

Foreign Court Judgments and the United States Legal System

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Introduction

Recognition and Enforcement of Foreign Judgments

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In my view, the premise of the Twenty-Sixth Sokol Colloquium is that broad and general changes in the international environment have consequences for even seemingly autonomous and technical bodies of law. The changes in question comprise the international reaction to the seeming triumph of liberal cosmopolitanism after the end of the Cold War. The Colloquium explores the evolution and proposed reforms of the rules governing the recognition and enforcement of foreign judgments, a supposedly hermetic subject. The resurgence in interest in this seemingly mundane topic, I maintain, reflects a transformation in global politics and economics.

The international-relations story goes something like this: From the collapse of the authoritarian regimes in Central and Eastern Europe in 1989 until the 9/11 attack on the United States, what I elsewhere have called the long decade of the 1990s, many informed observers believed that history had reached a new stage. In this brave new world, these observers thought, perpetual peace, growing respect for human rights and democratic politics, and a broader connectedness of the global community would dominate the international landscape. The ensuing decade, however, brought disruption and disappointment, including armed invasions of Afghanistan and Iraq, resurgent populist and illiberal hostility to the United States and Europe in places as diverse as Argentina, China, Ecuador, Nicaragua, Russia, Venezuela, and Zimbabwe, and a financial crisis that undermined the confidence and international influence of both the United States and, even more profoundly, the European Union. Low-level conflicts on the periphery of Russia and the messy aftermath of the Arab Spring have added exclamation points to the basic insight that what appeared optimistic but attainable in the 1990s seems utopian and even rather dark today.¹

The period of liberal cosmopolitan optimism had its impact on the private international law system that governed recognition and enforcement of foreign judgments. Liberal cosmopolitan values imply principles of equality and cooperation among national courts. In practice, this means that courts around the world should develop rules that allow lawsuits to find an appropriate home,

¹ I develop this argument in somewhat greater length in Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17, 102–05 (2014).

taking into account the interests of the parties as well as the international system generally, and then assist in the implementation of the decisions reached in the appropriate jurisdiction. Those portions of the 1986 Restatement (Third) of the Foreign Relations Law of the United States that dealt with foreign judgments generally reflected this outlook.² The efforts of the Hague Conference on Private International Law to draft an international convention on jurisdiction and recognition and enforcement of judgments, begun in 1992, similarly rested on a premise that the time was ripe for multilateral cooperation in the field.³ Europe had achieved regional integration with the Brussels and Logano treaties, later extended through the 2001 Brussels Regulation.⁴

Since the dawn of the new century, however, fissures have emerged in this vision of a happy kingdom of internationally cooperative courts. As part of general resistance to the hegemony of the United States and Europe, several jurisdictions have collaborated with deeply committed U.S. plaintiffs' attorneys to redress what they see as the structural iniquities of multinational corporations. These jurisdictions, either legislatively, through judicial innovation or both, have applied new rules and procedures to facilitate civil suits seeking compensation for what they believe to be great and grave injuries resulting from corporate indifference to those whom Frantz Fanon called the wretched of the earth.⁵ The resulting judgments, often enormous, have in turn challenged the jurisdictions in which the plaintiffs have sought recognition and enforcement. The suspect, if only because tailor-made, processes that have generated these judgments have prompted the enforcing jurisdictions to reconsider the rules of recognition. More generally, the chasm between the originating and receiving courts has exposed the potential downside to a regime of easy recognition. Courts have

2 AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481–86 (1987).

3 For discussion of the origins and evolution of this project, see Peter D. Trooboff, *Implementing Legislation for the Hague Choice of Court Convention*, in this volume.

4 Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters, Brussels, Sept. 28, 1968, 1262 U.N.T.S. 222; Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Logano, Sept. 16, 1988, O. J. L 319/9 (1988); Council Regulation (EC) No. 44/2001, art. 34(1), O. J. L 12/1 (2001), *to be superseded by* Brussels I Regulation (Recast), Council Regulation (EU) No. 1215/2012, art. 45(1)(a), O. J. L 351/1 (2012) (going into effect mostly on Jan. 10, 2015). Whether these particular achievements are an artifact of regional integration or a template for the rest of the world remains to be seen.

