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Foreign Country Money-Judgments and Arbitral Awards and the Restatement (Third) of the Foreign Relations Law of the United States: A Conventional Approach

The enforcement of foreign country judgments and arbitral awards is an integral part of today's international business. "It should be clear today," wrote Homburger a few years ago, "that recognition and enforcement of foreign judgments are far more than attractive subjects for academic exercises; they have become bread and butter problems for the legal profession which increasingly encounters them on the interstate and international levels."¹ The recently revised Restatement of the Foreign Relations Law of the United States² reflects this fact. Chapter Eight of the new Restatement sets forth some of the prevailing common and statutory law principles concerning the recognition and enforcement of foreign country judgments and foreign arbitral awards in the United States.³ The

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1. Homburger, *Recognition and Enforcement of Foreign Judgments: A New Yorker Reflects on Uniform Acts*, 18 AM. J. COMP. L. 367, 368 (1970).

2. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) [hereinafter RESTATEMENT]. When the project of the new Restatement began, its working title was "Restatement of the Foreign Relations Law of the United States (Revised)," reflecting the fact that it was the direct successor to the Restatement of the Foreign Relations Law of the United States published by the American Law Institute in 1965. The designation of the new work as "Restatement (Third)" signifies that it is in the generation of Restatements forthcoming since the Restatement (Second). See RESTATEMENT at IX.

3. See RESTATEMENT *supra* note 2, at 591-92.

Introductory Note to Chapter Eight⁴ and some of the Reporters' Notes⁵ also take account of legal sources and developments outside the United States.

While the Restatement of the Foreign Relations Law would seem to be an appropriate place to set forth provisions relating to the recognition and enforcement of foreign countries' judgments and arbitral awards,⁶ the Restatement did not contain provisions relating to this important topic until the recent revisions.⁷ In essence, the previous Restatement of the Foreign Relations Law of the United States did not deal with the subject; it merely stated the generally accepted principle that refusal by one state to give effect to judgments of another because of lack of reciprocity does not violate international law.⁸ Prior to the recent revisions of the Restatement of the Foreign Relations Law, only the Restatement (Second) of Conflict of Laws (1971) and its 1986 Revisions addressed the enforcement questions in some detail.⁹ The Restatement (Second) of Judgments, by contrast, does not deal with judgments rendered by courts of foreign countries. The principles applicable to interstate recognition and enforcement of judgments, however, may be applicable to the international recognition and enforcement of foreign judgments as well.

This article explores the recognition and enforcement of foreign judgments and arbitral awards provisions of the revised Restatement of the Foreign Relations Law in light of existing common and statutory law in the United States. Consequently, the enforcement of American judgments and arbitral awards outside the United States is beyond the scope of this essay.¹⁰ While the new

4. RESTATEMENT, *supra* note 2, §§ 481-488; *see also* RESTATEMENT, *supra* note 2, § 460.

5. *See, e.g.*, RESTATEMENT, *supra* note 2, § 481 reporters' notes 6 & 7; RESTATEMENT, *supra* note 2, § 487 reporters' note 2; RESTATEMENT, *supra* note 2, § 488 reporters' note 2 at 640-641.

6. In the United States, law of recognition and enforcement of foreign-country judgments is primarily domestic law that has substantial significance for the foreign relations of this country as well as other substantial international consequences. *See* RESTATEMENT, *supra* note 2, § 1(b).

7. As Restatements are informal sources of law, their relevance, impact, use, and persuasiveness in the United States and abroad depend upon the consensus they reflect. *See* Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50 LAW & CONTEMP. PROBS., Summer 1987, at 47. *See generally* K. ZWIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 259-60 (2d ed. 1987).

8. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 9 Comment a (1962).

9. *See* RESTATEMENT (SECOND), CONFLICT OF LAWS § 98 (1986) [hereinafter RESTATEMENT OF CONFLICT]. For details of the enforcement of foreign judgment provisions of the Restatement (Second) of Conflict of Laws, *see* Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220 (1972).

10. For a detailed country-by-country analysis of the recognition and enforceability of American judgments outside the United States, *see, e.g.*, ENFORCEMENT OF MONEY JUDGMENTS ABROAD (P. Weems ed. 1988); *see also* G. DELAUME, LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS 199-222 (1988); G. ROMAN, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN VARIOUS FOREIGN COUNTRIES (1984); Nadelmann, *Non-Recognition of American Money Judgments Abroad and What to Do About It*, 42 IOWA L. REV. 236 (1957); Sandrock & Hentzen, *Enforcing Foreign Arbitral Awards in the Federal Republic of Germany: The Example of a United States Award*, 2 TRANSNAT'L LAW. 49 (1989); Woodward, *Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom and the European Economic Community*, 8 N.C.J. INT'L L. & COMM. REG. 299

Restatement of the Foreign Relations Law deals with foreign money-judgments as well as non-money-judgments, the focus of this article is upon foreign country judgments granting or denying recovery of a sum of money. The enforcement of judgments other than money-judgments, such as orders for specific performance, injunctions, divorce decrees,¹¹ child custody orders,¹² and support orders,¹³

(1983). For an historical account, see Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188 (1919).

11. See RESTATEMENT, *supra* note 2, § 484, which reads:

(1) Courts in the United States will recognize a divorce granted in the State in which both parties to the marriage had their domicile or their habitual residence at the time of divorce, and valid and effective under the law of that State.

(2) Courts in the United States may, but need not, recognize a divorce, valid and effective under the law of the State where it was granted,

(a) if that State was, at the time of divorce, the State of domicile or habitual residence of one party to the marriage; or

(b) if the divorce was granted by a court having jurisdiction over both parties, and if at least one party appeared in person and the other party had notice of an opportunity to participate in the proceeding.

(3) A court that would not recognize a divorce that is within Subsection 2(a) or 2(b) may nevertheless recognize such a divorce if it would be recognized by the State where the parties were domiciled or had their habitual residence at the time of the divorce.

For details, see Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193 (1951); Note, *United States Recognition of Foreign Nonjudicial Divorces*, 53 MINN. L. REV. 612 (1969).

12. See RESTATEMENT, *supra* note 2, § 485, which reads:

(1) A court in the United States will recognize an order of a foreign court awarding or modifying an award of custody of a child, valid and effective in the State where it was issued, if, when the proceeding was commenced,

(a) the issuing State was the habitual residence of the child;

(b) the child and at least one party to the custody proceeding has a significant connection with that State; or

(c) the child was present in that State and emergency conditions required a custody order for protection of the child;

provided that notice of the proceeding was given to each parent and to any other person having physical custody of the child.

(2) Ordinarily, a court in the United States may modify a custody order entitled to recognition under this section only if the rendering court no longer has jurisdiction to modify the order, or had declined to exercise its jurisdiction to modify it.

See also UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 123 (1968); FEDERAL PARENTAL KIDNAPPING PREVENTION ACT OF 1980, 28 U.S.C. § 1738A (1982). For details of the recognition and enforcement of foreign custody decrees, see, e.g., Ehrenzweig, *Recognition of Custody Decrees Rendered Abroad*, 2 AM. J. COMP. L. 167 (1953).

13. See RESTATEMENT, *supra* note 2, § 486 which reads:

(1) A court in the United States will recognize and enforce an order of a foreign court for support, valid and effective under the law of the State where it was issued, if the issuing State

(a) was the domicile of habitual residence of both parties to the marriage when the obligation for support accrued;

(b) was the domicile or habitual residence of the support debtor at the time the order was issued; or

(c) was the domicile or habitual residence of the support creditor, and the support debtor appeared in the proceedings.

properly merits separate analyses. Additionally, the enforcement of foreign public law judgments, such as tax and penal judgments,¹⁴ is not examined in this paper. Finally, the enforcement of international bankruptcy judgments¹⁵ is also excluded despite its growing significance in practice.

The Restatement (Third) of the Foreign Relations Law of the United States carefully distinguishes between the enforcement of judgments and the enforcement of arbitral awards. This distinction flows from the fact that enforcement of foreign arbitral awards is a matter of international obligation and in the United States is governed by federal law, whereas enforcement of foreign judgments is a matter of state law. In view of the diversity in the law and practice of the fifty states, the drafters of the Restatement faced a particularly difficult task in restating the law in this area. Yet, to anticipate the conclusion drawn by this article, the drafters have succeeded in providing a succinct restatement of the principles of the law of recognition and enforcement of foreign country judgments as well as foreign arbitral awards. Given the great number of foreign country money-judgments that are sought to be enforced in this country, the first part of this article inquires into the Restatement provisions relating to the recognition and enforcement of foreign money-judgments. The second part of this article analyzes the Restatement provisions relating to the recognition and enforcement of foreign arbitral awards.

I. Foreign Country Money-Judgments

The recognition and enforcement of foreign country money-judgments in the United States is complicated by the absence of federal law on this subject. Although through a multilateral or bilateral treaty the United States could preempt the area of recognition and enforcement of foreign money-judgments,

(2) A court in the United States may modify a support order entitled to recognition under Subsection (1), at the initiative of either party in accordance with § 421(2)(b), (c), or (g).

See also REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 98 U.L.A. 381 (1968); Cavers, *International Enforcement of Family Support*, 81 COLUM. L. REV. 994 (1981).

14. See RESTATEMENT, *supra* note 2, § 483, which reads: "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the court of other States." Under the "revenue rule," American courts will normally not enforce the tax or criminal laws of a foreign nation. See R. FOLSOM, M. GORDON & J. SPANOGLE, *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK* 347 n.2 (1986). For a discussion of the origin of and the rationale for the "revenue rule," see RESTATEMENT, *supra* note 2, § 483 reporters' notes 1 & 2. See also Note, *The Nonrecognition of Foreign Tax Judgments: International Tax Evasion*, 1981 U. ILL. L. REV. 241 (author argues that nonrecognition of foreign tax judgments encourages tax evasion).

15. For details of the recognition of foreign bankruptcies in the United States, see, e.g., James, *International Bankruptcy: Limited Recognition in the New U.S. Bankruptcy Code*, 3 Hous. J. INT'L L. 241 (1981); Unger, *United States Recognition of Foreign Bankruptcies*, 19 INT'L LAW. 1153 (1985).

no such treaty has been established.¹⁶ Because of the absence of an international treaty¹⁷ and a federal statute,¹⁸ the recognition and enforcement of foreign country money-judgments in the United States is essentially regulated by state law.¹⁹ State action in this area is, of course, subject to the limitations imposed by the United States Constitution and international law.

In most states of the Union, the law on recognition and enforcement of foreign country money-judgments is not codified. Much of the development of the law of enforcement of foreign judgments has evolved through decisions of state or federal courts applying state law; thus it is not surprising that the law varies widely from jurisdiction to jurisdiction. Attempts to harmonize the existing body of law in this field have been relatively unsuccessful. Although the Restatement closely parallels much of the Uniform Foreign Money-Judgments Recognition Act of 1962,²⁰ only a minority of state jurisdictions in the United States have adopted the Uniform Act.²¹ Additionally, many of the

16. R. FOLSOM, M. GORDON & J. SPANOGLE, *supra* note 14, at 371. See also RESTATEMENT, *supra* note 2, ch. 8, introductory note, at 592, acknowledging that the United States has not been a party to any bilateral or multilateral treaty regarding the recognition and enforcement of foreign judgments, although numerous other countries, including the Member States of the European Community, have.

