Date: June 25, 2003
From: Kathleen Patchel
To: Study Committee on Recognition of Foreign Judgments
Re: Study Report on Possible Amendment of the Uniform Foreign Money-Judgments Recognition Act

I. History of the Act

The current Uniform Foreign Money-Judgments Recognition Act was promulgated by the Conference in 1962. The Act codified the most prevalent common law rules with regard to the recognition of money judgments rendered in other countries.[1] The hope was that codification of the law on recognition of foreign country judgments would encourage courts in other countries to recognize U.S. judgments. The Prefatory Note to the Act states that

> In a large number of civil law countries, grant of conclusive effect to money-judgments from foreign courts is made dependent upon reciprocity. Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will

[1]The Prefatory Note states that the "Act states rules that have long been applied by the majority of courts in this country. In some respects the Act may not go as far as the decisions. The Act makes clear that a court is privileged to give the judgment of the court of a foreign country greater effect than it is required to do by the provisions of the Act." *See also*, Dresdner Bank, AG v. Haque, 161 F. Supp. 2d 259, 262 n.6 (S.D.N.Y 2001) (Recognition Act principally codified pre-existing New York law already favoring enforcement of foreign money judgments); Barbara Kulzer, Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgments Recognition Act, 18 Buffalo L. Rev. 1, 5 (1968-69) ("The Act purports only to codify, not to change, the common law on recognition of foreign judgments."). Of course, in a jurisdiction that did not take the majority view under the common law, the Act replaced the common law position. *See e.g.*, Chabert v. Bacquie, 694 So.2d 805, 811 (Fla. App. 1997) (Recognition Act replaced Florida common law principles, at least to the extent of any differences; Florida nonuniform amendment making reciprocity a discretionary defense replaced Florida common law rule requiring reciprocity; absence of distinction in Recognition Act regarding recognition of default versus other judgments replaced Florida common law indicating would not recognize default judgments).

be recognized abroad.[2]

The Act takes a "bare-bones" approach to its subject matter.[3] Rather than attempting a comprehensive codification of the law regarding recognition and enforcement of foreign country judgments, the Act establishes only minimum standards for recognition[4] while leaving both the

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[2]Recognition Act, Prefatory Note. *See also*, Kulzer, *supra* note 1, at 5 (uniform legislation will notify civil law countries that foreign judgments are recognized in the U.S., concisely set out the prevailing law, facilitate treaties in the area by showing that the common law is similar to treaty provisions found in most other countries, and collect and clarify applicable standards for U.S. courts); J. Noelle Hicks, Facilitating International Trade: The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments, 28 Brooklyn J. Int'l L. 155, 163 (2002) (Recognition Act codified common law, making it more likely U.S. judgments would be recognized in countries with reciprocity requirements). Courts also have tended to focus on encouragement of reciprocal enforcement as the primary purpose of the Act. *E.g.*, Porisini v. Petricca, 456 N.Y.S. 2d 888, 949 (N.Y. App. 1982) (Recognition Act passed to protect interests N.Y. citizens in foreign states by encouraging reciprocal accommodation); Nippon Emo-Trans Co., Ltd. V. Emo-Trans, Inc., 744 F. Supp. 1215, 1219 (E.D.N.Y. 1990) (purpose of Recognition Act was to procure for New York judgments better treatment in foreign countries than they now receive); Guinness PLC v. Ward, 955 F.2d 875, 883 (4th Cir. 1992) (purpose is to promote international comity by assuring that in certain well-defined circumstances foreign judgments will be recognized, with the hope that certainty of recognition will facilitate recognition of U.S. judgments abroad); Bank of Montreal v. Kough, 430 F. Supp. 1243, 1249 (N.D. Calif. 1977) (purpose of Recognition Act is to create greater recognition of state judgments in foreign nations by informing foreign nations of situations in which their judgments definitely will be recognized, thus encouraging them to recognize California judgments). *Cf.* Andes v. Versant Corp., 878 F.2d 147, 149 (4th Cir. 1989) (prime purpose of the Recognition Act was to make uniform the law on the effect to be given a foreign money judgment); Laager v. Kruger, 702 So.2d 1362, 1363 (Fla. App. 1997) (intent of Act is to provide a speedy and certain framework for recognition of foreign judgments).

[3]Kulzer asserts, in response to the concern that codification might discourage further develop in the area by checking liberal trends or might conversely open the door to recognition of judgments from undesirable tribunals that the "Act, by its terms is nonrestrictive. Most of its provisions are phrased in terms general enough to allow a considerable degree of discretion. Indeed it appears to represent a judgment of the draftsmen that it would be unwise to codify all the case law in the field." Kulzer, *supra* note 1, at 5-6.

[4]Guinness PLC v. Ward, 955 F.2d 875, 884 (4th Cir. 1992) (act delineates a minimum number of foreign judgments that must be recognized, not the maximum of those that can be recognized); Nippon Emo-Trans Co., Ltd v. Emo-Trans, Inc., 744 F.Supp. 1215, 1219 (E.D.N.Y. 1990) (Recognition Act mandated recognition at level below what previously accorded in New York courts, but left courts free to exceed Recognition Act if they so choose).

procedure for, and the consequences of, recognition to be determined largely by other law. As a consequence, courts interpreting the Act have had to supplement its provisions with regard to a number of issues. Courts may look to common law rules applicable to foreign judgments before adoption of the Act,[5] or to rules applying to sister-state judgments.[6] With regard to the procedure for enforcement, states continue to recognize a common law enforcement action as a means for enforcing foreign judgments. In states that have adopted the Conference's Uniform Enforcement of Foreign Judgments Act ("Enforcement Act"), which provides a truncated procedure for enforcement of sister-state judgments, some courts have held that Act applicable to foreign judgments as well.[7] Courts also sometimes look to three ALI Restatements as evidence of common law rules: Restatement (Second) of Conflicts of Law, Restatement (Third) of Foreign Relations Law, and Restatement of Judgments.[8]

The Uniform Laws Annotated indicates that the Act has been adopted in 29 states,[9] as well as the District of Columbia and the Virgin Islands. Eleven of these enactments have occurred since 1990;[10] five states have adopted the Act since 1996.[11]

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[5]*E.g.*, Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp. 73, 74 (D.Mass. 1987) (looking to common law for test as to what constitutes a "fine or other penalty" under the Act); Guinness PLC v. Ward, 955 F.2d 875, 898 (4th Cir. 1992) (looking to the leading common law decision of *Hilton v. Guyot*, 159 U.S. 113 (1895) for meaning of due process defense under the Act).

[6]*E.g.*, Bianchi v. Savino Del Bene Int'l Freight Forwarders, Inc., 770 N.E.2d 684 (Il. App. 2002) (citing sister-state judgment cases for proposition that the Recognition Act requires that the foreign judgment itself determine the amount of money owed before the judgment can be enforced); Ingersoll Milling Machine Co. v. Granger, 833 F.2d 680, 691 (7th Cir. 1987) (finding prejudgment interest portion of foreign judgment enforceable although prejudgment interest would not be awarded in Illinois on rationale that once enforceable treat like sister-state judgment and sister-state judgment given same recognition in forum state as would receive in the courts of the rendering state).

[7]The relationship of the Recognition Act and the Enforcement Act is discussed further below.

[8]*E.g.*, McCord v. Jet Spray Int'l Corp., 874 F.Supp. 436 (D. Mass. 1994)(looking to Restatement (Second) of Conflict of Laws §98, cmt f (1969) for rule that scope of foreign judgment is determined by foreign country's res judicata principles, but in absence proof of foreign law will assume principles are similar to those of U.S.).

[9]Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and Washington.

[10]Pennsylvania (1990); New Mexico (1991); Virgin Islands (1992); North Carolina (1993); Montana (1993); Florida (1994); Hawaii (1996); District of Columbia (1996); New

As discussed below, there are a number of issues in this area, some relating to interpretation of the actual provisions of the Recognition Act, and others relating to the "gaps" the Act left to be filled by other law. Nevertheless, the bottom line is that the Recognition Act seems to have been quite successful in its goal of providing certainty with regard to the enforcement of the foreign money judgments that it covers. The United States is among the most receptive of nations to the recognition and enforcement of the judgments of other countries, with a tradition of almost automatic enforcement, without either federal law or a treaty.[12] Further, states that have not adopted the Act usually apply principles similar to those contain in the Act.[13] As a result, there is a considerable degree of uniformity as to the enforcement of foreign country judgments in the U.S.[14] It also appears that the Recognition Act has, at least to some extent, assisted U.S. litigants in obtaining foreign enforcement of U.S. judgments.[15]

II. The Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters and the American Law Institute International Jurisdiction and Judgments Project

Despite the high degree of certainty of enforcement of foreign country judgments in the U.S., enforcement of U.S. judgments abroad remains a problem. Those seeking to enforce U.S. judgments continue to encounter resistance in other countries. In light of this, negotiations were begun several years ago under the auspices of the Hague Conference on Private International Law to produce a multilateral treaty in this area, the Hague Convention on International Jurisdiction and Foreign Judgments in International Matters.[16] The Convention was intended to

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Jersey (1997); Delaware (1997); Maine (1999).

[11]Hawaii (1996); District of Columbia (1996); New Jersey (1997); Delaware (1997); Maine (1999).

[12]Hicks, *supra* note 2, at 158.

[13]*Id.*at 163.

[14]Tonga Air Services, Ltd. v. Fowler, 826 P.2d 204, 208 (S.Ct. Wash. 1992) (procedure for recognition and enforcement of foreign country judgments is similar in all states, with some following the common law, and others the Recognition Act).

[15]*See* American Bar Association, Section of International Law & Practice, Enforcing Foreign Judgments in the United States and United States Judgments Abroad 25 (1992) (recommending that practitioners obtain judgments that they foresee will need to be enforced abroad in states that have adopted both the Recognition Act and the Enforcement Act because states that do not have these Acts generally will not provide the certainty and clarity that will assist the practitioner in satisfying foreign reciprocity requirements).

[16]Over forty countries were involved in the negotiations, including, in addition to the United States, Canada, Australia, and Ireland, all 15 Member States of the European Union, China, Japan, Israel, Egypt, Morocco and a number of Latin American and Eastern European countries. Peter H. Pfund, Intergovernmental Efforts to Prepare a Convention on Jurisdiction and

be a dual convention, establishing both international rules for the recognition and enforcement of foreign country judgments and international standards as to acceptable bases of personal jurisdiction.

Professor Silberman explains the politics that led to this dual coverage in a recent article.[17] Enforcement of U.S. judgments in other countries is often resisted, while courts in the United States are extremely liberal in enforcing judgments of other countries; therefore, the United States is very interested in establishing international rules for recognition and enforcement of foreign country judgments.[18] On the other hand, Europe already has enforcement of judgments among fellow European countries under the Brussels and Lugans Conventions, and has the advantage of liberal enforcement of foreign judgments by U.S. courts; Europe therefore does not need a Convention with regard to recognition and enforcement of foreign judgments.[19] Europe, however, objects to some bases of personal jurisdiction that are common in the United States, and, in particular, the concept of general doing business jurisdiction, especially as used as a basis of personal jurisdiction in human rights cases.[20] (Prof. Silberman notes that much of the attack on U.S. jurisdiction reflects unhappiness with other aspects of U.S. civil litigation — the use of juries, liberal discovery rules, class actions, contingent fees, U.S. substantive law, and a perceived pro-plaintiff bias in the substantive law and the choice of law rules applied — but jurisdiction tends to be used as the grounds for complaint.[21]) The Europeans thus saw the Convention as an opportunity to establish a consensus on judicial jurisdiction in order to set limits on U.S. jurisdiction over foreign defendants.[22]

The enforcement provisions of the proposed treaty did not create significant controversy, but the Convention foundered on the failure of the parties to agree on prohibited and permitted bases of jurisdiction.[23] After negotiations reached an impasse, an informal working group was established to see if it would be possible to draft a text with regard to certain issues. In March 2003, this working group proposed a draft text dealing only with recognition and enforcement of judgments resulting from proceedings based on choice of court agreements.[24] Treaty negotiations may go forward limited to this topic.

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the Enforcement of Judgments, www.ali.org./1999_Pfund1.htm.

[17]Linda Silberman, Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?, 52 DePaul L. Rev. 319 (2002).

[18]Id. at 321.

[19]Id. at 322.

[20]Id. at 322-23.

[21]Id. at 319.

[22]Id.

[23]Id. at 327.

[24]Preliminary Result of the Work of the Informal Working Group on the Judgments Project, Preliminary Document No. 8, March 2003.

While the Convention negotiations were ongoing, the American Law Institute began its International Jurisdiction and Judgments Project ("ALI Draft Statute") to draft a federal statute to implement the Convention.[25] When negotiations on the Convention stalled, the ALI decided to continue its project as a freestanding federal statute. The ALI Draft Statute is intended to provide a comprehensive set of national rules to govern the circumstances under which foreign judgments are recognized and enforced, as well as the effect to be given those foreign judgments. As such, the ALI Draft Statute is intended to preempt state law in this area, including the Recognition Act.[26] Although the ALI Draft Statute has gone through a number of drafts and has been considered by the ALI and by the ALI Council on several occasions, the first complete draft of the Statute was presented to the ALI at its annual meeting in May 2003. Comment at the meeting was in general quite critical, and time was reserved at the end of the session for discussion of a motion to abandon the statutory drafting project and turn the draft into either a restatement or a reporters' note.[27] During the discussion, however, ALI leadership announced that they believed a motion to abandon the project was premature, and thus no vote was taken on the motion, allowing the project to continue for another year.

The present Study Committee was appointed by the Conference to consider whether the Recognition Act should be updated in light of these recent events, as well as any interpretive issues that have arisen under the Act since its original promulgation.

III. Issues Under the Recognition Act

The following is a discussion of issues that have arisen under the Recognition Act since its promulgation, organized by section of the Act. It is based on review of case law interpreting the Act, nonuniform amendments made by enacting states, and selected issues raised by the ALI Draft Statute. This review does not purport to be a comprehensive discussion of all issues that

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[25]The American Law Institute, International Jurisdiction and Judgments Project (Tentative Draft, April 14, 2003) (hereinafter "ALI Draft Statute"). All citations to the ALI Draft Statute are to the April 14, 2003 Tentative Draft.

