

**SURVEY
ON
FOREIGN RECOGNITION
OF
U.S. MONEY JUDGMENTS**

**Committee on Foreign and Comparative Law
Association of the Bar of the City of New York**

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CONTENTS

- I. Introduction
- II. Nature and Scope of the Survey
- III. Recognition of U.S. Money Judgments (USMJJs)
 - A. Summary of Substantive Approaches to the Recognition of USMJJs
 - 1. Statutory
 - 2. Common Law or Jurisprudential
 - B. Summary of Defenses to the Recognition of USMJJs
 - 1. Lack of Jurisdiction Over the Defendant
 - (a) States Having More Restrictive Tests of Jurisdiction
 - (b) States Having Less Restrictive Tests of Jurisdiction
 - (c) States Having No Specific Tests of Jurisdiction
 - 2. Recognition of Foreign Decision Against Public Policy
 - (a) Judgments Awarding Multiple or Punitive Damages
 - (b) Judgments Deemed to Unacceptably Restrain Trade
 - (c) Judgments Based on Decisions Grounded in Novel Causes of Action
 - (d) Judgments Deemed to be Administrative, Quasi-criminal or Criminal in Nature
 - 3. Procedural Defects
 - (a) Inadequate Notice
 - (b) Lack of Opportunity to Defend
 - (c) Lack of “Finality”
 - 4. No Review of the Merits
 - 5. Reciprocity
 - 6. Choice of Law
 - 7. Expiration of Time Limits
 - 8. Conflict with Other Proceedings

9. Proof of Judgment

10. Fraud

C. Summary of Practical Obstacles to the Recognition of USMJ's

1. Bias and Corruption in the Recognizing Jurisdiction

2. Lack of Appeal Process

3. Right to Pursue Recognition

4. Export of Proceeds

D. Length of Time and Procedural Complexity for Recognition

IV. Concluding Remarks

**SURVEY
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I. Introduction.

The Committee on Foreign and Comparative Law of the Association of the Bar of the City of New York has prepared this survey regarding the recognition of United States money judgments (USMJJs) abroad. The survey, undertaken in response to a request by the United States Department of State as part of its ongoing negotiations of the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, was for the purpose of determining what practical obstacles exist to obtaining recognition of money judgments obtained in United States courts in the domestic courts of selected trading partners of the United States.

Our approach was to posit a hypothetical situation in which a US judgment creditor obtained a money judgment in a state or federal court of the United States against a judgment debtor who has assets outside the United States,¹ and, having ascertained that there were insufficient assets in the United States to satisfy the judgment, had decided to pursue the matter abroad. To find out how difficult it would be to actually do so, our Committee looked to a group of selected countries,² and surveyed members of the bar in those countries and with experience seeking to enforce judgments in those countries, seeking to go beyond black letter law to the more informal, even anecdotal, kinds of information not usually found in the published literature. We wanted to know if there were “unwritten” rules or factors which make it difficult for USMJJs to be recognized in other legal systems. We wish to stress that we were not looking for any particular factor or set of factors, especially negative ones such as corruption, but rather wanted to see which issues would prove important. We also wish to point out that our survey is intended to be just that -- a survey, and not an analysis of any particular aspects of (or open issues under) the draft Convention.

The results of our survey turned out to be somewhat different from what we expected, but in retrospect perhaps not altogether surprising. We found little in the way

¹ To maintain focus, we limited our survey to commercial matters, rather than attempting to address such matters as family law and personal injury cases.

² The countries surveyed are identified in Part II below.

of the anecdotal information that we had anticipated obtaining. What we found was that the relevant substantive and procedural laws themselves, or more precisely the variances found in them between the United States and the states surveyed, constitute significant hurdles to efficient recognition. While at first glance many of the differences may appear minimal, in the actual reality of daily practice they constitute significant obstacles to the efficient recognition of foreign judgments. These substantive and procedural differences result both from historical and cultural factors and from conscious domestic policy choices, and while their existence is understandable, their impact on international commercial activity is indisputable.

We gratefully acknowledge the assistance of members of the Committee on Litigation of the Association in the compilation of this survey.

II. Nature and Scope of the Survey.

The survey is based on background papers prepared with respect to the following states and jurisdictions: Belgium, Canada, People's Republic of China (China), England and Wales, France, Hong Kong Special Administrative Region (Hong Kong), Italy, Japan, Mexico, South Africa, Spain, and Switzerland. Because of practical constraints it was not possible to include all of the United States' important trading partners, but the Committee believes the states and jurisdictions included comprise a reasonable cross-section of such group. The papers were prepared by members of the Committee on Foreign and Comparative Law and by two members of the Association's Committee on Litigation. In many instances, the Committee members prepared the papers after extensive consultation with jurists, practicing attorneys, and other jurisprudential authorities in the surveyed state, or with US-based attorneys with extensive experience in the surveyed state.³

This survey is arranged by topical subject matter rather than on a state-by-state basis. Under each topic we discuss the states where the topic is relevant. We have chosen this method to emphasize the relevant topic, rather than to focus attention on the specific country. We have focused on recognition rather than on enforcement because we believe that recognition raises "threshold" legal, political, and social issues which must be overcome before issues of enforcement can be addressed.⁴ Once a judgment has been recognized, the issues of enforcement that are unique to international proceedings would seem to be reduced, but in any event are beyond the scope of this survey.

³ Some of the contributing Committee members themselves are qualified in the relevant jurisdiction.

⁴ Recognition is the determination by the recognizing court that a foreign judgment comprises the final and conclusive resolution of the relevant issues between the parties to the proceeding, and is entitled, generally speaking, to the same treatment as a domestic judgment. Enforcement of a (recognized) judgment, by which the judgment creditor "collects" on the judgment, can be had by any of the various procedural devices available for enforcement in the recognizing (enforcing) jurisdiction.

III. Recognition of U.S. Money Judgments (USMJs).

A. Summary of Substantive Approaches to the Recognition of USMJs (Sources of Applicable Law).

1. Statutory.

Legislation to recognize foreign money judgments falls into two broad categories. In all the countries surveyed, legislation of general application governs proceedings to recognize a foreign money judgment in the absence of a treaty with a specific country where a foreign judgment may originate, although not all the legislation can be used by a US plaintiff to its benefit. Where a country has ratified a bilateral or multilateral treaty (and implemented it where necessary), that treaty will govern if the foreign judgment came from one of the other states which also has ratified that treaty.

In the case of the United States, with all but one of the surveyed countries there is no treaty governing the recognition of judgments. Indeed, for that matter there is no such treaty with any other country.⁵ Thus, parties seeking recognition of a USMJ are subject to a patchwork of national laws governing the recognition of judgments. In those countries having a civil law system, such as Italy, Mexico, Spain, France, Japan, China, Belgium, and Switzerland, national statutes form the exclusive basis for gaining recognition of USMJs. While it is not accurate to say the civil law countries have no “jurisprudence,” in the sense that courts there do not pay attention to legal precedent in the sense of *stare decisis*, prior decisions clearly play a lesser role in determining outcomes of cases. In the four jurisdictions surveyed which use common law forms of action, England, Canada, Hong Kong, and South Africa, US judgment creditors may proceed under a suit at common law to enforce the judgment.

2. Common Law or Jurisprudential.

In countries or regions with a common law system, such as England, Canada, Hong Kong, and South Africa, the applicable law for recognition of USMJs can be either statutory or case law, with each country having its particular set of requirements. In England, for example, while foreign judgments may be enforced either at common law or by statute, the relevant statutes are applicable only to judgments from those countries with which there are statutory reciprocal arrangements. These countries are generally those which are parties to certain international treaties to which England is also a party. This statutory régime most definitely excludes the United States. Thus a United States judgment creditor may still gain recognition and enforcement of the judgment, but as English common law treats the debt as a contract containing an implied promise to pay, the US judgment creditor must seek recognition through filing an ordinary lawsuit to enforce the debt between the parties. Or, the judgment creditor may file a suit *de novo* if a cause of action exists. In general, US judgment creditors experience little apparent

⁵ Certain Canadian provinces have reciprocal legislation with a limited number of (US) states.

difficulty in enforcing judgments in England; a 1983 decision, *Israel Discount Bank v. Hadjipateras*, allowed the enforcement of a US \$10 million judgment.

