

MEMORANDUM

Date: June 7, 2004

To: Uniform Law Commissioners

From: Drafting Committee to Amend the Uniform Foreign Money-Judgments Recognition Act

Re: Issues for Conference Consideration at the 2004 Annual Meeting

I. History of the Drafting Committee

The Drafting Committee to Amend the Uniform Foreign Money-Judgments Recognition Act (“UFMJRA”) was approved at the January, 2004 meeting of the Conference Executive Committee. Its charge is “to draft amendments to the Uniform Foreign Money Judgments Recognition Act, with the scope of the project limited to those issues necessary to correct problems created by the current Act and its interpretation by the courts.”¹ A Study Report prepared by a UFMJRA Study Committee had concluded that, while the UFMJRA, which was promulgated by the Conference in 1962, had in large part been successful in carrying out its purpose of establishing the standards under which state courts would recognize the judgments of a foreign country, there had been sufficient interpretive problems in the courts to warrant a revision of the Act. The Drafting Committee held its first drafting committee meeting April 23-25, 2004 in Chicago, Illinois. The Drafting Committee seeks input from the Committee of the Whole with regard to four issues that it discussed at the drafting committee meeting: (1) revision of the scope of the UFMJRA; (2) the appropriate procedure for recognition of foreign country judgments; (3) expansion of the public policy ground for denying recognition; and (4) reciprocity. These issues are discussed below.

II. Scope of the UFMJRA

The scope of the current UFMJRA is determined in part by its definition of “foreign state,” as the Act only applies to certain money judgments of a “foreign state.” “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.” The “foreign state” definition obviously needs to be updated — for example, the Panama Canal Zone is no longer within the control of the United States. At its first meeting, the Drafting Committee tentatively decided to

¹Minutes of the Midyear Meeting of the Executive Committee, National Conference of Commissioners on Uniform State Laws, January 10, 2004, Wilmington, Delaware.

update this definition by defining a foreign country in terms of whether the judgments of that political entity would be entitled to full faith and credit in the United States. Thus, the new definition, which is a definition of “foreign country” rather than “foreign state,”² would define a “foreign country” as “any governmental unit the judgments of whose courts are not entitled to full faith and credit in this State.”

This definition of “foreign country” has the advantage of coordinating the UFMJRA definition with the definition of “foreign judgment” contained in another Uniform Act of the Conference, The Uniform Enforcement of Foreign Judgments Act. That Act, which establishes a registration procedure for the enforcement of *sister state* judgments, defines a “foreign judgment” as “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 in this state.”³ By defining “foreign country” in the UFMJRA in terms of those judgments *not* subject to full faith and credit, it is clear that the two Acts are mutually exclusive, and that, between them, they cover the full array of foreign money judgments.

This new definition, however, may enlarge the scope of the UFMJRA to some extent, and will clarify its application in other situations. For example, courts interpreting the current Act have questioned whether judgments of Native American tribal courts come within the UFMJRA.⁴ Under the new definition, as tribal court judgments are not entitled to full faith and credit, they clearly would come under the UFMJRA.

In light of the possibility that certain types of judgments not formerly covered by the UFMJRA may be brought in by this revised definition, the Drafting Committee felt it would be valuable to seek comment from the Commissioners on this issue.

III. Appropriate Procedure for Recognition of Foreign Judgments

²The change in defined terms from “foreign state” to “foreign country” was made to clarify that the UFMJRA does not apply to judgments of a sister-state. Review of case law under the current UFMJRA revealed that some litigants and courts had been misled by the use of the term “foreign state,” which is often used as a term of art referring to the judgment of a sister-state, into believing that the UFMJRA applied to the judgments of sister-states as well as those of foreign nations.

³Uniform Enforcement of Foreign Judgments Act, §1 (1964).