[26]ALI Draft Statute, cmt a. ("The Act preempts and supersedes state legislation, including the Uniform Foreign Money-Judgments Recognition Act. However, to the extent that the Act is consistent with the Uniform Act, decisions construing or implementing that act may be cited as precedent in applying this Act.")

[27]Although it is difficult to generalize the discussion, my impression was that much of the negative comment focused on the Reporters' drafting style (the Statute currently is drafted more in the style of a restatement than in that of legislation) and on concerns raised by the broad scope of the Statute.

have been raised under the Act. There is a wealth of material in this area, and time constraints have allowed me to review only a small portion of it. Although I have reviewed a large number of cases (including all those cited in the ULA, and many others) I have by no means read anywhere near all of the cases. Further, my research has barely scratched the surface of the secondary literature. Review of nonuniform amendments has been limited to those reported in the ULA, and, although I refer to the ALI Draft Statute in this discussion, this Report does not contain a comprehensive comparison of that Statute and the Act. Despite these caveats, the hope is that this Report will give the Study Committee a sense of the types and range of issues that have arisen under the current Recognition Act to assist them in making their decision as to whether to recommend revision. In addition, a brief discussion of the Conference criteria for proposing an Act is included in the concluding section.

A. Section 1 — Definitions

1. Definition of "Foreign State"

Section 1 defines the terms "foreign state" and "foreign judgment." "Foreign state" is defined as "any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands."[28] Two issues have arisen regarding the "foreign state" definition, which are reflected in nonuniform amendments that have been made to this definition by some enacting states.

First, some states have dropped the specific references at the end of the definition. Alaska's version of the definition is illustrative of this trend: it provides that "'foreign state' means a governmental unit other than the United States, or a state, district, commonwealth, territory including trust territory, or insular possession thereof." This change to a more generic description seems wise, as it avoids the need to update the statute when there is a change in the status of a U.S. territory, as has happened, for example, with regard to the Panama Canal Zone. At any rate, this definition clearly needs to be updated.

Second, some states have changed the defined term from "foreign state" to "foreign country." This change no doubt was made in order to make it clearer that the Act applies only to judgments of foreign countries, and not to those of sister-states. As discussed further below, review of the cases reveals some confusion among litigants and some courts as to whether the Act applies to judgments from sister states as well as to foreign country judgments, despite the definition's exclusion of sister state judgments.[29]

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[28]Recognition Act, §1(1).

[29]*See, e.g.* Brown v. Rock, 362 S.E.2d 480, 480 (Ga. App. 1987) (plaintiffs had tried to use Recognition Act to have sister state judgment recognized and enforced; court notes full faith

2. Definition of "Foreign Judgment"

Section 1(2) defines "foreign judgment" as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." As with the definition of "foreign state," some states have nonuniform amendments changing the defined term to "foreign country judgment" (for example, New York) or to "foreign country money judgment" (for example, Virginia). Again, these changes appear to reflect concern that use of "foreign judgment" may cause confusion as to whether sister-state judgments are included in the Act, despite their exclusion under the definition of "foreign state."

For example, in *Eagle Leasing v. Amandus*,[30] the Iowa Supreme Court reversed a lower court decision applying the Recognition Act to a sister-state judgment.[31] The Court noted, however, that the lower court's confusion was understandable, as "foreign judgment" is a term of art that commonly refers to judgments of neighboring states.[32] The Court further noted that the similarity in titles between the Recognition Act and the Enforcement Act — both of which refer to foreign judgments, although one uses that term to apply only to foreign country judgments and one to apply only to domestic judgments — adds to the confusion.[33]

3. Use of "Foreign Judgment" Definition to Create Exclusions

A second area of confusion created by the definition of "foreign judgment" derives from the nature of the definition, which is not so much a definition as a statement of the scope of the Recognition Act. As Prof. Kulzer notes in her study of the Recognition Act for New York, this definition does not define the term "judgment;" the meaning of that term will continue to be determined by reference to decisional law.[34] Rather, the primary purpose of this definition seems to be to establish the scope of the Recognition Act — the Act applies only to those judgments (1) rendered by a foreign state (as defined in the Act), (2) which grant or deny recovery of a sum of money and (3) which are not a judgment for taxes, (4) do not constitute a fine or penalty, and (5)

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and credit, not the Recognition Act, is basis for domestication of sister state judgments).

[30]476 N.W.2d 35 (S.Ct. Iowa 1991).

[31]*Id.* at 37.

[32]*Id.* at 35.

[33]*Id.* Indeed, both of the Acts use "foreign judgment" as a defined term, but each defines the term to give it a meaning exactly the opposite of the meaning it has in the other act. *Compare* Recognition Act, §1 (defining "foreign judgment" as the judgment of a foreign state, which is itself defined to exclude sister state and federal judgments) *with* Enforcement Act, §1 (defining "foreign judgment" as the judgment of a sister state or federal court).

[34]Kulzer, *supra* note 1, at 9 (subsection 2 limits, rather than defines, the word "judgment" as used in the Act).

are not a judgment for support in matrimonial or family matters.[35]

The use of a defined term as the means for excluding certain types of foreign judgments from the Act creates potential confusion in determining the extent to which judgments not covered by the Act may nevertheless be recognized under principles of common law comity. Section 7 of the Act contains a savings clause that at first glance appears to answer this question in favor of non-exclusivity. Section 7 states that "[t]his Act does not prevent the recognition of a *foreign judgment* in situations not covered by this Act."[36] Because, however, "foreign judgment" is defined so as to state the types of judgments excluded from the Act, read literally, the savings clause does not address the question of whether judgments not covered by the Act still can be recognized; section 7 only applies to foreign judgments and judgments excluded from the Act's coverage are not "foreign judgments." Instead, the savings clause literally addresses only judgments that *are* within the scope of the Act, but in *situations* not covered by the Act.

Both courts[37] and commentators[38] have noted the uncertainty created by the use of the defined term "foreign judgment" in section 7. Despite this apparent drafting glitch, most courts,[39] although not all,[40] do find that the types of foreign money judgments excluded from the

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[35]Recognition Act, §1(2).

[36]Recognition Act, §7 (emphasis added).

[37]*E.g.,* Wolff v. Wolff, 389 A.2d 413, 416 (My. App. 1978) (savings clause must be construed to apply only to foreign judgments as defined in the Act and thus does not apply to matrimonial decrees, but does evidence intent that Act be expansive rather than limiting in scope).

[38]*E.g.*, A. Homburger, Recognition and Enforcement of Foreign Judgments: A New Yorker Reflects on Uniform Acts, 18 Am. J. Comp. L. 370-71 (1970) (despite "obscure wording of the clause" intent clear that drafters did not want to fetter court's power to recognize judgments falling outside the scope of the Act or to discourage application of more liberal standards than those prescribed in the Act for judgments within its scope, as, for example, by recognizing a support decree although excluded from the Act or by giving a foreign judgment within its scope more extensive res judicata effect than Act requires).

[39]*E.g.,*Wolff v. Wolff, 389 A.2d 413, 416 (My. App. 1978) (Act does not prevent recognition of foreign country support decree under principles of comity). The *Wolff* court reasoned that the Act was not a statute purporting to apply to all foreign money judgments and then to allow recognition only of some and not of others; rather, by its definition of "foreign judgment" it only applies to certain types of foreign money judgments. *Id.* The legislature simply had not spoken with regard to those judgments not covered, and that silence should not be construed as evidencing any intent that such judgments never under any circumstances be accorded recognition. *Id. Accord*, Zalduendo v. Zalduendo, 360 N.E. 2d 386, 390 (Ill. 1977) (section 7 of Recognition Act says that can recognize other foreign judgments besides those it covers; previous determination of paternity challenge given res judicata effect); Dart v. Dart, 597

Act can nevertheless be recognized under common law principles of comity. The ALI Draft Statute avoids this problem by stating the excluded foreign judgments in a scope provision, rather than in the definition of "foreign judgment" itself.[41] If the Recognition Act is amended, this fix should be made.

4. Matrimonial Exclusion

Another issue regarding the "foreign judgment" exclusions arises from the phrase "a judgment for *support* in matrimonial or family matters."[42] Is this phrase intended to exclude only judgments for support or does it also exclude other types of money judgments in connection with divorce and matrimonial and family matters, such as alimony? Courts tend to read the term "support" beyond its literal meaning to broadly exclude all money judgments in connection with domestic matters,[43] which was no doubt the drafters' intent.[44] If the Act is amended, however,

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N.W.2d 82, 83n.1 (Sup. Ct. Mich. 1999) (if Recognition Act does not apply, judgment may nevertheless be recognized under comity); Philips Electronics, N.V. v. New Hampshire Ins. Co., 692 N.E.2d 1268, 1275 (Ill. App. 1998) (if declaratory judgments are not covered by the Recognition Act, then the savings clause would allow recognition based on comity).

[40]*E.g.*, Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp.73, 75 (D.Mass. 1987) (Recognition Act was intended to cover entire subject of enforcement of foreign money judgments and supersedes any common law enforcement action; therefore, common law action could not be brought to collect on money judgment excluded from the Act as a fine or penalty). Lower courts seem to have had the most trouble with this issue. *See e.g.*, Mandel-Mantello v. Treves, 426 N.Y.S. 2d 929, 930 (N.Y. Sup. Ct. 1980), *rev'd*, 434 N.Y.S.2d 29 (N.Y. App. 1980) (denying recognition to divorce decree fixing child support because it was excluded from coverage of the Recognition Act); Wolff v. Wolff, 389 A.2d 413, 415 (My. App. 1978) (reversing trial court dismissal of action to enforce alimony provisions of English divorce decree for lack of subject matter jurisdiction based on exclusion of matrimonial matters from Recognition Act).

[41]ALI Draft Statute, §1(a) ("This Act applies to foreign judgments as herein defined other than . . . .").

[42]Recognition Act, §1(2) (emphasis added).

[43]*E.g.*, Wolff v. Wolff, 389 A.2d 413, 415 (My. App. 1978) ("support" includes alimony).

[44]*See, e.g.* Wolff v. Wolff, 389 A.2d 413, 417 (My. App. 1978) (marital decrees excluded from the Act because of lack of sufficient uniformity of treatment; like other uniform laws, Recognition Act necessarily must be limited in scope to those areas upon which there is likely to be a consensus of opinion and thus uniformity); Kulzer, *supra* note ___, at 13 (noting that the widely divergent national laws relating to marital decrees of all kinds provide sufficient rationale for giving them separate treatment); *cf.* ALI Draft Statute, §1, Reporters' Note 3(a) (noting that recent attention to domestic relations judgments in statutes and international treaties and fact they are a sufficiently discrete area warrants separate and specialized treatment of this type of

this exclusion should be rewritten. The comparable ALI Draft Statute exclusion excludes "judgments for divorce, support, maintenance, custody, adoption, or other judgments rendered in connection with matters of domestic relations."[45]

B. Section 2 — Scope of the Act

Section 2 is the official scope provision for the Recognition Act. It provides that the Act 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." Section 2 is the only section of the Act that expressly indicates whose law governs an issue — it says that the forum court should look to the law of the rendering country to determine whether the judgment is final, conclusive and enforceable, rather than to the law of the forum. Courts have followed this direction.[46]

1. Burden of Proof

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judgment).

Prof. Kulzer raises the issue of whether foreign money judgments relating to decedents' estates are within the scope of the Act, noting that most codifications exclude them. Kulzer, *supra* note1, at 13. I found no cases on this issue. These matters would be covered under the ALI Draft Statute, which also has a much broader scope than that of the Recognition Act. *See* ALI Draft Statute, §1, Reporters' Note 1 (giving a case recognizing a non-money foreign judgment determining succession to a decedent's property as an example of recognition of foreign judgments beyond the money judgment category).

[45]ALI Draft Statute, §1(a)(i). One other issue concerning the coverage of the Act raised in two cases was whether the Act applies to judgments of American Indian Tribal Courts. Anderson v. Engelke, 954 P.2d 1106 (Mont. 1998); Day v. Montana Dept of Social & Rehab. Servs., 900 P.2d 296 (Mont. 1995). Judgments of Tribal Courts were held not entitled to full faith and credit, but rather were to be treated with the same deference shown to foreign country judgments. *Day*, 900 P.2d at 301. Both courts noted, without deciding, that tribal judgments might be covered by the Recognition Act. *Anderson*, 954 P.2d at 1111 (assumes tribal judgment might be covered under the Act as a foreign judgment); *Day*, 900 P.2d at 300 (reserves judgment as to whether Recognition Act would apply). Otherwise, tribal judgments would be enforced under comity principles. *Anderson*, 954 P.2d at 1111.

[46]*E.g.*, Guinness PLC v. Ward, 955 F.2d 875, 889 (4th Cir. 1992) (law of rendering state determines whether judgment is enforceable in light of post-judgment settlement); Desjardins Ducharme v. Hunnewell, 585 N.E.2d 321, 324 (S.Ct. Mass. 1992) (law of rendering state determined whether intervener suit was final despite continuance of main litigation); Island Territory of Curacao v. Solitron Devices, 489 F.2d 1313, 1323 (2d Cir. 1973) (finality determined by law of rendering country).

Section 2, however, does not state who has the burden of establishing that a foreign judgment is final, conclusive and enforceable where rendered. Courts generally hold this burden is on the party seeking recognition.[47] If the Act is revised, this issue should be addressed.

2. Enforceability Requirement

In her study for New York, Professor Kulzer also notes an ambiguity created by the section 2 requirement that the foreign judgment must be "enforceable where rendered."[48] A judgment is "enforceable" when it grants some affirmative relief that can be carried out through invocation of the powers of the state. Thus, read literally, this requirement would exclude from the scope of the Act judgments that by their nature are "non-enforceable" because they are in favor of the defendant. This clearly is not the drafters' intent, as evidenced by section 3, which states that both judgments granting and those *denying* a sum of money are conclusive under the Act.[49] My review did not disclose any cases in which the "enforceable" language had caused a problem. The Texas version of the Recognition Act, however, contains a nonuniform amendment to section 2 that follows Prof. Kulzer's recommended statutory fix of this language.[50] If the Act is revised, the Drafting Committee should consider clarification of this language.