17. For a discussion of the negotiations between the United States and the United Kingdom on a proposed Convention Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, see E. SCOLES & P. HAY, CONFLICT OF LAWS 971-72 (1982); Smit, *The Proposed United States—United Kingdom Convention On Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443 (1977). See generally Nadelmann, *The United States of America and Agreements on Reciprocal Enforcement of Foreign Judgments*, 1 NETHERLANDS INT'L L. REV. 156 (1953).

18. Some commentators argue that a body of federal common law concerning the recognition and enforcement of foreign judgments could be developed on the basis of a "dormant foreign commerce clause." See, e.g., Comment, *Judgments Rendered Abroad—State Law or Federal Law?*, 12 VILL. L. REV. 618 (1967); Note, *Alternative Theories for Establishing a Federal Common Law of Foreign Judgments in Commercial Cases: The Foreign Affairs Power and the Dormant Foreign Commerce Clause*, 16 VA. J. INT'L L. 635 (1976).

19. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see also *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

20. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1962) [hereinafter UNIFORM ACT]. The Uniform Act has been held not to be preempted by federal law. See 9 U.S.C. §§ 201-208 (1989), implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter New York Convention]. See *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974). The court held the federal statutes only applied to arbitration awards, not foreign money-judgments or enforcement of foreign judgments confirming foreign arbitral awards. See also *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987).

21. Jurisdictions that have adopted the Uniform Act include: Alaska, California, Colorado, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Texas, and Washington. See UNIFORM ACT, *supra* note 20, at 19 (1989 Supp.). In view of the practical significance of the Uniform Act in these jurisdictions, it is surprising that, as far as the authors know, there is no comprehensive study of the Uniform Foreign Money-Judgments Recognition Act in English. For a thorough analysis in German, see F. WEIN-SCHENK, *DIE ANERKENNUNG UND VOLLSTRECKUNG BUNDESDEUTSCHER URTEILE IN DEN VEREINIGTEN STAATEN*

states that have adopted the Uniform Act have done so with considerable variations and amendments.²²

Recognizing the lack of international treaties and federal law and the need for uniformity in this area of the law, the new Restatement of the Foreign Relations Law incorporates provisions relating to the recognition and enforcement of foreign country judgments. Section 481(1) of the Restatement states the general principle that a final judgment of a court of a foreign country is entitled to recognition in courts in the United States. Section 481(2) emphasizes the basic principle that a judgment entitled to recognition may be enforced in the United States in accordance with the procedure for enforcement of judgments applicable in the state where enforcement is sought.²³ Section 482 of the Restatement qualifies the general principles laid down in section 481 by enunciating a number of situations in which courts in the United States may not, or need not, recognize a foreign country judgment.²⁴

UNTER DEN "FOREIGN COUNTRY MONEY JUDGMENT RECOGNITION ACTS" (1988) (dealing primarily with the recognition and enforcement of German judgments in the United States, especially in New York).

22. See, e.g., UNIFORM ACT, *supra* note 20, variations from official text at 263-64, 269-70, 272-73. Many deviations from the official text of the Uniform Act are semantic only. Some alterations, however, are significant. For instance, changes made by New York in regards to the Uniform Act § 4, are equivalent to the Restatement § 482 tests. UNIFORM ACT, *supra* note 20, at 268. For details of the New York law, see F. WEINSCHENK, *supra* note 21, at 96-147. Additionally, Maryland has made fraud a mandatory ground for the denial of a foreign country money-judgment. See UNIFORM ACT, *supra* note 20, at 269.

23. See RESTATEMENT, *supra* note 2, § 481, which reads:

(1) 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.

(2) A judgment entitled to recognition under Subsection (1) may be enforced by any party or its successor or assigns against any other party, its successors or assigns, in accordance with the procedure for enforcement of judgments applicable where enforcement is sought.

24. See RESTATEMENT, *supra* note 2, § 482, which reads:

(1) A court in the United States may not recognize a judgment of the court of a foreign State if:

- (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
- (b) 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 Section 421.

(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;

In contrast to the Uniform Act,²⁵ sections 481 and 482 of the Restatement (Third) of the Foreign Relations Law of the United States are not limited to judgments granting or denying recovery of a sum of money.²⁶ Section 7 of the Uniform Act makes it clear, however, that the Act does not prevent recognition of judgments other than money-judgments.²⁷ Like sections 484 to 486 of the Restatement, section 7 of the Uniform Act reflects the practice of American courts to recognize and enforce foreign country non-money-judgments, such as judgments of divorce, custody, adoption, and other incidents of family status, provided, of course, that certain conditions are met.²⁸ In view of this practice, it should be appreciated that the drafters went beyond the Uniform Act when they included the current state of the law with respect to the recognition and enforcement of non-money-judgments.

A. RECOGNITION

Section 481 of the Restatement properly distinguishes between the recognition and enforcement of foreign judgments. The principle of recognition is primarily founded upon the policy that there is no need to relitigate an issue already adequately determined by a foreign court.²⁹ The importance of recognition, however, goes well beyond a successful litigant's attempt to enforce a foreign country money-judgment in the United States. Recognition may also be relevant when a litigating party seeks to defend its cause on the basis of prior adjudication of the controversy (*res judicata*),³⁰ or a prior determination of a fact or law issue

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- (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.

25. SEE UNIFORM ACT, *supra* note 20, § 1(2), which states: "'[F]oreign judgment' means 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."

26. SEE RESTATEMENT, *supra* note 2, §§ 484-486.

27. UNIFORM ACT, *supra* note 20, § 7.

28. RESTATEMENT, *supra* note 2, § 481 reporters' note 2.

29. See von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1602-05 (1968), indicating that the policy behind ending litigation includes both prudential and fairness factors such as: (1) not harassing the successful litigant; (2) limiting the availability of plaintiff's choice of forum; (3) fostering stability and unity in international relations; and to a certain extent, (4) fostering the belief that the rendering forum is more appropriate than the recognizing forum, for reasons like convenience in deciding the merits of a suit. See also *Hunt v. BP Exploration Co. (Libya)*, 492 F. Supp. 885, 905 (N.D. Tex. 1980).

30. See generally F. WEINSCHENK, *supra* note 21, at 105-11; Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291 (1963); Peterson, *supra* note 9, at 259-64; Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950); Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44 (1962); Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 MICH. L. REV. 1129 (1935).

(collateral estoppel and claim preclusion).³¹ Additionally, the issue of recognition may become relevant in proceedings before institutions other than courts, such as administrative agencies or arbitration tribunals.³²

1. Comity

In the final analysis, the willingness of one country to recognize another country's money-judgments rests upon the paramount yet often elusive concept of comity.³³ Comity is generally analogized to and described as the international equivalent of the full faith and credit clause of the United States Constitution as applied to the sister states.³⁴ Unfortunately, courts continue to have difficulty in distinguishing between these two distinct, albeit functionally similar, legal bases.³⁵ The full faith and credit clause applies only to the recognition of judgments as between the sister states of the United States; it does not legally bind U.S. courts to recognize judgments rendered outside the United States. In contrast, comity applies only to the recognition of judgments rendered outside the United States. Most importantly, comity has been established merely as a rule of practice, convenience, and expediency;³⁶ it is not a rule of law.³⁷

Comity stands for the proposition that, as a general rule, foreign country judgments are as much entitled to recognition in the United States as judgments between the sister states. The United States Supreme Court recognized comity in the landmark case of *Hilton v. Guyot*.³⁸ The Supreme Court stated that comity is

31. See F. WEINSCHENK, *supra* note 21, at 115-20; Smit, *supra* note 30; Reese, *supra* note 30. For the relevance of "collateral estoppel" in recognition and enforcement cases, see *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971). See also *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926) (concerning claim preclusion effect).

32. See RESTATEMENT, *supra* note 2, § 481 reporters' note 5 (citing *Regierungspraesident Land Nordrhein Westfalen v. Rosenthal*, 17 A.D.2d 145, 232 N.Y.S.2d 963 (1962) in which the decision of a West German administrative agency revoking an award of restitution to victims of the Nazi regime on grounds of misrepresentation was recognized in New York, and the agency was permitted to recover funds previously awarded).

33. See Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 7-8 (1988).

34. Note *Recognition of Foreign Country Judgments—A Case for Federalization*, 22 TEX. INT'L L.J. 331, 334-35 (1987); see also von Mehren & Trautman, *supra* note 29, at 1607.

35. See Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW. 425, 426-27 (1982) (citing a case in which a United States court awarded a Costa Rican judgment both full faith and credit and comity); see also Note, *The Uniform Foreign Money-Judgments Recognition Act: A Survey of the Case Law*, 14 VAND. J. TRANSNAT'L L. 171, 177-78 (1981) (citing situations wherein purely domestic cases in the United States courts incorrectly attempted to treat a sister state judgment as a foreign country judgment under the Uniform Act).

36. *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972); *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 152 N.E. 121, 123 (1926).

37. See *Somportex*, 453 F.2d at 440.

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

neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.³⁹

Both the Restatement and the Uniform Foreign Money-Judgments Recognition Act are grounded upon the basic notions of comity.

Comity is, of course, subject to a number of constraints. One of the primary limitations that continues to be acknowledged by some courts in the United States is that of reciprocity. In *Hilton v. Guyot* the Supreme Court concluded that comity called for enforcement of foreign judgments only on the basis of reciprocity.⁴⁰ While the holding in *Hilton* has not been formally overruled, modern case law suggests that reciprocity has lost much of its vitality in the United States,⁴¹ and the extent to which reciprocity is still a prerequisite for recognition is uncertain.⁴² The Uniform Money-Judgments Recognition Act does not make reciprocity a precondition for recognition and enforcement of foreign-country judgments.⁴³ The Restatement (Second) of Conflicts of Law questions whether considerations of reciprocity are material.⁴⁴

The drafters of the new Restatement of the Foreign Relations Law recognize that the great majority of courts in the United States have rejected the requirement of reciprocity, both in construing the Uniform Act and apart from the Act.⁴⁵ As a result, reciprocity is not expressly required under the Restatement,⁴⁶ even though reciprocity continues to lurk between the lines of the recognition and enforcement provisions of the Restatement, its comments, and reporters' notes. In light of the modern case law and the Restatement, reciprocity

39. *Id.* at 163-64.

40. *Id.* at 228; see also *Ritchie v. McMullen*, 159 U.S. 235 (1895).

41. See Juenger, *supra* note 33, at 33; von Mehren & Trautman, *supra* note 29, at 1660-62; Note, *Denying Enforcement of a Foreign Country Injunction—Solution or Symptom: Pilkington Bros. v. AFG Industries, Inc.*?, 17 CONN. L. REV. 703, 706-08 (1985).