⁴*See, e.g.,* Anderson v. Engelke, 954 P.2d 1106 (Mont. 1998) (tribal court judgment not entitled to full faith and credit; court assumes might be covered by Recognition Act); Day v. Montana Dep’t. of Social & Rehab. Servs. 900 P.2d 296 (Mont. 1995) (reserves judgment as to whether Recognition Act would apply).

The Drafting Committee seeks Commissioner comment as to the appropriate procedure for recognition of foreign country judgments under the UFMJRA. The current Act is silent as to the procedure that should be followed in seeking recognition of a foreign country judgment.

The Drafting Committee decided at its April drafting committee meeting that the UFMJRA should expressly state the procedure by which a foreign country judgment may be recognized, but rejected a registration procedure as an appropriate procedure for the recognition of foreign country judgments, deciding instead that the judgment creditor should be required to file a court action in order to have a foreign country judgment recognized. Accordingly, Section 5 of the Draft provides:

- (a) If recognition of a foreign country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim or affirmative defense.
- (b) If recognition of a foreign country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action for recognition of the foreign country judgment.

The background of these issues and the rationale for the Drafting Committee's decisions is discussed below.

The Study Report revealed that the most troublesome interpretative issues regarding the current Act have resulted from the failure of the Act to specify the procedure by which the issue of recognition of a foreign judgment — and the grounds for denying recognition — should be raised. The current Act is completely silent on this issue, and courts have struggled with the question.

At common law, the issue of recognition of a foreign country judgment normally was raised by filing an action on the foreign country judgment in the courts of the state in which recognition was sought to have the foreign country judgment “domesticated.” Based on the cases reviewed in connection with the Study Report, filing of an action on the foreign country judgment currently is also the primary way in which the issue of recognition of a foreign country judgment is raised under the UFMJRA.

With regard to sister-state (as opposed to foreign country) judgments, however, the registration procedure provided by the Uniform Enforcement of Foreign Judgments Act is available in most states. That Act allows a judgment creditor to obtain enforcement of a sister state judgment simply by filing an authenticated copy of the sister state judgment in the clerk's office in the forum state, together with an affidavit stating the name and last known post office address of the judgment debtor. The clerk of court then mails notice of the filing of the foreign judgment to the judgment debtor at the address provided by the judgment creditor. Under the Enforcement Act, upon filing, the sister state judgment “has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying” as a judgment

of the forum state “and may be enforced or satisfied in like manner,” although there is an optional bracketed provision that would prevent execution on the judgment for a given number of days after the sister state judgment is filed with the clerk. The judgment debtor also may seek a stay of execution of the judgment if the judgment debtor shows that an appeal of the judgment is pending or will be taken, that the judgment has been stayed, or that any ground upon which a judgment of the forum state would be stayed exists.

By its terms, the Enforcement Act applies only to sister-state judgments, and, therefore, its provisions do not provide for raising or determination of issues relating to recognition of the foreign judgment. With regard to sister-state judgments, recognition is mandated by the Full Faith and Credit Clause. Nevertheless, some courts have held that the Enforcement Act registration procedure can be used with regard to a foreign country judgment without any separate determination of whether the foreign country judgment is entitled to recognition under the UFMJRA. *E.g.* *Society of Lloyd’s v. Ashenden*, 233 F.3d 473 (7th Cir. 2000). Other courts have held (correctly, it would seem) that the Enforcement Act only applies to enforcement of foreign judgments and, therefore, at best would be available as a means of enforcing a foreign country judgment only after a separate proceeding had made the determination that the foreign country judgment was entitled to recognition. *E.g.*, *Matusevitch v. Telnikoff*, 877 F.Supp. 1 (D.D.C. 1995); *Hennessy v. Marshall*, 682 S.W.2d 340 (Tex. App. 1984). In fact, the lack of any procedure for raising defenses to recognition (as opposed to grounds for non-enforcement) under the Enforcement Act has caused some courts to find that, if the Recognition Act is interpreted to allow use of the Enforcement Act procedure as the means for determining whether a foreign country judgment should be recognized as well as enforced, then the Recognition Act is unconstitutional as applied when the Enforcement Act is used because the party opposing recognition is denied notice and a hearing with regard to issues relating to recognition of the foreign country judgment. *E.g.*, *Detamore v. Sullivan*, 731 S.W.2d 122 (Tex. App. 1987); *Plastics Engineering Inc. v. Diamond Plastics Corp.*, 764 S.W.2d 924 (Tex. App. 1989).⁵

