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Comity in the Free Trade Zone

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COMITY IN THE FREE TRADE ZONE

I. INTRODUCTION

Due to the constant movement of goods, services, people, and capital across national boundaries, international litigation is becoming commonplace. This litigation often requires parties who win money judgments to seek enforcement of the judgment in the defendant's country.[1] In spite of the frequency of this type of litigation, current United States law on the recognition and enforcement of foreign judgments is unnecessarily disjointed.[2] There are essentially fifty-one different laws on the recognition and enforcement of foreign judgments.[3] Thus, achieving consistency and uniformity regarding the enforcement of foreign judgments in the United States is vital.

The North American Free Trade Agreement (NAFTA) heightens the need for the United States to have consistency in the recognition and enforcement of foreign judgments. NAFTA breaks down the trade barriers between Mexico, Canada and the United States, causing increased movement of goods, services, persons, and capital among the three countries. NAFTA not only necessitates an agreement between these countries, but also provides the United States with an opportunity to set policy on the recognition and enforcement of judgments from foreign country. Such an agreement would be a large step in making law in this area more consistent and uniform. Also, making a foreign judgment agreement would make sound economic sense. Countries that decide to lower the economic barriers between one another must also work to harmonize political barriers between their countries. Otherwise, the benefit of lowering of economic barriers is limited.

This Note attempts to look at the recognition and enforcement of foreign judgments in the United States in light of NAFTA, which went into effect January 1, 1994.[4] It will first trace the evolution of the doctrine of comity in this country and examine the major attempts at

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1. *See* Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 255 (1991) (declaring that "dispute resolution in national courts requires that litigants consider not only the likelihood of a favorable judgment but also the ability to collect on that judgment").

2. *Id.* at 255 (stating that "there is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgments rendered by the courts of another nation").

3. *Id.* at 262 (determining that "federal courts have consistently held that state law governs judgment recognition and enforcement in diversity cases").

4. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 [hereinafter NAFTA].

uniformity. North Dakota comity policy will also be analyzed. Canada's and Mexico's policies for the enforcement of foreign country judgments will be discussed separately. Then, two problem areas, antitrust regulation and libel litigation, will be examined in order to introduce some of the inherent issues with judgment enforcement in a free trade area. The judgment enforcement policy of the European Union will be looked at by way of analogy because it is a free trade area further along the path to integration than the NAFTA countries. Finally, conclusions will be drawn as to what action the United States should take with regard to foreign judgments.

II. UNITED STATES DEVELOPMENT OF COMITY

The most often quoted definition of international comity[5] is from the foundational United States Supreme Court case, *Hilton v. Guyot*.[6] It defines comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws."[7] Though some commentators purport that the subject of comity is undefinable,[8] the difficulty lies not with the doctrine's definition, but in the mechanics of its application. Comity can be reasonably defined as the recognition one country gives to the judgments of another country. Nevertheless, the situations comity implicates and how it will be applied in these instances are a different matter.

A. *HILTON V. GUYOT*

The seminal case in American jurisprudence on comity and the enforcement of foreign judgments is *Hilton v. Guyot*.[9] Although *Hilton* no longer has binding power on the states due to the Erie Doctrine,[10] the decision remains a frequently used authority.[11] The case involved a suit

5. *See* BLACK'S LAW DICTIONARY 267 (6th ed. 1990) (defining "Comity of nations" as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws").

6. 159 U.S. 113, 202-03 (1895) (holding that comity induces the United States not to retry legitimate foreign judgments).

7. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

8. *See, e.g.*, Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 3 (1991).

9. 159 U.S. 113 (1895).

10. Erie Railroad v. Tompkins, 304 U.S. 64, 78 (1938) (determining that there is no federal common law).

11. *See* William C. Honey & Marc Hall, *Bases for Recognition of Foreign Nation Money Judgments in the U.S. and Need for Federal Intervention*, 16 SUFFOLK TRANSNAT'L L. REV. 405, 407 (1993) (stating that *Hilton* is "quoted widely in judicial opinions"); *see also* Matthew H. Adler, *If We Build it, Will They Come?—The Need for a Multilateral Convention on the Recognition and*

brought by a French liquidator of the firm of Charles Fortin & Company to enforce a French judgment against Henry Hilton and William Libbey, American citizens who had done business in France under the name A.T. Stewart & Company.[12] The United States federal district court directed a verdict in favor of the French plaintiff.[13]

The defendants appealed, claiming a number of defenses,[14] including a reciprocity defense, which means that this country should not enforce a foreign country's judgment unless that country is willing to accept judgments rendered in the United States.[15] As such, the defendants argued that the French judgment should not be enforced without an examination of the merits of the action because under French law foreign country judgments were retried on the merits.[16] On appeal, the United States Supreme Court determined that evidence of France's lack of reciprocity should have been admitted by the trial court.[17] Therefore, the Court reversed and remanded the case to the circuit court, with directions to set aside the verdict and to order a new trial.[18]

Justice Gray, writing for the majority, after discussing a host of authorities, concluded that comity should not allow one country to retry the decisions of another country.[19] Specifically, the Court stated:

> We are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason by the comity of this nation should not allow it full effect, the merits of the case should not, in an

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Enforcement of Civil Monetary Judgments, 26 LAW & POL'Y INT'L BUS. 79, 84 (1994) (asserting that most jurisdictions in the United States have adopted the *Hilton* requirements).

12. *See Hilton*, 159 U.S. at 114. Hilton and Libbey carried on a general business in New York and Paris. *Id.* They maintained a regular store and place of business in Paris. *Id.* Charles Fortin & Co. manufactured and sold gloves in Paris. *Id.* The two firms dealt with each other in this business and the instant controversy arose due to these dealings between the two parties. *Id.*

13. *Id.* at 122.

14. The defendants claimed there were "gross frauds" in the accounts of the plaintiff. *Id.* at 117. They further asserted that "there was not a full and fair trial of the controversies," and that the French courts were deceived by false statements made by Fortin & Company *Id.* at 117-18. The defendants also alleged that the French judgment was "contrary to natural justice and public policy that the said judgment should not be enforced against a citizen of the United States." *Id.* at 118.

15. *Id.*

16. *Id.*

17. *Id.* at 211.

18. *Id.* at 229.

19. *Id.* at 203-04

> action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or fact.[20]

It is these words from *Hilton* that give us much of our modern analysis of comity.[21] Several factors to be taken into account in determining whether to enforce a foreign judgment emanate from this passage. They include: 1) finality and conclusiveness of the decision; 2) due process considerations; 3) subject matter jurisdiction; 4) personal jurisdiction; 5) proper notice; and 6) fraud. According to *Hilton*, if these basic requirements of justice are met, it is unnecessary to retry a judgment from a foreign country.[22] The foreign judgment then is at least prima facie evidence of the truth of the matter.[23]

The foreign judgment can further be considered conclusive if the reciprocity requirement is satisfied.[24] Since France, if put in a similar situation, would not recognize an American judgment, (or that of any other country), the Court reasoned that comity did not require enforcement of a French judgment.[25] The Court, upon examination of the policy of nations in both Europe and South America, stated, "there is hardly a civilized nation on either continent which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money."[26] Further, the Court concluded that "the rule of reciprocity has worked itself firmly into the structure of international jurisprudence."[27] The Court rationalized that the doctrine had nothing to do with individual "retaliation," but was based "upon the broad ground that international law is founded upon mutuality and reciprocity."[28]

The long-term effect of *Hilton* has been important, although limited.[29] The Restatement (Third) of Foreign Relations Law and the Uniform Foreign Money-Judgments Recognition Act echo many of the

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20. *Id.*

21. *See* Brand, *supra* note 1, at 261 (concluding that "judicial decisions, statutes and Restatements have continued to be built upon the other requirements extracted from the comity analysis in *Hilton*").

22. *Hilton*, 159 U.S. at 202-03.

23. *Id.* at 227 (determining that judgments rendered in a foreign country are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiffs' claim).

24. *Id.* at 228 (holding that the French judgment is not conclusive because reciprocity is lacking).

25. *Id.* Under French law, foreign-country judgments are examined anew, "unless a treaty to the contrary effect exists between the said Republic of France and the country in which such judgment is obtained." *Id.* at 119.

26. *Id.* at 227.

27. *Id.*

28. *Id.* at 228.

29. Brand, *supra* note 1, at 261 (concluding that the reciprocity analysis of *Hilton* "has been either rejected or ignored by most subsequent courts").

provisions found in *Hilton*.[30] However, the reciprocity doctrine, which was so vital to the result in *Hilton*, has achieved far less support.[31] Possibly the biggest piece taken out of *Hilton* was by a landmark decision in 1938.

Erie Railroad v. Tompkins[32] made *Hilton* merely a persuasive authority for the states.[33] At its core, the *Erie* Court held that there is no federal common law.[34] Prior to this case, federal courts in matters of diversity jurisdiction, often applied "general law" independent of the state's authority.[35] However, this practice was held unconstitutional because it "invaded rights which . . . are reserved by the Constitution to the several states."[36] Thus, because there is no federal authority in terms of the enforcement of foreign judgments, the appearance to a foreign court is that application in this country is completely inconsistent. In practice, this country has fifty-one separate, yet similar rules on the enforcement of foreign judgments.[37]

B. ATTEMPTS AT UNIFORMITY

Since the eradication of any federal common law, other attempts at making uniform comity laws have emerged. The two primary attempts at uniformity are the Uniform Foreign Money-Judgments Recognition Act (Recognition Act),[38] and the Restatement (Third) of Foreign Relations Law (Restatement).[39] The Recognition Act has been adopted by twenty-five states since its appearance in 1962.[40] It generally follows

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30. *See id.*

31. *See, e.g.*, Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d at 435, 440 n.8 (1972) (stating that the reciprocity doctrine "has received no more than desultory acknowledgment").

32. 304 U.S. 64 (1938). Tompkins, a citizen of Pennsylvania, was alleged to have been struck, while walking along a footpath, by something "projecting from one of the moving cars," of Erie Railroad's train. Erie Railroad v. Tompkins, 304 U.S. 64, 69 (1938). Erie contended that Pennsylvania law should govern the action and under Pennsylvania law, Tompkins would be considered a trespasser. *Id.* at 70. The Circuit Court of Appeals held that the issue was not one of local, but "general law," and as such, the court could exercise its independent judgment as to what the law is. *Id.*

33. *See* Brand, *supra* note 1, at 262 (concluding "federal courts have consistently held that state law governs judgment recognition and enforcement in diversity cases"). *But see* John D. Brummett, Jr., *The Preclusive Effect of Foreign Country Judgments in the United States and Federal Choice of Law: The Role of the Erie Doctrine Reassessed*, 33 N.Y.L. SCH. L. REV. 83, 109 (1988) (arguing that the *Erie* Doctrine has been misapplied to the enforcement of foreign judgments.)