42. Reciprocity requirements are effectuated in numerous forms of extraterritorial assertions of jurisdiction including, but not limited to: economic sanctions, competition laws and regulations, export controls, national security policies, and law enforcement. Some of these assertions are made through a legislative process and are expressed statutorily, while others are not. See generally Small, *Managing Extraterritorial Jurisdiction Problems: The United States Government Approach*, 50 LAW & CONTEMP. PROBS., Summer 1987, at 283.

43. See R. FOLSOM, M. GORDON & J. SPANOGLE, *INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL* 451 (3d ed. 1988).

44. RESTATEMENT OF CONFLICT, *supra* note 9, § 98 comment e.

45. RESTATEMENT, *supra* note 2, § 481 reporters' note 1 (with a list of cases); see also RESTATEMENT, *supra* note 2, § 481 comment d.

46. The RESTATEMENT, *supra* note 2, § 481 reporters' note 1 quotes from an influential article by Professor Reese who suggests that "the creditor is not to blame for the fact that the State of rendition does not accord conclusive effect to American judgments . . ." Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 793 (1950).

may be viewed more in terms of being a desirable long-term objective than as a precondition for recognition.⁴⁷

2. *Judgments Entitled to Recognition*

Section 481 of the Restatement requires that in order for a foreign country money-judgment to be recognized and subsequently enforced, the judgment must be final, conclusive between the parties, and not fall within an exception for nonrecognition under section 482.⁴⁸ Comment *e* to section 481 defines a final judgment as "one that is not subject to additional proceedings in the rendering court other than execution."⁴⁹ The comment continues by stating that the fact that a judgment is subject to appeal or modification "in light of changed circumstances" does not deprive the judgment of its finality.⁵⁰ This statement, which will come as a surprise to most Continental lawyers, is, however, less far-reaching than it may appear.⁵¹ In practice, recognition and enforcement actions in the United States typically will be stayed until the final termination of the appeal in the country that rendered the judgment.⁵² The same holds true in cases in which a party satisfies the court that it is entitled to and intends to appeal the foreign country money-judgment.⁵³ The Uniform Act coincides with these limitations.⁵⁴

Neither the Restatement nor the Uniform Act differentiates between the recognition of a default judgment and the recognition of a contested judgment. This approach does not necessarily mean, however, that courts will generally give the same direct effect to default judgments as to judgments following proceedings in which all parties participated. Some states will probably decline to recognize or enforce foreign judgments rendered after default.⁵⁵ In any case,

47. See also von Mehren & Trautman, *supra* note 29, at 1661 (arguing that "[a] reciprocity requirement may on occasion be justified as a way of bringing pressure upon systems that, in their recognition practice, drastically limit the effects of foreign judgments.") Accord Carl, *Recognition of Texas Judgments in Courts of Foreign Nations—and Vice Versa*, 13 Hous. L. Rev. 680, 685-86 (1976).

48. See RESTATEMENT, *supra* note 2, § 481(1).

49. See RESTATEMENT, *supra* note 2, § 481 comment e, at 596.

50. *Id.*

51. For a detailed discussion of the different views of American and Continental lawyers as to the meaning of a final judgment, see F. WEINSCHENK, *supra* note 21, at 103-04.

52. See, e.g., *Hunt v. BP Exploration Co. (Libya), Ltd.*, 492 F. Supp. 885, 906 (N.D.Tex. 1980); see also F. WEINSCHENK, *supra* note 21, at 104-05.

53. See RESTATEMENT, *supra* note 2, § 481 comment e ("[B]ut courts in which enforcement is sought in these circumstances often stay their proceedings until the appeal has run its course.")

54. See UNIFORM ACT, *supra* note 20, §§ 2 & 6, at 264 & 274. UNIFORM ACT, *supra* note 20, § 6 states:

If the defendant satisfies the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

55. See RESTATEMENT, *supra* note 2, § 487 comment c.

courts will normally scrutinize very carefully the jurisdiction of the court rendering the judgment after default. If the rendering court lacked jurisdiction over the default-judgment debtor, the judgment is not entitled to recognition.⁵⁶ If the judgment debtor appeared in the rendering court for the purpose of challenging its jurisdiction and that jurisdiction was upheld, this judgment debtor is generally precluded from renewing the challenge in the recognizing state unless the proceeding in the rendering court was manifestly unfair to the judgment debtor or the asserted basis for jurisdiction is clearly untenable in light of section 421 of the Restatement.⁵⁷

Section 482(2)(f) of the Restatement deals with judgments inconsistent with the parties' contractual choice of forum and may also be used by a court as a ground for nonrecognition of a default judgment.⁵⁸ Additionally, public policy may operate to deny recognition of a default judgment in the United States.⁵⁹ *Ackermann v. Levine*⁶⁰ stands for the proposition, however, that courts in the United States should be cautious in utilizing the "unruly horse" (Cardozo) of public policy in the default-judgment context. Whether other U.S. courts will follow the good example set by the Second Circuit in *Ackermann* remains to be seen.

3. *Grounds for Nonrecognition: Some General Observations*

The main issue in recognition cases is whether grounds for nonrecognition exist. Section 482 of the Restatement⁶¹ and section 4 of the Uniform Act⁶²

56. RESTATEMENT, *supra* note 2, § 482(1)(b).

57. See RESTATEMENT, *supra* note 2, § 481 comment i.; see also *Hunt v. BP Exploration Co. (Libya), Ltd.*, 492 F. Supp. 885, 895 (N.D. Tex. 1980).

58. See RESTATEMENT, *supra* note 2, § 482 comment h.

59. RESTATEMENT, *supra* note 2, § 482(2)(d); see also RESTATEMENT, *supra* note 2, § 482(2)(b).

60. 788 F.2d 830 (2d Cir. 1986).

61. For the text of § 482, see *supra* note 24.

62. UNIFORM ACT, *supra* note 20, § 4:

- (a) A foreign judgment is not conclusive if
 - (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; or
 - (3) the foreign court did not have jurisdiction over the subject matter.
- (b) A foreign judgment need not be recognized if
 - (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 action.

attempt to clarify this limitation by distinguishing between mandatory and discretionary grounds for nonrecognition. The Restatement lists two mandatory conditions for nonrecognition: (1) the rendering foreign forum lacks fair procedures and (2) the rendering state lacks personal jurisdiction over the defendant.⁶³ It also states six grounds upon which a court in the United States need not recognize a foreign judgment: (1) lack of subject matter jurisdiction; (2) insufficient notice was given to the defendant; (3) the judgment was obtained by fraud; (4) the cause of action or resulting judgment is repugnant to the public policy of the United States or the recognizing state; (5) the judgment conflicts with prior judgments entitled to recognition; or (6) the judgment process was contrary to the litigants' contractual choice of forum.⁶⁴ The Restatement resembles the Uniform Act in this respect. They have, however, two important differences: (1) under the Uniform Act, lack of subject matter jurisdiction is a mandatory ground for nonrecognition;⁶⁵ (2) an additional discretionary factor of *forum non conveniens* is incorporated into the Uniform Act if jurisdiction is founded exclusively on personal service.⁶⁶

The differences between the Restatement and the Uniform Act merit consideration.⁶⁷ The fact that subject matter jurisdiction is a discretionary factor for nonrecognition under the more recent Restatement, while a binding ground for the recognizing court under the earlier Uniform Act, is of relatively little significance. Comments *a* and *d* of section 482 of the Restatement state that subject matter jurisdiction of the rendering court is "normally" presumed,⁶⁸ except in cases where the subject matter of the action in the foreign court affects rights in the United States regarding land or intellectual property (i.e., patents, trademarks, or copyrights).⁶⁹ Therefore, comment *d* concludes that subject matter jurisdiction

63. RESTATEMENT, *supra* note 2, § 482(1)(a)-(b).

64. RESTATEMENT, *supra* note 2, § 2 482(2)(a)-(f).

65. UNIFORM ACT, *supra* note 20, § 4(a)(3). The New York version of the Uniform Act, by contrast, treats the lack of subject matter jurisdiction as a discretionary ground for nonrecognition. See UNIFORM ACT, *supra* note 20, at 269.

66. UNIFORM ACT, *supra* note 20, § 4(b)(6).

67.

GROUND S FOR NONRECOGNITION

Mandatory Denial of Recognition

- Lack of Fair Procedures:
 1. Lack of Impartial Tribunals or
 2. Procedures Incompatible with Due Process
- Lack of Personal Jurisdiction
- Lack of Subject Matter Jurisdiction (only under the Uniform Act)

Discretionary Denial of Recognition

- Lack of Subject Matter Jurisdiction (only under the Restatement)
- Insufficient Notice
- Judgment Obtained by Fraud
- Cause of Action or Judgment Repugnant to Public Policy of the recognizing state (under both the Uniform Act and the Restatement) or of the United States (only under the Restatement)
- Conflicting Judgments Entitled to Recognition
- Contrary to Parties' Contractual Choice of Forum
- Inconvenient Foreign Forum (only under the Uniform Act)

68. See RESTATEMENT, *supra* note 2, § 482 comment a, at 605 and comment d, at 607.

69. RESTATEMENT, *supra* note 2, § 482 comment d, at 607.

of a foreign court is rarely subject to challenge in the recognizing court, especially if the issue was or could have been contested in the rendering court.⁷⁰

At first glance the lack of an express *forum non conveniens* ground for nonrecognition in the Restatement seems to be more problematic. Comment *c* to section 482 of the Restatement refers to both section 5(a)(1) of the Uniform Act and section 421 of the Restatement, which lists the jurisdictional bases needed to adjudicate.⁷¹ Comment *e* to section 421 of the Restatement acknowledges that a "transitory" or "tag" presence is not generally acceptable under international law.⁷² A possible inference from this comment is that under the Restatement *forum non conveniens* factor are automatically incorporated into the fairness test of personal jurisdiction.⁷³ This explanation seems, however, somewhat superficial given the rather uncertain status of personal jurisdiction guidelines necessary to satisfy constitutional due process requirements in the United States. The better view treats the Restatement in this respect as essentially equivalent to the Uniform Act, where *forum non conveniens* is an escape hatch to be used only where personal jurisdiction is established solely by means of personal service.

Serious consideration of *forum non conveniens* as an established ground of nonrecognition in the future would be beneficial. For a relatively small price, this deliberation would help to attain predictability and uniformity, desirable objec-

70. *See id.*

71. RESTATEMENT, *supra* note 2, § 482 comment *c* states:

In addition, Section 5(a)(1) of the Uniform Foreign Money Judgments Act lists personal service in the foreign State as an acceptable basis for jurisdiction, subject, however, to the reservation that a judgment rendered on this basis need not be recognized if the foreign court was a seriously inconvenient forum. Compare § 421 comment *e*.

72. *See* RESTATEMENT, *supra* note 2, § 421 comment *e*. Domestically "tag" jurisdiction still seems acceptable. Thus, for example, under New York law "personal delivery of the summons to the defendant within the state, no matter how transient his presence, will still give personal jurisdiction of him. . . ." *See* D. SIEGEL, HANDBOOK ON NEW YORK PRACTICE 61 (1978).