C. Section 3 — Recognition and Enforcement

Recognition of a judgment occurs to the extent that the forum state gives the judgment "the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the state where it was rendered."[51] Recognition of a foreign country judgment often is associated with enforcement of the judgment. This is not surprising, as

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[47]*E.g.*, Mayekawa Mfg. Co. Ltd. v. Sasaki, 888 P.2d 183, 189 (Wash. App. 1995) (burden of proof on creditor to establish judgment is final, conclusive, and enforceable where rendered); Bridgeway Corp. v. Citibank, 45 F.Supp.2d 276, 285 (S.D.N.Y. 1999) (party seeking recognition must establish that there is a final judgment, conclusive and enforceable where rendered); S.C.Chimexim S.A. v. Velco Enterprises, Ltd., 36 F. Supp.2d 206, 212 (S.D.N.Y. 1999) (Plaintiff has the burden of establishing conclusive effect). *Cf.* Hernandez v. Seventh Day Adventist Corp., Ltd., 54 S.W.3d 335, 337 (Tex. App. 2001) (judgment debtor bears burden to demonstrate judgment not final if judgment appears final on its face; if not facially final, creditor bears burden to show is final).

[48]Kulzer, *supra* note 1, at 17.

[49]Recognition Act, §3.

[50]The Texas Recognition Act adds a subsection (2) that states that the Act applies to a foreign country judgment "that is in favor of the defendant on the merits of the cause of action and is final and conclusive where rendered, even though an appeal is pending or the judgment is subject to appeal." *See* Kulzer, *supra* note 1, at 19 (suggesting very similar language).

[51]Restatement (Second) of Conflicts of Laws, Chapt. 5, Topic 3, Introductory Note.

recognition of a foreign country judgment is a necessary prerequisite to enforcement of the foreign country judgment in the forum state,[52] and, particularly with regard to the foreign money judgments covered by the Recognition Act, the goal of obtaining recognition of the judgment often is to seek its enforcement in the recognizing state.

Recognition, however, also has significance outside of the enforcement context because a foreign judgment also must be recognized before it can be given any preclusive effect under res judicata and collateral estoppel principles.[53] The issue of whether a foreign judgment will be recognized is distinct from both the issue of whether the judgment will be enforced,[54] and the issue of whether it will be given preclusive effect.[55]

The Recognition Act is primarily concerned with establishing the standards under which foreign country judgments will be recognized, rather than with stating rules governing the consequences of recognition. Section 3 of the Recognition Act, however, briefly sets out the two major consequences of recognition of a foreign money judgment. First, section 3 provides that a foreign judgment meeting the requirements of the Act "is conclusive between the parties to the extent that it grants or denies recovery of a sum of money." Thus, one consequence of recognition is that the foreign judgment constitutes a final determination of the parties' controversy under applicable principles of res judicata and collateral estoppel.[56] Second, section

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[52]Bianchi v. Savino Del Bene Int'l Freight Forwarders, Inc., 770 N.E.2d 684, 693 (Ill. App. 2002) (foreign judgment must be recognized before it can be enforced). *Accord*, Restatement of the Law Third — Foreign Relations Law of the United States, §481, cmt b. (1987) ("The judgment of a foreign state may not be enforced unless it is entitled to recognition").

[53]Guinness PLC v. Ward, 955 F.2d 875, 889 n.9 (4th Cir. 1992) (finding of recognition establishes judgment is conclusive between the parties and should be given res judicata and collateral estoppel effect). *Accord*, Restatement of the Law Third — Foreign Relations Law of the United States, §481, cmt b (recognition issue may arise "not only in enforcement, but in other contexts, for example where the defendant seeks to rely on a prior adjudication of a controversy (res judicata), or where either side in a litigation seeks to rely on prior determination of an issue of fact or law.").

[54]Wolff v. Wolff, 389 A.2d 413, 415 n.3 (My. App. 1978) (whether court should recognize a foreign judgment and whether it should go further and enforce it through the use of equitable remedies once recognized are two separate, distinct inquiries); Guinness PLC v. Ward, 955 F.2d 875, 889 n.9 (4th Cir. 1992) (questions of recognition and enforcement are distinct issues; recognized judgment is not necessarily automatically enforced).

[55]Alfadda v. Fenn, 966 F. Supp. 1317, 1326 (S.D.N.Y. 1997) (issue of recognition is distinct from issue of preclusive effect).

[56]Guinness PLC v. Ward, 955 F.2d 875, 893 n.14 (4th Cir. 1992) (by stating that the judgment is "conclusive" section 3 codifies the traditional rule that a foreign judgment entitled to

3 states that a foreign judgment meeting the Act's requirements "is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."

1. Absence of Rules Governing Preclusion

In keeping with the minimalist approach of the Recognition Act and with its primary focus on establishing standards for recognition rather than dealing with collateral issues, Section 3 leaves the details with regard to both conclusive effect and enforcement to other law. For example, with regard to conclusive effect, Section 3 does not state what law should be applied to determine the extent of that conclusive effect,[57] and, as discussed below, courts have taken different positions on this issue.

The decision not to include preclusion rules also may have been a function of the uniform law mandate to draft in areas of consensus. Professor Kulzer gives the following description of the state of the law in this area at the time New York was considering enactment of the Recognition Act in 1969:

> Extranational judgments that are recognized may have the effect of res judicata, including collateral estoppel and bar, in the second state, but the common law distinguishes them from sister state judgments. The law of the sister state determines what persons are effected by its judgments and what issues are determined, but it can only be said that normally an American court would apply the foreign rules as to these matters if they are substantially the same as the rules of the American court. "It is also uncertain what effect would be given by an American court to foreign rules of res judicata with respect to findings by the court that it had jurisdiction over the defendant or over a thing or status or that it had competence over the subject matter of the controversy"[58]

In light of this uncertainty, Professor Kulzer approved of the Recognition Act decision not to address these difficult choice of law questions:

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recognition is given res judicata effect); *see* Kulzer, *supra* note 1, at 15-16 ("A judgment may be said to be conclusive when it is entitled to res judicata effect and is free from collateral attack.").

[57]As discussed above, section 2 says that the Act only applies to a judgment that is conclusive where rendered. Professor Kulzer points out that the choice of law rule established by section 2 is "related to, but distinct from, the choice of law in determining the effect to be given a foreign judgment in the second state." Kulzer, *supra* note 1, at 15. Once the court has decided that the judgment was final, conclusive and enforceable in the rendering state, and thus within the scope of the Act, the court must still decide the separate question of whether foreign or forum preclusion rules govern the effect of the foreign judgment once recognized. *Id.*

[58]Kulzer, *supra* note 1, at 21 (citations omitted).

> Section 3 limits the effect of a foreign judgment; it is conclusive only between the parties, and only to the extent that it grants or denies a sum of money. No attempt was made by the drafters to clarify the difficult conflict of laws questions involved, which seems to reflect a decision that [it] would be desirable to permit the courts to develop concepts without the restrictions of statutory language.
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> This section reflects, in its silence on the conflicts question, the uncertainty noted also by the Restatement (Second) of the Conflict of Laws. Although the word "recognition" implies that a judgment is given the same effect as it would have in the state of rendition, American courts have not committed themselves to application of foreign res judicata rules. The Act does not require such a development.
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> [Section 3] reflects existing law, which, however uncertain, seems to be in the process of development. An attempt to formulate generally valid directives as to the proper choice of law would be complicated and far beyond the limited purposes of the Act.[59]

Initial review of the decisions since the Recognition Act indicates that there still is little consensus on these issues. Some courts apply their own preclusion rules without apparently recognizing — or, at least, without explicitly addressing — the choice of law issue.[60] Some courts apply the law of the rendering state to determine preclusive effect.[61] Others apply the preclusion rules of the forum, while still others have developed special rules designed to best serve the parties' interests.[62] Some courts hold that, while the judgment must be given at least as much preclusive effect as it would be given in the rendering state, the Recognition Act allows the court to give the judgment greater effect.[63] Finally, although a court may find that the res

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[59] *Id*. at 22-23 (citations omitted).

[60] *E.g.*, Guinness PLC v. Ward, 955 F.2d 875, 893 (4th Cir. 1992) (defining res judicata effect to be given foreign country judgment in terms of U.S. law).

[61] *E.g.*, Bank of Montreal v. Kough, 430 F.Supp. 1243, 1250 (N.D. Calif. 1977) (whether assertion of counterclaim was barred by res judicata effect of Canadian judgment is determined by reference to Canadian law).

[62] Andes v. Versant Corp., 878 F.2d 147, 149 (4th Cir. 1989).

[63] Andes v. Versant Corp., 878 F.2d 147, 149 (4th Cir. 1989) (applying Maryland law). In *Andes,* the court held that the Recognition Act allows the court to give a judgment greater effect than it is required to give it under the Act, but can give it no lesser effect than it would have in the rendering nation. *Id.* The court opined that a court would be expected to give greater effect to the judgment if that would be consistent with generally accepted notions of American substantive law *Id.* In *Andes*, the court held that an English rule that a guarantor may not be made a party to an enforcement action did not apply, apparently because it found the rules so

judicata principles of the foreign country govern, it may also find that in the absence of proof of those principles it will assume that the foreign principles are similar to res judicata principles in the U.S.[64]

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2. Absence of Procedural Rules Regarding Recognition and Enforcement

The Recognition Act also does not contain any procedural rules with regard to either recognition or enforcement of a foreign country judgment. With regard to enforcement, section 3 does provide a modicum of guidance: it states that, except as provided in section 4 (setting out grounds for non-recognition), a judgment meeting the requirements of section 2 (that is, one that is final, conclusive and enforceable where rendered) "is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."[65] In addition, the Comment to section 2 states that "[t]he method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 in a state having enacted that Act." The sentence and comment thus suggest that the procedure available for enforcement of judgments recognized under the Act is the same as that available in the forum state for sister-state judgments, including the Enforcement Act, if it is available. That position is supported by the Prefatory Note, which states that the "Act does not prescribe a uniform enforcement procedure," but '[i]nstead ... provides that a judgment entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state entitled to full faith and credit." Courts, however, have also used this sentence to help answer ancillary issues regarding enforcement, [66] as well as issues regarding preclusion.

Unlike the lack of preclusion rules discussed above, which seems merely to reflect pre-existing uncertainties in the law, review of the cases reveals that the Recognition Act's failure to include any procedure regarding recognition and enforcement has created its own additional confusion for courts and litigants attempting to apply the Act. This confusion involves two

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much at odds with American jurisprudence. *Id.*

[64]*E.g.*, McCord v. Jet Spray Int'l Corp., 874 F.Supp. 436 (D.Mass. 1994) (scope of Belgium judgment is matter of Belgium law, but in absence proof of Belgium law court will assume that it is similar to res judicata in U.S.).

[65]Recognition Act §3.

[66]*E.g.*, Guinness PLC v. Ward, 955 F.2d 875, 889 (4th Cir. 1992) ("enforceable in same manner" language should not be read narrowly to mean only the same enforcement procedures and remedies as for sister-state judgments, but as also including any defenses and counterclaims that could be raised in a sister-state enforcement proceeding); La Societe Anonyme Goro v. Conveyor Accessories, Inc., 677 N.E.2d 30 (Ill. 1997) (statute of limitations applicable to enforcement of sister state judgments should apply to enforcement of foreign country judgments because Recognition Act says foreign judgments should be enforced in same manner as judgment of a sister state).

distinct issues: (1) what is the appropriate procedure for determining whether a judgment should be recognized under the Recognition Act?; and (2) what is the appropriate procedure for enforcing a foreign country judgment that is entitled to recognition under the Recognition Act? Although these issues are logically distinct, they are also interrelated, and, in the cases, often not distinguished. Further, these issues almost always come up only in cases that involve an attempt by the judgment creditor to use the Conference's Enforcement Act as the means to initiate proceedings to have the foreign country judgment recognized as well as enforced. In the situation where the judgment creditor files a new action based on the judgment (which is what occurs in the large majority of cases reviewed) or where the question of recognition is raised in a pending suit in which the foreign country judgment is sought to be used for its preclusive effect, no issue of appropriate procedure arises: the pending case provides the procedure for fully airing the issues of both recognition and enforcement. It is when the judgment creditor seeks to avoid filing a new suit through use of the Enforcement Act that difficult questions regarding appropriate procedure arise.

(i) Relationship of the Recognition Act and the Enforcement Act

The simplest question created by the failure to set out a procedure is whether the Enforcement Act can in fact be utilized as the procedure for *enforcing* a foreign country judgment that has met the requirements for recognition under the Act. The Enforcement Act is designed to streamline and make uniform enforcement procedures with regard to certain judgments rendered in other jurisdictions.[67] At common law, a judgment creditor is required to file an action on the judgment as a new suit in the state where enforcement is sought in order to have the foreign judgment recognized (domesticated) and to invoke the forum state's enforcement mechanisms. [68] The Enforcement Act provides a truncated procedure for enforcement that does not require the judgment creditor to file a new suit in the enforcing state. Originally promulgated in 1948 (the version to which the comment to the Recognition Act refers), the Enforcement Act was completely rewritten in 1964. The ULA indicates that 46 states, the Virgin Islands, and the District of Columbia have adopted the 1964 Enforcement Act. Only one state, Missouri, still has a statute based in part on the 1948 Act.

