement and recognition issues in the context of jurisdiction and choice of law. *See, e.g.*, Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable Worldwide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 200–02 (2001) [hereinafter von Mehren, *Drafting*] ("It is extremely difficult as well to draft provisions that jurists with different legal and cultural backgrounds can be expected to understand and apply correctly."); Quintanilla & Whytock, *supra* note 10, at 37 ("But transnational litigation in U.S. courts is itself likely to be increasingly multipolar in terms of applicable law."); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation,* 10 ROGER WILLIAMS U. L. REV. 1, 55–59 (2004) (discussing Hilton v. Guyot, 159 U.S. 113, 164–65, 202–03 (1895)); Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 791–99 (2004) (analyzing comity in U.S. courts); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments,* 111 COLUM. L. REV. 1444, 1446–47 (2011) (providing a brief introduction to the intersection of forum non conveniens and the enforcement of foreign judgments).

13. *See* Katy Dowell, *International Litigants in London Rise by a Third in Three Years,* THE LAW. (May 7, 2013), http://www.thelawyer.com/news-and-analysis/practice-areas/litigation/international-litigants-in-london-rise-by-a-third-in-three-years/3004520.article (noting rise of U.S. litigants in English courts); Quintanilla & Whytock, *supra* note 10, at 37 (projecting an increase in opinions involving foreign judgments from 2010 to 2019); William F. Sullivan et al., *A Global Concern: The Rise of International Securities Litigation,* BLOOMBERG LAW (2013), http://about.bloomberglaw.com/practitioner-contributions/a-global-concern-the-rise-of-international-securities-litigation/ (discussing an increase in multijurisdictional securities litigation worldwide).

While domestic entities are sometimes characterized as benefitting from an onerous enforcement regime (since that approach is thought to reduce the number of foreign parties who are willing or able to enforce a judgment in the United States), the truth is that U.S. companies and individuals suffer a variety of costs as a result of a faulty system of enforcement. For example, a U.S.-based commercial entity can either lose international business (due to a foreign party's fears about its ability to recover damages against the U.S. party in an economically efficient manner) or be made subject to a "litigation premium" that increases the price the U.S. party must pay to complete the transaction.[14] In either case, the increased cost of doing business will likely be passed along to U.S. consumers. Furthermore, U.S. entities will still have to go through the process of defending against the recognition and enforcement of a foreign judgment, even if it is unlikely that the movant will prevail. These costs are also absorbed by U.S. commercial and non-commercial parties. Finally, there is no guarantee that the U.S. party will be the one resisting enforcement. Indeed, the U.S.-based party could very well be the one seeking recognition or enforcement of the foreign judgment.[15]

These factors suggest that it is well past time for the United States to review and reform its enforcement regime. The United States could proceed in two ways. First, it could try to coordinate its efforts with those of the international community. This approach seems promising in many regards, since the Hague Conference decided in 2012 to consider creating a working group to draft a new multilateral treaty concerning the recognition and enforcement of foreign judgments, with work possibly beginning as early as October 2013.[16] However, it could take years for a new convention to be

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14. *See* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective,* 58 STAN. L. REV. 1267, 1288 (2006) (noting transaction costs associated with the risk of litigation).

15. The U.S. party could be moving against assets held by the foreign party in the United States or could be seeking to rely on the preclusive effect of the foreign judgment. *See infra* notes 139–161 and accompanying text.

16. *See Conclusions and Recommendations Adopted by the Council,* HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, para. 8, (Apr. 9–11, 2013), *available at* http://www.hcch.net/upload/wop/gap2013concl_e.pdf; Ronald A. Brand,

finalized and adopted, and there is no guarantee that the project would be successful.

Second, the United States could work unilaterally to improve its enforcement regime. Although this approach has the benefits of immediacy and autonomy, some counter-arguments can nevertheless be raised. For example, some people could claim that COCA, which includes a number of provisions relating to the enforcement and recognition of foreign judgments,[17] is sufficient to meet the present needs of U.S. parties and that any further reform efforts should wait until the effectiveness of COCA can be ascertained. Although caution has its place, a wait-and-see approach is unwarranted in this instance since COCA is limited by its terms to a small subset of judgments arising out of an exclusive choice-of-court agreement and relating to certain types of civil and commercial matters.[18] Numerous disputes, including those involving consumer, employment, succession law, personal injury and various tort claims, fall outside the terms of the treaty and would benefit from an improved domestic enforcement regime.

Alternatively, some people could claim that there is no real need to reform U.S. law because international actors can avoid any difficulties associated with recognition and enforcement of foreign judgments by taking their disputes to arbitration.[19] However, this

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Jurisdictional Developments and the New Hague Judgments Project, in A COMMITMENT TO PRIVATE INTERNATIONAL LAW – ESSAYS IN HONOUR OF HANS VAN LOON 89, 90 (2013) [hereinafter Brand, *Hague*]. Some commentators attribute this renewed interest in the judgments project to the successful adoption of COCA. *See* COCA, *supra* note 4; Stewart, *supra* note 11, at 198. However, renewed interest in this issue may also have been triggered by the success of the European Union in revising the European framework on jurisdiction and judgments. *See* Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1 [hereinafter Brussels I Recast] (noting the new provisions will go into effect on January 10, 2015); Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) (EC) [hereinafter Brussels I Regulation]; Brand, *Hague, supra*, at 97–98 (discussing developments in the European Union, including the Brussel I Regulation).

17. COCA, *supra* note 4, arts. 1–2, 8–9.

18. *See id.* arts. 1–2 (providing the scope of COCA).

19. International commercial arbitration is the primary means by which international commercial actors resolve their disputes. *See* GARY B. BORN,

argument ignores the fact that one of the primary reasons why parties choose international commercial arbitration is to take advantage of the ease with which arbitral awards can be enforced internationally.[20] Given the costs associated with international commercial arbitration, parties might very well prefer to litigate their disputes if they could be assured of a simple and straightforward means of recognizing and enforcing foreign judgments. Furthermore, the kinds of disputes that are amenable to arbitration are largely analogous to those that can be made subject to a forum selection agreement under COCA, thereby leaving a significant subset of businesses and individuals without a remedy.[21]

INTERNATIONAL COMMERCIAL ARBITRATION 77–78 (2009). However, arbitration is currently experiencing something of a backlash as parties express concerns about costs, delays, and lack of an appeal. *See* WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 3–27 (2d ed. 2012); S.I. Strong, *Arbitration of International Business Disputes: Maturity and Methodology*, 29 ARB. INT'L 671 (2013) (book review) (discussing criticisms of international commercial arbitration); S.I. Strong, *Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, A New Approach to Cures*, 7 WORLD ARB. & MED. REV. 117 (2013) (discussing reasons behind the backlash and whether mediation can provide a remedy for the alleged ills of international commercial arbitration).

20. International commercial arbitration offers other benefits as well, including the ability to have a neutral decision-maker. *See* BORN, *supra* note 19, at 78–88 (discussing the perceived benefits and shortcomings of international commercial arbitration). Arbitration also offers parties more procedural freedom than litigation, although that distinction may be changing. *See* S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT'L L. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2378979.

21. *Compare* COCA, *supra* note 4, arts. 1–2 (applying COCA to "exclusive choice of court agreements concluded in civil or commercial matters" but placing more than a dozen other types of cases outside of its jurisdiction), *with* Inter-American Convention on International Commercial Arbitration, art. 1, Jan. 30, 1975, S. TREATY DOC. NO. 97-12., Pan-Am. T.S. 42 [hereinafter Panama Convention] ("An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid."), *and* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arts. 1–2, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention] ("[Any state] may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.")

These factors, taken together, suggest that the United States can and should reconsider U.S. law concerning the recognition and enforcement of foreign judgments immediately and unilaterally. Although this may appear to be a daunting task, reform efforts will be greatly aided by a proposed federal statute drafted by the ALI in 2006 (ALI Proposed Statute).[22] The ALI undertook this project with the goal of creating a new and improved domestic enforcement regime that would be suitable for adoption even in the absence of an international treaty on judgments.[23] In so doing, the ALI focused on federal rather than state law. This decision was made on the grounds that "[t]he only practical way to achieve uniformity among the states in recognizing and enforcing foreign country judgments is through federal legislation preempting state law."[24]

Of course, parties can only benefit from the ALI Proposed Statute if it is adopted into law.[25] Congress has held some initial hearings regarding recognition and enforcement of foreign judgments, which suggests that there is some interest in legislative reform.[26] The international business community has also thrown its

22. *See* ALI, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006); *see also* Robert L. McFarland, *Federalism, Finality, and Foreign Judgments: Examining the ALI Judgment Project's Proposed Federal Foreign Judgments Statute,* 45 NEW ENG. L. REV. 63 (2010) (noting the ALI's efforts constituted a "significant contribution to an important discussion" regarding the enforcement of foreign judgments); Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150 (2013) (proposing an alternative federal statute based on a modified version of the ALI Proposed Statute).

23. *See* Matthew H. Adler & Michele Crimaldi Zarychta, *The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band,* 27 NW. J. INT'L L. & BUS. 1, 7 n.26 (2006) (explaining that the ALI continued its work on foreign judgments even after COCA was adopted).

24. Luthin, *supra* note 11, at 145. This approach is somewhat unusual, given that most existing law regarding recognition and enforcement of foreign judgments exists at the state, rather than federal, level. *See infra* notes 31–192 and accompanying text.

25. ALI, *supra* note 22.

26. *See* H. R. REP. NO. 112-747, at 83 (2013) (noting subcommittee hearings held on November 15, 2011); Burbank, *Equilibration*, *supra* note 6, at 401; *see also* Montré D. Carodine, *Political Judging: When Due Process Goes International,* 48 WM. & MARY L. REV. 1159, 1233 (2007) (disucssing the ALI presentation to Congress).

support behind reform efforts, based on a growing recognition that a predictable and uniform method of recognizing and enforcing foreign judgments actually works to the benefit of U.S. companies and individuals.[27]

As positive as these measures may be, they would doubtless be facilitated by scholarly analyses demonstrating the extent of the problems relating to the recognition and enforcement of foreign judgments and the benefits of a new approach. Unfortunately, the "scholarly desert" regarding foreign judgments extends to the ALI Proposed Statute.[28] The absence of critical commentary regarding

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27. *See ICC Calls on Governments to Facilitate Cross-Border Litigation*, INT'L CHAMBER OF COMMERCE (Nov. 29, 2012), http://www.iccwbo.org/News/Articles/2012/ICC-calls-on-governments-to-facilitate-cross-border-litigation/ (supporting efforts to facilitate transnational litigation); *Recognition & Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 109, 55–67 (2011) (statement of John B. Bellinger, III, Partner, Arnold & Porter, LLP, on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform) [hereinafter Bellinger Testimony].

28. Whincop, *supra* note 12, at 416; *see also* ALI, *supra* note 22. The ALI Proposed Statute has been subject to some scholarly scrutiny, although most commentators merely mention the statute in passing or address only a single aspect of the proposal. *See* ALI, *supra* note 22; Carodine, *supra* note 26, at 1234 (suggesting the ALI does not sufficiently protect judgment debtors); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Law*, 44 STAN. J. INT'L L. 301, 345–46 (2008) (putting the ALI's efforts into larger context); James P. George, *Enforcing Judgments Across State and National Boundaries: Inbound Foreign Judgments and Outbound Texas Judgments*, 50 S. TEX. L. REV. 399, 424–25 (2009) (recognizing U.S. inaction on the proposed statute); Richard R. Graving, *The Carefully Crafted 2005 Uniform Foreign-Money Judgments Recognition Act Cures a Serious Constitutional Defect in Its 1962 Predecessor*, 16 MICH. ST. J. INT'L L. 289, 291–92 (2007) (discussing the proposed statute in the context of the absence of federal legislation on U.S. recognition of foreign judgments); Luthin, *supra* note 11, at 140, 145 (discussing the ALI's hopes for the statute and its constitutional implications); Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. 459, 460–62 (2013) (criticizing the proposed statute); Silberman, *Impact*, *supra* note 6, at 359–61 (identifying some of the provisions of the ALI Proposed Statute); Whytock & Robertson, *supra* note 12, at 1504 (comparing the ALI Proposed Statute to the Uniform Foreign-Country Money Judgments Recognition Act and the Restatement (Third) of Foreign Relations Law of the United States).

whether and to what extent the ALI's recommendations can and will resolve existing problems is highly problematic, since Congress is unlikely to act without a sense of urgency or a proper understanding of the ramifications of the ALI Proposed Statute.[29]

This Article fills the analytical gap by outlining the scope of the existing problems in this area of law and conducting a detailed and comprehensive evaluation of the ALI Proposed Statute. Part II provides a basic introduction to the recognition and enforcement of foreign judgments in the United States, including actions filed in both federal and state court and proceeding under both federal and state law. This section also outlines various issues relating to the preclusionary effect of foreign judgments. Next, Part III identifies the specific problems that arise under the current enforcement regime while Part IV considers whether and to what extent the ALI Proposed Statute cures these concerns.[30] In undertaking this analysis, Part IV not only compares the ALI's proposals to existing U.S. law but also considers whether the ALI's recommendations constitute an improvement over the current enforcement regime. Part V concludes the Article by drawing together the various strands of discussion.

II. CURRENT STATUS OF THE LAW CONCERNING THE TREATMENT OF FOREIGN JUDGMENTS IN THE UNITED STATES

A. Recognition and Enforcement of Foreign Judgments in the United States

Professor Paul Stephan, one of the reporters on the upcoming Restatement (Fourth) of the Foreign Relations Law of the United States, has suggested that "U.S. law regarding the recognition and enforcement of foreign judgments is rather odd. Almost all the law is state, even though the federal interest in international relations is pervasive. As a result, the risk of local interests interfering with

29. ALI, *supra* note 22.
30. *Id.*

national policy is significant."[31] Professor Linda Silberman enunciated similar concerns during her testimony to Congress regarding the propriety of a federal statute on enforcement and recognition of foreign judgments, suggesting that the highly fragmented nature of existing U.S. law has a detrimental effect on the foreign relations of the United States.[32]

This is not to say that all foreign judgments should be recognized and enforced without proper scrutiny from U.S. courts. Indeed, Professor Stephan has noted that "the rise of populist governments in countries where significant U.S. investment is located, especially in the Western hemisphere, has led to several dubious local judgments that U.S. courts have rejected."[33] However, some observers believe that wider enforcement of certain types of foreign judgments is necessary to give effect to certain international human rights norms.[34]

Although issues in this field appear to be limited to the realm of "international" concerns, recognition and enforcement of foreign judgments actually implicates a variety of domestic laws and policies. Indeed, recent developments regarding COCA have lent a certain "urgency to a broader debate about the role of federalism in enforcing foreign judgments. Traditionally states have regulated the

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31. UNIV. OF VA. SCH. OF LAW, *26th Sokol Colloquium Will Explore Implications of Foreign Judgments*, (Apr. 17, 2013), http://www.law.virginia.edu/html/news/2013_spr/sokol.htm [hereinafter *Colloquium*]; *see also Current Projects, Restatement Fourth, The Foreign Relations Law of the United States*, ALI, http://www.ali.org/index.cfm?fuseaction=projects.members&projectid=28 (last visited Oct. 31, 2013).

32. *See Recognition and Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 3–17 (2011) [hereinafter Silberman Testimony] (statement of Linda Silberman, Martin Lipton Professor of Law, New York University School of Law) (identifying issues with a lack of consistency in the existing recognition and enforcement regime and calling for a more uniform approach to ensure predictability and clarity in the law).

33. *Colloquium*, *supra* note 31; *see also* Bellinger Testimony, *supra* note 27 (discussing industry support for the Hague Choice of Law Convention); Rosen, *supra* note 12, at 785 (discussing "un-American" judgments).

34. *See* Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention,* 42 HARV. INT'L L.J. 141, 182–200 (2001) (discussing the connection between enforcement of foreign judgments and human rights).

terms of enforcement of foreign judgments, even though the federal constitution governs enforcement of state judgments within the United States. The states in turn have adopted uniform laws, although not universally."[35] As a result, any reforms relating to the recognition and enforcement of foreign judgments will need to consider matters of both state and federal law, including those of a constitutional nature.[36]

At this point, a significant amount of diversity exists within the United States with respect to both the substance and procedure relating to the recognition and enforcement of foreign judgments. This phenomenon arises as a result of two factors: (1) the largely unchallenged belief that each state is constitutionally entitled to adopt its own unique approach to recognition and enforcement of foreign judgments and (2) basic principles of civil procedure requiring federal courts to follow state law principles in certain circumstances.[37]

Nevertheless, some unifying forces do exist.[38] For example, virtually every state follows the guidelines set forth by the U.S.

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35. *Colloquium*, *supra* note 31; *see also* COCA, *supra* note 4 and accompanying text.

36. *See* McFarland, *supra* note 22, at 70–82 (indicating that the applicability of the Full Faith and Credit Clause does not eliminate the need to consider both state and federal law); Shill, *supra* note 28 (noting that no federal law controls the domestication of foreign judgments); *Colloquium*, *supra* note 31 (discussing the disparity of procedures concerning enforcement of foreign judgments).

37. *See* ALI, *supra* note 22, at 2 (attributing the change to *Johnson v. Compagnie Generale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926), in the state courts and *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938), in the federal courts); BRAND, *supra* note 1, at 1. However, there is relatively little discussion of the constitutional issues that arise. *See* McFarland, *supra* note 22, at 75–82 (rejecting the applicability of the Full Faith and Credit Clause to enforcement of foreign judgments); Linda Silberman, *Transnational Litigation: Is There a "Field"? A Tribute to Hal Maier*, 39 VAND. J. TRANSNAT'L L. 1427, 1432 n.20 (2006) [hereinafter Silberman, *Maier*] (observing that "recognition and enforcement of foreign-country judgments is presently governed by state law").

38. Indeed, some commentators have concluded that "[i]n practice, U.S. law . . . is neither as diffuse nor as complicated as many fear." Stewart, *supra* note 11, at 180; *Recognition and Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial & Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 46–54 (2011) (statement of H. Kathy Patchel, Uniform Law Commissioner). However, other observers take the opposite view. *See* Bellinger Testimony, *supra* note 27 (describing the current system of state laws as

Supreme Court in the seminal case of *Hilton v. Guyot*.[39] Furthermore, a majority of states have adopted one of two model acts promulgated by the Uniform Law Commission (previously known as the National Conference of Commissioners on Uniform State Laws or NCCUSL) regarding recognition and enforcement of foreign judgments.[40]

U.S. law and procedure, therefore, reflect a considerable amount of tension between uniformity and diversity. The following discussion considers the impact of these twin forces on both litigants and society as a whole.

1. Federal Court

Most foreign parties involved in U.S. litigation prefer to be in federal court, since federal judges are perceived as being less prone than state judges to bias based on nationality.[41] However, federal courts have only limited jurisdiction, and litigants typically must demonstrate that both personal and subject matter jurisdiction exist before a matter can be heard by a federal court.[42] These

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a "patchwork"); Silberman Testimony, *supra* note 32 (emphasizing that there is "no uniformity of practice" among the states).

39. *See* Hilton v. Guyot, 159 U.S. 113, 202–03 (1895); *see also* BRAND, *supra* note 1, at 3 (stating that "most state and federal court decisions on recognition of foreign judgments follow some version of the U.S. Supreme Court's comity analysis" in *Hilton*).

40. *Infra* notes 67–76 and accompanying text. The Uniform Law Commission provides model legislation in those areas of law that would benefit from standardization at the state level. *About the ULC*, UNIF. L. COMM'N, http://www.uniformlaws.org/Narrative.aspx?title=About the ULC (last visited Feb. 21, 2013).

41. *See* Samuel P. Jordan, *Reverse Abstention,* 92 B.U. L. REV. 1771, 1809–10 (2012) (discussing the assertion that federal judges are superior arbiters of federal rights); Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction,* 73 TUL. L. REV. 1, 15–16 (1998) (suggesting that "xenophobia remains an issue in state courts"); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 530 n.215 (2011) (pointing to sources suggesting that foreign defendants see federal courts as more "congenial" than state courts).

42. *See* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1063, 3522 (3d. ed. 2012) (discussing subject matter jurisdiction of federal courts).

constitutional requirements can cause significant uncertainty for parties involved in an action to recognize and enforce a foreign judgment. For example, it is unclear whether parties must meet the "minimum contacts" test relating to personal jurisdiction over a person or property in cases involving the recognition or enforcement of a foreign judgment.[43] Some courts, such as those sitting in New York State, take the view that:

> the judgment debtor need not be subject to personal jurisdiction in New York before the judgment creditor may obtain recognition and enforcement of the foreign country money judgment, as neither the Due Process Clause of the United States Constitution nor New York law requires that the New York court have a jurisdictional basis for proceeding against a judgment debtor.[44]

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43. *See* BRAND, *supra* note 1, at 11 n.48 (collecting cases applying the minimum contacts test); *see also* Walden v. Fiore, 134 S. Ct. 1115, 1121–24 (2014); Daimler AG v. Bauman, 134 S. Ct. 746, 755–58 (2014); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108–12 (1987) (O'Connor, J.) (discussing the application of the stream of commerce and minimum contacts tests to defendant's conduct in California); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478–79 (1985) (discussing the application of the minimum contacts test to defendant's conduct in Florida); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414–15 (1984) (noting "due process is not offended by a state's subjecting the corporation to its in personam jurisdiction when there are significant contacts between the state and the foreign corporation"); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (applying the minimum contacts test); Shaffer v. Heitner, 433 U.S. 186, 199 (1977) (describing the differences between in personam, in rem, and quasi in rem jurisdiction); Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) (explaining that defendants must have minimum contacts in the territory of a forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'"); FED. R. CIV. P. 4(k)(2). This test establishes the limits of a court's extraterritorial ("long-arm") jurisdiction as a matter of U.S. constitutional law and can apply in state as well as federal court. *See,* e.g., CAL. CIV. PROC. CODE § 410.10 (2013) (extending jurisdiction to the full extent of state and federal constitutional limits); UTAH CODE ANN. § 78B-3-201 (2013) (extending jurisdiction to the full extent of the federal constitution).

44. Lenchyshyn v. Pelko Elec., Inc., 281 A.D.2d 42, 43 (2001); *see also* Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 910 (N.D. Iowa 2002) ("[I]n the context of the recognition and enforcement of other state judgments, the minimum contacts requirement of the Due Process Clause does not prevent a state

However, other courts require parties seeking to recognize or enforce a foreign judgment to meet the constitutional tests relating to jurisdiction over the person or property of the defendant.[45] These discrepancies obviously make it difficult for parties to predict what standard will apply in any particular situation.[46]

Constitutional standards relating to subject matter jurisdiction are equally ambiguous, at least in cases involving diversity jurisdiction.[47] For example, as a general rule, diversity jurisdiction

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from enforcing another state's valid judgment against a judgment-debtor's property located in that state, regardless of the lack of other minimum contacts.").

45. *See* Electrolines v. Prudential Assurance Co., 677 N.W.2d 874, 885 (Mich. Ct. App. 2003) (holding that the court must possess jurisdiction over the judgment debtor or the judgment debtor's property); BRAND, *supra* note 1, at 11. Some commentators have suggested that cases relating to the enforcement of foreign arbitral awards can or should be relevant to the question of whether the minimum contacts test should be applied in cases involving the enforcement of foreign judgments. *See* BRAND, *supra* note 1, at 11 n.47. However, that approach appears inappropriate, given that the enforcement of foreign arbitral awards is governed by treaty and the enforcement of foreign judgments is not. *See* BORN, *supra* note 19, at 65–79; S.I. Strong, *Constitutional Conundrums in Arbitration*, 15 CARDOZO J. CONFLICT RESOL. 41 (2013) (discussing constitutional issues in arbitration).

46. Notably, this issue does not appear to be addressed in the ALI Proposed Statute, which suggests continuing confusion in this regard. *See* ALI, *supra* note 22, at 19 (discussing Section 9 under the proposed statute, which contemplates action "where the judgment debtor is subject to personal jurisdiction" or "where assets belonging to the judgment debtor are situated," but not indicating whether constitutional tests must be met).

