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Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom and the European Economic Community*

by David Luther Woodward**

I. Introduction

Throughout its existence, the United States of America has engaged in commercial transactions with the United Kingdom without the benefit of any agreement between the two countries as to the recognition of the judicial acts of the other. The United States has reached no such agreement with any country, but the United Kingdom, through Acts of Parliament and the rulings of its courts, has developed a body of law addressing the issues of recognition and enforcement of foreign judgments. Lately, the entry of the United Kingdom into the European Economic Community has placed at issue yet another system of law.¹

Assuming the desirability, value, and possible necessity of reciprocal recognition of agreements between countries whose citizens engage regularly in commercial transactions, and further assuming the public policy in favor of and the private convenience created by such agreements, this article will examine what has been proposed and attempted between the United States and the United Kingdom. In addition, the article will discuss the posture of the Member States of the European Economic Community resulting from the legal obligations imposed upon them by the agreements reached in forming that international institution.

Thus, an analysis of the state of the law of recognition of foreign judgments in the United States will be compared with that of the United Kingdom. Also examined will be the result that would obtain upon the

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¹ See generally Smit, *The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA J. INT'L L. 443, 443-446 (1977).

conclusion of an international agreement. Thereafter, the state of affairs in the European Economic Community will be considered.

The anticipated effects of any international agreement on the recognition and enforcement of judgments cannot be examined properly without first determining the state of the internal law of the countries involved; especially when the proposed agreement establishes indirect rather than direct bases of jurisdiction.² The historical context in which recognition practice has arisen emphasizes the need for comparison of internal law. Most of the body of recognition law that is involved, and any statutory treatment thereof, has developed since 1776. In both the United States and the United Kingdom, that body of law, although somewhat parallel in development, has resulted in differing treatments and results.

A. *The United States*

In the United States, the recognition and enforcement of foreign judgments is a matter of state law.³ The United States Supreme Court has spoken to the issue only once, in *Hilton v. Guyot*.⁴ In that case, the Court said that foreign judgments should generally be recognized, unless the judgment suffers from unfairness, prejudice, fraud or lack of jurisdiction.⁵ Nevertheless, the Court held that "judgments rendered in . . . any . . . foreign country, by the laws of which [U.S.] judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim."⁶ This statement, although dictum, is still a reasonably accurate statement of basic law.

Because of the importance of state law to U.S. recognition of foreign judgments, it is inaccurate to speak of an "American rule" in the area. It is possible, however, to identify certain common state procedures, which anyone seeking to enforce a foreign judgment in the United States will encounter.⁷ A state will generally follow only one of these procedures.

The first common state procedure was established by the Uniform Enforcement of Judgments Act.⁸ This proposed statute, which was adopted by only four states,⁹ required that a normal lawsuit be filed to

² See *infra* notes 115-122 and accompanying text.

³ Although Congress possesses the power to regulate recognition of foreign judgments, U.S. CONST. art. IV, § 1, it has never exercised this power; thus, the only applicable laws are those of the several states. See von Mehren, *Recognition and Enforcement of Sister-State Judgements: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 COLUM. L. REV. 1044, 1046-47 (1981).

⁴ 159 U.S. 113 (1895).

⁵ *Id.* at 202.

⁶ *Id.* at 207.

⁷ See von Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 L. & Pol. Int'l Bus. 37, 39 (1974).

⁸ 13 U.L.A. 190 (1948) [hereinafter cited as 1948 ACT].

⁹ 13 U.L.A. 7 (Supp. 1983). The states are Arkansas, Illinois, Missouri and Nebraska.

enforce a foreign judgment.¹⁰ Thus, the Act merely restated the common law method of enforcing foreign judgments.

The Uniform Enforcement of Judgements Act was revised in 1964.¹¹ The 1964 Act fashions a registration procedure, requiring administrative registration of foreign judgments.¹² The Act mandates that the defendant be notified of the registered judgment¹³ and specifies the reasons for which a registered judgment would not be enforced.¹⁴ Although the comments appended to the Act suggest that it merely restates past law, the registration procedure clearly departs procedurally from the common law. The 1964 Act has been enacted in twenty-one states.¹⁵

Defenses to enforcement under the 1964 Act are those characteristic of the common law,¹⁶ fraud upon, or want of jurisdiction in, the rendering court,¹⁷ including lack of subject matter jurisdiction and due process.¹⁸ The failure to raise a meritorious defense at the trial of a cause before the court of a sister-state is not a defense in the court of the state in which enforcement is sought,¹⁹ nor can a defendant object to domestication upon the ground that his special appearance to contest jurisdiction was denied, and that the sister-state judgment was entered upon a default after his failure to defend.²⁰ It is inappropriate to raise counterclaims in the enforcement proceeding.²¹ When introduced in subsequent litigation between the same parties, sister-state judgments have res judicata and collateral estoppel effect.²²

The list of states that enacted the 1964 Act is long.²³ Nevertheless, the law is by no means uniform, for two reasons. First, some thirty states and the District of Columbia, as well as other territories, follow neither the 1964 Act nor the 1948 Act. Second, because both Acts apply, on

¹⁰ 1948 ACT, *supra* note 8, § 2, 13 U.L.A. at 192.

¹¹ UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT OF 1964; 13 U.L.A. 173 (1964)[hereinafter cited as 1964 ACT].

¹² *Id.* § 2, 13 U.L.A. at 177.

¹³ *Id.* § 3, 13 U.L.A. at 183-84.

¹⁴ *Id.* § 4, 13 U.L.A. at 185.

¹⁵ 13 U.L.A. at 2 (Supp. 1983). The states are Alaska, Arizona, Colorado, Connecticut, Idaho, Iowa, Kansas, Maine, Minnesota, Nevada, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Washington, Wisconsin, and Wyoming.

¹⁶ Both the 1948 Act and the 1964 Act adopt by reference the same defenses to enforcement of a foreign judgment as are available to prevent enforcement in one state court of a judgment delivered by another court in the same state. *See* 1964 Act, *supra* note 11, § 2, 13 U.L.A. at 177; 1948 Act, *supra* note 13, § 8, 13 U.L.A. at 201. Defenses to enforcement of foreign judgments are therefore a mixture of state statute and case law. Both the statutes and the cases rely heavily on the common law. For a typical statute specifying grounds for non-enforcement, see FED. R. CIV. P. 60.