5 FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington trans. 1967).

begun to support corporations that oppose foreign judgments.⁶ Scholars have weighed in on both sides, as scholars tend to do. Some have proposed rules that would make recognition easier in such circumstances, while others have called for greater scrutiny of problematic foreign judgments.⁷

This particular conundrum in turn has influenced two general trends in U.S. law. On the one hand, definition and development of existing doctrine presents challenges. Almost all of the U.S. law of recognition and enforcement of foreign judgments is derived from a pre-*Erie* Supreme Court decision that expounded what was then thought to be general, and thus nonmandatory, common law.⁸ For the last half-century, state statutes, based on uniform laws propounded by the National Conference of Commissioners of Uniform State Laws (NCCUSL), have occupied the field.⁹ Local variations in the statutes as well as a choice between two uniform laws, as well as reliance on only common law in a significant minority of States, means that the law is a hodge-podge and common practice is sometime hard to discern.

For those hoping to bring order to the field and to promote dynamic responses to the new challenges of judgment recognition, several paths seem open. One response has been the launch of a Fourth Restatement, devoted to many of the topics of the Third but, at present, furthest along with respect to the recognition topic. The Tentative Draft currently before the ALI's membership focuses specifically on recognition and enforcement of foreign judgments.¹⁰

6 In one prominent case, a court has enjoined plaintiffs and their lawyers from seeking to benefit in any way from a foreign judgment that, the court found, they had obtained through fraud and political collusion. *Chevron Corp. v. Donziger*, ___ F. Supp. 2d ___ (S.D.N.Y. 2014).

7 Compare Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011) (calling for easier recognition in cases where party resisting enforcement had argued for forum that produced the judgment), with Peter B. Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 VA. J. INT'L L. 181 (2012) (supporting barriers to recognition of suspect judgments).

8 *Hilton v. Guyot*, 159 U.S. 113 (1895). The general common law was nonmandatory in the sense that State courts had no obligation to apply it.

9 In 2007 NCCUSL remained itself as the Uniform Law Commission. I refer here to the name that the organization had when it adopted the Uniform Acts.

10 AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES—JURISDICTION (Tent. Draft No. 1, 2014) [hereinafter FOURTH RESTATEMENT]. The reporters for this Tentative Draft are William Dodge, Anthea Roberts, and myself. Sarah Cleveland and I are the coordinating reporters for the entire Fourth Restatement. The ALI membership approved the Tentative Draft, subject to revision, at the May 2014 annual meeting.

An alternative project is to supersede the existing welter of State law with a federal statute. The American Law Institute proposed such an enactment in 2006.¹¹ The launching of this enterprise undoubtedly induced the NCCUSL to revise its Uniform act, the final version of which it approved in 2005 and which, to date, has been adopted in 17 States and the District of Columbia.¹² The only federal statute that addresses recognition and enforcement, however, is the SPEECH Act of 2010, which deals only with foreign defamation judgments.¹³ One cannot hold out much hope for comprehensive Congressional action in the near future. But a very discrete part of the general project, namely the recognition and enforcement of foreign judgments resting on a contractual choice of forum, remains a very live topic. The United States signed a 2005 Hague Convention treaty on this subject in 2009. As contributions to this Colloquium attest, the precise means of ratifying and implementing this treaty has generated considerable controversy.

The Twenty-Sixth Sokol Colloquium deals with both of these developments. The first set of papers looks at particularly difficult problems in current law and the potential responses of the Fourth Restatement. The second considers the prospects for legislative reform in the United States, both generally and in implementing the Hague Convention on Choice of Courts Agreements (COCA). Each explores the surprising complexities and difficult policy choices that lie beneath the surface of this seemingly settled field.