47. *See* WRIGHT & MILLER, *supra* note 42, §§ 3602.1, 3604 (discussing 28 U.S.C. § 1332(a); U.S. CONST. art. III, § 2, cl. 1). Although some courts and commentators refer to matters involving "citizens of a State and citizens or subjects of a foreign state" as constituting "alienage" jurisdiction, most authorities combine those situations with suits between "citizens of different States" under the single heading of "diversity" jurisdiction. 28 U.S.C. § 1332(a); *see also* Walter C. Hutchens, *Alienage Jurisdiction and the Problem of Stateless Corporations: What Is a Foreign State for Purposes of 28 U.S.C. § 1332(a)(2)*, 76 WASH. U. L. Q. 1067, 1072 (1998) (emphasizing that "not only do diversity and alienage jurisdiction apply to different types of parties, they are also founded on different rationales."); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 4 (1996) (noting the "academic preoccupation" with diversity jurisdiction and highlighting the dearth of attention

does not exist in cases arising entirely between non-U.S. parties, which could end up barring certain types of enforcement actions that would otherwise appear to be prime candidates for federal court.[48] However, non-U.S. parties can bring an enforcement action in federal court even if no U.S. party is involved if another type of subject matter jurisdiction (such as that based on a question of constitutional or federal law) exists.[49]

a. Substantive Law in Federal Court

Once the litigants find themselves properly in federal court, they must determine what law controls substantive issues. According to the U.S. Supreme Court decision in *Erie Railroad Co. v. Tompkins*,

> the substantive law to be applied by the federal courts in any case is state law, except when the matter before the court is governed by the United States Constitution, an Act of Congress, a treaty, international law, the domestic law of another country, or, in special circumstances, by federal common law.[50]

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given to alienage jurisdiction). This Article will follow the general practice and refer to alienage jurisdiction under the more general heading of diversity jurisdiction.

48. *See* Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 14 (1800) (noting that one of the parties must be a U.S. citizen in order for federal courts to have diversity jurisdiction); Gall v. Topcall Int'l, No. Civ. A. 04-CV-432, 2005 WL 664502, at *4–5 (E.D. Pa. Mar. 21, 2005) (discussing the historical interpretation of alienage jurisdiction); WRIGHT & MILLER, *supra* note 42, § 3604 (discussing diversity jurisdiction in suits with citizens or subjects of foreign states as parties).

49. This may be becoming increasingly difficult to do. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (discussing extraterritorial application of the Alien Tort Statute); Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2888 (2010) (dismissing claim in "foreign cubed" securities action).

50. WRIGHT & MILLER, *supra* note 42, § 4501; *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938). The *Erie* doctrine applies to both diversity and alienage jurisdiction. *See* Michael Steven Green, *Erie's International Effect,* 107 NW. U. L. REV. COLLOQUY 165, 166 n.7 (2012) (acknowledging that the *Erie* doctrine applies to alienage jurisdiction).

Although *Erie* is subject to a number of exceptions, it clearly applies in matters relating to the recognition and enforcement of foreign judgments.[51] This phenomenon adds a number of complexities and ambiguities to the process of recognizing and enforcing a foreign judgment.

1. Substantive law in cases involving federal question jurisdiction

According to the *Erie* doctrine, courts whose subject matter jurisdiction is based on a question of federal law must rely on substantive federal law to determine whether and to what extent a foreign judgment should be recognized and enforced.[52] However, at this point, there is no general federal statute describing the circumstances in which foreign judgments can or should be recognized or enforced.[53] As a result, courts must look to federal common law.[54]

The common law in question arises out of the U.S. Supreme Court decision in *Hilton v. Guyot*, which indicates that recognition

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51. WRIGHT & MILLER, *supra* note 42, § 4501.

52. *See* Hurst v. Socialist People's Libyan Arab Jamahiriya, 474 F. Supp. 2d 19, 32 (D.D.C. 2007) ("[I]n determining whether to recognize the judgment of a foreign nation, federal courts . . . apply their own standard in federal question cases."); *see also* Heiser v. Woodruff, 327 U.S. 726, 733 (1946) (noting that in non-diversity cases, "federal courts will apply their own rule" of res judicata); Choi v. Kim, 50 F.3d 244, 248 n.7 (3d Cir. 1995) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (1988) (observing that the recognition of foreign judgments is governed by state law except in federal question cases).

53. Federal legislation has recently been enacted in one limited area of law. *See infra* notes 66, 86–87 and accompanying text.

54. Some debate exists about the scope and continuing viability of federal common law, but the principle appears to have continued relevance in the field of foreign judgments. *See* BRAND, *supra* note 1, at 3 (noting that *Hilton v. Guyot*, 159 U.S. 113 (1895), is the foundation of federal common law regarding foreign judgments); Green, *supra* note 50, at 166 (emphasizing that after *Erie*, "diversity jurisdiction does not give a federal court the power to make federal common law"); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 585–87 (2006) (noting "well-established and stable pockets of federal common law persist in several areas [such as] . . . cases affecting international relations").

and enforcement of foreign judgments is primarily based on the principle of international comity.[55] Thus,

> where 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 . . . .[56]

Some authorities have occasionally justified the recognition and enforcement of foreign judgments on principles other than comity.[57] However, this change in rationale does not alter the basic standards and procedures that are applicable as a practical matter.[58]

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55. *See* Hilton v. Guyot, 159 U.S. 113, 202–03 (1895) (discussing the application of comity in cases involving foreign judgments); BRAND, *supra* note 1, at 3 (recognizing *Hilton* as the foundation of federal common law).

56. *Hilton*, 159 U.S. at 202–03; *see also* BRAND, *supra* note 1, at 3 (quoting *Hilton*). Although *Hilton* was at one point read as requiring reciprocity of recognition between the United States and the country in which the judgment originated, the need for reciprocity has diminished in the years since the case was decided. *See Hilton*, 159 U.S. at 210–28 (discussing reciprocity requirement); BRAND, *supra* note 1, at 4 (discussing cases that reject the need for reciprocity after *Hilton*).

57. For example, the Restatement (First) of the Conflict of Laws took the view that "a foreign judgment creates a 'vested right' or 'legal obligation' that is entitled to enforcement wherever the judgment debtor or his property can be found." BORN & RUTLEDGE, *supra* note 11, at 1082 (internal citation omitted).

58. *See Hilton,* 159 U.S. at 202–03 (stating the basic requirements of comity); BORN & RUTLEDGE, *supra* note 11, at 1082; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1988) ("A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.").

2. Substantive law in cases involving diversity jurisdiction

The situation is very different when the court that has been asked to recognize or enforce a foreign judgment is hearing the case in diversity. In these circumstances, *Erie* requires the court to look to state rather than federal law to determine issues of substance.[59] While the principles enunciated in *Hilton* remain important in state law analyses (thereby providing jurisprudential consistency across the federal–state divide), state law draws on a number of different statutory and common law authorities.[60] The various nuances of state law can, and often do, create considerable uncertainty for parties seeking recognition and enforcement of a foreign judgment in federal court, as discussed below.[61]

b. Procedures in federal court

Because the *Erie* doctrine only applies to matters of substantive law,[62] parties might expect that procedures for enforcing and recognizing a foreign judgment would be the same in every federal court across the country, regardless of the basis on which subject matter jurisdiction is asserted. However, unanticipated problems again arise, this time as a result of Rule 69 of the Federal Rules of Civil Procedure, which states that "[t]he procedure on execution . . . must accord with the procedure of the state where the court is located."[63] Although Rule 69 also indicates that "a federal statute governs to the extent it applies,"[64] "[t]here is no general federal law governing the procedure for the enforcement of foreign judgments," which means that federal courts must look to state law to determine matters of procedure in the vast majority of cases.[65] The one exception is in the area of free speech, although the statutes in effect in that area have more to do with easing the restrictions on federal subject matter jurisdiction than with enforcement procedures

59. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938); BRAND, *supra* note 1, at 4.

60. *See* BRAND, *supra* note 1, at 4, 6–9 (discussing the various authorities state courts look to when faced with controversies already resolved in another nation).

61. *Infra* notes 66–131and accompanying text.

per se.[66] Thus, litigants involved in the recognition and enforcement of foreign awards in federal court face complexity and uncertainty with regard to procedural as well as substantive law.

2. State Court

As the preceding discussion suggests, actions to recognize or enforce a foreign judgment in the United States are primarily governed by state law, regardless of whether the matter is heard in state or federal court. Although each individual state is allowed to adopt its own rules regarding the recognition and enforcement of foreign judgments, the Uniform Law Commission has attempted to promote consistency in this area of law by promulgating two different model enactments. Most U.S. states have adopted one or the other of the two statutory schemes, although some jurisdictions have retained a common law approach to the recognition and enforcement of foreign judgments.

The first form of model legislation proposed by the Uniform Law Commission was the 1962 Uniform Foreign Money-Judgments Recognition Act (1962 Act).[67] This enactment, which is currently in force in whole or in part in sixteen states, "applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal."[68] A foreign judgment is "conclusive between the parties

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62. *Erie*, 304 U.S. at 78–79 ("Congress has no power to declare substantive rules of common law applicable in a state.").

63. FED. R. CIV. P. 69.

64. *Id.*

65. BRAND, *supra* note 1, at 5; *see* RESTATEMENT (SECOND) OF CONFLICTS § 99.

66. *See* Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, Pub. L. No. 111-223, 124 Stat. 2480 (codified at 28 U.S.C. §§ 4101–05 (2012)) [hereinafter SPEECH Act] (allowing for removal to federal court when the parties are diverse, but eliminating requirements regarding the amount in dispute); BRAND, *supra* note 1, at 29 (discussing the SPEECH Act).

67. Uniform Foreign Money-Judgments Recognition Act, UNIF. LAW COMM'N [hereinafter 1962 ACT], *available at* http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf.

68. *Id.* § 2. At one time, the 1962 Act was in force in as many as thirty-one states along with the District of Columbia, although fifteen states and the District

to the extent that it grants or denies recovery of a sum of money."[69] Although the 1962 Act applies to a wide range of disputes, it does not address matters involving taxes, fines, or penalties, even if a final, monetary judgment exists, since those types of judgments constitute a form of revenue for the state.[70]

In 2005, the Uniform Law Commission revised the 1962 Act by promulgating the Uniform Foreign-Country Money Judgments Recognition Act (2005 Act).[71] Eighteen states plus the District of Columbia have adopted the 2005 Act in whole or in part.[72] The 2005 Act applies to a similar subset of judgments (i.e., those that involve "recovery of a sum of money" and are "final, conclusive, and enforceable" where rendered) but differs from the 1962 Act in a number of ways.[73] For example, the 2005 Act addresses issues of procedure as well as substance and includes provisions relating to the burden of proof and the statute of limitations.[74] However, the 2005 Act, like the 1962 Act, explicitly states that it does not apply to money judgments involving taxes, penalties, or fines.[75] The 2005

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of Columbia have since repealed the 1962 Act in favor of more recent legislation. *See* BRAND, *supra* note 1 app. D (listing specific state law provisions and identifying repeals); *see also* 1962 ACT, *supra* note 67 (listing states, although repeals are not indicated).

69. 1962 ACT, *supra* note 67, § 3.

70. *Id.* § 1(2); *see also* BERMANN, *supra* note 11, at 353–55 (discussing the revenue rule in the context of recognition and enforcement of foreign judgments); BORN & RUTLEDGE, *supra* note 11, at 1102 (same).

71. Uniform Foreign-Country Money Judgments Recognition Act, UNIF. LAW COMM'N [hereinafter 2005 ACT], *available at* http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf (last visited Nov. 1, 2013).

72. For a list of the specific state law provisions, see BRAND, *supra* note 1 app. D; *see also* 2005 ACT, *supra* note 71 (listing states that adopted the act). The Uniform Law Commission provides a list of the ways in which the 2005 Act is superior to the 1962 Act. *See* 2005 ACT, *supra* note 71, at 1 (discussing "Why States Should Adopt").

73. 2005 ACT, *supra* note 7171, §§ 3(a), 4(a); *see also* 1962 ACT, *supra* note 67.

74. 2005 ACT, *supra* note 71, §§ 3(c), 4(d), 9; *see also* BRAND, *supra* note 1, at 7–8.

75. 2005 ACT, *supra* note 71, § 3(b); *see also* 1962 ACT, *supra* note 67, § 1(2).

Act also excludes judgments relating to divorce or maintenance from its scope.[76]

The remaining sixteen states rely on common law principles, including those reflected in the Restatement (Third) of Foreign Relations Law.[77] According to the Restatement, a foreign judgment "granting or denying recovery of a sum of money" is entitled to recognition and enforcement in a U.S. court if the judgment is "final" and "conclusive between the parties."[78] However, the Restatement is somewhat broader than the two statutory enactments, in that it is not limited to money judgments and also contemplates recognition and enforcement of final, conclusive judgments "establishing or confirming the status of a person, or determining interests in property . . . "[79] Although these latter types of judgments can also be recognized and enforced in jurisdictions operating under either the 1962 Act or the 2005 Act, courts in those instances would have to rely on common law principles rather than statutory law.[80] Parties seeking recognition and enforcement can also rely on certain subject-specific statutes. Thus, the International Support Enforcement Act,[81] the Uniform Child Custody Jurisdiction and Enforcement Act,[82] and the amended Uniform Interstate Family

76. 2005 ACT, *supra* note 71, § 3(b).

77. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987); *see also* BRAND, *supra* note 1, at 6–7.

78. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 (1987).

79. *Id.*

80. *See* 2005 ACT, *supra* note 71, § 3(b) (explaining that the Act does not apply to judgments for taxes, fines, or penalties, or in connection with domestic relations); 1962 ACT, *supra* note 67, § 1(2) (limiting the definition of an applicable "foreign judgment" in a similar manner); *see also* Hilton v. Guyot, 159 U.S. 113, 202–03 (1895) (establishing the general principle that where there has been a full and fair trial abroad, the merits of the case should not be retried in the United States).

81. 42 U.S.C. § 659a (2012).

82. Child Custody Jurisdiction and Enforcement Act, UNIF. LAW COMM'N, *available at* http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf (last visited Nov. 1, 2013); BRAND, *supra* note 1, at 13.

Support Act[83] can all be used to recognize and enforce judgments involving domestic relations.[84]

Most legislation concerning the recognition and enforcement of foreign judgments attempts to facilitate the process. However, some concerns have been raised relating to the possibility that some jurisdictions (most notably England) allow libel to be established more easily than would be the case under the First Amendment to the U.S. Constitution.[85] As a result, various state[86] and federal[87] laws have been enacted to ensure that any foreign judgment that is recognized and enforced complies with U.S. standards regarding free speech.

There is one other form of model legislation that deserves mention since it causes considerable confusion in this area of law. The 1964 Revised Uniform Enforcement of Foreign Judgments Act (1964 Act) is a model act adopted by forty-six of the fifty U.S. states as well as the District of Columbia.[88] Although this enactment discusses procedural issues relating to the enforcement of foreign judgments, the term "foreign judgments" in this case refers to judgments from U.S. sister states rather than judgments from other

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83. Interstate Family Support Act Amendments, UNIF. LAW COMM'N, *available at* http://www.uniformlaws.org/shared/docs/interstate%20family%20support/uifsa_final_08.pdf; BRAND, *supra* note 1, at 13.

84. This area of law is changing rapidly in Europe. *See* Horatia Muir Watt, *European Federalism and the "New Unilateralism"*, 82 TUL. L. REV. 1983, 1985–86 (2008) (discussing the revolution in European conflict of laws to protect cross-border relationships).

85. *See* BRAND, *supra* note 1, at 29 (discussing the concerns created by heightened protection for speech in the United States); Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507, 523–28 (2012) (explaining "libel tourism" due to disparities in regulation between the United States and the United Kingdom).

86. One such provision, known as the Libel Terrorism Protection Act, was passed by the New York state legislature. N.Y. C.P.L.R. 302 (McKinney 2008).

87. *See, e.g.*, SPEECH Act, *supra* note 66 (making foreign libel judgments unforceable in U.S. courts unless they comply with First Amendment protections).

88. Revised Uniform Enforcement of Foreign Judgments Act, UNIF. LAW COMM'N [hereinafter 1964 ACT], *available at* http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf; *see* BRAND, *supra* 1, app. D (listing forty-eight adopting jurisdictions, including the Virgin Islands).

countries.[89] Although some states have relied on the 1964 Act in cases involving international recognition and enforcement (thereby opening the door for federal courts sitting in those same states to do the same), the 1964 Act should be primarily viewed as a means of facilitating full faith and credit between individual U.S. states rather than as a mechanism providing for recognition and enforcement of judgments in the international context.[90]

a. Substantive Law in State Court

Regardless of the precise legal framework adopted by a particular state, the basic approach to matters of substantive law is approximately the same in that recognition and enforcement of a foreign judgment that is final, conclusive, and enforceable in its home jurisdiction is presumed to be appropriate for recognition and enforcement in the United States in the absence of certain disqualifying factors.[91] Grounds for non-recognition may be either mandatory or discretionary.[92]

The list of mandatory grounds for non-recognition and -enforcement is relatively short. For example, the 1962 Act indicates that a foreign judgment cannot be recognized or enforced if:

- it was "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law";

89. *See id.* § 1 (defining foreign judgments as those that are from "a court of the United States or of any other court which is entitled to full faith and credit").

90. *See id.*; BRAND, *supra* note 1, at 5.

91. *See* 2005 ACT, *supra* note 71, § 4(a) (providing for the recognition of foreign-country judgments as long as they meet certain standards); 1962 ACT, *supra* note 67, § 3 (same); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 (1987) (same). Case law provides guidance as to what constitutes a final, conclusive, and enforceable judgment. *See* BRAND, *supra* note 1, at 9–10; Chao & Neuhoff, *supra* note 12, at 152–53 (noting that courts look to the law of the rendering country to determine the finality of a judgment).

92. *See* BRAND, *supra* note 1, at 7–8, app. C (comparing requirements for mandatory and discretionary enforcement). Most of the factors leading to non-recognition and -enforcement are enunciated in *Hilton v. Guyot*. *See* Hilton v. Guyot, 159 U.S. 113, 202–03 (1895) (listing several factors relating to the opportunity for a "full and fair trial").

- "the foreign court did not have personal jurisdiction over the Defendant"; or
- "the foreign court did not have jurisdiction over the subject matter" of the dispute.[93]

The 2005 Act repeats these basic principles with only minor changes in language.[94] However, those states following a common law approach to recognition and enforcement of foreign judgments consider only the first two items to act as a mandatory bar to recognition or enforcement in a U.S. court.[95]

Neither the 2005 Act, the 1962 Act, nor the Restatement provides any further definition of the first ground for non-recognition and -enforcement (i.e., what constitutes an impartial tribunal or a procedure that is incompatible with due process).[96] However, U.S. courts have consistently characterized these terms as referring to systemic unfairness rather than unfairness in a particular proceeding.[97] When determining whether a particular legal system meets the necessary standards, U.S. courts consider evidence from a variety of sources including the constitution of the foreign country, U.S. State Department reports regarding foreign judicial practices, expert testimony, and the existence of treaties between the United States and the other country regarding reciprocal access to courts.[98]

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93. 1962 ACT, *supra* note 67, § 4(a).

94. *See* 2005 ACT, *supra* note 71, § 4(b) (providing that a court may refuse to recognize a foreign judgment if "(1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter").

95. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(1) (1987) (listing the absence of impartial tribunals and lack of jurisdiction over defendants as grounds for non-recognition of judgments).

96. *See* 2005 ACT, *supra* note 71; 1962 ACT, *supra* note 67; RESTATEMENT (THIRD) OF FOREIGN RELATIONS (1987), *supra* note 77.

97. BRAND, *supra* note 1, at 13–14.

98. *See* Bridgeway Corp. v. Citibank, 201 F.3d 134, 137–38 (2d Cir. 2000) (considering the Liberian Constitution); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1411–12 (9th Cir. 1995) (considering U.S. State Department reports); S.C. Chimexim S.A. v. Velco Enters. Ltd., 36 F. Supp. 2d 206, 208, 214 (S.D.N.Y. 1999) (considering expert testimony); BRAND, *supra* note 1, at 15–17.

Although reciprocity is not required under the 1962 Act, the 2005 Act, or *Hilton v. Guyot*, some states have included such a requirement either on a mandatory basis (Georgia and Massachusetts) or a discretionary basis (Florida, Idaho, Maine, North Carolina, Ohio, and Texas).[99]

The second mandatory ground for non-recognition and -enforcement (i.e., lack of personal jurisdiction by the foreign court) is further defined in Section 5 of the 1962 Act, Section 5 of the 2005 Act, and Section 421 of the Restatement.[100] According to the 1962 Act and the 2005 Act, personal jurisdiction is proper in cases of personal service, voluntary appearance, prior consent to jurisdiction of the foreign court, domicile, and commercial conduct.[101] The Restatement formulation is slightly more complicated, although the underlying principles are essentially the same.[102] On their face, provisions regarding the need for personal jurisdiction appear to consider the issue solely from the perspective of the court rendering the judgment in question. However, U.S. courts often interpret these principles in light of U.S. standards of due process.[103] In so doing,

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99. *See* Hilton v. Guyot, 159 U.S. at 113, 202–03 (1895); 2005 ACT, *supra* note 71; 1962 ACT, *supra* note 67; Stewart, *supra* note 11, at 183; *see also supra* note 56 (discussing the diminishing need for reciprocity following *Hilton*). The common law does not appear to include such a requirement. *See* Somportex v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 n.8 (3d Cir. 1971) (observing that reciprocity has not been an "essential precondition" to enforcing a foreign judgment).

100. *See* 2005 ACT, *supra* note 71, § 5 (listing situations in which a foreign court lacks personal jurisdiction); 1962 ACT, *supra* note 67, § 5 (listing situations in which a foreign judgment will not be refused recognition for lack of personal jurisdiction); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 421 (1987) (listing instances in which jurisdiction is "reasonable").

101. *See* 2005 ACT, *supra* note 71, § 5(a); 1962 ACT, *supra* note 67, § 5(a). These grounds may be expanded as a matter of state law. *See* 2005 ACT, *supra* note 71, § 5(b); 1964 ACT, *supra* note 88, § 5(b).

102. *See* 2005 ACT, *supra* note 71, § 5(a); 1962 ACT, *supra* note 67, § 5(a); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 77, § 421 (1987).

103. *See, e.g.*, Koster v. Automark Indus., Inc. 640 F.2d 77, 78–80 (7th Cir. 1981) (finding that contacts were "insufficient to reach the minimum level needed to satisfy due process requirements" necessary to enforce judgment); Mercandino v. Devoe & Raynolds, Inc., 436 A.2d 942, 943–44 (N.J. Super. Ct. App. Div. 1981) (observing that "the minimum contacts standard provides assurance that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice'") (quoting Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945)); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482 cmt. C (1987)

courts emphasize U.S. constitutional standards, as defined by *International Shoe* and its progeny, rather than U.S. statutory requirements.[104]

The third ground for non-recognition and -enforcement (i.e., lack of subject-matter jurisdiction by the rendering court) is only mandatory under the 2005 Act and the 1962 Act.[105] According to the Restatement, the absence of subject-matter jurisdiction only constitutes a discretionary ground for non-enforcement.[106] In either case, questions regarding the subject-matter jurisdiction of the foreign court are typically considered pursuant to standards identified by foreign law, not U.S. law.[107]

Although U.S. courts must deny recognition or enforcement of a foreign judgment if any of these three (or in the case of the Restatement, two) grounds exist, recognition and enforcement may be denied in other circumstances as a matter of discretion.[108] Thus, for example, the 1962 Act indicates that a U.S. court may refuse to recognize and enforce a foreign judgment in cases where:

(noting that articulated bases to adjudicate satisfy the requirements of due process in the United States).

