U.S. ENFORCEMENT OF FOREIGN MONEY JUDGMENTS AND THE NEED FOR REFORM

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INTRODUCTION

Creating an effective government requires the establishment of methods for resolving disputes between parties and systems for payment of restitution.[1] Prior to the industrial revolution, disputes arose in a confined, localized setting, usually among neighbors. Enforcing a judgment between remote parties was virtually unheard of. As a result, legal doctrine with respect to cross-nation enforcement of judgments was skeletal.[2] With the industrial revolution came increased travel, which led to increased cross-border, private-party interaction. This increased interaction naturally led to a rise in disputes between remotely located parties.[3] Once a judgment was issued, the judgment creditor needed a way to see his judgment satisfied. No statute or treaty, however, provided methods for ensuring enforcement of a foreign judgment.[4] As such, judges created enforcement procedures through common law, under the principles of fairness.[5] The absence of uniform written law, combined with our unique system of fifty state sovereignties existing within a unified federal government, invited non-uniformity of the procedures for recognition and enforcement of judgments rendered in a court of a foreign nation.

This article examines the evolution of U.S. procedures for recognizing and enforcing foreign country judgments. It assesses the lack of uniform procedures among the states, examines the potential constitutional problems

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[1] *See generally* Arthur Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical Critical Analysis*, 16 LA L. REV. 465 (1956).

[2] *Id.*

[3] *Id.*

[4] Enron (Thrace) Exploration & Production BV v. Clapp, 378 N.J. Super. 8, 14 (App. Div. 2005) ("Generally the law governing the recognition of judgments of foreign nations had not been codified.").

[5] Hilton v. Guyot, 159 U.S. 113, 164 (1895).

with the current law, evaluates two current proposals for unification,[6] and discusses possible solutions to unresolved issues. Specifically, this article addresses the due process implications with respect to personal jurisdiction over the parties in both the original proceeding, and the enforcement and recognition proceedings. Part I gives a historical perspective of the problems. Part II discusses the development U.S. recognition and enforcement of foreign country judgments and introduces the concept of comity. Part III explores the ambiguities and procedural differences among the current state enforcement and recognition procedures. Parts IV through VI identify and evaluate the differing views among the states regarding the extent to which due process is implicated at various stages in these proceedings: in foreign country judgment enforcement and recognition procedures; in the original foreign action; and in actions that seek declaratory judgment of non-enforceability of a foreign country judgment. Part VII introduces the National Conference of Commissioners on Uniform State Law (NCCUSL) proposed model state statute and the American Law Institute (ALI) proposed federal statue and analyzes their effectiveness in unifying U.S. procedures for recognizing and enforcing foreign judgments. Part VIII raises questions regarding the adequacy of adopting each proposal, and suggests solutions to problems not adequately addressed by either one.

I. HISTORY OF U.S. PROCEDURES FOR ENFORCING CIVIL JUDGMENTS AMONG SISTER STATES

In civil litigation, the entry of a judgment is often not the end of the matter. This is especially true when the judgment involves a monetary award. Collecting on the judgment or otherwise enforcing a judgment is often laborious and time consuming.

If the litigation occurs in the United States, and the party against whom the judgment has been rendered has assets in the forum state (state A), then enforcing the judgment is relatively simple. The winning party presents the judgment to the court and requests that the debtor's assets be attached. If the debtor's assets are in another state (state B), the winning party must petition the court in state B for recognition and enforcement.

Streamlined enforcement of judgments between the sister states was paramount to the unification of the states as one nation. As such, the founding fathers included this issue in Article IV, Section 1 of the Constitution: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."[7] This provision

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[6] The ALI and the NCCUSL have proposed divergent ideas for solving the problem. *See infra* VIII.

[7] U.S. Const. art. IV, § 1.

requires state courts to recognize and enforce the judgments of sister states in the same manner in which they recognize and enforce their own.

Notwithstanding this directive, enforcement of sister-state judgments initially was cumbersome and procedurally demanding. To secure recognition and enforcement of a judgment from a sister state, the judgment creditor would have needed to initiate a full-blown action in the second state. The process for enforcing sister-state judgments overloaded the court system and caused serious case backlog.

In 1948, the NCCUSSL responded to this need by drafting the Uniform Enforcement of Foreign Judgments Act (the '48 Enforcement Act).[8] The '48 Enforcement Act provided a streamlined process for granting full faith and credit to sister-state judgments. Despite its reference to *foreign* judgments, as originally drafted, its scope was limited to enforcing judgments rendered in a U.S. court. In this version, a judgment creditor was still required to initiate a second cause of action in the sister state, but the '48 Enforcement Act provided for summary judgment procedure for actions on sister-state judgments.[9]

The '48 Enforcement Act was amended in 1964 to streamline the process for garnering enforcement of sister-state judgments.[10] This first update of the '48 Enforcement Act, called the Revised Uniform Enforcement of Foreign Judgments Act (the '64 Enforcement Act), is currently in force in most states. Only one state has retained the language of the '48 Enforcement Act.[11] The '64 Enforcement Act permits parties to enforce a judgment of a sister state upon the mere act of filing or registering the judgment in the office of a Clerk of Court. In general, once registered, the court treats the out-of-state judgment as if it were a judgment rendered in that court. This provides a mechanism for the judgment to be enforced without further proceedings.[12] Despite the reference to "foreign judgments," the amended version clearly states that the term (and the scope of the act) refers only to a "judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state."[13] The amended version thus maintained the original purpose of helping the

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[8] Uniform Enforcement of Foreign Judgments Act (1948) [hereafter '48 Enforcement Act].

[9] Revised Uniform Enforcement of Foreign Judgments Act Prefatory Note. (1964) [hereafter '64 Enforcement Act].

[10] Virtually all fifty states and the District of Columbia have adopted a version of the '64 Enforcement Act. *See* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uefja.asp (last visited Jan. 11, 2008).

[11] Kathleen Patchel, Study Report on Possible Amendment of the Uniform Foreign Money-Judgments Recognition Act (2003) [hereafter NCCUSL Study Report].

[12] '64 Enforcement Act, *supra* note 8, § 2.

[13] *Id.* § 1.

fifty states adopt a uniform standard for implementing the Full Faith and Credit Clause of the U.S. Constitution.[14]

The Full Faith and Credit Clause of the Constitution, of course, does not impose any similar duty for states to recognize or enforce judgments rendered in courts of foreign nations. The next section addresses foreign country judgments and describes the evolution of U.S. law regarding the domestic recognition of these judgments.

II. U.S. RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY JUDGMENTS AND THE CONCEPT OF COMITY

There has never been a federal statute describing the proper method for enforcing a judgment rendered in court of a foreign nation.[15] Courts originally relied on the principles of common law when faced with the task of determining whether such a judgment should be recognized.[16] They also used the text of the Full Faith and Credit Clause — which although not directly applicable to the judgments of other nations, has certainly influenced the development of U. S. recognition practice — as guidance.[17]

A. Development of the Recognition and Enforcement Doctrines

The seminal case regarding the recognition and enforcement of a foreign country money judgment ("FMJ") is *Hilton v. Guyot*.[18] In this case, the United States Supreme Court held:

> No sovereign is bound... to execute within his dominions a judgment rendered by the tribunals of another State; and if execution be sought... the tribunal in which the suit is brought, [is free] to give effect to it or not, as may be found just and equitable. The general comity, utility, and convenience of nations have, however, established a usage among most civilized states, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in

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[14] *See id.* Prefatory Note (1964) ("It provides the enacting state with a speedy and economical method of doing that which it is required to do by the Constitution of the United States.").

[15] David Epstein & Jeffrey L. Snyder, *International Litigation: A guide to Jurisdiction, Practice, and Strategy*, 11.09 (2d ed. 1996).

[16] *See generally* Robert B. von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 VA. J. INT'L L. 401 (1977).

[17] Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44, 45-46 (1962).

[18] 159 U.S. 133 (1895).

different countries.[19]

The Court also defined the concept of comity:

> 'Comity' in the legal sense, is 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.[20]

Although the overwhelming majority of courts in the country agree that the doctrine of comity governs the recognition of foreign judicial acts, the application of that doctrine has been a source of confusion.[21] Comity is a nebulous concept, and *Hilton* holds that enforcement is discretionary.[22] Discretionary enforcement of a nebulous doctrine has invited a multitude of differing standards for enforcement.

From the beginning, the *Hilton* decision did little to help litigants understand the extent to which comity requires the recognition and enforcement of a judgment rendered in a foreign nation. The problem escalated when the enforcement shifted from federal to state jurisdiction. At the time of *Hilton*, the general understanding was that recognition of foreign judgments was a matter of federal jurisdiction. However, a few years later, the state courts began to claim recognition of foreign judgments in state courts to be a state law matter. Once states began to determine the enforceability of foreign judgments, a multitude of differing standards emerged.[23]

By 1926, beginning with the New York case *Johnston v. Compagnie Generale Transatlantique*,[24] the states began to determine the enforceability of judgments rendered in a foreign court based on state common law.[25] In *Johnson*, the trial court, relying on the *Hilton* reciprocity rule, had refused to allow recognition and enforcement of a French judgment because, at the time, France did not recognize judgments rendered in the United States. The plaintiff appealed, claiming that the New York common law as established

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[19] *Id.* at 166.

[20] *Id.* at 163-64.

[21] R. Doak Bishop & Susan Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW. 425 (1982).