¹⁷ *See* Phares v. Nutter, 125 Ariz. 291, 293-94, 609 P.2d 561, 563-64 (1980).

¹⁸ *See id.* at 293, 609 P.2d at 563.

¹⁹ *See* Miller v. Eloie Farms, Inc., 128 Ariz. 269, 625 P.2d 332 (Ct. App. 1980).

²⁰ *See* Purser v. Corpus Christi State Nat'l Bank, 258 Ark. 54, 522 S.W.2d 187 (1975).

²¹ *See id.* at 57, 522 S.W.2d at 189.

²² *See* Schroeder v. 171.74 Acres of Land, 318 F.2d 311, 314 (8th Cir. 1963); *See also infra* text accompanying note 59.

²³ *See supra* note 13.

their faces, only to judgments of other U.S. states,²⁴ further legislation is needed to make the Acts applicable to foreign nation judgments. Such legislation has not been passed in some states which have enacted the 1964 or 1948 Act.

B. Foreign Judgments in the United States

1. Recognition by the States

Chronologically, between the proposal of the two enforcement acts, the Conference of Commissioners on Uniform State Laws drafted the Uniform Foreign Money-Judgements Recognition Act,²⁵ which is strikingly similar to the British Foreign Judgements (Reciprocal Enforcement) Act of 1933.²⁶ It permits recognition of a judgment of any governmental unit other than a state or territory of the United States that grants or denies a sum of money, except "for taxes, fine or penalty, or a judgment in family law for support."²⁷ Registration occurs as an equivalent to a sister-state judgment,²⁸ and is barred by lack of conclusiveness, absence of minimal due process, and want of personal or subject matter jurisdiction.²⁹ Discretionary denial of registration occurs in cases of preclusion of the opportunity to defend through inadequate notice, judgments obtained by fraud, judgments which are repugnant to the recognizing state's public policy, conflicts of judgments, judgments that are contrary to the agreement of the parties, or in cases where jurisdiction is based solely on personal service coupled with "serious inconvenience."³⁰ Jurisdiction in the international sense is required, with specific requirements of personal service in the foreign state or voluntary appearance, except to protect property, as bases.³¹

In construing the Recognition Act, the reciprocity rule of *Hilton v. Guyot* was specifically rejected in *Nicol v. Tanner*.³² In *Nicol*, the lower court refused to enforce a German judgment, because Germany does not

²⁴ 1964 ACT, *supra* note 11, § 1, 13 U.L.A. at 176; 1948 ACT, *supra* note 8, § 1(a), 13 U.L.A. at 190.

²⁵ 13 U.L.A. 417 (1962) (hereinafter cited as FOREIGN MONEY-JUDGEMENTS ACT). The Act has been adopted in Alaska, California, Colorado, Illinois, Maryland, Massachusetts, Michigan, New York, Oklahoma, Oregon, Texas, and Washington. 13 U.L.A. at 168 (Supp. 1983).

²⁶ 23 & 24 Geo. 5, ch. 13 (1933).

²⁷ FOREIGN MONEY-JUDGEMENTS ACT, *supra* note 25, § 2, 13 U.L.A. at 420.

²⁸ *Id.* § 3, 13 U.L.A. at 420.

²⁹ *Id.* § 4(a), 13 U.L.A. at 422.

³⁰ *Id.* § 4(b), 13 U.L.A. at 422.

³¹ *Id.* § 5, 13 U.L.A. at 425. Compare this definition of jurisdiction with the traditional "two-pronged" definition of interstate jurisdiction adopted by the U.S. Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Jurisdiction exists, the Court said, if 1) the defendant has certain "minimum contacts" with the forum, and 2) assumption of jurisdiction by the forum will not "offend traditional conception[s] of fair play and substantial justice." *Id.* at 320. The definition of minimum contacts is unclear, but the contacts clearly must amount to more than temporary physical presence. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The "two-pronged" test applies whether jurisdiction is in personam or in rem. *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

³² 310 Minn. 68, 256 N.W.2d 796 (1976).

enforce U.S. judgments. The Minnesota Supreme Court reversed, finding reciprocity not essential to the enforcement of a foreign judgment.³³ By comparison, notice in the German language of a Swiss proceeding delivered from the Swiss Consul General to the defendant in California by certified mail did not constitute adequate personal service, resulting in an inconclusive judgment to which recognition and enforcement were denied.³⁴

To the extent that the judgment of a Lebanese court granted or denied a monetary amount, that judgment would invoke the Recognition Act and require treatment of the Lebanese judgment as a sister-state judgment even though the issues include title to, and ownership in, real property in Alaska, Lebanon and Washington, and rights in an Italian corporation.³⁵ Under proper circumstances, stays of execution are appropriate when an appeal is pursued in the rendering state at the same time recognition is sought in a sister state.³⁶

Recognition in matrimonial cases is universally denied under the Act because it specifically excludes such actions.³⁷ The recognition, domestication and enforcement of marital cases before the courts of American states sitting in chancery, however, has been permitted on the theory of comity and upon the inherent power of chancery.³⁸ Matrimonial cases require that jurisdiction exist before the adjudicatory court, and that proper jurisdiction exist in the court addressed.³⁹ In *In Re the Marriage of Red Fox*,⁴⁰ the court held that a state court was not required to give full faith and credit to an Indian tribal court's divorce decree. The court held, however, that deference should be given to the decree in the same manner as it is given to the decree of a foreign nation. The court defined comity as the recognition given by one sovereign to the acts of another upon due regard for "international duty and convenience" of citizens of the respective sovereigns.⁴¹

As in the enforcement statutes, fraud in the proceeding before the rendering court is a defense under the Recognition Act, but it must be

³³ *Id.* at 81, 267 N.W.2d at 803.

³⁴ *Julen v. Larson*, 25 Cal. App.3d 325, 101 Cal. Rptr. 796 (1972).

³⁵ *Abadou v. Trad*, 624 P.2d 287 (Alaska 1981). The *Trad* opinion is particularly well-written, and is recommended for its examination of choice of forum clauses as well as recognition and enforcement practice.

³⁶ See *Stevens v. Superior Court for the County of Los Angeles*, 28 Cal. App.3d 1, 4, 104 Cal. Rptr. 369, 371 (1972); FOREIGN MONEY-JUDGEMENTS ACT, *supra* note 25, § 6, 13 U.L.A. at 427.