104. *See* BERMANN, *supra* note 11, at 339–41; *see also* Walden v. Fiore, 134 S. Ct. 1115, 1121–24 (2014); Daimler AG v. Bauman, 134 S. Ct. 746, 755–58 (2014); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108–12 (1987) (discussing the requirements for the assertion of personal jurisdiction under the Due Process Clause); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–79 (1985) (evaluating the assertion of personal jurisdiction for comportment with "fair play and substantial justice"); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984) (noting that due process is met when personal jurisdiction is asserted over a defendant that has "certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice") (internal citations omitted); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294–95 (1980) (considering due process limitations on jurisdiction); *Int'l Shoe*, 326 U.S. at 316 (holding that due process requires that a defendant have "certain minimum contacts with a forum such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'") (quoting Milliken v. Meyer, 311 U.S. 357 (1940)).

105. *See* 2005 Act, *supra* note 71, § 4(b); 1962 Act, *supra* note 67, § 4(a).

106. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(2)(a) (1987).

107. *See* BRAND, *supra* note 1, at 20 ("[W]hen ruling on the question of subject matter jurisdiction, U.S. courts apply the jurisdictional rules of the foreign court.").

108. *See supra* notes 93–107 and accompanying text (explaining mandatory grounds for non-recognition and -enforcement).

- "the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend";
- "the judgment was obtained by fraud";
- either the cause of action or the claim for relief associated with the foreign judgment "is repugnant to the public policy" of the forum state;
- "the judgment conflicts with another final and conclusive judgment";
- the foreign proceedings were contrary to a forum selection clause or arbitration agreement; or
- "in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action."[109]

These six grounds are supplemented in the 2005 Act by two additional provisions.[110] Thus, a court operating under the 2005 Act may refuse recognition or enforcement of a foreign judgment as a matter of discretion if "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment."[111]

Furthermore, a court proceeding under the 2005 Act may refuse a request to recognize or enforce a foreign judgment if "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[112]

Both of these grounds for non-recognition and -enforcement address concerns with a specific judgment, not the judicial system as a whole.

The 2005 Act exceeds the scope of the 1962 Act in other ways. For example, the 2005 Act allows objections based on public

109. 1962 ACT, *supra* note 67, § 4 (b).

110. *See* 2005 ACT, *supra* note 71, § 4(c) (listing additional grounds for non-recongition of a foreign-country judgment).

111. *Id.* § 4(c)(7).

112. *Id.* § 4(c)(8); *see also* BRAND, *supra* note 1, at 8–9 (discussing how the SPEECH Act prevents recognition and enforcement in a defamation action of a foreign court's assertion of personal jurisdiction over a defendant when it is inconsistent with U.S. due process standards).

policy to include concerns relating to both the judgment itself and the underlying cause of action, whereas the 1962 Act only contemplates the latter.[113] Furthermore, the 2005 Act allows courts to consider the public policy of either the forum state or the United States as a whole, while the 1962 Act only refers to the former.[114]

The Restatement approach is in many ways similar to the two statutory provisions. For example, the Restatement allows courts to deny recognition and enforcement of a foreign judgment as a matter of discretion in cases involving lack of notice, fraud, conflicts with another judgment, or a forum selection agreement.[115] However, the Restatement differs from both the 2005 Act and the 1962 Act in that the Restatement lists the absence of subject-matter jurisdiction as a discretionary rather than mandatory ground for non-enforcement and does not allow for non-recognition in cases involving both personal service (i.e., "tag" jurisdiction) and a "seriously inconvenient forum."[116] The Restatement also differs from the 1962 Act in that the Restatement allows the enforcing court to look not only to the public policy "of the State where recognition is sought" but also to "the public policy of the United States" as a whole—an approach that is consistent with the 2005 Act.[117]

Although these provisions have been set forth in a relatively linear fashion so as to compare the various approaches, parties coming to the United States to have a foreign judgment recognized and enforced find questions relating to substantive law to be very confusing. Although this discussion has identified a number of broad-brush similarities between the different approaches, each state

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113. *Compare* 2005 ACT, *supra* note 71, § 4(c)(13) (providing that the state court is not required to recognize a foreign country judgment if it is "repugnant to the public policy"), *with* 1962 ACT, *supra* note 67, § 4(b)(13) (providing that a foreign judgment need not be recognized if the cause of action or claim for relief is repugnant to public policy, but not if the judgment itself is repugnant to public policy).

114. *See* 2005 ACT, *supra* note 71, § 4(c)(13); 1962 ACT, *supra* note 67, § 4(b); BRAND, *supra* note 1, at 8–9.

115. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(2)(b)–(c), (e)–(f) (1987)

116. *Id.* § 482(2)(a), cmt. a, c (1987); *see also* 2005 ACT, *supra* note 71, § 4(c); 1962 ACT, *supra* note 67, § 4(b) (quoting the same language).

117. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(2)(d) (1987); *see also* 2005 ACT, *supra* note 71, § 4(c)(3); 1962 ACT, *supra* note 67, § 4(b).

interprets and implements its law in its own way, which can make it difficult, if not impossible, for parties to predict whether and to what extent a particular judgment will be recognized or enforced.

b. Procedures in State Court

As difficult as the substantive choice of law analysis may be in cases involving the recognition or enforcement of a foreign judgment, procedural questions may be even worse. Indeed, a considerable amount of confusion exists regarding the procedures that U.S. courts are to follow in cases involving recognition and enforcement of foreign judgments, since neither the 1962 Act nor the Restatement explicitly describes how such judgments are to be recognized.[118]

Furthermore, neither of the two enactments provides any detailed guidance on how foreign judgments that have been recognized are to be enforced.[119] For example, the 1962 Act merely indicates that a foreign judgment that has been recognized in a U.S. court "is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit" under the U.S. Constitution and ancillary legislation,[120] while the Restatement simply states that foreign judgments that are entitled to recognition in a U.S. court may be enforced "in accordance with the procedure for enforcement of judgments applicable where enforcement is sought."[121]

In the absence of any controlling legal authority, some courts operating under the 1962 Act have turned to the 1964 Act concerning enforcement of judgments from U.S. sister states and applied the type of simplified procedures (often referred to as "registration" of a judgment) contemplated in that enactment to cases

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118. *See* 1962 ACT, *supra* note 67, § 4; RESTATEMENT (THIRD) OF FOREIGN RELATIONS §§ 481–82 (1987); BRAND, *supra* note 1, at 5.

119. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 cmt. B (1987) (distinguishing between the recognition and the enforcement of foreign judgments).

120. 1962 ACT, *supra* note 67, § 3 (discussing U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738).

121. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481(2) (1987).

involving judgments from foreign countries.[122] However, most states have decided against that approach and instead require parties to engage in a full-fledged evidentiary proceeding.[123] Jurisdictions that have adopted a Restatement-based approach to recognition and enforcement do not appear to have relied on the simplified enforcement mechanism reflected in the 1964 Act and instead simply follow standard common law procedures.[124]

The situation is much improved under the 2005 Act, since that enactment includes specific language regarding the procedures to be used to recognize and enforce a foreign judgment.[125] Thus, the 2005 Act states that "[i]f recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment."[126] Furthermore, "[i]f recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may

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122. *See* 1964 ACT, *supra* note 88, § 23; 1962 ACT, *supra* note 67; Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 481–82 (7th Cir. 2000) (stating that the 1964 Act is applicable in cases involving foreign judgments); Enron (Thrace) Exploration & Prod. BV v. Clapp, 874 A.2d 561, 565–66 (N.J. Super. Ct. App. Div. 2005) (using the 1964 Act in situation involving a foreign judgment); Pinilla v. Harza Eng'g Co., 755 N.E.2d 23, 26 (Ill. App. Ct. 2001) (using the 1964 Act to determine how a foreign judgment may be enforced); BRAND, *supra* note 1, at 5. The technique of relying on the 1964 Act to construe the 1962 Act has been used in other contexts, such as the definition of a "penalty." *See* Java Oil Ltd. v. Sullivan, 86 Cal. Rptr. 3d 177, 183 (Cal. Ct. App. 2008). Similar approaches have been used to identify what constitutes proper notice. *See* Milhoux v. Linder, 902 P.2d 856, 862 (Colo. App. 1995) (using 1964 Act to determine whether mailing a notice informing defendant of Belgian judgment satisfied requirements in an action brought under the 1962 Act).

123. *See, e.g.*, Baker & McKenzie Abvokatbyra v. Thinkstream Inc., 20 So. 3d 1109, 1117 (La. Ct. App. 2009) (declining to allow simplified *ex parte* procedure under 1964 Act); Genujo Lok Beteiligungs GmbH v. Zorn, 943 A.2d 573, 581 (Me. 2008) (requiring evidentiary hearing); BRAND, *supra* note 1, at 5. If recognition and enforcement actions are not possible under the simplified procedures contemplated in the 1964 Act, they may nevertheless be brought as a common law action. *See* 1964 Act, *supra* note 88; Barone v. Barone, No. E2011-01014-COA-R3-CV, 2012 WL 1116320, at *1, *5 (Tenn. Ct. App. Apr. 3, 2012) (allowing a common law action to enforce a Canadian judgment).

124. *See, e.g.*, Maberry v. Maberry, No. M1999-01322-COA-R3-CV, 1999 WL 1072568, at *2 (Tenn. Ct. App. Nov. 30, 1999) (declining to reach the issue).

125. *See* 2005 Act, *supra* note 71, § 7(2).

126. *Id.* § 6(a).

be raised by counterclaim, cross-claim, or affirmative defense."[127] Once recognized, a foreign judgment is "enforceable in the same manner and to the same extent as a judgment rendered in this state."[128]

Notably, the procedures outlined under the various model enactments are not exclusive. Parties may still rely on common law procedures to obtain recognition or enforcement of a foreign judgment, even in those jurisdictions that have adopted the 1962 Act or the 2005 Act.[129] It is also possible for a state that has enacted the 1962 Act to eliminate the Act's procedural shortcomings by adopting an independently created set of procedural provisions,[130] although only one state, Florida, appears to have done so to date.[131]

3. Full Faith and Credit

Once a foreign judgment has been recognized or enforced in one U.S. state or federal district court, parties may wish to seek recognition and enforcement elsewhere in the country.[132] This process is typically carried out pursuant to the Full Faith and Credit Clause of the U.S. Constitution and related legislation.[133]

Application of full faith and credit is a relatively simple matter within the federal system, since "[f]ederal law provides for registration of a final federal judgment in any district and entitles it

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127. *Id.* § 6(b).

128. *Id.* § 7(2).

129. *See* Milhoux v. Linder, 902 P.2d 856, 860 (Colo. App. 1995) (holding that foreign judgment may be recognized under the common law doctrine of comity); Don Docksteader Motors, Ltd. v. Patal Enters., Ltd., 794 S.W.2d 760, 761 (Tex. 1990) (discussing common law suits); *see also* 2005 Act, *supra* note 71; 1962 Act, *supra* note 67.

130. BRAND, *supra* note 1, at 5.

131. *See* FLA. STAT. ANN. § 55.604 (West 2012) (detailing procedures for recording of judgment as well as notice and enforcement).

132. The need for any parallel enforcement can arise for any one of a variety of tactical reasons, including insufficient assets in any one jurisdiction.

133. *See* 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."); 1964 Act, *supra* note 88. The principles of the Full Faith and Credit Clause are extended to the federal government by statute. *See* 28 U.S.C. § 1738 (2013).

to the same status as in the adjudicating district."[134] Enforcement of judgments across the state–federal line is also relatively straightforward, since state courts "are treated as collateral jurisdictions, with the federal court having no greater or lesser priority to impose its rules."[135] Thus, a federal court must give full faith and credit to a state court judgment just as a state court must give credit to a federal court judgment.[136]

However, a certain amount of national variation arises as a procedural matter, since questions of procedure are governed by state law regardless of whether the case is seated in state or federal court.[137] Thus, it has been said that "[e]nforcement measures do not travel with the sister state judgment as preclusive effects do; [instead,] such measures remain subject to the evenhanded control of forum law."[138] Although this issue has seldom been discussed in the commentary, it is clear that foreign parties will find the intricacies of U.S. state and federal procedural law daunting.

B. U.S. Concepts of Preclusion

Actions to recognize and enforce a foreign judgment are motivated by two different principles. For example, many parties

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134. George, *supra* note 28, at 423; *see also* 28 U.S.C. § 1963 (2013) (permitting "a federal judgment rendered in one district to be registered in any other in the federal system").

135. George, *supra* note 28, at 423.

136. *See* San Remo Hotel, L.P. v. City & Cnty. of S. F., 545 U.S. 323, 338, 347–48 (2005) (holding that the full faith and credit statute precluded further litigation of takings claims that had been adjudicated in state court); Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 380–81 (1985) (noting that "a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment"); Allen v. McCurry, 449 U.S. 90, 96 (1980) ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so."); Stoll v. Gottlieb, 305 U.S. 165, 170–71 (1938) (noting that under the full faith and credit statute, "the judgments and decrees of the Federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances").

137. *See* WRIGHT & MILLER, *supra* note 42, § 4467; *see also* George, *supra* note 28, at 422 (explaining that those seeking to enforce judgments outside of the state face differences in local procedures).

138. Baker *ex rel.* Thomas v. Gen. Motors Corp., 522 U.S. 222, 235 (1988).

bring these actions because they wish to obtain the required relief in a jurisdiction other than the one which rendered the original judgment. This phenomenon, which is perhaps the most common type of enforcement action, is essentially affirmative in nature and is of primary concern to judgment creditors.

However, parties can also attempt to use a judgment rendered in one jurisdiction to block subsequent relitigation of the same matter in another jurisdiction. This phenomenon, which is essentially defensive in nature, involves the various principles of preclusion.[139]

1. Choice of Law Concerns

Every legal system in the world recognizes the concept of preclusion, although the principles are defined and applied somewhat differently from jurisdiction to jurisdiction.[140] For example,

> [i]n . . . England and Wales, the Netherlands, Spain, and the United States . . . judgments have issue preclusive effect. In . . . other countries, however – Germany, France, Romania, Sweden, and Switzerland – judgments have no issue preclusive effect. When coupled with the narrow definition of the claim for purposes of claim preclusion employed in these countries and the failure to accord settlements claim preclusive effect, this lack of issue preclusive effect may leave parties with a fair bit of room to relitigate

139. *See* Peter Barnett, *The Prevention of Abusive Cross-Border Re-Litigation*, 51 INT'L & COMP. L.Q. 943, 944 (2002) (discussing different types of preclusion).

140. *See id.* at 953–57 (discussing preclusive principles); Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 344–45 (2011) (discussing preclusion internationally).

> matters already adjudicated by changing the theory upon which they sue or by seeking different relief.[141]

Although these sorts of differences can make it difficult for parties to anticipate whether and to what extent a particular claim or issue will be precluded in the United States, it also means that U.S. courts are on notice that a conflict of laws analysis may be necessary in actions relating to recognition and enforcement. In the international context, two such analyses must occur. First, the court must determine whether state or federal law should be used to represent the so-called "U.S." position, and second, the court must determine whether U.S. or foreign law governs a particular issue.[142]

The domestic conflict of laws issue is resolved on principles similar to those relating to the substantive law of recognition and enforcement (i.e., the *Erie* doctrine).[143] State courts rely on state law, and federal courts rely on state or federal law depending on the type of subject matter jurisdiction that exists.[144] Thus, in cases

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141. Wasserman, *supra* note 140, at 344–45 (internal citations omitted). Although the biggest differences in preclusion arise in the cross-border context, discrepancies can also arise within a single jurisdiction in countries reflecting federal or other non-unitary legal structures. The United States provides a prime example of the types of problems that can arise in these circumstances. Not only do a number of variations regarding the scope of interjurisdictional preclusion arise in the interstate context, they also arise in cases crossing over the federal–state divide. *See* Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules,* 70 TEX. L. REV. 1551, 1556–87 (1992) (discussing federal judgments law in state, interjurisdictional, and international cases).

142. *See* WRIGHT & MILLER, *supra* note 42, § 4473; Wasserman, *supra* note 140, at 369–78 (describing the preclusion law analysis in Europe); *see also* Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 56–57 (1984) (discussing the "source of the standards to be used in determining the issue preclusion effect of a foreign country judgment"); Chao & Neuhoff, *supra* note 12, at 159–60 ("Once the court determines that a judgment is entitled to recognition, it must then determine whose law governs the preclusive effect that should be accorded to the judgment. Many United States courts apply either federal or state law . . . Other courts apply the law of the rendering country . . . .").

143. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938) (stating that except in matters governed by the Constitution, the law to be applied is state law).

144. *See id.*; WRIGHT & MILLER, *supra* note 42, § 4473.

involving federal question jurisdiction, courts look to federal law.[145] However, in cases involving diversity jurisdiction, courts look to the law of the state in which the federal court sits.[146]

Once the question of state versus federal law has been determined, the court must decide whether to apply the preclusive principles used in the country that rendered the judgment or those that are used in the United States. Here, no standard approach exists. Instead,

> [t]hree major models have been proposed. One model approaches domestic views of full faith and credit, incorporating the res judicata rules of the court that entered judgment. A second model relies on the domestic res judicata rules of the court that entertains the second action. The third would create special res judicata rules to account for the special circumstances presented by international judgments.[147]

Each of these approaches has merit. Looking to the law of the rendering court "has the obvious advantages of protecting the procedural and substantive interests of the first forum and promoting predictability for the parties," while relying on the law of the enforcing court "may serve important domestic interests."[148] However, the notion of creating a special rule for foreign judgments that "strikes a middle ground" between the United States' uniquely "broad domestic views [regarding preclusion] and the ordinarily narrower views of other countries" has been discussed for a number of years as providing an appropriate compromise position.[149]

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145. *See* WRIGHT & MILLER, *supra* note 42, § 4473; *see* Int'l Nutrition Co. v. Horphag Research Ltd., 257 F.3d 1324, 1328–30 (Fed. Cir. 2001) (discussing patent law); Egan v. Weiss, 119 F.3d 106, 108–09 (2d Cir. 1997) (discussing immigration law); *see also* Taveras v. Taveraz, 477 F.3d 767, 782–84 (6th Cir. 2007) (stating that "to determine whether a judgment issued by a court of a foreign country is entitled to preclusive effect, the threshold inquiry is whether the case arises under federal question or diversity jurisdiction").

146. *See* WRIGHT & MILLER, *supra* note 42, § 4473.

147. *Id.*

148. *Id.*

149. *Id.* (citing Arthur T. von Mehren & Donald D. Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach,* 81 HARV. L. REV. 1601 (1968)).

2. Scope of Preclusion

Once the conflict of laws concerns have been resolved, courts need to identify which principle of preclusion is at issue and what the scope of that principle is.[150] Courts in the United States distinguish between two different concerns. The first involves claim preclusion, also known as the principle of *res judicata*.[151] This concept "bars the relitigation of a claim that was, or should have been, raised in the first lawsuit as long as the first lawsuit ended in a valid final judgment on the merits" and "requires that both the plaintiff and the defendant be identical in both suits."[152] Matters relating to claim preclusion typically "arise when a party has unsuccessfully litigated a claim in the first lawsuit and later attempts to bring a different, related claim in a subsequent lawsuit."[153]

The second concept, known as issue preclusion or collateral estoppel, "does not bar the entire claim [in the second action] but simply precludes relitigating a discrete issue."[154] The only time that parties to a second suit "are barred from challenging the resolution in the first litigation" is when "the issue was actually litigated and decided in the first suit, resolution of the issue was essential to the result, and there was a full and fair opportunity to litigate."[155]

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150. *See* Barnett, *supra* note 142, at 944 (classifying preclusion in three ways, based on the prevention of contradictory claims, reassertion of successful claims, and abuse of process).

151. *See* Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process,* 2010 BYU L. REV. 597, 600–01 (2010).

152. *Id.* (citation omitted); *see also* Taylor v. Sturgell, 553 U.S. 880, 892 (2008) ("Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" (citing New Hampshire v. Maine, 532 U.S. 742, 748 (2001)).

153. Minzner, *supra* note 151, at 601 (citation omitted).

154. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27); *see also Taylor,* 553 U.S. at 892 (noting "[i]ssue preclusion . . . bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim" (citing *New Hampshire*, 532 U.S. at 748-49)).

155. Minzner, *supra* note 151, at 601 (citation omitted).

However, issue preclusion differs from claim preclusion in that the parties do not need to be identical for issue preclusion to arise.[156]

Although a detailed analysis of preclusion issues is beyond the scope of the current discussion, the U.S. Supreme Court has handed down a number of opinions over the last ten years that "reaffirm[ ] the due process limitations on nonparty preclusion."[157] The most recent of these decisions, *Taylor v. Sturgell*, reiterated "the general rule that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."[158] *Taylor* identified six situations in which claim and issue preclusion apply, although the Court explicitly noted that this list was non-exclusive.[159] Therefore, in the United States, a non-party may not relitigate a matter if he or she (1) agreed to be bound by the earlier decision; (2) has a certain type of "pre-existing 'substantive legal relationship' . . . [with] a party to the judgment," such as that existing between "preceding and succeeding owners of property, bailee and bailor, and assignee and assignor"; (3) has been adequately represented by an actual party to the suit, including representation in a class action; (4) has assumed control over the earlier litigation; (5) acts as "the designated representative of a person who was a party to the prior adjudication;" or (6) falls within certain statutory schemes, such as "bankruptcy and probate proceedings, and *quo warranto* actions or other suits that, 'under [the governing] law, [may] be brought only on behalf of the public at large.'"[160]

As this discussion shows, parties attempting to rely on the preclusive effect of a foreign judgment in the United States face numerous uncertainties and ambiguities. Not only is it impossible to predict which law will apply under a conflict of laws analysis, but it is also entirely unclear what the scope of preclusion will be once the substantive law has been identified. This situation is highly

156. *See id.* (citation omitted).

157. *Id.* at 597; *see also Taylor*, 553 U.S. at 891–93; *New Hampshire*, 532 U.S. at 748.

158. *Taylor*, 553 U.S. at 893, 904 (citation and internal quotation marks omitted) (invalidating the concept of "virtual representation").

159. *Id.* at 893 n.6.

160. *Id.* at 893–95 (citations and internal quotation marks omitted).

problematic and will only become more pressing as recognition actions become more frequent across the United States.[161]

III. POTENTIAL PROBLEMS

As the preceding discussion shows, the law regarding enforcement and recognition of judgments in the United States is extremely convoluted. As a result, it is nearly impossible for litigants to anticipate either the procedural or substantive principles that will govern in any particular case. Although it may be relatively easy for a U.S. lawyer to identify the relevant legal standards once a particular venue is chosen,[162] it is not always clear where an action to recognize or enforce a foreign judgment can or will be brought. Furthermore, it is extremely difficult for foreign parties to understand the complex web of constitutional, statutory, and common law that arises as a matter of state and federal law. Indeed, the current state of affairs appears entirely contrary to statements by the United States Supreme Court that "[i]n our dealings with the outside world the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states."[163]

While parties can limit the amount of unpredictability inherent in an enforcement action by adopting a choice of court agreement, that method is not entirely foolproof, for although COCA provides a relatively standard framework for recognition and enforcement of foreign judgments arising out of an exclusive choice of court agreement,[164] COCA is not yet in force and may never achieve the kind of widespread adherence that its proponents

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161. *See supra* note 12 and accompanying text.

162. This may be the perspective taken by commentators who suggest that the law relating to recognition and enforcement of foreign judgments in the United States is "neither as diffuse nor as complicated as many fear." Stewart, *supra* note 11, at 180.

163. United States v. Pink, 315 U.S. 203, 242 (1942) (Frankfurter, J., concurring); *see also* ALI, *supra* note 22, at 1–2 (discussing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964)).

164. *See* COCA, *supra* note 4, arts. 8–9.

anticipate.[165] Furthermore, COCA is relatively limited in the types of disputes to which it applies.[166]

Experts in law and economics have identified a number of difficulties that can arise as a result of unpredictability and non-uniform application of law.[167] The most well-known problems relate to the increased costs and delays that arise as a result of legal uncertainty. However, other procedural and substantive concerns become apparent upon closer examination.

A. Procedural Concerns

The U.S. approach to recognition and enforcement of foreign judgments gives rise to a number of procedural concerns, including "reduced access to justice, negative repercussions for foreign relations, and underregulation of transnational activity."[168] Problems with access to justice are perhaps the most visible and can arise in a variety of ways. For example, some parties may fail to bring an action for recognition and enforcement of a foreign judgment

165. *Id.*; *see also supra* note 4 and accompanying text.