[22] Harold Meir, *Extraterritorial Jurisdiction at the Crossroads: The Intersection Between Public and Private International Law*, 76 AM. J. INTL. L. 280, 281 (1982).

[23] Saad Gul, *Old Rules for a New World? The Constitutional Underpinnings of U.S. Foreign Judgment Enforcement Doctrine*, 5 APPALACHIAN J.L. 67, 79 (2006).

[24] 242 N.Y. 381 (1926).

[25] *See generally* Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381 (1926).

in *Dunstan v. Higgins*[26] should control. According to *Dunstan*, a conclusive foreign judgment "can be impeached only by proof that the court in which it was rendered had no jurisdiction of the subject matter of the action or of the person of the defendant, or that it was procured by means of fraud."[27] In reversing the trial court's decision, the Court of Appeals held that *Hilton* was not applicable to enforcement procedures initiated in New York State Courts, stating:

> [P]rivate rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done... The principles of comity should give conclusiveness to such a judgment.[28]

Apparently no longer bound by *Hilton*, other states followed the lead of New York. Each state began looking to its own common law in determining whether to enforce a judgment from a foreign nation.[29] With fifty states writing on a blank slate and with no statute to guide them, each state developed its own unique method for enforcing foreign country judgments.

Despite the disjointed procedures for enforcement, the United States is generally considered one of the most receptive nations in recognizing and enforcing Foreign Money Judgments (FMJs).[30] Many foreign nations, however, were still reluctant to recognize or enforce U.S. judgments abroad.[31] In response to this perceived imbalance, many states began to reintroduce a reciprocity requirement.[32] Although critics felt that a

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[26] 138 N.Y. 70 (1893).

[27] *Id.* at 74.

[28] Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 387, 388 (1926).

[29] *See* Richard H. M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think It Needs Repairing*, 5 J. INT'L LEGAL STUD. 1, 48-56 (Winter, 1999).

[30] *E.g.,* Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention Be Stalled?*, 52 DEPAUL L. REV. 319, 321 (2002) *and* ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 259 (Charles Platto & William G. Horton eds., 2d ed., London 1993). *But cf.* Matthew H. Adler, *If we build it, will they come? - the need for a multilateral convention on the recognition and enforcement of civil monetary judgments.* LAW AND POLICY IN INTERNATIONAL BUSINESS Vol. 26; No. 1; Pg. 79 (Sept. 26, 1994) ("Although there are many scholarly works that discuss the perceived problems litigants face in seeking recognition and enforcement of U.S. judgments, this perception currently is not supported by empirical data.").

[31] Adler, *supra* note 29 ("There is no catalogue of the actual experiences of U.S. litigants seeking enforcement abroad.").

[32] For a thorough review of the state and federal courts' treatment of the reciprocity requirement see, Richard H. M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think It Needs Repairing*, 5 J. INT'L LEGAL STUD. 1 (Winter, 1999).

reciprocation requirement would induce foreign nations to increase their recognition of U.S. judgments, some critics believed it to be a step backward.[33]

Those critics felt that recognition of FMJs was paramount to U.S. economic success.[34] Any threat to a private party's ability to collect a foreign debt in the U.S. could seriously impede U.S. participation in the global market. The critics believed the requirement of reciprocity would induce retaliation rather than cooperation.[35] The critics worried that foreign companies might refuse to do business with the United States, because foreign companies also feared they would not be able to collect the debts owed to them.[36] Accordingly, U.S. courts began either to abandon the reciprocity requirement, [37] or to use it as merely one factor in determining whether to enforce a judgment rendered in a foreign country.[38] This, coupled with the already disjointed enforcement among the states, signaled unquestionable need for uniformity.

B. Early Attempts to Develop Uniform State Law

In an effort to codify the common law, to unify the procedures for enforcing foreign judgments across the states, and to promote enforcement of FMJs in the United States, the NCCUSL drafted the Uniform Foreign Money-Judgments Recognition Act (UFMJRA) of 1962 (the '62 Recognition Act). This Act focused on the recognition of FMJs. To date, thirty-two states have adopted some form of the '62 Recognition Act.[39]

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[33] *See, e.g.*, Willis L. M. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783, 791-92 (1950); Kurt H. Nadelmann, *Reprisals Against American Judgments*?, 65 Harv. L. Rev. 1184 (1952).

[34] *See* Antonio F. Prez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 BERKELEY J. INT'L L. 44, 62 (2001).

[35] *See* Arthur Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical Critical Analysis*, 16 LA L. REV. 465, 482 (1956) ("[T]he insistence on reciprocity serves only to mislead the forum by diverting its attention from the real question, that is, the question of whether the judgment shows that the particular national had become the victim of serious misjustice."); Maloy & Desamparados *supra* note 29, at note 199.

[36] *Id.* ("Thus the motive of self-interest replaced the motive of doing justice…")

[37] Direction Der Disconto-Gesellschaft v. United States Steel Corp., 300 F. 741, 747 (D.N.Y. 1924) ("Whatever may be thought of [*Hilton*], the court certainly did not mean to hold that an American court was to recognize no obligations or duties arising elsewhere until it appeared that the sovereign of the locus reciprocally recognized similar obligations existing here.").

[38] *E.g.*, Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 387 (1926). (Comity "therefore, rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment.").

[39] Uniform Law Commissioners, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufmjra.asp (last visited Jan. 11, 2008).

The basic provision in the '62 Recognition Act require a court to recognize a final judgment of a foreign court unless decision the judgment falls within one of the listed grounds for non-recognition. The '62 Recognition Act mandates non-recognition of judgments rendered under a system that fails to provide impartial tribunals or procedures compatible with the requirements of due process of law. In addition, judgments rendered by a court lacking either subject matter jurisdiction or jurisdiction over the defendant shall "neither be recognized nor enforced."[40]

In addition to instances where courts must not recognize a FMJ, the '62 Recognition Act grants permissive refusal to recognize judgments where (1) the defendant in the proceedings in the foreign court did not receive proper notice; (2) the judgment was obtained by fraud; (3) the cause of action on which the judgment is based is repugnant to the public policy of the enforcing 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 other than by proceedings in that court; or (6) when jurisdiction was based only on personal service, the foreign court was a seriously inconvenient forum for the trial.[41] If the FMJ falls within one of these six enumerated categories, '62 Recognition Act permits but does not require courts to refuse recognition.

Notwithstanding these grounds for permissive and mandated non-recognition, the '62 Act was generally intended to expand recognition for FMJs rather than restrict their recognition. Thus, courts are free to give a FMJ greater effect than the '62 Recognition Act enumerates.[42] Courts are also free to consider foreign country judgments relating to subject matter outside the scope of the '62 Recognition Act (for example, injunctions and other non-monetary judgments).[43]

Courts have struggled with the scope of the '62 Recognition Act because its language is confusing and ambiguous. First, the '62 Recognition Act references the 1948 version of the Enforcement Act, yet the 48' Enforcement Act's scope was limited to enforcing domestic, sister-state judgments only. Second, while the Enforcement Act was completely rewritten in 1964, the '62 Recognition Act references the procedures of the defunct '48 Enforcement Act. Moreover, authors and practitioners often

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[40] This is stated as an adoption of the rules established by *Hilton v. Guyot*, 159 U.S. 113, 205 (1895).

[41] Uniform Foreign Money Judgments Recognition Act § 7 (1962) [hereafter '62 Recognition Act].

[42] Unless the judgment is rendered unenforceable, and non-recognition is mandated by the statute. *See infra*.

[43] '62 Recognition Act, *supra* note 40.

mistakenly concluded that the '62 Recognition Act references the procedures of the '64 Enforcement Act, which is an impossibility because the former was created two years prior to the latter.[44] These issues have created several layers of non-uniform state law language, implementation, and application in recognizing and enforcing FMJs.

III. STATE PROCEDURES FOR RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY JUDGMENTS

Although most states have adopted some form of the '62 Recognition Act, the laws are still not *uniform*.[45] The differences in the versions of the "uniform" act adopted by the various states create significant variances in FMJs recognition and enforcement procedures. Some states that adopted the '62 Recognition Act chose to adopt only those portions that mirrored their already established common law. It appears that others adopted the language act in its entirety, but the state courts continue to rule on enforcement and recognition procedures as they had previously done. To date, state adoption of the Uniform Acts has not unified state court proceedings..[46]

A. The '62 Recognition Act's Procedural Ambiguities

The Title of the '62 Recognition Act (Uniform Foreign Money-Judgments Recognition Act) and its text ("This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it."[47]) appear to indicate that the main purpose of the '62 Recognition Act is unification of the law among the states. In actuality, this was not case. When contemplating the '62 Recognition Act, the drafters were not primarily concerned with unifying which FMJs would be recognized. Nor were they primarily concerned with unifying the procedures for recognizing and enforcing FMJs. Instead, the purpose of the '62 Recognition Act was to facilitate international business by recognizing money judgments obtained in other nations.

The NCCUSSL drafters knew that some foreign courts refused to

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[44] *See, e.g.,* Bishop & Burnette, *supra* note 20.

[45] Adler, *supra* note 29, ("[T]here is at least an appearance, viewed from the perspective of a non-U.S. court, of fifty-one separate 'United States policies', on the enforcement of foreign judgments.").