At least six states have adopted non-uniform amendments to the UFMJRA to address the issue of the recognition procedure to be applied under the Act. Four of these states — Florida, Hawaii, North Carolina, and Texas — adopted a registration procedure based on the Enforcement Act. California, on the other hand, expressly prohibits the use of the Enforcement Act, requiring that the judgment creditor instead bring an action on the judgment. New York also rejects use of the Enforcement Act. Its nonuniform amendment provides that a foreign country judgment is enforceable “by an action on the judgment, a motion for summary judgment

⁵In *Don Dockstader Motors, Ltd. v. Patal Enterprises, Ltd.*, 794 S.W.2d 760 (Tex. 1990), the Texas Supreme Court disapproved of the *Detamore* and *Plastics Engineering* decisions to the extent those decisions were in conflict with its decision that the UFMJRA was constitutional when the procedure used was the filing of a cause of action on the judgment rather than the Enforcement Act; because the decisions in *Detamore* and *Plastics Engineering* were based specifically on use of the Enforcement Act rather than an action on the judgment, however, their core rationale appears to remain intact.

in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense.” In addition, a current American Law Institute project to draft a federal statute in the area of recognition of foreign judgments, the International Jurisdiction and Judgments Project, contains provisions creating a registration procedure for recognition of foreign country judgments that were not obtained by default.

As mentioned above, the Drafting Committee decided that the UFMJRA needs to provide for the appropriate procedures for recognition of foreign country money judgments in order to clear up the confusion that has resulted from the failure of the current Act to provide a procedure for recognition.

The second question for the Drafting Committee, then, was what those procedures should be? Should the Drafting Committee limit the applicable procedure to the filing of an action on the judgment, thus requiring court involvement with regard to every action to recognize a foreign country judgment, or should the statute also provide for a truncated procedure, comparable to the registration procedure found in the Enforcement Act? After much discussion, and review of a Draft provision creating a registration procedure, the Drafting Committee decided that a registration procedure was not appropriate in the context of recognition of foreign country judgments.

In essence, the Drafting Committee concluded that the safeguards that would be required in a foreign country judgment registration procedure in order to adequately protect the judgment debtor would remove most of the efficacy of a registration procedure for the judgment creditor. A registration procedure represents a balancing between the interests of the judgment creditor in obtaining quick and efficient enforcement of a judgment when the judgment debtor has already been provided with an opportunity to litigate the underlying issues versus the interest of the judgment debtor in being provided an adequate opportunity to raise and litigate issues regarding whether the foreign country judgment should be recognized.

In the context of sister-state judgments, this balance favors use of a truncated procedure such as that found in the Enforcement Act. Recognition of sister-state judgments normally is mandated by the Full Faith and Credit Clause. Courts recognize only a very limited number of grounds for denying full faith and credit to a sister-state judgment — that the rendering court lacked jurisdiction, that the judgment was procured by fraud, that the judgment has been satisfied, or that the limitations period has expired. Thus, the judgment debtor with regard to a sister-state judgment normally does not have any grounds for opposing recognition and enforcement of the judgment. The extremely limited grounds for denying full faith and credit to a sister-state judgment reflect the fact such judgments will have been rendered by a court that is subject to the same due process limitations and the same overlap of federal statutory and constitutional law as the forum state’s courts, and, to a large extent, the same body of court precedent and socio-economic ideas as those shaping the law of the forum state. Therefore, there is a strong presumption of fairness and competence attached to a sister-state judgment that justifies use of a registration procedure.