34. *Erie*, 304 U.S. at 78.

35. *Id.* at 71.

36. *Id.* at 80.

37. *See* Brand, *supra* note 1, at 329 (listing the individual statutes used by all the states and the District of Columbia for the enforcement of foreign judgments).

38. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, §§ 1-9, 13 U.L.A. 261 (1997) [hereinafter RECOGNITION ACT].

39. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 481-82 (1986) [hereinafter RESTATEMENT OF FOREIGN RELATIONS].

40. The states that have adopted the Recognition Act are Alaska, California, Colorado, Con

the Doctrine of Comity delineated in *Hilton*, except that there is no reciprocity requirement. The Recognition Act applies to any foreign money judgment[41] that is final and conclusive and enforceable where rendered, even though an appeal is pending or it is subject to appeal.[42] It has three mandatory grounds for non-recognition:

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 personal jurisdiction over the subject matter.[43]

The Recognition Act also has six discretionary bases for non-enforcement.

1. The defendant in the proceedings in the foreign court 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) (claim for relief) on which the judgment is based is repugnant to the public policy of this state;
4. the judgment conflicts with another final and conclusive judgment;
5. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
6. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the actions.[44]

The procedural enforcement under the Recognition Act is to be in the same manner as sister-state judgments under the Full Faith and Credit

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necticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and Washington. RECOGNITION ACT, *supra* note 38, § 4 cmt. The District of Columbia and the Virgin Islands have also adopted the Act.

41. RECOGNITION ACT, *supra* note 38, § 1. "Foreign state" is defined under the Recognition Act 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."

42. *Id.* § 2.

43. *Id.* § 4.

44. *Id.*

Clause of the United States Constitution.[45] The Recognition Act's fundamental goal is to provide consistency, which is woefully lacking, to the treatment of foreign country judgments.[46] The goal has not been fully realized. Only twenty-five states have codified the basic language and six of those have added a reciprocity requirement.[47]

The Restatement (Third) of Foreign Relations Law is similar to the Recognition Act, in its codification of *Hilton*, minus the reciprocity requirement. There are a few minor differences between the Recognition Act and the Restatement. First, unlike the Recognition Act, the Restatement is not limited to only money judgments.[48] It includes judgments "denying recovery of a sum of money, establishing or confirming the status of a person or determining interests in property."[49] Further, the Restatement has only two mandatory reasons for non-recognition, as it makes subject matter jurisdiction a discretionary ground.[50] The mandatory grounds for non-recognition are lack of personal jurisdiction and due process of law.[51] These two provisions read almost exactly like the Recognition Act's provisions.[52]

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45. *Id.* § 3. The Act governing sister-state judgments is the Uniform Enforcement of Foreign Judgments Act of 1948. *See* Alan J. Sorkowitz, *Enforcing Under the Uniform Foreign Money-Judgments Recognition Act*, 37 No. 5 Prac. Law. 57 (1991) (analyzing the enforcement of judgments under the Uniform Foreign Money Judgments Recognition Act).

46. *See* Honey & Hall, *supra* note 11, at 408-09; *see also* Sorkowitz, *supra* note 45, at 61 (asserting that "the goal was to increase the likelihood that foreign countries will recognize the judgments of our own American courts").

47. RECOGNITION ACT, *supra* note 38, § 4 cmt. The states that have adopted a reciprocity requirement are Florida, Georgia, Massachusetts, Idaho, Ohio, and Texas. *Id.*

48. *Id.* § 1. The Recognition Act restricts its language to "foreign judgments" which are defined as "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." *Id.*

49. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, at § 481(1) (reading in full "Except as provided in § 482, a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States").

50. This provision reads, "A court in the United States need not recognize a judgment of the foreign state if the court that rendered the judgment did not have jurisdiction of the subject matter of the action." RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482(2)(a).

51. The provision in full reads, "A court in the United States may not recognize a judgment of the court of a foreign state if the judgment was rendered under a judicial system that does not provide impartial tribunals or procedure compatible with due process of law; or the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482(1)(a)-(b).

52. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482(2)(a)-(b).

The Restatement has six discretionary bases for non-enforcement.[53] They are lack of subject matter jurisdiction, notice, fraud, repugnance to public policy, *res judicata,* and contrary to prior agreement.[54] Aside from subject matter jurisdiction being made discretionary in the Restatement, the only difference between the Restatement and the Recognition Act, is that the latter has a discretionary *forum non conveniens* defense.

The following is an analysis of the major and minor defenses to the recognition of foreign judgments. The ten defenses analyzed here provide nearly an exhaustive list of the reasons for non-enforcement in the United States.[55] Although many jurisdictions do not use all ten, most, in some way, recognize the majority of the defenses that follow.[56] These defenses will be analyzed in order to gain a thorough understanding of comity law in the United States and the policies that underlie it.

1. Finality and Conclusiveness of Decision

Whether an action has sufficiently concluded[57] or ended is a consideration to look into in enforcing a foreign judgment. Courts will generally enforce judgments under the Doctrine of Comity as long as there has been a decision on the merits of the case.[58] A decision that may be appealed or even modified later can still be considered final.[59] However,

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53. *Id.* §. 482(2)(a)-(f). The discretionary section reads:

> (2) A court in the United States need not recognize a judgment of the court of a foreign state if: (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action; (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend; (c) the judgment was obtained by fraud; (d) the cause of action on which the judgment was based or the judgment itself is repugnant to the public policy of the United States or of the State where recognition is sought; (e) the judgment conflicts with another final judgment that is entitled to recognition; or (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

54. *Id.* § 482(2)(a)-(f).

55. Brand, *supra* note 1, at 268 (holding that the ten factors are those "most often considered by courts, using the criteria set forth in both the Recognition Act and the Restatement for guidance").

56. *Id.* at 268.

57. BLACK'S LAW DICTIONARY, *supra* note 5, at 290 (defining conclusive as "[s]hutting up a matter; shutting out all further evidence; not admitting of explanation or contradiction; putting an end to inquiry; final; irrefutable; decisive. Beyond question or beyond dispute; manifest; plain; clear; obvious; visible; apparent; indubitable; palpable").

58. Section 481 states, in relevant part, "A final judgment is one that is not subject to additional proceedings in the rendering court other than execution." RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 481 cmt. e (1986). *See Island* Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d. Cir. 1973) (ruling that action was final even though judgment was left open for a further arbitration demand and possibly to obtain further damage); Desjardins Ducharme v. Hunnewell, 585 N.E.2d 321, 324-25 (Mass. 1992) (holding that judgment was conclusive even though main litigation was ongoing); *see also* Mayekawa Mfg. Co., Ltd. v. Sasaki, 888 P.2d 183, 187-88 (Wash Ct. App. 1995) (determining that the Japanese judgment was not final and conclusive because an objection was filed and under Japanese law, when a timely objection is made, litigation on the merits is still proceeding).

59. *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 481 cmt. e (stating "that a judgment is subject to appeal or to modification in light of changed circumstances does not deprive it of its

a court may decide to stay enforcement until an appeal or modification is complete.[60]

Mayekawa Manufacturing v. Sasaki,[61] illustrates how another country's procedures can make the issue of finality difficult to determine.[62] In this case, a Japanese judgment was found to be non-conclusive.[63] Mayekawa Manufacturing had obtained a Japanese judgment against Satoshi Sasaki.[64] The judgment was preliminarily enforceable in Japan, but the procedures of the judgment were unusual.[65] The initial "special procedure" was one that limited live testimony, prohibited witness statements, and counterclaims.[66] However, if a party is not satisfied with the result of this "special procedure," the party may object, as Sasaki did in this case.[67]

After an objection, the case then shifts to a "regular procedure" where a trial is conducted on the merits of the case without the constraints of the "special procedure."[68] Although the "special procedure" had been objected to in this case, the "regular procedure" had not yet taken place.[69] The court relied on the plain language of a Japanese statute that stated a judgment which is objected to is not final and conclusive.[70] Consequently, the court refused to enforce the Japanese judgment.[71]

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character as a final judgment").

60. *Id.* § 481 cmt. e.

61. 888 P.2d 183 (Wash. Ct. App. 1995).

62. Mayekawa Mfg. Co., Ltd. *v. Sasaki*, 888 P.2d 183, 189 (Wash. Ct. App. 1995).

63. *Id.*

64. *Id.* at 184.

65. *Id.* at 187.

66. *Id.* at 185. The court quoted Hideyuki Sakai, attorney for Sasaki, who explained the "special Japanese proceeding."

> In this special procedure, judgment is rendered upon submission by the Plaintiff of copies of the notes or checks. The introduction of live testimony is not allowed except for the sole limited purpose of establishing the authenticity of the documents or to prove presentation of a note, draft, or check. Live testimony concerning a fact other than the two above mentioned matters is completely prohibited. The affirmative defense is allowed, but only if it may be established under the rigid restrictions on the introduction of evidence employed in the special procedure. Counterclaims are not allowed. Additionally, the civil procedure law do [sic] not allow for witness statements in the special procedure. No prior notice of documents to be presented at the hearing is required to be given to the adverse party. The documents may be simply presented to the court for examination of the time of the hearing.

Id.

67. *Id.* According to the court's quotation of Sakai, "the objection is not an appeal because a judgment rendered on the special procedure is neither final nor conclusive if an objection is filed." *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 187.

71. *Id.* at 189. The court concluded "that the enforcement of [the] judgment in the United States might well lead to inconsistent interpretations and enforcement of foreign law." *Id.*

2. *Due Process*

The phrase "due process of law" stems from constitutional guarantees found in the Fifth and Fourteenth amendments, which state that citizens may not be deprived of "life, liberty, or property, without due process of law."[72] The amorphous concept of due process can basically be defined as, "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights."[73] As a requirement for judgment enforcement, it was originally expressed in *Hilton*.[74]

To pass due process muster, an American court must be adequately convinced of the fairness of the judicial system that made the decision.[75] Generally, differences between the foreign country's methods and our own are not enough to deny recognition, unless something more is shown.[76] Two areas frequently litigated under the umbrella of due process are jurisdiction[77] and notice of process,[78] even though each can be challenged under individual grounds as well. Jurisdictional requirements are generally tested by *International Shoe v. Washington*[79] and its progeny.[80]

A case that illustrates how a judicial system with different methods can be found not to violate due process is *Ingersoll Milling Machine Co.*

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72. U.S. CONST. amend. V (guaranteeing that "no person shall . . . be deprived life liberty or property, without due process of law"); U.S. Const. amend. XIV, § 1 (guaranteeing that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property without due process of law").