The 1964 Enforcement Act allows a judgment creditor to obtain enforcement of a foreign judgment simply by filing an authenticated copy of the foreign judgment in the clerk's office in the forum state.[69] Once filed, the foreign judgment "has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying" as a judgment of a court of the state in which enforcement is sought.[70] Notice of filing of the foreign judgment is

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[67]Guinness PLC v. Ward, 955 F.2d 875, 890 (4th Cir. 1992).
[68]*Id.*
[69]Enforcement Act, §2.
[70]*Id.*

mailed by the clerk of court to the judgment debtor after the foreign judgment is filed at the judgment debtor's last known address as provided by the judgment creditor.[71] The judgment creditor also may mail notice of filing of the judgment to the judgment debtor.[72] An optional provision prohibits issuance of execution or other process for enforcement of the foreign judgment until a stated number of days after the judgment is filed.[73] The judgment debtor may stay enforcement proceedings in certain situations, including appeal of the judgment or stay of execution of the judgment in the rendering state.[74] The 1964 Enforcement Act procedure is modeled after the federal registration procedure of 28 U.S.C. §1963.[75] The Enforcement Act is not exclusive — the judgment creditor may still seek enforcement by means of a common law action if it so chooses.[76]

By its terms, however, the Enforcement Act applies only to "any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit."[77] As foreign country judgments are not entitled to full faith and credit, but are recognized and enforced as a matter of comity, the Enforcement Act therefore does not by its own terms apply to such judgments.[78] Some courts, however, have held that Section 3 of the Recognition Act makes the Enforcement Act applicable to enforcement of a foreign country judgment by providing that a judgment entitled to recognition under the Recognition Act is "enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." Because the Enforcement Act is one method for enforcing a sister state judgment, these courts reason that the Enforcement Act is available for enforcement of a foreign judgment that meets the requirements for recognition under the Recognition Act.[79] Other courts have

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[71] *Id.* §3. The notice must include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in the state of filing. *Id.*

[72] *Id.* If the judgment creditor files proof of mailing of notice with the clerk of court, then a failure by the clerk to mail notice will not affect the enforcement proceedings. *Id.*

[73] *Id.* §3(c).

[74] *Id.* §4.

[75] *Guinness PLC*, 955 F.2d at 890.

[76] Enforcement Act, §6. *Accord, Guinness PLC*, 955 F.2d at 890; Allen v. Tennant, 678 S.W.2d 743, (Tex. App. 1984) (two ways to enforce foreign judgment under Enforcement Act are to bring a cause of action or use the simplified filing procedure).

[77] Enforcement Act, §1.

[78] *Guinness PLC*, 955 F.2d at 890.

[79] *E.g.* Guinness PLC v. Ward, 955 F.2d 875, 890 (4th Cir. 1992) (Enforcement Act applies through language of section 2 of Recognition Act once foreign country judgment has been recognized); Pinilla v. Harza Engineering Co., 755 N.E.2d 23, 26 (Ill. App. 2001) (Recognition Act only provides means to recognize, not procedure to file or enforce foreign judgment; Act says once recognized, then enforce like sister state, which means methods to file and enforce are those in the Enforcement Act); Allen v. Tennant, 678 S.W.2d 743, 744 (Tex. App. 1984) (Recognition Act's

found that the Enforcement Act does not apply.[80]

(ii) Appropriate Recognition Procedure

The second, more serious, issue is raised by the fact that the Recognition Act also does not provide any procedure for determining whether a foreign judgment should be *recognized* (as opposed to enforced), and, with regard to this issue, section 3 provides no guidance. Some courts have acknowledged this as a separate issue from the question of the appropriate procedure for enforcement of a judgment once recognized. For example, in *Matusevitch v. Telnikoff*,[81] the court found that, while the Enforcement Act could be used to enforce a foreign country judgment once recognized, the Recognition Act required a proceeding to determine preliminarily whether the court should recognize the foreign country judgment.[82] Once the court determined that the foreign country judgment should be recognized, then filing of the judgment under the Enforcement Act would be appropriate; use of the Enforcement Act filing procedure, however, was contingent upon an initial determination that the judgment should be recognized.[83]

While this interpretation of the relationship between the Recognition Act and the Enforcement Act is entirely logical and consistent with the import of Section 3 of the Recognition Act and its comment, at the practical level, it leaves something to be desired. As discussed above, the purpose of the Enforcement Act was to provide a streamlined procedure that did not require the judgment creditor to file a new action on the judgment in the enforcing state.

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procedural requirements are found in the Enforcement Act); La Societe Anonyme Goro v. Conveyor Accessories, Inc., 677 N.E. 2d 30, 33 (Ill. 1997) (agreeing with cases holding Enforcement Act and Recognition Act should be interpreted to complement each other, rather than being mutually exclusive). Indeed, as mentioned above, the Comment to Section 3 of the Recognition Act indicates that this was the drafters' intent — at least with regard to the 1948 Enforcement Act.

[80] *E.g.*, Hager v. Hager, 274 N.E.2d 157, 160 (Ill. App. 1971) (foreign country judgment cannot be registered under the Enforcement Act). Various Districts of the Illinois Court of Appeals have split on this issue. A series of Illinois cases following *Hager* held that the Enforcement Act could not be used with regard to foreign country judgments. *E.g.*, In re Marriage of Brown, 587 N.E.2d 648 (Ill. App. 1992); Dayan v. McDonald's Corp., 397 N.E.2d 101 (Ill. App. 1979); Zalduendo v. Zalduendo, 360 N.E.2d 386 (Ill. App. 1977). Then, in *Pinilla v. Harza Engineering Co.,* 755 N.E.2d 23 (Ill. App. 2001), the First District Court of Appeals rejected these decisions as "antiquated," finding that a change in wording in the new Enforcement Act, adopted by Illinois in 1991, made the Enforcement Act applicable. *Id.* at 25 n.3. *See also Guinness PLC*, 955 F.2d at 890 (listing cases finding the Enforcement Act inapplicable).

[81] 877 F.Supp. 1 (D. D.C. 1995).

[82] *Id.* at 2.

[83] *Id.*

If the judgment creditor of a foreign country judgment has to file such an action anyway in order to obtain a court determination that the judgment should be recognized, then there would be no reason to take the further step of then filing under the Enforcement Act in order to have the judgment enforced. The more efficient procedure at that point would be to have process issued for enforcement of the judgment by the court that had determined the judgment should be recognized.

Other courts have held that the Enforcement Act is an appropriate method for initiating action with regard to a foreign country judgment. These courts, however, tend to conflate the issues of recognition and enforcement, or at least fail to recognize that the two issues involve different inquiries. For example, in *Society of Lloyd's v. Ashenden,*[84] Judge Posner, interpreting Illinois law, rejected the judgment debtor's argument that in the case of a foreign country judgment, as opposed to a sister-state judgment, enforcement proceedings could not be invoked until a court entered an order recognizing the foreign country judgment.[85] Judge Posner reasoned that there was no reason to require a "two-step" proceeding.[86] Such a requirement would be in tension with the state enforcement statute, under which the issue of the judgment's enforceability is raised by defense to compliance with the enforcement proceeding. [87] Judge Posner reasoned that "[t]here is no reason to make the judgment creditor bring two separate proceedings, one to enforce the judgment and the other to collect it."[88] He stated that

> [a]ny doubt on this score is dispelled by reading in tandem the statutes governing enforcement of foreign-state and foreign-nation judgments respectively. The Illinois Enforcement of Foreign Judgments Act, which governs the enforcement in Illinois of judgments rendered in the courts of other states of the United States, as distinct from foreign nations, not only treats such judgments the same as Illinois judgments, which means that no separate step of "recognition" is necessary before they can be enforced; the act also makes the foreign judgment enforceable *unless* the judgment debtor objects and invokes "procedures, defenses, and proceedings for reopening, vacating, or staying" the judgment. This clearly implies that separate "recognition" proceedings are not required — an interpretation confirmed in cases from other jurisdictions that have adopted the Uniform Enforcement of Foreign Judgments Act. The Uniform Enforcement [sic] of Foreign Money-Judgments Act, which governs judgments of courts outside the United States, makes such judgments, if enforceable at all, "enforceable in the same manner as

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[84]233 F.3d 473 (7th Cir. 2000)
[85]*Id.* at 481.
[86]*Id*.
[87]*Id.*
[88]*Id.*

the judgment of a sister state which is entitled to full faith and credit." Q.E.D.[89]

Judge Posner's analysis blurs the distinction between recognition and enforcement in the foreign country judgment context. He assumes that because there is no separate recognition step with regard to sister-state judgments, then none is required with regard to foreign country judgments. Recognition, however, is constitutionally mandated by the Full Faith and Credit Clause with regard to sister-state judgments; thus, there is no need in that context for an initial determination as to whether the sister-state judgment should be recognized. Recognition of foreign country judgments, on the other hand, is a matter of comity, subject under the Recognition Act to both mandatory and discretionary grounds for non-recognition.[90] Thus, while, as Judge Posner states, section 3 of the Recognition Act does provide for *enforcement* of foreign country judgments in the same manner as sister-state judgments, section 3 is subject to the requirements for recognition contained in sections 2 and 4 of the Act. The issue is the appropriate procedure for determining whether those requirements have been met, not what enforcement procedures are available once recognition has occurred. Judge Posner's opinion fails to recognize that recognition and enforcement are distinct issues; in fact, in the quote above, he even refers to the Recognition Act at one point as the "Uniform *Enforcement* of Foreign Money-Judgments Act."[91] His "Q.E.D." seems a bit premature; his argument appears to assume the thing to be decided.[92]

3. Constitutionality of the Recognition Act

The lack of a procedure for determining whether a foreign country judgment should be recognized led the Texas court of appeals in a series of cases to hold that the Recognition Act was unconstitutional. In *Hennessy v. Marshall*, [93] the parties against whom enforcement of the foreign country judgment was sought argued that the foreign country judgment could be recognized and enforced only after a plenary hearing, while the judgment creditor argued that

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[89]*Id.* at 481-82. (emphasis in original) (citations omitted).

[90]Recognition Act, §4.

[91]233 F.3d at 482.

[92]Judge Posner's *Ashenden* decision also appears to have inaccurately predicted what the Illinois courts would hold regarding this issue. In *Bianchi v. Savino Del Bene Int'l Freight Forwarders, Inc.,* 770 N.E.2d 684 (Ill. App. 2002), the Illinois Court of Appeals found the simultaneous initiation of recognition and enforcement proceedings to be procedural error. *Id.* at 693. Because a foreign country judgment must be recognized before it can be enforced, the Court believed that it was improper to bring enforcement proceedings before a determination that the foreign country judgment should be recognized had occurred. *Id.* (The Court did not reverse for this error, however, because the argument had not been raised by the judgment debtor. *Id.*)

[93]682 S.W.2d 340 (Tex. App. 1984).

filing under the Enforcement Act was sufficient for both recognition and enforcement.[94] The *Hennessy* court found that a plenary hearing on the recognition issue was required.[95] The court reasoned that the express language of section 3, which makes conclusiveness of the judgment subject to section 4, required a determination as to whether the foreign judgment meets the requirements of section 4 (grounds for nonrecognition) before the judgment could be enforced; thus, the question of enforcement under section 3 was not material until after the judgment has first been recognized.[96] Further, the court concluded that it was obvious from the nature of the section 4 grounds for nonrecognition that whether they were present could only be established in a plenary hearing by the judgment creditor against the judgment debtor; "[a]bsent such a plenary hearing, the defendant has not had an opportunity to present matters set forth in section [4], some of which are in the nature of affirmative defenses and some of which the party seeking recognition of the foreign country judgment must affirmatively establish."[97] Finally, the court concluded that "[b]ecause section [3] is expressly conditioned upon the items set forth in section [4], the drafters of the Uniform Act and the Texas legislature intended that a plenary hearing be had *before* the foreign country judgment is recognized and before enforcement of the foreign country judgment commences."[98]

The *Hennessy* court noted that because the judgment debtor had the burden of establishing some of the section 4 conditions, he must be afforded notice and an opportunity to be heard in accordance with due process requirements,[99] but did not address the constitutionality of the Recognition Act because the court read the requirement of a plenary hearing into the Act. In *Detamore v. Sullivan,*[100] however, the court, while agreeing with the *Hennessy* court rationale that notice and a hearing on the conclusiveness of the foreign country judgment were required under section 3, rejected the *Hennessy* court's solution, finding that to imply the requirement of a plenary hearing into the Recognition Act would be improper judicial legislating.[101] Instead, the court held that the Recognition Act violated the due process clause because it did not provide a judgment debtor with notice and an opportunity to be heard on the conclusiveness of the foreign country judgment.[102] The court rejected the argument that the judgment debtor would be able to

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[94] *Id.* at 342.

[95] *Id.*

[96] *Id*.

[97] *Id.* at 344. The court believed that section 5 of the Act, setting out certain bases of personal jurisdiction that if found would prevent a challenge to the judgment based on lack of personal jurisdiction also demonstrated the need for a plenary hearing, as these matters also could not be determined absent a plenary hearing. *Id.*

[98] *Id.* at 345 (emphasis in original).

[99] *Id.* at 344.

[100] 731 S.W.2d 122 (Tex. App. 1987).

[101] *Id.* at 123.