[46] Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 636 (2000) ("[I]t is virtually impossible to explain to French or Dutch or Japanese lawyers that a judgment originating in their country may be enforceable in New York but not in New Jersey, in Oklahoma but not in Arkansas. That is, however, the case.").

[47] '62 Recognition Act, *supra* note 40, § 8.

recognize judgments rendered in the United States because those courts were not satisfied that their judgments would be recognized in the United States.[48] The idea behind the '62 Recognition Act was to provide statutory proof of reciprocity.[49] Since the sole impetus for the Act was to encourage and facilitate recognition of U.S. judgments abroad, the language merely codified the common law. The drafters did not bother to significantly change or unify it.[50] Consequently, the procedures for unification of enforcement and recognition that the NCCUSSL adopted were ultimately skeletal, at best.[51]

Given the primary purpose of the '62 Recognition Act, it is not surprising that the text is very short and contains very few comments. As a result, the final version of the '62 Recognition Act specifies *substantive* formulas for recognition (and non-recognition) of FMJs , but gives little guidance regarding the *procedures* for domestic recognition and enforcement of those judgments. As adopted, the '62 Recognition Act merely mentions the procedures in passing. In two cryptic and conflicting sentences, the prefatory notes to the '62 Recognition Act first purport not to prescribe a uniform enforcement procedure. In the next paragraph, however, the notes state that a FMJ entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state which is entitled to full faith and credit.[52] This ambiguous and confusing language gave little guidance to the states.

To further the confusion, section three of the '62 Recognition Act states, "The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." This appears to confirm that the procedures for enforcing a foreign country money judgment should mirror the 1948 procedures for enforcing a sister-state judgment (enforcement upon summary judgment action).[53]

Since the '62 Recognition Act refers to the summary judgment action for enforcement, and does not refer to the '64 Enforcement Act's registration procedure, it is unclear whether the states can or must use this procedure as a

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[48] '62 Recognition Act, *supra* note 40, Prefatory Note.

[49] *Id.*

[50] *Id.*

[51] NCCUSL Study Report, *supra* note 10, ("The Act takes a "bare-bones" approach to its subject matter.").

[52] *Id.*

[53] *Compare* '62 Recognition Act, *supra* note 40, § 3 ("The method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 in a state having enacted that Act.") *with* NCCUSL Study Report, *supra*, note 10 ("The sentence and comment thus suggest that the procedure available for enforcement of judgments recognized under the Act is the same as that available in the forum state for sister-state judgments, including the Enforcement Act, if it is available.").

means to enforce FMJs. Unfortunately, many states that adopted the '62 Recognition Act simply referenced the state code section for enforcement procedures. When those states amended their codes to allow for sister-state recognition via registration ('64 Enforcement Act), this new procedure was incorporated by reference into the FMJ recognition statutes. It is unclear whether the state legislatures intended for the registration procedures to be used in this fashion. Indeed, some states amended their FMJ Recognition Acts to prevent recognition upon registration.[54]

B. State Implementation of the '62 Recognition Act Exacerbates the Procedural Differences Among the States

As noted earlier, many states that adopted the '62 Recognition Act have eliminated, modified, and/or supplemented the language. Since the '62 Recognition Act did not directly address enforcement procedures, states have varied significantly in their approach to recognition and enforcement. Some states allow for recognition of FMJs via the sister-state registration process of the '64 Enforcement Act. Others require a domestic action to enforce FMJs. If both recognition and enforcement of FMJs are possible by merely filing in the local court, then a party could potentially have its FMJ domestically enforced without having to initiate any separate U.S. procedure at all. This creates the potential problem that no U.S. court will review the FMJ to determine if it is eligible for enforcement unless the party against whom the judgment is being enforced challenges the enforcement.

1. Recognition and Enforcement via Registration; Separate Action Not Required.

The New Jersey code recites the enforcement provision of the '62 Recognition Act verbatim. It then includes explicit language mirroring the 1964 version of the Uniform Enforcement of Judgments Act:

> A copy of any foreign judgment authenticated in accordance with an act of Congress or the statutes of this State may be filed in the office of the Clerk of the Superior Court of this State. The clerk shall treat the foreign judgment in the same manner as a judgment of the Superior Court of this State. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a Superior Court of this State and may be enforced in the same manner.[55]

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[54] *E.g.*, Cal. Civ. Proc.§ 1713.3 (West 2007).

[55] N.J. Stat. § 2A:49A-27 (2007).

When this statute was challenged, the Appellate Division of the New Jersey Superior Court held that the statute permitted the recognition and enforcement of a monetary judgment issued by courts in foreign nations by filing the judgment with the Clerk of the Superior Court. Once filed, a foreign judgment would then be enforceable in the State of New Jersey "without a prior determination by the Superior Court recognizing those judgments, [and] even without prior notice and the opportunity to be heard."[56] The court noted, however, that this ruling applied only when the original judgment was rendered from a nation whose procedures adhered to basic principles of due process.[57] The court noted that the constitutionality of the registration system may be questioned if the judgment filed was rendered in a nation that did not adhere to the basic principles of due process.[58]

Similarly, in Illinois, a party may register an authenticated copy of a FMJ with the clerk of the court. Upon filing, the court must treat the FMJ in the same manner as a judgment of the circuit court of any other county of the state. The judgment is subject to the same procedures as a domestic judgment.[59] Although both New Jersey and Illinois permit the party seeking enforcement of a foreign country money judgment to initiate an action in the domestic court, neither state requires it.[60]

2. Recognition and Enforcement via Mandatory Separate Action.

Some states, such as California and New York, have more formalized recognition and enforcement procedures. For instance, California has codified a version of the '62 Recognition Act in its civil code.[61] However, the language of California's code differs from the '62 Recognition Act with respect to enforcement. It expressly rejects the possibility of recognition upon filing or registration. The text of the code states, "The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit, except that it may not be enforced [by registering the judgment with the court]."[62]

States that do not allow recognition of FMJs upon registration require the party seeking recognition to initiate a suit in the domestic court. The process of filing for recognition is more cumbersome. Once the domestic court finds the FMJ enforceable, it renders its own domestic judgment with

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[56] Enron Exploration & Prod. BV v. Clapp, 378 N.J. Super. 8, 15-16, 17 (App. Div. 2005).

[57] *Id.* at 19

[58] *Id*. *See also* due process discussion, *infra* Part V for further analysis.

[59] § 735 ILCS 5/12-656 (West 2006)

[60] *See* § 735 ILCS 5/12-656 and NY CLS CPLR § 5406 (2007).

[61] Cal. Code Civ. Proc 1713 *et seq*.

[62] Cal. Code Civ. Proc 1713.3.

respect to the dispute. It is this domestic judgment, not the original FMJ that is enforceable. As such, the new domestic judgment is then enforceable upon its filing with any court within that state or elsewhere in the United States. [63]

States that require a domestic action differ in their views regarding the limitations on exercising personal jurisdiction over the party opposing recognition of the FMJ. In addition, extraterritorial service of process must comply with the state long arm statutes. For example, California's enforcement statute requires a judgment creditor to follow certain formalities in notifying a defendant of the proceeding to enforce the FMJ. If the plaintiff does not follow these formalities, the California court will refuse to enforce the judgment, although the defendant has property located within the state.[64]

These notice requirements are different from the notice requirements for enforcement of a sister-state judgment. A party may enforce a sister-state judgment by complying with a streamlined registration process.[65] Since the party seeking enforcement of a FMJ must initiate a court proceeding,[66] service of process must comply with the statutory requirements, including service of the summons.[67]

New York also requires separate domestic actions in order to recognize FMJs. However, its procedure is different from California's procedure. The New York Code states, "[an eligible foreign money judgment] is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim, or affirmative defense."[68] Notably missing from the statute is any mention of full faith and credit or any discussion of a registration procedure.

The Supreme Court of New York, Suffolk County has interpreted this silence to imply that merely registering a foreign country money judgment is insufficient to comply with the requirements of the code. In *Biel v. Boehm*,[69] the court held that the sister-state full faith and credit enforcement statute "does not apply to foreign country judgments, whose status is controlled by [the state version of the '62 Recognition Act]. Therefore, New York State discriminates against the foreign country judgments and places a more

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[63] Hamilton v. Superior Court, 37 Cal. App. 3d 418, 423 (1974).

[64] *See, e.g.* Renoir v. Redstar, 123 Cal. App. 4th 1145, 1152 (2004) (holding that proper service according to California's long arm statute is required for initiating an enforcement procedure, and knowledge of the procedure would not substitute for proper service.).

[65] Cal Code Civ. Proc. §1710.10 et seq. (West 2006).

[66] Cal Code Civ. Proc. §1713.3 (Deering 2006). '62 Recognition Act, *supra* note 40, Prefatory Note.

[67] Renior v. Redstar Corporation, 123 Cal. App. 4th 1145, 1148 (2004).

[68] NY CLS CPLR § 5303 (2006).