³⁷ FOREIGN MONEY-JUDGEMENTS ACT, *supra* note 25, § 1(2), 13 U.L.A. at 419.

³⁸ See, e.g., *Wolff v. Wolff*, 40 Md. App. 168, 389 A.2d 413 (1978). But see *Hager v. Hager*, 1 Ill. App. 1047, 274 N.E.2d 157 (1971); *Nardi v. Segal*, 90 Ill. App.2d 432, 234 N.E.2d 805 (1967) (comity alone held insufficient basis on which to enforce foreign divorce decree. . . specific statutory authorization held necessary).

³⁹ See *Williams v. North Carolina*, 317 U.S. 287 (1942); *after remand*, 325 U.S. 226 (1945). See also Note, *Recognition of Foreign Divorce Decrees*, 32 U. CHI. L. REV. 802 (1965).

⁴⁰ 23 Or. App. 393, 542 P.2d 918 (1975).

⁴¹ *Hilton v. Guyot*, 163 U.S. 113, 164 (1895).

pleaded specifically.⁴²

2. *Role of the Federal Courts*

The state courts are courts of general jurisdiction, but the federal courts are of limited jurisdiction. The jurisdiction of the federal courts is limited to the constitutionally-defined judicial power and to the grants of jurisdiction given by Congress.⁴³ When a United States District Court entertains a suit under its diversity of citizenship jurisdiction,⁴⁴ it must apply the substantive law of the state in which it sits.⁴⁵ Similarly, the district court must apply the conflicts of laws rules of the state in which it sits.⁴⁶

Federal original jurisdiction must embrace a federal question; actions arising under the Constitution and the laws of the United States and its treaties,⁴⁷ or must arise under diversity of citizenship jurisdiction, which requires that the litigants be citizens of different states or nations, subject to a minimum dollar amount of \$10,000.⁴⁸ Various U.S. statutes grant exclusive federal jurisdiction in matters of antitrust, bankruptcy, patents, and copyright.⁴⁹

By statute, judgments of the district courts sitting in one state may be registered before the district court in another state,⁵⁰ but such is merely a ministerial act.⁵¹ Recordation of the judgment with the clerk of the state court of general jurisdiction for the county, parish or judicial district, or the recording office for deeds, is necessary to create a judgment lien,⁵² whereupon final process can be accomplished by state officials.⁵³ Although one might infer that the federal courts are of minor significance, the federal courts are competent to construe state law, and thus the law of recognition and enforcement of foreign judgments.⁵⁴

Furthermore, satisfaction of due process requirements is the measure

⁴² FOREIGN MONEY-JUDGEMENTS ACT, § 4(b)(2), 13 U.L.A. at 269. *See* Davis v. Nehf, 14 Ill. App.3d 318, 302 N.E.2d 382 (1973).

⁴³ C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 7 (3d ed. 1976). *See* U.S. CONST. art. III, § 2, cls. 1-2.

⁴⁴ *See* 28 U.S.C. § 1332 (1976).

⁴⁵ Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

⁴⁶ Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

⁴⁷ C. WRIGHT, *supra* note 43, § 17.

⁴⁸ 23 U.S.C. § 1332 (1976).

⁴⁹ C. WRIGHT, *supra* note 43, § 10. *See, e.g.*, 15 U.S.C. § 7174 (1976) (giving federal courts exclusive jurisdiction over violations of the Natural Gas Act); 18 U.S.C. § 3231 (1976) (giving federal courts exclusive jurisdiction over cases involving crimes against the United States).

⁵⁰ 28 U.S.C. § 1963 (1976). *See* Stiller v. Hardman, 324 F.2d 626 (2d Cir. 1963); Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union, 128 F. Supp. 697 (D. Hawaii 1955).

⁵¹ *Juneau Spruce*, 128 F. Supp. at 699.

⁵² 28 U.S.C. §§ 1963, 1963A (1976 & Supp. V 1981).

⁵³ Knapp v. McFarland, 462 F.2d 935 (2d Cir. 1972).

⁵⁴ *See, e.g.*, Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1912 (E.D. Ark. 1973) ("[I]t therefore becomes the duty of the court to predict as best it can how the Supreme Court of Arkansas would answer the question").

by which American courts determine if the foreign court has perfected personal jurisdiction.⁵⁵ In a proceeding commenced in England on a contract concluded by telephone, the American defendant appeared specially to test jurisdiction. When his motion was denied, he moved to withdraw. On appeal, the English Court of Appeal overruled the trial court's finding that appearance has been made according to English law, and entered judgment in favor of the English plaintiff.⁵⁶ The English plaintiff sought recognition and enforcement in the United States. In *Sumportex v. Philadelphia Chewing Gum Corp.*,⁵⁷ the Third Circuit Court of Appeals ruled that recognition should be granted, and found that jurisdiction in the international sense was lodged in Queen's Bench, that notice was due and proper under Order 11, the English equivalent of long-arm jurisdiction as exercised by Pennsylvania, and that the defendant waived his right to defend by his default.⁵⁸

In the exercise of their specialized jurisdiction, the federal courts have the power to domesticate foreign judgments. In *International Sea Food Ltd. v. M/V Campeche*,⁵⁹ for example, the court recognized a judgment of the High Court in Admiralty of the Isle of Barbados. The Fifth Circuit has given res judicata effect to a settlement decree of a Greek court.⁶⁰ Finding that full faith and credit is extended by the admiralty rules of Costa Rica, a Florida district court ruled that full faith and credit should be extended to the order of a Costa Rican court granting judicial foreclosure and sale of a vessel on default of its preferred first mortgage, giving the purchaser at the sale title superior to any claim of the plaintiff maritime lienors.⁶¹

There emerges no "American Rule" for the recognition and enforcement of foreign judgments, but rather a crazy quilt arrangement of methods for their domestication. A simple analysis shows the following pattern:

1. Alaska, Colorado, New York, Oklahoma, Oregon, Texas and Washington have enacted the Recognition Act and the 1964 Enforcement Act, which would seem to permit administrative registration and administrative enforcement of foreign judgments;
2. Illinois has enacted the Recognition Act and 1948 Enforcement

⁵⁵ *Royal Bank of Canada v. Trentham Corp.*, 491 F. Supp. 404 (S.D. Tex. 1980).