73. BLACK'S LAW DICTIONARY, *supra* note 5, at 500 (defining "due process of law").

74. *See* Hilton v. Guyot, 159 U.S. 114, 205-06 (1985) (declaring that if a decision, "rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to a course of civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged") (emphasis added).

75. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482 cmt. b (declaring that "[a] court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which it was rendered").

76. *See* Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 686 (7th Cir. 1987) (concluding that under due process "the similarity or dissimilarity of the Belgian procedures is not the issue"); *see also* Sorkowitz, *supra* note 45, at 62 (asserting that "not every difference between a foreign system and our own is sufficient to warrant a finding that the foreign system does not afford due process").

77. *See, e.g.*, Southern v. Southern, 258 S.E.2d 422, 425 (N.C. Ct. App. 1979) (holding that due to lack of minimum contacts an English court lacked *in personam* jurisdiction over the defendant); *see also* Brand, *supra* note 1, at 270 (stating that "the element of due process has arisen principally in the context of personal jurisdiction").

78. *See* Condre v. Silberstein, 744 F. Supp. 429 (E.D.N.Y. 1990) (ruling that the defendant did not receive notice); *see also* Vrozos v. Sarantopoulos, 552 N.E.2d 1093 (Ill. 1990).

79. 326 U.S. 310 (1945); *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); World-Wide Volkswagen Corp. v. Woodson, 44 U.S. 286 (1980).

80. Brand, *supra* note 1, at 270.

v. Granger.[81] Granger won a money judgment from a Belgian court.[82] He sought enforcement of the judgment in an Illinois federal court.[83] Ingersoll challenged the due process safeguards of the Belgian system.[84] Ingersoll was not allowed to cross-examine witnesses because Granger did not present himself in front of the court.[85] Ingersoll was also unable to present live testimony except by letters rogatory.[86]

The Seventh Circuit Court of Appeals, in determining whether due process requirements are met, stated "the similarity or dissimilarity of the Belgian procedures to our own is not the issue; the issue is only the basic fairness of the foreign procedures."[87] "Ingersoll never petitioned the Belgian court to hear live testimony outside of Belgium."[88] Further, Ingersoll also called no witnesses, so he is partly responsible for the omission of cross-examination in the proceeding.[89] For these reasons, the court, agreeing with the lower court, found that the procedures of the "Belgian judicial system were fundamentally fair and did not produce an injustice."[90] Although Belgium had different procedures than American courts, comity allows the United States to look beyond differences to questions of fundamental fairness.

3. *Personal Jurisdiction*

Personal jurisdiction or in personam jurisdiction is the "power which a court has over the defendant's person and which is required before a court can enter a personal or in personam judgment."[91] Personal Jurisdiction is the element most often found deficient in foreign

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81. 833 F.2d 680 (7th. Cir. 1987).

82. Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 683 (7th Cir. 1987). Ingersoll and a Belgian company also prevailed on counterclaims. *Id.* However, Granger's award against Ingersoll was for 3,860,081 BF (Belgian francs) and the counterclaims in favor of Ingersoll and the Belgian Company were for 317,218 BF and 428,233 BF respectively. *Id.*

83. *Id.* By this time Ingersoll had already brought suit in an Illinois Court (Winnebago County) against Granger. *Id.* at 682. Granger first sought to get the suit dismissed, but the district court instead "stayed proceedings pending the outcome of the Belgian appellate process." *Id.* at 683. After the decision was affirmed by a Labour Court of Appeal in Belgium, "Granger filed a counterclaim in the Illinois suit seeking enforcement of the Belgian judgment." *Id.*

84. *Id.* at 686.

85. *Id.* at 687. "The Belgian Labor Court does not allow cross-examination of a party or a party's witnesses if that party does not put himself or his witnesses before the tribunal to testify." *Id.*

86. *Id.* "Letters rogatory" is defined as "a request by one court of another court in an independent jurisdiction, that a witness be examined upon interrogatories sent with the request. The medium whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country." *See* BLACK'S LAW DICTIONARY, *supra* note 5, at 905 (defining "Letters rogatory").

87. *Granger*, 833 F.2d at 688.

88. *Id.* at 687.

89. *Id.*

90. *Id.* at 688.

91. BLACK'S LAW DICTIONARY, *supra* note 5, at 854 (defining "Jurisdiction *in personam*").

judgment recognition actions.[92] The Recognition Act lists six acceptable jurisdictional bases, which are widely accepted:[93]

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 in threatened with seizure in the proceeding or of contesting the jurisdiction of the court over him;
3. the defendant prior to commencement of the proceeding had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
4. the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
5. the defendant had a business office in the foreign state and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of such operation.[94]

The Recognition Act also has a catchall jurisdictional basis, which provides that courts "may recognize other bases of jurisdiction."[95] Whatever a state does, the due process rules already discussed are the foundational requirements for what will be acceptable grounds of personal jurisdiction. States may accept only due process requirements or demand more.[96] Also, a court may recognize a judgment based on foreign jurisdictional requirements not recognizable in the United States if there is another basis accepted as legitimate in the United States that would have supported the action.[97]

One case in which a foreign country money judgment was found to be lacking in personal jurisdiction is *Koster v. Automark Industries, Inc.*[98] Hendrik Koster received a default judgment against Automark in

92. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482 cmt. c.

93. Sorkowitz, *supra* note 45, at 64 (stating these bases of jurisdiction "are recognized almost universally and are reasonably easy to apply").

94. RECOGNITION ACT, *supra* note 38, § 5(a).

95. *Id.* § 5(b).

96. *See* Siedler v. Jacobson, 383 N.Y.S.2d 833 (1976). The jurisdictional requirements would have satisfied New York's long-arm statute, but the court still refused enforcement because it held that the state foreign judgment statute was not as liberal as its own "transaction of business" test. *Id.*

97. *See* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482 cmt. c (explaining that "if the judgment of the foreign court is founded on a basis of jurisdiction not meeting the standards of § 421 . . . but another basis of jurisdiction would have supported the action . . . a court in the United States may recognize and enforce the judgment").

98. 640 F.2d 77 (7th Cir. 1981).

a district court in Amsterdam, Netherlands.[99] Enforcement was sought in the United States.[100] The Seventh Circuit Court of Appeals determined that whether a court may "assert jurisdiction over a foreign defendant depends upon whether the company 'purposefully avails itself of the privilege of conducting activities within the forum State.'"[101] Automark's contacts with the Netherlands included eight letters, a telegram, and a transatlantic telephone call.[102] These contacts were in pursuit of a contract between the two parties that led up to a meeting in Milan, Italy.[103] The court determined that these contacts did not satisfy the due process requirements of jurisdiction because, "such a result would make virtually every business subject to suit in any state with which it happened to communicate in some manner."[104] This result and others may show a willingness on the part of American courts to scrutinize the personal jurisdiction of foreign courts more closely than sister-state judgments since burdens on the defendant are greater.[105]

4. *Subject Matter Jurisdiction*

Subject matter jurisdiction refers to the "power of a particular court to hear the type of case that is then before it."[106] Subject matter jurisdiction rarely is found to deny recognition of a foreign judgment.[107] Under the Recognition Act, it is a mandatory basis for non-recognition, while under the Restatement of Foreign Relations, it is a discretionary ground for non-recognition.[108] Under the Restatement, non-recognition is discretionary because a foreign court is generally presumed to have legitimate subject matter jurisdiction.[109] Under either

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99. Koster v. Automark Indus., Inc., 640 F.2d 77, 78 (7th Cir. 1981). The case was brought based on an alleged breach of contract. *Id.*

100. *Id.*

101. *Id.* (citing Shaffer v. Heitner, 433 U.S. 186, 216 (1977)). The court further said that "this means that the company must pass a threshold of minimum contacts with the forum state so that it is fair to subject it to the jurisdiction of that state's courts." *Id.* (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); International Shoe v. Washington, 326 U.S. 310 (1945).

102. *Id.* at 79.

103. *Id.* at 78. Koster and Automark negotiated for approximately five months before contracting in Milan. *Id.*

104. *Id.* at 79.

105. *See* Royal Bank of Canada v. Trentham Corp., 491 F. Supp. 404, 407 (D. Tex. 1980) (concluding that "a foreign country's assertion of personal jurisdiction over a nonresident defendant still may be subjected to closer examination than that of our sister states, if only because the burdens on the defendant may be far greater there because of possibly greater distances and languages differences").

106. BLACK'S LAW DICTIONARY, *supra* note 5, at 854 (defining "jurisdiction of the subject matter").

107. Brand, *supra* note 1, at *273.*

108. RECOGNITION ACT, supra note 38, § 4(a)(3); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482(2)(a).

109. *Id.* § 482 cmt. d. "An inquiry into possible lack of competence is initiated only on the basis

the Restatement or Recognition Act, a technical jurisdictional mistake by a foreign court in its allocation of work will generally not be grounds for non-recognition.[110]

5. *Extrinsic Fraud*

It stands to reason that a fraudulent judgment by a foreign court should not be recognized in the United States. However, one must distinguish between extrinsic fraud and intrinsic fraud, the former generally being the only acceptable basis to non-recognition.[111] Extrinsic fraud is fraud on the court, that is a "fraudulent action by the prevailing party that deprived the losing party of adequate opportunity to present its case to the court."[112] Slightly different is intrinsic fraud, such as perjured testimony or falsified documents,[113] which were litigated or could have been litigated in the rendering court.[114] The logic is that if it was or could have been litigated in the rendering court, it should not be retried in a United States court. However, if the fraud was such that it could not have been litigated in the rendering court, then it is grounds for non-recognition.

A case that demonstrates the difficulty of proving extrinsic fraud is *Norkan Lodge Company Ltd. v. Gillum*.[115] Norkan Lodge Company

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of a credible challenge by the judgment debtor or by another person resisting recognition or enforcement." § 482 cmt. a. Subject matter jurisdiction is not presumed if the order of the foreign court affects rights in land in the United States or rights in a United States patent, trademark, or copyright. § 482 cmt. d.