[69] 406 N.Y.S. 2d. 231 (1978).

substantive burden upon the plaintiff, whether a New York resident or a foreigner, in attempting to enforce his judgment."[70]

The states' separate action requirements differ not only in their procedures, but also in their courts' understanding of how the procedures interrelate with other statutory and constitutional limitations. For instance, contrary to the holdings in California,[71] New York case law appears not to require that the court hearing the enforcement procedure have personal jurisdiction over the defendant.[72] This is another opportunity for the states to diverge, and indeed, they have.[73]

IV. CONFLICTING VIEWS OF THE DUE PROCESS IMPLICATIONS ASSOCIATED WITH RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY JUDGMENTS

A court's exercise of personal jurisdiction includes properly serving the defendant with notice of the proceeding. Those states that require the initiation of a domestic proceeding to recognize and to enforce a foreign money judgment require that the notice comport with both constitutional and statutory rules. Those states that merely require filing the judgment, without initiating the proceeding are not so restrained. Although notice is also required for sister-state recognition, the notice requirements of these filing may not be as stringent as the notice requirements for initiating an action.[74] States differ in their views regarding whether these notice requirements, and jurisdictional rules comport with the due process requirements and whether due process is implicated at all.

A. Due Process in the Domestic Action, Implicated or Not?

If a state requires the initiation of a separate, domestic action in order to recognize a judgment, then it should follow that the action may not proceed

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[70] *Id.* at 233.

[71] Society of Lloyd's v Byrens 2003 U.S. Dist LEXIS 26719 at *13-*14 (2003, SD Cal).

[72] *See* Lenchyshyn v. Pelko Elec., Inc., 281 A.D.2d 42, 47 (2001) ("a party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts.").

[73] Although, since California allows for Quasi in rem jurisdiction so long as the service of summons satisfies the statutory requirements, this difference may be in name only. *See infra* Part V for discussion of due process issues associated with quasi in rem jurisdiction.

[74] California notice requirements are for service of summons and notice of entry of judgment are identical. (Code Civ. Proc., § 1710.30, subd. (a).). However, in Illinois, the judgment creditor is merely required to file an affidavit with the clerk listing the last known address of the judgment debtor. It is the clerk's responsibility to mail the notice to the judgment debtor. § 735 ILCS 5/12-652-3 (West 2006).

unless the court has personal jurisdiction over the parties. Our case law indicates that any court's exercise of personal jurisdiction must comport with constitutional due process standards expressed in *International Shoe Co. v Washington.*[75] In *International Shoe,* the United States Supreme Court held that due process requires that a court may exercise personal jurisdiction over a defendant only if that defendant has had "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[76] Later, the United States Supreme Court held that a court must not exercise its jurisdiction based solely on its power over a party's property (in rem or quasi in rem jurisdiction). In *Shaffer v. Heitner*,[77] the Court held, "[I]n order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing. The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*."[78]

The United States Supreme Court has never held that the due process standards for the exercise of personal jurisdiction over a party in an action seeking recognition of a FMJ are less than the standards for initiating a claim. However, in *Shaffer*, the Court noted that since the full faith and credit clause makes sister-state judgments enforceable in all other states, personal jurisdiction is not required for the enforcement of a domestic judgment rendered in another state. The Court addressed the constitutional due process constraints by stating, "Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter."[79] This footnote implies one of two things: either the operation of the full faith and credit clause eliminates the due process requirement for the subsequent action to enforce domestic judgments across state lines, or that the judgment rendered by a competent jurisdiction, combined with the in rem jurisdiction of the court where the enforcement of the judgment is sought, comports with the fundamental fairness requirements of due process. Although the basis of the reasoning behind the Court's statement is ambiguous, it is clear that, at least for domestic judgments, a party seeking enforcement of a judgment may do so in any state where the judgment

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[75] 326 U.S. 310 (1945).

[76] *Id.* at 316.

[77] 433 U.S. 186 (1977).

[78] *Id* at 207.

[79] Shaffer v. Heitner, 433 U.S. 186, at 210, n 36.

debtor's property is located. What is less clear is whether the term "court of competent jurisdiction" applies only to U.S. courts or if it includes foreign courts as well.

Courts that have addressed this issue with respect to FMJ recognition and enforcement have extended the *Shaffer* footnote to allow for FMJ enforcement without requiring *International Shoe's* minimum contacts. In practice, though, these states use a different rationale.

The California legislature identifies the exercise of personal jurisdiction over a judgment creditor in a FMJ recognition action based solely on the presence of property in the state as "quasi in rem jurisdiction." Consequently, California state courts recognize that the exercise of jurisdiction must comport with due process.[80] The extent of the requirements of due process in an action to enforce a FMJ in California was clarified in *Society of Lloyd's v. Byrens*.[81] In that case, judgment creditor plaintiffs sought recognition and enforcement of a FMJ in California because the judgment debtor has assets located there. Except for the presence of the property, judgment debtor defendants had no other contact with California. Defendants argued that according to *Shaffer v. Heitner*[82] a state's exercise of personal jurisdiction based solely on property, without minimum contacts with the forum state, violates due process.[83]

In rejecting this contention, the district court distinguished between exercising jurisdiction for the purposes of enforcing a judgment and exercising jurisdiction over the original proceeding. The Court held, "If the judgment is rendered in a forum that comports with the due process standards... allowing jurisdiction in another forum to enforce the judgment remains within the parameters of due process."[84] Essentially, the court held that the due process and fairness issues in exercising jurisdiction arise during the original court proceeding, not court proceedings that enforce a properly adjudicated judgment.

In concluding that the due process constraints of *International Shoe* apply only to the exercise of jurisdiction in the original forum, the Court referred to the Restatement (Second) of Conflict of laws, which states, "The due process requirements are not aimed at helping a defendant escape enforcement of a judgment if that defendant, for example, removes the subject property to a forum that does not have personal jurisdiction over the

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[80] Society of Lloyd's v. Byrens, 2003 U.S. Dist. LEXIS 26719 at *13, (S.D. Cal. May 29, 2003).

[81] 2003 U.S. Dist. LEXIS 26719 (S.D. Cal. May 29, 2003).

[82] 433 U.S. 186, (1977).

[83] *See* Society of Lloyd's v. Byrens, 2003 U.S. Dist. LEXIS 26719 at *11-*12 .

[84] *Id.* at *14.

defendant."[85] The Court noted that the United States Supreme Court articulated these principles in *Shaffer*.[86]

The defendant also attempted to limit the use of quasi in rem jurisdiction to enforcement of domestic judgments rendered in sister states, and not enforcement of FMJs. The court quickly rejected this argument, stating that nothing in the previous case law suggests this limit.[87] As such, so long as the rendering court was of competent jurisdiction, California's exercise of quasi in rem jurisdiction in a proceeding to enforce FMJs does not offend due process.[88]

The Court essentially extended the principles of the *Shaffer* footnote to FMJs. It justified its ruling by stating, "Full faith and credit incorporates the same principles as comity, which allows for recognition of foreign courts as courts of competent jurisdiction."[89] Essentially the Court held that the due process and fairness issues in a court's exercise of jurisdiction arise primarily during court proceedings that adjudicate the case, not court proceedings that enforce a properly adjudicated judgment.

New York, which also requires an action in order to have a FMJ enforced locally, approaches the due process issue in a different manner. Instead of holding that the court is exercising quasi in rem jurisdiction over a judgment debtor with assets in the state, courts in New York merely hold that the judgment debtor need not be subject to personal jurisdiction at all.[90]

In one case, the Appellate Division of the New York Supreme Court, Fourth Division held a FMJ could be recognized even without proof that the judgment debtor held property in the state.[91] The court stated, "[A]lthough defendants assert that they currently have no assets in New York, that assertion has no relation to their jurisdictional objection."[92] In addition, the

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[85] Restatement (Second) of Conflict of Laws § 66, Comment a.I.

[86] Society of Lloyd's v. Byrens, 2003 U.S. Dist. LEXIS 26719 at *13-*14 ("Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter." quoting Shaffer, 433 U.S. at 210 n.36).

[87] *Id.* at *14.

[88] *Id.* at *14 - *15.

[89] *Id.* at *15.

[90] Lenchyshyn v. Pelko Elec., Inc., 281 AD2d 42, 49 (2001) ("Considerations of logic, fairness, and practicality dictate that a judgment creditor be permitted to obtain recognition and enforcement of a foreign country money judgment without any showing that the judgment debtor is subject to personal jurisdiction in New York… we conclude that it is not essential to recognition and enforcement of a foreign country money judgment that the judgment debtor be subject to the personal jurisdiction of the New York courts.").

[91] *Id.* at 50.

[92] *Id.*

court stated, "even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment... and thereby should have the opportunity to pursue all such enforcement steps in futuro, whenever it might appear that defendants are maintaining assets in New York...."[93]

The court justified its holding by referencing the *Shaffer* footnote and noting that there is no statutory requirement of personal jurisdiction in recognizing and enforcing FMJs. Perhaps because the court held that personal jurisdiction over the judgment debtor is not required, the court did not address the issue of whether service and the exercise of personal jurisdiction must comply with New York's long arm statute.

Oddly absent from the New York decision is any discussion of the Constitutional constraints of due process, or the statutory requirements of the New York long arm statute for service of process. Since our Constitution guarantees the protection of due process for all people subject to all judicial procedures in the United States, it would seem that there would be some constitutional limitation to enforcement procedures. This is especially so when the state recognition of FMJs is initiated through a separate state action.