⁵⁶ *Sumportex, Ltd. v. Philadelphia Chewing Gum Corp.*, [1968] 3 All E.R. 26, 27-29.

⁵⁷ *Sumportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1917 (1972). An exhaustive annotation of the case appears at 13 A.L.R. FED. 194 (1972).

⁵⁸ *Sumportex*, 453 F.2d at 444.

⁵⁹ 566 F.2d 482 (5th Cir. 1978).

⁶⁰ *Zorgias v. SS Hellenic Star*, 487 F.2d 519 (5th Cir. 1973).

⁶¹ *Atlantic Ship Supply, Inc. v. M/V Lucy*, 392 F. Supp. 179 (M.D. Fla. 1975). *But see* *Grotian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 365 F. Supp. 707, 719 (S.D.N.Y. 1973), *aff'd* 523 F.2d 1331 (2d Cir. 1975) (German court decisions regarding trademark rights disregarded as "irrelevant and inadmissible" within the United States).

Act, which would seem to permit administrative registration of foreign judgments, but require judicial enforcement by summary judgment;

3. California, Maryland, Massachusetts and Michigan have enacted the Recognition Act only, thus seeming to permit administrative recognition of foreign judgments, but requiring for enforcement a common-law suit on a judgment pursuant to local conflicts of law rules;

4. Some states that have enacted either the 1964 Revised Act or the 1948 Act, which standing alone are inapplicable to foreign judgments. (These states are in no different position than those of the following group);

5. In the remaining states, a suit on the foreign judgment, not only for recognition but also enforcement, must be pursued according to the conflicts of law rules of the state in which the suit or the judgment is filed.⁶²

Unfortunately, the entire statutory procedure may be flawed because the Commissioners either chose to ignore, or neglected to perceive, the necessity of incorporating a rule on exchange rates in their proposed Recognition Act.⁶³ No state that has enacted the Act has inserted one.⁶⁴ Because the value of the U.S. dollar in terms of any foreign currency is a fact that must be proved, the registration aspect of the Recognition Act is a futile pursuit unless the foreign judgment assesses a sum of money in U.S. dollars, which is a highly unlikely situation.⁶⁵ Conversion of the foreign currency must be pleaded and proven in almost every instance.⁶⁶

C. Foreign Judgments in the United Kingdom

Although recognition and enforcement practice has seen its greatest development in the twentieth century, the action of *indebitatus assumpsit* was extended as early as 1813 to allow the courts of England to enforce the judgments of foreign courts.⁶⁷ From those beginnings, recognition

⁶² See generally *supra* notes 15 and 25.

⁶³ See Bishop, *Obtaining Recognition and Enforcement of Foreign-Country Judgements in Texas*, 45 TEX. B.J. 287, 289 (1982).

⁶⁴ See Becker, *The Currency of Judgment*, 25 AM. J. COMP. L. 152, 156 (1977).

⁶⁵ Courts are usually required to assess damages in the currency of the country in which they sit. See *id.* at 152-54. The U.S. Supreme Court has held that U.S. courts must award damages in dollars. *Bronson v. Rodes*, 74 U.S. (7 Wal.) 229 (1868).

⁶⁶ See Bishop, *supra* note 63, at 289. See also *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854, 865 n.6 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 313 (1982) (remanding case for factual determination of exchange rate). Further, the date upon which the exchange rate is determined differs between jurisdictions. Compare *Deutsche Bank Filiale Nurnburg v. Humphrey*, 272 U.S. 517 (1926) (date court's judgment delivered) with *Hope v. Russo-Asiatic Bank*, 235 N.Y. 37, 138 N.E. 497 (1923) (date cause of action arose). In diversity of jurisdiction suits, the federal courts follow the rule of the state in which they sit. *Vishipco*, 660 F.2d at 865-66.

⁶⁷ See *Walker v. Witter*, 99 Eng. Rep. 1, 1 Dougl. 1 (1813). See also J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 397 (2d ed. 1979). *Indebitatus assumpsit* arose under the theory that the defendant, already indebted to the plaintiff, undertook to pay to the plaintiff a particular sum. Although actions for debt could only be brought in the Court of Common Pleas, actions for *assumpsit* could be brought in the Court of Common Pleas or before the King's Bench. See T. PLUNKNETT, A CONCISE HISTORY OF THE COMMON LAW 644 (5th ed.

and enforcement practice relating to foreign judgments developed along common-law lines until the twentieth century enactment of the Administration of Judgement Act of 1920,⁶⁸ and the Foreign Judgements (Reciprocal Enforcement) Act of 1933.⁶⁹ When common-law jurisdiction exists in the adjudicatory court, foreign judgments are enforceable by suit on a judgment⁷⁰ provided they are conclusive,⁷¹ not obtained by fraud,⁷² not contrary to the public policy of England,⁷³ or not contrary to the principles of natural justice.⁷⁴ Also, the judgment must be for a definite sum,⁷⁵ and not for the payment of taxes or penalties.⁷⁶ To be used as a defense in an enforcement proceeding, and to be dispositive, the foreign judgment must comply with the doctrines of *res judicata* and collateral estoppel.⁷⁷

During the nineteenth century, the Judgements Extension Act of 1868⁷⁸ and the Inferior Courts Judgements Extension Act of 1882⁷⁹ permitted the judgments of both the superior courts and the inferior courts⁸⁰ sitting in one part of the United Kingdom to be registered in another part of the United Kingdom. Not until the enactment of the Administration of Justice Act of 1920⁸¹ did legislation embrace foreign judgments *per se*.

The 1920 Act applies to the judgments of the superior courts of Her Majesty's dominions and former colonies, and currently applies only to those countries to which it applied at the time of the enactment of the Foreign Judgements (Reciprocal Enforcement) Act of 1933.⁸² The 1933 Act applies to judgments obtained in foreign countries that may be registered in the United Kingdom if the foreign country is among those to which the application of the statute has been extended by an Order in Council.⁸³ Orders in Council have not been extended to the United

1956). Seeking to expand its jurisdiction, the King's Bench allowed *indebitatus assumpsit* as an action equivalent to debt. T. PLUNKNETT at 653.

⁶⁸ 10 & 11 Geo. 5, ch. 81 (1929).