73. *See, e.g., Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, (1987), *rev'g* 39 Cal. 3d 35, 702 P.2d 543, 216 Cal. Rptr. 385 (1985), where, in a plurality opinion, the United States Supreme Court acknowledged that the international character of the defendant affects the four-prong test of fairness and substantial justice, which is derived from the second part of the *International Shoe* test. *See International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). Justice O'Connor stated convincingly: "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114. Unfortunately, because *Asahi* is a plurality opinion, and entails different levels of analyses, workable guidelines concerning jurisdiction over an alien defendant have not materialized. For a blurring of the traditional treatment of the *forum non conveniens* factor as solely a venue-oriented prudential concern, and one which is incorporated into personal jurisdiction as a fairness factor, see *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). Under *Burger King*, the following factors are to be considered: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most convenient and effective relief; (5) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (6) the shared interest of the several states in furthering fundamental substantive social policies. *See Burger King*, 471 U.S. at 477 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, (1980)).

tives in international relations.⁷⁴ Additionally, giving credence to the forum non conveniens doctrine would help properly to relate the forum, the litigants, and the nature of the action, which in turn could facilitate resolving peripheral problems in this area, such as those encountered by a defendant who is a components part manufacturer.⁷⁵ A reasonable use of the forum non conveniens factor in recognition and enforcement cases would also give courts a certain amount of flexibility in solving extremely difficult issues of a political nature.⁷⁶

4. *Mandatory Grounds for Nonrecognition*

Although the nonrecognition factors set forth in section 482 of the Restatement are discrete rather than cumulative, most recognizing courts tend to deny recognition on the basis of more than one ground. This common practice probably arose because courts seem comfortable with multiple legal support of their decisions, especially in light of the fact that the contours of the nonrecognition factors stated in section 482 of the Restatement are somewhat blurred. The multiple justification of nonrecognition determinations makes decisions of the courts in the forum in which recognition is sought less vulnerable in that they cannot easily be considered "result driven." Consequently, in a given action, it is not unusual for a court to find various nonrecognition grounds to be applicable. Case law is enlightening in attempting to discern both the meaning and scope of the two compulsory nonrecognition factors of section 482 of the Restatement.

a. *Lack of Fair Procedures*

As previously mentioned, section 482(1) of the Restatement lists two mandatory grounds for the nonrecognition of a foreign judgment in the United States. Under section 482(1)(a) of the Restatement, a court in the United States may not recognize a judgment rendered abroad, unless it has satisfied itself of the essential fairness of the judicial system that rendered the judgment. The lack of

74. See generally Degnan & Kane, *The Exercise of Jurisdiction over and Enforcement of Judgments against Alien Defendants*, 39 HASTINGS L.J. 799 (1988); Levitt, *The Extraterritorial Assertion of Long-Arm Jurisdiction and the Impact on the International Commercial Community: A Comment and Suggested Approach*, 9 U. PA. J. INT'L BUS. L. 713 (1986).

75. See also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), where a forum non conveniens determination considered such factors as the relative ease of access to sources of proof, the availability of compulsory process for the attendance of witnesses, the availability of an alternative forum, the costs of obtaining willing witnesses, and the burden on the court system. See von Mehren, *Transnational Litigation in American Courts: An Overview of Problems and Issues*, 3 DICK. J. INT'L L. 43 (1985), stating that two factors weigh heavily in favor of forum retaining a case: (1) the plaintiff has chosen the forum and consequently, unless abusive, the plaintiff's choice should not be lightly overridden, and (2) a suit will not be dismissed if it cannot be brought elsewhere. *Id.* at 45-46. Obviously, an appropriate forum non conveniens analysis that is used to test the sufficiency of personal jurisdiction contacts or as an independent venue factor should not be taken lightly.

76. See, e.g., *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478 N.Y.S.2d 597, 467 N.E.2d 245 (1984), cert. denied, 469 U.S. 1108 (1985).

impartial tribunals or procedures compatible with due process of law justifies the conclusion that the judicial system of the rendering country lacks the necessary fairness. The Restatement emphasizes that a court may make this determination without formal proof or argument on the basis of general knowledge and judicial notice.⁷⁷ Conclusions may be drawn from the facts of the particular case, the circumstances, and the working of the legal system in question.⁷⁸

Devising a test of whether the foreign judicial proceedings meet U.S. criteria of fairness thrusts a court into a difficult and complex task. Much must be known about the rendering country's legal system and its legal processes. Consequently, it is hardly surprising that U.S. courts traditionally have been reluctant to pass upon the issue of fairness and have opted instead for easier tests, such as public policy. Foreign judgments rarely have been denied recognition for want of fair procedures, and given the development towards a truly international economy, the chances that this ground will be utilized by U.S. courts in the future seem even more remote. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*⁷⁹ is one of the few cases in which the lack of fair procedures was used as a ground for nonrecognition. In this case, Judge Mansfield denied recognition because he was convinced that the East German courts were incapable of functioning as an independent or civilized judiciary, as they "orient their judgments according to the wishes of the leaders of the socialist state."⁸⁰ One commentator suggests that this ground could have been conversely used by United States courts confronted with judgments obtained in Iran against United States companies.⁸¹

b. Lack of Personal Jurisdiction

The second ground for the mandatory nonrecognition of a foreign judgment in the United States applies when the rendering court did not have personal jurisdiction over the defendant in accordance with the laws of the rendering state and in accordance with the requisite constitutional due process requirements.⁸² The lack of jurisdiction over the defendant is undoubtedly the most common of the mandatory grounds for refusal to recognize or enforce a judgment rendered by a court outside the United States. A court that did not have jurisdiction over the defendant under the laws of its own state cannot expect the courts of other countries to recognize or enforce such a judgment. Even if the rendering court had jurisdiction over the defendant under the laws of its own country, a court in the United States applying the Restatement test will not automatically recognize

77. RESTATEMENT, *supra* note 2, § 482 comment b.

78. For details, see RESTATEMENT, *supra* note 2, § 482 comment b.

79. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971).

80. *Id.*, 293 F. Supp. at 906-07.

81. See Newman, *Enforcement of Judgments*, 17 VAND. J. TRANSNAT'L L. 77, 86-88 (1984).

82. RESTATEMENT, *supra* note 2, § 482(1)(b).

the foreign judgment. Section 482(1)(b) of the Restatement requires that the court scrutinize the basis for the asserted jurisdiction in light of the principles set forth in section 421 of the Restatement.⁸³

Section 421 of the Restatement establishes the bases upon which personal jurisdiction may be predicated in light of the requirements of due process in the United States.⁸⁴ Section 5(a) of the Uniform Act contains many of the broad connecting factors through which personal jurisdiction can be established under the Restatement.⁸⁵ The Restatement is, however, more expansive than the

83. RESTATEMENT, *supra* note 2, § 482 comment c.

84. RESTATEMENT, *supra* note 2, § 421, at 305-07 states:

- (1) A State may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the State to the person or thing is such as to make the exercise of jurisdiction reasonable.
- (2) In general, a State's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted:
 - (a) the person or thing is present in the territory of the State, other than transitorily;
 - (b) the person, if a natural person, is domiciled in the State;
 - (c) the person, if a natural person, is resident in the State;
 - (d) the person, if a natural person, is a national of the State;
 - (e) the person, if a corporation or comparable juridical person, is organized pursuant to the law of the State;
 - (f) a ship, aircraft or other vehicle to which the adjudication relates is registered under the laws of the State;
 - (g) the person, whether natural or juridical, has consented to the exercise of jurisdiction;
 - (h) the person, whether natural or juridical, regularly carries on business in the State;
 - (i) the person, whether natural or juridical, had carried on activity in the State, but only in respect of such activity;
 - (j) the person, whether natural or juridical, had carried on outside the State an activity having a substantial, direct, and foreseeable effect within the State, but only in respect of such activity; or
 - (k) the thing that is the subject of adjudication is owned, possessed, or used in the State, but only in respect of a claim reasonably connected with that thing.
- (3) A defense of lack of jurisdiction is generally waived by any appearance by or on behalf of a person or thing (whether as plaintiff, defendant, or third party), if the appearance is for a purpose that does not include a challenge to the exercise of jurisdiction.

85. See UNIFORM ACT, *supra* note 20, § 5(a), which states:

- (a) The foreign judgment shall not be refused recognition for lack of personal jurisdiction if
 - (1) the defendant was served personally in the foreign State;
 - (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
 - (3) the defendant prior to the commencement of the proceedings 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 proceedings in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign State; or

Uniform Act in that section 421 also includes provisions for establishing jurisdiction based upon the presence of property.⁸⁶ Due to the broad scope of the personal jurisdiction provisions of the Restatement, it is unlikely that a court in the United States will refuse to recognize a foreign country money-judgment on this basis as it will apply similarly broad personal jurisdiction contacts as those used by a foreign forum.⁸⁷

The lack-of-jurisdiction-over-defendant ground, like other mandatory grounds of nonrecognition, is utilized with caution by U.S. courts. The case law in this area is exceedingly interesting, but sparse. Much of the limited case law is rather dated, which demonstrates the increasing hesitancy of U.S. courts when promoting comity,⁸⁸ while at the same time facing the mandatory nonrecognition conditions. Most U.S. courts prefer to rely upon the nonrecognition grounds that the Restatement and the Uniform Act qualify as discretionary grounds for nonrecognition.

5. Discretionary Grounds for Nonrecognition

As mentioned previously, section 482(2) lists six discretionary nonrecognition grounds.⁸⁹ Under this section, a U.S. court is not required to deny recognition, but may do so in the interest of justice. As with the mandatory grounds for nonrecognition, the discretionary conditions can be regarded as "recognition defenses."⁹⁰

a. Lack of Subject Matter Jurisdiction

The first discretionary ground for nonrecognition listed in the Restatement is lack of subject matter jurisdiction.⁹¹ For purposes of the Restatement, subject

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- (6) the defendant operated a motor vehicle or airplane in the foreign State and the proceedings involved a [cause of action] [claim for relief] arising out of such operation.

According to UNIFORM ACT, *supra* note 20, § 5(b), however, courts may recognize other bases of jurisdiction.

86. RESTATEMENT, *supra* note 2, §§ 421(1), 421(2)(a), (k), at 305-06.

87. See *In re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d 195 (2d Cir. 1987), in which an Indian court was determined to have contacts with the United States defendant in general compliance with the requirements of due process in the United States. Notice that in this case a forum non conveniens analysis seemed to be assimilated within the personal jurisdiction analysis. But see *Kohn v. American Metal Climax, Inc.*, 458 F.2d 255 (3d Cir. 1971), *cert. denied*, 409 U.S. 874 (1972), where a judgment by the High Court of Zambia was given effect over creditors and shareholders from the United States, over whom the Zambian court did not have personal jurisdiction.

88. See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984), in which the court described comity as that which "serves our international system like the mortar which cements together a brick house." For a thoughtful analysis of *Laker Airways*, see Rogers, *Still Running Against the Wind: A Comment on Antitrust Jurisdiction and Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 50 J. AIR L. & COM. 931 (1985).