B. Does Recognition by Registration of a Foreign Country Judgment Violate Due Process?

A third approach to the due process requirements is taken by those states that do not require filing a separate action for the recognition of FMJs. In those states, neither personal jurisdiction nor prior notice of the filing is required. States such as Illinois and New Jersey, which do not require a separate action, in addressing the due process issue, have concluded that the filing of a FMJ for recognition and enforcement without initiating an action does not offend the principles of due process. *Enron Exploration & Prod. BV v. Clapp* exemplified this approach. There, a New Jersey appellate court stated, "Because the United States Constitution makes no specific provision for the enforcement of judgments of foreign nations, recognition and enforcement of such judgments has been considered a matter of comity." The court held that recognition of the FMJ by filing it instead of initiating an action "without prior notice and the opportunity to be heard did not violate defendants' right to due process of law where, as here, the judgments were entered by a court in a nation that adheres to fundamental requirements of due process."[94]

Texas, however, came to a different conclusion. As originally written,

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[93] *Id.*

[94] Enron Exploration & Prod. BV v. Clapp, 378 N.J. Super. 8, 20 (2005).

its version of the '62 Act included the provision for enforcement upon registration. The constitutionality of this method of enforcement was challenged in *Plastics Engineering, Inc. v. Diamond Plastics Corp*.[95] In holding that enforcement of FMJs in the same manner as sister-state judgments violates the constitutional due process requirements, the appellate court stated:

> [T]he framers in drawing the Recognition Act, and the Legislature in adopting the Recognition Act, recognized that recognition of the foreign country judgment was not automatic and that serious questions might exist as to whether it should be recognized. Those questions could only be resolved by court decision. However, nowhere in the Recognition Act itself is there prescribed any provision for notice of the attempt at recognition or mechanism for hearing and disposition of any disputes or contests as to whether the judgment deserved recognition. Therefore, the Recognition Act itself is clearly deficient in meeting due process constitutional requirements.[96]

Soon after this holding, the Texas legislature amended the FMJ enforcement statute to provide procedures for a judgment creditor to assert non-recognition grounds in response to notice of filing (as opposed to notice of an action to enforce).[97]

In a subsequent case, *Don Docksteader Motors, Ltd. v. Patal Enterprises, Ltd.*,[98] a judgment creditor filed an action to enforce a FMJ. The judgment debtor challenged the constitutionality of the amended statute in the Texas Supreme Court.[99] In its overview, the court reiterated that the Recognition Act provided that a foreign country judgment was entitled to the same enforceability that is accorded to judgments of sister states. The court explained that "[a] judgment of a sister state is enforceable by two means and thus... a foreign country money judgment is enforceable by the same two means. One such means is the statutory 'short-cut' set forth in the Enforcement Act...."[100]

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[95] 764 S.W.2d 924 (Tex. App. 1989).

[96] Plastics Engineering, Inc. v. Diamond Plastics Corp. 764 S.W.2d 924, 926 (Tex. App. 1989) (disapproved on other grounds).

[97] Tex. Civ. Prac. & Rem. Code Ann. §§ 36.0041-.0044 (although the procedures expressed do not create any new procedural protections; they merely explain the process. Neither do they provide any additional notice protections nor any substantive relief for a judgment debtor who would not otherwise be subject to personal jurisdiction in Texas. In essence, they are a Band-Aid to a system with questionable constitutional compliance.).

[98] 794 S.W.2d 760 (1991).

[99] *Id.*

[100] *Id.* at 761.

The court then held that the Texas statute was constitutional *as applied to the circumstances of the case*. Without providing any constitutional analysis, the court held that "the Recognition Act necessarily allows for the bringing of a common-law suit and thereby allows for notice and a hearing.... [U]nder the circumstances of this case, the court of appeals erred in concluding that the Recognition Act was unconstitutional."[101] The court also discredited *Plastics Engineering* to the extent that it contradicted the current decision.[102] Because the plaintiff in this case filed an action and did not attempt to enforce the FMJ using the short-cut registration process, the court did not address the issue of the constitutionality of recognition upon registration. Thus, this holding did not address the constitutionality of the Texas registration process and was limited to the constitutionality of FMJ enforcement upon filing a separate action.

C. Summary of State Interpretation of Due Process Implications in the Enforcement Procedures

States disagree on the application of due process to the enforcement of FMJs on two levels. They differ as to whether due process applies to enforcement of FMJs in the first place, and they also differ as to the constitutional requirements of due process for FMJ enforcement. The different states have at least four different approaches to this issue:

1. California believes that parties seeking recognition of FMJs must file an action, and that the procedure is subject to constitutional constraints of due process. However, with respect to foreign judgment enforcement, California treats quasi in rem jurisdiction as comporting with the fundamental fairness requirements of due process.

2. New York, which also requires filing an action of recognition of FMJs, appears to believe that due process does not apply to these proceedings.

3. Texas requires the enforcement of a FMJ by the filing method to comport with the constitutional constraints of due process. However, it is not clear whether the constraints render the filing method unconstitutional.

4. Other states, including Illinois and New Jersey, have held that enforcement by registration (without an action on the judgment) is not subject to constitutional requirements because the Constitution does not expressly discuss FMJ recognition procedures.

California and Texas may be two of the only states that require FMJ enforcement to fulfill the constitutional requirements of due process. However, even their approach is somewhat relaxed. Texas and California

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[101] *Id.*

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

courts have loosened the requirements delineated in *International Shoe* so that exercising quasi in rem jurisdiction over judgment creditors in FMJ recognition actions fulfills the fundamental fairness requirements of due process.

Those state courts that deny any constitutional constraint on the recognition and enforcement of FMJs seem to be the most inconsistent with the purpose of the due process requirement. For if the Constitution only applies to procedures enumerated in its text, then due process would not apply to tort actions, design defect actions, contract disputes, and most all other types of claims.

Indeed, at least one court in New Jersey found the filing method to be potentially in conflict with due process beyond the requirements of jurisdiction and notice. In dicta, the *Enron*[103] court stated:

> We note that concerns about the constitutionality of the [short-form filing] of judgments from nations that do not adhere to basic principles of due process of law may be addressed by amending the [New Jersey statute] to require prior judicial approval of judgments of foreign countries.... We suggest that the Legislature consider such a change to avoid potential claims that the filing of judgments... may result in an unconstitutional taking of property without due process of law.[104]

V. DUE PROCESS CONCERNS IN THE ORIGINAL FOREIGN ACTION

Due process concerns arise not only in the U.S. procedures for enforcing the FMJ but also in determining whether the foreign entity rendered the FMJ according to U.S. notions of fundamental fairness. Under the Recognition Act, a judgment must be rendered under a *system* that uses "procedures compatible with the requirements of due process of law."[105] On its face, the Recognition Act limits the inquiry to the foreign nation's procedures as a whole, and does not account for U.S. courts' evaluations of due process in individual cases. This is the method for review envisioned in the landmark case, *Hilton v. Guyot*.[106]

In attacking a domestic enforcement or recognition action, however, some plaintiffs have argued that the United States Constitution requires that the foreign process comport with U.S.-specific requirements of fundamental

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[103] *See generally* 378 N.J. Super. 8 (2005).

[104] *Id.* at 19-20.

[105] '62 Recognition Act, *supra* note 40, § 4 (1962).

[106] Hilton v. Guyot, 159 U.S. 113 (1894) ("We are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment.").

fairness.[107] Some plaintiffs try to have the domestic court reevaluate the appropriateness of their individual foreign court process, even after the court has established the constitutionality of the statute.[108]

At least one court has implied that, if properly pled, it might entertain an argument that a foreign court failed to abide by its own basic requirements.[109] However, most courts refuse to engage in an examination of the procedures of courts that have a justice system that generally comports with our notions of fundamental fairness. In *British Midland Airways Ltd. ("BMA ") v. Int'l Travel, Inc*.,[110] the Ninth Circuit held that foreign judgments should be enforced unless they "are the result of outrageous departures from our own notions of civilized jurisprudence."[111] The Seventh Circuit came to a similar conclusion, holding that the state's requirement of a system to comport with "due process" refers only "to a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers."[112] In rejecting the plaintiff's case-specific due process claim, the court held, "The statute requires only that the foreign procedure be compatible with the requirements of due process of law, and we have interpreted this to mean that the foreign procedures are 'fundamentally fair' and do not offend against 'basic fairness.'"[113]

California courts have similarly held that due process requirements in the foreign action should focus on the system that rendered the judgment, and that U.S. courts should not second guess the proceedings of forum courts, so long as the judgment was rendered in a nation whose court systems do not offend basic notions of fairness.[114] In *Society of Lloyd's v. Byrens*,[115] the Ninth Circuit District Court rejected the defendant's argument that the court should not recognize an English judgment because the English court erred in finding personal jurisdiction. In refusing to consider the specific facts regarding the English court's exercise of personal jurisdiction over the defendant, the court noted that the California version of the

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[107] British Midland Airways Ltd. ("BMA ") v. Int'l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974).

[108] *Id.*

[109] *See* Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (after finding that a foreign system need not adopt "every jot and title of American due process", Judge Posner nonetheless engaged in a case-specific evaluation of whether the specific foreign action conformed with the international concept of due process).

[110] 497 F.2d 869 (9th Cir. 1974).

[111] *Id.* at 871.

[112] *Id.*

[113] Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).

[114] *See* Society of Lloyd's v. Byrens at *24, 2003 U.S. Dist. LEXIS 26719 (S.D. Cal. May 29, 2003).

[115] 2003 U.S. Dist. LEXIS 26719 (S.D. Cal. May 29, 2003).