⁶⁹ 23 & 24 Geo. 5, ch. 13 (1933). See 8 HALSBURY'S LAWS OF ENGLAND, ¶ 752 n.1 (4th ed. 1974).

⁷⁰ 8 HALSBURY, *supra* note 69, ¶ 715.

⁷¹ *Id.* ¶ 725.

⁷² *Id.* ¶ 727.

⁷³ *Id.* ¶ 728.

⁷⁴ *Id.* ¶ 729.

⁷⁵ *Id.* ¶ 733.

⁷⁶ *Id.* ¶ 733. See *Her Majesty the Queen ex rel. British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979). But see *Regina v. Kemp*, 69 Crim. App. 330 (1979) (forfeiture permitted despite common-law rule).

⁷⁷ *Id.* ¶¶ 726-37.

⁷⁸ 31 & 32 Vict., ch. 54 (1868).

⁷⁹ 45 & 46 Vict., ch. 31 (1882).

⁸⁰ 8 HALSBURY, *supra* note 69, ¶ 749.

⁸¹ 10 & 11 Geo. 5, ch. 81 (1920).

⁸² Foreign Judgements (Reciprocal Enforcement) Act, §7(2), 23 & 24 Geo. 5, ch. 13 (1933). See 8 HALSBURY, *supra* note 69, ¶ 752.

⁸³ Foreign Judgements (Reciprocal Enforcement) Act, § 1(1), 23 & 24 Geo. 5, ch. 13

States or to any of its constituent states, territories, or enclaves.⁸⁴

The more significant 1933 Act is a statute of an "indirect" nature in the international law sense.⁸⁵ The recognition statute sets out basic conditions, similar to those of the common law, that must be met if recognition is to be obtained. The basic conditions are: 1) voluntary submission to the rendering court other than to protect property or to contest jurisdiction; 2) agreement to jurisdiction in the foreign court; 3) residence of the defendant (if a natural person) or principal place of business of the defendant corporation in the forum country or; 4) existence of an office in the forum country and the dispute arising in the course of business of that office or branch.⁸⁶

Neither judgments obtained under a "long-arm" theory of jurisdiction nor judgments from countries to which the 1933 Act does not apply may be registered.⁸⁷ A judgment may not be registered if it: 1) lacks common-law personal jurisdiction; 2) lacks sufficiency of notice; 3) results from fraud; or 4) is repugnant to public policy.⁸⁸ The resulting judgment cannot be recognized if the subject matter of the foreign judgment is immovable property outside the territorial jurisdiction of the rendering court, if the defendant enjoys international immunity coupled with no submission to the rendering court, or if the use of the rendering court is contrary to the agreement of the parties.⁸⁹ Also, as at common law, judgments for taxes, fines and penalties may not be registered.⁹⁰

Because of the doctrine of absence of merger of the cause of action in a foreign judgment,⁹¹ and because of preliminary dismissals by foreign courts that do not determine the merits of the cause,⁹² a new local pro-

(1933). An Order in Council is an order issued by the British Sovereign with the advice of the Privy Council. See generally 36 HALSBURY, *supra* note 69, ¶¶ 723-24 (3d ed. 1961).

⁸⁴ See 8 HALSBURY, *supra* note 69, ¶ 757 n.4 (listing the countries to which Orders in Council have been extended).

⁸⁵ 8 HALSBURY, *supra* note 69, ¶¶ 762-63. Indirect or functional statutes (or treaties) deal only with the enforceability of one nation's judgments with another nation, and do not alter the substantive jurisdictional law of any nation. Direct statutes (or treaties) achieve the same effect by changing the substantive jurisdictional law of participating nations. Thus, a direct statute might prevent a nation's courts from hearing a case, while an indirect statute would allow the court to hear the case, but would make the court's judgment unenforceable abroad. P. WOOD, LAW AND PRACTICE OF INTERNATIONAL FINANCE § 3.07[2] (1981).

⁸⁶ Foreign Judgements (Reciprocal Enforcement) Act, § 4(2)(a), 23 & 24 Geo. 5, ch. 13 (1933). See also *Vogel v. Kahnstamm, Ltd.*, [1973] 1 Q.B. 133, 147 (giving similar conditions as necessary for recognition under the common law).

⁸⁷ See *Perry v. Zissis*, [1977] 1 Lloyd's L.R. 607, 614 (C.A.); 8 HALSBURY, *supra* note 69, ¶ 758; WOOD, *supra* note 85, § 3.06[3].

⁸⁸ See Foreign Judgements (Reciprocal Enforcement) Act, § 4(1)(a), 23 & 24 Geo. 5, ch. 13 (1933).

⁸⁹ *Id.* § 4(3).

⁹⁰ *Id.* § 1(2)(b).

⁹¹ See *Taylor v. Hollard*, [1902] 1 K.B. 676, 682. This doctrine prevents a release in a foreign country from automatically acting as a bar to a cause of action arising out of a contract to be performed in Britain. The doctrine was recently abolished by the Civil Jurisdiction and Judgement Act, 1982, ch. 31.

⁹² See *Black-Clawson Int'l. Ltd. v. Papierwerke Waldhof-Aschaffterberg A.G.*, 1975 A.C. 591.

ceeding on the cause of action may be commenced.⁹³ If the defendant had the opportunity to defend, but refused or declined to do so after losing a jurisdictional battle, the resulting judgment may be recognized and enforced.⁹⁴ Nevertheless, the registration must be set aside if the indirect definitions of jurisdiction, which are not identical to the common law, are not met.⁹⁵

Should a plaintiff wish to seek recognition of a foreign judgment to which the 1920 Act or the 1933 Act applies, he may use the registration procedure of the Act or sue on the cause of action. He may not, however, sue on the judgment.⁹⁶ If the judgment is from a state to which the act does not apply, the common law applies.⁹⁷

England traditionally followed the due-date or breach-date rule in setting the exchange rate applicable to the foreign judgment.⁹⁸ More recent decisions, however, have departed from the breach-date rule and have allowed recovery in the foreign currency in terms of sterling if the proper law of the contract is foreign and the terms of the contract were in foreign currency.⁹⁹ The decisions state that the applicable date of conversion should be the date that leave for enforcement was granted.¹⁰⁰ Appeal of the foreign judgment in the rendering jurisdiction will not prevent recognition if in that jurisdiction, as in the United States, enforcement during the pendency of an appeal would be permitted.¹⁰¹

In summary, recognition occurs in one of two ways: 1) registration pursuant to the registration procedure of the appropriate act of Parliament if the act has been made applicable to the rendering country by an Order in Council; or 2) a suit on the judgment pursuant to common law rules. The applicable rate of exchange will be the date on which leave to enforce is permitted.