In Canada, the laws of the provinces and territories, not the federal law, govern the recognition of foreign judgments. Each province and territory, except for Québec, has the common law as its basis of law governing foreign judgments. Certain of these common law provinces and territories (excluding Ontario, which has Canada's largest and most international economy) have enacted statutes specifically addressing the recognition of foreign judgments. These are available to foreign judgments from jurisdictions with which there are statutory reciprocal arrangements, including a number of states of the United States. Reciprocity arrangements are, however, most frequently in place with respect only to certain border states of the United States.

The other way a judgment creditor can seek recognition of a USMJ is by bringing a common law action on the judgment as a debt claim in the Canadian province or territory in which it is to be enforced. In almost all cases, this ends up being a longer procedure than seeking recognition under the reciprocal statutes.

Hong Kong, although formally a part of China since June 30, 1997, retains (under its Basic Law) laws that were previously in force (subject to certain exceptions not relevant here and that do not change the rules for recognition of foreign judgments to be recognized). Under Hong Kong law, foreign judgments may be recognized and enforced by (a) registration (domestication) pursuant to statute; (b) suit at common law; or (c) relitigating the original cause of action. Since the US has no treaty with Hong Kong, it cannot benefit from the statute.

In South Africa, the applicable law for the recognition of USMJ's is the South African common law, which is based on the Roman-Dutch legal system. Nonetheless, there is a statutory constraint placed on foreign judgments in that the Protection of Businesses Act (as amended in 1979) requires that the Ministry of Industry, Commerce and Tourism grant permission before recognition will be allowed. This measure is taken so that the Government of South Africa can assert any interest it may have in any proceedings involving South African persons or assets by foreign persons.

B. Summary of Defenses to Recognition of USMJ's.

1. Lack of Jurisdiction Over the Defendant.

Whether the courts of the originating jurisdiction have jurisdiction over the defendant, as determined by the conflict of laws rules of the recognizing jurisdiction, is an important issue in all the states surveyed. The applicable laws have different tests for jurisdiction, and can in general be divided between states having more restrictive or less restrictive tests. Most of the states surveyed have concepts of jurisdiction which are inconsistent or incompatible with US concepts of long-arm jurisdiction and are not prepared to see such US concepts expanded into their countries. Two of the states surveyed, Japan and China, appear to have no formal criteria, which makes the standards

for determining jurisdiction difficult to discern. As both Japan's and China's legal systems incorporate more features of civil law systems than of common law systems, however, it is highly unlikely that USMJ's based on expansive US long-arm concepts will find a welcoming environment in those two countries.

(a) States Having More Restrictive Tests of Jurisdiction.

The states of England and Wales, Switzerland, South Africa, France, Italy, Spain, and Mexico take a narrow view when considering whether a United States court had jurisdiction over a defendant.

For example, jurisdiction in England and Wales must be established according to English rules of conflict of laws; it is not sufficient that the US court asserted jurisdiction based on its own law. Pursuant to English conflict of law rules, jurisdiction shall be established if (a) the defendant was resident or present in the country of the foreign court at the date to the commencement of the proceedings; (b) in the event that the defendant is a corporation, it was to some extent carrying on business in the country of the court, at a definite and reasonably permanent place, at the date of the commencement of the proceedings;⁶ or (c) the defendant submitted or agreed to submit to the jurisdiction of the foreign court. The judgment creditor must also provide evidence of service of process, and must show that the judgment is "final and conclusive."

Under Swiss law, jurisdiction is even more narrowly determined. Under the Swiss Private International Law (SPIL), the law governing the recognition of foreign money judgments in Switzerland, a foreign judicial authority has jurisdiction only (a) if the defendant had its domicile in the country where the decision was rendered, or (b) in disputes involving a financial interest, if the parties agreed on a forum selection clause, or (c) in disputes involving a financial interest, if the defendant unconditionally surrendered itself to the foreign authority's jurisdiction, or (d) if the defendant brought a counterclaim before that authority. Swiss law generally provides that contractual claims must be brought at the defendant's place of residence or domicile. Thus, a US judgment against a Swiss resident defendant would not be enforceable in Switzerland unless there was a forum selection clause, an unconditional submission to the foreign jurisdiction in a financial dispute, or a counterclaim by a Swiss defendant in the U.S.

An important issue under Swiss law is whether a defendant has unconditionally submitted to the foreign court's jurisdiction. According to one (Swiss) District Court, a defendant has unconditionally submitted to a court's jurisdiction if the defendant leaves no doubt that the defendant is doing so. If a defendant objects to the US court's jurisdiction at the outset of the proceedings, then Swiss law will deem the defendant not

⁶ While there are of course differences between a natural person and a corporation, whether jurisdiction would be established would likely turn on questions of fact regardless of the form of the entity. If the individual, agent, or other entity was resident or present and doing business at a definite and reasonably permanent place in the originating jurisdiction on the date of the commencement of the proceedings, then the individual, agent, or other entity would likely fall within the scope of the rule.

to have unconditionally submitted to the US court's jurisdiction, even if the defendant did not object again during the proceedings or appeal the decision.

South African courts will not recognize a foreign judgment, including a USMJ, unless the foreign court exercised jurisdiction according to South African rules. This precludes US-style long-arm jurisdiction as an acceptable means to assert jurisdiction. South African courts will recognize the debtor's domicile as valid jurisdictional grounds, provided the defendant had the opportunity to appear and defend. Notice by publication in a local newspaper in the foreign forum has been held to be unacceptable by South African courts if the defendant did not live in the foreign forum. To be enforced in a South African court, the judgment must also be "final." Finality is considered to attach when the judgment is no longer "rescindable." Under South African law, the fact that a foreign judgment is on appeal has no effect on the finality of a judgment, although South African courts have the discretion to stay a proceeding pending the outcome of the appeal.

Under French law, the court will examine the jurisdiction of the foreign court to determine whether the litigation has a real connection with the country where the foreign judgment was rendered and to see whether the French court has exclusive jurisdiction or not. Under Article 15 of the French Civil Code, the portion of the Code relating to the recognition of foreign judgments, if the French rules governing conflict of laws do not confer exclusive jurisdiction to French courts, the jurisdiction of the foreign court must be recognized so long as the dispute has a significant connection with the foreign country and the choice of court was not fraudulent.

In practice, Article 15 and the case law interpreting it impose a very effective obstacle to the recognition of USMJ's by granting exclusive jurisdiction to the French courts whenever the defendant is a French national (unless the defendant has waived it). Waiver by the French defendant may be express, via a valid choice of law clause in a contract, or implied, via failure to raise as a preliminary issue the lack of jurisdiction of the foreign court. However, failure to appear, failure to appeal, or appearance solely for the purpose of contesting jurisdiction do not constitute waivers of jurisdiction under French law.

Italian law also follows the general tendency of civil law countries not to recognize and enforce USMJ's due to incompatible concepts of what constitutes an appropriate basis to assert jurisdiction. In Italy, the exercise of "exorbitant" jurisdiction by US courts inconsistent with Article 64(a) of Law No. 218 ("Reform of the Italian System of Private International Law," enacted May 31, 1995) will make USMJ's difficult or impossible to enforce. USMJ's rendered on the basis of some state long-arm statutes will not be enforced in Italy to the extent that such jurisdictional criteria are unknown in Italian law. In contract matters, for example, Italian courts have jurisdiction only if the defendant is domiciled or resident in Italy, or if the contract was to be performed in Italy. In tort matters, Italian courts have jurisdiction only if the defendant is domiciled or resident in Italy or if the harmful event occurred in Italy. A USMJ will not be enforced if

jurisdiction over the defendant was based on the “minimum contacts” basis or another jurisdictional basis not recognized in Italian law.