89. RESTATEMENT, *supra* note 2, § 482(2)(a)-(f). For the text of § 482(2)(a)-(f), see *supra* note 24.

90. See Note, *supra* note 35, at 186.

91. RESTATEMENT, *supra* note 2, § 482(2)(a).

matter jurisdiction is normally presumed.⁹² Consequently, under the Restatement, lack of subject matter jurisdiction is of little practical importance. Conceptually, lack of subject matter jurisdiction retains more significance under the Uniform Act because it treats the lack of subject matter jurisdiction as a mandatory ground for nonrecognition.⁹³ If lack of subject matter jurisdiction is a discretionary factor for nonrecognition, as under the Restatement, then subject matter jurisdiction is viewed primarily as a matter of internal organization within the purviews of the rendering court. The recognizing court should closely scrutinize the rendering court's subject matter jurisdiction in cases in which the foreign judgment sought to be enforced in the United States affects land in the United States, or patents, trademarks, copyrights, and equally important intellectual property rights.⁹⁴

b. Insufficient Time to Defend

Another discretionary ground for nonrecognition in section 482 of the Restatement is that the defendant did not receive notice of the action in sufficient time to prepare a defense.⁹⁵ Because a total lack of adequate notice would prevent personal jurisdiction,⁹⁶ section 482(2)(b) of the Restatement, being a discretionary provision, must mean that the defendant received adequate notice, but that the notice was untimely. Receiving late notice implies that the defendant could not reach the court in time to defend. In many respects, section 482(2)(b) of the Restatement reflects due process requirements in the United States and is closely associated with the question of personal jurisdiction, the lack of which is a mandatory ground for nonrecognition under section 482(1)(b) of the Restatement.

Case law suggests that notice requires not only timeliness but also a certain degree of informativeness. Insufficient notice exists not only when no notice or late notice is given, but also when actual notice is given but such notice does not adequately apprise the defendant: (1) of the nature of the proceeding; (2) of the time of the proceeding; or (3) of the issues to be litigated. In international enforcement cases, language often becomes a major issue. At the outset, it should be clear that notice ought to be in the defendant's language. How much notice should be in that language becomes the crucial question. Two cases involving the United States, Israel, and Switzerland illustrate the problem. Switzerland, Israel, and the United States are all signatory parties to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965.⁹⁷ Under the terms of the Hague

92. RESTATEMENT, *supra* note 2, § 482 comment a and d, at 604-05 and 607, respectively.

93. UNIFORM ACT, *supra* note 20, § 4(a)(3).

94. See RESTATEMENT, *supra* note 2, § 482 comment d.

95. RESTATEMENT, *supra* note 2, § 482(2)(b).

96. RESTATEMENT, *supra* note 2, § 482(1)(b).

97. See Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter Hague Convention].

Convention to meet the constitutional due process requirements of personal jurisdiction in the United States the defendant must be informed in the language of the jurisdiction where he is served that a specific legal action is pending against him at a particular time and place.⁹⁸

*Julen v. Larson*⁹⁹ involved a Swiss default judgment in which the defendant, a U.S. citizen, was served by two mailed letters in California. Neither letter indicated that the papers were of any legal significance. The documents were in German, a language the defendant could not understand. Consequently, it may be argued that under neither the due process standards of the United States Constitution nor the Hague Convention was the notice adequate to inform him of the lawsuit or to give him sufficient time to defend.¹⁰⁰ Therefore, the court had no choice but to deny recognition of the Swiss judgment.¹⁰¹ The result should be the same under the Restatement even though section 482(2)(b) focuses heavily upon the time element rather than the degree of informativeness.

Contrast the preceding case with *Tahan v. Hodgson*.¹⁰² In *Tahan* the court upheld and recognized a default judgment entered against the defendant by an Israeli court.¹⁰³ Defendant Hodgson operated a travel agency that had transacted business in Israel for several years until a dispute arose with the plaintiff's travel agency. Plaintiff Tahan claimed that Hodgson's agency owed him a sum of money for past services, but Hodgson denied the debt. The plaintiff's attorney subsequently served Hodgson while Hodgson was in Jerusalem. Hodgson refused service, and later, a copy of the complaint, on the grounds that they were drawn in Hebrew, a language he could not read. Plaintiff Tahan later received a default judgment in Israel, which he sought to have recognized and enforced in the United States.

The court concluded service was effective and sufficient in the initial proceeding and well within constitutional parameters.¹⁰⁴ Not only were the papers in the language of the state where the defendant was served, but the court also found that on the basis of Tahan's previous business experience in Israel he "risked ignoring the papers at his own peril."¹⁰⁵ Most importantly, the court emphasized that Hodgson admitted to having contacted a lawyer about defending the charge.¹⁰⁶ Accordingly, the court reversed the district court's judgment and recognized the Israeli judgment, which held that the plaintiff had attained proper personal jurisdiction over the defendant.

98. *Id.* art. 5.

99. *Julen v. Larson*, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972).

100. Even if the letter had said in English that the accompanying documents were official court documents that would fully explain the nature of the proceedings, the notice requirements would not have been met under Hague Convention, *supra* note 97, art. 5.

101. *Julen*, 101 Cal. Rptr. at 800.

102. *Tahan v. Hodgson*, 626 F.2d 862 (D.C. Cir. 1981).

103. *Id.* at 862-63, 868.

104. *Id.* at 864-65.

105. *Id.* at 865.

106. *Id.* at 863, 865.

c. Fraud

A rare yet legally interesting discretionary ground upon which a U.S. court can properly refuse to recognize a foreign country judgment is fraud.¹⁰⁷ Both the corresponding comments¹⁰⁸ and case law¹⁰⁹ acknowledge that traditionally only extrinsic fraud permitted a court in the United States to deny recognition of a foreign state's judgment. Thus, only if the rendering court precluded the losing party of an adequate opportunity to present its case could the court in the State in which recognition was sought, set aside the judgment.¹¹⁰ In the United States intrinsic fraud, such as a judgment based on perjured testimony or falsified documents, normally does not bar the recognition of foreign judgments.¹¹¹ Contrary to the traditional views of the judiciary, the Restatement (Second) of Judgments rejects the distinction between extrinsic and intrinsic fraud.¹¹²

Under the Restatement (Third) of the Foreign Relations Law, the question is subject to discussion. The Restatement makes it perfectly clear that the appropriate standard of nonrecognition based upon fraud is established by the recognizing forum, regardless of whether the judgment could be set aside on that ground in the rendering foreign court.¹¹³ Conversely, if the judgment could be set aside in the rendering forum, the U.S. court should stay the recognition and enforcement action in order to provide the judgment debtor an opportunity to petition the rendering court to set aside the judgment, subject, in appropriate cases, to the posting of security.¹¹⁴ For recognition purposes, a challenge based upon intrinsic fraud should be addressed to the rendering court because that court is more familiar with the case than the recognizing court. Essentially, this view allows the determination of fraud to be made by the recognizing forum unless it is defaulted—default being whether the U.S. court would “permit the issue of fraud to be settled conclusively upon concepts of fairness and justice at variance with those prevailing in the United States.”¹¹⁵

107. See RESTATEMENT, *supra* note 2, § 482(2)(c).

108. RESTATEMENT, *supra* note 2, § 482 comment e at 607-08.

109. Among the early intrinsic fraud cases are *Harrison v. Triplex Gold Mines, Ltd.*, 33 F.2d 667 (1st Cir. 1929); *Harges v. Harges*, 46 Misc. 2d 994, 261 N.Y.S.2d 713 (Sup. Ct. 1965). For extrinsic fraud cases, see, e.g., *Tamimi v. Tamimi*, 38 A.D.2d 197, 328 N.Y.S.2d 477 (1972); *Parker v. Parker*, 155 Fla. 635, 21 So. 2d 141 (1945).

110. For further details, see *Bishop & Burnette*, *supra* note 35, at 434-36; von Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37, 59-61 (1974); Note, *Foreign Nation Judgments: Recognition and Enforcement of Foreign Judgments in Florida and the Status of Florida Judgments Abroad*, 31 U. FLA. L. REV. 588, 618-20 (1979).

111. See RESTATEMENT, *supra* note 2, § 482 comment e; see also *Reese*, *supra* note 30, at 793-97.

112. RESTATEMENT (SECOND) OF JUDGMENTS §§ 68, 70 and comment c to § 70 (1968).

113. RESTATEMENT, *supra* note 2, § 482 comment e, at 607; see also von Mehren & Patterson, *supra* note 110, at 60.

114. RESTATEMENT, *supra* note 2, § 482 comment e, at 608.

115. See *Reese*, *supra* note 30, at 794; see also *Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co.*, 470 F. Supp. 610 (S.D.N.Y. 1979).

d. Public Policy

In practice, probably the single most important ground for nonrecognition is public policy. It is well settled that a court in the United States will not recognize or enforce a foreign judgment based upon a claim that is perceived as contrary to fundamental notions of decency and justice.¹¹⁶ The Restatement reflects this view by treating violations of public policy as a discretionary ground for nonrecognition.¹¹⁷ On its face, public policy appears to be a catchall provision. Not surprisingly, therefore, the public policy ground for nonrecognition has been criticized as the "most elastic and unpredictable."¹¹⁸ To keep it within reasonable limits, the public policy defense to judgment recognition should be construed with restraint. Only a cautious utilization of the public policy defense will help the courts achieve the goal of international comity. Perhaps the wisdom of Judge Cardozo's famous statement against a parochial use of the public policy defense as enunciated in *Loucks v. Standard Oil Co.* should be heeded: "... [Courts should] not close their doors, unless [application of the forum law] would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."¹¹⁹

The Restatement agrees with this view. Comment *f* to section 482 states that the mere fact that a cause of action on which a judgment was based does not exist or has been abolished in a State where recognition is sought does not necessarily make recognition and subsequent enforcement contrary to the public policy of that State or the United States.¹²⁰ The case law is replete with examples that illustrate how far American courts are willing to go in this regard.¹²¹ In *Hilton v. Guyot*, for example, the Supreme Court found no offense to public policy in the French procedures whereby courts admitted hearsay and testimony not under oath and denied the defendants the right to cross-examine witnesses.¹²² Similarly, other courts in the United States have held that public policy is not offended by rules of evidence that create presumptions at variance with those of the forum.¹²³ Recently the United States District Court for the Northern District of Texas has made it very clear, however, that lack of reciprocity does not violate American public policy.¹²⁴

116. See von Mehren & Patterson, *supra* note 110, at 61.

117. See RESTATEMENT, *supra* note 2, § 482(2)(d).

118. Scoles & Aarnas, *The Recognition and Enforcement of Foreign Nation Judgments: California, Oregon, and Washington*, 57 OR. L. REV. 377, 384 (1978).

119. *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).