110. *Id.* § 482 cmt. d (stating that, "whether a particular court in a foreign state was the right one to adjudicate a dispute—for instance, whether the dispute was civil or commercial in nature or whether it should have been heard in a different city—is in general not subject to challenge before the court asked to recognize the judgment, especially if the issue was or could have been contested in the rendering court"). *See* Sorkowitz, *supra* note 45, at 62 (stating that "a lack of competence in the foreign court that was unnoticed by both parties and the court itself may, in some cases, be irrelevant to the merits and insufficient to warrant non-recognition, especially when it resulted from some technicality of the foreign country's laws relating to the division of work among various courts").

111. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482 cmt. e.

112. *Id.* § 482 cmt. e. BLACK'S LAW DICTIONARY defines "fraud on court" as "a scheme to interfere with judicial machinery performing task of impartial adjudication, as by preventing opposing party from fairly presenting his case or defense. Finding of fraud on the court is justified only by most egregious misconduct directed to the court itself such as bribery of a judge or jury to fabrication of evidence by counsel and must be supported by clear, unequivocal and convincing evidence . . . . It consists of conduct so egregious that it undermines the integrity of the judicial process." BLACK'S LAW DICTIONARY, *supra* note 5, at 661.

113. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482 cmt. e.

114. Bank of Nova Scotia v. Tschabold Equipment Ltd., 754 P.2d 1290, 1294-95 (Wash. 1988) (indicating that "fraud involving the merits of a case or issues that were, or could have been litigated, is not a basis under the Foreign Money-Judgments Act for denying a recognition of foreign judgments"); *see* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482 cmt. e. Section 482 comment e says that the definition of fraud normally used is that of the state determining recognition. "If the judgment could be set aside in the rendering state, the court in the United States where enforcement is sought should stay the action for enforcement in order to give the judgment debtor a reasonable opportunity to petition the rendering court to set the judgment aside . . . . " RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482 cmt. e.

115. 587 F. Supp. 1457 (N.D. Tex. 1984).

Limited (Norkan) obtained a Canadian money judgment against Randy Gillum.[116] Norkan then filed an action in Texas to have the judgment enforced.[117] One of Gillum's contentions was that the foreign country judgment was obtained by fraud.[118] Gillum asserted three areas of fraud by the Canadian court. First, he argued that "fraud occurred when Norkan's counsel presented portions of Gillum's deposition to the Canadian court without reading into the record certain other portions of Gillum's deposition."[119] Second, Gillum contended that one witness's deposition testimony and trial testimony were inconsistent, thus resulting in fraud.[120] Thirdly, Gillum stated that the trial court's acceptance of another witnesses testimony instead of Gillum's testimony also was fraudulent.[121] The court said that in order for a case to constitute fraud:

> it must appear the fraud practised, unmixed with any fault or negligence of the party complaining, prevented him from making a full and fair defense, and that the fraud complained of was not involved in, or presented to, the court of first instance either at the original trial or in a petition for review.[122]

Consequently, the court found the issues Gillum raised to be "credibility questions and simple facts issues" rather than fraud.[123] As to the inconsistencies Gillum raised, the court determined that the Canadian court had all the evidence before it when reaching the conclusions it did.[124] Further, the court also took into account that Gillum failed to appear for the trial and contest Norkan's version of the facts.[125] *Gillum* demonstrates that extrinsic fraud is a difficult defense to assert unless there is something fraudulent that could not have been asserted in the foreign court.

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116. Norkan Lodge Co. Ltd. v. Gillum, 587 F. Supp. 1457, 1458 (N.D. Tex. 1984).
117. *Id.* at 1458-59.
118. *Id.* at 1460.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1461. The court further said that "false testimony or fabricated documents are not sufficient to justify the interference of a court of equity, if they have been presented to the court determining the law and fact in the first instance." *Id.*
123. *Id.* at 1460.
124. *Id.* at 1460-61.
125. *Id.* at 1461.

6. *Notice*

The Recognition Act and Restatement read almost identically in stating that a judgment in which the defendant "did not receive notice of the proceeding in sufficient time to enable him to defend," may be rejected.[126] Although non-recognition under both is discretionary, it is unlikely that a United States court would recognize a foreign judgment if there had been true lack of notice.[127] The lack of notice issue arises solely in default judgments because if the defendant appeared, it logically follows that notice was adequate.[128] Courts may construe proper notice to mean that which is in compliance with the foreign country's rules of service.[129] Conversely, courts may simply inquire into whether the defendant had actual notice of the proceeding.[130] Notice received by the defendant in a language she does not understand has been considered proper notice.[131]

A case that examines notice requirements is *Ackermann v. Levine*.[132] In this case, Peter Ackermann sued Ira Levine in Germany.[133] A summons and complaint was routed through the German Consulate in New York and then sent by registered mail from there to Levine's former address in New Jersey.[134] Levine claims that he never received that process.[135] A second summons and complaint were sent by the same method to Levine's Manhattan address and signed for by a building employee.[136] Levine acknowledges receiving this process and having actual knowledge of the suit.[137] Levine chose not to defend the suit and

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126. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482(2)(b); RECOGNITION ACT, *supra* note 38, § 4(b)(1).

127. Jonathan H. Pittman, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 VAND. J. TRANSNAT'L L. 969, 978 (1989) (determining that "despite the discretionary nature" of the notice requirement, "it seems unlikely that any United States court would recognize a foreign judgment when there has been lack of notice").

128. *Id.*

129. Brand, *supra* note 1, at 274 (citing to Tahan v. Hodgson, 662 F.2d 862 (D.C. Cir. 1981)).

130. *Id.* at 274; *see* Pittman, *supra* note 127, at 978 (concluding that "while the rule seems to be that, 'effective service of process' is required for adequate notice, United States courts are primarily concerned with whether the defendant had actual notice and do not generally consider the sufficiency of the foreign states statutory notice provisions").

131. *Tahan*, 662 F.2d at 865. The defendant received personal service in Israel, in the Hebrew language, which the defendant did not understand. *Id.* However, the defendant had done business in Israel for several years and was aware of the legal nature of the papers. *Id.*

132. 788 F.2d 830 (2d Cir. 1986).

133. Ackermann v. Levine, 788 F.2d 830, 837 (2d Cir. 1986). Ackermann sued Levine for attorney's fees he expended while working on behalf of Levine. *Id.* at 836-37.

134. *Id.* at 837.

135. *Id.*

136. *Id.*

137. *Id.* "Levine testified that on at least one occasion before judgment was entered, he consulted . . . [an attorney] about the suit and he decided to ignore it." *Id.*

a default judgment was entered against him.[138] Ackermann sued in the United District Court for the Southern District of New York, seeking enforcement of the German judgment.[139]

The court in *Ackermann* determined that "service of process must satisfy both the statute under which service is effectuated and constitutional Due Process.[140] The statutory authority governing the case, [the court held], was the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Convention)."[141] The court found that mail service was legitimate under the Hague Convention[142] and passed due process muster.[143] The court stated that the lower court erred in holding that service must satisfy state service of process requirements.[144] The court determined that if the Hague Convention is applicable, it should be applied.[145] If the Convention is not applicable, then federal, rather than state law should govern.[146] This case demonstrates that even where service of process is not effectuated according to state law, the notice requirement may still be met.

7. *Contrary to Public Policy*

A judgment that is contrary to public policy means that it is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought."[147] Public policy is similar to the "due process" defense to enforcement in its potentially broad application[148] and overlap into other areas.[149] In order to violate public policy, courts generally limit application to situations where the original claim is repugnant to fundamental notions of what is decent and just in the recognition

138. *Id.* After appeal had lapsed, the judgment became final on February 20, 1981. *Id.*

139. *Id.*

140. *Id.* at 838.

141. *Id.*

142. *Id.* at 839-40. The lower court found that service of process violated the Hague Convention. *Id.* at 834. Nevertheless, on appeal, service was found to comport with Articles 8 and 10 of the convention. *Id.* at 839.

143. *Id.* at 841. The court spoke in conclusory terms about due process. *Id.* (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), which indicates that process by mail comports with due process as long as the service provides "notice reasonably calculated . . . to provide interested parties notice of the pendency of the action").

144. *Id.*

145. *Id.* at 840. The court's rationale was as follows: "To construe the convention otherwise would unduly burden foreign judgment holders with the procedural intricacies of fifty states." *Id.*

146. *Id.*

147. Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981).

148. *See* BLACK'S LAW DICTIONARY, *supra* note 5, at 981 (stating that "theoretically, a defendant could claim a violation of public policy anytime there is a variation between the procedure or result in a foreign court and in a United States Court").

149. Other singular bases for enforcement are sometimes argued under the umbrella of public policy; for instance: Tahan v. Hodgson, 662 F.2d 862 (1981) (Notice); Somportex Ltd. v. Philadelphia Chewing Gum Corp, 453 F.2d 435 (1971) (Personal Jurisdiction).

forum.[150] Some courts have held that a public policy defense cannot be raised if the defendant defaulted on the issue that is the basis for the defense.[151] However, other courts have disagreed, stating that a defendant, having defaulted in a foreign action, may raise a defense of public policy.[152] The fact that a certain claim has been abolished in a particular state does not necessarily mean enforcement of that claim would be contrary to public policy.[153]

A case involving a public policy challenge is *McCord v. Jet Spray International Corp.*[154] George McCord of Belgium sued Jet Spray International of Massachusetts in Belgium.[155] McCord received a money judgment due to Jet Spray's breach of an employment contract.[156] He then sought enforcement of the judgment in Massachusetts.[157] Jet Spray argued that the judgment is repugnant to the public policy of the state and should not be enforced because the employment contract at issue in the case would not be enforceable under Massachusetts law.[158] The court said that the "public policy exception" is a high standard and that the judgment must tend to clearly undermine the "public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property."[159] The court found that the mere difference in the law does not violate public policy because the conflict does not offend the court's sense of justice, nor compromises the public welfare.[160] *McCord v. Jet Spray International Corp.* demonstrates that often something more must be shown than a difference between a foreign country's law and a state's law in order for a foreign judgment to violate public policy.

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150. RECOGNITION ACT, *supra* note 38, § 4 cmt.; *see also* RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, § 482 cmt. f (stating that "courts will not recognize or enforce foreign judgments based on claims perceived to be contrary to fundamental notions of decency and justice") *Id.*

151. Pittman, *supra* note 127, at 985 (citing *Tahan*, 662 F.2d at 867).

152. *See, e.g.*, Ackerman v. Levine, 788 F.2d 830, 842 (2d Cir. 1986) (declaring that "we disagree with dicta . . . suggesting that a defendant may not raise a public policy defense once he has defaulted in the foreign adjudication").

153. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 38, § 482(f).

154. 874 F. Supp. 436 (D. Mass. 1994)

155. McCord v. Jet Spray Int'l Corp., 874 F. Supp. 436, 437 (D. Mass. 1994).

156. *Id.*

157. *Id.* McCord was unable to satisfy the judgment in Belgium. *Id.*

158. *Id.* at 438. Jet Spray claimed that the employment contract lied at the center of the judgment and was in conflict with Massachusetts policy of "at-will" employment contract. *Id.* Further, Jet Spray contended that the contract was designed to defraud the Belgian government. *Id.* at 438-39.

159. *Id.* at 439.

160. *Id.*

8. *Inconsistent Judgments*

Inconsistent judgments refers to those judgments that are "contrary, the one to the other, so that both cannot stand but the acceptance or establishment of the one implies the abrogation or abandonment of the other."[161] This rule applies the principle of *res judicata* to foreign judgments. Under the Restatement, courts are likely to recognize the later in time of the two inconsistent judgments, although they may potentially recognize the earlier judgment or neither judgment.[162] When an otherwise legitimate foreign country judgment is made after a sister-state court judgment, there is no automatic preference for the sister-state judgment.[163]

One case that deals with inconsistent judgments is *Gannon v. Payne*.[164] Fred Gannon and Robert Payne were involved in a joint venture for oil and gas production in Alberta Province.[165] Due to a dispute over the distribution of profits, Payne sued Gannon in Canada.[166] Payne won a judgment against Gannon in that forum.[167] Payne sued Gannon again, this time in Texas.[168] Two years after Payne sued Gannon in Texas, Gannon sued for a declaratory judgment in Canada.[169] Gannon was seeking to obtain a ruling that some of the matters raised in Texas had already been litigated in Canada.[170] "Payne then filed an application for a temporary injunction seeking to prohibit Gannon from prosecuting or taking any action in the Canadian court."[171] The trial court granted the motion.[172]

One of the rationales that the trial court relied on in granting the motion was a concern about inconsistent judgments.[173] On appeal, the Supreme Court of Texas determined that the possibility of inconsistent judgments did not justify an anti-suit injunction regarding a case pending in a different country.[174] The court noted that other courts have upheld the issuance of an anti-suit injunction in similar situations.[175]

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161. BLACK'S LAW DICTIONARY, *supra* note 5, at 766 (defining "inconsistent").
162. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 38, § 482 cmt. g.
163. *Id.*
164. 706 S.W.2d 304 (Tex. 1986).
165. Gannon v. Payne, 706 S.W.2d 304, 305 (Tex. 1986).
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 307.
174. *Id.*
175. *Id.*

However, such a result in this case would render comity useless.[176] Although the *Gannon* court allowed the Canadian proceeding to continue, it concluded that "there should be only one judgment recognized in both forums."[177]

9. *Prior Agreement*

Freedom to contract is an important American policy. Thus, American courts have the discretion to refrain from enforcing judgments contrary to an exclusive choice of forum because it undermines the policy of favoring forum selection clauses.[178] Typically, this defense will only come about in default judgments because when defendants participate in a forum, they are waiving any previous choice of forum and agreeing to the new forum.[179]

A case that demonstrates that this rule likely only applies to adverse parties, not two defendants, is *Bank of Nova Scotia v. Tschabold Equipment Ltd.*[180] While this action was being litigated in Canada, the two defendants, Pacific Western and Tschabold Equipment Limited (Tschabold) entered into an agreement.[181] Tschabold agreed that it "would take care of" the Canadian case.[182] The Bank of Nova Scotia (Nova Scotia) won a default judgment against Pacific Western.[183] Nova Scotia then sought enforcement of the judgment in the state of Washington.[184] On appeal, one of Pacific Western's defenses to enforcement was that the prior agreement between the two defendants should bar enforcement of the action.[185] However, the court concluded that this rule only applies to agreements between adverse parties.[186]

10. *Forum non conveniens*

Forum non conveniens "refers to [the] discretionary power of [a] court to decline jurisdiction when convenience of parties and ends of justice would be better served if [the] action were brought and tried in another forum."[187] This rule allowing non-recognition when a foreign

176. *Id.* The court stated that "if the principle of comity is to have any application, a single parallel proceeding filed in a party's home country cannot justify issuing an anti-suit injunction." *Id.*
177. *Id.*
178. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 39, at § 482 cmt. h.
179. *Id.*
180. 754 P.2d 1290 (Wash. Ct. App. 1988).
181. Bank of Nova Scotia v. Tschabold Equip. Ltd., 754 P.2d 1290, 1293 (Wash. Ct. App. 1988).
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 1296.
186. *Id.*
187. BLACK'S LAW DICTIONARY, *supra* note 5, at 655 (defining "*Forum non conveniens*").

forum is seriously inconvenient is found in the Recognition Act, but not in the Restatement.[188] The Recognition Act's rule is limited to instances where jurisdiction is based only on personal service, and the foreign court was a seriously inconvenient forum for the trial.[189] A United States court will not enforce a judgment only if the court believes the original action should have been dismissed by the foreign country court on grounds of *forum non conveniens*.[190] The foreign court need not have the *Forum Non Conveniens* Doctrine.[191] The United States court simply determines whether the foreign court should have dismissed the case if it did have the Doctrine.[192]

Forum non conveniens was raised as a defense in *Bank of Montreal v. Kough*.[193] A default judgment was entered against Jack Kough and in favor of the Bank of Montreal (Bank) in an action in British Columbia.[194] The Bank then sought enforcement of the action in federal court in California.[195] One of the defenses raised by Kough is that the forum in British Columbia was seriously inconvenient.[196] The court refused to accept the defense because under the Recognition Act, the enforcing court must find that the original action should have dismissed the action on the basis of *forum non conveniens*.[197] The court determined that the British Columbian forum was not seriously inconvenient.[198] A fact that likely played a role in the holding was that the contract upon which the litigation is based was signed in British Columbia.[199] This case demonstrates that because *forum non conveniens* is a discretionary basis of non-enforcement, it may be difficult to receive the desired action (non-enforcement).

D. COMITY IN NORTH DAKOTA

North Dakota comity policy will be analyzed to gain insight into the procedure for enforcing a judgment in this state. Second, it provides an opportunity to see some of the difficulties associated with the enforce-

188. RECOGNITION ACT, *supra* note 38, § 4(b)(6).
189. *Id.* § 4(b)(6).
190. *ID.* § 4 cmt.
191. Brand, *supra* note 1, at 277.
192. *Id.*
193. 430 F. Supp. 1243 (N.D. Cal. 1977).
194. Bank of Montreal v. Kough, 430 F. Supp. 1243, 1245 (N.D. Cal. 1977).
195. *Id.* at 1246.
196. *Id.* at 1250.
197. *Id.* at 1251. The relevant provision of the Recognition Act "authorizes a court to refuse recognition and enforcement of a judgment rendered in a foreign country on the basis only of personal service when it believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens*." RECOGNITION ACT, *supra* note 38, § 4 cmt.
198. *Kough*, 430 F. Supp. at 1251.
199. *Id.*

ment of foreign judgments at the state level. Since North Dakota has no statutory provision for the recognition or enforcement of foreign country judgments,[200] rules of comity have been developed through case law. The primary North Dakota case is *Medical Arts Building Limited v. Eralp*.[201] In *Eralp*, a Winnipeg, Manitoba court granted a judgment in favor of the plaintiff against the defendant, Muammer Suha Eralp for unpaid rent.[202] The Walsh County District Court in North Dakota enforced the Canadian money judgment.[203]

On appeal, the Supreme Court of North Dakota affirmed the enforcement of the Canadian judgment.[204] The *Eralp* court's comity analysis generally followed the *Hilton* analysis.[205] The court quoted from *Hilton* the portion that lists the numerous factors to be taken into account when determining whether to enforce a judgment:

> When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens . . . and the foreign judgment appears to have been rendered by a competent court having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.[206]

The defendant's primary defense to the enforcement of the Canadian money-judgment was that reciprocity, as found in *Hilton*, was a

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200. Medical Arts Bldg. Ltd. v. Eralp, 290 N.W.2d 241, 242 (1980). The North Dakota Supreme Court ruled that North Dakota Century Code § 28-20.1 does not include judgments from foreign countries. *Id.*

201. 290 N.W.2d 241 (1980).

202. Medical Arts Bldg. Ltd. v. Eralp, 290 N.W.2d 241, 246 (1980). Eralp allegedly owed rent for the period from March 1, 1976 to Jan. 1, 1978, totaling $5,317.21 (Canadian dollars). *Id.* He had allegedly moved to Grafton, ND after failing to pay rent in Canada. *Id.*

203. *Id.* The defendant Eralp alleged that the Walsh County District Court lacked subject matter and personal jurisdiction and that any judgment entered by the Canadian court was against the public policy of the United States and of the State of North Dakota. *Id.* Neither party personally appeared nor introduced any evidence except portions of the Canadian record of the case. *Id.* The parties attorneys presented arguments on behalf of their clients. *Id.*

204. *Id.* at 247.

205. *Id.* at 245.

206. *Id.* (quoting Hilton v. Guyot, 159 U.S. 113, 205 (1895)).

prerequisite to enforcing foreign judgments.[207] The court rejected this argument, instead concluding that *Hilton* did not require reciprocity as a prerequisite to enforcement.[208] This conclusion was based on the following provision from *Hilton*:

> The reasonable if not necessary conclusion appears to be that judgments rendered in France, or in any other foreign country by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country but are prima facie evidence only of the justice of the plaintiff's claim.[209]

The *Eralp* court reasoned that, under *Hilton*, a foreign-country money judgment lacking reciprocity only limits the judgment to prima facie evidence of being correct; reciprocity is not a prerequisite to enforcement.[210]

For further support for the idea that reciprocity is not an integral part of comity, nor a prerequisite to enforcement of foreign judgments, the *Eralp* court cited several cases rejecting the reciprocity doctrine.[211] Upon concluding that the foreign judgment is due prima facie evidence of being correct, the court sought to define "prima facie evidence."[212] The court determined that there is "little or no difference between a judgment which is prima facie evidence and has not been overcome by counter evidence and a judgment which is conclusive."[213] Consequently, the court in *Eralp* ruled that the lower court had this in mind when it determined that the "judgment in question was conclusive after observ-

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207. *Id.* at 243.