[102] *Id.*

establish grounds for nonrecognition when the judgment creditor seeks to register the judgment under the provisions of the Enforcement Act, noting that registration under the Enforcement Act relates to enforcement of the judgment, not recognition.[103] Because recognition is a prerequisite to enforcement under the Recognition Act, the registration provision of the Enforcement Act does not come into play until after the decision to recognize the judgment already has been made.[104] The court believed that the judgment debtor thus could find himself in the procedural quandary of having a valid defense to recognition of the judgment, but being unable to assert the defense; this constituted a denial of due process.[105]

Finally, in *Plastics Engineering Inc. v. Diamond Plastics Corp.,*[106] the Texas court of appeals once again held that the Recognition Act's failure to include a procedure by which the recognition determine could be made violated due process.[107] The court agreed with *Detamore* that the fact the Enforcement Act has notice procedures that may satisfy due process was not enough because the Recognition Act makes the foreign country judgment conclusive upon recognition; thus, the court believed the parties would not be able to relitigate the issues regarding recognition in the enforcement proceeding.[108]

In *Don Docksteader Motors, Ltd. V. Patal Enterprises, Ltd.,*[109] the Texas Supreme Court finally addressed the constitutionality of the Recognition Act. Unlike the three court of appeals cases, however, in which the judgment creditor had initiated proceedings on the foreign country judgment by filing under the Enforcement Act, the judgment creditor in *Docksteader* had brought a common law action to enforce the judgment. The court noted that under the Recognition Act the same two enforcement procedures were available with regard to foreign country judgments as with regard to sister-state judgments: the statutory "short-cut" of the Enforcement Act or filing of a common law action.[110] Here, the judgment creditor had filed a common law suit, and in such a suit "a judgment debtor is afforded notice and a plenary hearing at which all defenses including grounds for nonrecognition can be asserted."[111] The court concluded,

> In summary, the Recognition Act expressly provides that a foreign country money judgment "is enforceable in the same manner as a judgment of a sister state... ." By this provision, the Recognition Act necessarily allows for the bringing of a

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[103] *Id.*
[104] *Id.*
[105] *Id.* at 124.
[106] 764 S.W.2d 924 (Tex. App. 1989).
[107] *Id.* at 926.
[108] *Id.*
[109] 794 S.W.2d 760 (Tex. 1990).
[110] *Id.* at 761.
[111] *Id.*

> common-law suit and thereby allows for notice and a hearing. We therefore hold that, *under the circumstances of this case*, the court of appeals erred in concluding that the Recognition Act was unconstitutional.[112]

Thus, the court holds that as applied in the case before it, in which a plenary hearing was in fact provided by virtue of the filing of a common law action for recognition, the Recognition Act satisfied due process. Although the court states in a footnote that, to the extent the decisions in *Plastics Engineering* and *Detamore* were in conflict with its decision, they were disapproved,[113] one can certainly argue that they do not conflict with the court's decision at all, for they hold that in the situation when the Recognition Act is invoked by means of a filing under the Enforcement Act, rather than by filing of a common law action, it is unconstitutional. At any rate, before the Supreme Court decision in *Docksteader*, the Texas legislature had already given the final word on this issue by adopting a nonuniform amendment to the Recognition Act to expressly include a procedure for determining whether the foreign country judgment should be recognized.[114]

Perhaps the clearest evidence that the lack of any procedure for recognition in the Recognition Act has created problems is the fact that five other states in addition to Texas have passed nonuniform amendments to address this issue.[115] The ALI Draft Statute also contains its own procedure.[116] If the Study Committee decides that the Recognition Act should be amended, problems raised by the lack of a procedure for recognition and the relationship of the Recognition Act to the Enforcement Act should be addressed.

In addition, there are differences between foreign judgment recognition and recognition of sister state judgments that a Drafting Committee would need to considered in determining whether the Enforcement Act is sufficient as a procedural mechanism for recognition as well as enforcement of a foreign judgment. Unlike recognition of sister-state judgments, which is usually automatic,[117] recognition of a foreign judgment involves looking behind the judgment to

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[112] *Id.* (emphasis added).

[113] *Id.*at 761n.2.

[114] *See id.* at 761n.1 (noting passage of the amendment).

[115] The states are California, Florida, Hawaii, New York, North Carolina and Texas.

[116] ALI Draft Statute, §§9, 10. The ALI procedure has its own problems. Among them is the fact that it applies to "[a]ny foreign judgment entitled to recognition and enforcement under this Act," although, presumably one purpose of the procedure is to make that very determination. *See* ALI Draft Statute, §§9(a),10(a).

[117] Courts recognize only a very limited number of grounds for denying full faith and credit to a sister state judgment — the rendering court lacked jurisdiction, the judgment was procured by fraud, the judgment has been satisfied, the limitations period has expired. Reading & Bates Constr. Co. v. Baker Energy Resources Group, 976 S.W.2d 702, 713 (Tex. App. 1998).

evaluate the law under which it was rendered for purposes of the public policy exception, as well as evaluation of the jurisdictional environment in which the judgment was rendered.[118]

In *Hunt v. BP Exploration Co. (Libya) Ltd.*,[119] the court explained the different cost-benefit analysis involved when considering recognition and enforcement of a foreign country judgment as opposed to that of a sister state. Recognition and enforcement of foreign judgments (whether sister-state or foreign country) prevents harassment of the successful party, eliminates duplicative judicial proceedings, and provides a measure of settled expectations to the parties.[120] In the domestic context, the courts of each state are subject to the same due process limits and the same overlap of federal statutory and constitutional law, and share to a large extent the same body of court precedent and socio-economic ideas; thus, there is a presumption of fairness and competence.[121] In the sister-state context, therefore, the benefits of giving conclusive effect to foreign judgments are not balanced by any obvious costs.[122] Conclusive effect for sister state

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Accord, Jordan v. Hall, 858 P.2d 863, 865 (N. M.App. 1993) (under full faith and credit, grounds for reopening judgment are limited to lack of jurisdiction, fraud in the procurement, lack of due process, or other grounds making the judgment void and unenforceable). The U.S. Supreme Court also has indicated that there may be an exception to full faith and credit based on federalism, recognizing that consistent with full faith and credit there may be limits on the extent to which the policy of one state may be subordinated to the policy of another. Thomas, 448 U.S. 261, 279 (1980). *Accord*, Restatement (Second) of Conflicts of Law §103 (1988) (a state need not recognize and enforce a sister state judgment if this would involve improper interference with important state interests); *Reading & Bates*, 976 S.W.2d at 713.

[118]Reading & Bates Constr. Co. v. Baker Energy Resources Group, 976 S.W.2d 702,715 (Texas App. 1998). In *Reading & Bates*, the court denied recognition to a Louisiana judgment recognizing a Canadian judgment on the basis that the forum court is entitled to assess for itself whether it would recognize and enforce the foreign judgment under its own laws. *Id.* at 715. To recognize a sister state judgment recognizing a foreign judgment would be tantamount to ceding the right to evaluate the foreign judgment to another state, and the court stated it would not permit a party to clothe a foreign judgment in the garment of a sister state judgment to evade the forum state's own recognition process. *Id.* The Court found that its refusal to recognize the sister state judgment came within the exception to the full faith and credit requirement for situations where recognition and enforcement is not required by the national policy of full faith and credit because it would involve improper interference with important interests of a sister state. *Id.*at 713, 715. Although one can question the wisdom of this decision, it does illustrate the extent to which a state may feel there is an important difference between recognition and enforcement of a sister-state judgment and a foreign country judgment.

[119]492 F.Supp. 885 (N.D. Tex. 1980).

[120]*Id.* at 905.

[121]*Id.*

[122]*Id.*

judgments can be fully justified on the basis of fairness to the litigants and judicial economy; there is no reason for a second trial, as the rendering forum had at least the constitutionally required contacts with the litigants, there is little possibility of error in the rendering forum, and the substantive policies effectuated by that forum are likely to be fully acceptable to the recognizing forum.[123] The cost-benefit calculus for automatic exclusive effect is far less favorable, however, when considering foreign country judgments. There is less expectation that foreign courts will follow procedures comporting with U.S. notions of due process and jurisdiction or that they will apply substantively tolerable laws, and there may be suspicions of unfairness or fraud.[124]

D. Section 4 — Mandatory and Discretionary Grounds for Denying Recognition

Section 4 sets out three mandatory grounds for denying conclusive effect to a foreign judgment and six discretionary grounds for nonrecognition. The mandatory grounds are (1) "the judgment was rendered under a system which 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;" and (3) "the foreign court did not have jurisdiction over the subject matter."[125] The discretionary grounds are (1) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend; (2) the judgment was obtained by fraud; (3) the cause of action on which the judgment is based is repugnant to the public policy of the forum state; (4) the judgment conflicts with another final and conclusive judgment; (5) the foreign court proceeding was contrary to the parties' agreement that the dispute was to be settled otherwise than by proceedings in that court; and (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.[126] The following discussion focuses on two grounds often raised in the cases reviewed: (1) the mandatory due process ground for nonrecognition and (2) the discretionary public policy ground for nonrecognition.

1. The Due Process Exception — "The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law"

The comment to Section 4 states that *Hilton v. Guyot*[127] sets out the standard for applying this first ground for denying recognition — "a mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved." Courts have

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[123] *Id*.
[124] *Id.*
[125] Recognition Act, §4(a).
[126] Recognition Act, §4(b).
[127] 159 U.S. 113 (1895).

followed these admonitions,[128] with the result that there was a high degree of uniformity as to the standards applied to determine whether a due process violation exists in the cases reviewed. There is less uniformity, however, among the cases with regard to the focus of the due process inquiry — is it on the specific proceeding leading to the foreign judgment or on the system of the foreign country as a whole? These two aspects of this ground for nonrecognition are tied to specific textual language, discussed below.

(i) "System" limitation

First, the language of subsection 4(a)(1) states that what must be shown is that the foreign judgment was rendered under a *system* that did not provide impartial tribunals and procedures compatible with the requirements of due process. Some courts have interpreted this "system" language to mean that the focus is on the overall judicial procedures of the foreign country, not the particular procedures employed in the case that gave rise to the foreign country judgment.[129] Thus, for example, in *CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V.*,[130] the court rejected the judgment debtor's challenge to a British court's use of an *ex parte* injunction freezing the judgment debtor's assets in the proceeding giving rise to the judgment against him as not compatible with due process, finding that the "system" language means that this ground for nonrecognition could not be relied upon to challenge the legal processes employed in a particular litigation on due process grounds.[131] Similarly, in *Society of Lloyd's v. Ashenden*,[132] the court rejected a challenge to certain contractually agreed upon procedures that had been followed in the litigation that gave rise to the foreign country judgment because the focus of the inquiry under this subsection is not on the particular proceedings in which the judgment is issued.[133]

(ii) "Compatible With Due Process"

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The second important textual limit is that the requirement of this subsection is only that the foreign country's system be one that has procedures *compatible* with due process of law.[134]

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[128] *E.g.*, Kam-Tech Systems, Ltd. v. Yardeni, 774 A.2d 644, 649 (N.J. App. 2001) (focus is not whether the procedure is similar to U.S. procedure, but the basic fairness of the foreign procedure).

[129] *E.g.*, The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002); CIBC Mellon Trust Co. v. Mora Hotel Corp,. N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).

[130] 743 N.Y S.2d 408 (N.Y. App. 2002).

[131] *Id.* at 415.

[132] 233 F.3d 473 (7th Cir. 2000).

[133] *Id.* at 477.

[134] The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002); Society of Lloyd's v. Ashenden, 233 F.3d 473, 476-77 (7th Cir. 2000).

Courts have held that this standard means "the foreign proceedings need not comply with the traditional rigors of American due process to meet the requirements for recognition."[135] The requirement refers not to the "idiosyncratic jurisprudence of a particular state, but to the concept of fair procedure simple and basic enough to describe judicial processes of civilized nations."[136] All that is required is that the procedure be "fundamentally fair," that it not offend basic notions of fairness.[137]

The combination of these two textual limits means that there are few cases denying recognition of a foreign money judgment because the judicial system failed to provide procedures compatible with due process.[138] Courts deny recognition under this exception only in extraordinary circumstances.[139] For example, in *Bank Melli Iran v. Pahlavi*, [140] Iranian banks sought to enforce judgments they had obtained against the sister of the deposed Shah of Iran in the courts of revolutionary Iran. The court found that this exception had been met, based on evidence that trials were rarely public and highly politicized; the regime did not believe in an independent judiciary and judges were subject to continuous scrutiny and threat of sanctions; attorneys were officially discouraged from representing politically undesirable interests and witnesses in favor of those interests were not forthcoming; and Iranians returning to Iran were often detained.[141] Similarly, in *Bridgeway Corp. v. Citibank*,[142] this exception was applied to deny recognition to a Liberian judgment, based on evidence that at the time of the judgments Liberia was embroiled in a civil war and the Constitution had been suspended; the regular procedures for the selection of judges were not being followed and instead judges were serving at

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[135]The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002).

[136]Society of Lloyd's v. Ashenden, 233 F.3d 473, 476-77 (7th Cir. 2000).

[137]Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000). *Accord*, The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (foreign procedures must only be fundamentally fair). Judge Posner refers to this concept of fundamental fairness as opposed to the specifics of U.S. due process requirements as the "international concept of due process" to distinguish it from "the complex concept under U.S. case law." Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000). Section 5 of the ALI Draft Statute, which contains a similar exception, refers to "procedures compatible with fundamental principles of fairness," presumably to make the same point. Although a Drafting Committee could consider following the ALI language, the courts in the cases reviewed seemed to have no trouble applying the fundamental fairness standard under the current language of the Recognition Act.

[138]CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V., 743 N.Y.S.2d 408, 414 (N.Y. App. 2002).

[139]Dart v. Balaam, 953 S.W.2d 478, 480 (Tex. App. 1997) (serious injustice must be found before the system will be found not compatible with due process).

[140]58 F.3d 1406 (9th Cir. 1995).

[141]*Id.* at 1412.

[142]45 F.Supp.2d 276 (S.D.N.Y. 1999).

the will of the warring factions and were subject to political and social influence; the court system was barely functioning; there was corruption and incompetence in the handling of cases; and due process rights often were ignored.[143]

(iii) Challenges to Specific Proceedings

As discussed above, the basic standard for finding that there is compatibility with due process has been applied quite uniformly; the focus on the "system" as opposed to the specific proceeding was less uniform in the cases reviewed. The focus on the "system" means that this exception does not address the situation when the particular foreign proceeding leading to the foreign country judgment involved a denial of fundamental fairness to the judgment debtor, but there is insufficient evidence to show that the system as a whole denies fundamental fairness. In *Society of Lloyd's v. Ashenden*,[144] Judge Posner rejects a focus on the individual proceeding on the basis that otherwise the judgment debtor would have a second chance to raise at the collection phase things that could have been or were actually challenged in the original proceeding.[145] Presumably, the assumption underlying this rationale is that, as long as the overall system in the foreign country is compatible with due process, the judgment debtor had an adequate remedy for any denial of fundamental fairness in the particular proceeding by way of appeal.

Judge Posner, however, went on to consider the judgment debtor's arguments on the merits, finding that even if the focus under this exception were on the particular proceedings leading to the foreign country judgment, the process complained of did not violate due process.[146] In *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*,[147] the Court engaged in a similar analysis, rejecting the judgment debtor's attempt to focus on the particular proceeding leading to the foreign country judgment because of the "system" language, but also considering those objections on the merits and finding no due process violation in the particular proceeding.[148] In *Bank Melli Iran v. Pahlavi*,[149] discussed above, the Court, while presented with evidence that supported a finding of systemic denial of fundamental fairness, did not explicitly refer to the "system" language and seemed to be most interested in whether the Shah's sister could obtain a

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[143] *Id.* at 285. The court noted that the fact the Liberian system was modeled on the U.S. system was not sufficient when the evidence established that the system in fact was not operating in that fashion. *Id.*

[144] 233 F.3d 473, 477 (7th Cir. 2000).