166. *See* COCA, *supra* note 4, arts. 1–2 (outlining the scope of COCA's application); *see also supra* notes 14–15 and accompanying text.

167. *See* The Honourable J.J. Spigelman, Chief Justice of New South Wales, Address at the 16th Inter-Pacific Bar Association Conference: Transaction Costs and International Litigation (May 2, 2006) (transcript available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_spigelman020506) (discussing transaction costs in transnational litigation); *see also* Rebecca Golbert, *The Global Dimension of the Current Economic Crisis and the Benefits of Alternative Dispute Resolution,* 11 NEV. L.J. 502, 503 (2011) (noting the risks associated with transnational litigation, including "monetary costs, duration of time, representation in foreign courts, unpredictability of outcome, problems of enforcement, and long-term impact to business relationships"); Yaad Rotem, *The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments,* 10 CHI. J. INT'L L. 505, 508 (2010) (explaining differing incentives that affect countries' willingness to recognize foreign judgments).

168. Whytock, *supra* note 41, at 483.

because it is not cost-effective to do so.[169] This phenomenon violates the fundamental concept that justice must be available to all persons, not only the wealthy.[170]

Other parties may hesitate to bring an action to recognize or enforce a foreign judgment in the United States because of concerns about a potential bias against foreign litigants.[171] This is not a novel issue, since several commentators have suggested that the current U.S. approach to recognition and enforcement may be tilted in favor

169. *See* Edward C.Y. Lau, *Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments,* 6 ANN. SURV. INT'L & COMP. L. 13, 24 (2000) ("[I]f the award is reduced by the enforcing court, the award could be so small as to not make it worthwhile to have recognition enforced . . . ."); Whytock & Robertson, *supra* note 12, at 1481–88 (discussing the gap in transnational access to justice and the costs of adversarial proceedings). Some lawyers take the view that it is not worthwhile bringing an enforcement action in the United States if the judgment involves less than $100,000. This strategy is based on estimates regarding both various fixed costs (such as filing and translation fees) and hourly attorneys' fees, which can add up very quickly. *See* INTERNATIONAL ENFORCEMENT OF FOREIGN JUDGMENTS 374–479 (Paul Hopkins ed., 2006); Houston Putnam Lowry, *Enforcing Foreign Judgments,* GP SOLO, Apr.-May 2011, at 34 (explaining the extensive process to secure enforcement of a foreign judgment). Attorneys' fees are of particular interest to non-U.S. parties because the American rule on costs means each party bears its own attorneys' fees and costs, unlike the approach used in most other jurisdictions. *See* Elizabeth J. Elias, Note, *Nearly Toothless: Why the SPEECH Act is Mostly Bark, with Little Bite,* 40 HOFSTRA L. REV. 235, 256 (2011) (noting that the SPEECH Act has a provision reversing attorneys' fees). In most countries, the losing party is required to pay the prevailing party's fees as an incentive to avoid unmeritorious litigation. *See* Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts,* 98 CORNELL L. REV. 327, 335–39 (2013) (contrasting the American rule with the English rule on fees).

170. *See* Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 872–91 (2009) (outlining barriers to justice and discussing the costs of such limitations); *see also* Gene Nichol, *State Budget Challenges and the Scourge of Poverty,* 7 DUKE J. CONST. L. & PUB. POL'Y 71, 77 (2012) (noting the United States has significant problems living up to promises regarding equal justice).

171. *See* Whytock & Robertson, *supra* note 12, at 1450 (noting that the foreign judicial adequacy standard of the doctrine of forum non conveniens is "lenient" whereas "the judgment enforcement doctrine's standard is stricter").

of defendants, who are predominantly U.S. parties.[172] However, any pro-forum bias would be highly problematic as both a matter of law and policy, given that foreign nationals are considered "persons" within the meaning of the U.S. Constitution and, therefore, hold certain constitutional rights relating to due process and equal treatment under the law.[173] However, it is unclear whether and to what extent a constitutional challenge to these procedures could be mounted, given recent U.S. Supreme Court jurisprudence relating to standing.[174]

Giving U.S. parties preferential treatment in actions to recognize and enforce foreign judgments not only gives rise to constitutional concerns, it also creates difficulties on the foreign relations front.[175] Furthermore, certain aspects of U.S. enforcement

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172. *See id.* (explaining that the current system may deny plaintiffs meaningful access to justice); *see also* Brand, *supra* note 6, at 82 (discussing the rationale behind the current system).

173. *See* Sanchez-Llamas v. Or., 548 U.S. 331, 350 (2006) ("A foreign national detained on suspicion of crime . . . enjoys under our system the protections of the Due Process Clause."); Arg. v. Weltover, 504 U.S. 607, 619–20 (1992) (assuming, without deciding, that "a foreign state is a 'person' for the purposes of the Due Process Clause"); Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 565 (1987) (Blackmun, J., concurring in part and dissenting in part) (noting the "major United States interest . . . in fair and equal treatment of litigants" and noting the need to avoid "unacceptable asymmetries" between foreign and domestic litigants (citation and internal quotation marks omitted)); *id.* at 553–54 & n.4 (Blackmun, J., concurring in part and dissenting in part) (discussing how a "pro-forum bias is likely to creep into" judicial analyses); Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 (1969) (noting that the Commerce Clause and Equal Protection Clause apply to discriminatory tax burdens on foreign sources); Karen Nelson Moore, *Aliens and the Constitution,* 88 N.Y.U. L. REV. 801, 808 (2013) (suggesting that under the Constitution, "persons" and "the people" identify a broad class of individuals "that would necessarily encompass aliens").

174. For example, a recent constitutional challenge to a statute that distinguishes between "United States persons" and others failed due to problems associated with the standing of the parties. *See* Clapper v. Amnesty Int'l, USA, 133 S. Ct. 1138, 1142 n.1 (2013) ("The term 'United States person' includes citizens of the United States, aliens admitted for permanent residence, and certain associations and coporations."). Similar problems could arise in cases involving challenges to the recognition and enforcement of foreign judgments. *See id.* at 1146–47 (articulating the requirements for standing under Article III).

175. *See Colloquium*, *supra* note 31; Brand, *supra* note 6, at 82; Whytock & Robertson, *supra* note 12, at 1450. Indeed, foreign states and litigants already find

practice could be seen as an unacceptable form of extraterritorial policymaking by U.S. courts to the extent that U.S. courts are permitted or required to consider the propriety of foreign judgments from the perspective of U.S. principles of due process.[176]

Finally, unnecessarily complex procedures relating to the recognition and enforcement of foreign judgments could lead to underregulation of certain transnational legal injuries.[177] Cross-border regulation is an extremely difficult issue to address, given the absence of a single political actor with jurisdiction over all interested parties, and a particularly severe or unpredictable national approach to recognition and enforcement of foreign judgments can lead to regulatory gaps and the concomitant under-deterrence of the harmful behavior.[178]

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a number of U.S. procedural practices highly objectionable. *See* Whytock & Robertson, *supra* note 12, at 1450 (discussing forum non conveniens).

176. *See* Carodine, *supra* note 26, at 1246 (opposing "any conception of due process that requires courts to engage in foreign policymaking"); *see also* Luthin, *supra* note 11, at 132–34 (noting the reluctance of most courts to "engage in an examination of the procedures of courts that have a justice system that generally comports with our notions of fundamental fairness").

177. *See* Whytock, *supra* note 41, at 483 (discussing the effects of transnational forum shopping).

178. *See* Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 261 (2006); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 13 (2009); S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 NOTRE DAME L. REV. 899, 902, 915–18 (2012) [hereinafter Strong, *Regulatory Litigation*].

B. Substantive Concerns

Procedural issues are not the only kind of problem that can arise in the context of recognition and enforcement of foreign judgments. A number of substantive concerns also exist. For example, the lack of uniformity inherent in the U.S. enforcement regime means that parties are largely unable to anticipate which substantive principles of law will apply in any given situation. This unpredictability arises with respect to both the standards relating to recognition and enforcement as well as the scope of preclusion.

However, parties seeking to have a foreign judgment recognized or enforced face an even greater problem than legal uncertainty. Over the last several years, a significant number of U.S. states have adopted (or have attempted to adopt) legislation limiting courts' ability to rely on anything other than U.S. state or federal law, primarily as a means of blocking the influence of Shari'a law in the domestic U.S. context.[179] The best known of these efforts was the Oklahoma Save Our State amendment,[180] but similar proposals have been made in thirty-two other U.S. states, with five such laws having been successfully enacted.[181] Although the Oklahoma state

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179. *See* Michael Kirkland, *Under the U.S. Supreme Court: Islamic Law in U.S. Courts*, UPI (May 19, 2013), http://www.upi.com/Top_News/US/2013/05/19/Under-the-US-Supreme-Court-Islamic-law-in-US-courts/UPI-64481368948600/ (discussing legislation introduced in thirty-two states that would have limited consideration of foreign or religious laws in state court decisions).

180. *See* Awad v. Ziriax, 670 F.3d 1111, 1125–33 (10th Cir. 2012) (upholding a preliminary injunction against certification of "Save Our State" amendment election results); Awad v. Ziriax, 966 F. Supp. 2d 1198, 1207 (W.D. Okla. 2013) (permanently enjoining certification of election results); John R. Crook, *Tenth Circuit Upholds Injunction Barring Oklahoma Anti-Sharia, Anti-International Law Constitutional Amendment*, 106 AM. J. INT'L L. 365, 365–66 (2012) (discussing the passage of the "Save Our State" amendment and the *Awad* decision); John T. Parry, *Oklahoma's Save Our State Amendment and the Conflict of Laws*, 65 OKLA. L. REV. 1, 1 (2012) (explaining the history of the *Awad* decision).

181. *See* Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law,* 106 AM. J. INT'L L. 107, 107–17 (2012) (describing various proposed federal and state measures limiting consideration of foreign sources of law); David L. Nersessian, *How Legislative Bans on Foreign and International Law Obstruct the Practice and Regulation of American Lawyers,* 44 ARIZ. ST. L.J. 1647, 1652–53 (2012) (discussing the negative impact of laws limiting consideration of foreign law).

amendment was judicially enjoined in 2012,[182] that decision turned on First Amendment principles, and it is possible that some of these laws will be upheld if they are drafted in a way that does not disapprove of or disadvantage the free exercise of religion.[183] Although each state frames its law slightly differently, many of these provisions are quite broad and could effectively prohibit the recognition or enforcement of a foreign judgment based on foreign law.[184] No distinction is made for judgments arising out of courts whose systems of justice are beyond any possible reproach, thereby creating a universal ban on the recognition of enforcement of foreign judgments in U.S. courts unless the foreign court applied U.S. state or federal law.[185] Notably, several of these laws would also prohibit the recognition and enforcement of judgments rendered by tribal courts from any of the over 500 federally recognized Native American nations.[186]

Most commentators have focused on the effect these provisions would have in state courts.[187] However, these substantive

182. *See Awad*, 670 F.3d at 1125–33 (analyzing whether a preliminary injunction was appropriate); Crook, *supra* note 180, at 365.

183. *See* U.S. CONST. amend. I; Jay Wexler, *Government Disapproval of Religion,* 2013 B.Y.U. L. REV. 119, 145 (2013) (commenting that the Oklahoma amendment imposed "real legal disability upon the plaintiff and other Muslims by prohibiting them from, for instance, relying on their religion's teachings in Oklahoma courts in cases involving probate matters or religious expression").

184. *See* Fellmeth, *supra* note 181, at 107 (discussing a proposed Iowa bill barring use of foreign precendent or case law in court decisions and a Utah bill barring enforcement of foreign judgments when a person's constitutional rights are violated).

185. *Id.*; *see also* Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 476 (7th Cir. 2000) (noting that to question the legitimacy of the English legal system "borders on the risible").

186. There are currently 565 federally recognized Native American nations, each with their own legal system. *See* Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a-1 (2013); *Tribal Directory*, U.S. DEP'T OF THE INTERIOR, INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/ (last visited Nov. 2, 2013); *Peacemaking and Conflict Resolution*, NAT'L INDIAN LAW LIBRARY, http://www.narf.org/nill/resources/peacemaking.html (last visited Nov. 2, 2013).

187. *See* Martha F. Davis & Johanna Kalb, *Oklahoma and Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1, 9–15 (2011); Fellmeth, *supra* note 181, at 113–17; Penny M. Venetis, *The Unconstitutionality of Oklahoma's SQ 755 and Other Provisions Like It That Bar*

standards would also apply in federal courts hearing cases in diversity, since the *Erie* doctrine requires federal courts to look to state rather than federal law to determine issues of substance in those circumstances.[188]

Laws like the Oklahoma Save Our State provision are problematic in a variety of ways.[189] Not only does this sort of legislation threaten judicial independence with respect to enforcement and recognition of foreign judgments, but it also challenges various constitutional principles relating to the role of the federal government in international and foreign affairs.[190] Aside from the legal and policy issues, these sorts of isolationist measures give rise to certain practical problems. For example, these sorts of enactments increase the likelihood that foreign states will refuse to recognize or enforce judgments rendered by U.S. courts and limit the contractual freedom of U.S. business and individuals.[191] While most commentators believe that these provisions violate the U.S. Constitution and will therefore be struck,[192] the future of these laws remains unclear.

IV. SOLUTION – THE ALI PROPOSED FEDERAL STATUTE

As the preceding discussion shows, relying on state law to govern the recognition and enforcement of foreign judgments creates numerous procedural and substantive problems. As a result, the best way to proceed may very well be to replace the piecemeal approach

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State Courts From Considering International Law, 59 CLEV. ST. L. REV. 189, 201–16 (2011).

188. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–79 (1938); BRAND, *supra* note 1, at 4. For additional discussion of the *Erie* doctrine, see *supra* notes 50–66 and accompanying text.

189. *See* Davis & Kalb, *supra* note 187, at 14–15.

190. *See id.* Some people view the statutes as upholding states' rights whereas other observers believe the provisions violate the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2; Davis & Kalb, *supra* note 187, at 9–12; Parry, *supra* note 180, at 37.

191. *See* Davis & Kalb, *supra* note 187, at 12–15.

192. *See, e.g.*, *id.* at 13 (arguing that the statutes violate the Constitution); Venetis, *supra* note 187, at 215–17 (discussing numerous grounds under which the statutes are unconstitutional).

that is currently in place with a uniform federal statute.[193] Indeed, this was the view of the ALI when it drafted the ALI Proposed Statute in 2005.[194] This provision, if adopted, would preempt state legislation in this area of law and standardize the procedural and substantive standards relating to the recognition and enforcement of foreign judgments in the United States.

The ALI's approach is somewhat controversial, given that a number of authorities believe that individual U.S. states have primary, if not exclusive, competence over matters relating to the recognition and enforcement of foreign judgments. However, other experts suggest that the influence of state law in this field arose as a historical accident and ceding control over such matters to the federal government would be more in keeping with the separation of powers principles set forth in the U.S. Constitution.[195] Indeed, the federal government was universally considered to be the primary actor in this field all the way up until 1926, when the New York Court of Appeals claimed competence for itself over enforcement issues because "the question is one of private rather than public international law, of private right rather than public relations."[196] Since then, states have taken an increasingly large role for

193. *See* McFarland, *supra* note 22, at 67–68; Silberman, *Maier, supra* note 37, at 1432–37; von Mehren, *Drafting, supra* note 12, at 200. Some analysts have reached this conclusion by applying game theory and other abstract analytical models. *See* Rosen, *supra* note 12, at 802–11; Rotem, *supra* note 167, at 508–09; Whincop, *supra* note 12, at 416; Susan L. Stevens, Note, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 135–58 (2002); *see also* Robert B. Adieh, *Foreign Affairs, International Law, and the New Federalism: Lessons From Coordination*, 73 MO. L. REV. 1185, 1215 (2008).

194. *See* ALI, *supra* note 22; Luthin, *supra* note 11, at 145.

195. *See* U.S. CONST. art. I, § 8, cl. 3; *Recognition and Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 73–74 (2011) (prepared statement of Hon. Steve Cohen, Member, H. Comm. on the Judiciary) (discussing ALI, *supra* note 22, at 2–3); Vaughan Black, *A Canada–U.S. Full Faith and Credit Clause?*, 18 SW. J. INT'L L. 595, 607–08 (2012); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1635 (1997); McFarland, *supra* note 22, at 67–68.

196. Johnson v. Compagnie Generale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926).

themselves in matters of recognition and enforcement, albeit with very little critical analysis by either courts or commentators.[197]

The ALI Proposed Statute sidesteps these sorts of constitutional debates by giving state and federal courts concurrent jurisdiction over the recognition and enforcement of foreign judgments.[198] Given the relative paucity of discussion about federalism concerns by both the ALI and other authorities, this Article will leave that analysis to another day. Instead, the focus here is on determining whether and to what extent the ALI Proposed Statute addresses the various substantive and procedural problems described earlier in this Article.[199]

The ALI Proposed Statute contains thirteen separate sections.[200] Each is discussed in turn below.

A. Section 1 – Scope

The ALI Proposed Statute begins by describing its scope of application.[201] Like the 1962 Act, the 2005 Act, and the Restatement, the ALI Proposed Statute focuses primarily on foreign money judgments that do not arise out of domestic matters, bankruptcy, or ongoing arbitrations.[202]

Most of these exclusions give rise to few concerns. For example, insolvency[203] and family law[204] both see a great deal of

197. *See* ALI, *supra* note 22, at 2–3.

198. *See id.* at 4. For additional discussion of removal and concurrent jurisdiction, see *infra* notes 414–415 and accompanying text.

199. *See* ALI, *supra* note 22, at 29–149 (providing detailed comments and reporters' notes); Bellinger Testimony, *supra* note 27, at 65 (discussing improvements to the ALI Proposed Statute).

200. *See* ALI, *supra* note 22, at 29–149.

201. *See id.* § 1, at 29–35.

202. *See id.* § 1, at 29; 2005 ACT, *supra* note 71, § 3; 1962 ACT, *supra* note 67, § 3; RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 (1987). However, judgments relating to succession are covered by the proposed statute. *See* ALI, *supra* note 22, § 1 cmt. b, at 30.

203. *See* ADLER, *supra* note 1, at 1–2 (explaining that Chapter 15 is a "nearly verbatim adoption" of the UNCITRAL Model Law, which is an "international effort to deal with cross-border insolvency issues"); BUFFORD ET AL., *supra* note 1, at 53–75 (discussing various international treaties concerning invsolvency); *see also* ALI, *supra* note 22, § 1 n.3(b), at 35 (noting bankruptcy has received special treatment from both courts and scholarly writing).

international coordination through other measures. Arbitration is also subject to other means by which a foreign arbitral award can be effectively recognized and enforced internationally.[205] However, some problems could arise in the arbitral realm to the extent that the ALI allows a foreign judgment confirming an arbitral award to be recognized and enforced under the ALI Proposed Statute.[206] Although there is nothing objectionable about recognizing or enforcing such judgments per se, some questions exist as to whether the process of obtaining a judgment on an arbitral award causes the award to "merge" into the judgment and which country's law should decide that issue.[207] Given these difficulties, caution should be exercised when considering this aspect of the proposed statute.[208]

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204. *See* ALI, *supra* note 22, § 1 reporters' note 3(a), at 34 (noting that a number of U.S. statutes and international treaties regulate aspects of family law related issues, such as international child abduction, adoption, and support); *see also supra* notes 85–88 and accompanying text (mentioning the International Support Enforcement Act, the Uniform Child Custody Jurisdiction and Enforcement Act, and the Uniform Interstate Family Support Act as examples of subject-specific statutes involving domestic relations).

205. *See* BORN, *supra* note 19, at 76–78 (discussing how international arbitral awards are enforced under international agreements such as the New York Convention); New York Convention, *supra* note 21 (applying to arbitral awards made outside of the state where recognition and enforcement is sought); Panama Convention, *supra* note 21 (delineating international commercial arbitration agreement between members of the Organization of American States).

206. *See* ALI, *supra* note 22, § 1(a)(iii), cmt. c(3), at 29, 31. Sometimes a party may be unable to confirm a foreign arbitral award (because of time limitations, for example), but may be able to enforce a foreign judgment on the award. *See* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 29 F.3d 79, 81–82 (2d Cir. 1994) (holding that a French arbitration decree conferring "exequatur" was a functional equivalent of a judgment awarding sums specified and thus was enforceable).

207. *See* Richard M. Mosk & Ryan D. Nelson, *The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions*, 18 J. INT'L ARB. 463, 463–71 (2001).

208. The ALI appears to hold some misconceptions about the nature and practice of international commercial arbitration. For example, the reporters' notes suggest that the annulment of an arbitral award at the place where the award was rendered is problematic under the various treaties governing arbitration, when in fact such a possibility is expressly contemplated by the relevant treaties and poses no absolute barrier to the enforcement of the award in other jurisdictions. *See* New York Convention, *supra* note 21, art. V(1)(e); Panama Convention, *supra* note 21,

Despite this minor concern, the ALI Proposed Statute is clearly superior to existing law, since the ALI allows recognition and enforcement of a number of matters that are not addressed in previous enactments.[209] For example, the ALI Proposed Statute covers recognition and enforcement of both injunctions and various types of declaratory relief, unlike the Restatement or the earlier model acts.[210] Furthermore, "[j]udgments for civil damages given in a penal proceeding, if otherwise entitled to recognition and enforcement, come within" the scope of the ALI Proposed Statute, but such judgments fall outside both the 1962 Act and the 2005 Act.[211] Some types of admiralty and maritime matters also fall within the terms of the ALI Proposed Statute.[212]

B. Section 2 – General Provisions on Recognition and Enforcement

Judgments that fall within the scope of the ALI Proposed Statute are to be enforced in accordance with the terms of the statute, regardless of whether the action is brought in state or federal court.[213] Once enacted, the ALI Proposed Statute would therefore supersede state legislation in this area of law, including statutes based on the 1962 Act and the 2005 Act.[214]

The ALI Proposed Statute reflects a pro-enforcement bias that eliminates the possibility of any merit-based review of the

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art. 5(1)(e); ALI, *supra* note 22, § 1 reporters' note 2(b), at 33; STRONG, *supra* note 1, at 79–82.

209. *See* ALI, *supra* note 22, § 1 cmt. b, at 30; *see also* 2005 ACT, *supra* note 71; 1962 ACT, *supra* note 67.

210. *See* ALI, *supra* note 22, § 1 cmt. b, at 30 (discussing the scope of the proposed statute's coverage, including judgments granting injunctive or declaratory relief); *supra* notes 71–84 and accompanying text.

211. ALI, *supra* note 22, § 1 reporters' note 1, at 32; *see also* 2005 ACT, *supra* note 71, § 3(b); 1962 ACT, *supra* note 67, § 1(2).

212. *See* ALI, *supra* note 22, § 1 reporters' note 2(a), at 31–32.

213. *See id.* § 2, cmt. a, at 35–36, 36.

214. *See id.* § 2, cmt. a, at 35–36; *see also* 2005 ACT, *supra* note 71; 1962 ACT, *supra* note 67.

foreign judgment.[215] Although the ALI Proposed Statute operates in a manner reminiscent of the Full Faith and Credit Clause of the U.S. Constitution, the two mechanisms are not identical.[216]

Most judgments falling under the terms of the ALI Proposed Statute are subject to a mandatory duty of enforcement and recognition.[217] However, "[j]udgments for taxes, fines, and penalties may [only] be recognized and enforced" under the ALI Proposed Statute on a discretionary basis.[218] While this approach introduces a degree of uncertainty, it is also more expansive than previous enactments, since the ALI allows U.S. courts to enforce judgments of this type for the first time, provided that they are non-penal in nature.[219] However, the ALI keeps concerns about excessive uncertainty and undue expansiveness in check by suggesting that U.S. courts should only enforce these types of judgments on a reciprocal basis.[220]

Declaratory judgments and orders for injunctive or similar relief are also only enforceable on a discretionary basis.[221] Although the element of discretion makes enforcement somewhat difficult to predict, the ALI believed it important to find a way to support certain measures, such as "*Mareva* injunctions" (freezing orders), that are

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215. *See* ALI, *supra* note 22, § 2 cmt. d, at 37; *see also id.*§ 5 cmt. c, at 59, reporters' note 2, at 69–70. Among other things, parties cannot raise defenses based on claims that U.S. courts would have come to a different conclusion about the choice of operative law or that the foreign court chose and misapplied U.S. law. *See id.* § 2 cmt. e, at 37. However, failure to comply with a valid choice of law clause could lead to non-enforcement as a matter of public policy. *See id.*

216. *Compare* U.S. CONST. art. IV, §1 (requiring that full faith and credit be given by a state to all other states), *with* ALI, *supra* note 22, § 2 cmt. c, at 36–37 (discussing interstate cooperation). For example, the ALI Proposed Statute includes a general public policy defense, whereas the Full Faith and Credit Clause does not. *See* U.S. CONST. art. IV, §1; ALI, *supra* note 22, § 2 cmt. c, at 37.