George Rutherglen and James Stern take up a fundamental problem. The *International Shoe* revolution in procedural due process greatly expanded the range of choices for deciding where to bring a civil suit. But to turn a civil judgment into actual compensation, one has to engage the enforcement process, and enforcement is relentlessly territorial. Even though the transformation of communications and transportation in the last century (even before the rise of the Internet) supposedly erased national borders, states continue to hold the enforcement of judgments hostage to the particular policies and values of the forum where assets are located.

After reviewing the many ways in which states, including the United States, treat foreign judgments as different from their own, Rutherglen and Stern

11 AMERICAN LAW INSTITUTE, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND A PROPOSED FEDERAL STATUTE* (2006). Linda Silberman and Andreas Lowenfeld were the reporters for this project.

12 Uniform Foreign-Country Money Judgments Recognition Act (2005), 13(II) U.L.A. 19 (Supp. 2013).

13 Securing the Protection of Our Enduring and Established Constitutional Heritage Act, Pub. Law 111-223, 124 Stat. 2480, codified at 28 U.S.C. §§ 4801-05.

offer a defense of territorial sovereignty in the face of the last century's hopes for liberal cosmopolitanism. They link the territorial regime to the general rule restricting the power to adjudicate interests in property to the forum where property is located.¹⁴ Territorial sovereignty has value, whether it lies in the coherence of a system of entitlements or the preservation of the values and interests of the sovereign. Functionally, it also provides a check on what might otherwise be unbridled and inappropriate forum selection on the part of claimants.

Pamela Bookman looks at forum selection from the front as well as back end. She explores doctrines that allow defendants to frustrate forum selection at the outset by invoking either the mandatory or discretionary authority of the selected forum to dismiss a suit. She notes that, in the last century, corporate defendants saw avoidance of a U.S. forum as a paramount goal, because no other jurisdiction would employ as onerous a set of rules and procedures as did the U.S. civil justice system, including jury trials, punitive damages, broad pretrial discovery, class actions, contingency compensation for plaintiffs' attorneys, and no fee shifting to plaintiffs. In the past decade, however, extravagant victories by plaintiffs suing U.S. companies abroad have shifted the calculus. Back-end rules that allow U.S. courts to resist recognition and enforcement of foreign judgments will not necessarily help global firms that have assets around the world, including in countries that might sympathize with the litigation forum's hostility toward first-world companies and interests. Faced with this dilemma, defendants may consider abandoning those discretionary doctrines that can defeat a U.S. forum.

William Dodge considers one of the doctrines that undergird the ongoing resilience of territorial sovereignty, namely the general refusal to recognize or enforce foreign penal and revenue judgments. Dodge has written extensively on this topic in the past, and has played a major role in the drafting of the Tentative Draft of the Fourth Restatement that deals with this issue.¹⁵ His contribution to the Colloquium considers a critical and under-explored problem, namely whether these doctrines, often called the penal and revenue rules, are ones that the States are free to accept or reject as they please, or instead are imposed on the States due to federal constitutional preemption.

¹⁴ Earlier work by Stern on this subject includes James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111 (2014).

¹⁵ His prior work includes William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. J. INT'L L. 161 (2002); *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT'L L. 371 (2008). See also FOURTH RESTATEMENT, note 10 *supra*, § 409.

Dodge argues for a narrow but crucial preemption principle. The inclination of the United States to negotiate treaties that permit the recognition and enforcement of certain penal and tax judgments, he argues, implies a policy that should preempt State laws that would frustrate the federal program. Any State that volunteered on its own to recognize and enforce these judgments would take away one of the federal government's bargaining chips. Ergo, he argues, any State law that did so should be preempted by the federal policy.

Although no State to my knowledge has sought to renounce the penal or revenue rule, one should not dismiss this argument as academic. It implicates a general approach to preemption. Dodge very carefully argues against regarding the revenue rule as federal common law, an alternative path to preemption of State law. The status of policy preemption as settled constitutional doctrine remains controversial, and the Fourth Restatement has not yet ventured any views on this issue. As views develop, Dodge's argument will anchor an important perspective of the problem, whether it ultimately prevails or not.