⁹³ See 8 HALSBURY, *supra* note 69, ¶ 715.

⁹⁴ *Miliangos v. George Frank (Textiles) Ltd.*, 1976 A.C. 443.

⁹⁵ *Societe Coop. Sidmetal v. Titan Int'l. Ltd.*, [1968] 1 Q.B. 828, 848-50. See Foreign Judgement (Reciprocal Enforcement) Act, § 4(2)(a), 23 & 24 Geo. 5, ch. 13 (1933). See also WOOD, *supra* note 85, §3.07[2].

⁹⁶ See 8 HALSBURY, *supra* note 69, ¶ 716.

⁹⁷ *Id.* ¶ 715.

⁹⁸ See *Tomkinson v. First Pa. Banking & Trust Co.*, 1961 A.C. 1007. But see *East India Trading Co., Inc. v. Carmel Exporters & Importers, Ltd.*, [1952] 2 Q.B. 439 (judgment day rule used in enforcement of Indian court judgment).

⁹⁹ See, e.g., *Miliangos*, 1976 A.C. 443; *Schorsch Meier G.m.b.H. v. Hennin*, [1975] 1 Q.B. 416 (C.A.).

¹⁰⁰ See *Schorsch Meier*, [1975] 1 Q.B. 416 (C.A.), citing the Treaty of Rome, *infra* note 145. See also *Henry v. Geoprosco Int'l. Ltd.*, [1976] 1 Q.B. 726 (C.A.). But see *Tracomin, S.A. v. Sudan Oil Seed, Ltd.*, [1983] 1 W.L.R. 662, 670-71 (applying §§32-33 of the Civil Jurisdiction and Judgements Act to reverse *Henry* as it applies to foreign court judgments in cases involving prior agreements of the parties to resolve disputes by methods other than those employed by the plaintiff in the foreign proceedings (e.g., agreements to resolve disputes by arbitration, or in some court other than the court in which plaintiff first brought suit).

¹⁰¹ *Colt Indus., Inc. v. Sarlie* (No. 2), [1966] 3 All E.R. 85 (C.A.).

II. The United Kingdom/United States Draft Convention

In response to a need felt by the United Kingdom,¹⁰² and a desire by the United States to avoid the "exorbitant" jurisdiction of certain continental countries,¹⁰³ negotiations began in the early 1970's to prepare a Draft Convention between the United States and the United Kingdom for mutual recognition of certain classes of judgments.¹⁰⁴ In 1978, subsequent to publication of the Draft Convention, changes were made that resulted in a text more acceptable to the representatives of the United Kingdom.¹⁰⁵ Although the United Kingdom withdrew from negotiations in 1980,¹⁰⁶ the accomplishments must be considered, either in view of probable resurrection of negotiations or as a possible model for negotiations with other countries.

As early as 1874, the United States Department of State declined to become involved in the negotiations and conclusions of treaties in the area of private international law, and of judgments conventions. The State Department felt constitutional constraints on its authority to enter the area, notwithstanding the obligations of the national government to protect the interests of the states in the international context.¹⁰⁷ The states, however, are constitutionally prohibited from concluding treaties with foreign states or entering into any compact with a foreign power.¹⁰⁸ The Full Faith and Credit Clause of the Constitution¹⁰⁹ substitutes federal policy for state policy. Similarly, international recognition should be the result of similar court systems under similar constraints of natural justice, giving a theoretical constitutional basis for international recognition practice.¹¹⁰

The proposed Convention applies only to civil or commercial judgments, and excludes judgments that are for customs duties, taxes, punitive and multiple damages, provisional or interim relief, and possibly discovery.¹¹¹ The proposed Convention also excludes judgments against states and their constituent units; judgments regarding the status and powers of persons and legal entities; and judgments regarding matters of

¹⁰² See *Perry v. Zissis*, [1977] 1 Lloyd's L.R. 607, 614 (C.A.).

¹⁰³ See *infra* text accompanying note 195.

¹⁰⁴ Draft Convention on Reciprocal Recognition and Enforcement of Judgments in Civil Matters, *initialed* Oct. 26, 1976, United States-United Kingdom, *reprinted in* 16 I.L.M. 71 (1977) [hereinafter cited as 1976 Draft].

¹⁰⁵ Draft Convention on Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Third Consultative Paper, March 1979, United States-United Kingdom, *reprinted in* the appendix to this article, *infra* at ____ [hereinafter cited as 1979 Draft].

¹⁰⁶ See von Mehren, *supra* note 3, at 1060 n.61.

¹⁰⁷ See Nadelmann, *Non-Recognition of American Money Judgments Abroad and What to Do About It*, 42 IOWA L. REV. 236, 257 (1957).

¹⁰⁸ U.S. CONST. art. I, §10. See also McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709 (1958).

¹⁰⁹ U.S. CONST. art. IV, § 1.

¹¹⁰ See von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601, 1607 (1968).

¹¹¹ 1979 Draft, *supra* note 105, art. 2. See Smit, *supra* note 1, at 446.

a personal nature (*i.e.*, status and rights in marital property, succession, bankruptcy, administration of the estates of incompetents, and claims upon public funds).¹¹² Excluded are severable parts of judgments.¹¹³ The Convention specifically protects against execution in England on judgments against Americans obtained under exercise of the "exorbitant" jurisdiction of some of the member states of the European Economic Community.¹¹⁴

Although there is a strong resemblance to the Foreign Judgements (Reciprocal Enforcement) Act 1933,¹¹⁵ and the Uniform Recognition of Foreign-Money Judgements Act,¹¹⁶ the Convention also extends to nonmoney judgments such as injunctive relief and specific performance.¹¹⁷ The bases of jurisdiction are somewhat changed.¹¹⁸ Citizens and corporations of the United Kingdom, except for those actually present or doing business in the United States, are protected under the Convention to a greater extent than at common law.¹¹⁹ There are new grounds for refusal of recognition to protect United Kingdom citizens and corporations, and better enforcement procedures.¹²⁰ The traditional objections to recognition; public policy, fraud, conflict of judgments, and international immunity, are preserved.¹²¹ The rate of exchange is fixed as of the date of the original judgment.¹²²

Although it has been said that in the United States recognition under the Convention would be as a sister-state judgment absent traditional federal legislation,¹²³ a distinction exists in the United States between self-executing and non-self-executing treaties.¹²⁴ Lacking the traditional language, the Convention is non-self-executing. Thus, unless the Convention is revised to contain clauses of self-execution, or unless Congress passes enabling legislation, state courts will not be obliged to follow the Convention.¹²⁵

¹¹² 1979 Draft, *supra* note 105, art. 2(3).