217. *See* ALI, *supra* note 22, § 2 cmt. f, at 38.

218. *Id.* § 2 cmt. f, at 35; *see also id.* § 2 reporters' note 1, at 39–41 (reporters' note 2(1)).

219. *See id.* § 2 cmt. f, at 38; *see also supra* notes 70, 75 and accompanying text.

220. *See* ALI, *supra* note 22, § 2 cmt. f, at 38 (stating "if a foreign state enforces tax judgments or administrative orders issued in the United States, a court in the United States correspondingly may recognize and enforcement judgments or orders of that state"); *see also infra* notes 395–412 and accompanying text.

221. *See* ALI, *supra* note 22, § 2, at 35.

used by foreign courts to increase the effective enforcement of money judgments.[222] However, the ALI anticipates that "interpretation of foreign-court injunctions, and particularly of their intended territorial scope, will require special care."[223]

Although the ALI Proposed Statute is pro-enforcement, it avoids an overly permissive attitude toward the recognition and enforcement of a foreign judgment by indicating that an action must be brought "within 10 years from the time the judgment becomes enforceable in the rendering state, or in the event of an appeal, from the time when the judgment is no longer subject to ordinary forms of review in the state of origin."[224] Actions may be brought while an appeal is pending.[225]

The ALI Proposed Statute is not the first time a limitations period has been adopted in this area of law.[226] However, the ALI is somewhat unusual in that it does not refer to the limitations period in the state where the judgment was originally rendered.[227]

Together, Sections 1 and 2 of the ALI Proposed Statute illustrate a number of key differences between the ALI's approach to the recognition and enforcement of foreign judgments and existing law.[228] The innovations appear to be well balanced, for although the ALI clearly expands the number and type of judgments that are eligible for recognition and enforcement and allows for a certain

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222. *See id.* § 2 cmt. g, at 38–39; *see also* David Capper, *The Need for* Mareva *Injunctions Reconsidered,* 73 FORDHAM L. REV. 2161, 2162 (2005) ("A *Mareva* injunction is an interlocutory (normally ex parte) injunction restraining a defendant in civil litigation from disposing of assets so as to render itself judgment proof. It operates in personam against the defendant.").

223. ALI, *supra* note 22, reporters' note 2(2), at 42. Special procedures are used in these cases. *See id.* § 2 cmt. g, at 39; *see also infra* notes 447–478 and accompanying text.

224. ALI, *supra* note 22, § 2(c), at 35–36.

225. *See id.* § 2 cmt. h, at 39. Both the 2005 and 1962 Acts allow a stay of proceedings pending an appeal in the foreign court. *See* 2005 ACT, *supra* note 71, § 8; 1962 ACT, *supra* note 67, § 6.

226. The 2005 Act requires enforcement actions to be brought either during the time the judgment is in effect in the home jurisdiction or within fifteen years of the time the judgment became effective in that state, whichever is earlier. 2005 ACT, *supra* note 71, § 9; *see also* ALI, *supra* note 22, § 2 reporters' note 3, at 43.

227. Historically, U.S. courts have typically declined enforcement if a foreign judgment is outside the limitations period in the sending state. *See* ALI, *supra* note 22, § 2 reporters' note 3, at 42.

228. *See id.* § 2 reporters' note 3, at 29–43.

amount of judicial discretion (thereby introducing an element of uncertainty), the proposed statute also establishes clear boundaries and predictability through the use of an explicit limitations period and reciprocity requirement. This new approach would seem highly beneficial to U.S. parties and interests, since it takes into account the realities of contemporary commercial practice (such as the ability of potential judgment debtors to hide their assets quickly and efficiently through instantaneous electronic transfers) and minimizes the need for U.S. parties (who may have obtained declaratory relief in a foreign action) to relitigate a matter that has already been adjudicated in their favor.

C. Section 3 – Effect of a Foreign Judgment

Foreign judgments that meet the standards outlined in the ALI Proposed Statute are not only entitled to recognition and enforcement of a judgment with respect to issues of liability but also with respect to damages, interest, costs, attorneys' fees, and other sorts of permissible relief.[229] This feature does not appear in either the 1962 Act or the 2005 Act, although it is largely analogous to the approach taken under the Full Faith and Credit Clause of the U.S. Constitution.[230] If damages are payable in a foreign currency, then the U.S. court may order payment either in that currency or in U.S. dollars.[231]

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229. *See id.* § 3(a), at 43.

230. *See* U.S. CONST. art. IV, §1; ALI, *supra* note 22, § 3 cmt. a, at 45; *see also* Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 443 (3d Cir. 1971); 2005 ACT, *supra* note 71; 1962 ACT, *supra* note 67.

231. *See* ALI, *supra* note 22, § 3(a), at 43–44 ("If the foreign judgment orders payment in a foreign currency, a court in the United States may order payment in that currency or in United States dollars . . . ."). The conversion rate would reflect the time of the entry of judgment of enforcement, similar to other enactments. *See id.* § 3 cmt. b, at 45 (discussing exchange rate calculations); *see also* U.C.C. § 3-107 (2012); N.Y. JUD. LAW § 27(b) (McKinney 2013). This issue was subject to a number of discrepancies under state law. *See* ALI, *supra* note 22, § 3 cmt. a, at 45, cmt. c, at 45–46 (citing *Semportex Ltd.*, 453 F.2d at 443).

Default judgments may be recognized and enforced under the ALI Proposed Statute in much the same way as judgments that have been fully contested.[232] The only difference is that recognition and enforcement of a default judgment is only proper so long as

> (i) the rendering court had jurisdiction over the defendant in accordance with the law of the state or origin of the judgment; (ii) the defendant was served with initiating process in accordance with the law of the state of origin; and (iii) the rendering court had jurisdiction over the defendant on a basis not unacceptable to the United States under §6 of [the ALI Proposed Statute].[233]

This approach allows judgment debtors under a default judgment to contest enforcement and recognition in the United States on the grounds of U.S. public policy or other criteria defined in the ALI Proposed Statute.[234]

The ALI's approach to default judgments is a significant improvement over the 2005 Act and the 1962 Act, which are largely silent regarding this issue.[235] Not only does the ALI Proposed Statute specifically identify the circumstances in which a default judgment can be recognized and enforced, but the formulation is also designed to make sure that the default judgment debtor has the opportunity to raise all defenses that would be persuasive to a U.S. court in a contested hearing.

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232. *See* ALI, *supra* note 22, § 3 cmt. c, at 45–46 (discussing defendant's ability to challenge enforcement of a default judgment).

233. *Id.* § 3(b), at 44; *see also infra* notes 269–394 and accompanying text (discussing Sections 5 and 6 of the ALI Proposed Statute).

234. *See* ALI, *supra* note 22, § 3 cmt. c, at 45–46; *see also* Ackermann v. Levine, 788 F.2d 830, 842 (2d Cir. 1986) (holding that a foreign default judgment can be challenged by a public policy defense); *infra* notes 269–394 and accompanying text.

235. References to non-appearance are minimal in the two model acts. *See* 2005 ACT, *supra* note 71, § 5(a)(2) (stating a foreign judgment cannot be refused recognition for lack of personal jurisdiction if the defendant appeared voluntarily); 1962 ACT, *supra* note 67, § 5(a)(2) (same).

This section of the ALI Proposed Statute also introduces issues relating to the burden of proof.[236] For example, the party resisting recognition or enforcement bears the initial burden of challenging the jurisdiction of the court rendering the judgment.[237] If a credible challenge is raised, then the party relying on the judgment must show that the original court had jurisdiction and complied with all necessary due process requirements.[238] However, defaulting in the U.S. court does not result in an automatic victory for the party seeking enforcement or recognition. Instead, the party relying on the judgment must make the necessary showing relating to the jurisdiction of the rendering court even if the party against whom the judgment is brought does not appear in the U.S. court.[239]

Although most authority in this field focuses on recognition and enforcement of a foreign judgment that has been rendered after a contested or default proceeding, it is also possible for parties to seek recognition of a judgment dismissing the dispute.[240] According to the ALI Proposed Statute, "[a] judgment of dismissal rendered by a foreign court, if otherwise entitled to recognition, shall be treated in the same way as a judgment for the defendant," subject to certain conditions.[241] For example, no preclusive effect will arise in cases involving dismissals based on the lack of jurisdiction or as a result of any time limitations, unless the party seeking to rely on the dismissal shows "that the claim is extinguished under the law applied to the claim by the rendering court."[242] Furthermore, the ALI suggests that a U.S. court should not give preclusive effect to a foreign judgment if the dismissal in the foreign court is akin to a dismissal without prejudice in a U.S. court, such as, for example, a dismissal on the basis of "defective service, failure to pay the required filing fees,

236. The 2005 Act includes some provisions relating to the burden of proof. *See* 2005 ACT, *supra* note 71, §§ 3(c), 4(d); *see also* 1962 ACT, *supra* note 67.

237. *See* ALI, *supra* note 22, § 3(c), at 44.

238. *See id.*

239. *See id.*

240. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 19–20 (1982).

241. ALI, *supra* note 22, § 3(d), at 44–45.

242. *Id.*

failure to post security, failure to join required parties, or similar defects."[243]

The ALI's approach to preclusion in cases involving judgments based on a dismissal differs somewhat from the approach adopted in other sorts of matters.[244] In most situations, the scope of preclusion is defined by the law of the country rendering the judgment rather than by the ALI Proposed Statute.[245] However, an alternative approach appears necessary in this context because of the difficulties associated with determining whether the foreign dismissal is akin to a U.S. dismissal with prejudice.[246] When considering that issue, U.S. courts would be well advised to adopt a functional methodology, since functionalism is designed to overcome any superficial differences between the common law and civil law traditions.[247]

D. Section 4 – Preclusion and Challenges to the Jurisdiction of the Rendering Court

As a general rule, the ALI Proposed Statute gives a foreign judgment the same preclusive effect that the judgment would receive in its home jurisdiction.[248] The only exception is if the judgment arises out of certain types of dismissals (as described in Section 3) or if "the rule of preclusion applicable in the state of origin would be manifestly incompatible with a superior interest in the United States in adjudicating or not adjudicating the claim or issue in question."[249]

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243. *Id.* Dismissals relating to the lack of timeliness can be particularly problematic. *See id.* § 3 reporters' note, at 47.

244. *See id.* § 3 cmt. d, at 46–47 (discussing the preclusive effect of a judgment).

245. *See id.* § 3 cmt. d, at 46; *see infra* notes 245–258 and accompanying text (describing Section 4 of the ALI Proposed Statute).

246. *See* ALI, *supra* note 22, § 3 cmt. d, at 46 (discussing preclusion issues regarding foreign dismissals).

247. *See* Ralf Michaels, *The Functional Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 342, 357 (Mathias Reiman & Reinhard Zimmerman eds., 2006).

248. *See* ALI, *supra* note 22, § 4(a)–(b), at 47–48 (stating that, with only a few enumerated exceptions, "a foreign judgment that meets the standards set out in this Act shall be given the same preclusive effect by a court in the United States that the judgment would be accorded in the state of origin").

249. *Id.*

One way that the United States might have an interest in the scope of preclusion is if the foreign judgment were based on U.S. law.[250]

U.S. courts could experience some difficulties in ascertaining the appropriate scope of preclusion, given the amount of variation in the way different countries approach such matters.[251] However, defining the scope of preclusion with reference to the law of the country in which the judgment originated creates a degree of consistency and predictability that does not currently exist in the United States.[252] For example, even those states that rely on principles of U.S. domestic law to determine the scope of preclusion (as recommended by the 2005 Act)[253] have experienced a significant number of problems in practice.[254]

Under the ALI Proposed Statute, the party seeking to rely on the foreign judgment has the burden of proof for demonstrating the scope of preclusion under foreign law.[255] This approach makes a great deal of sense, since the party seeking enforcement should be particularly well placed to understand the scope of preclusion under the law of the country rendering the judgment. This technique also mirrors methods used in the domestic context under the Full Faith and Credit Clause and related statutes.[256] Nevertheless, commentators have expressed concern about whether and to what

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250. *See id.* § 4 cmt. b, at 49 (recognizing U.S. interest when foreign judgment implicates U.S. law).

251. *See supra* note 141 and accompanying text. For example, issue preclusion (also referred to as collateral estoppel) is not necessarily recognized in all jurisdictions. *See* ALI, *supra* note 22, § 4 reporters' note 1, at 51–52.

252. *See* ALI, *supra* note 22, § 4 reporters' note 1, at 51–52; *id.* note 3, at 53–54.

253. *See* 2005 ACT, *supra* note 71, § 7(1) (indicating a foreign judgment is "conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive").

254. *See* ALI, *supra* note 22, § 4 reporters' note 1, at 51–52; *see also id.* § 4 reporters' note 3, at 53–54. The 1962 Act does not even discuss matters of preclusion. *See* 1962 ACT, *supra* note 67; *see also* RESTATEMENT OF CONFLICTS, *supra* note 52, § 98.

255. *See* ALI, *supra* note 22, § 4(a), at 47–48.

256. *See* U.S. CONST. art. IV, § 1 (requiring full faith and credit among states); 28 U.S.C. § 1738 (2013) (same), *see also* ALI, *supra* note 22, § 4 cmt. a, at 49 ("The basic rule of preclusion adopted . . . in this section is the same as . . . required in the domestic context by the Full Faith and Credit Clause of the Constitution and the implementing statute . . . .").

extent U.S. judges are in a position to determine the scope of preclusion under foreign law.[257]

One downside to the ALI's approach to preclusion is the possibility that courts will rely too heavily on language indicating that the foreign rule of preclusion is applicable unless it is "manifestly incompatible with a superior interest in the United States,"[258] thereby allowing the exception to swallow the rule.[259] However, that seems to be a risk that will have to be taken, since it is unlikely that the ALI Proposed Statute would be adopted by Congress absent this sort of escape clause.[260]

Section 4 of the ALI Proposed Statute also introduces a number of issues relating to challenges to the jurisdiction of the rendering court at the time of the original proceeding.[261] For example, if the judgment debtor appears in the rendering court at the time of the original proceeding and challenges the jurisdiction of the rendering court, then the foreign court's findings of fact and legal determinations are considered conclusive.[262] However, this determination does not forestall the party resisting recognition or enforcement in the United States from attempting to show that the jurisdiction of the original court was unacceptable under Section 6 of the ALI Proposed Statute.[263]

If the judgment debtor appears in the rendering court but does not enter a jurisdictional challenge, then the party resisting enforcement or recognition in the United States may not challenge

257. *See, e.g.*, Tanya J. Monestier, *Transnational Class Actions and the Illusory Search for Res Judicata*, 86 TUL. L. REV. 1, 78–79 (2011) (discussing class actions).

258. ALI, *supra* note 22, § 4(a), at 47–48; *see also supra* notes 250–257 and accompanying text.

259. The ALI describes the numerous difficulties associated with international preclusion and identifies several possible ways U.S. courts might rely on the exception to the general rule. *See* ALI, *supra* note 22, § 4 cmt. b, at 49–50; *see also id.* § 4 reporters' notes 2–3, at 52–54.

260. *See id.* § 4(a), at 47–48.

261. *See id.* § 4(b)–(c), at 48.

262. *See id.* § 4(b), at 48.

263. *See id.* (allowing parties to renew objections in U.S. courts against the foreign tribunal's jurisdiction); *see also infra* notes 372–394 and accompanying text.

the jurisdiction of the foreign court under foreign law.[264] However, that party may nevertheless attempt to demonstrate that the rendering court's jurisdiction is unacceptable under Section 6 of the ALI Proposed Statute.[265]

The ALI's approach is somewhat similar to that used in cases involving sister-state judgments in the domestic context.[266] However, the ability to challenge recognition or enforcement under Section 6 of the ALI Proposed Statute introduces a somewhat novel element.[267]

Together, Sections 3 and 4 of the ALI Proposed Statute provide a much more predictable and comprehensive approach to the preclusive effect of foreign judgments than currently exists in U.S. courts.[268] Although some difficulties could arise as a result of provisions requiring U.S. courts to look to the scope of preclusion used in the country whence the judgment originated (since U.S. courts may be less than familiar with foreign law and legal principles), the ALI's methodology introduces a welcome level of clarity into the process, since the parties will always know where the judgment was rendered (and thus what law governs the issue of preclusion), even if they do not know where the judgment will be recognized and enforced. Furthermore, the ALI has addressed a number of issues (such as dismissals and defaults) that are not adequately covered under existing U.S. law.

E. Section 5 – Standards for Non-Recognition and Non-Enforcement

Section 5 sets forth the basic terms on which a foreign judgment can be refused recognition and enforcement under the ALI Proposed Statute and, in conjunction with Section 7, reflects the only

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264. *See* ALI, *supra* note 22, § 4(b), at 48 (requiring parties to challenge the foreign court's jurisdiction before challenging it in the United States).

265. *See id.* § 4(b), at 48; *see also infra* notes 372–394 and accompanying text.

266. *See* ALI, *supra* note 22, § 4 reporters' note 4, at 54–55.

267. *See id.* (discussing jurisdictional challenges under U.S. standards set out in Section 6); *see also infra* notes 372–394 and accompanying text.

268. *See* ALI, *supra* note 22, §§ 3–4, at 43–55.

grounds upon which recognition or enforcement may be refused.[269] This approach provides a great deal of finality and makes it impossible, for example, to argue that the foreign judgment was "inadequate or excessive, or that the claim on which the foreign judgment was based or the relief granted is not known in the United States or in the state where recognition or enforcement is sought."[270]

The section is broken into four basic parts: mandatory non-recognition and -enforcement (subsection a), recognition and enforcement in the face of a forum selection clause (subsection b), discretionary non-recognition and -enforcement (subsection c), and burdens of proof (subsection d).[271] Given the importance of this particular provision, it is useful to consider each element in detail.

1. Mandatory Grounds

The ALI Proposed Statute identifies six different circumstances that will result in the mandatory non-recognition or -enforcement of a foreign judgment in the United States.[272] They include judgments that were rendered:

- by a "system (whether national or local) that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness;"
- "in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question;"
- "on a basis of jurisdiction" that is "unacceptable" under Section 6 of the ALI Proposed Statute;
- "without notice reasonably calculated to inform the defendant of the pendency of the proceeding in a timely manner;" or

269. *See id.* § 5, at 55–58; *see also id.* § 5 cmt. b, at 58.

270. *Id.* § 5 cmt. b, at 58. The one exception is if the judgment is repugnant to the public policy of the United States or an individual state. *See supra* notes 260–266 and accompanying text.

271. *See* ALI, *supra* note 22, § 5, at 55–58.

272. *See id.* § 5(a), at 55–56.

- through "fraud that had the effect of depriving the party resisting recognition or enforcement of adequate opportunity to present its case to the court."[273]

Judgments will also be deemed non-recognizable and -enforceable if they are "repugnant to the public policy of the United States, or to the public policy of a particular state of the United States when the relevant legal interest, right, or policy is regulated by state law."[274]

Although the basic principles of non-recognition and -enforcement under the ALI Proposed Statute are reminiscent of those outlined under the 1962 Act, 2005 Act, and Restatement, some differences do arise.[275] Each ground of non-recognition and -enforcement is considered in turn.

273. *Id.*

274. *Id.*

275. *See* 2005 ACT, *supra* note 71, § 4; 1962 ACT, *supra* note 67, § 4; ALI, *supra* note 22, § 5(a), at 55–56; RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 77, § 481 (1987).

a. Fairness

The first area of discussion involves the criteria surrounding the fairness of the foreign proceeding.[276] One of the more significant innovations of the 2005 Act was the principle that a court could refuse enforcement and recognition of a foreign judgment because "the specific proceeding in the foreign court . . . was not compatible with the requirements of due process of law."[277] The ALI declined to focus on individualized concerns in this way and instead concentrates on systemic problems so as to promote a more pro-enforcement regime.[278] Although some commentators have criticized the ALI for adopting this approach on the grounds that it does not allow (or require) courts to take U.S. principles of due process properly into account, other observers have expressed fewer concerns based on the belief that it is improper to impose U.S. constitutional values on foreign countries through the recognition and enforcement process.[279]

The standards for unfairness under the ALI Proposed Statute appear to be the same as those enunciated in *Hilton v. Guyot*.[280] Therefore, there needs to be an "opportunity for a full and fair trial abroad before a court of competent jurisdiction," with "regular proceedings," sufficient notice, an "impartial administration of justice" as between nationals and non-nationals, and the absence of "either prejudice . . . or fraud."[281] The foreign court does not need to adopt procedures similar to those in use in the United States so long as the foreign proceedings comply with what Judge Richard Posner

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276. Due process is a significant concern in this area of law. *See* Brand, *supra* note 6, at 82 (suggesting that U.S. jurisdictional rules are based on protecting the due process rights of the defendant, not on access to justice); Carodine, *supra* note 26, at 1162–64 (discussing the notion of international due process); Luthin, *supra* note 11, at 125–36 (discussing due process issues arising in the recognition of foreign judgments).

277. 2005 ACT, *supra* note 71, § 4(c)(8).

278. *See* ALI, *supra* note 22, § 5 cmt. c, at 58–59, reporters' note 2, at 68–70.

279. *See* Carodine, *supra* note 26, at 1246; Luthin, *supra* note 11, at 132–34; Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 186–209 (2004); Whytock & Robertson, *supra* note 12, at 1516.

280. *See* 159 U.S. 113, 202 (1895); ALI, *supra* note 22, § 5 cmt. c, at 58–59; *supra* note 56 and accompanying text.

281. *Hilton,* 159 U.S. at 202–03.

has called the "international concept of due process."[282] Thus, under the ALI approach, "[a] judicial system may fail to meet the criteria of fairness in general, or in its treatment of particular classes of litigants, such as Jews in Germany under Hitler or blacks in South Africa under apartheid."[283]

The challenge to the fairness of the foreign legal system may focus on either national or local concerns and can be based on "general knowledge or judicial notice, and without formal proof."[284] As with other defenses described in this section, the ALI places the burden of proof on the judgment debtor.[285]

b. Corruption and Lack of Integrity

Although the ALI focuses on systemic concerns in the area of due process, issues relating to judicial corruption and lack of integrity consider the actions of the rendering court, rather than the foreign judicial system as a whole.[286] To assert a successful defense under this provision, the party resisting recognition or enforcement must not only show corruption in the underlying proceeding but must also demonstrate the probable effect of the lack of integrity on the outcome of the dispute.[287] Furthermore, "[i]n ruling that the burden has been satisfied, the court in the United States must explain the reasons for its doubt about the integrity of the judgment in question."[288]

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282. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000); *see also* ALI, *supra* note 22, § 5 cmt. c, at 60, reporters' note 2, at 68–69.

283. ALI, *supra* note 22, § 5 reporters' note 2, at 70.

284. *Id.* § 5 cmt. c, at 58. However, many of the methods of proof currently used will likely be deemed sufficient under the ALI regime. *See supra* note 98 and accompanying text.

285. *See* ALI, *supra* note 22, § 5 reporters' note 2, at 70.