My own contribution addresses one of the established doctrines for resisting foreign judgments, namely flaws in the legal system that produced the award. A century or so ago, the Supreme Court seemed comfortable with the distinction between civilized and uncivilized legal systems, with the implication that the decisions of the latter lacked credibility in U.S. courts. In our postcolonial contemporary world, this formulation embarrasses rather than illuminates, but our law continues to distinguish between acceptable and unacceptable foreign legal regimes.

The 1962 and 2005 Uniform Acts both categorize systems that fail to comport with due process of law as incapable of generating judgments entitled to recognition or enforcement. But judicial practice under these statutes, as well as the common law in States that have not enacted relevant legislation, is somewhat different. Almost invariably the courts assess not the foreign legal system as a whole, but rather the rules and processes that produced the judgment in question. The 2005 Uniform act, unlike its predecessor, expressly approves of a focused assessment of the prior proceedings. Some commentators caution against this approach, arguing that it undermines the value of avoiding relitigation.¹⁶ I argue that some review of the propriety of foreign proceedings is desirable, and indeed perhaps is inevitable in a fractured world that no longer seems committed to the liberal cosmopolitan project. Moreover, I maintain, judges rightly prefer to undertake retrospective, fact-based inquiries, rather than to pronounce on the general qualities of entire national legal

16 See, e.g., Michael Traynor, *The Corruption Defense to Recognition of a Foreign Judgment: A Cautionary Note*, 34 U. PA. J. INT'L L. 755 (2013).

systems. The Tentative Draft of the Fourth Restatement contains hints of a similar conception.¹⁷

A doctrinal, common-law approach to the challenges of judgment recognition and enforcement has the virtues of incrementalism and flexibility. What it lacks is comprehensive scope and systematic consideration of the issues. A statute, ideally, can redress these failings and provide a stable foundation for the development of the law. The American Law Institute's Proposed Statute, for example, would provide a stable solution to all of the problems explored in the first set of papers in this colloquium. Moreover, as federal legislation it would provide common rules for the entire country and authorize the federal courts, ultimately under the supervision of the Supreme Court, uniformly to interpret and develop the statute.

Linda Silberman, one of the two reporters who produced the Proposed Statute, focuses here on the virtues of a federal law. She notes that the United States allowed State law to occupy this field largely by default, and that upon further consideration federal law has much to recommend itself. She focuses in particular on the role of the Supreme Court as the ultimate expositor and interpreter of a federal statute. Nothing similar would exist in a system of uniform State laws not subject to Supreme Court oversight.

The choice between a federal statute and uniform State laws is at the heart of the debate over implementation of the COCA. Since the Hague Conference produced this instrument in 2005, a debate has unfolded inside the United States over the best means of implementing it in domestic law. Keith Loken, the Assistant Legal Adviser for Private International Law at the time that he gave the keynote speech at the Colloquium, offers a comprehensive overview of the State Department's perspective on this controversy. He locates COCA in the unhappy history of the Hague Conference's effort to draft a broader judgments convention. As Loken notes, in general terms the question boils down to the arbitration model, where the United States responded to its international obligations with a federal statute (the nationalist position), and the uniform State law model (the cooperative-federalism position propounded by the Uniform Law Commission). He identifies the key issues in controversy and describes the State Department's position on them as of the time of his writing.

Peter Trooboff, as his contribution indicates, was one of the original U.S. participants in the Hague Conference effort, and serves on the State Department's advisory committee on private international law. He has played a major role in the ongoing debate. His position represents a compromise between the nationalist and cooperative-federalism approaches. In his view, States may

17 FOURTH RESTATEMENT, note 10 *supra*, § 403 comments *b* and *e*; § 404 comments *i* and *j*.

and should adopt uniform laws, but measures must be taken to ensure some kind of ultimate federal supervision of the resulting laws. Most fundamentally, he believes that resolving questions of first principles and making a sweeping choice between nationalism and federalism is unnecessary to ratify and implement an obviously desirable treaty.