208. *Id.*

209. *Id.* (quoting *Hilton*, 159 U.S. at 227).

210. *Id.*

211. *See id.* at 243-45 (citing Toronto-Dominion Bank v. Hall, 367 F. Supp 1009 (N.D. Ark. 1973); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d. Cir. 1971); Nicol v. Tanner, 256 N.W.2d 796 (Minn. 1976)).

212. *Eralp*, 290 N.W.2d at 245. The court quoted the definition of prima facie evidence: "the term 'prima facie evidence,' which frequently appears in cases, denotes evidence which, if unexplained or uncontradicted, is sufficient in a jury case to carry the case to the jury and to sustain a verdict in favor of the issue which it supports, but which may be contradicted by other evidence . . . A prima facie evidence rule is nothing more or less than a rule of evidence, and it is not a rule of substantive law; it has reference and applies only to the mode or manner by and through which facts essential to a judgment or conviction might be established." *Id.* (citing 29 AM. JUR. 2D *Evidence* § 4, at 38 (1980)). The court defined prima facie evidence as "that which, either alone or aided by other facts presumed from those established by the evidence, shows the existence of the fact which it is adduced to prove, unless overcome by counter evidence; it is evidence which, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed." *Id.* (citing 32A C.J.S. *Evidence* § 1016, at 624 (1980)). The *Eralp* court quoted a past North Dakota Supreme Court case, *Schnoor v. Meinecke*, 40 N.W.2d 803 (N.D. 1950), which defined prima facie evidence as "sufficient evidence upon which a party would be entitled to recover, providing his opponent produced no further testimony." *Id.* at 246.

213. *Id.* at 246.

ing that no evidence was introduced except the certificate and the Canadian memorandum opinion."[214]

In scrutinizing the *Eralp* court's comity analysis, some problems emerge. The court distorts the reciprocity analysis of *Hilton*. *Eralp* states that *Hilton* neither requires reciprocity as a prerequisite to enforcement, nor does it find reciprocity to be an "integral party of comity."[215] The *Eralp* court is correct in concluding that reciprocity is not a prerequisite to enforcement and in determining that even a judgment lacking reciprocity is entitled to prima facie evidence of being correct.[216] However, under the *Hilton* analysis, reciprocity is an integral party of comity.[217]

The *Hilton* court demonstrated the importance of reciprocity when it said "the rule of reciprocity has worked itself firmly into the structure of international jurisprudence."[218] This statement was made prior to the section the *Eralp* court quoted,[219] which was referring to the mechanics of applying the doctrine of reciprocity.[220] The key words in the sentence are, "by the laws of which our own judgments are reviewable upon the merits."[221] The Court in *Hilton* was referring to the countries whose laws guide them to retry foreign judgments on the merits of the case.[222] Under reciprocity, as to countries that retry United States judgments on the merits, the United States will not be obligated to consider the foreign country judgments as conclusive.[223] Instead, the United States may retry the foreign-country judgments, with the judgments being limited to prima facie evidence of being correct.[224] However, if a country does not retry the judgments of the United States, its judgments may be held conclusive.[225]

The *Eralp* court further obscures the reciprocity doctrine found in *Hilton* when it discusses a number of cases rejecting the reciprocity doctrine. The court describes the cases rejecting reciprocity directly

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214. *Id.*
215. *Id.*
216. Hilton v. Guyot, 159 U.S. 113, 227 (1895) (concluding that "judgments rendered in France, or in any other country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are prima facie evidence only of the justice of the plaintiff's claim").
217. Brand, *supra* note 1, at 261 (stating that "the *Hilton* case was ultimately decided on the issue of reciprocity").
218. *Hilton*, 159 U.S. at 227.
219. *See supra* note 210 and accompanying text.
220. *Hilton*, 159 U.S. at 227.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*

after discussing why, under *Hilton*, reciprocity is not a prerequisite to enforcement.[226] This gives the impression that the cases cited are further parallel evidence that reciprocity is not a prerequisite to enforcement. However, the cases cited in *Eralp* do not support the *Hilton* analysis of reciprocity.[227] They explicitly reject this analysis.[228] These cases do find that reciprocity is not a prerequisite to enforcement.[229]

The *Eralp* case highlights the problems in the United States with the recognition and enforcement of foreign judgments, especially in a state with no case law or statutory provisions in the area. The question is what a state like North Dakota should do. Implementing a foreign-country judgment recognition statute would be a productive idea, since the state has no statutory provision for the enforcement of foreign judgments. There are a couple of advantages to this. First, the courts then have a concrete provision to look at in applying the rules of foreign judgments. Second, for those countries still requiring reciprocity, having a statute on the subject is much easier for many foreign courts to analyze than case law. However, if a case comes up again before such a statute is passed, then an advisable option would be to follow an influential writing like the Restatement. Although the state may wish to modify the given factors, it gives a good starting point to begin the discussion of comity. Also, the fundamental factors to look at enunciated in the Restatement of Foreign Relations and the Recognition Act basically encompass the way the individual states approach comity.

III. CANADIAN ENFORCEMENT OF FOREIGN JUDGMENTS

One might think that the geographic closeness and cultural similarities between the United States and Canada would have led to a consistent history of foreign judgment recognition. However, such is not the case. Although the United States has traditionally implemented a relatively liberal enforcement policy, Canada, until recently has had a strict

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226. *Eralp*, 290 N.W.2d at 243-44.

227. *See, e.g.*, Somportex Limited v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 n.8 (3d Cir. 1971).

> In *Hilton v. Guyot*, . . . the Supreme Court spoke of the likelihood of reciprocity as a condition precedent to the recognition of comity. The doctrine has received no more than desultory acknowledgement . . . . It has been rejected by the courts of New York . . . and by statute in California . . . . We agree with the district court that this issue of the enforceability of foreign judgments has not frequently been litigated in Pennsylvania, and the Court has not been cited to, nor has independent examination revealed any Pennsylvania cases which even intimate that a finding of reciprocity is an essential precondition to their enforcing a foreign judgment.

Id.

228. *Id.*

229. *See, e.g., id.* at 440 (holding that "comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect").

enforcement policy.[230] The two countries are linked by NAFTA and are the largest trading partners in the world.[231] This high-trade volume leads inevitably to increased litigation.[232] In our friendly trade with Canada, it is important that a fair and consistent policy of judgment enforcement is realized. This way, parties in both countries can receive justice and free trade can continue without hindrance.

The best way to achieve fairness and consistency is through a foreign judgment agreement with Canada. Such an agreement would have several advantages. First, it would be fair in the sense that both countries could make an agreement consciously rather than leaving decisions to individual courts, which may give inconsistent verdicts. Second, standards would be the same for both countries, so both sides would be less likely to "cry foul." Third, the standards would be consistent, so judgments could be enforced efficiently. Fourth, individuals and corporations would better understand the standards for judgment enforcement and they could modify their behavior accordingly.

Prior to 1990, Canada adhered to antiquated comity standards based on rules developed in England during the nineteenth and early twentieth century.[233] A pre-1990 court in Canada would not recognize a foreign judgment[234] unless: 1) the defendant was either present in or a resident of the foreign forum at the time the action began; or 2) the defendant voluntarily submitted to the jurisdiction of the foreign court.[235] The presence in the foreign jurisdiction was sufficient as long as the defen-

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230. *See* Ivan F. Ivankovich, *Enforcing U.S. Judgments in Canada: "Things are Looking Up!"*, 15 NW. J. INT'L L. & BUS. 491, 491-93 (1995) (stating that prior to 1990, "Canadian courts utilized a rigid approach developed in nineteenth century England to determine whether a 'foreign' judgment should be given local effect"); *see also* Shirley Sostrequendo, *Recognition and Enforcement of Foreign Judgments in the United States and Canada in the Free Trade Era*, 1992 DET. C.L. REV. 1019, 1020 (1992) (declaring that "until very recently . . . the common law provinces of Canada have disallowed the enforcement of foreign-country judgments within their borders").

231. *See* Ivankovich, *supra* note 230, at 491-92 (asserting that "Canada and the United States are the world's largest trading partners").

232. *See* Sostrequendo, *supra* note 230, at 1032 (indicating that "there is . . . no doubt that litigation follows commerce, no matter how friendly the relations").

233. *Id.* at 1022. According to Sostrequendo, one of the most frequently quoted cases in Canada is *Emanuel v. Symon*, 1 K.B. 302 (C.A. 1908). *Id.* The court in *Emanuel* considered five instances in which a foreign judgment would be enforced:

> (1) Where the defendant is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; and (5) where he has contracted to submit himself to the forum in which the judgment was obtained.

Id.

234. *Id.* at 1020 n.3. In Canada, just as in the United States, the term "foreign judgment" refers to both foreign country and sister-province (state) judgments. *Id.*

235. *Id.* at 1021-22 (citing to Philip J. Loree Jr., *The Recognition and Enforcement of United States Judgments in the Canadian Common-Law Provinces: The Problem of In Personam Jurisdiction*, 15 BROOK J. INT'L L. 317, 318 (1989)).

dant was not induced to enter the jurisdiction by fraud.[236] Corporations met the requirement of presence as long as they were "carrying on business" in the foreign jurisdiction at the time the action was commenced.[237] Voluntary submission to the foreign court's jurisdiction could be found in three situations: 1) if the defendant chose the same forum as the plaintiff; 2) if the defendant voluntarily appeared in the action; and 3) if defendants contracted to submit themselves to the jurisdiction of the foreign court.[238]

In 1991, the Supreme Court of Canada decided *DeSavoye v. Morguard Investments Ltd.*,[239] which radically changed the way "foreign judgments" would be recognized and enforced. The case involved a mortgage defaulted on by the Appellant (mortgagor), who originally lived in Alberta, but moved to British Columbia.[240] Respondents, the mortgagees, brought a foreclosure action in Alberta, in which the Appellant failed to appear.[241] Pursuant to the Alberta court's judgment in favor of Respondent, the mortgaged property was sold and judgments were entered against Appellant.[242] Respondents then brought actions in British Columbia to enforce the deficiency judgments.[243] The issue was whether a valid personal judgment in Alberta could be enforced in British Columbia.[244] The Supreme Court of Canada analyzed the common law rules and found that the judgment could be enforced.[245]

The court found that "the courts in one province should give full faith and credit . . . to the judgments given by a court in another province or a territory so long as that court has properly . . . exercised jurisdiction in the action."[246] The *Morguard* court indicated that if a traditional basis of jurisdiction is used, the judgment should be enforced.[247] However, where such a basis is not available, such as in the *Morguard* case, the court uses a "real and substantial connection"

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236. *Id.* at 1022.