286. *See id.* § 5 cmt. d, at 60 ("[T]he burden is on the person resisting recognition or enforcement of the foreign judgment to show circumstances that raise substantial and justifiable doubt about the integrity of the rendering court."). There is some inconsistency between the comments and the reporters' notes, with the latter suggesting that the impropriety in question could relate to systemic corruption or corruption in the proceedings giving rise to the judgment pending in U.S. court. *Compare id. with id.* § 5 reporters' note 3, at 70.

287. *See id.* § 5 cmt. d, at 60.

288. *Id.*

The ALI Proposed Statute is not the first enactment to deny recognition and enforcement to a judgment rendered in the face of potential corruption.[289] The 2005 Act has a similar provision, although the 2005 Act speaks of "substantial doubt about the integrity of the rendering court" rather than "substantial and justifiable doubt."[290] In focusing on these issues, the ALI Proposed Statute and the 2005 Act are addressing growing concerns about the high rate of judicial corruption in many countries.[291] Notably, the ALI's emphasis on individualized harm under this subsection may alleviate any uneasiness relating to the absence of an individualized focus under the due process provision.[292]

c. *Lack of Jurisdiction*

The ALI prohibits recognition and enforcement of a judgment if the basis on which the rendering court took jurisdiction over the initial matter is deemed unacceptable under Section 6(a) of the ALI Proposed Statute.[293] This provision is discussed in more detail below.[294]

As a general rule, "any basis of jurisdiction that would meet the requirements of due process if asserted in an action in the United States will meet the requirements of jurisdiction for recognition or enforcement of a foreign judgment."[295] Furthermore, a party may usually only challenge the jurisdiction of the rendering court pursuant to the principles set forth in Section 6 of the ALI Proposed

289. *See id.* § 5(a)(ii), at 55.

290. 2005 ACT, *supra* note 71, § 4(c)(7) (allowing non-recognition or -enforcement in cases where "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment"); ALI, *supra* note 22, § 5(a)(ii), at 55; *see also id.* § 5 cmt. d, at 60. The ALI's approach appears somewhat more rigorous than that of the 2005 Act, which is in keeping with the ALI's pro-enforcement bias. *See id.*; *see also* 2005 ACT, *supra* note 71.

291. *See* ALI, *supra* note 22, § 5 reporters' note c, at 70; *see also supra* notes 33–34 and accompanying text.

292. *See supra* note 286 and accompanying text.

293. *See* ALI, *supra* note 22, § 5 cmt. e, at 60–61; *see also infra* notes 379–402 and accompanying text.

294. *See infra* notes 372–394 and accompanying text.

295. ALI, *supra* note 22, § 5 cmt. e, at 61.

Statute.[296] The one exception is if the judgment in question was obtained by default.[297] In that case, "the judgment debtor may challenge the judicial jurisdiction of the rendering court both under the law of the state of origin and under the standards of §6."[298]

d. Notice

The ALI Proposed Statute's provision on notice is largely unremarkable, given that it echoes the language reflected in both the 2005 Act and the 1962 Act.[299] However, the ALI makes insufficient notice a mandatory ground for non-recognition and -enforcement,[300] whereas the 2005 Act and the 1962 Act indicate that problematic notice merely constitutes a discretionary grounds for non-recognition or -enforcement.[301] The ALI's approach not only has the benefit of increased clarity and predictability, it also helps offset any charges that the ALI is being too permissive in its attitude towards the recognition and enforcement of foreign judgments.

e. Fraud

The ALI Proposed Statute requires U.S. courts to deny recognition and enforcement to judgments involving "extrinsic fraud."[302] This approach makes sense, given that those situations involve foreign courts that merely have "colorable jurisdiction" over

296. *See id.* § 5 reporters' note 4, at 71–72 (discussing the defense of lack of judicial jurisdiction of the rendering court).

297. *See id.*

298. *Id.* § 5 cmt. 4, at 72.

299. *Compare id.* § 5(a)(iv), at 55–56 (requiring non-recongition when "the judgment was rendered without notice reasonably calculated to inform the defendant of the pendency of the procceding in a timely manner"), *with* 2005 ACT, *supra* note 71, § 4(c)(1) (discussing situations in which "the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend"), *and* 1962 ACT, *supra* note 67, § 4(b)(1) (same).

300. ALI, supra note 22, § 5(a)(iv), at 56.

301. *See* 2005 ACT, *supra* note 71, § 4(c)(1); 1962 ACT, *supra* note 67, § 4(b)(1)

302. ALI, *supra* note 22, § 5 cmt. g, at 62.

the parties or the dispute.[303] Claims of "'intrinsic' fraud . . . will not normally defeat recognition or enforcement in a court in the United States, since such an assertion should have been raised in the rendering court."[304]

Comparative analysis suggests that the ALI's approach is superior to existing laws in a number of different ways.[305] For example, although a foreign judgment rendered in the face of "fraud that deprived the losing party of an adequate opportunity to present its case" may be denied recognition or enforcement under the 2005 Act, that provision speaks only of judicial discretion rather than a mandatory duty.[306] The 1962 Act similarly allows non-recognition and -enforcement of a foreign judgment arising out of fraud, but only on a discretionary basis.[307] The 1962 Act is also somewhat ambiguous in that it only refers to fraud as a general concern without any further distinguishing factors.[308] Thus, the ALI Proposed Statute not only takes a more rigorous stance towards judgments arising out of the most problematic types of wrongdoing (in that the ALI requires non-recognition and -enforcement in cases involving extrinsic fraud), it also provides a more clear and predictable approach to these sorts of analyses by eliminating the element of discretion.[309]

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303. Long v. Shorebank Dev. Corp., 182 F.3d 548 (7th Cir. 1999); *see also* Falcon v. Faulkner, 567 N.E.2d 686, 694–95 (Ill. App. Ct. 1991) ("The classic definition of 'extrinsic fraud' refers to situations where 'the unsuccessful party has been prevented from exhibiting fully his case . . . as by keeping him away from court . . . or where the defendant never had knowledge of the suit.'") (quoting United States v. Throckmorton, 98 U.S. 61, 65–66 (1878)).

304. ALI, *supra* note 22, § 5 cmt. g, at 62 (citing false testimony in a foreign proceeding and introduction of a forged document as examples of "intrinsic fraud"); *see also* John Sanderson & Co. (Wool) Pty. v. Ludlow Jute Co., 569 F.2d 696, 697–98 (1st Cir. 1978) ("When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens . . . and the foreign judgment appears to have been rendered by a competent court . . . it should be held conclusive on the merits . . . .").

305. *See* ALI, *supra* note 22, § 5(a)(v), at 56.

306. 2005 ACT, *supra* note 71, § 4(c)(2).

307. *See* 1962 ACT, *supra* note 67, § 4(b)(2).

308. *See id.*

309. *See* ALI, *supra* note 22, § 5 cmt. 6, at 73.

f. Public Policy

Existing laws relating to the recognition or enforcement of a foreign judgment all include a public policy provision, and the ALI Proposed Statute is no exception.[310] However, the language adopted by the ALI is somewhat different from that seen elsewhere, in that the ALI Proposed Statute indicates that the violation of public policy constitutes a mandatory, rather than discretionary, ground for non-recognition and -enforcement.[311]

The scope of the ALI Proposed Statute's public policy provision is similar to that of the 2005 Act and the Restatement, in that the ALI makes reference to the public policy relating to both the judgment and the claim on which the judgment is based.[312] The 1962 Act, on the other hand, only refers to public policies relating to the cause of action and is therefore narrower than the ALI Proposed Statute.[313]

The standard for making out a defense based on public policy is quite high under existing case law,[314] and the ALI Proposed

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310. *See* 2005 ACT, *supra* note 71, § 4(c)(3); 1962 ACT, *supra* note 67, § 4(b)(3); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(2)(d) (1987); ALI, *supra* note 22, § 5(a)(vi), at 56.

311. *See* 2005 ACT, *supra* note 71, § 4(c)(3); 1962 ACT, *supra* note 67, § 4(b)(3); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 77, § 482(2)(d); ALI, *supra* note 22, § 5(a)(vi), at 56.

312. *See* 2005 ACT, *supra* note 71, § 4(c)(3); 1962 ACT, *supra* note 67, § 4(b)(3); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(2)(d) (1987); ALI, *supra* note 22, § 5 cmt. h, at 63; Stewart, *supra* note 11, at 188. For example, under the ALI approach, an award as to interest (i.e., an issue specific to the judgment in question) could provide the basis for a defense based on public policy as much as a quality of the underlying claim. *See* ALI, *supra* note 22, § 5 cmt. h, at 63.

313. *See* 1962 ACT, *supra* note 71, § 4(b)(3); ALI, *supra* note 22, § 5 cmt. h, at 63.

314. *See* Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Paper (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (discussing the invocation of public policy defenses and narrow construction of those defenses); Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918) (discussing public policy defense)

Statute is likely to use a similar standard.[315] The "guiding definition" indicates that the public policy defense is only applicable if recognizing or enforcing a foreign judgment "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[316] This approach significantly narrows the range of allegations that could support a defense based on public policy. For example, a party would be unable to assert a public policy defense based solely on the notion that the underlying claim is not one that could have been asserted in the place where recognition or enforcement is now being sought.[317]

The ALI reporters take the view that parties cannot assert a general public policy defense for any behavior that is covered elsewhere in the ALI Proposed Statute.[318] In this, the ALI differs somewhat from existing law, since parties have sometimes been able to assert both generalized and specialized claims relating to the same issue.[319] Going forward, parties will also be unable to rely on the public policy exception to assert certain First Amendment-based defenses to the recognition and enforcement of judgments involving allegedly defamatory material published on the internet, since these sorts of concerns are now covered by subject-specific legislation.[320]

Courts considering a public policy defense may face some conflict-of-laws concerns if the party asserting the defense is relying on individual state (as opposed to national) policies or regulations, since the U.S. state with the most compelling interest in the events and parties may not be the place where the action to recognize or

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315. *See* ALI, *supra* note 22, § 5 reporters' note 7(a), at 75 (suggesting that public policy is offended if the subject matter of the judgment arouses local opposition to enforcement); Stewart, *supra* note 11, at 188.

316. *Loucks,* 120 N.E. at 202. Interestingly, the public policy defense could be based on a principle of international law. *See* ALI, *supra* note 22, § 5 cmt. h, at 63.

317. *See* ALI, *supra* note 22, § 5 reporters' note 7(a), at 74.

318. *See id.* § 5 cmt. h, at 63.

319. *See id.* However, the ALI Proposed Statute "preserves a residual authority in the court to decline to enforce a judgment that appears to be the result of some overall unfairness in the rendering of the judgment, even if none of the other specific defenses set out in this section are clearly applicable." *Id.* § 5 cmt. h, at 63; *see also id.* § 5 reporters' note 7(b), at 77.

320. *See* U.S. CONST. amend. I; ALI, *supra* note 22, § 5 reporters' note 7(d), at 79–82; *see also supra* notes 66, 85–87 and accompanying text.

enforce the judgment is brought.[321] However, the ALI has proposed a relatively straightforward solution. If the defense is based on a state regulation, then the court should apply that regulation regardless of where the action is brought.[322] Alternatively, if the defense is based on a policy interest, then the court should apply the policy of the state where the action is brought.[323] In the latter category of cases, a court may not apply state policy without considering other factors, since "[a] particular state's public policy . . . is to be measured against the national interest in favor of recognition and enforcement."[324]

2. Discretionary Grounds

The preceding discussion addressed mandatory grounds for non-recognition and -enforcement of a foreign judgment under the ALI Proposed Statute.[325] However, there may be times when a court may be able to deny recognition or enforcement of a foreign judgment on a discretionary basis. According to the ALI Proposed Statute, a U.S. court may refuse recognition or enforcement of a foreign judgment as a matter of discretion if:

- the state whence the judgment originated "did not have jurisdiction to prescribe" the behavior in question or the rendering court did not have subject-matter competence over the controversy;
- "the judgment is irreconcilable with another foreign judgment entitled to recognition or enforcement under [the ALI Proposed Statute] and involving the same parties;"
- the proceedings that resulted in the judgment in question were initiated after an action involving the same parties and the same subject matter was initiated in the United

321. *See* ALI, *supra* note 22, § 5 cmt. h, at 64.
322. *See id.*
323. *See id.*
324. *See id.*
325. *See id.* § 5(a), at 55–56; *see also supra* notes 261–317 and accompanying text.

States, and the U.S. action was neither stayed nor dismissed; or

- the proceedings that resulted in the judgment in question were "undertaken with a view to frustrating a claimant's opportunity to have the claim adjudicated in a more appropriate court in the United States, whether by an anti-suit injunction or restraining order, by a declaration of nonliability, or by other means."[326]

Although some of these provisions are similar to those existing under current law, there are a number of differences that need to be discussed.

a. Jurisdiction to Prescribe

The first type of situation that can lead to a discretionary denial of recognition or enforcement of a foreign judgment involves circumstances in which the rendering court did not have "jurisdiction to prescribe" the activity in question.[327] "'Legislative' or 'prescriptive' jurisdiction involves the authority of a state to make its substantive laws applicable to conduct, relationships or status,"[328] and the ALI in this instance is allowing U.S. courts to deny recognition or enforcement when the "foreign judgment results from the application of regulatory law of the state of origin to matters more appropriately regulated by the law of the United States or of a third country."[329] This provision is somewhat unique since the ALI Proposed Statute does not generally allow a U.S. court to deny

326. *See* ALI, *supra* note 22, § 5(c), at 57.

327. *Id.*

328. BORN & RUTLEDGE, *supra* note 11, at 591. "Judicial jurisdiction" (also known as "jurisdiction to adjudicate" or "adjudicative jurisdiction") refers to the ability of a court to assert its power over certain parties or claims. *Id.* at 1.

329. ALI, *supra* note 22, § 5 cmt. i, at 64. Questions about the proper limits of prescriptive jurisdiction are on the rise as cross-border disputes become increasingly complex and increasingly common. In the absence of a single political actor with comprehensive authority over international wrongdoing, national courts often feel compelled to address certain cross-border injuries pursuant to their own national laws. *See* Brussels I Regulation, *supra* note 16; Nagareda, *supra* note 178, at 13; Strong, *Regulatory Litigation*, *supra* note 178, at 913. The failure to adjudicate these issues can lead to regulatory mismatches. *See supra* note 178 and accompanying text.

recognition and enforcement of a foreign judgment because the foreign court made the wrong decision in a conflict-of-law analysis.[330] However, an exception is made in the context of regulatory concerns, since those issues are of heightened importance to the United States.[331]

A U.S. court may also deny recognition or enforcement of a foreign judgment if the rendering court did not have proper subject matter jurisdiction over the dispute.[332] Thus, for example, a U.S. court could deny recognition or enforcement of a foreign judgment involving real estate located in the United States.[333] However, claims that an action was heard in the wrong court in the foreign jurisdiction—for example, a civil court rather than a commercial court—would not usually result in non-recognition or -enforcement.[334]

b. Irreconcilable Judgments or Proceedings

One of the key problems facing international litigants is the possibility of irreconcilable judgments or proceedings arising out of parallel litigation.[335] The ALI attempts to avoid inconsistencies between two foreign judgments (what might be called Judgment A and Judgment B) involving the same parties by focusing on whether the court that rendered Judgment A (the judgment that is now being considered by a U.S. court) had an opportunity to determine whether Judgment B would be inconsistent with Judgment A.[336] Under the ALI Proposed Statute, a U.S. court should typically recognize and enforce Judgment A if the rendering court considered the possibility of inconsistency with Judgment B under standards similar to those described in the ALI Proposed Statute.[337] If, however, the rendering court did not give fair consideration to Judgment B, then the U.S.

330. *See* ALI, *supra* note 22, § 5 cmt. i, at 64.
331. *See id.*
332. *See id.* § 5, cmt. i, at 65.
333. *See id.*
334. *See id.*
335. *See* Brussels I Regulation, *supra* note 16, para. 15.
336. *See* ALI, *supra* note 22, § 5 cmt. j, at 65.
337. *See id.* § 5 cmt. j, at 65.

court could legitimately deny recognition and enforcement to Judgment A.[338] Similar analyses can and should be conducted in cases involving ongoing proceedings, since the ALI Proposed Statute does not require the disputes to have reached final judgment.[339]

Notably, this provision only addresses judgments from, or proceedings in, non-U.S. courts.[340] If a foreign judgment is irreconcilable with a judgment rendered by a U.S. court, then the U.S. judgment must be given precedence pursuant to the Full Faith and Credit Clause and associated legislation, regardless of when the various actions were commenced or concluded.[341]

c. *Inappropriate Forum*

ALI recommendations relating to irreconcilable judgments or proceedings involving two foreign judgments differ from those involving foreign judgments rendered in the face of a U.S. proceeding. The ALI Proposed Statute addresses the issue of parallel litigation involving U.S. and foreign courts by allowing a U.S. court to deny recognition or enforcement of any judgment arising out of a foreign proceeding if the foreign proceeding was initiated after a U.S. proceeding involving the same parties and the same subject matter had begun.[342] The ALI adopted this approach "to create an incentive for a foreign court to decline jurisdiction in favor of a prior U.S. proceeding."[343]

d. *Anti-Suit Injunctions*

Anti-suit injunctions are typically sought "(i) to prevent a pending or threatened action in a foreign forum; (ii) to prevent relitigation elsewhere after issuance of a judgment; and (iii) to

338. *See id.* (noting that the United States may, in appropriate circumstances, decline to recognize the judgment presented).

339. *See id.* § 5 cmt. j, at 65–66.

340. *See id.* § 5 cmt. j, at 66.

341. *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2013); ALI, *supra* note 22, § 5 cmt. j, at 66.

342. *See* ALI, *supra* note 22, § 5 cmt. k, at 66–67. The ALI notes that the U.S. proceeding must not have been stayed or dismissed. *See id.* § 5(c)(iii), at 57.

343. *Id.* § 5 cmt. k, at 66–67 (noting that U.S. courts have no power to halt duplicative foreign litigation).

protect against an anti-suit injunction in a foreign forum."[344] Although these devices were initially available only in a few common law jurisdictions, a growing number of legal systems, including those from the civil law tradition, now allow such procedures.[345] As such, U.S. courts may be facing an increasing number of requests to recognize or enforce a foreign anti-suit injunction or similar type of device.

The ALI Proposed Statute takes the view that these sorts of orders may be recognized and enforced in the United States, but only as a matter of discretion.[346] In so doing, the ALI recognizes that anti-suit injunctions and similar measures may be issued by a foreign court with the intent of frustrating a U.S. action.[347] Although some unpredictability will exist as a result of the use of judicial discretion, the ALI Proposed Statute nevertheless constitutes an improvement over existing law, since no other enforcement regime addresses questions relating to foreign orders or injunctions.[348]

The ALI's anti-suit provision is also remarkable because it reverses the general rule, enunciated in Section 11(a), that the court first seised of a matter is presumed to be the proper adjudicator of the dispute.[349] In so doing, the ALI discourages parties from using

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344. *Id.* § 5 reporters' note 9, at 83 (describing situations in which injunctions are sought, why they are disfavored, and why they do not often resolve conflict of parallel litigation and sometimes lead to further conflict). Efforts to block anti-suit injunctions (typically referred to as anti-anti-suit injunctions) are a relatively recent development. *See* S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 J. DISP. RESOL. 119, 164.

345. *See, e.g.*, Andrey Y. Astapov, *Ukraine*, 45 INT'L LAW. 581, 593 (2011) (discussing Ukrainian anti-suit injunctions); Tanya J. Monestier, *(Still) a "Real and Substantial" Mess: The Law of Jurisdiction in Canada*, 39 FORDHAM INT'L L.J. 396, 445 n.147 (2013) (discussing Canadian anti-suit injunctions); Mark Stiggelbout, *The Recognition in England and Wales of United States Judgments in Class Actions*, 52 HARV. INT'L L.J. 433, 471 (2011) (discussing English anti-suit injunctions); Daniel Tan, *Enforcing International Arbitration Agreements in Federal Courts: Rethinking the Courts' Remedial Power*, 47 VA. J. INT'L L. 545, 596 (2007) (noting the spread of anti-suit injunctions to civil law jurisdictions).

346. *See* ALI, *supra* note 22, § 5 cmt. l, at 67.

347. *See id.*

348. *See supra* note 210 and accompanying text.

349. *See* ALI, *supra* note 22, § 5 cmt. l, at 67; *see also infra* notes 447–459 and accompanying text.

injunctive and declaratory actions as a means of racing to the courthouse.

3. Forum Selection Agreements

The ALI Proposed Statute includes a specific provision regarding forum selection agreements, which includes choice of court agreements of the type contemplated by COCA as well as arbitration agreements.[350] According to the ALI, U.S. courts are prohibited from recognizing or enforcing a judgment rendered by a foreign court if the proceeding was contrary to one of these exclusive forum selection agreements.[351] The ALI Proposed Statute is silent as to the form that the forum selection agreement must take, thereby leaving that issue to be determined pursuant to national or international law.[352]

There are some exceptions to this general rule. For example, if the party resisting recognition or enforcement in the United States participated in the foreign proceeding without raising the existence of the forum selection agreement as a defense, then the U.S. court should recognize or enforce the judgment unless it was "clear" that a defense based on the existence of a forum selection clause "would have been futile."[353]

However, if the party resisting recognition and enforcement did assert the protection of the forum selection clause and the court rendering the foreign judgment "held that the agreement was inapplicable or invalid, [then] the judgment shall not be denied recognition or enforcement" unless that determination "was manifestly unreasonable."[354] This outcome is consistent with

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350. *See* COCA, *supra* note 4; ALI, *supra* note 22, § 5 cmt. b, cmt. f, at 56, 61.

351. ALI, *supra* note 22, § 5(b), at 56.

352. *See, e.g.*, 9 U.S.C. §§ 2, 202 (2013); COCA, *supra* note 4, art. 3; New York Convention, *supra* note 21, art. II(2). Forum selection agreements may be in writing or in some other form that the parties have established independently or through custom, trade, and usage. *See* ALI, *supra* note 22, § 5(f), at 61 (articulating the policy of honoring forum-selection agreements). Such agreements may be embedded within a larger contract or entirely independent. *See id.* (explaining that forum-selection agreements are generally regarded as effective if contained in a contract or in a special agreement to settle a particular dispute).

353. ALI, *supra* note 22, § 5(b)(ii), at 56.

354. *Id.* § 5(b)(iii), at 56–57.

COCA, although the ALI's approach is somewhat more comprehensive, since COCA "does not address judgments rendered in contravention of forum-selection agreements, leaving that issue to national law."[355] Neither the 1962 Act nor the 2005 Act addresses situations involving forum selection agreements.[356]

4. Burden of Proof

The ALI Proposed Statute also addresses issues relating to burdens of proof.[357] Under the ALI approach, the party resisting recognition or enforcement of a foreign judgment has the burden of proof in cases where there is no forum selection clause.[358] This method is also adopted by the 2005 Act.[359] However, some U.S. courts follow the opposite rule and place the burden of proving the absence of a mandatory ground for non-recognition on the judgment creditor.[360]

If, however, the party opposing recognition and enforcement raises the existence of a forum-selection agreement as a defense, then the burden shifts to the party seeking enforcement or recognition of the judgment to show the inapplicability of the forum selection agreement.[361] Notably, "[i]f the judgment debtor failed to appear in the rendering court," the ALI's approach means that "the

355. *Id.* § 5 reporters' note 5, at 73; *see also* COCA, *supra* note 4; ALI, *supra* note 22, § 5 cmt. f, at 62 (discussing the applicability and validity of forum-selection agreements and describing the criteria for assessing unreasonableness).

356. *See* 2005 ACT, *supra* note 71; 1962 ACT, *supra* note 67.

357. *See* ALI, *supra* note 22, § 5(d), at 57–58.

358. *See id.*

359. *See* 2005 ACT, *supra* note 71, § 4(d). The 1962 Act is silent on this issue. *See* 1962 ACT, *supra* note 67.

360. *See* ALI, *supra* note 22, § 5 reporters' note 1, at 67–68 (stating that "[s]ome courts have stated that the burden is on the judgment creditor to prove that no mandatory basis for non-recognition exists"); *see also* S.C. Chimexim S.A. v. Velco Enters. Ltd., 36 F. Supp. 2d 206, 212 (S.D.N.Y. 1999).