Spain will recognize a USMJ if the US court applied jurisdictional rules similar to those used by Spain. Spain will not recognize “exorbitant” jurisdiction, *i.e.*, one in which there is no connection between the subject matter of the litigation and the commercial or other activities carried out by the defendant in that jurisdiction. This may preclude recognizing jurisdiction asserted under US long-arm statutes. Spain (like many states) reserves to itself the exclusive right to decide certain matters, such as rights in real property and immovables located in Spain; the incorporation, validity, nullity and dissolution of corporations or any other legal person domiciled in Spain, as well as agreements and decisions of the governing bodies, such as a Board of Directors, of such domestic legal entities; the validity and nullity of the records registered in any Spanish register; and the validity and nullity of patents and any other registered rights or deposited rights when filed in Spanish registers. Therefore, any USMJs arising out of one of these areas will not be recognized or enforced in Spain. USMJs are most likely to be successfully recognized and enforced in matters relating to contracts or damages for breach thereof, including damages for breach of labor contracts.

Mexico will recognize and enforce a USMJ so long as the US court had jurisdiction over the defendant and the USMJ was rendered in accordance with rules of jurisdiction compatible with Mexican law. Under Mexican rules of jurisdiction, mere physical presence in the country is not a sufficient basis to assert jurisdiction. Mexican courts require evidence of some other kind of connection, such as doing business in Mexico or committing a tort in Mexico. A foreign company is “doing business” in Mexico if it “habitually” carries out “acts of commerce,” or qualifies as a “permanent establishment” under the US-Mexico treaty for the avoidance of double taxation. The subject matter of a suit need not be specifically related to the business of the foreign company in Mexico. A US attorney seeking to enforce a USMJ in Mexico would be well advised to pay careful attention to Mexico’s rules regarding proper notification--personal service is the only acceptable form.

There are certain substantive matters which Mexican law reserves exclusively to Mexico, and therefore Mexican courts will not recognize foreign judgments in those areas. Examples include suits relating to lands and waters located within Mexico’s national territory or marine resources within Mexico’s 200 nautical mile exclusive economic zone, suits relating to acts of the federal or state entities of Mexico, and other cases as provided by Mexican law. Mexican law does not recognize the concept of *forum non conveniens*.

(b) States Having Less Restrictive Tests of Jurisdiction.

In the 1990s, Canadian case law began to take a more expansive approach to jurisdictional matters than it previously had. Prior to 1990, Canada applied a narrow common law test (similar to that in the UK, as discussed above) to determine whether a foreign court had proper jurisdiction over the defendant. After a case decided in 1990,

Morguard Invts. v. DeSavoye, the decisional basis became a “real and substantial connection” to the subject matter or to the person against whom the originating court rendered judgment. Among the factors a Canadian court will look at to determine whether the requisite nexus exists are the following: (a) whether the debtor was a resident in the foreign jurisdiction when the cause of action arose (*not* on the date of the commencement of the recognition proceedings); (b) whether the debtor carried on business in the foreign jurisdiction; (c) whether the debtor was served in the foreign jurisdiction; (d) whether the contract which is the subject matter of the suit was entered into in the jurisdiction; (e) whether the action in the foreign jurisdiction was anticipated to be a remedy likely to be relied on by the judgment creditor; (f) whether any objection to the jurisdiction of the foreign court was made by the debtor; (g) whether any agreement to bar proceedings in the foreign jurisdiction was entered into; (h) whether the loss or damage complained of occurred in the foreign jurisdiction; and (i) whether there was a choice of law clause selecting the foreign jurisdiction. Almost without exception, Canadian courts have held that the emphasis in *Morguard* on comity, including its international dimensions, supports the application of its principles to judgments from outside Canada, including the US.

(c) States Having No Specific Tests of Jurisdiction.

According to the Japanese Code of Civil Procedure, for a foreign money judgment to be enforceable in Japan, the court of origin must have jurisdiction over the parties and the subject matter of the original action from the point of view of Japanese laws and ordinances, or on a basis of a treaty that is applicable to Japan. Since the US has no treaty with Japan regarding the recognition of judgments, anyone seeking recognition of a USMJ must seek recognition under relevant Japanese law. The Code of Civil Procedure does not provide specific standards for determining whether a Japanese court has such jurisdiction; accordingly, there can arise uncertainty in evaluating whether this requirement has been met.

China has entered into bilateral treaties on judicial assistance in civil and commercial matters with a number of countries; however, the US is not one of them. According to the Chinese Code of Civil Procedure, jurisdiction lies with the Intermediate People’s Court in the area where the judgment debtor resides or where the subject property is situated. The principles governing the recognition of judgments under Chinese law assign great importance to reciprocity. Under Chinese law, the foreign judgment must be recognized if the foreign judgment or ruling is not in contradiction with basic Chinese legal principles or the sovereignty, security, or social and public interest of China. Beyond these very general prescripts, it is not known how these general principles would play out with specificity in actual practice. The Committee was unable to find any precedent of any US party having attempted to have a USMJ enforced in China.

2. Recognition of Foreign Decision Against Public Policy.

If the above discussion of jurisdiction leaves the reader with the sense that widely varied concepts of jurisdiction make the prospect of pursuing a judgment abroad an uncertain proposition, then a review of the public policy bases for refusing recognition of a USMJ will not make the reader rest any easier. Reflecting fundamental political and cultural disharmony with US laws, courts, and procedures, the notion of public policy in all the states surveyed often acts as an effective deterrent to the recognition abroad of USMJ's.

The public policy defense may serve as a useful shield to the judgment debtor against the recognition of a USMJ in a number of ways. Where a USMJ has a punitive (or multiple) component, a feature of US law universally disliked in the states surveyed, denial of recognition may be justified as furthering local concepts of justice by preventing unjust enrichment. In some countries, standards of what constitutes private law itself may differ so sharply from those accepted in the US that a local court may refuse to recognize or enforce certain kinds of judgments. Securities and tax cases in particular fall into this category. Swiss law, for example, probably would not recognize judgments rendered under US federal securities laws ordering the disgorgement of profits on the grounds that such a judgment is public or administrative in nature. Public policy can in some instances be seen as a means of mitigating laws prohibiting the re-examination of the merits of a case.

The various specific grounds for refusing recognition of USMJ's on the basis of inconsistency with local public policy vary widely. Speaking broadly, US or other foreign money judgments will not be enforced if to do so would threaten the sovereignty and security interests of the recognizing state, violate constitutional protections or offend the social or public order. For example, in Japan, the Civil Code states that both the content and procedure followed in the court of origin must not be contrary to the "public order or morals" of Japan if the USMJ or other foreign judgment is to be recognized. Public policy is generally thought to mean the basic principles or philosophy of the Japanese legal order in light of the common moral good. In Japan, as elsewhere, defining what constitutes the common moral good is frequently left to the discretion of the presiding judge. The effect is to give the judge wide although not indiscriminate latitude.

In Hong Kong, the main public policy grounds for refusing to enforce a USMJ are restraint of trade and judgments the recognition of which would offend local standards of morality, justice, human liberty, and freedom of action.

Italian law provides that foreign judgments shall not conflict with Italian public policy. Italian case law on the definition and scope of public policy is very limited and has tended not to involve commercial cases. In those cases in which an Italian court has ruled on the issue, the practice has been to adopt a very narrow construction of public policy. It is therefore possible for an Italian judge to order the recognition of a foreign judgment which, had the judgment originated in Italy itself, would not have been issued

on the basis that it violated public policy. Since most of the cases in which the issue of public policy has been raised involve the recognition of foreign judgments of divorce, it is not clear how it would apply to the recognition of a USMJ outside of this context. It has been suggested by some Italian practitioners, however, that in the appropriate situation public policy arguments could successfully be made.