237. *Id.* at 1022-23.

238. *Id.* at 1023.

239. 1990 D.L.R. LEXIS 636, at *2 (Can.) (holding that the appeal by De Savoye of the judgment enforced in favor of Morguard should be dismissed).

240. Morguard Invs. Ltd. v. De Savoye, 1990 D.L.R. LEXIS 636, at *1 (Can.).

241. *Id.*

242. *Id.* at 1-2.

243. *Id.* at 2.

244. *Id.* at 14-15.

245. *Id.* at 52 (determining that the Alberta court had jurisdiction, and its judgment should be recognized and enforceable in British Columbia).

246. *Id.* at 42.

247. *Id.* at 44. The court stated that the question of whether a court exercised its jurisdiction reasonably is affirmed if a "traditionally accepted" basis is used. *Id.* The court referred to two such bases: "in the case of judgments *in personam* where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment." *Id.*

test.[248] There must be a "real and substantial connection" between the litigation and the forum rendering the decision.[249] The court determined there was a "connection" in this case because the properties in question were in Alberta, and the contracts were entered into in Alberta by persons who, at the time, were residents of Alberta.[250]

The rationale for the decision rested on several different factors. The court found that the old rule came about in the 19th century[251] when travel between countries was impractical.[252] It was also based on England's view that foreign country judicial systems were inferior.[253] However, this isolationism, the court found, does not comport with the modern world.[254] It concluded that, "Modern states . . . cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances."[255]

Morguard has liberalized judgment enforcement in Canada, but it has not unified judgment enforcement. Just as the United States has a patchwork standard of judgment enforcement, so does Canada, in that foreign judgment enforcement is governed by provincial law.[256] Generally, since *Morguard,* a United States judgment is more likely to be enforced than before.[257] However, there are important exceptions to *Morguard*'s reach. Two provinces have statutory provisions and are not bound to follow the *Morguard* rule.[258] Also, the rule would generally not be applicable to international judgments sought to be enforced in Quebec.[259]

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248. *Id.* at 45-46.

249. *Id.* at 48-50.

250. *Id.* at 52.

251. *Id.* at 28 (determining that "the common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted by the English courts in the 19th Century").

252. *Id.* at 33. The court stated that, "one can understand the difficulty in which a defendant in England would find himself in defending an action initiated in a far corner of the world in the then state of travel and communications." *Id.* The court concluded that the world has changed a great deal since the common law rules were developed in 19th century England. *Id.* at 34. "Modern means of travel and communications have made many of these 19th century concerns appear parochial." *Id.*

253. *Id.* at 33-34 (declaring that when the old rule was formulated "there was an exaggerated concern about the quality of justice that might be meted out to British residents abroad").

254. *Id.* at 34.

255. *Id.* at 29.

256. Ivankovich, *supra* note 230, at 496-97 (outlining "The Recognition and Enforcement of United States Judgments: Post-Morguard").

257. *Sostrequendo, supra* note 230, at 1026 (stating that "the cases involving U.S. judgments that have followed *Morguard* indicate that . . . Canadian courts are willing to begin enforcing U.S. judgments in Canada").

258. Ivankovich, *supra* note 230, at 492 (declaring that due to "specific statutory provisions in Saskatchewan and New Brunswick, *Morguard's* expansion of the common law grounds for recognition has been held inapplicable in its entirety to all extraprovincial judgments in those two provinces").

259. *Id.* at 492.

Therefore, although the enforcement of foreign country judgments in Canada has been brought out of the 19th century, more needs to be done as we fast approach the 21st century. Canada is now leaning towards the openness that the United States has exemplified in enforcing foreign judgments. Nevertheless, just like the United States, its enforcement policy is often inconsistent. An agreement could confirm this new openness and make enforcement more widespread, consistent, and fair.

IV. MEXICAN ENFORCEMENT POLICIES

Just like Canada, Mexico has been wary of enforcing foreign country judgments. Prior to 1988, Mexico disallowed the enforcement of foreign judgments.[260] However, in 1988, three presidential decrees were amended to regulate conflict-of-law questions inherent in the international arena.[261] Mexico's Federal Code of Civil Procedure (Codigo Federal de Procedimientos Civiles) now deals with the enforcement of foreign judgments.[262] The first requirement is "proper and valid jurisdiction" by the foreign judge.[263] According to Article 564 of the Code of Civil Procedure, "The jurisdiction assumed by the foreign court shall be recognized in Mexico regarding the enforcement of a judgment, when said jurisdiction has been assumed by reasons resulting compatible or analogous with the national law, save in those cases which are of the exclusive jurisdiction of the Mexican courts."[264] Article 565 recognizes jurisdiction of the foreign court if jurisdiction was assumed to avoid a denial of justice.[265] Article 566 recognizes forum selection clauses as long as the chosen court "does not imply a de facto impediment or denial of justice."[266] This is read in conjunction with Article 567, which declares a forum selection not valid when it results in the exclusive benefit of one party to the contract, but not all of the parties.[267]

If proper jurisdiction has been established, the judgment must also not be "contrary to the internal public order."[268] This is similar to the public policy defense in the United States. Then, in order to have "exclusive effect," foreign country judgments must comply with the following conditions:

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260. Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 NW. J. INT'L L. & BUS. 376, 380 (1994).
261. *Id.* at 380.
262. *Id.* at 397.
263. *Id.* at 398.
264. *Id.*
265. *Id.*
266. *Id.*
267. *See Id.* (declaring that Article 566 "should be read in conjunction with Article 567").
268. *Id.* at 400.

> 1) That the formalities provided for in this code regarding letters rogatory from abroad, have been satisfied; 2) that they have not been rendered as a consequence of the exercise of a realty action; 3) that the judge or sentencing court had jurisdiction to take cognizance and decide the matter in accordance with the recognized rules in the international sphere compatible with those adopted by this code; 4) that the defendant had been summoned or served in a personal manner in order to assure him or her a fair trial, and the exercise of his or her defenses; 5) to be *res judicata* in the country that rendered them, or that there is no ordinary recourse against them; 6) that the action generating them is not the subject of another suit still pending between the same parties in Mexican courts, and in which suit the Mexican court has prevailed, or at least the letter rogatory had been transmitted and delivered to the Secretariat of Foreign Affairs or to the authorities of the State where service of summons is to take place. This same rule is to be applied when a definite judgment is rendered; 7) that the obligation requested to be carried out is not contrary to the public order in Mexico; and 8) that the requirements to be considered as authentic are complied with.[269]

Once a foreign judgment has jumped through all these hoops, there is still another ground upon which enforcement can be denied: reciprocity.[270] At the Mexican judge's discretion, judgment may be denied if similar decisions are not enforced in the forum court.[271] However, three things should be remembered here. First, lack of reciprocity must be proven, not the existence of reciprocity.[272] Second, reciprocity is only relevant when applied to similar cases in the forum court.[273] Third, the judgment not to enforce is discretionary.[274]

Like Canada, Mexico has liberalized its enforcement of foreign judgments.[275] However, more needs to be done. Mexico does have a central set of laws on the subject, unlike Canada and the United States.[276] Yet, Mexico's system is complicated and comparatively youthful.

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269. *Id.* at 402.
270. *Id.*
271. *Id.*
272. *Id.* at 403 (stating that "it is not necessary to prove the existence of reciprocity before a Mexican judge to obtain the enforcement, but to prove the lack of it to enjoin such enforcement").
273. *Id.*
274. *Id.*
275. *See Id.* at 380 (determining that Mexico has gone from not allowing judgment enforcement to having the area regulated by presidential decrees).
276. *Id.* (indicating that judgment enforcement is regulated by the code of civil procedure).

Mexico's judges have not been enforcing judgments for very many years, which may lead to inconsistencies. Also, an agreement by the NAFTA countries could clarify important issues. For instance, all three countries are concerned with jurisdiction in enforcing judgments. If an agreement is made, the three countries may be able to agree upon some acceptable bases of jurisdiction. That way, all three countries have an understanding of what jurisdiction means, rather than merely applying their own definition of jurisdiction to the dismay of the other states. This discussion leads to problem areas among the NAFTA countries because of their varying enforcement policies.

V. PROBLEM AREAS WITHIN NAFTA

One area where an agreement between the signatory nations of NAFTA would be effective is in antitrust regulation. Canada and the United States have a similar history in this area, but Mexico has just recently begun this type of regulation.[277] The United States, with its free enterprise market, has strict regulations for antitrust violations, including civil judgments with treble damages and attorneys' fees awarded.[278] The United States has provisions prohibiting: 1) "joint conduct that unreasonably restrains 'trade or commerce . . .' with foreign nations;"[279] 2) attempts at conspiracies to monopolize and monopolization;[280] 3) unfair competition;[281] and 4) certain acquisitions by merger, or joint venture.[282] As will be shown below, the United States allows a wide jurisdictional swath across national boundaries.

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277. Mark R. Joelson, *Is There Three-Party Commitment to the Effective Enforcement of National Antitrust Laws?*, 40 FED. B. NEWS & J. 573, 574 (1993).

278. *Id.*; *see* 15 U.S.C. §§ 1-45 (1994 & Supp. 1998).

279. *See* 15 U.S.C. § 1 (Supp. 1998). The provision broadly states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *Id.*

280. *Id.* § 2. The provision reads in pertinent part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." *Id.*

281. *Id.* § 45(a)(1).

282. *Id.* § 18. A portion of this provision reads,

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id.

Due to a 1993 case, *Hartford Fire Insurance Co. v. California*,[283] the jurisdictional stretch of United States antitrust regulations widened.[284] The case involved London reinsurers who argued that Sherman Act rules did not apply to their activities because their conduct is more reasonably under the jurisdiction of Britain, not America.[285] However, the Court held that since there was no direct conflict between United States and British law and policy, there was no basis under international comity to refrain from this antitrust jurisdiction.[286]

The Department of Justice also applies broad jurisdictional standards in enforcing antitrust laws.[287] In 1992, Attorney General William P. Barr announced a return to the looser pre-1988 policy, meaning that enforcement action may be taken against conduct that occurs overseas, which restrains United States exports, whether or not there is direct harm to American consumers.[288] In general, American laws have the ability to cross national boundaries, particularly with Mexico and Canada.