David Stewart, formerly the Assistant Legal Adviser for Private International Law, also describes the implementation debate.¹⁸ Like Trooboff, he also strongly supports U.S. participation in this treaty, but has some sympathy for a greater role for State uniform laws along the lines proposed by the Uniform Law Commission. He describes in detail the terms of the conflict. He takes seriously the argument that a freestanding federal statute might not survive scrutiny by the contemporary Supreme Court, which over the last two decades has revived judicial policing of the limits of the Commerce Clause. Most importantly, he agrees with Trooboff that the differences between the two sides should not defeat implementation of an important and useful treaty.

Kevin Cope concentrates on one dimension of an issue that divides the nationalists and the federalists with respect to COCA and similar treaties, namely the prospect of uniformity in the interpretation and application of a law. He argues that in a world that inevitably will delegate considerable discretion to judges in the implementation of legislative commands, uniform outcomes are unlikely, and systematic divergence is probable. He expresses skepticism about the ability of the Supreme Court to overcome this tendency due to its limited time and mind-space budgets. He concludes that the stakes between the nationalist and federalist positions are less than the adherents believe. One might infer from his argument that the two sides would do well to embrace a pragmatic compromise. This inference bolsters the pleas of both Trooboff and Stewart for creative accommodation in the COCA implementation controversy.

Finally, Timothy McEvoy brings a comparative perspective to this problem. As an Australian barrister, he works under Australian rules, which include a federal statute on jurisdiction. This establishes a two-track system, with designated countries falling under the statute and the remainder seeing their judgments receive only common-law comity. This means that certain kinds of U.S. civil judgments, specifically those based on long-arm personal jurisdiction, will not enjoy legal force in Australia. He notes that U.S. enactment of a

18 Stewart's contribution builds on his contribution to the Twenty-Fifth Sokol Colloquium. David P. Stewart, *The 2005 Hague Choice of Court Agreements Convention: A Useful Tool for the Transnational Litigator*, in *FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS* 203 (John N. Moore ed. 2013).

statute along the lines proposed by Silberman would put greater pressure on Australian courts to accord greater recognition to our judgments.

Australia's treaty practice also opens a window to the future of liberal cosmopolitanism. McEvoy notes that Australia and the United States have entered into an international agreement that permit enforcement of each other's penal judgments resulting from fraud to consumers as determined by the relevant administrative agencies. Australia and New Zealand have gone even further, producing the Trans-Tasman Proceedings Act, which provides each country's judgments, even penal ones, considerable reciprocal enforceability.

McEvoy does not put the point this boldly, but I will: The ideal of interchangeability of national judgments, of a global system approaching that realized in the United States with respect to State judgments under the Full Faith and Credit Clause, is not dead, but it is not for courts and commentators to pursue. Rather, states can use their formal lawmaking processes to contract for this treatment, as the several United States did when they ratified the Constitution. The obstacles to common-law adaptation are too great to be overcome, but treaties and legislation can do the job.

This point about relative legislative and judicial competence is another lesson that one might draw from the post-liberal-cosmopolitan world in which we find ourselves. Right after the end of the Cold War, one plausibly might believe that the leading legal figures of all societies, especially the independent judiciary, would share common values on which progressive legal developments would rest.¹⁹ Judicial power and law reform thus complemented each other. But as suspicion about the values and integrity of each other have arisen, confidence in a shared global judicial mission has waned. Judges have shrunk from the task of differentiating between friends and foes and have fallen back on strategies that do not assume the presence of common ground. In this environment, legislative direction and screening may help. Of course, those of us in the United States appreciate only too well the limitations of our gridlocked political branches. But alternatives may be beyond our grasp.

19 The exposition par excellence of this view can be found in ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2004). My general criticism is expressed in Paul B. Stephan, note 1 *supra*, *passim*.