[145] *Id.* at 477.

[146] *Id.* at 479.

[147] 743 N.Y.S.2d 408 (N.Y. App. 2002).

[148] *Id.* at 415-17.

[149] 58 F.3d 1406 (9th Cir. 1995).

fair hearing.[150] Other cases have not raised the "system" distinction at all, and have considered (and, in the cases reviewed, rejected) arguments based on events in the particular proceeding.[151]

The Comments to section 5 of the ALI Draft Statute, which contains a similar exception,[152] states that this provision requires that the forum court "be satisfied with the essential fairness of the judicial system under which the judgment was rendered," but that "[a] showing that the judgment debtor was not dealt with fairly in the particular case will not defeat recognition and enforcement" under the subsection.[153] The Comment points out, however, that, other exceptions to recognition that do focus on the particular proceeding might be used in particular fact situations.[154] The same would be true under the Recognition Act, where two of the defenses to recognition focus on the specific proceeding — if the unfairness were fraud, then subsection (b)(2) would apply;[155] if the problem was one of notice, subsection (b)(1) would apply.

The ALI Draft Statute, however, makes two changes to the exceptions to recognition that facilitate the ability of the judgment debtor to challenge the specific proceeding by adding two new grounds for doing so. First, it adds an entirely new mandatory ground for nonrecognition if "the judgment was rendered in circumstances that cast justifiable doubt about the integrity of the rendering court with respect to the judgment in question."[156] Under this provision, recognition would be denied if the judgment debtor could show "corruption in the particular case and its

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[150]For example, the *Pahlavi* Court suggests that the judgment debtor's failure to present, in addition to the evidence of systemic lack of due process, the "more specific evidence" that she personally would be treated unfairly in the Iranian courts weakened her case somewhat. *Id.* at 1412.

[151]*E.g.*, Tonga Air Services, Ltd. v. Fowler, 826 P.2d 204 (Wash. 1992) (considering and rejecting on the merits arguments of denial of due process through failure to grant a continuance when lawyer could not appear and lack of verbatim transcript of proceedings).

[152]Section 5 of the ALI Draft Statute states that a foreign judgment shall not be recognized if "the foreign judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness." ALI Draft Statute, §5(a)(i).

[153]ALI Draft Statute, §5, cmt c.

[154]*Id.*

[155]Courts are in agreement that the fraud involved must be extrinsic fraud, defined as conduct of the prevailing party that deprives the losing party of an adequate opportunity to present that party's case — as opposed to intrinsic fraud, such as perjured testimony or falsified documents . *E.g.*, Tonga Air Services, Ltd. v. Fowler, 826 P.2d 204, 210 (S.Ct. Wash. 1992). The *Tonga* court states that the burden of proof is on the party alleging fraud to establish extrinsic fraud by "clear, cogent, and convincing evidence." *Id.*

[156]ALI Draft Statute, §5(a)(ii).

probable impact on the judgment in question."[157] The second change is a modification to the language of the public policy exception, discussed in the next section, which changes the focus of that provision to make it available to challenge specific proceedings.

2. Public Policy Exception: "A foreign judgment need not be recognized if the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state."

(i) Standard Applied

Neither the text nor the comments to the Recognition Act provide any guidance as to the standard to be applied in determining repugnancy to public policy. Nevertheless, in the cases reviewed courts across the various states adopted a surprisingly uniform and quite stringent standard for finding a public policy violation.[158] A difference in law, even a marked one is not sufficient to raise a public policy issue.[159] Courts recognize that differences in substantive law are inevitable, as laws and legal systems reflect the historic and cultural diversity of the people of different nations and are designed to meet the needs of those people.[160] Nor is it relevant that the foreign law allows a recovery that the forum state would not.[161] Public policy is violated only if enforcement tends clearly to injure the public health, the public morals, the public confidence in administration of the law, or to undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."[162] The substance of the law must be inimical to good morals, natural justice, or the general interests of the citizens of the

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[157] *Id.* Cmt d.

[158] Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317, 322 (5th Cir. 1999) (level of contravention of state law must be high; narrowness of the public policy exception reflects a compromise between two axioms that underlie recognition of foreign judgments, res judicata and fairness to litigants).

[159] *E.g.,* Tonga Air Services, Ltd. v. Fowler, 826 P.2d 204, 214 (S.Ct. Wash. 1992); The Society of Lloyd's v. Turner, 303 F.3d 325, 332 (5th Cir. 2002). An equally stringent standard was applied in the common law decisions. *E.g.* Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 900-01 (N.D. Tex. 1980) (British rule allowing prejudgment interest does not violated public policy) (decided before the Act enacted in Texas).

[160] *Tonga Air Services*, 826 P.2d at 214. The *Tonga* court states that what the Act requires is a basic standard of fairness — that due process be honored, that litigants be given the right to a hearing and to representation, and that the foreign court's decision be reasoned and not arbitrary. *Id.*

[161] Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980) (applying common law).

[162] *Id.*

state.[163] Public policy is found in the constitution, statutes, and case law.[164]

(ii) "Cause of Action" Limitation

The language of the public policy exception limits the public policy inquiry to whether the *cause of action* on which the judgment is based, as opposed to the judgment itself, violates the forum's public policy. In light of this "cause of action" language, some courts have refused to find that a challenge based on something other than repugnancy of the cause of action comes within this exception to recognition. For example, in *Southwest Livestock & Trucking Co., Inc. v. Ramon*,[165] the Court refused to deny recognition to a Mexican judgment on a promissory note with an interest rate of 48%.[166] The Court found that the plain language of the Recognition Act requires that the cause of action on which the judgment is based be repugnant to public policy; thus, the fact that the judgment itself offends state public policy is not a sufficient basis to deny recognition.[167] The foreign cause of action, an action to collect on a promissory note, was not

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[163] *Id.*

[164] Dart v. Dart, 568 N.W.2d 353, 358 (Mich. App. 1997). In general, courts have recognized that the public policy of the forum state includes the public policy of the United States — that is, those policies reflected in the Constitution and federal statutes. *E.g.*, Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment not entitled to recognition because it violates public policy found in First Amendment) (court notes when public policy to which judgment is repugnant is found in U.S. Constitution, denial of recognition is constitutionally mandated); *Cf.* Yahoo!, Inc. v. La Ligne Contre Le Racisme et L'antisemitism, 169 F.Supp.2d 1181, 1194 (N.D. Calif. 2001) (declaratory judgment holding that French judgment requiring internet service provider to restrict access to certain information would be unenforceable in U.S. as in violation of First Amendment). One exception is *Reading & Bates Construction Co. v. Baker Energy Resources Corp.,* 976 S.W. 2d 702 (Tex. App. 1998), in which the Texas Court of Appeals rejected a public policy argument based on U.S. patent law. The judgment debtor argued that a Canadian judgment for patent infringement violated public policy because it awarded profit-based damages while the U.S. allows only actual damages in patent infringement actions. *Id*. at 708. The court, noting that the relevant public policy was the public policy of "this state," rejected this argument on the grounds that patent infringement is not a matter of state policy, but of federal policy and thus the appropriate measure of damages in a patent infringement case did not impact the public policy of Texas. *Id.*at 708-09. Although patent law is unique in some respects, as its interpretation is left largely to the federal courts under their exclusive jurisdiction over patent cases, this decision seems clearly in tension with the Supremacy Clause.

[165] 169 F.3d 317 (5th Cir. 1999).

[166] *Id.* at 323.

[167] *Id.* at 321.

repugnant to Texas public policy, and, under the Recognition Act, it was irrelevant that the Mexican judgment itself contravened the Texas public policy against usury.[168] Similarly, in *The Society of Lloyd's v. Turner*,[169] the Court, noting that the cause of action, not the judgment, must offend public policy, rejected the judgment debtors' argument that the legal standards applied to establish the elements of breach of contract against them violated Texas public policy because the cause of action for breach of contract was not itself contrary to state public policy.[170] Other courts have applied the public policy exception without taking any notice of this limitation.

The ALI Draft Statute version of the public policy exception broadens that exception to include a public policy violation based on the judgment as well as the claim: a foreign judgment will not be recognized if "the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States."[171] This departure from the text of the Recognition Act was designed to broaden the public policy defense so that it can be used as a basis for challenges based on the specific proceedings giving rise to the judgment, as well as those based on the type of cause of action involved:

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[168] *Id.*

[169] 303 F.3d 325 (5th Cir. 2002).

[170] *Id.* at 332. Although both *Southwest Livestock* and *Society of Lloyd's* involved Texas law, this interpretation of the public policy exception is not limited to Texas. In *Guinness PLC v. Ward*, 955 F.2d 875 (4th Cir. 1992), the Fourth Circuit, applying Maryland law, found that the Recognition Act's public policy exception was "narrow," and applied only when the cause of action on which judgment is based violates public policy; therefore, a challenge to recognition based on post-judgment settlement could not be asserted under the it. *Id.* at 878. In *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661, 662 (N.Y. Sup. Ct. 1992), the judgment creditor used this distinction to argue that a British libel judgment should be recognized despite the judgment debtor's argument that the judgment violated the public policy embodied in the First Amendment because New York recognizes libel as a cause of action, and thus the cause of action did not violate New York public policy. *Id.* at 662. The *Bachchan* Court avoided the issue by stating that if the public policy to which the judgment was repugnant was found in the U.S. Constitution, then the court's refusal to recognize the judgment would be constitutionally mandated, rather than a matter of discretion under the Recognition Act. *Id.* Finding that the judgment did violate First Amendment protection of the press, the court denied recognition. *Id.*

[171] ALI Draft Statute, §5(a) (vi). The ALI Draft Statute public policy provision is mandatory, while the Recognition Act provision is discretionary. It also says that the relevant policy is that of "the United States," while the relevant public policy under the Recognition Act is that of the forum state. The ALI Reporters' Notes state that the public policy of the United States is intended to include state policy in areas where the subject matter is regulated by state law. *Id.* §5, Reporters' Note 5(a). The relevant state law, however, is not the law of the forum state, but the law of "the state with the predominant interest in the events." *Id.* (Whatever that means.)

> By moving to a focus on the judgment instead of just the "claim," the [ALI Draft Statute] opens up the possibility of inquiry into the process by which the judgment was obtained in the particular case. Thus, it would be possible to invoke the public-policy defense if the overall effect of the litigation by which the judgment was obtained would be contrary to public policy. . . . [H]owever, the bar to finding a public-policy violation would be set quite high and the procedures in the individual foreign proceeding need only meet an "international standard" of fairness and not the particulars of U.S. constitutional due process.[172]

3. Lack of Any "Escape Valve"

As discussed above, the Recognition Act currently has only two exceptions that focus on the specific proceeding giving rise to the foreign country judgment, and those exceptions are limited to specific types of unfairness: extrinsic fraud and inadequate notice. Thus, if a court strictly follows the text of section 4, which limits fundamental fairness challenges to a lack of fundamental fairness in the entire system of which the rendering court is a part, and limits public policy challenges to those addressed to the cause of action, there is no exclusion in the Recognition Act that allows the judgment debtor to resist recognition of the judgment based on a lack of fundamental fairness in the specific proceeding, unless that unfairness constitutes extrinsic fraud or inadequate notice. Further, courts have held that the grounds for nonrecognition listed in section 4 are exclusive — the court cannot deny recognition to a foreign country judgment on any other basis.[173] Therefore, under these decisions, there is no "escape valve" to allow the court to deny recognition in situations involving a denial of fundamental fairness that does not fit within the terms of section 4.

In *Guinness PLC v. Ward*,[174] the Fourth Circuit explained the rationale behind exclusivity. It reasoned that the Recognition Act's underlying purpose of establishing a minimum of foreign judgments that must be recognized in order to encourage reciprocal recognition of U.S. judgments in other countries argued against adding grounds for

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[172]ALI Draft Statute, §5, Reporters' Note 5(b). This broader public policy provision, of course, would also allow the judgment debtor to assert public policy violations on issues more closely associated with the judgment itself, such as the award of excessive damages. *Id.* Cmt g.

[173]Guinness PLC v. Ward, 955 F.2d 875, 884 (4th Cir. 1992) (§4 grounds are exclusive, except perhaps in the most exceptional cases); *accord*, The Courage Co., LLC v. The Chem Share Corp., 93 S.W.3d 323, 329 (Tex. App. 2002) (grounds for nonrecognition listed in §4 are only defenses available to a judgment debtor); Dart v. Balaam, 953 S.W.2d 478, 480 (Tex. App. 1997) (Recognition Act strictly narrows issues that can be raised to those listed in the Act). The grounds for nonrecognition listed in section 5 of the ALI Draft Statute also are intended to be exclusive. ALI Draft Statute, §5, cmt b.

[174]955 F.2d 875 (4th Cir. 1992).

nonrecognition to those expressly stated in the Act, except perhaps in the most exceptional cases.[175] The Court believed that the legislature had elevated the policy of facilitating recognition of U.S. judgments in foreign courts over other policies of public concern by statutorily narrowing the grounds for nonrecognition to provide certainty to foreign countries that their judgments will be recognized in the United States.[176] The Court therefore refused to find that the existence of a post-judgment settlement could be asserted as a grounds for nonrecognition, as it did not fit within the terms of any of the exceptions expressly stated in section 4.[177]

As the *Guinness* Court suggests, the desire to provide certainty in the recognition of foreign country judgments may also explain the narrowness of the due process and public policy exceptions. The underlying theory of the Recognition Act is that this certainty ultimately benefits U.S. citizens because it will encourage recognition of U.S. judgments abroad by satisfying those foreign countries that have a reciprocity requirement. As is often the case, however, the trade off for certainty is a diminished ability to provide for fairness in individual cases. Given the different balance struck by the ALI Draft Statute regarding this issue, if a revision of the Recognition Act is undertaken, the Drafting Committee might want to revisit this balance. In particular, the Drafting Committee might consider whether the public policy exception should be broadened beyond its focus on the cause of action, as has been done in the ALI Draft Statute, so that it can serve as the Act's "escape valve," a role that public policy exceptions often play.[178]

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[175] *Id.* at 884.