¹¹³ *Id.* art. 2(5).

¹¹⁴ *Id.* art. 18. See also *infra* notes 196-203 and accompanying text.

¹¹⁵ 23 & 24 Geo. 5, ch. 13 (1933).

¹¹⁶ 13 U.L.A. 417 (1962). See *supra* note 25 and accompanying text.

¹¹⁷ 1979 Draft, *supra* note 105, art. 15(1).

¹¹⁸ *Id.* art. 10(b)-(j). These changes are a result of compromise between the British and U.S. common law positions. See Mathers, *The U.S./U.K. Civil Judgments Convention*, 127 NEW L.J. 777, 821-22 (1977).

¹¹⁹ 1979 Draft, *supra* note 105, art. 10(e). See Mathers, *supra* note 118, at 821.

¹²⁰ 1979 Draft, *supra* note 105, arts. 7-8. See Mathers, *supra* note 118, at 778.

¹²¹ 1979 Draft, *supra* note 105, art. 7.

¹²² *Id.* art. 17(5).

¹²³ See Hay & Walker, *The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom*, 11 TEX. INT'L. L.J. 421, 448-49 (1976).

¹²⁴ See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) (treaties are normally self-executing, but treaties amounting to a contract to take future action require that implementing legislation be passed by Congress).

¹²⁵ Compare *Sei Fujii v. State*, 38 Cal.2d 718, 724-25, 242 P.2d 617, 622 (1952) (United Nations Charter on Human Rights found "humane and enlightened," and as such entitled to "respectful consideration," but nonetheless a "moral commitment . . . not intended to supersede domestic legislation").

Until the adoption of the Convention, any final judgment of a state or federal court in the United States would be recognized in the United Kingdom if international jurisdiction existed,¹²⁶ even though the assessment of damages included punitive or exemplary damages.¹²⁷ The recognition and enforcement of multiple damages is disputed by some authorities.¹²⁸

Among the advantages that would inure to American defendants upon the conclusion of a treaty such as the proposed draft would be the protection of their assets in the United Kingdom from final process as a result of litigation in another member state of the European Economic Community.¹²⁹ Furthermore, due to its indirect nature, the proposed convention would not affect the local rules of jurisdiction in either country.¹³⁰ This does not free the Draft Convention from criticism. Suggestions have been made that the negotiations involved dramatic comparisons and resulted in a document that lacks objectivity or, more disappointingly, is an incomplete project.¹³¹

A specific objection to the terms of the initial draft was that it appeared to be distinctly advantageous to American litigants but was not advantageous to parties in the United Kingdom.¹³² Some felt that Article 10, on jurisdiction, should be limited to purely contractual claims, that the multiple damages exclusion was too narrow; and that judgments resulting from products liability would create a "claims explosion" in the United Kingdom.¹³³

In response to these and other criticisms, substantial revision is evident in the draft published in 1979. The prohibitions against customs duties and penalties have been enlarged to include civil penalties, such as those imposed by the Federal Trade Commission,¹³⁴ and to make civil damages awarded in privately prosecuted American antitrust proceedings unenforceable in the United Kingdom.¹³⁵

Considered most important is an addendum that permits the court addressed to review, and at its discretion modify, the quantum of damages awarded by the adjudicatory court, and to align them with the bases of damages in the court addressed.¹³⁶ The language of the provision is fair in its construction, but it would be xenophobic in its application.

¹²⁶ See North, *Insurance and Foreign Judgments*, 128 NEW L.J. 315 (1978).

¹²⁷ S.A. Consortium Gen'l Textiles v. Sun & Sand Agencies Ltd., [1978] 1 Q.B. 279 (C.A.).

¹²⁸ See, e.g., Mathes, *supra* note 118, at 778.

¹²⁹ See North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219, 222-23 (1979).

¹³⁰ *Id.* at 224.

¹³¹ See generally Droz & Dyer, *The Hague Conference and the Main Issues of Private International Law for the Eighties*, 3 NW. J. INT'L L. & BUS. 155, 179-80 (1981).

¹³² See North, *supra* note 129, at 228-29.

¹³³ *Id.* at 231-38. See 1976 Draft, *supra* note 104, art. 10, 16 I.L.M. at 78-80.

¹³⁴ 1979 Draft, *supra* note 105, art. 2(2)(b). See generally 15 U.S.C. §§ 45-46 (1982).

¹³⁵ *Id.* art. 7(aa).

¹³⁶ *Id.* art. 8A.

The apparent stimulus for its insertion seems to have come from those who characterize American jury verdicts in tort as excessive.¹³⁷ Implicitly, the Draft Convention fails to countenance compensation for future medical expenses, which are substantial components of tort recovery in the United States. Consideration for compensation of future medical expenses is almost completely unnecessary in the United Kingdom because of its differing social policy.¹³⁸

Because the draft is indirect in its approach to jurisdiction, the British tort victim could recover for future medical expenses if the suit is brought in the United States. Nothing in the draft prevents a British tort victim from lodging his suit for damages and obtaining them by verdict of jury in a U.S. state or federal court having jurisdiction and proper venue under its local rules. The Draft Convention would play no part in recognition and enforcement because the judgment rendered in the cause would be a local judgment.¹³⁹

To assuage the anxiety of British manufacturers concerned about products liability, provisions relating to litigation in the earlier draft are totally revised to require that the wrongful act and the resulting injury sustained must be events that occurred in the country in which suit was brought.¹⁴⁰ This virtually absolves the manufacturer located in one country from liability for the injury that the negligently designed and/or manufactured product may cause in the country where it is used or consumed. From the American point of view, this places British manufac-

¹³⁷ The author's private discussions with numerous practitioners, scholars and students in the United Kingdom reveal the existence of ignorance, or at least misinformation, in the English legal community of the practical aspects of the contingency fee system used by most American counsel in the representation of those suffering injury. The opinion that juries automatically inflate their verdicts to compensate the plaintiff for the fees to his attorney seems to be widely held, and many are unaware of the possibility and occurrence of remittitur on appeal. No regard is given to the quality of representation a person of limited means can engage under the system. Representative of the attitude of the English judiciary is the opinion of Lord Denning, M.R., in *Smith, Kline & French Labs. Ltd. v. Bloch*, [1982] 1 W.L.R. 730, 733-734:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself: and at no risk of having to pay anything to the other side. . . . There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic

See also *Butler & Woodward, The American Contingency Fee: Fact or Fiction*, 80 LAW. SOC. GAZETTE 919 (1983).