Under Swiss case law, the public policy exception must be narrowly construed, and is applied on a case-by-case basis. The closeness of the connection to Switzerland is an important factor in deciding the standard to be applied. Similarly in Belgium, case law has repeatedly emphasized that refusal to recognize a foreign judgment on public policy grounds must remain the exception.

A detailed discussion of the many public policy grounds that the states surveyed have used for refusing enforcement of a USMJ is beyond the scope of this survey. However, four principal grounds have emerged from the Committee's survey. These are: (a) judgments awarding multiple or punitive damages; (b) judgments deemed to have the effect of unacceptably restraining trade; (c) judgments based on decisions grounded in novel causes of action; and (d) judgments deemed to be based on US public law or having a criminal or quasi-criminal nature. Reluctance or refusal to enforce USMJs based on these grounds may be seen as a reluctance of foreign courts to act as an arm of, or to be perceived to be acting as an arm of, a foreign state in furthering the interests of the citizens of such foreign state. A more detailed discussion of these grounds follows.

(a) *Judgments Awarding Multiple or Punitive Damages.*

Most of the surveyed countries consider the recognition of punitive damages to be contrary to public policy. The general rule is not to enforce that component of a USMJ. The legal basis for this approach is analogous to the general common-law principle of not enforcing so-called "penalty clauses" in contracts which have the effect of rewarding a plaintiff beyond the extent of the actual damages suffered. In the civil law context, the principle is the same: the public policy rationale is to favor compensation over deterrence in civil matters.

The issue of multiple damages in a foreign recognition context is also troubling. In the US, double or treble damages most often are awarded pursuant to antitrust, securities, or environmental legislation. The notion of a judgment directed at deterrence and patently out of proportion to the actual pecuniary loss suffered is, like punitive damages, offensive to the public policy of most nations. Of course, the granting of double or treble damages under US statutes itself reflects deliberate policy choices, so perhaps it is not surprising that other states do not feel compelled to blindly accept such choices.

Under Swiss law, for example, an important issue in the recognition arena is whether a judgment awarding multiple or punitive damages is considered a civil judgment, normally recognized under private law, or a criminal law judgment, which would not be recognized. Historically, Swiss courts have not recognized multiple or

punitive damage judgments because they were considered penal in nature. Thus a USMJ reflecting multiple or punitive damages normally would not be recognized. However, in 1991 the Court of Appeals of the canton of Basle-Stadt held that a judgment awarding punitive damages may be characterized as a civil matter under the SPIL. The court held that the punitive damage component was not a “criminal law punishment” but a “private law punishment,” and therefore worthy of recognition. The court’s reasoning was that the punitive damages served the purpose of enforcing private law, and accordingly could be recognized. There are other recent cases, all decided on a case-by-case basis, which have recognized punitive judgments under the reasoning that if the purpose of the punitive judgment was *predominantly* to compensate the plaintiff for actual damages or to deprive a defendant of unjust enrichment, then the damages could be enforced as a civil matter. On the other hand, if the Swiss court determines that the punitive damages are primarily intended to punish the defendant, deter future behavior, or give rise to unjust enrichment, then the judgment probably will be refused recognition on the grounds that it is not a civil matter. As of this date, the Swiss Federal Court, the nation’s highest court, has yet to publish a decision regarding the recognition of punitive damage judgments under the SPIL, although there have been recent indications that punitive damages could be recognized, given the right circumstances.

Another issue with respect to the recognition of USMJ’s in Switzerland relates to judgments ordering the disgorgement of profits. Under US securities laws, disgorgement of profits is a civil remedy designed to deprive the defendant of illegal profits. Swiss law, however, is more likely to consider disgorgement to be an administrative law remedy because the disgorgement is intended to recover illicit gains and not to determine the obligations between the parties. Additionally, US securities laws are designed to protect the integrity of the US securities markets, and therefore under Swiss law will be characterized as public or administrative, and therefore not given effect.

Under French law, punitive damages do not exist, and as a general principle are against public policy. Under the French Civil Code, judgments for damages are only intended to indemnify the plaintiff for actual losses. Even if the parties agree on a penalty clause, the French court may, *sua sponte*, increase or decrease the penalty if it is either excessively high or excessively low. Although there appears to be no case law on this specific subject matter, some French courts reportedly do tend to uphold punitive damage judgments under limited circumstances, although an in-depth discussion of the precise nature of those circumstances requires more information than is presently available to the Committee.

The reasoning behind an apparent willingness to recognize some non-compensatory awards despite the general public policy prohibition lies in the French judiciary’s treatment of foreign judgments in general. Since 1964, when an important case establishing the framework for recognizing foreign judgments in France was decided, courts have held that French judges are prohibited from reviewing the substance and merits of a foreign judgment. Thus a judgment may be upheld even if it violates French public policy so long as its *overall* effects are not contrary to it. Application of French public policy does not strike down the foreign judgment itself, but only the effects

it might produce in France. Insofar as the effects are divisible, a French judge may recognize certain of those effects but not others.⁷

In England, multiple and punitive damages are considered to be contrary to public policy. Hong Kong also will not enforce multiple or punitive damages on public policy grounds. In Italy, multiple and punitive damages also appear to be against public policy, especially if they are awarded pursuant to a default judgment or if they exceed damages permissible under Italian law. There is, however, no specific case law on this subject.

Finally, South African law prohibits the recognition of multiple or punitive damages.

(b) Judgments Deemed to Have the Effect of Unacceptably Restraining Trade.

The notion of promoting, not restraining, trade and commerce is a fundamental tenet of many states. In refusing to recognize a USMJ on the ground that it reflects an unacceptable restraint of trade, a foreign court again is contrasting the laws of the originating jurisdiction with those of its own. For example, the traditional common law test for enforcement of a restrictive covenant such as a non-compete clause (that it be reasonable as to the scope of activities, geographic coverage, and time period) will be interpreted differently in different common law jurisdictions.

In Hong Kong, restraint of trade constitutes adequate grounds for a refusal to recognize a foreign judgment.

(c) Judgments Based on Decisions Grounded in Novel Causes of Action.

Again, the defense to recognition of a USMJ on the ground that it is based on a “novel cause of action” reflects a tendency of recognizing courts to compare United States law to domestic law and to resist adopting the US form when such comparison illustrates substantive differences. In addition, it reflects a wariness of validating a new cause of action which has yet to be tested in the United States over time and through appeal decisions. Also at work is a theme running through each of the two public policy grounds discussed above, namely, that by recognizing a USMJ inconsistent with local law, there is a risk that the decision to recognize will be seen as precedent for (and thereby importing into the local law) the reasoning behind the USMJ. Although many foreign states consider United States decisions to be of precedential value, a proceeding to recognize a foreign judgment is likely to be seen as an inappropriate forum for developing local law. Mexico is a jurisdiction where there has been a historical reluctance to recognize unfamiliar causes of action.

⁷ There appear to be only two cases on this point, both in the domestic relations arena. In the first case, financial support in favor of two wives of the same man was awarded even though bigamy violates French law. In the second, a repudiated wife was awarded a financial settlement even though French law does not recognize this manner of divorce. It is uncertain how, if at all, the reasoning in these two cases would apply to a foreign judgment rendered in a corporate matter.

(d) *Judgments Deemed to be Based on US Public Law or Having a Criminal or Quasi-Criminal Nature.*

The preceding discussion makes it apparent that, in sensitive areas of the law, foreign courts view the recognition of foreign judgments as a potential threat to their sovereignty. Recognition of judgments based on prosecutions by foreign states runs especially counter to the natural desire of each state to preserve its borders and to protect its nationals from foreign sanctions. As a matter of national import, there is a judicial bias toward deferring to the domestic government in respect of such matters rather than exercising legislative authority by judicial act based on foreign policy determinations. Examples of this kind of recognition problem can be seen in the general reluctance of foreign courts to recognize USMJ's arising from revenue and tax judgments, judgments based on US securities laws, and antitrust cases.