[176] *Id.*

[177] *Id.* The Court did indicate, however, that the post-judgment settlement could be raised under section 2 of the Recognition Act to prevent recognition under the Act by excluding the foreign country judgment from the coverage of the Act, if the post-judgment settlement would make the judgment unenforceable in the rendering country, and could be asserted under section 3 of the Act to avoid enforcement, as a settlement would be a basis for denying enforcement of a sister-state judgment. 955 F.2d at 884. The Court, however, did not reach these issues because it found that the doctrine of judicial estoppel prevented the judgment debtor from raising the post-judgment settlement because the judgment debtor did not inform the appellate court in the original proceeding of the existence of the settlement. *Id.* at 898.

[178] This is the role that public policy apparently is intended to play under the ALI Draft Statute. After stating that the grounds for nonrecognition listed in the ALI Draft Statute are exclusive, the comment to section 5 of the ALI Draft Statute states that "[o]ther grounds, such as an assertion that the damages awarded in the foreign judgment were 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, will not defeat recognition or enforcement, unless the claim or the foreign judgment meets the threshold of repugnance to the public policy of the United States." ALI Draft Statute, §5, cmt b.

4. Burden of Proof

Section 4 does not state which party has the burden of proof with regard to the grounds for denying recognition to a foreign judgment. Courts have taken different positions on the issue. Some courts have held that the person seeking recognition has the burden of establishing the absence of conditions that would *require* denial of recognition (mandatory conditions), while the person resisting recognition has the burden of establishing the existence of the discretionary grounds for denying recognition.[179] Others have held that the burden of proof with regard to mandatory as well as discretionary grounds for nonrecognition normally should be on the party resisting recognition.[180] The ALI Draft Statute expressly places the burden of proof on the party

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[179] *E.g.*, Bridgeway Corp. v. Citibank, 45 F.Supp. 2d 276, 285 (S.D.N.Y. 1999) (Plaintiff has burden to show no mandatory basis under 4(a) for recognition exists; defendant has burden regarding nondiscretionary bases); S.C.Chimexim S.A. v. Velco Enterprises, Ltd., 36 F.Supp.2d 206, 212 (S.D.N.Y. 1999) (burden of proof is on plaintiff regarding mandatory requirements and on defendant regarding discretionary requirements); Dresdner Bank, AG v. Haque, 161 F.Supp.2d 259, 263 (S.D.N.Y. 2001) (plaintiff has burden of proof no mandatory ground for nonrecognition exists; defendant has burden of proof to establish that a discretionary basis for nonrecognition applies); Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1005 (5th Cir. 1990) (discretionary grounds are phrased as affirmative defenses and thus burden of proof regarding them is on the defendant). The *Bridgeway* Court further states that in order to meet its burden under the Recognition Act, the party seeking recognition must establish (1) a final judgment, conclusive and enforceable where rendered, (2) subject matter jurisdiction of the rendering court, (3) jurisdiction over the parties or the res in the rendering court, and (4) regular proceedings conducted under a system providing impartial tribunals and procedures compatible with due process. *Bridgeway Corp.,* 45 F. Supp.2d at 285; *accord*, Ackermann v. Levine, 788 F.2d 830, 842 n.12 (2nd Cir. 1986); CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 743 N.Y.S.2d 408, 421 (N.Y. App. 2002) (weight of New York case law requires the plaintiff to establish these elements to make out a prima facie case for recognition and enforcement).

[180] *E.g.*, Kam-Tech Systems, Ltd. V. Yardeni, 774 A.2d 644, 649 (N.J. App. 2001) (burden of proof to establish ground for nonenforcement should be on party asserting the ground, though burden might be shifted when fundamental fairness warrants it, as, for example, when the information about the foreign proceeding is peculiarly within the knowledge or control of the party seeking enforcement or is inordinately burdensome for the opponent to obtain); The Courage Co. LLC v. The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition); Dart v. Balaam, 953 S.W.2d 478, 480 (Tex. App. 1997) (burden is on the defendant regarding all grounds for nonrecognition); Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317, 320 (5th Cir. 1999) (court must recognize judgment unless judgment debtor establishes one of the ten specific grounds for nonrecognition).

seeking to defeat recognition.[181] If a Drafting Committee is appointed, an express allocation of the burden of proof seems advisable.

5. Reciprocity

One exception to recognition *not* found in section 4 of the Recognition Act is any requirement that it be established that the courts of the foreign country whose judgment is sought to be recognized would recognize and enforce a comparable judgment of the forum state. In *Hilton v. Guyot*,[182] often referred to as the seminal common law case on the recognition and enforcement of foreign country judgments, the U.S. Supreme Court, by a 5-4 vote, established a limited reciprocity requirement applicable when the judgment creditor is a national of the rendering state and the judgment debtor is a U.S. national. Even *Hilton*'s limited reciprocity requirement, however, has been rejected in most states,[183] as well as by most federal courts, and by both the Restatement (Second) of Conflict of Laws and the Restatement (Third) of the Foreign Relations Law of the United States.[184] Thus, in not including a reciprocity requirement in the Recognition Act, the drafters were reflecting the consensus with regard to this issue.

Nevertheless, eight states have adopted nonuniform amendments to the Recognition Act regarding reciprocity.[185] Three of these states have adopted reciprocity as a mandatory grounds for nonrecognition;[186] the other five make denial for lack of reciprocity discretionary.[187] Further,

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[181]ALI Draft Statute, §5(a), (b).

[182]159 U.S. 113 (1895).

[183]Tonga Air Services, Ltd. v. Fowler, 826 P.2d 204, 209 (S.Ct. Wash. 1992) (reciprocity is not generally required to recognize a foreign judgment in the U.S.); Brand, *supra* note 15, at 5 (reciprocity requirement of *Hilton* has been rejected or ignored by most subsequent cases).

[184]Restatement (Third) of Foreign Relations Law §481, cmt d (1987) ("A judgment otherwise entitled to recognition will not be denied recognition or enforcement because courts in the rendering state might not enforce a judgment of a court in the United States if the circumstances were reversed. ... Though [*Hilton's*] holding has not been formally overruled, it is no longer followed in the great majority of State and federal courts in the United States."); *id.* Reporters Note 1 ("[T]he great majority of court is the United States have rejected the requirement of reciprocity, both in construing the Uniform Foreign Money Judgments Recognition Act ... and apart from the Act.")

[185]The states are Colorado, Florida, Georgia, Idaho, Maine, Massachusetts, North Carolina and Texas.

[186]Colorado, Georgia and Massachusetts. The most unusual of the nonuniform amendments adding a reciprocity requirement is that of Colorado. Unlike other states, which added the reciprocity requirement to the list of grounds for denying recognition in section 4, Colorado placed a very stringent reciprocity requirement in its definition of "foreign state," requiring that in order to be a "foreign state" under the Recognition Act, the foreign state must

by a divided vote, the ALI Council approved inclusion of a mandatory reciprocity requirement in the ALI Draft Statute.[188]

Initial research reveals little change in the consensus position against reciprocity requirements, other than the ALI Draft Statute and law review articles written in support of that Statute and the now-stalled Hague Convention.[189] The reciprocity provision in the ALI Draft Statute apparently has its origins in a belief that if foreign country judgments are subject to less recognition than they currently enjoy in the United States under the Recognition Act and the common law, this may encourage other countries to enter treaties with the U.S. regarding recognition and enforcement. The comment to the ALI Draft Statute reciprocity provision states that:

> The purpose of §7 is not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive to foreign

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have "entered into a reciprocal agreement with the United States recognizing any judgment of a court of record of the United States ... and providing for procedures similar to those contained in this article." As "foreign judgment" is defined as the judgment of a foreign state, and, as the United States has no formal agreement with any foreign country regarding recognition of judgments, Colorado's version of the Recognition Act therefore cannot be the basis for the recognition of any foreign country judgment. In *Milhoux v. Linder*, 902 P.2d 856 (Color. App. 1995), the Colorado Court of Appeals consider whether a foreign country judgment could be recognized in Colorado, given this unusual situation created by the Colorado version of the Recognition Act. The *Milhoux* Court stated that the fact the Act cannot be the basis for recognition of any foreign judgments does not make the Act meaningless because its legislative history indicates that it was intended to provide encouragement to other countries to enter reciprocity agreements. *Id.* at 856. The Court also held, however, that comity could serve as the basis for recognition, as the Recognition Act does not prevent recognition in situations not covered by the Act — the Act delineates the minimum of judgments that must be recognized, not the maximum that may be recognized. *Id.* at 860. The Court further determined that reciprocity was not a requirement for recognition in Colorado as a matter of common law comity and affirmed the lower court decision recognizing the foreign country judgment. *Id.* Therefore, the situation in Colorado seems to be that it has a Recognition Act with the most stringent reciprocity requirement of any of the states, which does not apply to anything, while the foreign country money judgments that normally are subject to the Recognition Act are recognized without any reciprocity requirement under principles of comity.

[187]Florida, Idaho, Maine, North Carolina, and Texas.
[188]ALI Draft Statute, §7.
[189]*E.g.*, Hicks, *supra* note 2.

> countries to commit to recognition and enforcement of judgments rendered in the United States. [The reciprocity requirement] is designed to provide the incentive to foreign states of avoiding lengthy and possibly expensive proceedings to secure recognition and enforcements of judgments rendered in their courts.[190]

In *Hunt v. BP Exploration Co. (Libya) Ltd,*[191] the court rejected the argument that imposing a reciprocity requirement would encourage foreign courts to recognize U.S. judgments:

> [R]equiring reciprocity would arbitrarily penalize private individuals for positions taken by foreign governments and such a rule has little if any constructive effect, but tends instead to a general breakdown of recognition practice. Reciprocity also would reduce predictability in recognition of foreign judgments: a reciprocity rule is difficult to apply both because of uncertainty as to just how much foreign recognition of American judgments should be considered adequate and because courts are ill-equipped to determine foreign law.[192]

Indeed, one commentator has argued that, rather than encouraging enforcement of U.S. judgments, the reciprocity discussion in *Hilton v. Guyot* is in large part responsible for existing reciprocity requirements in foreign nations.[193]

Reciprocity requirements also create the conflict of laws conundrum known as "double renvoi" when recognition of a U.S. judgment from a state with a reciprocity requirement is sought in a foreign jurisdiction that also has a reciprocity requirement.[194] A reciprocity requirement requires the forum jurisdiction to look to the rendering jurisdiction's law to determine if similar judgments from the forum state are enforced there. If the rendering

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[190]*Id.* §7, cmt b. (One can't help wondering at the fine distinction drawn in this comment between making recognition and enforcement more difficult and creating an incentive by making recognition of foreign judgments "lengthy and possibly expensive proceedings.")

[191]492 F. Supp. 885 (N.D. Tex. 1980).

[192]*Id.*at 899. The court went on to note that even if reciprocity would encourage greater recognition, that use of reciprocity would be more appropriate as part of executive or legislative action. Ironically, after the court had determined Texas common law did not require reciprocity, Texas passed the Recognition Act with a nonuniform amendment making lack of reciprocity a discretionary grounds for denying recognition of a foreign judgment. In *Hunt v. BP Exploration Co. (Libya) Ltd*, 580 F.Supp. 304 (N.D. Tex. 1980) (*Hunt II*), the court applied the new Act's reciprocity requirement, finding that the burden of establishing lack of reciprocity was on the party resisting recognition and that the burden had not been met. *Id.* at 308.

[193]Nadelmann, Reprisals Against American Judgments?, 65 Harv. L. Rev. 1184 (1952) (cited in Brand, *supra* note 15, at 5 n.21).

[194]Brand, *supra* note 15, at 25.

jurisdiction's law is substantive, as it would be, for instance, under the current Recognition Act, then the reference allows the forum court to make a determination as to whether or not its own judgments would be enforced. When, however, the rendering jurisdiction's law also contains a reciprocity requirement, which has the effect of referring the issue back to the forum state, an "analytical circle" is created from which "there is no easy exit." [195]

Initial research in this area suggests that the situation is one of considerable consensus over a period of time against reciprocity, with a determined minority in favor of it. If a drafting committee is appointed, it may want to revisit this issue in light of the ALI Draft Statute and the nonuniform amendments in some states, but with the recognition that, particularly in light of the Conference mandate to draft in areas of consensus, it may not be able to improve on the current situation under the Recognition Act.

E. Section 5 — Personal Jurisdiction

One mandatory ground for denying recognition under section 4 is that "the foreign court did not have personal jurisdiction over the defendant."[196] Section 5(a) lists bases of personal jurisdiction that will be deemed to conclusively establish that personal jurisdiction was present. It provides that a foreign judgment will not be denied recognition for lack of personal jurisdiction if: (1) the defendant was served personally in the foreign state; (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting jurisdiction; (3) the defendant had agreed to submit to the jurisdiction of the foreign court with regard to the subject matter involved prior to commencement of the proceedings; (4) the defendant was domiciled in the foreign state when the proceedings were instituted, or if the defendant is a corporate entity, it had it principle place of business or was incorporated in, or had otherwise acquired corporate status in the foreign state; (5) the defendant had a business office in the foreign state and the cause of action arose out of business done by the defendant through that foreign state office; or (6) the defendant operated a motor vehicle or airplane in the foreign state and the cause of action arose out of that operation.

These bases for personal jurisdiction are not exclusive; section 5(b) makes it clear that the forum court may recognize other bases of jurisdiction as well, and courts have held that under section 5 (b) the forum court should recognize a foreign country judgment based on any jurisdictional basis that would be recognized under the forum's internal law, including the forum's long arm statute.[197]

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[195] *Id.*

[196] Recognition Act, §4(a)(2).

[197] *E.g.*, Porsini v. Petricca, 456 N.Y.S.2d 888, 950 (N.Y. App. 1982); CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 743 N.Y.S.2d 408, 420 (N.Y. App. 2002) (plaintiff had to show

Section 5(a) thus in effect establishes a safe harbor with regard to personal jurisdiction: as long as jurisdiction exists on the basis of one of the listed grounds, the judgment will not be denied recognition for lack of personal jurisdiction, but personal jurisdiction based on other grounds may be upheld as well. The Prefatory Note states that "[i]n codifying what bases for assumption of personal jurisdiction will be recognized, which is an area of the law still in evolution, the Act adopts the policy of listing bases accepted generally today and preserving for the courts the right to recognize still other bases."