Recognition Act requires only that the *system* in which the FMJ was entered be "compatible with the requirements of due process of law."[116] The court reminded the parties that the United States inherited a majority of its judicial system from the United Kingdom and further stated that the "origins of due process of law are located in English law." As such, the "United States courts are hardly in a position to call the Queen's Bench a kangaroo court."[117]

Practically speaking, a court will deny recognition only in the extraordinary circumstance where the entire foreign system lacks adequate due process protections.[118] Indeed, there have been few cases denying recognition of FMJs based on the argument that the judicial system failed to provide procedures compatible with due process. With the majority of the case law indicating that the domestic courts will not consider the procedures of individual cases in evaluating whether the original judgment was rendered in a system that does not comport with due process standards, it is unlikely that this rule will change. As such, this may be one of the few areas of constitutional implications arising from the enforcement of FMJs that appears to be uniform.

VI. DUE PROCESS CONCERNS IN DOMESTIC ACTIONS SEEKING DECLARATORY JUDGMENT OF NON-ENFORCEABILITY OF A FOREIGN COUNTRY JUDGMENT

Due process issues arise when a judgment debtor wants to beat the judgment creditor to the courtroom, and have a U.S. court declare a FMJ or other foreign country judgment unenforceable. The language of the Recognition Act only addresses domestic *enforcement* FMJs; it does not address the procedures for seeking declaratory judgment that a FMJ is *unenforceable*. Therefore, it is arguable that declaratory judgments of unenforceability are outside the scope of the Recognition Act. However, both the Recognition Act and the Revised UFCMJRA define the scope in terms of the FMJ itself. According to the text of those acts, if the FMJ comports with the requirements of the Act, then it is covered by the Act. It is not clear whether the scope of the Recognition Act is specifically limited to claims of enforcement and recognition or if it also includes the declaratory judgment proceedings that seek to render a FMJ unenforceable.

The application of the Recognition Act to injunctive procedures can affect how the court deals with personal jurisdiction over the parties. While

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[116] *Id.* at *24.

[117] *Id.* (internal quotations omitted).

[118] *E.g.*, Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (1995) (court refused to enforce an Iranian Judgment against the exiled Shah's sister based on the fact that she could not have expected fair treatment in any of the courts in Iran.).

enforcement proceedings may raise issues of personal jurisdiction over a judgment debtor, procedures designed to render FMJs unenforceable definitely raise issues of whether a court has personal jurisdiction over the judgment creditor. In addition, if the judgment creditor is not domiciled in the forum state, service of process as well as the exercise of personal jurisdiction must comport with the state long arm statutes as well. This adds an additional layer of non-uniformity to the already muddled FMJ issue.

Two recent cases illustrate the lack of uniformity in this area. Both cases had similar facts but reached different conclusions: a California court found personal jurisdiction while a New York court found that it lacked personal jurisdiction.

In *Yahoo! Inc. v. La Ligue Contre Le Racisme (LICRA)*,[119] defendants in the United States action were the successful litigants in a French action against Yahoo!. In that case, Yahoo! users violated French law by selling Nazi paraphernalia over the internet. LICRA sent a letter to Yahoo! at its Santa Clara headquarters, demanding that it stop selling Nazi paraphernalia over the internet.[120] LICRA then sought a court order requiring Yahoo! to stop allowing its users to sell Nazi paraphernalia on its website to users in France. The French Court issued a cease and desist order to Yahoo!. The order also imposed monetary penalties, payable to LICRA and others.[121]

In anticipation of U.S. enforcement, Yahoo! filed suit in federal court in California seeking declaratory judgment that the French order is unenforceable because it violated Yahoo!'s First Amendment rights.[122] LICRA moved to dismiss for lack of personal jurisdiction, among other things. The only connection LICRA had with California was the letter it sent to Yahoo! prior to filing the French lawsuit. A Ninth Circuit court found that LICRA was subject to California jurisdiction. It held that the trial court's exercise of personal jurisdiction over LICRA comported with the constitutional restraints of due process. In addition, since the California long arm statute allowed for the exercise of personal jurisdiction subject only to constitutional limitations, exercise of personal jurisdiction over LICRA was proper.[123]

Although the Court did not refer to the California Uniform Foreign Money-Judgments Recognition Act in its analysis of the personal jurisdiction issue, it did refer to it in determining whether the French order fell within the statute's scope.[124] Specifically, the Court stated that although

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[119] 433 F.3d 1199 (9th Cir. 2006).

[120] *Id.* at 1202.

[121] *Id.* at 1204.

[122] *Id.*

[123] *Id.* at 1205.

[124] *Id.* at 1213.

the California statute does not expressly authorize enforcement of injunctions, "neither does [it] prevent enforcement of injunctions."[125]

Unfortunately, the court focused on the fact that the French order was an injunction, not a final judgment. It did not directly address the issue of whether actions seeking declaratory judgment that a foreign country judgment be unenforceable are within the scope of the California statute. Nevertheless, it is clear that, according to the Ninth Circuit, actions seeking declaratory relief from foreign country judgments might be within the scope of California's Uniform Foreign Money-Judgments Recognition Act.

In New York, however, a state court reached the opposite conclusion on very similar facts. In *Ehrenfeld v. Mahfouz,*[126] a foreign money judgment creditor successfully thwarted a state lawsuit attempted by the foreign country judgment debtor to render the FMJ unenforceable. In this case, the U.S. plaintiff was the judgment debtor in an English Case. Like the plaintiff in *Yahoo!*, Mr. Ehrenfeld filed suit in a U.S. court seeking declaratory judgment of unenforceability of the foreign country judgment.[127] Furthermore, like the defendant in *Yahoo!*, the judgment creditor moved to dismiss the New York action for lack of personal jurisdiction. The court ruled that it lacked personal jurisdiction over the defendant because jurisdiction based on telephonic or letter communications does not comport with New York's statutory long arm requirements.[128] In its ruling, the court specifically addressed the *Yahoo!* holding, stating that there were "fundamental differences between the New York and the California long arm statutes."

These new cases place California and New York in the unusual position of having intrastate non-uniformity regarding due process requirements in foreign country enforcement procedures. California now appears to be more restrictive than New York in exercising personal jurisdiction in FMJ enforcement procedures, but less restrictive in exercising personal jurisdiction in cases seeking non-enforcement of FMJs. This is due to California's belief that enforcement of FMJs should be subject to due process, combined with the fact that the states' statutory requirements for the exercise of personal jurisdiction differ. The non-uniformity is also due to the fact that states may look to their FMJRA in establishing the process for foreign country judgment debtors seeking declaratory relief, while others will not. Again, this inconsistency adds another layer of ambiguity to the process of domestic enforcement of foreign country judgments. Despite the word "uniform" in the statutes' titles, their enforcement is anything but.

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[125] *Id.* at 1205.

[126] 2006 U.S. Dist. LEXIS 23423 S.D.N.Y. (Apr. 25, 2006).

[127] *Id.* at *6-7.

[128] *Id* at *14, *19.

VII. TWO PROPOSALS FOR UNIFICATION

After over forty years of implementation, the inconsistencies between the states in their recognition and enforcement of FMJs became difficult to ignore. The NCCUSL, the American Bar Association (ABA), and the American Law Institute (ALI) all recognized that the confusing variation among the states in their enforcement of FMJs might compel Congress to create a national standard preempting state law regarding this issue. The ALI embraced the idea of a federal statute.[129] The NCCUSL and the ABA took a different approach, opining that the enforcement of foreign judgments, whether from a sister-state or from a foreign nation, is a matter of state law, appropriately left to the jurisdiction of the state courts.[130]

A. Proposal for Uniformity Among the States; Modification of the Uniform Recognition Act

In a study report, the NCCUSL stated that the Recognition Act, while not created primarily for unification, actually did create a "considerable degree of uniformity as to the enforcement of foreign country judgments in the United States."[131] However, the NCCUSL understood that the Act's failure to address certain issues, combined with textual ambiguities, have caused a lack of uniformity in state law.[132]

In response, the NCCUSL sought to address this lack of uniformity as a primary issue and undertook to revise the Recognition Act. In July 2005, it finalized its revision of the '62 Recognition Act, and renamed it the Uniform Foreign-Country Money Judgments Recognition Act of 2005 ('05 Recognition Act). This version was also approved and adopted by the American Bar Association.

The drafters of the '05 Recognition Act intended to clarify the provisions of the '62 Recognition Act, while maintaining its basic rules and approaches.[133] The '05 Recognition Act set out the procedure for seeking recognition of a foreign-country money judgment under the Recognition Act and clarified and expanded upon the grounds for denying recognition. It also allocated the burden of proof with regard to establishing application of the Act and the grounds for denying recognition, and established a statute of

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[129] As explained in the introduction of the Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, a divided membership of the ALI endorses the concept of a federal statute.

[130] On February 13, 2006, the ABA formally approved the 2005 version of the NCCUSL Uniform Foreign-Country Money Judgments Recognition Act.

[131] NCCUSL Study Report , *supra*, note 10.

[132] Uniform Foreign-Country Money Judgments Recognition Act, Prefatory Note, (2005) [hereafter '05 Recognition Act].