3. Procedural Defects.

In each of the states surveyed, certain procedural defects that are proved by a defendant serve as a defense to recognition of a foreign judgment. The following procedural defects have been identified in all the states surveyed: lack of notice to the defendant; failure to afford the defendant the opportunity to present a proper defense, as in the case of a default judgment; and lack of "finality" of the judgment itself.⁸

(a) *Inadequate Notice.*

In all of the states surveyed, a USMJ or other foreign judgment will not be recognized if the defendant was not afforded adequate notice. The chief difference among the states surveyed is whether adequate notice must be given in accordance with the laws of the originating jurisdiction or the recognizing one.

In Canada, the courts generally require only that the defendant be given notice in accordance with the rules for service of process in the originating jurisdiction.

Italian law similarly requires that the defendant be afforded notice in accordance with the law of the place where the judgment was granted, and that the defendant's fundamental due process rights are respected.

Japanese law requires that the Japanese defendant receive notice by summons or "other necessary orders" other than notice by publication, or that the defendant has appeared and defended despite the absence of service. Japanese law does not require that service be accomplished in accordance with the Japanese Code of Civil Procedure, but only that the defendant be given adequate notice to defend. Service must be

⁸ Most states also will not recognize a foreign judgment if it conflicts with a judgment rendered by the recognizing court, nor will a foreign judgment be recognized if there is a current proceeding or judgment pending on the same issues and between the same parties before the recognizing court. See Part III.B.8 below.

accompanied by a translation, regardless of a defendant's foreign language ability. There are no specific court decisions on the adequacy of service by mail.

By contrast, Mexico places great importance on the formalities of proper service, requiring that "personal" service be effectuated. Service by mail is not acceptable as there is no presumption of receipt by mail. Judgment creditors seeking to recognize a foreign judgment in Mexico are well advised to follow Mexican procedural rules to the letter in this particular regard, as lack of proper notice according to Mexican standards is a major obstacle to having a judgment recognized.

China requires that the defendant receive "actual notice" by a method which was "reasonable." South African courts have refused to recognize a judgment claiming notice via publication in the local newspaper of the foreign forum when the defendant did not live there.

The Spanish Code of Civil Procedure establishes that a foreign money judgment cannot be recognized or enforced if the judgment has been rendered as a default judgment. This has been interpreted by the Spanish Supreme Court to mean not that a defendant must be physically present to defend, but that the defendant must have been duly notified and given enough time to defend. Thus, proper summons or subpoena must have been given.

Under Belgian law there is no specific requirement with regard to notification of the defendant. There is case law, however, upholding the right of the defendant to a proper defense in the foreign proceeding.

(b) Lack of Opportunity to Defend.

All of the states surveyed require that the defendant be given an opportunity to present a proper defense in the foreign jurisdiction as a condition to the recognition of a foreign judgment. Failure to permit sufficient time to prepare a proper defense between the time of notice and the time of hearing and failure to permit a full and fair trial on the merits with a full right of the defendant to be heard are grounds for refusal to recognize and enforce a USMJ or other foreign judgment. The determination of what constitutes "sufficient" time and what constitutes a full and fair trial on the substantive and procedural merits obviously varies by state, the latter being well beyond the scope of this survey.

As to default judgments, the general rule in a number of jurisdictions seems to be that foreign default judgments will not be recognized on the grounds that they do not afford a defendant the opportunity to be heard. Mexico is one such jurisdiction and some US practitioners with experience there have indicated that gaining recognition of a USMJ or other foreign judgment rendered by default can be problematic for just that reason.

In Italy, a foreign default judgment will be recognized if it was granted in accordance with the law of the originating court. However, Italian law requires

examination of the notice to the defendant in the original action, both to determine whether the originating court followed its own service and notice procedures and whether the service and notice provided satisfies due process rules applicable in Italy. USMJ's obtained by default can be challenged as a violation of the right of defense guaranteed under Italian statutory law.

In France, a USMJ or other foreign judgment will not be recognized if the sole basis for the judgment is the default of the defendant. Under English law, a USMJ will not be recognized if the foreign proceedings were contrary to "natural justice." Since Belgian law requires that foreign judgments always must be reviewed on the merits before recognition can be granted, presumably USMJ's entered by default would not be recognized. Likewise, an inadequate period of time between the notice and the hearing will constitute grounds to deny recognition of a foreign judgment in Belgium.

The Spanish Supreme Court recognizes three different types of default: default in conviction, default of convenience, and forced default. The first type, default in conviction, is a non-appearance by the defendant before the foreign court because the defendant does not recognize the court as competent. In the second type, default of convenience, the defendant appears but only to contest the jurisdiction of the court. In both these types of defaults, the Spanish Supreme Court will recognize the USMJ. A forced default occurs when the defendant does not appear because the defendant was not properly served or was not served in time to appear. As a corollary to the need for adequate service, a USMJ rendered under these circumstances will not be recognized in Spain.

(c) *Lack of "Finality."*

All of the states surveyed require that a foreign judgment be "final" (*res judicata*) as a condition to recognition. "Final" means either that the judgment has become effective and that all avenues of appeal are exhausted, or that the time period for appeal has expired without action by either party.

This raises the issue of what "final" really means in the context of the surveyed states' legal systems. In the US, finality is usually determined by whether the judgment has disposed of all the issues on the merits of the case. Finality thus could arise through a trial judgment. In Mexico, on the other hand, a judge is much less likely to accept a trial court decision as final for the purposes of recognizing a USMJ or other foreign judgment. This would appear to offer an opportunity for a defendant to raise a roadblock to the recognition of a USMJ.

In Spain, recognition of a USMJ will not be granted unless the decision is beyond the possibility of further appeal in the US. The Spanish court will refuse to grant recognition due to lack of finality, defined in this manner, despite Spain's reciprocity rules, discussed below. In other words, even if the country of origin enforces judgments that are not final according to Spanish rules, Spain will not similarly enforce a USMJ or other foreign judgment. Preliminary relief awarded by a US court will also not be

enforced by a Spanish court, even though Spanish law recognizes a number of preliminary relief measures in its own law.

The law of Belgium requires that the judgment has become final and non-appealable in the country of origin and that the decision is enforceable in accordance with the law of the originating jurisdiction.

Swiss law requires the plaintiff to prove that the judgment has become final. This may be done by submitting a certificate confirming that a judgment has become final or by proving finality through the content of the court files. Whether an affidavit valid under US law will suffice to prove the finality of a USMJ is an issue which apparently has not yet been reviewed by the Swiss Federal Court.

South African law holds that a decision is final when it is no longer rescindable. Under South African law, even if a foreign judgment is on appeal in the originating jurisdiction, a USMJ or other foreign judgment is considered to be final. However, South African courts have the discretion to stay a recognition proceeding in South Africa pending the outcome of the appeal. In South Africa it is the defendant, not the party seeking recognition, which has the burden of proving that the judgment is on appeal.

In Canada, the USMJ must be final and conclusive, in that any appeal period must have expired without any appeal having been taken.

In England, for a USMJ to be enforced under a summary judgment proceeding (alleging breach of contract), the judgment must be final and for a fixed sum of money. If the USMJ is on appeal before the US courts, the English court may stay the English proceedings.

In Hong Kong, a judgment must be final and conclusive. A judgment will be considered to be final and conclusive even if it is still subject to appeal or there is an actual appeal pending, so long as it is final and unalterable in the court in which it was pronounced.

In Japan, before a judgment can be recognized, it must be final and non-appealable. For a USMJ to be final and non-appealable, it must have been rendered by a court, as opposed to an administrative agency, and it must not be subject to further appeal under the laws of the country in which the judgment was originally issued. In China, a USMJ or other foreign judgment must be final and non-appealable in accordance with the law of the originating jurisdiction.