Initial research suggests that section 5(a) has provided a useful guide for the courts, while not limiting their ability to go beyond it. Courts not only use it as a baseline for determining whether personal jurisdiction exists, but also as an interpretive source in determining other questions related to personal jurisdiction, such as whether the judgment debtor should be deemed to have waived a challenge to personal jurisdiction by participation in the foreign country proceedings.

The ALI Draft Statute, however, takes a different approach to jurisdiction. Instead of creating a safe harbor of acceptable bases of personal jurisdiction, it creates a list of prohibited bases for asserting personal jurisdiction,[198] no doubt, at least in part because the proposed Hague Convention took this approach.

If a drafting committee is appointed, it may want to review section 5 to determine if it needs to be updated in light of develops since the Recognition Act was promulgated.[199] That Committee also might want to consider whether there is any merit in also listing prohibited bases of jurisdiction in the Act, and whether there is a sufficient consensus on prohibited bases to allow them to do so.

F. Other Issues

1. Absence of a Statute of Limitations

The Recognition Act does not contain any provision indicating by when action to have a

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that, based on evidence presented to the rendering court, forum law would permit exercise of personal jurisdiction.)

[198]ALI Draft Statute, §6.

[199]For example, the U.S. Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), held that the exercise of quasi in rem jurisdiction was subject to the minimum contacts test, but also seemed to suggest that quasi in rem jurisdiction might be treated differently in the enforcement context. A Drafting Committee might want to review the cases addressing quasi in rem jurisdiction in the enforcement context since *Shaffer* to determine if there is sufficient consensus to establish a rule in the Act on this issue.

foreign judgment recognized or enforced must be taken. Some courts have held that the general statute of limitations applies.[200] Others have applied the statute of limitations applicable with regard to enforcement of a domestic judgment. [201] The ALI Draft Statute contains a ten-year statute of limitations regarding enforcement of a foreign country judgment, which begins to run when the judgment becomes enforceable in the rendering state, or, if an appeal is taken, from the time when no further review is available in the rendering the state.[202] If a drafting committee is appointed, it should consider whether the statute of limitations issue should be addressed in the Act.

2. Exchange Rate on Judgments and The Uniform Foreign-Money Claims Act

The Recognition Act does not contain rules regarding how a judgment issued in a foreign currency should be converted to U.S. currency. Courts have recognized three options with regard to the applicable exchange rate: the date payment is due, the date of breach, and the date judgment is entered.[203] The ALI Draft Statute adopts the date of judgment rule.[204] The Conference has promulgated the Uniform Foreign Money-Claims Act, adopting the date of payment as the appropriate date from which to determine the exchange rate.[205] The Uniform Foreign-Money Claims Act also contains other provisions relevant to foreign judgments. Section 7(b) of the Uniform Foreign-Money Claims Act allows the judgment debtor to pay a foreign judgment in either the currency in which it was issued or in U.S. currency. Section 7(c) requires that costs be entered in U.S. dollars. Section 10 specifically makes the requirements of section 7 applicable to foreign judgments that are recognized and enforced. Subsection 10(c) requires that a satisfaction or partial payment on a foreign judgment be credited against the amount of foreign money specified in the judgment.

If a drafting committee is appointed to revise the Recognition Act, that Committee should consider whether the Recognition Act should adopt a rule regarding exchange rate, and whether

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[200] *E.g.*, Vrozos v. Sarantopoulos, 552 N.E.2d 1053, 1098 (Ill. App. 1990) (as Recognition Act contains no statute of limitations, general five year statute of limitations applies).

[201] *E.g.*, La Societe Anonyme Goro v. Conveyor Accessories, Inc., 677 N.E.2d 30, 32 (Ill. App. 1997) (applying seven year statute of limitations applicable to enforcement of domestic judgments to enforcement of a foreign country judgment).

[202] ALI Draft Statute, §2(d).

[203] Manches & Co. v.Gilbey, 646 N.E.2d 86, 88 (Mass. 1995).

[204] ALI Draft Statute, §3(a) ("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 at the exchange rate prevailing on the date of the judgment granting enforcement.")

[205] Uniform Foreign-Money Claims Act, §1(3) (1989). The ULA indicates that the Uniform Foreign-Money Claims Act has been adopted in 21 states, the District of Columbia, and the Virgin Islands.

the Recognition Act needs to be coordinated with the Uniform Foreign-Money Claims Act.

IV. Conclusion

Review of the Conference criteria for proposing an Act[206] indicates that the Committee could find that a recommendation of revision of the Recognition Act is appropriate. A brief discussion of these criteria follows.

A. "The subject matter must be appropriate for state legislation in view of the powers granted by the Constitution of the United States to the Congress."

It has long been recognized that, except in cases involving federal questions, state law governs the recognition of foreign judgments.[207] Therefore, the subject matter clearly is

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[206]Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts, January 13, 2001, NCCUSL 2002-2003 Reference Book, page 115.

[207]Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1003 (5th Cir. 1990) (state law governs recognition and enforcement in diversity cases); Tonga Air Services, Ltd. v. Fowler, 826 P.2d 204, 208 (S.Ct. Wash. 1992) (while standard for sister state recognition is federal under full faith and credit, absent treaty or federal statute, standard for foreign country recognition is state, even when recognition is sought in federal court). Although some courts have recognized that these suits necessarily involve to some extent relations between the United States and foreign governments, and some commentators have argued enforceability therefore should be governed by reference to a general rule of federal law, courts nevertheless have concluded that the law of the state applies even in federal court under the *Erie* doctrine. *Id.* at 1003 n.1; *accord*, Success Motivation Institute of Japan v. Success Motivation Institute, Inc., 966 F.2d 1007, 1009 (5th Cir. 1992) (state law applies to recognition of foreign judgments in diversity cases even though some courts have found foreign relations issues are involved and some commentators have argued for application of a rule of general federal law). Federal courts have held that state law governs the preclusive effect given the judgment as well as its recognition under *Erie*. Success Motivation Institute of Japan v. Success Motivation Institute, Inc., 966 F.2d 1007, 1010 (5th Cir. 1992) (preclusive effect of judgment as well as recognition governed by state law, not Fifth Circuit res judicata rules); Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co. Ltd, 470 F. Supp. 610, 614 (S.D.N.Y. 1979) (In diversity action, New York law determines preclusive effect of foreign country judgment). *See* Restatement of the Law Third — Foreign Relations Law of the United States, §481, cmt a:

> Since Erie v. Tompkins, 304 U.S. 64 (1938), it has been accepted that in the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign country judgments is a matter of State law, and an action to enforce a foreign country judgment is not an action arising under the laws of the United States. Thus, state courts, and federal

appropriate for state legislation.

B. "The subject matter must be such that the approval of the Act by the Conference would be consistent with the objectives of the Conference . . . to promote uniformity in the law among the several States on subjects where uniformity is desirable and practicable."

Recognition of foreign country judgments is an area in which uniformity of state law is both desirable and practicable. Uniformity is particularly desirable because of the combination of an international context and the possibility that recognition and enforcement proceedings with regard to the same judgment may occur in more than one state. The underlying premise of the current Recognition Act is that the establishment of uniform rules in this area ultimately will benefit U.S. interests by making it easier to have U.S. judgments recognized in foreign countries that have reciprocity requirements. The complexity of the U.S. federal system can make the task of a foreign court, approaching that system from the perspective of its own different legal system, culture, and language, quite difficult. To the extent the U.S. law in this area is uniform, as well as clear, it will make it easier for those with U.S. judgments to demonstrate to foreign courts that reciprocity requirements have been satisfied. That uniformity is practicable is demonstrated by the considerable degree of uniformity that exists in this area now under the current Recognition Act.

C. "[T]here shall be an obvious reason for an Act on the subject such that its preparation will be a practical step toward uniformity of state law or at least toward minimizing diversity."

As this Study Report demonstrates, despite the considerable degree of uniformity in this area, sufficient interpretive issues have arisen under the current Recognition Act to make its revision a practical step towards further uniformity. Clarification of these issues will encourage more widespread uniformity by encouraging adoption of the Act in more states, as well as by eliminating nonuniform amendments necessitated by the need for states that have adopted the current Act to address some of these issues on an individual basis.

D. "[T]here must be a reasonable probability that an Act, when approved, either will be accepted and enacted into law by a substantial number of jurisdictions or, if not, will promote uniformity

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courts applying State law, recognize and enforce foreign country judgments without reference to federal rules.

In cases involving federal questions, federal courts generally apply federal law to determine whether to recognize a foreign judgment. Alfadda v. Fenn, 966 F.Supp. 1317, 1325 (S.D.N.Y. 1997).

indirectly."

To the extent that such things can be predicted, it would seem that there is a reasonable probability that a revised Recognition Act would be adopted in a substantial number of jurisdictions. The level of interest in codification of the law of recognition appears high, as evidenced by continuing adoptions of the current Recognition Act despite its age, including five adoptions since 1996, as well as the ALI and Hague Convention efforts. Further, practitioners have recognized that codification of the law in this area under the current Recognition Act has assisted them in obtaining recognition of U.S. judgments in other countries.[208] With the Hague Convention stalled, and the ALI project placed in at least some doubt after its reception at the ALI Annual Meeting in March, the Recognition Act may very well continue to be the only vehicle for providing certainty in this area. The current Recognition Act has been enacted in thirty-one jurisdictions, despite the interpretive issues discussed in this Report. One can predict that a revised Recognition Act should do at least as well, and probably better.

E. "[T]he subject matter of the Act shall be such that uniformity of law among States will produce significant benefits to the public through improvements in the law . . . or will avoid significant disadvantages likely to arise from diversity of state law."

Clear and certain rules are particularly important in this area because of its international context. Clear rules regarding the U.S. enforcement of judgments obtained in other countries facilitate commercial transactions at the international level by both assuring those from other countries that judgments received against U.S. entities will be enforceable against their U.S. assets and assisting those with U.S. judgments in establishing in foreign courts that reciprocity requirements have been met. Revision of the Recognition Act to clarify areas in which interpretive issues have arisen should increase certainty and clarity and thus constitute an improvement in the law to the benefit of the public. Conversely, revision of the Recognition Act will avoid the disadvantages of having diverse recognition law in the various states, which ultimately leads to increased difficulty in obtaining enforcement not only of foreign country judgments in the U.S., but of U.S. judgments in foreign countries.

F. Additional Considerations

There are two other issues the Committee may wish to consider in making its decision as to whether the Recognition Act should be revised. First, the comments to the current Act are extremely terse, and, for some sections, nonexistent. Although comments are not always

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[208] *See* Brand, *supra* note 15, at 25 (recommending that U.S. litigants who anticipate foreign enforcement of their judgment obtain judgments in states whose law is clearly stated and does not contain a reciprocity requirement, and stating that "[s]tates which have not adopted both the Recognition Act and the Enforcement Act generally provide neither certainty nor clarity.").

available and Judge Easterbrook may not read them, they nevertheless provide a valuable interpretive tool for many practitioners and courts. Another benefit of revision of the Recognition Act would be the opportunity to provide more extensive comments than those under the current Act.

Second, if the Committee decides to recommend revision of the Act, it may also want to consider making a recommendation as to the scope of that revision. One type of revision would focus on improving the current Recognition Act by clarifying the interpretive issues that have arisen since its enactment. That revision would operate on the assumption that the basic approach and current scope of the Recognition Act are fundamentally sound. The touchstone for the addition of new material would be whether addition of that material would improve the operation of the current Act, and thus facilitate increased enactment. The discussion in this Report has largely focused on the type of issues that would be addressed by such a revision; as it demonstrates, a revision adopting this approach, while a manageable project, would certainly provide a drafting committee with adequate work and interesting issues to keep them busy.

A second possible type of revision is raised by a comparison of the current Recognition Act with the ALI Draft Statute. As discussed above, the Recognition Act takes a minimalist approach to its subject matter. Its focus is on only a specific type of foreign country judgment — money judgments that do not fall within one of the excluded categories — and its rules are aimed only at establishing the minimum level of recognition a state is required to give those judgments, while leaving procedural issues and issues regarding the effect of recognition largely to other law. The main reasons for this minimalist approach are first, the limited goal of the Recognition Act — it is designed primarily to provide certainty to foreign countries with reciprocity requirements that their money judgments will be recognized in order to encourage reciprocal recognition of U.S. judgments in those countries — and, second, the desire to avoid areas in which consensus is lacking that is common to all uniform laws drafting.

The ALI Draft Statute represents an entirely different approach to regulation of the recognition and enforcement of foreign country judgments. It is intended to be a comprehensive statute covering the entire area of recognition and enforcement of judgments. It is broader than the Recognition Act both in the subject matter that it covers — it applies to "any judgment or final order of the court of a foreign state granting or denying a sum of money or determining a legal controversy"[209] — and in the extent to which it regulates that subject matter. The ALI Draft Statute contains specific rules on most of the issues regarding recognition and enforcement left by the Recognition Act to other law, as well as on such collateral issues as parallel proceedings[210] and provisional measures in aid of foreign proceedings.[211]

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[209] ALI Draft Statute, §1(b).
[210] *Id.* §11.
[211] *Id.* §12.

The second type of revision would be one that would authorize the drafting committee to consider not only changes and additions that would improve the current Act, but to re-examine the scope and drafting approach of the original Act — in other words, to consider whether the ALI Draft Statute's comprehensive approach is better. Such a revision would be more open-ended and, if the decision was made to adopt a comprehensive approach, more complex,[212] than the first type. Because it would involve the drafting committee in issues in which less consensus is present, it also would likely be more controversial. Nevertheless, to the extent it was successful in producing an acceptable, enactable statute, it would have the advantage of producing increased uniformity with regard to a wider range of issues in this area.

[212]It should be noted in this regard that the ALI Draft Statute is more complex than it appears because many of its important substantive rules currently are contained in its comments and its reporters' notes rather than in its text.