The balance between the benefits and costs of a registration procedure is significantly different, however, in the context of recognition and enforcement of foreign country judgments. Unlike the limited grounds for denying full faith and credit to a sister-state judgment, the UFMJRA lists a number of grounds upon which recognition of a foreign country judgment may be denied. Determination of whether these grounds apply requires the court to look behind the foreign country judgment to evaluate the law and the judicial system under which it was rendered. The existence of these grounds for nonrecognition reflects the fact 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. In some situations, there also may be suspicions of unfairness or fraud. These differences between sister-state judgments and foreign country judgments provide a justification for requiring judicial involvement in the decision whether to recognize a foreign country judgment in all cases in which that issue is raised.

The Drafting Committee considered whether a registration procedure could be devised that would adequately protect the judgment debtor in the foreign country judgment context while still providing expedited recognition and enforcement for the judgment creditor. The draft registration procedure being considered by the Drafting Committee provided that (unlike the Enforcement Act) the filing of the foreign country judgment with the clerk of court would have no effect for 45 days after notice of registration of the judgment was sent to the judgment debtor. The Drafting Committee concluded that, in order to adequately protect the judgment debtor, the registration procedure also would have to require that the judgment debtor be served with notice of the registration in the same manner that the judgment debtor would be served with process if an action on the judgment were filed, rather than simply being mailed a notice of registration of the judgment as provided in the Enforcement Act.

Two of the main advantages of a registration procedure for the judgment creditor, however, are the ability to provide notice by mail to the judgment debtor in lieu of more formal service of process and to obtain the right to collect on the judgment simply by registering it. Once the Drafting Committee determined that these two features must be removed in order to strike an appropriate balance between the interests of the judgment creditor and judgment debtor in the foreign country judgment context, the Drafting Committee concluded that the resulting registration procedure would not be likely to be much more efficient than simply filing an action on the foreign country judgment.⁶

⁶It should be noted that the action that is filed is an action on the foreign country judgment, not an action on the cause of action that gave rise to the foreign country judgment. The complaint that is filed is a fairly simple one, stating briefly the facts leading to the judgment, the fact that the judgment was rendered after proper service of process and by a court of competent jurisdiction, and that the judgment remains unsatisfied. The complaint will further allege that the judgment is one within the scope of the UFMJRA — that is, a judgment granting recovery of a sum of money that is final, conclusive and enforceable where rendered — and that none of the grounds for denial of recognition should apply. The complaint requests that the court

In addition, a registration procedure has at least one significant disadvantage for the judgment creditor — because it does not involve the court, it does not allow the judgment creditor to obtain prejudgment relief. Thus, if a judgment creditor is concerned about assets of the judgment debtor disappearing or otherwise wishes to seek prejudgment relief, the judgment creditor likely will opt for an action on the foreign country judgment anyway. All of these considerations caused the Drafting Committee to conclude that a registration procedure was not an appropriate means for recognition of foreign country judgments.

In light, however, of the fact that some states through nonuniform amendment, and others by judicial interpretation, have reached a different conclusion, as well as the different approach taken by the ALI Project, the Drafting Committee felt it would be helpful to seek comment from the Commissioners on this issue.

The Drafting Committee also briefly considered whether the New York approach, which allows a judgment creditor to bring an action on a foreign country judgment by filing a motion for summary judgment in lieu of complaint, might be adopted. Because this approach would involve a rule of civil procedure, it was suggested that this approach would run into enactment difficulties in states in which rules of procedure are adopted by the State Supreme Court rather than by the legislature. The Drafting Committee also would appreciate comment from Commissioners on this issue.