120. See RESTATEMENT, *supra* note 2, § 482 comment *f*, at 608.

121. See, e.g., *Pentz v. Kupfinger*, 31 Cal. App. 3d 590, 107 Cal. Rptr. 540 (1973); *Hager v. Hager*, 1 Ill. App. 3d 1047, 274 N.E.2d 157 (1971); *Stein v. Siegel*, 50 A.D.2d 916, 377 N.Y.S.2d 580, 582 (1975).

122. *Hilton v. Guyot*, 159 U.S. 113, 204-05 (1895).

123. See *Newton v. Hunt*, 59 Misc. 633, 112 N.Y.S. 573 (Sup. Ct. 1908), *modified*, 134 App. Div. 325, 119 N.Y.S. 3 (1909), *modified*, 201 N.Y. 599, 95 N.E. 1134 (1911).

124. *Hunt v. BP Exploration Co. (Libya), Ltd.*, 492 F. Supp. 885, 898 (N.D. Tex. 1980).

The bifurcation of jurisdiction between federal and state courts in the United States adds complexity to the public policy defense. The Restatement emphasizes that the cause of action upon which the judgment is based and the judgment itself must not be repugnant to the public policy of the United States *or* of the state where recognition is sought.¹²⁵ By contrast, the Uniform Act permits the recognizing court to deny recognition if the judgment is “repugnant to the public policy of this state.”¹²⁶ Thus, the Uniform Act does not make special reference to the public policy of the United States. The Restatement seems to assume that there may be situations in which the public policy of the United States may differ from that of the recognizing state. It is difficult, however, to hypothesize a situation in which recognition would be offensive to the public policy of the recognizing state but not to that of the United States. Consequently, the distinction between the public policy of the recognizing state and the public policy of the United States should not be overestimated. This distinction is important, however, in that it underscores that courts in the United States should not apply local public policy against a foreign judgment lightly.

e. Inconsistent Judgments

Under section 482(2)(e) of the Restatement a court in the United States need not recognize a judgment that conflicts with another final judgment that is entitled to recognition in this country.¹²⁷ While this provision appears to be of little practical importance, there may be situations where two conflicting foreign judgments are sought to be enforced in the United States. Theoretically, in such a situation a court could recognize the earlier judgment, the later judgment, or neither of them. Particularly difficult questions may arise in cases where a foreign judgment is in conflict with a judgment rendered by a U.S. court. In such a situation, the U.S. court may be inclined to recognize the sister-state judgment rather than the inconsistent foreign judgment, whether or not the sister-state judgment was rendered first in time.

Section 482(2)(e) of the Restatement is silent on the issue of which of two conflicting judgments should receive preference. Comment *g* to section 482 states that courts are “likely” to recognize the later of two inconsistent foreign judgments, presumably on the theory that the later judgment has considered the effects of the previous one. The comment acknowledges, however, that under section 482(2)(e) of the Restatement the court may recognize the earlier judgment or neither of them.¹²⁸ As to the conflict between a foreign country judgment and a prior sister-state judgment, comment *g* to section 482 of the

125. See RESTATEMENT, *supra* note 2, § 482(2)(d).

126. UNIFORM ACT, *supra* note 20, § 4(b)(3).

127. RESTATEMENT, *supra* note 2, § 482(2)(e).

128. See RESTATEMENT, *supra* note 2, § 482 comment *g*, at 608; see also *Bata v. Bata*, 163 A.2d 493, 506 (Del. 1960), *cert. denied*, 366 U.S. 964 (1961); *Ambatielos v. Foundation Co.*, 202 Misc. 470, 116 N.Y.S.2d 641, 648 (Sup. Ct. 1952).

Restatement confines itself to the statement that there is "no principle requiring automatic preference for the sister-state judgment." In sum, the rather noncommittal comment to section 482(2)(e) of the Restatement leaves the determination to the recognizing court. The ultimate determination as to which of two inconsistent judgments is to be recognized should be achieved by balancing the equities involved in a particular case.¹²⁹ As a result, a judicial decision in this type of case is highly fact sensitive.

f. Judgment Inconsistent with Parties'
Contractual Choice of Forum

The sixth and final discretionary nonrecognition factor in section 482 of the Restatement applies when parties to a contract select an exclusive forum for any dispute that may arise between them, and one party receives a judgment from a forum other than the one agreed to by the parties.¹³⁰ In such a situation, a court in the United States need not recognize the judgment rendered by the not-agreed-to forum.¹³¹ Section 482(2)(f) of the Restatement reflects the modern trend to give effect to forum selection agreements,¹³² at least in respect of international commercial and business transactions.¹³³ Of course, the forum selection clause may be waived expressly or by implication,¹³⁴ and if waiver is found by the rendering court, the finding is typically binding on the recognizing court.¹³⁵ In practice, section 482(2)(f) of the Restatement will ordinarily apply to foreign default judgments, since appearance of the judgment debtor before, and participation of the judgment debtor in an action in a forum other than the forum previously agreed upon by the parties effectively waives the contractual choice of forum.¹³⁶

B. ENFORCEMENT

Under section 481(2) of the Restatement, recognition is a necessary prerequisite for enforcement. Even though a foreign judgment may be entitled to recognition under section 481(1) of the Restatement, however, enforcement will not necessarily follow. Recognition and enforcement can be analogized to a favorite American pastime, that of baseball. Recognition could be compared to reaching first base. Enforcement, in turn, would be similar to reaching home, and scoring a run that wins the game for the team in the bottom of the ninth

129. See von Mehren & Patterson, *supra* note 110, at 71-72; Note, *supra* note 35, at 186.

130. RESTATEMENT, *supra* note 2, § 482(2)(f).

131. *Id.*

132. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *The Bremen v. Zapata Off-shore Co.*, 407 U.S. 1 (1972).

133. RESTATEMENT, *supra* note 2, § 482 reporter's note 5 at 610-11.

134. See RESTATEMENT, *supra* note 2, § 482 comment h.

135. *Id.*

136. *Id.*

inning. In other words, recognition, although essential, is in reality nothing more than the first step in a two-step procedural process.

Whether or not a foreign judgment entitled to recognition in the United States will be enforced is determined ultimately by the law of the jurisdiction where enforcement is sought. Each of the fifty states has its own law governing the procedure for enforcement of judgments.¹³⁷ Given the differences in the law and practice of the fifty states, it is understandable that neither the comments nor the reporters' notes following sections 481 and 482 of the Restatement attempts to comment upon state enforcement procedures and their applicability to foreign money-judgments. Generally foreign judgments are not directly enforceable in the United States; instead, they need to be reduced to a judgment of the enforcing court. This procedure makes them enforceable under local law.¹³⁸

Statutory provisions that simplify the enforcement procedure and act as a surrogate by merging the judgment and the original claim are found under the Uniform Enforcement Acts.¹³⁹ By the end of 1988, a majority of the states in the United States had adopted the Uniform Enforcement Act of 1964.¹⁴⁰ In other words, far more states have adopted the Uniform Enforcement Act than the Uniform Recognition Act.¹⁴¹ The typical, simplified, summary judgment-type procedure under the Uniform Enforcement Act is as follows:¹⁴²

- (1) A judgment that is properly authenticated under federal or state statutes should be filed in the district clerk's office.
- (2) A notice of the filing should be sent to the judgment debtor, with the name and address of the judgment creditor and his attorney.
- (3) Along with the filing of judgment should be a proof of mailing of the notice, an affidavit showing the name and last known address of both the judgment debtor and creditor, and a sworn translation (if the judgment is written in a foreign language).
- (4) The clerk is required to mail a notice of the filing to the debtor and to treat the foreign judgment in the same manner as a domestic judgment.

If these provisions are complied with, the foreign country judgment is enforceable as if it were rendered by a court in the United States. The judgment creditor

137. Federal courts generally follow the enforcement procedures of the state in which the federal court sits. See von Mehren & Patterson, *supra* note 110, at 72 n.194.

138. See *id.* at 72.

139. See UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT OF 1948, 13 U.L.A. 181 (1986), and UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT OF 1964, 13 U.L.A. 149 (1986) (revision of 1948 Act).

140. Jurisdictions that have adopted the Uniform Enforcement Act of 1964 include Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nevada, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Utah, Washington, Wisconsin, and Wyoming. See 13 U.L.A. at 4 (Supp. 1989). Jurisdictions that have adopted the Uniform Enforcement Act of 1948 include Arkansas, Illinois, Missouri, and Nebraska. See 13 U.L.A. at 12 (Supp. 1989).

141. For a list of states that have adopted the Uniform Recognition Act, see *supra* note 21.

142. See, e.g., Bishop, *Obtaining Recognition and Enforcement of Foreign Country Judgments in Texas*, 45 TEX. B.J. 287, 287-88 (1982).

retains the option of bringing a suit to enforce the judgment, and the judgment debtor may still initiate a proceeding to reopen, vacate, or stay the execution of the judgment.¹⁴³

II. Foreign Arbitral Awards and Agreements to Arbitrate

Thus far, attention has focused upon legal issues in connection with the recognition and enforcement of foreign court judgments. Similarly complex and complicated questions arise in cases in which recognition and enforcement of foreign arbitral awards or agreements to arbitrate are sought in the United States. International commercial arbitration has become the preeminent mechanism for resolving international commercial disputes, and it is likely to remain an important dispute resolution device in virtually all countries involved in international trade.¹⁴⁴ In the landmark case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*¹⁴⁵ the United States Supreme Court reaffirmed its belief in the efficacy of arbitral proceedings in international commercial disputes by upholding the arbitrability of antitrust claims arising from an international contract.

A. SOME GENERAL OBSERVATIONS

The Restatement (Third) of the Foreign Relations Law takes into account the overwhelming practical importance of international commercial arbitration and the need for the smooth functioning of the recognition and enforcement of arbitration agreements and arbitral awards.

1. *The Restatement and the New York Convention*

Sections 487¹⁴⁶ and 488¹⁴⁷ of the Restatement cover the recognition and

143. *Id.* at 289.

144. See Ebke, *Book Review*, 22 INT'L LAW. 1258 (1988) (reviewing M. ADEN, INTERNATIONAL COMMERCIAL ARBITRATION (1988)).

145. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). For a thorough discussion of this case, see Comment, *Enforcing International Commercial Arbitration Agreements—Post-Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 36 AM. U.L. REV. 57 (1986).

146. RESTATEMENT, *supra* note 2, § 487:

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and subject only to the defenses set forth in § 488,

(1) a court in a State party to the Convention must recognize and enforce an arbitral award, rendered in a State party to the Convention pursuant to a valid written agreement to arbitrate, at least if the legal relationship that gave rise to the controversy was commercial in character;

(2) a court in a State party to the Convention must, at the request of any party to an action, stay or dismiss the action pending arbitration if an agreement to arbitrate falling under the Convention is in effect and covers the controversy on which the action is based.