4. No Review of the Merits.

In all the states surveyed except Belgium, the law provides that the recognizing court will not review, or that the recognition proceeding should not be used as an opportunity to re-litigate, the merits of the original case. This is subject to the caveat that where the basis for the judgment impinges on the public policy concerns of the

recognizing state, these concerns will be considered and may be found to be a valid defense to recognition. In short, the merits of the decision will not be reviewed unless issues of public policy are involved. How large an obstacle the public policy exception will constitute to the recognition of a USMJ will obviously depend on the circumstances of the case, but its potential impact cannot be ignored by a US judgment creditor.

In Japan, for example, the Code of Civil Execution states that there will be no review of the merits of the original judgment and that the scope of review of the Japanese court is restricted to whether or not the foreign court has rendered a valid and final judgment. However, if the Japanese court determines that there is a public policy question at issue, then the Japanese court has the discretion to hear the underlying facts of the case.

A Chinese court will not review the merits of a case unless recognition would be prejudicial to the sovereignty, security, public order, or social and public interest of China. In Hong Kong, on the other hand, the merits will not be reviewed on the grounds that recognition of a USMJ or other foreign judgment cannot be refused due to errors of fact or law.

In Canada, where recognition of a USMJ is sought under reciprocal legislation, the merits of the case will not be reviewed. If the USMJ is sought to be enforced under common law proceedings, the judgment will be deemed to be conclusive as to findings of fact and conclusion of law, so long as the originating court had jurisdiction over the judgment debtor.

In South Africa, issues of fact and law are considered conclusive and not subject to review unless it can be shown that concepts of natural justice were violated.

Under Spanish law, the merits of the case will not be reviewed unless the Spanish court finds that there are issues of public policy or that Spanish constitutional rights and liberties are at stake.

Since the *Munzer* decision in France, French courts have held that a review of the merits of a foreign judgment shall not be undertaken.

In Belgium, the relevant statute provides that the merits of the case must always be reviewed before recognition may be granted. Such a review involves consideration of whether the foreign (US) judge has carefully examined the facts and correctly applied the law. In exercising a kind of “quality control” over foreign judgments, the review of the merits is extensive and may lead to a totally new trial, but without the possibility of introducing new claims. Although a trial *de novo* can result in the same favorable (to a US judgment creditor) outcome, the mere prospect of having to retry a case from the beginning obviously represents a significant obstacle to a US judgment creditor.

5. Reciprocity.

Reciprocity is a key issue in many of the states surveyed. Without reciprocity, many of the states will not recognize a USMJ. Since the US has no relevant treaty with any of the states surveyed, reciprocity in the context of the recognition of USMJs is determined either under legislation or by case law.

It must be noted here that the issue of reciprocity sometimes is complicated by the fact that some states, *i.e.*, the US, Canada, and Mexico, are federal in their political and legal organization, while the others surveyed are unitary. Recognition in unitary states is governed by laws applicable throughout the state. In the case of states having a federal structure, the situation is more complex as judgments may arise (whether by statute or by jurisprudence) either from the state entity or from the federal entity. This may pose a problem for the recognizing state in deciding which foreign (originating) entity -- the state or the federal -- is relevant in determining whether the reciprocity requirement is met. That is, does a recognizing state look to US federal law or US state law to determine whether reciprocity exists?

South Africa has no official policy or statute regarding reciprocity and generally will not deny recognition of valid USMJs on reciprocity grounds. One important exception is where the foreign judgment was issued by a state not recognized by South Africa.

In Mexico, reciprocity is not a prerequisite to recognition but a defense to it. Judges have discretion to consider whether the courts of the originating jurisdiction have given Mexican judgments sufficient reciprocity. If the Mexican court finds insufficient reciprocity, the Mexican court can deny recognition of the USMJ or other foreign judgment. In recent years, a concerted effort has been made to strengthen US-Mexican reciprocity.⁹

English statutes allow recognition of foreign judgments by registration, but only to those countries with which there are statutory reciprocal arrangements. Since the United States is not recognized by statute as a reciprocal jurisdiction, US judgment creditors seeking to have a judgment enforced in England must follow the common law route.

In Canada, only Alberta, British Columbia, Manitoba, Newfoundland, Nova Scotia, Prince Edward island and Yukon Territory (*n.b.*, not Ontario, Canada's largest and most international economy) have legislation providing for reciprocal recognition of judgments obtained outside Canada, which requires that there be statutorily recognized reciprocal arrangements with the foreign jurisdiction. To gain recognition of a USMJ in Ontario, then, it is necessary for the holder of the USMJ to proceed by a common law action. This is generally a slower and more expensive way of proceeding than through reciprocal legislation. In general, the legislation of the relevant Canadian provinces and

⁹ See *Southwest Livestock & Trucking Co. Inc. v. Ramon*, 169 F. 3d 317 (5th Cir. 1999).

territories recognizes reciprocity only with a limited number of border states of the United States.

Hong Kong courts do not require reciprocity with US courts to recognize and enforce a USMJ, so long as the judgment is final and conclusive, and was rendered by a court of competent jurisdiction.

Reciprocity has long been considered by the Chinese government to be a matter of national sovereignty. The principle of reciprocity is written into almost every Chinese law and regulation dealing with foreigners. To obtain recognition of a foreign judgment in China, either the requesting party may apply directly to the Intermediate People's Court with jurisdiction over the matter, or the originating court may, according to the principles of reciprocity, request that the Chinese court recognize and enforce the judgment or ruling. These are the procedures that those seeking recognition of a USMJ must use because there is no treaty between China and the US on this matter (and therefore the Chinese Civil Procedure Code governs). After a request to recognize a USMJ is made, the Chinese court will first enter its own judgment based on the principle of reciprocity. If there is no reciprocity, the Chinese court can refuse to recognize the USMJ. There appears to be no written definition of what reciprocity means in actual practice, however, or how a Chinese court would treat a USMJ from one of the fifty United States as opposed to a USMJ from a US federal court.

Under the Japanese Code of Civil Procedure, reciprocity must exist between Japan and the country where the foreign judgment was entered if the judgment is to be recognized in Japan. According to the Japanese Supreme Court, reciprocity is considered to exist if, in the originating court, the same kind of judgment handed down in a Japanese court would be recognized in the foreign court under conditions not materially different from those set forth in the Japanese Civil Procedure Code. Japanese courts have not provided further guidelines to assist in determining whether reciprocity exists between two countries. Thus, there currently exists uncertainty as to whether a party seeking to enforce a USMJ has met this requirement.

In Spain, reciprocity applies where there is no convention or treaty between Spain and the state from which the judgment to be enforced originates. The US falls into this category. Under this regime, Spain will recognize and enforce a USMJ if the jurisdiction where the judgment is rendered also recognizes judgments from Spain.

Spain will look to the law of the originating jurisdiction to determine the requirements and conditions that must be met for recognition to be granted. In the case of a USMJ or other foreign judgment, those conditions include adequate service of process and various formalities of the judgment. In other words, for a Spanish court to grant recognition of a USMJ or other foreign judgment, it will insist that the same conditions for recognition be met by the court of the originating jurisdiction. It is not enough that the courts of the foreign jurisdiction recognize foreign judgments in general; they must recognize Spanish judgments in particular (bilateral reciprocity). If the US courts recognize certain Spanish judgments, but examine the merits of a case, a Spanish

court will similarly examine the merits of a case in making a determination whether to grant recognition. Under the regime of reciprocity, before deciding whether or not to recognize a foreign judgment Spanish courts will consider (a) whether a foreign judgment is *res judicata* (the USMJ must be absolutely final), (b) whether the originating court recognizes the same subject matter of the decision brought before it (Spain) in the recognition proceedings, (c) whether bilateral reciprocity exists, and (d) whether reciprocity is *actually, currently* and *consistently* practiced in the originating state.