361. *See* ALI, *supra* note 22, § 5(d), at 57–58. COCA does not address burdens of proof, but the ALI approach appears consistent with the terms of the convention. *See* COCA, *supra* note 4, arts. 13–14 (discussing enforcement procedures).

issue of validity of the forum-selection agreement will be contested only in the court of the United States."[362]

5. Intermediate Comparison

A brief comparison of Section 5 of the ALI Proposed Statute to existing law suggests that the ALI has made a number of improvements to the standards and procedures relating to recognition and enforcement of foreign judgments.[363] Although clarity and uniformity are the two most obvious advantages, the ALI promotes not only clear law, but also good law.[364]

One of the key ways that the ALI advances the law in this field is by promoting a pro-enforcement regime while simultaneously providing sufficient safeguards for U.S. parties and interests. For example, the ALI Proposed Statute may appear to be too permissive in the way that it limits fairness-based defenses of recognition and enforcement to systemic rather than individual concerns, but any concerns in that regard are offset by the fact that due process violations constitute a mandatory rather than discretionary ground for non-recognition and enforcement.[365] The ALI also ensures that judgment debtors can raise individualized issues relating to the rendering court under the provision relating to lack of integrity.[366] However, the ALI again provides an appropriate balance between the interests of the judgment debtor and the judgment creditor by drawing the corruption defense quite narrowly and requiring the U.S. court to identify a link between the improper behavior and the judgment itself.[367]

One of the challenges facing the ALI involves whether and to what extent U.S. policies and principles should affect recognition

362. ALI, *supra* note 22, § 5 cmt. f, at 61–62.

363. *See id.* § 5, at 55–58.

364. *See* Kristen David Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice?*, 32 S. ILL. U. L.J. 173, 183 (2007) (describing efforts by the ALI and prominent jurists to ensure that the legislative process produces "good law, not just clear law").

365. *See* ALI, *supra* note 22, § 5(a)(i), at 55.

366. *See id.* § 5(a)(ii), at 55 (providing for discretionary non-recognition when a judgment "was rendered in circumstances that raise a substantial and justifiable doubt about about the integrity of the rendering court with respect to the judgment in question").

367. *See id.*

and enforcement of foreign judgments. The ALI Proposed Statute appears to do well in this regard, since provisions relating to insufficient notice and extrinsic fraud successfully reinforce universal notions of procedural fairness without falling prey to the charge that U.S. courts are exporting U.S. constitutional values.[368] The public policy defense, though somewhat nebulous (as indeed all such provisions are), also imposes certain useful limits, such as the ban on using the general provision to make objections that could be asserted elsewhere under the statute.[369]

Although the ALI takes a somewhat more U.S.-centric approach to the discretionary grounds for non-recognition and -enforcement, the standards nevertheless promote predictability and neutrality.[370] While it is unclear whether the ALI's approach will actually "create an incentive for a foreign court to decline jurisdiction in favor of a prior U.S. proceeding," there is at least some logic to the methodology that has been adopted.[371]

F. Section 6 – Unacceptable Bases of Jurisdiction

When considering whether to recognize or enforce a foreign judgment, the U.S. court must be assured that the rendering court had proper jurisdiction over the parties and the dispute.[372] The 2005 Act and the 1962 Act handled this issue by listing the grounds of jurisdiction that were considered acceptable for the foreign court to assert and allowing U.S. courts to refuse recognition and enforcement of foreign judgments in all other circumstances.[373] The ALI Proposed Statute reverses this approach and instead lists the

368. *See id.* § 5(a)(iv)–(v), at 56.

369. *See id.* § 5(a)(v), at 56.

370. Thus, for example, provisions relating to multiple actions balance comity with efficiency. *See supra* notes 335–343 and accompanying text.

371. ALI, *supra* note 22, § 5 cmt. k, at 67. The United States has attempted to lead by example in other areas of law, with questionable success. *See* S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295 (2013) (discussing 28 U.S.C. § 1782 (2013))

372. To enforce a judgment when the rendering court did not have proper jurisdiction would constitute a breach of due process. *See* ALI, *supra* note 22, § 6, at 84–85; Luthin, *supra* note 11, at 132–36.

373. *See* 2005 ACT, *supra* note 71, § 5; 1962 ACT, *supra* note 67, § 5.

types of foreign jurisdiction that are considered unacceptable, thereby allowing U.S. courts to recognize or enforce judgments in all other circumstances.[374] In so doing, the ALI Proposed Statute "goes further" than existing law by "recognizing and enforcing some judgments where the jurisdictional basis of the rendering court does not mirror bases asserted by courts in the United States."[375]

Section 6 of the ALI Proposed Statute is framed in mandatory terms and indicates that a U.S. court must deny recognition and enforcement of a judgment if the rendering court's jurisdiction was based on:

- the presence or seizure of the defendant's property in the forum state, unless the underlying claim asserts an interest in or is related to the property, or arises in the context of an action in admiralty or maritime law;
- the plaintiff's nationality;
- the plaintiff's domicile, residence, or place of incorporation;
- jurisdiction arising out of service of process while the defendant was transiting the foreign state, "unless no other appropriate forum was reasonably available;" or
- "any other basis that is unreasonable or unfair given the nature of the claim and the identity of the parties," although jurisdiction is not to be deemed unreasonable or unfair simply because U.S. courts do not provide for a similar basis of jurisdiction.[376]

Many of these principles have been well-discussed as a matter of both domestic and private international law, so the ALI is not breaking new ground, conceptually speaking.[377] For example, prohibiting jurisdiction based on property in the forum state in cases where the claim is unrelated to the property itself echoes principles

374. *See* ALI, *supra* note 22, § 6, cmt. a, at 84–85.

375. *See id.* § 6 reporters' note 5, at 91.

376. *Id.* § 6(a), at 84.

377. *See id.* § 6 cmt. b, at 85 (noting features of subsection (a) that are in line with contemporary approaches and developments in international and domestic law).

enunciated by the U.S. Supreme Court in *Shaffer v. Heitner*.[378] Jurisdiction on the basis of nationality has long been disapproved of by most countries, although it is permitted in France.[379] Jurisdiction based on the domicile, residence, or place of incorporation of the plaintiff is widely condemned, unlike jurisdiction based on the domicile, residence, or place of incorporation of the defendant.[380] So-called "tag" or "transient" jurisdiction also meets with nearly universal disapprobation; indeed, the United States may be the sole proponent of this particular practice.[381]

Section 6 includes a catch-all provision that requires a court to deny recognition or enforcement if the exercise of jurisdiction by the rendering court was unreasonable or unfair.[382] The ALI suggests that although "[a] court should not regard an exercise of jurisdiction as unfair solely because it was founded on a basis that has not been accepted in the United States, . . . U.S. practice may be relevant in making the required assessment."[383] Although some courts and commentators may find this kind of reliance on U.S. legal principles appropriate,[384] this approach is potentially problematic both for

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378. *See* Shaffer v. Heitner, 433 U.S. 186, 196, 207–12 (1977) (discussing quasi in rem jurisdiction).

379. *See* ALI, *supra* note 22, § 6 cmt. b, at 86.

380. *See id.*

381. *See id.* § 6 reporters' note 1, at 88 (recognizing that while "tag" jurisdiction was found constitutional by the United States Supreme Court, the international legal community questions such jurisdiction); BORN & RUTLEDGE, *supra* note 11, at 129–37. However, some commentators have taken the view that "tag" or transient jurisdiction is necessary in cases involving international human rights violations. *See* ALI, *supra* note 22, § 6 reporters' note 2, at 89 (recognizing support for transient jurisdiction); Van Schaack, *supra* note 34, at 194. The Principles of Transnational Civil Procedure consider tag jurisdiction acceptable in exceptional circumstances, although most commentators view that feature as a concession to U.S. interests. *See* ALI, *supra* note 22, § 6 cmt. b, at 86–87; *see also* ALI/UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 1820 (2006) (discussing Principle 2 and Comment P-2B); Dubinsky, *supra* note 28, at 328–34; Simona Grossi, *Rethinking the Harmonization of Jurisdictional Rules*, 86 TUL. L. REV. 623, 678–83 (2012).

382. *See* ALI, *supra* note 22, § 6 cmt. c, at 87.

383. *Id.* (emphasis omitted).

384. *See* Rosen, *supra* note 12, at 785 (arguing that U.S. courts should accept foreign judgments based on foreign laws that would be considered unconstitutional under the U.S. Constitution).

pragmatic reasons (in that it could open the door to numerous challenges) as well as principled concerns (in that it could allow courts to ignore jurisdictional bases that are considered perfectly acceptable in the international context, even if they are not known in the United States).[385] However, the ALI Proposed Statute mitigates any untoward effects by "creat[ing] a presumption that judgments that rest on a proper exercise of jurisdiction under the law of the state of origin and do not fall within the grounds of jurisdiction identified in subsections (a)(i)-(a)(iv) are entitled to recognition, subject to the defenses listed in §§5-7."[386]

Even if a judgment is technically based on an unacceptable form of jurisdiction, a U.S. court may nevertheless recognize or enforce that judgment if the facts clearly demonstrate the existence of jurisdictional grounds that are not considered unacceptable under Section 6.[387] Although this provision increases the number of judgments that are eligible for recognition and enforcement in the United States, the ALI Proposed Statute does not indicate how alternative jurisdictional facts are to be entered into evidence and what standard or burden of proof is to be used to decide such matters, which is somewhat problematic.[388]

Parties may resist enforcement or recognition of a judgment in the United States under Section 6 even if they failed to object to the jurisdiction of the court rendering the judgment at the time of the initial procedure.[389] This approach avoids the need for a defendant to raise a futile defense in the rendering court so as to preserve the defendant's right to object to the jurisdiction of the rendering court in a U.S. enforcement action.[390] Defenses under Section 6 are also

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385. For example, certain types of jurisdiction that are available in the European Union are not known in the United States. *See* Owusu v. Jackson, [2005] Q.B. 801 (Eng.) (discussing jurisdiction under the Brussels Convention); ALI, *supra* note 22, § 6 reporters' note 3, at 89–90; S.I. Strong, *Backyard Advantage: New Rules Mean That U.S. Companies May be Forced to Litigate Across the Pond*, 28 LEGAL TIMES 43, May 23, 2005.

386. ALI, *supra* note 22, § 6 cmt. c, at 87.

387. *See id.* § 6(b), cmt. 4, at 85, 90–91.

388. *See id.* § 6(b), at 84.

389. *See id.* § 6(d), at 87–88.

390. For example, if the rendering court could obtain jurisdiction over the dispute on the basis of the plaintiff's nationality, the defendant would have no basis for objecting to jurisdiction in the foreign proceeding if there was no doubt that the plaintiff's nationality was as asserted. *See id.* § 6(d), cmt. 6(d), at 88.

available to parties who have mounted an unsuccessful objection to the jurisdiction of the rendering court at the time of the initial proceeding.[391]

One of the most remarkable aspects of Section 6 is the way that it expands the number and type of judgments that can be recognized and enforced in the United States by reversing the procedural approach to unacceptable bases of jurisdiction.[392] Although some people may be concerned that the ALI has made recognition and enforcement of foreign judgments too easy, Section 6 does not exist in isolation. Instead, Section 6 works in conjunction with other provisions that provide a limiting effect on the recognition and enforcement of foreign judgments.[393] Furthermore, another of the ALI's innovations—namely, the requirement of reciprocity—may result in even fewer judgments being recognized under the ALI Proposed Statute than is currently the case.[394]

G. Section 7 – Reciprocity

At this point, there is no consensus in the United States as to whether reciprocity is a necessary part of the process of enforcing and recognizing foreign judgments.[395] While a number of states

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However, the ALI takes the view that failure to enter an objection to jurisdiction based on nationality in the underlying action should not preclude the judgment debtor from doing so during an enforcement and recognition proceeding in the United States. *See id.*

391. *See id.* § 6(d), at 87–88.

392. *See id.* § 6, at 84–85.

393. Section 5 is perhaps the most notable of these cross-references. *See id.* § 5, at 55–58, § 6, at 84–85 (detailing which bases for foreign jurisdiction will not be recognized or enforced in the United States).

394. *See id.* § 7, at 92–94.

395. *See id.* § 7 cmt. a, at 94 (discussing history of reciprocity issue); *see also id.* § 7 reporters' notes 2–3, at 98–100. Numerous scholars have considered the wisdom of a reciprocity requirement in this field. *See, e.g.*, John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332290 (constructing an analytical framework for determining the conditions under which reciprocal legislation is most likely to change the behavior of foreign states); Richard W. Hulbert, *Some Thoughts on Judgments, Reciprocity, and the Seeming Paradox of International Commercial Arbitration*, 29 U. PA. J. INT'L L. 641, 646–56 (2008); Kathleen R. Miller, *Playground Politics, Assessing the*

require reciprocity as a matter of state law, neither the 1962 Act, the 2005 Act, nor the Restatement includes such a requirement.[396]

Given this background and the general pro-enforcement bias of the ALI Proposed Statute, it is somewhat surprising that the ALI would choose to require U.S. courts to deny recognition and enforcement of a foreign judgment unless the courts of the foreign state recognize and enforce "comparable judgments" of U.S. courts.[397] Although the ALI's approach has the benefit of creating a nationally consistent standard, it also has the effect of limiting the number and type of judgments that are eligible for recognition and enforcement within the United States.[398]

The party resisting recognition and enforcement has the duty of raising the lack of reciprocity "with specificity as an affirmative defense" and has the "burden to show that there is substantial doubt" that the courts in the rendering state would recognize or enforce comparable judgments from the United States.[399] The showing of non-reciprocity can be made "through expert testimony, or by judicial notice if the law of the state of origin or decisions of its courts are clear."[400] According to the ALI,

> [t]he law or practice of the courts of the state of origin may be demonstrated by statutes, decrees of generally applicability, or current decisions of courts of last resort, as well as by authoritative commentaries or treatises or expert testimony, in accordance with Rule

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Wisdom of Writing a Reciprocity Requirement Into U.S. International Recognition and Enforcement Law, 35 GEO. J. INT'L L. 239, 287–318 (2004) (discussing four points to be considered in evaluating the prudence of a reciprocity requirement)

396. *See* 2005 ACT, *supra* note 71 (advocating uniformity across states without requiring reciprocity); 1962 ACT, *supra* note 67, prefatory note (same); *see also supra* note 99 and accompanying text (noting states that require reciprocity).

397. ALI, *supra* note 22, § 7(a), at 92; *see also id.* § 7 cmt. a, reporters' note 1, reporters' note 4, at 94, 98, 101–02.

398. *See id.* § 7 cmt. b, at 95. The ALI indicates that "[t]he purpose of the reciprocity provision in this Act is . . . to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States." *Id.* § 7 cmt. b, at 95. This type of technique has not always proven successful in the past. *See supra* note 371 and accompanying text.

399. ALI, *supra* note 22, § 7(b), at 92.

400. *Id.*

44.1 of the Federal Rules of Civil Procedure and comparable state rules.[401]

Lower court decisions from the foreign state are not conclusive unless "a consistent pattern emerges."[402]

When making a determination regarding reciprocity, U.S. courts are instructed to consider a number of issues, including whether and to what extent the courts of the rendering state enforce:

- judgments from any state against nationals of the rendering state;
- judgments from U.S. state or federal courts;
- judgments involving compensatory damages in cases relating to personal injury and death;
- judgments for claims arising as a matter of statutory law; and
- "particular types of judgments rendered by courts in the United States similar to the foreign judgment for which recognition or enforcement is sought."[403]

These factors are illustrative, rather than exhaustive, and no single item should be considered conclusive.[404]

Although the ALI Proposed Statute requires reciprocity in most situations, there are certain exceptions to the rule.[405] For example, some countries have expressed concerns about enforcing tort judgments that provide damages for pain and suffering or that have been awarded as a result of a jury verdict.[406] According to the ALI, a foreign court's failure to enforce these types of judgments need not affect a U.S. court's reciprocity analysis.[407] Similarly, a

401. *Id.* § 7 cmt. e, at 96; *see also* FED. R. CIV. P. 44.1.

402. ALI, *supra* note 22, § 7 cmt. e, at 96.

403. *Id.* § 7(c), at 93.

404. *See id.* § 7 cmt. f, at 97.

405. *See id.* § 7, at 92–94.

406. *See id.* §7 cmt. f, at 97 (discussing the refusal to enforce tort judgments rendered in the United Slates).

407. *See id.* (explaining that the failure of tort judgments from a given country to pass the test of reciprocity does not necessarily show lack of reciprocity

foreign court's refusal to enforce U.S. judgments involving punitive, exemplary, or multiple damages need not stop a U.S. court from recognizing or enforcing judgments from that country.[408]

The ALI Proposed Statute also describes how the reciprocity requirement might be met, stating that "[t]he Secretary of State is authorized to negotiate agreements with foreign states or groups of states setting forth reciprocal practices."[409] These agreements, which may be as broad or as narrow as the parties desire, would not need to take the form of a formal treaty but could instead include various types of soft law.[410] Although the existence of one of these bilateral or multilateral agreements would conclusively establish the element of reciprocity with respect to the types of judgments covered by the agreement, the absence of such an agreement or the inapplicability of an agreement to a particular type of judgment would "not of itself establish that the state fail[ed] to meet the reciprocity requirement" under the ALI Proposed Statute.[411] At this point, the United States has not entered into any international agreements regarding recognition and enforcement of foreign judgments, so this provision is entirely prospective in nature.[412]

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with regard to other kinds of judgments, such as judgments for breach of contract or breach of a fiduciary relationship).

408. *See id.* § 7(d), at 93. However, the ALI Proposed Statute allows U.S. courts to enforce foreign judgments involving these types of damages on a reciprocal basis. *See id.*

409. *Id.* § 7(e), at 93. Game theorists argue that international agreements would maximize mutual enforcement of foreign judgments. *See* Rosen, *supra* note 12, at 808–09.

410. *See* ALI, *supra* note 22, § 7 cmt. c, at 95–96 (suggesting the possible use of diplomatic notes or memoranda of understanding); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1879 (2002).

411. ALI, *supra* note 22, § 7 cmt. c, at 95–96.

412. *See id.* § 7 reporters' note 3, at 100; *see also Enforcement of Judgments*, U.S. DEP'T OF STATE, http://travel.state.gov/law/judicial/judicial_691.html; ALI, *supra* note 22, § 7 reporters' note 7, at 105 ("'National Treatment' provisions in general Friendship, Commerce, and Navigation treaties do not alone qualify as 'agreements' or 'Memoranda of Understanding' within this section of the [ALI Proposed Statute], although reciprocity accorded to U.S. judgments by a foreign country pursuant to such a treaty might satisfy the reciprocity requirement."); John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302, 343 n.172 (2013).

H. Section 8 – Jurisdiction of U.S. Courts

The ALI Proposed Statute gives U.S. federal district courts original jurisdiction to hear actions to recognize and enforce foreign judgments, regardless of both the amount in controversy and the citizenship or residence of the parties.[413] Jurisdiction in the federal courts runs concurrently with jurisdiction in state courts,[414] and the ALI offers two options relating to removal and remand.[415] One of these options relates only to enforcement actions (subsection b) and the other relates to both enforcement and recognition actions (subsections c and d).[416] Neither the 1962 Act nor the 2005 Act contain any similar provisions, since both of those enactments were meant to be adopted at the state level.[417]

I. Section 9 – Enforcement Procedures

One of the major problems with the 1962 Act and the Restatement was the failure to provide adequate guidance regarding the procedures to be used in recognition and enforcement proceedings.[418] Although the 2005 Act reflected some improvements in that regard, the ALI provides somewhat more comprehensive discussion of the procedures to be used in

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413. ALI, *supra* note 22, § 8(a), at 105.

414. *See* 28 U.S.C. § 1446(b) (2013); ALI, *supra* note 22, § 8(a)–(b), at 105. Removal may take place without regard to either the amount in controversy or the citizenship or residence of the parties. *See id.* Claims that are not related to the foreign judgment may be remanded to state court by the district court in its discretion. *See id.*

415. *See* ALI, *supra* note 22, § 8 cmt. a, at 107.

416. *See id.* § 8(b)–(d), at 105–07.

417. *See* 2005 ACT, *supra* note 71; 1962 ACT, *supra* note 67. This aspect of the ALI Proposed Statute is somewhat similar to the jurisdictional provisions of international chapters of the Federal Arbitration Act (FAA). *See* 9 U.S.C. §§ 203, 302 (2013); ALI, *supra* note 22, § 8 cmt. a, at 107.

418. *See* 1962 ACT, *supra* note 67 (noting that a foreign judgment is enforceable if it meets the requirements set out in Section 2, but providing no guidelines for actual enforcement); RESTATEMENT OF FOREIGN RELATIONS §§ 481–82 (providing no guidelines for the enforcement of the foreign judgments); BRAND, *supra* note 1, at 5.

recognition and enforcement actions.[419] Under the ALI Proposed Statute, there are two ways in which a foreign judgment can be recognized and enforced in the United States: a civil action to recognize or enforce a judgment (Section 9) and registration of a foreign judgment (Section 10).[420] Both procedures are analogous to those that are currently in use in the United States.[421]

The procedures described in Section 9 can be used with any kind of foreign judgment falling within the terms of the ALI Proposed Statute, including judgments for the payment of money, declaratory relief, injunctive relief, orders to return property or perform some other activity, and judgments following default in the foreign court.[422] A party seeking to have a judgment recognized or enforced under Section 9 simply needs to bring a civil action in either state or federal court in the location where the judgment debtor is subject to personal jurisdiction or where the judgment debtor has assets.[423] Process is to be served in accordance with the relevant provisions of state or federal law,[424] which may permit or require recourse to international treaties such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention).[425]

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419. *See* 2005 ACT, *supra* note 71, §§ 6, 7(2); ALI, *supra* note 22, § 9, at 111–12; *see also supra* notes 129–32 and accompanying text.

420. *See* ALI, *supra* note 22, §§ 9–10, at 111–12, 119–23; *see also id.* § 9(a)(ii), at 111; *infra* notes 448–53 and accompanying text.

421. *See* ALI, *supra* note 22, § 9, cmt. a, at 112.

422. *See id.* § 9, cmt. a, at 113.

423. *See id.* § 9(a)–(b), cmt. b, reporters' note 1, at 111, 113, 116; *see also* Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977). Venue is established pursuant to the standard rules. *See* ALI, *supra* note 22, § 9 cmt. b, at 114.

424. *See* ALI, *supra* note 22, § 9(c), at 111.

425. *See, e.g,* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 658 U.N.T.S. 163, 20.1 U.S.T. 361 ("The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad."). However, the U.S. Supreme Court has largely eviscerated the effectiveness of the Hague Service Convention by interpreting it as merely supplementing existing U.S. procedures. *See* Patrick J. Borchers, *The Incredible Shrinking Hague Evidence Convention*, 38 TEX. INT'L L.J. 73, 73 (2003) (noting the U.S. Supreme Court has interpreted the Convention as simply an "add-on" to current U.S. procedures); *see also* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 700 (1986); Grossi, *supra* note 381, at 631–32.

Interestingly, the ALI Proposed Statute expressly contemplates the possibility that a party might bring several enforcement actions simultaneously in the United States.[426] Multiple actions are typically necessary if there are insufficient assets in a single U.S. state or federal district to satisfy the foreign judgment in whole.