147. RESTATEMENT, *supra* note 2, § 488:

Under the convention on the Recognition and Enforcement of Foreign Arbitral Awards,

enforcement of agreements to arbitrate and arbitral awards in some detail. These two provisions are based upon the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the New York Convention,¹⁴⁸ and the United States Arbitration Act, which implements the Convention.¹⁴⁹ The New York Convention, which despite its official title applies to both arbitral awards and agreements to arbitrate, became effective in 1959 and entered into force in the United States on December 29, 1970.¹⁵⁰ Seventy-six countries are presently parties to the New York Convention; these countries include developed and lesser developed nations, as well as socialist countries.¹⁵¹

a. Scope

The fact that Sections 487 and 488 of the Restatement are based upon the New York Convention determines their scope: sections 487 and 488 cover only arbitral awards and agreements to arbitrate arising out of legal relationships that are "commercial" in nature.¹⁵² Consequently, arbitration agreements and awards arising out of matrimonial or custody disputes are excluded.¹⁵³ Arbitration in

(1) a court in a State party to the Convention may deny recognition or enforcement to a foreign arbitral award if

- (a) the agreement to arbitrate was not valid under the applicable law;
 - (b) the party against which the award was rendered did not receive proper notice of the proceedings or was otherwise not afforded an opportunity to present its case;
 - (c) the award deals with matters outside the terms of the agreement to arbitrate;
 - (d) the constitution of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties or to the law of the State where the arbitration took place; or
 - (e) the award has not yet become binding on the parties, or has been suspended or set aside by a competent court in the State where it was made.
- (2) A court of a State party to the Convention may also deny recognition or enforcement to a foreign arbitral award that meets the requirements of § 487 if, under the law of that State,
- (a) the subject matter of the controversy is not capable of settlement by arbitration; or
 - (b) recognition or enforcement of the award would be contrary to public policy.

148. New York Convention, *supra* note 20.

149. See United States Arbitration Act, 9 U.S.C. §§ 201-208. (1982) [hereinafter U.S. Arbitration Act].

150. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Pub. L. No. 91-368, 84 Stat. 692 (1970). For details of the New York Convention and the implementing legislation, see Aksent, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw. U.L. REV. 1 (1971); McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735 (1971); Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A. J. 821 (1972); Comment, *United Nations Foreign Arbitral Awards Convention: United States Accession*, 2 CAL. W. INT'L L.J. 67 (1971).

151. For a listing of countries now parties to the Convention, see 9 U.S.C.A. § 201, at 197 (West Supp. 1989).

152. See RESTATEMENT, *supra* note 2, § 487 comment f.

153. See also U.S. Arbitration Act, 9 U.S.C. § 1 (1982).

accordance with the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, on the other hand, is in general subject to the rules set forth in sections 487 and 488 of the Restatement.¹⁵⁴ Similarly, an arbitration agreement arising out of a maritime contract would also seem to be subject to the rules in sections 487 and 488 of the Restatement.¹⁵⁵

b. Reciprocity

The United States, like a majority of the other States party to the Convention, adheres to the Convention subject to reciprocity.¹⁵⁶ The critical elements, therefore, for the United States and the other countries requiring reciprocity is the place of the award. Under section 487(1) of the Restatement the place of the arbitral award determines the applicability of the Convention. In the same manner, under section 487(e) of the Restatement the agreed place of arbitration determines the applicability of the Convention.¹⁵⁷ Arbitration agreements between citizens of the United States generally do not fall under the New York Convention unless the legal relationship out of which the arbitration agreement arises involves property located outside the United States, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign countries.¹⁵⁸ For purposes of section 487(2) of the Restatement, like the United States Arbitration Act, a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.¹⁵⁹

2. Federal Courts versus State Courts

The Convention and the implementing United States legislation aim at encouraging arbitration of disputes arising out of transactions by American

154. See RESTATEMENT, *supra* note 2, § 487 reporters' note 5 at 487-88. For further details, see Symposium, *The Recognition and Enforcement of Foreign Country Judgments and Arbitral Awards: A North-South Perspective*, 11 GA. J. INT'L & COMP. L. 635, 651-53 (1981).

155. Cf. *Atlas Chartering Servs., Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861 (S.D.N.Y. 1978) (enforceability of arbitration agreement in maritime contract between two foreign corporations is governed by the United States Arbitration Act, *supra* note 149, which implements the New York Convention).

156. See RESTATEMENT, *supra* note 2, § 487 comment b. Thus, in the case of Iran, American courts cannot give effect to a clause in a contract between an American and an Iranian providing for arbitration in Iran, as Iran is not a signatory to the New York Convention. See *National Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F. 2d 326, 331 (5th Cir. 1987), *reh'g denied*, 823 F.2d 552 (5th Cir.), *cert. denied*, 484 U.S. 943 (1987). By contrast, requisite reciprocity between the United States and India was present to permit recognition and enforcement of an arbitral award rendered in India. See *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981), *reconsideration denied*, 530 F. Supp. 542 (S.D. Ohio 1982).

157. See RESTATEMENT, *supra* note 2, § 487 reporters' note 2, at 633.

158. See U.S. Arbitration Act, 9 U.S.C. § 202 (1982); see also van den Berg, *When Is an Arbitral Award Nondomestic under the New York Convention of 1958?*, 6 PACE L. REV. 25 (1985).

159. See U.S. Arbitration Act, 9 U.S.C. § 202 (1982).

business in foreign countries.¹⁶⁰ As a result of the Convention and the implementing legislation, enforcement in the United States of foreign arbitral awards and agreements to arbitrate is a question of international obligation and federal law.¹⁶¹ Consequently, the federal courts in the United States typically hear motions to recognize and enforce a foreign arbitral award or an arbitration agreement.¹⁶² Actions brought in state courts to enforce or set aside a foreign arbitral award, or to proceed notwithstanding such an award, or an agreement to arbitrate falling under the New York Convention may be removed to federal court at any time before trial, whether or not the applicability of the Convention appears on the face of the complaint.¹⁶³ Actions to enforce foreign arbitral awards or arbitration agreements not falling under the Convention, by contrast, must be brought in state courts, unless a diversity of citizenship creates federal court jurisdiction.¹⁶⁴ Case law in the United States concerning the New York Convention is comparatively sparse. This is due in part to the fact that the United States became a party to the Convention only a few years ago, and in part to the fact that most arbitral awards are complied with voluntarily.

3. *Treaties of Friendship, Commerce, and Navigation (FCN Treaties)*

Many of the United States treaties of friendship, commerce, and navigation¹⁶⁵ contain provisions concerning the recognition and enforcement of agreements to arbitrate and of arbitral awards.¹⁶⁶ Generally, the FCN treaty provisions are

160. See *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1 (S.D.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

161. See RESTATEMENT, *supra* note 2, § 487 comment a, at 629-30.

162. See R. FOLSOM, M. GORDON & J. SPANOGLE, *supra* note 14, at 375.

163. See U.S. Arbitration Act, 9 U.S.C. § 205 (1982). As to the timeliness of the motion, see *Dale Metals Corp. v. Kiwa Chem. Indus. Co.*, 442 F. Supp. 78 (S.D.N.Y. 1977).

164. See RESTATEMENT, *supra* note 2, § 487 reporters' note 8, at 636-67. The law and practice of the fifty states concerning the recognition and enforcement of foreign arbitration awards and agreements to arbitrate vary widely. *Id.* Unfortunately, there is no equivalent to the Uniform Foreign Country Money-Judgments Act, *supra* note 20, with respect to arbitral awards or arbitration agreements. See RESTATEMENT, *supra* note 2, § 487 reporters' note 8, at 636-37.

165. On these treaties, see generally R.R. WILSON, *UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW* (1960); Hynning, *Treaty Law for the Private Practitioner*, 23 U. CHI. L. REV. 36 (1955); Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); Wilson, *A Decade of New Commercial Treaties*, 50 AM. J. INT'L L. 927 (1956).

166. See, e.g., Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. VI, § 2, 7 U.S.T. 1839, T.I.A.S. No. 3593.

2. Contracts entered into between nationals or companies of either Party and nationals or companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent juris-

consistent with the New York Convention.¹⁶⁷ The pertinent provisions of some of these treaties, however, amount to little more than declarations of nondiscrimination.¹⁶⁸ If both the New York Convention and an FCN treaty apply to a particular agreement to arbitrate or to a particular arbitral award, the Convention and the implementing U.S. legislation, rather than the FCN Treaty, will govern.¹⁶⁹ If no FCN Treaty exists, the New York Convention will apply, provided, of course, the conditions of the Convention are met.¹⁷⁰

4. *Cases Not Falling under the Convention or An FCN Treaty*

In the United States the enforcement of an agreement to arbitrate or of an arbitral award falling under neither the Convention nor an FCN treaty is subject to the general principles of U.S. law.¹⁷¹

a. General Principles

As the drafters of the Restatement correctly observed, arbitral awards and arbitration agreements are generally enforceable in the United States in the same manner as foreign judgments (sections 481 and 482 of the Restatement) whether or not judicially confirmed in the rendering state.¹⁷² As a result, such awards and arbitration agreements may be subject to rules of nonrecognition slightly different from those applicable to awards and agreements to arbitrate falling under the New York Convention or an FCN treaty. For example, arbitral awards falling under the Convention must be recognized and enforced even if rendered after default,¹⁷³ whereas many states decline to recognize or enforce foreign country judgments rendered after default.¹⁷⁴

diction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other states thereof.

167. See RESTATEMENT, *supra* note 2, § 487 comment a, at 630.

168. See Note, *supra* note 161, at 655.

169. See RESTATEMENT, *supra* note 2, § 487 comment a, at 629-30.

170. The New York Convention, *supra* note 20, does not apply to enforcement of judgments that confirm foreign arbitration awards. See *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987). The Convention does not bar attachment pending arbitration. See *Carolina Power & Light Co. v. Uranex*, 451 F. Supp. 1044, 1051 (N.D. Cal. 1977); see also *McCreary Tire & Rubber Co. v. Ceat S.P.A.*, 501 F.2d 1032 (3d Cir. 1974).

171. If an FCN treaty exists between the United States and a country which is not a party to the New York Convention, the treaty provisions concerning recognition and enforcement of arbitral awards and of agreements to arbitrate will ordinarily take precedence over domestic principles of the law of recognition and enforcement of foreign arbitral awards or agreements to arbitrate. But see von Mehren & Patterson, *supra* note 110, at 77.

172. See RESTATEMENT, *supra* note 2, § 487 comments c & h, at 630-31 & 633.

173. See RESTATEMENT, *supra* note 2, § 487 comment c, at 630-31.

174. See *supra* notes 55-57 & accompanying text.

b. Public Policy

Gradual differences as to the public policy defense also arise. As a general rule, the public policy limitation under the New York Convention is construed narrowly by courts in the United States.¹⁷⁵ In general, it is applied only where recognition and enforcement of a foreign arbitral award or arbitration agreement would violate the forum state's most basic notions of morality and justice.¹⁷⁶ One federal court held that failure to disclose an arbitrator's relationship with a party to the arbitration agreement did not taint arbitral proceedings in India such that recognition or enforcement of the arbitral award in the United States under the Convention was contrary to public policy.¹⁷⁷ By contrast, arbitration agreements exacted by duress may furnish a basis for refusing recognition or enforcement of an arbitral award falling within the ambit of the New York Convention.¹⁷⁸ Reporters' Note 2 to section 488 of the Restatement references cases that narrowly construe the public policy defense under the New York Convention and seems to suggest that the Restatement coincides with these limitations.¹⁷⁹ Consequently, although the public policy defense available in enforcement of foreign judgment cases is used cautiously by U.S. courts,¹⁸⁰ the defense may be even more limited under the Convention and the rules set forth in section 488(2)(b).