IV. Revision of the Public Policy Ground for Denying Recognition to a Foreign Country Judgment

Section 4 of the UFMJRA lists nine grounds for denying recognition to a foreign country judgment. These grounds have been held to be exclusive — the forum court must recognize the foreign country judgment unless one of these grounds is established. One ground for denying recognition is that “the *cause of action* on which the judgment is based is repugnant to the public policy of this state.” Some courts, focusing on this “cause of action” language, have held that a public policy challenge based on something other than repugnancy of the foreign cause of action itself to the public policy of the forum state may not be considered as a ground for denying recognition to a foreign country judgment. *E.g.*, *Southwest Livestock & Trucking Co., Inc. v. Ramon*, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to a Mexican judgment on a promissory note with an interest rate of 48% because an action on a negotiable instrument is not contrary to forum’s public policy); *The Society of Lloyd’s v. Turner*, 303 F.3d 325 (5th Cir. 2002) (rejecting argument that legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *Guinness PLC v. Ward*, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); *cf.* *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y. S. 2d 661 (N.Y. Sup. Ct. 1992) (judgment

issue an order declaring that the foreign country judgment is conclusive between the judgment creditor and the judgment debtor, and that it is entitled to recognition and enforcement. A copy of the foreign country judgment will be attached as an exhibit to the complaint.

creditor argued British libel judgment should be recognized despite argument it violated the First Amendment because New York recognizes a cause of action for libel).

The Drafting Committee decided that the “cause of action” language as interpreted in these cases made the public policy exception too narrow, and amended the public policy ground for denying recognition to provide that recognition may be denied when “the substantive law on which the judgment is based is repugnant to the public policy of this State or of the United States.” Although this amendment broadens the focus of the public policy exception, comments to the revised section will make it clear that the standard for finding a public policy violation remains unchanged – even a marked difference in the substantive law is not sufficient to find a public policy violation; public policy is violated only if the substance of the law is inimical to good morals, natural justice, or the general interest of the citizens of the state.

The Drafting Committee invites comment from the Commissioners on this proposed change.

V. Reciprocity

One ground for denying recognition to a foreign country judgment *not* found in the Recognition Act is any requirement that it be established the courts of the foreign country whose judgment is sought to be recognized would recognize a comparable judgment of the forum state. In *Hilton v. Guyot*, 159 U.S. 113 (1895), 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 by most state courts, most federal courts, and both the Restatement (Second) of Conflict of Laws and the Restatement (Third) of the Foreign Relations Law of the United States. Nevertheless, eight states have adopted nonuniform amendments to the UFMJRA adding a reciprocity requirement,⁷ and a mandatory reciprocity requirement is included in the ALI International Jurisdiction and Judgments Project.

There was little, if any, support on the Drafting Committee at the April drafting committee meeting for adding a reciprocity requirement to the UFMJRA. The primary purpose of the UFMJRA was to establish minimum standards for recognition of foreign country judgments in the hope that clear U.S. standards for recognition of foreign country judgments would encourage foreign courts, and particularly those in countries with reciprocity requirements, to recognize U.S. judgments. Placing a reciprocity requirement on the recognition of foreign country judgments would run counter to this goal by making it more difficult, if not

⁷The states are Colorado, Florida, Georgia, Idaho, Maine, Massachusetts, North Carolina and Texas. Colorado, Georgia and Massachusetts make lack of reciprocity a mandatory ground for denying recognition, while the other states list it as a discretionary ground.

impossible, for a foreign country court to determine whether its own reciprocity requirement was satisfied.⁸ As the court stated in *Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885, 899 (N.D. Tex. 1980):

[R]equiring reciprocity would arbitrarily penalize 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.

Nevertheless, given the number of states that have nonuniform amendments to the UFMJRA adopting reciprocity requirements, the Drafting Committee felt that it would be useful to obtain comment from the Commissioners on the reciprocity issue.

⁸Indeed, a U.S. reciprocity requirement would create an analytical circle when recognition of a U.S. judgment from a state with a reciprocity requirement was sought in a foreign country. 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 in the rendering state. If the rendering state also has a reciprocity requirement then the forum state cannot make this determination – whether the forum state will enforce the judgment from the rendering state depends on whether the rendering state would enforce a judgment from the forum state, which depends on whether the forum state would enforce a judgment from the rendering state.