Canada also has a long history of antitrust legislation, although, until recently, it was limited to criminal legislation.[289] The legislation, although similar to that of the United States, does not generally have the extraterritorial element that the United States does.[290] It makes it a criminal offense to conspire "with another person to prevent or lessen, unduly, competition . . . ."[291] However, Canada does prohibit a person outside the country from implementing directives to those within Canada, if the directives would have violated Section 45 had they been made within Canada.[292] Also, it has a "blocking provision" that is

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283. 509 U.S. 764 (1993).

284. *See* Joelson, *supra* note 277, at 575 (declaring that "the United States Supreme Court rendered an opinion in an insurance antitrust case, *Hartford Fire Insurance Co. v. California*, that will severely delimit the applicability of the jurisdictional rule of reason in future cases").

285. Hartford Fire Insurance Co. v. California, 509 U.S. 764, 795-96 (1993). The Court quoted the London reinsurers:

> Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the interests of another state are sufficient that the exercise of that jurisdiction should be restrained.

Id. at 795.

286. *Id.* at 798-99. The Court said, "'The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws,' even where the foreign state has a strong policy to permit or encourage such conduct." *Id.* at 799 (*citing* RESTATEMENT OF FOREIGN RELATIONS § 415 cmt. j).

287. Joelson, *supra* note 277, at 575.

288. *Id.*

289. *Id.*

290. *Id.*

291. R.S.C. 1985, c. C-34, § 45(1)(c).

292. *Id.* § 46.

designed to block foreign judgments, laws, and directives which cause anti-competitive effects.[293]

Mexico has just entered the world of antitrust regulations by legislation passed in 1992.[294] There are prohibitions against monopolies[295] and monopolistic practices[296] as well as provisions nullifying restrictive steps taken by local governments.[297] The Federal Competition Commission, "a decentralized administrative organ of the Secretariat of Commerce and Industrial Development," investigates and seeks to prevent antitrust violations.[298] Mexican law does not specifically address what antitrust rules apply in trade situations.[299]

There are important differences among NAFTA states, particularly between Mexico and the other two nations, but only limited steps have been taken to alleviate these differences.[300] Mere pledges to maintain national competition law measures and to foster effective competition law enforcement in the free trade area are the only steps that have been taken.[301] These pledges, although well intentioned, do not go far enough. Free trade, that is free movement of products and capital across national boundaries, is inhibited by a patchwork quilt of antitrust laws. Add this fact to the varying judgment enforcement policies and there is a problem with confusion of laws. Companies will be subject to at least three different antitrust regimes. Consequently, the most restrictive law may be the only one with any real meaning for some companies. Also,

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293. Joelson, *supra* note 277, at 576.

294. *Introduction to the Federal Law of Economic Competition," D.O., Dec. 24, 1992* (stating that the "Federal Law on Economic Competition" was introduced in December 1992).

295. *Id.* art. 8. This provision states that, "Monopolies and state-sanctioned monopolies are prohibited, as well as practices which, within the terms of this law, may diminish, damage or impede competition and free trade in the production, processing, distribution, and sale of goods or services." *Id.*

296. *Id.* art. 9. This provision states that monopolistic practices "shall have no legal effect and the economic agents who engage in their commission shall be subject to the sanctions set forth in this law . . . ." *Id.*

297. *Id.* art. 14. The provision states that "the acts of state authorities for the purpose of directly or indirectly prohibiting domestic or foreign merchandise or services from entering or leaving their territory shall have no legal effect." *Id.*

298. *Id.* art. 23. This provision reads,

> The Federal Competition Commission is a decentralized administrative organ of the Secretariat of Commerce and Industrial Development, which enjoys technical and operating autonomy, and whose duty is to prevent, investigate, and combat monopolies, monopolistic practices, and combinations, within the terms of this law, and which shall act independently in issuing its decisions.

Id.

299. Joelson, *supra* note 277, at 576 (concluding that "Mexican law does not address explicitly the question of what antitrust rules apply in import and export transaction situations except that there is an exemption for associations or cooperatives which sell certain products directly abroad").

300. *Id.* at 573.

301. *See* NAFTA, *supra* note 4, art. 1501. Article 1501 states "Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto." *Id.*

plaintiffs may forum-shop for the most friendly forum in which to sue. A better policy would be to harmonize, not necessarily integrate, important legal provisions between free trade countries. This would allow a proactive, coherent analysis of the problems inherent in lowering trade barriers, which is preferable to merely reacting to the problems as they develop.

Another area that has raised interesting issues in the enforcement of foreign judgments is libel litigation. In the modern age of informatization, media outlets distribute information across the globe, crossing national boundaries. Since other countries, like Canada and Great Britain, have stricter libel laws than the United States, media outlets in the United States must be wary of being sued in foreign countries.[302] This also allows potential plaintiffs to forum-shop, suing in the most libel-friendly jurisdiction.[303] Although the libel issue is not just relevant in discussing NAFTA states, it provides an opportunity to discuss important issues involving foreign judgments.

Recently, courts in the United States have not been willing to enforce foreign libel judgments in the United States because the judgments were found to be against public policy. In *Bachan v. India Abroad Publications Inc.*,[304] the New York Supreme Court refused to enforce a British libel judgment against a United States media defendant.[305] The court ruled that when foreign libel judgments conflict with First Amendment values, they are against the public policy of the United States.[306] Another important decision was *Matusevitch v. Telnikoff*,[307] where another British libel judgment was not recognized.[308] The *Matusevitch* court found that the British judgment was repugnant to the public policy of Maryland and the United States because British defamation law lacks First Amendment protections.[309]

It is only a matter of time before a similar Canadian libel judgment will be taken to a United States court to be enforced. This illustrates a

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302. Jeremy Maltby, *Juggling Comity and Self Government: The Enforcement of Foreign Libel Judgments in U.S. Courts*, 94 COLUM. L. REV. 1978, 1979 (1994) (indicating that "in contrast to the speech-protective standard employed by the United States, countries such as Britain and Canada have libel laws that favor plaintiffs' interests in privacy and reputation").

303. *See id.* at 1979-80.

304. 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

305. Maltby, *supra* note 302, at 1981.

306. *Id.* at 1982.

307. 877 F. Supp. 1 (D.D.C. 1995).

308. Rachel V. Korsower, *Matusevitch v. Telnikoff: The First Amendment Travels Abroad, Preventing Recognition and Enforcement of a British Libel Judgment*, 19 MD. J. INT'L L. & TRADE 225 (1995).

309. *Id.*

major problem with conflicting laws when there is free-movement of goods, persons, capital and, in this case, information. Simply having a liberal enforcement policy does not solve this problem. Harmonization of laws is also unlikely.

However, this is an area where it would simplify the situation by having one national standard for the enforcement of foreign judgments in the United States. It would be easier for United States courts to apply and the guidelines would be concrete so that foreign countries, particularly Canada and Mexico, would at least know what to expect from United States courts. This further explains why a foreign judgment agreement with the United States' free trade partners would be profitable. The European Union provides an example for the United States in making these kind of agreements.

VI. EUROPEAN UNION POLICY IN ENFORCING JUDGMENTS

Although the European Union is much further along the path to economic and political integration than its North American counterpart, it provides a useful analogy for other states pursuing free trade agreements. There are many variables in regard to just economic integration and the European Union is the best model to look at in analyzing integration.

The European Union, which began with the Rome Treaty in 1959, began to deal with judgment recognition and enforcement in its 1968 Brussels Convention.[310] Unlike the attempts at uniformity in the United States, the European Union does not simply have a list of acceptable bases of jurisdiction. It also lists bases of exorbitant jurisdiction.[311] However, these are only applicable to persons domiciled in a Member State.[312] Once jurisdiction is established, the general rule is that a judgment shall be recognized in the foreign state, without any special procedures required.[313]

However, just as in most American jurisprudence, a number of mandatory defenses are provided, if the foreign judgment is: 1) contrary to public policy; 2) a default judgment given without service in time to defend; 3) irreconcilable with a judgment in dispute between the same

310. Ronald A. Brand, *Enforcement of Judgments in the United States and Europe*, 13 J.L. & COM. 193, 201 (1994).

311. *See* 1990 O.J. (C 189) 3.

312. *Id.* (stating that "Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title").

313. *Id.* at 26.

parties in the recognizing state; 4) goes beyond the issue in dispute and requires determination of a matter of status or legal capacity or rights in property arising out of a matrimonial relationship, wills, or succession; or 5) irreconcilable with an earlier judgment from a non-Contracting State which is entitled to recognition and is on the same cause of action.[314] The Union also provides a mechanism for agreements with non European Union countries. A Contracting State in the European Union may enter into a treaty or agreement with a non-Contracting State on the recognition and enforcement of foreign judgments.[315]

The uniformity of the European Union's law for the recognition and enforcement of judgments is something that the United States could benefit from. Canada, Mexico, and the United States could have the same or similar policies, just as the countries in Europe have the same policy. Some may say that this is a loss of sovereignty. However, this is not the case. More problems will be solved than created. For instance, although the European Union has an integrated policy for the enforcement of judgments, there is still a defense for something contrary to the state's public policy.[316] This factor depends on the policy of each individual nation. Thus, national guarantees could still be in effect, while all the countries gain from simplicity and clarity.

VII. CONCLUSION

The inefficiency of the United States present system of enforcing judgments is problematic in the international arena. The fact that there are fifty-one different laws creates problems. Courts, like those in North Dakota, may have a difficult time defining the law and applying the law, especially when there is no applicable statute.[317] Further, foreign countries may have a difficult time figuring out what the law is with fifty-one different jurisdictions, many of which have no statutes on the subject. Some kind of international agreement would be a good first step in building bridges of comity. It would preempt any state legislation, thereby making one standard, instead of fifty-one different standards.[318]

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314. *Id.* at 27.

315. *Id.* at 59 (explaining that "this convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments an obligation towards a third state not to recognize judgments given in other Contracting States . . . .").

316. *Id.* at 27.

317. *See* Medical Arts Building Limited v. Eralp, 290 N.W.2d 241, 246 (N.D. 1980) (holding that the North Dakota Century Code does not deal with foreign country judgments).

318. *See* Brand, *supra* note 1, at 292 (stating that federal law under article VI of the United States Constitution would preempt state law).

The most workable and pragmatic place to begin such a treaty would be with NAFTA countries, Canada, and Mexico. Not only would it help centralize United States policy, but it would help clarify the policies of Canada and Mexico, respectively. If Canada, Mexico, and the United States are to have a successful free-trade relationship, these issues will have to be dealt with. Then, at least the issues will be dealt with consciously, rather than reacting to the inevitable issues when they arise.

Delvin J. Losing