B. DEFENSES

Apart from the public policy defense, section 488 of the Restatement lists numerous other defenses to the recognition and enforcement of arbitration agreements and arbitral awards rendered outside the United States. As the language used in section 488 of the Restatement ("may deny recognition") indicates, all of the defenses set forth in this provision, including the public policy defense, are discretionary. The list, however, is exclusive.¹⁸¹

1. Section 488(1) of the Restatement

Section 488(1) of the Restatement lists five grounds on which a court in a country party to the New York Convention may deny recognition or enforcement

175. See, e.g., *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

176. See, e.g., *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975); *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980).

177. See *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981), *reconsideration denied*, 530 F. Supp. 542 (S.D. Ohio 1982).

178. See *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G.*, 480 F. Supp. 352 (S.D.N.Y. 1979).

179. See *RESTATEMENT*, *supra* note 2, § 488 reporters' note 2.

180. See *RESTATEMENT*, *supra* note 2, § 482(2)(d); see also *supra* notes 116-26 & accompanying text.

181. See *RESTATEMENT*, *supra* note 2, § 488 comment a.

to a foreign arbitral award.¹⁸² The first paragraph of section 488 allows a court in a state party to the Convention to deny recognition and enforcement to a foreign arbitral award if the agreement was not valid under the applicable law.¹⁸³ The court may also deny recognition or enforcement if the party against whom the award was rendered did not receive proper notice of the proceedings or was otherwise not afforded an opportunity to present its case.¹⁸⁴ This defense includes elements of notice and fraud that under section 482(2)(b)-(c) of the Restatement are also discretionary grounds for nonrecognition of foreign judgments.¹⁸⁵ In addition, an award need not be recognized if it deals with matters outside the scope of the arbitration agreement.¹⁸⁶

Additionally, a court need not recognize or enforce an arbitration award if the "constitution" of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties or the law of the country where the arbitration took place.¹⁸⁷ This defense is similar to the "lack of fair procedures" defense under section 482(1)(a) of the Restatement, which, if established, is a mandatory ground for nonrecognition of a foreign judgment.¹⁸⁸ Finally, a court need not recognize or enforce a foreign arbitral award if the award is not yet binding on the parties or has been suspended or set aside by a competent court in the rendering state.¹⁸⁹

The reporters of the Restatement acknowledge that many of the grounds for nonrecognition stated above are expressly provided for in the New York Convention.¹⁹⁰ Yet, they consider it "clear" that "if a purported agreement to arbitrate is not valid under the applicable law . . . , or does not cover the controversy between the parties . . . , a court in a contracting State may not order the parties to arbitrate or stay an action pending arbitration."¹⁹¹ Similarly, the drafters of the Restatement are of the opinion that, "by analogy to [section 488(2)(a) of the Restatement]," a court is not required to recognize or enforce a foreign arbitral award if the subject matter of the controversy is not capable of settlement by arbitration according to the law of the state where the court sits.¹⁹² While there is indeed much in favor of the grounds for nonrecognition listed in section 488(1) of the Restatement, one should not forget that section 488 of the

182. See *supra* note 147.

183. See RESTATEMENT, *supra* note 2, § 488(1)(a). For a case illustrating this defense, see, e.g., *In re Ferrara S.P.A.*, 441 F. Supp. 778 (S.D.N.Y. 1977) (concerning an Italian rule of law providing that arbitration agreements are unenforceable unless they appear above signatures of both parties).

184. See RESTATEMENT, *supra* note 2, § 488(1)(b).

185. See RESTATEMENT, *supra* note 2, § 482(2)(b)-(c). For details, see *supra* notes 95-115 & accompanying text.

186. See RESTATEMENT, *supra* note 2, § 488(1)(c).

187. See RESTATEMENT, *supra* note 2, § 488(1)(d).

188. See RESTATEMENT, *supra* note 2, § 482(1)(a).

189. See RESTATEMENT, *supra* note 2, § 488(1)(e).

190. See RESTATEMENT, *supra* note 2, § 488 comment c.

191. *Id.*

192. *Id.*

Restatement does not purport to restate the law under the New York Convention. Instead, section 488(1) of the Restatement seems to provide a fair and succinct restatement of the rules of law developed by the courts in the United States applying the New York Convention. The grounds for nonrecognition set forth in section 488(1) of the Restatement do, however, contribute to the movement towards more uniformity with respect to the law of recognition and enforcement of arbitral awards at the state level in the United States, as there is no equivalent to the Uniform Foreign Country Money-Judgments Recognition Act.¹⁹³

2. Section 488(2) of the Restatement

Section 488(2) of the Restatement lists two additional discretionary defenses to recognition and enforcement to a foreign arbitral award: the public policy defense¹⁹⁴ and the defense based upon the fact that the matter is not capable of arbitration.¹⁹⁵ Both defenses are of utmost importance in practice. Many of the cases that have arisen in the U.S. courts under the New York Convention, as well as apart from it, have dealt with one or both of these defenses. As previously stated, U.S. courts applying the New York Convention public policy limitation tend to construe the defense narrowly and cautiously.¹⁹⁶ Given the fact that the New York Convention is applicable on its face only to agreements and awards of a commercial character,¹⁹⁷ the "lack of arbitrability" defense is also naturally limited to disputes arising out of commercial contracts, which are normally arbitrable. This is the case under the laws of most major states, including France, Germany, Italy, Sweden, and the United States.¹⁹⁸ Difficult questions may arise, however, in connection with the arbitrability of public laws not subject to the disposition of private parties, which with increasing frequency affect international business transactions.¹⁹⁹

Although, historically, international arbitration agreements were looked upon with disdain, the current trend is towards a more generous acceptance of arbitration, both nationally and internationally.²⁰⁰ In the past some courts have viewed international arbitration agreements and awards as an attempt to strip courts of their judicial authority. This view was put to rest, however, in the

193. See *supra* note 164.

194. See RESTATEMENT, *supra* note 2, § 488(2)(a). For details of the public policy defense, see *supra* notes 175-79 & accompanying text.

195. See RESTATEMENT, *supra* note 2, § 488(2)(a).

196. See *supra* notes 175-77 & accompanying text.

197. See *supra* note 152.

198. See RESTATEMENT, *supra* note 2, § 488 reporters' note 1.

199. For a thought-provoking analysis of the question of whether article VIII, section 2(b) of the International Monetary Fund Agreement is arbitrable, see Sandrock, *Are Disputes Over the Application of Article VIII, Section 2(b) of the IMF Treaty Arbitrable?*, 23 INT'L LAW. 933 (1989); see also W. EBKE, *INTERNATIONALES DEVISENRECHT* ch. 1 (1989).

200. See Comment, *supra* note 145, at 57-66.

famous case of *The Bremen v. Zapata Off-Shore Co.*²⁰¹ when the United States Supreme Court stated: "[T]he argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction."²⁰² In the same case, the Supreme Court acknowledged the changing of times and dependence on what is becoming an ever increasing international economy by stating that the judicial encroachment theory has "little place in an era when all courts are overloaded and when businesses once essentially local now operate in world markets."²⁰³

The acceptance of both the need and practicality of international arbitration agreements was again pushed to new heights in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,²⁰⁴ where the Supreme Court upheld the arbitration of an antitrust claim and again emphasized the need for international comity.²⁰⁵ The extent to which parties' choice of law or choice of forum agreements will be permitted is still the subject of considerable debate. The uncertainty is inevitable because, in an international arena there are conflicting and competing policy concerns: on the one side are the individuals' right and freedom to contract and the desire to ascertain predictability and certainty in the outcome of business dealings; on the other is the justification and protection of important domestic policies, such as consumer and investor protection through, for example, security regulation and antitrust laws. The fact that an arbitral award can be formulated and eventually binding without any reasons having to be uncommunicated by the arbitrator complicates the balancing of competing interests and the question of the arbitrability of an issue. It is not only understandable but also laudable that the drafters of the Restatement did not attempt to go into all of the issues associated with modern international arbitration agreements and the recognition and enforcement of arbitral awards, as any generalization in this area tends to do more harm than good.

III. Final Thoughts

The preceding discussion has illustrated some of the complex and complicated issues that the drafters of the Restatement (Third) of the Foreign Relations Law of the United States faced in their attempt to provide a succinct restatement of the law of recognition and enforcement of foreign country judgments and arbitral awards. The task regarding the recognition and enforcement of foreign country money-judgments was particularly difficult as there is essentially no federal law on the subject. For the most part, the drafters of the new Restatement have codified rather than changed the common and statutory law as applied by courts

201. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

202. *Id.* at 12.

203. *Id.*; see also *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974).

204. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

205. *Id.* at 614, 629; see also *Scherk*, 417 U.S. at 519-20.

in the United States. Where the Restatement deviates from the law (including the Uniform Law), as it does, for example, with respect to the nonrecognition of foreign judgments for want of subject matter jurisdiction, the suggested changes do not create a fundamentally different recognition and enforcement practice. Where the Restatement has failed to make definite statements of the current state of the law, as is the case with the doctrine of *forum non conveniens* in recognition and enforcement proceedings, possible solutions lurk between the lines of the Comments and Reporters' Notes.

The approach of the drafters of the Restatement was to restate carefully and conservatively, as opposed to change fundamentally, the current state of the law of recognition and enforcement of foreign country judgments in the United States. While this approach is laudable, it can hardly be denied that there is a great deal of unpredictability and uncertainty in this area of the law, which obviously results from the lack of multilateral and bilateral treaties and federal statutes that preempt pertinent state law. Given the lack of uniformity, a conventional approach such as the one adopted by the new Restatement is preferable because it may have constructive effects on the judicial development of the law in this area. Moreover, Restatement provisions that reflect consensus are more likely to be utilized as part of executive or legislative action towards a federalization of the relevant law than are novel and innovative provisions that lack substantial judicial and/or scholarly support.

In any event, the Restatement provisions concerning the recognition and enforcement of foreign country judgments and foreign arbitral awards will no doubt help courts in the United States accomplish substantial justice in a world that is increasingly linked legally, economically, socially, and politically. Construed reasonably and applied prudently, the Restatement provisions discussed in this article will enhance the reputation of the United States as one of the countries receptive not only to foreign arbitral awards, but also to foreign judgments. Most importantly, the provisions may eventually lay the ground for a legally sound, economically efficient, socially desirable, and politically acceptable universally uniform system of recognition and enforcement of foreign judgments and arbitral awards. Countries that share similar values with the United States, as well as countries that have different values, may be willing to adhere to the Restatement for the sake of the smooth functioning of international relations.