Multiple enforcement proceedings are permitted so long as the judgment creditor designates one of the various actions as the "main enforcement action."[427] Thus, "at least one such action must be brought in the state or federal court for the place where the judgment debtor . . . is domiciled or . . . has its principal establishment in the United States, or where the judgment debtor has substantial assets."[428] Inability to establish jurisdiction in one of these ways will cause the action to recognize or enforce the foreign judgment to fail.[429] This requirement means that judgment creditors may not bring an action to enforce or recognize a foreign judgment in the United States in anticipation of assets later coming into the jurisdiction.[430]

The action in the place where the judgment debtor is domiciled or has its principal establishment is deemed to be the "main enforcement action," and the court in that location is designated as the "main enforcement court."[431] If the judgment debtor does not bring an action in that location or there is no such place, then the "main enforcement action" (and corresponding "main enforcement court") are situated in the place where the judgment debtor has substantial assets.[432]

The purpose of designating a main enforcement action and a main enforcement court is to allow all issues concerning recognition of the judgment to be determined at a single time, by a single

426. *See* ALI, *supra* note 22, § 9(d)(iii), at 112.
427. *Id.* § 9(d)(iii), at 112; *see also id.* § 9 cmt. d, at 114.
428. *Id.* § 9(d)(i), at 111.
429. *See id.* § 9 reporters' note 2, at 117.
430. *See id.* § 9 reporters' note 2, at 117–18.
431. *Id.* § 9(d)(ii), at 111–12.
432. *Id.*

judge.[433] This approach is most efficient and strikes an appropriate balance between party autonomy and procedural fairness by limiting excessive forum shopping while allowing parties seeking recognition and enforcement some freedom to choose the place of enforcement.[434]

Once the main enforcement action is identified, other pending enforcement actions are stayed.[435] However, other courts can still hear matters related to "the propriety of . . . [any] attachment or garnishment [in that jurisdiction], exemptions of property from attachment or garnishment, or the title to such assets."[436] Furthermore, "[a]ny court where an action to enforce is pending may . . . require the party resisting enforcement to post security to prevent dissipation of assets" in that jurisdiction.[437] Once the main enforcement court has made its determination, "[t]he decision on recognition shall be binding on . . . every other court in the United States."[438]

The ALI Proposed Statute's procedure for civil enforcement actions marks a significant improvement over existing law. Not only does the ALI Proposed Statute provide a clear and consistent means of recognizing and enforcing foreign judgments,[439] it also discusses

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433. *See id.* § 9(d)(iv), at 112 (giving the main enforcement court authority to produce a binding judgment while staying all other enforcement proceedings in U.S. courts).

434. *See id.* § 9 cmt. d, at 114 ("The purpose of subsection (d) is to offer the judgment creditor a choice as to where the issue is to be heard, but to provide a limit on forum shopping.").

435. *See id.* § 9(d)(iv), at 112.

436. *Id.* § 9 cmt. e, at 115.

437. *Id.* § 9(e), at 112. Such a procedure may be useful "[w]here litigation of a defense is likely to be protracted." *Id.* § 9 cmt. f, at 115.

438. *Id.* § 9(d)(iv), at 112. Mutual recognition is not guaranteed under existing law. *See id.* § 9 reporters's note 3, at 118.

439. *See id.* § 9 reporters' note 3, at 118–19 (describing the ALI Proposed Statute as intending to provide a "uniform national standard" for enforcing foreign judgments). The current procedural approach is somewhat confusing. For example, some but not all states currently allow summary proceedings in cases involving the recognition or enforcement of foreign judgments. *See id.* § 9 cmt. g, at 115–16 (acknowledging that some states allow summary proceedings while the rest follow the federal government in not doing so); *see also* N.Y.C.P.L.R. 3213; *supra* notes 125–128 and accompanying text. However, "[i]f the judgment debtor opposes summary judgment and the motion is denied . . . the action to enforce the judgment would proceed as an ordinary civil action." ALI, *supra* note 22, § 9 cmt.

certain issues (including simultaneous proceedings) not covered by the 1962 Act, the 2005 Act, or the Restatement.[440]

J. Section 10 – Registration of Foreign Judgments

The second way in which a foreign judgment may be enforced under the ALI Proposed Statute is through a registration procedure similar to that provided for in federal courts under 28 U.S.C. § 1963 and in state courts under legislation modeled on the 1964 Act.[441] The registration procedure is only available if the judgment in question has been rendered by "the court of a state that has entered into an agreement with the United States for reciprocal recognition of judgments pursuant to §7(e)" of the ALI Proposed Statute.[442] Since no such agreements currently exist, this section would not be operative even if Congress adopted the ALI proposal today.[443]

Given the current inapplicability of the registration process, this Article will not conduct a detailed analysis of the procedures themselves.[444] Nevertheless, it is useful to note that the ALI proposed the registration procedure with two purposes in mind: first, to provide an incentive to foreign countries to enter into international agreements regarding recognition and enforcement of foreign judgments and, second, to standardize the registration process

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g, at 116. In federal court and some state courts, "the action would be commenced by filing a complaint with the court," although the motion for summary judgment could be made within the next twenty days. *Id.*; *see also* FED. R. CIV. P. 56(a).

440. *Compare* 2005 ACT, *supra* note 71 (failing to address simultaneous proceedings, among other issues), *and* 1962 ACT, *supra* note 67 (same), *with* ALI, *supra* note 22, § 9, at 111–12 (noting possibility of parallel suits).

441. *See* ALI, *supra* note 22, § 10, at 119–23 (describing the process by which a party can enforce a foreign judgment in U.S. federal court); *see also* 28 U.S.C. § 1963 (2013); 1964 ACT, *supra* note 88; ALI, *supra* note 22, § 10(a), at 124.

442. ALI, *supra* note 22, § 10(a), at 119. The provision also indicates that the registration procedure is only available in cases involving judgments for the payment of money following a contested (i.e., non-default) proceeding. *See id.*

443. *See supra* note 412 and accompanying text.

444. For a discussion of the registration process and procedures, see ALI, *supra* note 22, § 10 comments and reporters' notes, at 119–31.

nationwide.[445] Furthermore, registration procedures are meant to be significantly faster and less complicated than the kind of full proceedings contemplated under Section 9 of the ALI Proposed Statute.[446]

K. Section 11 – Declining Jurisdiction

Parallel litigation is a growing problem in transnational disputes, and U.S. courts need to know when it is proper to decline jurisdiction in favor of an action pending elsewhere.[447] Because "[d]eclination of jurisdiction . . . is closely related to recognition and enforcement of foreign judgments" (in that both procedures require a determination that jurisdiction is proper in a foreign court),[448] the ALI Proposed Statute includes a section describing when a U.S. court should stay or dismiss an action in favor of a foreign proceeding.[449]

At this point, "there is no general rule in the United States concerning lis pendens, either in domestic or in international litigation," and neither the 1962 Act nor the 2005 Act address this

445. *See id.* § 10 cmt. a, at 124. Standardization occurs because the ALI Proposed Statute not only restricts registration proceedings in federal courts, but also limits similar proceedings in state court. *See id.* § 10(a), at 119 ("A judgment not eligible for registration under this section may not be registered in a state court.").

446. *See id.* § 10 cmt. a, at 124; *see also id.* § 9, at 111–12.

447. *See* N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 603 (2006) (noting this is a highly unsettled area of law); Austen L. Parrish, *Duplicative Foreign Litigation,* 78 GEO. WASH. L. REV. 237, 239–40 (2010) ("What should a court do when a lawsuit involving the same parties and the same issues is already pending in the court of another country? Finding a coherent answer to this question has not been easy. Yet a need to find one exists."); Teitz, *supra* note 12, at 3–5 (addressing a growing awareness of the need to better regulate parallel proceedings to enforce foreign judgments).

448. ALI, *supra* note 22, § 11 cmt. a, at 132 (noting declination of jurisdiction can involve principles of lis pendens and forum non conveniens). COCA also demonstrates the link between the declination of jurisdiction and the recognition and enforcement of foreign judgments. *See* COCA, *supra* note 4, arts. 5(2), 6, 8–9 (describing the appropriate jurisdiction of courts and enforceability of judgments in contracting states in light of an exclusive choice of court agreement).

449. *See* ALI, *supra* note 22, § 11, at 131–32.

issue.[450] However, the ALI Proposed Statute requires a U.S. court to stay or dismiss an action pending before it if

> it is shown that a proceeding concerning the same subject matter and including the same or related parties as adversaries has previously been brought and is pending in the courts of a foreign state [and] . . . if (i) the foreign court's jurisdiction is not unacceptable under § 6; and (ii) the foreign court is likely to render a timely judgment entitled to recognition [under the ALI Proposed Statute].[451]

Although the ALI's primary purpose in adopting these procedures was to avoid inconsistent outcomes, this approach also "promotes both justice and efficient use of judicial resources."[452] Thus, the mere fact that "different causes of action or different styles of pleading are involved, or . . . not all the parties are the same in the two fora" is insufficient to cause a court to decline jurisdiction "when the underlying controversy is the same."[453] However, "[t]he fact that different members of the same corporate group or closely affiliated entities are involved in the different fora does not necessarily preclude a declination of jurisdiction."[454]

Even if the required criteria are met, U.S. courts have the discretionary power to decline a request to stay or dismiss an action if the party bringing the action in the United States can show "that the jurisdiction of the foreign court was invoked with a view to frustrating the exercise of jurisdiction" of a U.S. court when the U.S. court "would be the more appropriate forum," that the foreign proceedings are "vexatious or frivolous," or "that there are other

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450. *Id.* § 11 reporters' note 1, at 133. The closest analogue in the 1962 Act and the 2005 Act is language indicating that a U.S. court may stay an action to recognize or enforce a foreign judgment pending an appeal in the foreign court. *See* 1962 ACT, *supra* note 67, § 6; 2005 ACT, *supra* note 71, § 6.

451. ALI, *supra* note 22, § 11(a), at 131.

452. *Id.* § 11 reporters' note 1, at 134; *see also id.* § 11 reporters' note 3, at 135–36 (discussing how a strict *lis pendens* rule could create hardships for parties wishing to litigate in the United States).

453. *Id.* § 11 cmt. e, at 133.

454. *Id.*

persuasive reasons" for allowing the two cases to go forward simultaneously.[455] This type of "escape hatch" could prove problematic, since the notion that the United States might be the "more appropriate" forum could open the door to a somewhat parochial approach to questions of jurisdiction.[456] Nevertheless, such a provision may be necessary because application of a "strict lis pendens rule could work substantial hardship for parties seeking to litigate in a U.S. forum" due to "the substantial differences in the procedures and available remedies between litigation in the United States and in other countries."[457]

Although some people may oppose the ALI Proposed Statute based on the belief that "the United States should not add to the handicap of a generous law of recognition and enforcement by refusing to allow domestic litigants and courts to run a race to judgment," the ALI approach reflects the view that "the costs of parallel litigation are visited on domestic parties and domestic courts" as well as on foreign parties and foreign courts.[458]

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455. *Id.* § 11(b), at 131–32. These principles have their basis in the Leuven/London "Principles on Declining and Referring Jurisdiction in Civil and Commercial Matters" issued by the International Law Association Committee on International Civil and Commercial Litigation in 2000. *See id.* § 11 reporters' note 2, at 135; *see also* Int'l Law Ass'n, *International and Civil Litigation*, Res. No. 1/2000 (July 25–29, 2000).

456. Problems may arise in cases where the concept of a "more appropriate forum" is combined with the notion of "vexatious or frivolous" foreign proceedings to result in an anti-suit injunction. ALI, *supra* note 22, § 11(b), at 132. Although the United States is said to be cautious about issuing anti-suit injunctions, requests for anti-suit relief appear to be on the rise. *See id.* § 11 reporters' note 4, at 137–38. Furthermore, "[t]he Supreme Court has not considered the appropriate standard that lower courts should employ when considering whether to issue an anti-suit injunction in the context of foreign parallel proceedings," and "[t]he circuits are currently split" on this and related issues. *Id.* § 11 reporters' note 4, at 138.

457. *Id.* 11 reporters' note 3, at 135. The ALI rule can therefore be characterized as a limited form of lis pendens, since it directs U.S. courts to respect the jurisdiction of the court first seised of the matter in most situations and thereby give precedence to the plaintiff's choice of forum. *See id.* § 11 cmts. b–d, at 132–33; *see also* Silberman, *Impact*, *supra* note 6, at 339–46 (advocating a "modified lis pendens rule"). "For purposes of determining when a litigation is commenced in the foreign forum, the court in the United States should look to the law of that forum." ALI, *supra* note 22, § 11 cmt. c, at 133.

458. Burbank, *Equilibration*, *supra* note 6, at 233; *see also* ALI, *supra* note 22, § 11, at 131–32.

"Moreover, the general faith in other legal systems . . . has a firmer basis today than it did 100 years ago, as does the concept of an international system whose needs should be considered in the formulation and application of national law."[459] Thus, the ALI's increased respect for the concept of *lis pendens* appears appropriate, given the realities and demands of contemporary international legal practice and policy.

L. Section 12 – Provisional Measures

The ALI Proposed Statute includes an innovative provision that allows U.S. courts to exercise their discretion to provide provisional aid in support of an order of a foreign court that is intended "to secure enforcement of a judgment entitled to recognition and enforcement" under the ALI Proposed Statute or "to provide security or disclosure of assets in connection with proceedings likely to result" in an enforceable judgment.[460] Before the U.S. court can provide such assistance, the party seeking the provisional relief must make a showing that the

> judgment debtor or defendant is likely to dispose of or conceal assets, that the assets within the jurisdiction of the foreign court are or are likely to be insufficient to meet the obligations determined to be owing in the principle action, and that the judgment debtor or defendant has been given notice and a reasonable opportunity to be heard before the court of origin or that it was impossible to give such notice.[461]

When considering provisional measures of this type, U.S. courts "may, in the interests of justice, communicate directly with the foreign court."[462]

A court is permitted to "make use of such remedies and procedures as are available to it in connection with ordinary

459. Burbank, *Equilibration*, *supra* note 6, at 233.
460. ALI, *supra* note 22, § 12(a), cmt. c, at 139, 142.
461. *Id.* § 12(b), at 139–40.
462. *Id.* § 12(f), at 141.

proceedings in courts in the United States."[463] Therefore, the procedures and notice to be used under this provision are to be determined by the "applicable state statute or rule."[464]

This provision allows federal courts to freeze assets located anywhere within the United States[465] and "would enable courts in the United States to issue an ancillary order in support of the order of a foreign court, with a view, in appropriate cases, to subsequently enforcing a judgment of that court against assets in the United States so restrained."[466] The ALI limits freezing orders issued by federal courts for assets located within the United States, although nothing in this provision imposes a similar limit on state courts.[467] Notably, the order on which the U.S. order is based does not need to be final; instead, the foreign order may be interim in nature.[468]

Notice relating to freezing orders, as well as any other type of order, can and must be rendered to the judgment debtor or defendant in the foreign action regardless of whether that person is "present in or subject to personal jurisdiction in the United States."[469] The notice must be sufficient to give the judgment debtor or defendant a reasonable opportunity to contest the order or seek its

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463. *Id.* § 12(c)(i), at 140.

464. *Id.* § 12(d), at 140.

465. *See id.* § 12(c)(ii), at 140. The procedure and notice to be used in this context must comply with the requirements of the Federal Rules of Civil Procedure concerning anti-suit injunctions. *See id.* § 12(d), at 140.

466. *Id.* § 12(a), at 141. The U.S. freezing order would operate something like the Mareva injunction in England, in that it would not create priority relating to creditors but would instead simply restrain banks and similar entities from allowing transfer or other disposition of the assets. *See id.* § 12(a) at 141; *see also id.* § 12 reporters' notes 1–3, at 143–45 (discussing scope and use of Mareva injunctions in England and elsewhere); *supra* note 222 and accompanying text.

467. *See* ALI, *supra* note 22, § 12(d), at 143.

468. *See id.* § 12(a), at 139 (discussing provisional relief). Allowing enforcement of interim orders helps potential judgment creditors guard against the wrongful transfer of assets outside the jurisdiction by the potential judgment debtor, something that is becoming increasingly easy to do. *See id.* § 12(b), at 142; *see also* Jay A. Soled, *Implications of Discovering Unreported Income, Improper Deductions, and Hidden Assets Upon a Taxpayer's Death*, 44 GA. L. REV. 697, 724–25 (2010) (outlining application requirements for provisional relief).

469. ALI, *supra* note 22, § 12(d), at 140.

modification.[470] Parties who seek these types of provisional orders may be required to give security.[471]

There is nothing in the ALI Proposed Statute that prohibits parties from seeking other types of provisional relief, such as attachments, under state law.[472] However, orders under this section must take into account other forms of protection, such as sums frozen in other jurisdictions or paid to the foreign court, so that the U.S. order can be appropriately tailored to the circumstances.[473]

Neither the 1962 Act nor the 2005 Act discuss the enforcement of provisional relief, so the ALI Proposed Statute is a significant improvement in this regard.[474] Furthermore, the ALI has devised a means of balancing the interests of both judgment debtors and judgment creditors while addressing the very real problems associated with the potential for fraudulent disposal of assets before and after judgment.[475]

M. Section 13 – Foreign Orders Concerning U.S. Litigation

The ALI Proposed Statute closes with a provision indicating that foreign orders "that may concern or affect litigation in the United States may be taken into account for purposes of determining motions to stay, dismiss, or otherwise regulate related proceedings in the United States."[476] In these cases, the U.S. court is not enforcing

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470. *See id.*

471. *See id.* § 12(e), at 141.

472. *See id.* § 12 cmt. b, at 142.

473. *See id.* (noting "only such sum as is necessary to meet the underlying obligation should be restrained by order of the court in the United States").

474. *See* 2005 ACT, *supra* note 71; 1962 ACT, *supra* note 67.

475. *See* David E. Peterson et al., *Is the Homestead Subject to the Statute on Fraudulent Asset Conversions?*, 68 FLA. BAR J. 12, 14–15 (1994); Geoffrey Sant, *The Rejection of the Separate Entity Rule Validates the Separate Entity Rule*, 65 SMU L. REV. 813 (2012) (discussing international asset recovery in New York); *see also Basel Institute of Governance: International Centre for Asset Recovery*, BASEL INSTITUTE OF GOVERNANCE, http://www.baselgovernance.org/icar/ (last visited Nov. 5, 2013) (discussing an international training program to assist with international asset recovery).

476. ALI, *supra* note 22, § 13, at 147. For example, litigation between parties A and B may be heard in country 1, with a related litigation between parties B and C in country 2. *See id.* § 12 cmt. b, at 148 (justifying the requirement for

the foreign order but is instead taking that order and its underlying rationales into account when determining whether to stay or dismiss a U.S. action.[477] Such an approach allows U.S. courts to act in harmony with foreign courts in appropriate circumstances, although a U.S. court "will not accord respect to a foreign order, such as an anti-suit injunction or blocking order, that appears designed to frustrate proceedings in the United States."[478]

V. CONCLUSION

As the preceding analysis shows, the ALI Proposed Statute provides numerous and significant improvements over existing methods of recognizing and enforcing foreign judgments in the United States.[479] Although the most obvious benefits relate to uniformity and consistency, the ALI has also created an enforcement regime that is fair, efficient and practical as a matter of both substantive and procedural law. Furthermore, the ALI has provided a more comprehensive approach to recognition and enforcement of foreign judgments than currently exists and has anticipated a number of issues that are becoming increasingly important in a globalized legal environment.

Although the ALI Proposed Statute reflects numerous advantages, observers anticipate that it will be some time before Congress moves to enact legislation of this type.[480] One potential stumbling block is the belief that the proposal's pro-enforcement bias may injure U.S. parties and interests in some way, particularly in the wake of what is sometimes seen as a rising tide of abusive

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applicants to show that the debtor may move or hide assets). Parties finding themselves in these situations may seek a protective order designed to limit or prevent information developed in one jurisdiction from being disclosed or used in the other jurisdiction. *See id.* Such provisions may be necessary because different legal systems have adopted different rules regarding the future use of documents produced in and for litigation. *See* CPR 31.22 (Eng.) (noting "[a] party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed," with some minor exceptions).

477. *See* ALI, *supra* note 22, § 13(a), at 147.

478. *Id.* § 13 cmt. a, at 148.

479. *See id.* § 13 cmt. a, at 129–49; *see also supra* notes 201–485 and accompanying text.

480. *See* Burbank, *Equilibration*, *supra* note 6, at 231.

foreign judgments.[481] However, closer analysis of the proposed statute shows that the various pro-enforcement measures are tempered by numerous provisions limiting recognition and enforcement of foreign judgments.[482] This sort of balanced approach protects U.S. interests not only by curtailing the recognition and enforcement of judgments that have been rendered in legally suspect circumstances but by facilitating the easy recognition and enforcement of judgments that are procedurally unobjectionable.

In the past, efforts to reform the recognition and enforcement process in the United States have been thwarted by corporate interests that found it useful to make the enforcement process as difficult and as expensive as possible.[483] Because most problems were experienced by foreign parties who had virtually no voice in the U.S. legislative process, there was traditionally very little motivation to change the status quo.[484]

As economies and societies have become more globalized, a number of policies and practices that once seemed protective of U.S. parties and interests have experienced something of a backlash.[485] As a result, the U.S. business community is coming to recognize that a predictable and uniform method of recognizing and enforcing foreign judgments actually works to the advantage of U.S. companies and individuals.[486] For example, creating an

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481. *See supra* notes 30–31 and accompanying text. In fact, U.S. parties and interests suffer more grievous injuries from an inefficient and unpredictable enforcement regime. *See supra* notes 13–15 and accompanying text.

482. *See supra* notes 210, 395–412 and accompanying text.

483. *See* Whytock & Robertson, *supra* note 12, at 1450–51 (suggesting that the breakdown of the enforcement process produces a justice gap); Christina Weston, Comment, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'L L. REV. 731, 750–54 (2011) (explaining that corporate defendants can drag out suits for decades with this "backup plan"). This tactic may have been based on the theory that foreign courts cannot be trusted to be neutral (an assumption that has driven many multinational corporations to arbitration) or on the grounds that any method of avoiding paying a judgment is an inherent good.

484. While foreign interests can be asserted through diplomatic pressure, such efforts are not always successful, predictable, or uniform.

485. *See* Whytock & Robertson, *supra* note 12, at 1451; Weston, *supra* note 483, at 750–54.

486. *See ICC Calls on Governments to Facilitate Cross-Border Litigation*, INTERNATIONAL CHAMBER OF COMMERCE (Nov. 29, 2012), http://www.iccwbo.

internationally acceptable enforcement regime would eliminate the possibility of a "litigation premium" in cross-border transactions and reduce the cost of doing business internationally, thereby allowing companies to lower prices on U.S. consumer goods and services.[487] Individual parties (both foreign and domestic) would also experience fewer costs, delays, and uncertainties when seeking to have a foreign judgment recognized and enforced in the United States.[488] These advantages would accrue to U.S. parties regardless of whether they were the ones resisting enforcement procedures or bringing them.[489]

At this point, it is unclear what steps the Hague Conference on Private International Law will take with respect to a new convention on the recognition and enforcement of foreign judgments.[490] However, any efforts in that regard would not be finalized for many years. Therefore, it is in the best interests of the United States and U.S. parties that Congress consider domestic methods of improving the recognition and enforcement of foreign judgments in the United States. While the ALI Proposed Statute is not perfect,[491] it appears to provide a practical and jurisprudentially sound means of doing so and should be considered a strong contender for adoption at the federal level.[492]

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org/News/Articles/2012/ICC-calls-on-governments-to-facilitate-cross-border-litigation/; Bellinger Testimony, *supra* note 27.

487. *See supra* note 14 and accompanying text.

488. *See supra* notes 13–15 and accompanying text.

489. While no data is currently available as to precise numbers, it is logical to assume that U.S. parties would be at least as likely to be the party moving to have a foreign judgment enforced or recognized in the United States (primarily, but not solely, for purposes of preclusion) as they would to be the party resisting such efforts as a judgment debtor. *See supra* note 13 and accompanying text.

490. *See supra* note 16 and accompanying text.

491. Indeed, some observers have already proposed various amendments to the ALI's proposal. *See* Bellinger Testimony, *supra* note 27 (suggesting that the proposal could clarify the public policy exception for non-recognition). Furthermore, the ALI Proposed Statute does not appear to address issues relating to constitutional limitations on U.S. courts' jurisdiction over the person or property in question. *See* ALI, *supra* note 22, at 18–29 (discussing Section 9 under the proposed statute, which contemplates action "where the judgment debtor is subject to personal jurisdiction" or "where assets belonging to the judgment debtor are situated," but not indicating whether constitutional tests must be met); *see also supra* note 38 and accompanying text.

492. *See* ALI, *supra* note 22, at 29–149.