[133] *See id.*

limitations for recognition actions.[134]

As noted above, the term "Foreign Money Judgment" was changed to "Foreign Country Money Judgment" in the Act's title. In addition, the terms "foreign judgment" and "foreign state" were changed to "foreign-country judgment" and "foreign country" in order to clarify that the '05 Act does not apply to recognition of sister-state judgments.[135] This is one of the fundamental clarifications in the revision. It makes clear that the '64 Enforcement Act only applies to the enforcement of sister-state judgments, and the '05 Recognition Act only applies to recognition of judgments from foreign nations. In other words, the '05 Recognition Act requires a full-blown domestic action for the recognition of a FMJ.[136] In that respect it and the '64 Act are mutually exclusive.[137]

This sweeping statement that the Enforcement Act and the Recognition Act are mutually exclusive directly conflicts with previous jurisprudence. It effectively ignores all of the state court rulings that rely upon and endorse enforcing a foreign country judgment using the method described in the state version of the '62 Enforcement Act.[138] In addition, the statements that the two Acts are mutually exclusive are located not in the text, but in the comments section. Because the comments section will probably not be adopted as part of any state statute, courts will not have notice of this intended change.

Compounding the confusion regarding the relationship between the Enforcement and Recognition Acts is the '05 Recognition Act's persistent reference to full faith and credit and sister-state judgments. Despite their awareness of this confusion, the drafters of the '05 Recognition Act included language stating that any FMJ meeting the criteria of the '05 Recognition Act is "(1) conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and (2) enforceable in the same manner and to the same extent as a judgment rendered in this state."[139] Therein lies the problem. This is the very language courts have relied on to link the Enforcement Act and the

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[134] *Id.*

[135] *Id.*, § 2, cmt 1.

[136] *Id.* § 6.

[137] *Id.* ("If a foreign money judgment is subject to full faith and credit standards, then the Enforcement Act's registration procedure is available with regard to its enforcement; if the foreign money judgment is not subject to full faith and credit standards, then the foreign money judgment may not be enforced until recognition of it has been obtained in accordance with the provisions of the Recognition Act.").

[138] *E.g.*, Guinness PLC v. Ward, 955 F.2d 875, 892-95 (4th Cir. 1992) ("[T]he two Acts, or at least relevant portions thereof, would appear to be complementary rather than mutually exclusive.").

[139] '05 Recognition Act, *supra* note 131, §7 (2005).

Recognition Act together. This is also the language that courts have used to indicate that a separate action is *not* required for the enforcement of FMJs.[140] Unless this language is removed, the chaos may never end. Even if the states quickly adopt the '05 Recognition Act, there will be a host of litigation resulting in lag time before the local courts sort out the details. In our global economy, we may not be able to afford the time.

B. Proposal for Uniformity Through Federal Legislation

1. Background and Scope of the Proposal

As foreshadowed by the Prefatory Note to the '64 Enforcement Act, which indicates that non-uniformity among the states in enforcing sister-state judgments may cost the state courts their jurisdiction to hear these cases,[141] the ALI believes the time has come for the federal government to enact legislation to deal with the enforcement of FMJs.[142] Initially, the State Department approached the ALI to help draft a federal statute that would satisfy the requirements of the Proposed Hague Convention on the Uniform

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[140] *See, e.g.*, Society of Lloyd's v. Ashenden, 233 F.3d 473, 481-482 (7th Cir. 2000):

> Any doubt [regarding the fact that a separate action is not required for recognition of a FMJ] is dispelled by *reading in tandem* the statutes governing enforcement of foreign-state and foreign-nation judgments respectively. The Illinois Enforcement of Foreign Judgments Act, which governs the enforcement in Illinois of judgments rendered in the courts of other states of the United States, as distinct from foreign nations, not only treats such judgments the same as Illinois judgments which means that no separate step of "recognition" is necessary before they can be enforced; the act also makes the foreign judgment enforceable unless the judgment debtor objects and invokes "procedures, defenses, and proceedings for reopening, vacating, or staying" the judgment. This clearly implies that separate "recognition" proceedings are not required -- an interpretation confirmed in cases from other jurisdictions that have adopted the Uniform Enforcement of Foreign Judgments Act. Redondo Construction Corp. v. United States, 157 F.3d 1060, 1065 (6th Cir. 1998); Burchett v. Roncari, 181 Conn. 125, 434 A.2d 941, 943 (Conn. 1980). The Uniform Enforcement of Foreign Money-Judgments Act, which governs judgments of courts outside the United States, makes such judgments, if enforceable at all, enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.

(emphasis added, internal citations omitted).

[141] '64 Enforcement Act, *supra* note 8, Prefatory Note ("This act offers the states a chance to achieve uniformity in a field where uniformity is highly desirable. Its enactment by the states should forestall Federal legislation in this field.").

[142] Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, introduction (Proposed Final Draft 2005) [hereafter, ALI statute].

Recognition of Foreign Judgments. When the Hague efforts failed,[143] members of the ALI believed that federal regulation was a viable solution to the problem of non-uniform enforcement of FMJs among the states.

The ALI believes that state adoption of a uniform law has not resulted in adequate uniformity. Even modifying a model statute would not solve the problem. Whereas state adoption of a model uniform law was voluntary, and did not guarantee uniformity, federal regulation would ensure the uniform enforcement of FMJs in all U.S. courts.

The ALI believes that federal legislation is the proper means to "address a national problem with a national solution."[144] The ALI envisions that the federal legislation would preempt all state law governing enforcement of FMJs, although both state and federal courts would enjoy concurrent jurisdiction over the subject matter (but a defendant may remove an action initiated in state court to federal court).[145]

In April 2005, the ALI published a Proposed Final Draft of the Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (the ALI statute). This statute, like the '05 Recognition Act, sets uniform standards for the recognition and enforcement of foreign country judgments. Unlike the '05 Recognition Act, the scope of the ALI statute encompasses some non-money judgments.[146] In addition, the ALI statute clarifies some provisions overlooked by the NCCUSL, but failed to modify one important term: "foreign judgment." In addition, it did not thoroughly address the constitutional issues associated with the proposed procedures for enforcement, nor did it review the constitutional implications of federal regulation of foreign judgments.

2. Constitutional Implications of the ALI Proposed Federal Legislation

Although foreign country judgment recognition may be considered a federal issue, the United States Supreme Court has never held that recognition of FMJs falls outside the ambit of state regulation. The Supreme Court has also never expressly indicated whether this issue is a matter of state or federal law.[147] Thus, *Johnston v. Compagnie Generale Transatlantique* is still good law.[148] In addition, although the ALI believes

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[143] After eight years of attempts to resolve fundamental disagreements, the parties to the Hague Convention ultimately could not agree on a uniform set of criteria for a court's exercise of personal jurisdiction over litigants to a claim. As such, the terms of agreements were essentially gutted, and now the convention is limited to choice of court agreements.

[144] ALI Statute, s*upra* note 141.

[145] *Id.*, introductory cmt., § 8 (a).

[146] The two proposed statutes vary in many other areas that are not the topic of this writing.

[147] Bishop & Burnette, *supra* note 20, at 429 (1982).

[148] *Id.*, at 429 (1982).

that its federal statute is constitutional, the comments come to this conclusion with little to no constitutional analysis.[149] Other commentators have come to the opposite conclusion also without concrete analysis.[150] The NCCUSL believes the recognition and enforcement is best left to the states, but the ALI is equally convinced that enforcement of foreign judgments lies squarely within the realm of federal control.[151]

Interestingly, the ALI statue does not directly address the constitutional basis for allowing the recognition and enforcement of FMJs through its registration process. As stated above, the comment regarding registration refers to 28 U.S.C. §1963, whose constitutionality was challenged in *Dichter v. Disco Corp*.[152] In that case, the judgment debtor challenged the constitutionality of an Ohio registration of a Texas (sister-state) judgment. The judgment debtor argued that since he did not reside in Ohio, and had no property there, enforcement of the sister-state judgment violated his due process rights.[153] The court noted that since registration of the judgment effectively creates a new judgment in the local court, the registration arguably extends the jurisdiction of the original forum; however, it ultimately found the defendant's argument unconvincing.[154] In rejecting constitutional due process arguments, the court held that:

> while there may well be constitutional limitations on registration of judgments under the statute, personal jurisdiction in the court of registration upon the date of registration is not one of them.... He obtained the process that was due him in the Texas action, and our lack of personal jurisdiction... is simply irrelevant."[155]

Importantly, the court based its holding on the fact that "with respect to jurisdiction requirements, [the federal registration process for recognizing and enforcing sister-state judgments is] applicable only to *original actions brought in the federal courts.*"[156] The court's holding rested on the fact that the original action occurred in a United States federal court. Extending this to justify the constitutionality of a registration process for enforcing judgments rendered in a foreign country seems contrary to the underlying basis for the holding itself.

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[149] ALI Statute, *supra* note 141, Introduction: National Law in the International Arena ("There is no constitutional problem with the proposed statute.").

[150] *E.g.* Gul, *supra* note 22, at 79 ("Simply, there are to many constitutional restraints to permit a top-down, macro-management approach to the problem.").

[151] ALI Statute, *supra* note 141, Introduction: National Law in the International Arena.

[152] 606 F. Supp. 721, 725 (S.D. OH 1984).

[153] *Id.* at 724.

[154] *Id.* at 725.

[155] *Id.*

[156] *Id.* (quoting Moore's Federal Practice para. 1.04[2] at 223 (1967)(emphasis added)).