This elaborate regime appears to be quite cumbersome and complex. Rather than increasing the likelihood that judgments will be recognized, this regime has resulted in uncertainty and unpredictability.

Under Belgian law, reciprocity is not a requirement for the recognition of a USMJ or other foreign judgment. As noted above, Belgian law requires a review of the merits underlying the judgment.

The lack of reciprocal legislation between the US and the states surveyed (other than Canada to a limited extent) puts a party seeking to enforce a USMJ at a distinct disadvantage to parties that have access to the more expedited procedures provided for in legislation, forcing such a party instead to rely on more expensive, procedurally complex, and lengthy proceedings, with far less certainty that a judgment will be recognized.

6. Choice of Law.

In some of the states surveyed, the courts will review the choice of law analysis of the originating jurisdiction and will, if not satisfied, refuse to recognize the foreign judgment.

In France, the application of the proper law according to French conflict of laws rules is one of the main requirements which must be met so that a foreign judgment may be recognized in France. Therefore it follows that the French court will examine the foreign court's choice of law analysis.

In Belgium, as part of its review of the merits of the matter before it, the court will examine whether the correct choice of law analysis was made by the originating court.

Under Spanish law, the Spanish Supreme Court could refuse to recognize and enforce a USMJ or other foreign judgment if in its judgment the US or other originating court applied choice of law principles that contravene Spanish public policy; *i.e.*, that violate fundamental rights and liberties guaranteed in the Spanish Constitution.

The choice of law analysis by the originating court will not be reviewed by courts in Canada, China, Hong Kong, and South Africa.

7. Expiration of Time Limits (Statutes of Limitations).

Among the states surveyed there are differing approaches to the application of limitation periods to the recognition of USMJ's.

In England, recognition proceedings must be initiated within the British limitation period, which is six years, or the time period for enforcement prescribed by US law, whichever is shorter. Exceptions exist on public policy or undue hardship grounds.

In Hong Kong, a USMJ will still be recognized even if, at the time the recognition proceeding is commenced, the underlying cause of action would be barred as having exceeded the US limitation period. In China, the statute of limitations to recognize a USMJ or other foreign judgment is one year for individuals, and six months for corporations and other legal entities.

In Canada, the limitation period for enforcing a USMJ at common law is determined in accordance with the enforcing jurisdiction's statute of limitations, which usually begins to run from the date the USMJ was rendered. South African courts will not review whether the statute of limitations on the underlying cause of action has expired. Under Belgian law, a review of the merits also includes inquiry into the application of the appropriate statute of limitation of the originating jurisdiction.

In Japan, recognition of a USMJ or other foreign judgment will not be denied even when the underlying cause of action would have been barred under Japan's statute of limitations. This is because in Japan a statute of limitations is considered to be only a "system of convenience," and thus execution of a USMJ on a cause of action that would have been barred under Japan's statute of limitations does not violate public policy.

Under Spanish law, there is no statute of limitations on the recognition of USMJ's or other foreign judgments. Under Spanish concepts of reciprocity, however, if the law of the originating state (in the US, the relevant state or federal statute) would render the judgment unenforceable due to expiration of the applicable limitation period, then Spain will not enforce the foreign judgment.

8. Conflict with Other Proceedings.

Many of the states surveyed will refuse to recognize and enforce a USMJ or other foreign judgment if there is a parallel proceeding before their own courts. This refusal is grounded in sovereignty concerns.

For example, in France, recognition of a USMJ or other foreign judgment will be denied if (a) there is a prior French decision on the same matter involving the same parties or (b) there was a proceeding begun in the French courts while another proceeding on the same matter between the same parties was in progress in the foreign court (unless the plaintiff in the foreign proceeding raises *lis pendens* as a defense to the French proceeding). If recognition proceedings on the foreign judgment are begun in France

before a proceeding on the merits is begun in France, the recognition proceeding will be heard first and, if granted, will cause the second action to be terminated.

In Spain, recognition will be denied to a USMJ if a final judgment on a matter has already been rendered in Spain. Further, if proceedings on the merits are begun in Spain before proceedings on the merits in the foreign jurisdiction are begun, the defendant in a recognition proceeding begun in Spain can oppose recognition on the grounds of *lis pendens*. The policy of Spain is that proceedings begun abroad will not be permitted to limit the authority of the Spanish courts to hear a case.

Hong Kong public policy precludes a foreign judgment from being recognized if a prior judgment has been entered in Hong Kong on the same matter and between the same parties.

A foreign judgment will not be recognized in Italy if it conflicts with any other final judgment rendered by an Italian court.

Japanese courts will refuse to recognize, as a matter of public policy, a judgment rendered by a foreign court that is inconsistent with a judgment rendered by its own courts on the same matter and between the same parties, regardless of the order in which the actions were filed, the judgments were rendered, or the judgments became final.

9. Proof of Judgment.

The surveyed states have differing approaches to proving the existence and validity of USMJ's in the context of recognition proceedings. In practice these only amount to procedural and not substantive obstacles to recognition.

In most of the non-English-speaking states the subject judgment must be proved by way of legalization and translation into an official language of the recognizing jurisdiction. Not surprisingly, the surveyed states have differing procedures to accomplish this. In Mexico, for example, the judgment must be translated, but need not be authenticated if it is submitted to the court through consular or diplomatic channels.

In Spain, the foreign judgment must be translated, and an *apostille* submitted. The apostille is a standard form of certification prescribed by the Hague Convention of 5 October 1961 (Abolishing the Requirement of Legalisation for Foreign Public Documents) which is attached to the judgment by the competent authority in the originating jurisdiction. Since the United States is a party to that Convention, USMJ's are required to have an apostille.

Swiss law provides that the enforcing party may prove that a foreign judgment is final by submitting a certificate issued by the originating court confirming that the judgment has become final, or by proving the content of the court files. The originating court may be the appellate court or, if any applicable period for appeal has expired, the trial court. As noted before, it is not certain whether an affidavit valid under American law will suffice to prove finality.

An exception to the need for translation is Belgium. There, the law only requires authentication but not translation into either of the country's two official languages.

In English-speaking states, only authentication is required when submitting a USMJ, for obvious reasons. In Canada, proof of judgment may be made by tendering a certified copy of the USMJ impressed with the seal of the court that ordered it. Proving authenticity of the seal is not required.

In China, a judgment creditor must submit a written application containing the decision of the foreign court, certain other information, plus a certified translation into Chinese. If the foreign court is making the request, only the relevant text of the decision and a translation thereof into Chinese must be submitted.

In Japan, any document, including documents proving the originating court's decision, must be translated into Japanese before being submitted. Authentication of the documents evidencing the original judgment is not required.

10. Fraud.

It perhaps goes without saying that none of the states surveyed will recognize or enforce a USMJ or other foreign judgment if it was obtained by a fraud on the originating court. Not surprisingly, courts in at least one state feel free to examine this issue *de novo* if they think the situation warrants it. In the case of *Jet Holdings v. Patel*,¹⁰ the English Court of Appeal ruled that a foreign judgment will not be enforced at common law if it has been obtained by fraud even when the alleged fraud has been investigated and rejected by the originating court (in this case, the Superior Court of California).

C. Summary of Practical Obstacles to Recognition of USMJ's.

In addition to the legal obstacles to the recognition of USMJ's discussed in Section B above, the Committee's survey elicited a number of more practical and often systemic obstacles to recognition. These hidden obstacles may hinder recognition of USMJ's quite apart from any substantive or procedural difficulties arising under applicable law.