Since the constitutionality of the streamlined registration procedure appears to be based on registering other U.S. judgments (which are presumed to have been obtained in compliance with the due process requirements), then extending this process to foreign country judgments may not provide the same protections granted by our Constitution. The number of defenses allowed a person challenging recognition or enforcement of a FMJ is much larger than number of defenses to the validity of a sister-state judgment.[157] In addition, since all recognized judgments "shall be binding" on all other U.S. courts, it appears that any state may recognize a FMJ. This approach would possibly force a state to recognize a FMJ even though the judgment creditor had no property within the state. As such, the constitutionality of the registration process will increase litigation.

VIII. CONCLUSION

A. Comparison of the Problems Raised in the Two Approaches and Analysis of Unresolved Issues

Recall that both the '64 Enforcement Act and the '62 Recognition Act referred to "foreign judgments," but the former intended to address domestic, sister-state judgments, and the latter addressed judgments from a foreign country. Because "foreign judgment" became a term of art generally used in connection with recognition and enforcement of sister-state judgments, the NCCUSL recognized and remedied this source of confusion. In the '05 version of the Recognition Act, the NCCUSL changed the term to "foreign country money judgment" in order to clarify the ambiguity.[158] However, the ALI version continued to use the terms "foreign state" and "foreign judgment" when referring to judgments rendered in foreign nations. This continued use of an alternative meaning to "foreign" unnecessarily perpetuated the ambiguity. Despite this flaw, the ALI statute effectively clarified other substantive ambiguities that the '05 Recognition Act ignored.

Domestic recognition of a FMJ by a sister state is an unsettled issue. None of the NCCLU's Uniform Acts address the effect of domestic recognition of a FMJ by a sister state. The ALI statute clarifies that only one domestic recognition action is required. Once one U.S. court decides the issue of recognition, that determination is binding on all other U.S. jurisdictions.[159]

Recall that under both versions of the NCCUSL Recognition Act, as

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[157] *See* Part II B. for a full discussion of the permitted and mandatory grounds for non-recognition.

[158] '05 Recognition Act, *supra* note 131, introductory cmt.

[159] ALI Statute, *supra* note 141, § 10, cmt. (b).

adopted by the states, FMJs rendered under a "system that does not provide impartial tribunals or procedures compatible with the *requirements of due process of law*" must be refused recognition.[160] As mentioned above, judgment creditors attempted to invoke this defense to enforcement of any FMJ where the procedure exercised by the foreign court would not have comported with U.S. due process procedures.[161] The courts, however, have consistently held that a foreign court system does not violate due process simply because its procedural rules differ from ours, and that the test is whether the procedure violates our idea of fundamental fairness.[162] Despite this, whether a foreign court system comported with "due process" continued to be a hotly litigated issue.[163] The ALI statute clarified this issue by creating mandatory non-recognition for foreign country judgments "rendered under a system that does not provide impartial tribunals or procedures compatible with *fundamental principles of fairness*."[164]

The ALI statute also clarified the process for enforcement of FMJs as well as the requirements for a domestic court's exercise of personal jurisdiction over the domestic defendant. Under the ALI statute, a party may seek enforcement of any eligible foreign country judgment by initiating a civil action.[165] If a party seeks enforcement by means of a civil action, the domestic court *must* have a basis for exercising personal jurisdiction over the defendant. However, the standards for exercising personal jurisdiction are relaxed. The ALI statute allows for the exercise of personal jurisdiction either based on the standards of *International Shoe* or based on quasi in rem jurisdiction over a judgment debtor who has assets in the state.[166]

Even so, the statute explicitly states that these are the only two means of exercising personal jurisdiction over a defendant. The ALI Reporters Comments expressly reject the notion that personal jurisdiction is not required for recognition or enforcement.[167] In addition, the ALI statute allows service of process in accordance with the applicable state long arm

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[160] *E.g.,* '05 Recognition Act, *supra* note 131, section 4(b)(1) (emphasis added).

[161] *See, e.g.*, British Midland Airways Ltd. v. International Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974).

[162] *See, e.g.*, Ingersoll Milling Machine Co. v. Granger, 833 F.2d 680, 687-88 (7th Cir. 1987).

[163] *See, e.g.*, British Midland Airways Ltd. v. International Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974); Society of Lloyd's v. Byrens 2003 U.S. Dist. LEXIS 26719 at *13-* 14, (S.D. Cal. May 29, 2003).

[164] ALI Statute, *supra* note 141, §5(a)(1)(emphasis added).

[165] *Id.*, § 9 (a).

[166] *Id.*, § 9 (b).

[167] In its comments, the Reporters specifically reject the holding of *Lenchyshyn v. Pelko Electric, Inc.*

statute, federal statute, or any treaty.[168]

If the foreign country judgment is a FMJ, and it was not obtained by default, the party seeking enforcement has another option to filing an action. Contrary to the NCCLU Recognition Act, the ALI embraces an abbreviated method for enforcing FMJs. Under the ALI statute, individuals now have two avenues to seek recognition of FMJs: registration or civil action.[169] Individuals may register the FMJ with a federal district court. If registration is successful, the FMJ becomes a judgment of the district court.[170] The registration procedure is modeled after 28 U.S.C §1963 (the procedures for registration in federal courts, judgments rendered in other federal courts) and the '64 Enforcement Act. As such, registration does not depend on personal jurisdiction of the registering court over the domestic defendant. However, registration is limited to situations where the judgment debtor has property subject to the jurisdiction of the court against which the judgment may be enforced.[171] The statute does not discuss the jurisdictional scope of registration of a FMJ by a judgment debtor.

In addition, because this registration procedure is limited to registration in the federal courts, it appears that the legislation would not preempt enforcement by registration in state courts.[172] Although the comments to the ALI statute mention the quagmire created as a result of the differing and conflicting state procedures, it did not expressly foreclose the idea of state registration of FMJs.[173]

The ALI statute appears to address the situation of enforcing foreign judgments that have been recognized or enforced in other U.S. courts, the NCCUSL, however does not. As noted above, under the ALI statute, a recognition based on registration is transformed into a judgment of that court.[174] In addition, a decision on recognition based on an action is to be binding on all other U.S. courts.[175] Since either method results in domestic judgments, they are entitled to full faith and credit in other states.

The '05 Recognition Act does not address the procedures for recognition and enforcement of a FMJ in multiple jurisdictions. As such, the following questions are left unresolved:

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168 ALI Statute, *supra* note 141, § 9 (c).

169 *Id.*, § 9 (a).

170 *Id.*

171 *Id.*, § 10, cmt. (e).

172 Although the Introduction to the ALI Statute states, "The proposed Legislation would preempt state legislation, and in particular, the Uniform Foreign Money Judgments Recognition Act (1962),",many states have been using the '64 Act to recognize both sister-state and FMJs through registration.

173 ALI Statute, *supra* note 141, §10, reporters' note 2.

174 *Id.*, §10 (a).

175 Id. § 9 (d) (iv).

1. What happens when a party seeks recognition of a FMJ by registration in state A, then wants to seek recognition in state B (which requires recognition by filing a judicial action)? Must that party then initiate suit in state B?

2. What happens if both state A and state B require recognition by filing an action? Will state B give full faith and credit to the determination made by state B? Does full faith and credit require this? Or is recognition of an FMJ (absent treaty or statue stating otherwise) a discretionary issue of comity for the court to determine?

Notably, neither proposal addresses the subject of declarations of non-enforceability. When judgment debtor seeks declaratory relief by having a US court rule that the foreign judgment is unenforceable, personal jurisdiction and long arm statute issues arise that (apparently) do not arise in enforcement proceedings. Is it fair to not require personal jurisdiction over a party opposing recognition, yet require personal jurisdiction over a party opposing non-recognition? It appears that this discrepancy may not be compatible with our notions of fundamental fairness that the Constitution guarantees.

B. *Suggested Solutions the Problem*

In adopting the '62 Recognition Act, instead of adopting the Uniform Act, the states created versions of the Act that mirrored their contemporary common law practice. The states have been using these individual and unique procedures for nearly one century. Each state appears satisfied with its own law. There is no incentive for them to unify. As such, it is unrealistic to assume that the '05 Recognition Act will be adopted in any significant form. Therefore, the states will probably not champion uniformity.

The only practical way to achieve uniformity among the states in recognizing and enforcing foreign country judgments is through federal legislation preempting state law. However, the ALI proposed federal statute's registration procedure does not afford the proper due process protections. As noted above, many states have rejected recognition through registration as being unconstitutional, and seriously lacking the proper safeguards for making sure the FMJ deserves recognition according to our notions of fundamental fairness.[176] Indeed, even those states that allow for the registration of FMJs have questioned the procedure's constitutionality.[177]

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[176] *See, e.g.*, Renior v. Redstar Corporation, 123 Cal. App. 4th 1145 (2004); Society of Lloyd's v. Byrens, 2003 U.S. Dist. LEXIS 26719 (S.D. Cal. May 29, 2003).

[177] *See, e.g.*, Don Docksteader Motors, Ltd. v. Patal Enterprises, Ltd., 794 S.W.2d 760 (1991); Enron Exploration & Prod. BV v. Clapp 378 N.J. Super. 8, 19-20 (2005).

Requiring a domestic action as part of the enforcement procedures will assure that only those foreign country judgments that deserve recognition are enforced.

Requiring an action will not only provide an opportunity for the courts to evaluate the judgment with respect to the mandatory and permissive grounds for non-recognition, it will also ensure that U.S. courts treat all parties in similar situations equally and fairly. This assures that defendants, in recognition and enforcement actions as well as injunctive proceedings, will be treated with equal due process standards.