1. Bias and Corruption in the Recognizing Jurisdiction.

The possible existence of corruption and bias in the legal systems of foreign states is an important consideration for the US judgment creditor seeking to enforce abroad. In those jurisdictions where there are realistic concerns that a judge may be motivated by corrupt practices, *i.e.*, where money and influence may affect the outcome of cases, the root cause is usually an ill-paid, less well qualified judiciary not politically independent from the executive authority. The Committee wishes to stress that corruption was identified as a potential problem in only one of the states surveyed. It may be that the limited extent of this problem resulted from the fact that the states selected to be surveyed were those perceived by the Committee as being important trading partners of the United

¹⁰ [1983] 3 WLR 295.

States. On the presumption that states with more reliable and predictable legal regimes are more likely to achieve this status, it is perhaps not surprising that states where the concern over significant corruption is valid generally were not among the states surveyed.

The “good news” in the foregoing discussion is that, as those states which do have corruption problems seek to improve their international status and increase foreign trade, the need to heed the rule of law generally and the correlative need for a better trained and more independent judiciary will likely become clearer. At present, however, the inherently vague nature of certain tests for recognition, such as jurisdiction over the defendant and conformance with public policy, potentially provide wide and defensible tools for the pursuit of objectives outside the law. In short, the flexible laws relevant in foreign recognition proceedings potentially afford wide latitude for mischief.

The issue of bias is, like corruption, a many-headed creature, sometimes obvious in its manifestation, sometimes subtle to the point of near-undetectability. Perhaps especially in states having historical, cultural, political, and economic attributes significantly dissimilar from those of the US, judges in the recognizing jurisdiction may have a conscious or subconscious bias against the United States and its citizens, and therefore against recognizing USMJ's. They may reflect a larger culture which generally dislikes the United States and its nationals, and which fears being force-fed US law, policy, and culture. On the other hand, a defendant on “home turf” may naturally have certain advantages independent of any such bias.

A less troubling form of bias may arise from a concern over “importing” into their own domestic legal systems certain aspects of US law which are materially inconsistent with local law and which might give rise to novel causes of action in the recognizing jurisdiction. The Committee has noted the reluctance of many jurisdictions to enforce those judgments which are categorized as administrative or quasi-criminal in nature and therefore which are considered to impinge on areas reserved for the sovereign authority.

2. Lack of Appeal Process.

The availability of an appeal process is an important check on the integrity of judicial decisions. The majority of the states surveyed permit at least a limited right of appeal in the case of judgments involving the recognition of USMJ's. In such cases the judgment is treated procedurally like any other judgment in the recognizing jurisdiction and is therefore subject to appeal in accordance with the laws of the recognizing jurisdiction.

In Mexico, appeal is by way of a proceeding known as the *amparo*. This is apparently a time-tested way for a losing party to avoid paying a judgment for years, and to take the opportunity, if it has not already done so, to remove or otherwise shelter assets. Thus, in Mexico, the appeal process is often a significant practical obstacle to the recognition of a USMJ.

In Belgium, denial of recognition of a foreign judgment may be appealed as if it was an ordinary national judgment. In Italy, a denial by the Court of Appeal of the recognition of a foreign judgment may be appealed to the Supreme Court, but such a review is limited to questions of law.

In Spain, requests for recognition of a USMJ are made to the Supreme Court in Madrid. If recognition is denied, there is no appeal. Therefore, once recognition is granted, it is truly a final Spanish judgment.

In Canada, decisions in respect of the recognition of USMJ's may be appealed, but only in certain circumstances to its highest court with leave.

3. Right to Pursue Recognition.

Not all of the states surveyed automatically permit foreigners seeking recognition to file suit before their courts. Some require that a governmental authority either grant permission or at least be informed that a suit is being filed. The principle underlying such rules is to insure that the recognizing state's sovereign interests are protected. South Africa, for example, requires the permission of the Ministry of Industry Commerce and Tourism before suit may be filed. Mexico requires that the district attorney be informed so that the state can preserve its interest.

In China, an application for recognition of a foreign judgment will not be heard unless the local court first decides that it will hear the case. In other words, a separate proceeding appears to be required before the recognition proceeding can be instituted. The court is required by law to make the preliminary determination of whether or not to accept the case within seven days after the application is made.

There is no apparent requirement in the other jurisdictions surveyed that a governmental authority other than the recognizing court itself must either first grant permission for, or be formally informed of, a recognition proceeding about to be instituted in the local courts.

4. Export of Proceeds.

While a discussion of the procedural details of enforcing and executing upon a recognized judgment in the states surveyed is beyond the scope of this survey, the Committee is prompted to make reference to the existence of exchange controls in one of the jurisdictions surveyed, namely, South Africa. The existence of a regime of currency controls, intended to prevent the flight of capital, may restrict or limit the holder of a recognized USMJ from transferring the proceeds out of the jurisdiction after the judgment is satisfied. This represents an obvious practical obstacle which must be taken into consideration when contemplating pursuing a USMJ abroad in jurisdictions that have such restrictions.

D. Length of Time and Procedural Complexity for Recognition.

A holder of a USMJ considering whether to pursue a judgment debtor abroad must carefully consider the length of time it will take and the procedural complexity of doing so. In most of the states surveyed, this is by way either of trial or of summary proceedings.

Proceeding by way of trial is the usual course in virtually all of the states surveyed. The trial route in every state surveyed involves the normal procedural elements such as discovery, written submissions, submission of briefs, oral evidence, and so forth. What each of these elements entails may vary greatly from one jurisdiction to the next. In Mexico, for example, the use of discovery is far more limited than in the US; aggressive tactics such as are employed in the US are not allowed, and a judge would not permit the deposition of a government official, nor would the judge normally require the production of documents not already open to the public.

Pursuing a trial to its conclusion is often complex, costly, and complicated, and the difficulties of doing so can be even more pronounced in a foreign jurisdiction. The daunting prospect of engaging in foreign litigation may be somewhat mitigated by the fact that a proceeding to request recognition is directed only to a judgment already litigated to a conclusion, after the issues of liability and damages have been resolved. Such mitigation would be lacking in Belgium, where *de novo* review of the foreign judgment is required.

The Committee has been made aware of the following estimates as to the length of time to obtain recognition of a USMJ via trial proceedings: Canada, one to two years to obtain a trial date, with the trial to follow thereafter, length of time for trial depending on the nature of the case; China, six month initial limit, subject to a six month extension in special circumstances, with further extensions requiring the approval of a higher court; South Africa, one to two years depending on the nature of the case; Spain, one to two years depending on the nature of the case; Japan, two to nine years to obtain recognition of a USMJ; in Belgium the period may be lengthy due to the fact that the Belgian court is required to examine the merits; in South Africa, opposed filings may take a year or more; in Italy, the average time to obtain recognition of a USMJ may be between two and four years.

In Mexico, it was reported that the time period to obtain a trial is long due to backlogged court dockets. This was attributed to an increase in the state's international trade, and thus to an increase in its international disputes.

In England, Hong Kong, and Canada, summary proceedings could shorten the time period to a matter of months or even weeks. In the case of Canada, summary proceedings are available both in the case of recognition pursuant to reciprocity arrangements and in certain circumstances in the case of recognition pursuant to common law proceedings (see Part III. A.2 above).

In South Africa, provisional sentence filings, presumably available to US judgment creditors, could take one or two months if unopposed; three to four if opposed. The presumption of availability is based on the fact that neither the applicable South African treaties nor the relevant domestic laws differentiate among foreign judgments based on their state of origin with respect to this issue. The exception of course is those states which South Africa does not recognize at all.

IV. Concluding Remarks.

As the foregoing survey suggests, the recognition of USMJ's abroad is subject to inconsistent legal regimes and a myriad of substantive, procedural, and practical hurdles. No doubt similar hurdles face judgment creditors in most (if not all) other states. The Committee believes that a convention could create a framework for eliminating many of these hurdles. While complete uniformity regarding the recognition of foreign judgments in all jurisdictions is likely never to occur (and is not even a goal of the proposed Hague Convention), the Committee believes that a multinational instrument harmonizing the recognition of foreign judgments would mitigate many obstacles to international trade and thus promote its development.

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