¹³⁸ See generally P. GEMMIL, *BRITAIN'S SEARCH FOR HEALTH* (1960); Rimlinger, *American Social Security in a European Perspective*, in *THE AMERICAN SYSTEM OF SOCIAL INSURANCE* (1968). Query whether plaintiff would be permitted to introduce evidence tending to support the jury award in a proceeding in which damages are reviewed. Would that proof take the form of the original evidence and testimony upon which the jury award was based, or would the adducing of additional evidence be permitted, particularly as to the comparative costs for future medical treatment?

¹³⁹ See 1979 Draft, *supra* note 105, art. 2. Consistent with traditional recognition practice, the Draft Convention does not permit going behind the judgment to alter findings of fact and law. *Id.* art. 8A. That is, the Draft Convention does not permit the court addressed to review determinations of the adjudicatory court as to liability, or contributory or comparative negligence.

¹⁴⁰ *Id.* art. 10(j).

turers exporting products to the United States in a position of privilege and immunity concerning any duty they may owe their ultimate user or consumer, and erodes the effect of any judgment rendered by what is, in fact, the final arbiter of quality control.

In its "final" form, the Convention provides protection to parties from punitive or multiple damages¹⁴¹ and from the so-called "excessive verdicts" of juries in American cases.¹⁴² The latter is currently the greatest source of antipathy in recognition of American judgments in the United Kingdom. In return, American litigants are protected from execution under judgments of courts of member states of the European Economic Community exercising "exorbitant" jurisdiction.¹⁴³ The trade-off has the potential to protect the American and British business communities, despite the substantial sacrifice to the rights of the private litigant in the United States, and the contravention of the basic and most expedient tool of consumer protection and redress for breach of duty.¹⁴⁴

In summary, the Convention does not substantially change the fundamental common-law doctrines upon which the recognition of foreign judgments has been based; rather, it provides uniform bases in both countries. By avoiding the present divergence of systems in the states of the United States—providing agreed tests for bases of jurisdiction, registration procedures, definitional approaches to the types of judgments that will not be recognized, and a self-contained code replacing extant common-law actions—the Convention provides the means for facilitating domestication of foreign judgments.

III. The Brussels Convention

By implementing Article 220 of the Treaty of Rome,¹⁴⁵ the European Economic Community concluded the *Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*¹⁴⁶ (hereinafter, the Brussels Convention). The Convention introduced a community-wide system of direct jurisdiction that represents political success for the community.¹⁴⁷ Even if any of the member states of the European Economic Community had failed to implement the Brussels Convention into its municipal law, it is doubtful that an enforcement proceeding could have been brought against that member state pursuant to the Treaty of

¹⁴¹ *Id.* art. 2(2)(b).

¹⁴² *Id.* art. 8A.

¹⁴³ *Id.* art. 18. See *infra* notes 196-203 and accompanying text.

¹⁴⁴ The 1979 Draft also reflects several minor changes made to bring the proposed Convention in line with current European law and practice. See 1979 Draft, *supra* note 105, art. 10(c)-(g), (j).

¹⁴⁵ Treaty of Rome, March 25, 1957, art. 220, 298 U.N.T.S. 3.

¹⁴⁶ Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments, Sept. 27, 1968. 8 I.L.M. 229 (1969) (hereinafter cited as Brussels Convention).

¹⁴⁷ See Kohler, *The Case Law of the European Court on the Judgments Convention*, 7 EUR. L. REV. 3, 111 (1982).

Rome.¹⁴⁸

The protocol to the Brussels Convention¹⁴⁹ gives jurisdiction to the Court of Justice of the European Community to interpret the convention in a reference procedure similar to, but not precisely the same as, the procedure under Article 177 of the Treaty of Rome.¹⁵⁰

The protocol permits preliminary references to the European Court from those national courts listed therein before which final appeals may be brought, from national courts of the member states "sitting in an appellate capacity," and from courts of the member states that hear appeals from recognition and enforcement proceedings.¹⁵¹ This permission is a departure from Article 177.¹⁵² Trial courts are excluded from seeking preliminary rulings. A "conflict jurisdiction" classification is created to resolve such conflicts as may exist between the rulings of the court in which the cause is lodged, and the other courts of the member states and the European Court.¹⁵³ It is believed that, absent the ability of the trial courts to seek preliminary rulings, this procedure does permit the European Court to resolve conflicts between the rationale and final judgment given by a trial court that is *res judicata* as compared to a ruling of the European Court or an appeal court of a member state.¹⁵⁴ The conflict must exist in this configuration because conflicts between judgments of trial courts do not lodge jurisdiction in the European Court.¹⁵⁵ The "conflict jurisdiction" cases have only prospective value, but the first cat-

¹⁴⁸ See T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 287-88 (1981).

¹⁴⁹ Protocol Amending the Brussels Convention, June 3, 1971, 21 O.J. EUR. COMM. NO. L 304) 50, 51 (1978).

¹⁵⁰ *Id.* art. 2, 21 O.J. EUR. COMM. NO. L 304) at 51. See also Hartley, *The Recognition of Foreign Judgments in England under the Jurisdiction and Judgments Convention*, in *HARMONISATION OF PRIVATE INTERNATIONAL LAW BY THE E.E.C.* 38 (K. Lipstein ed. 1978); Kohler, *supra* note 147, at 4; von Mehren, *supra* note 3, at 1057. Cf. Treaty of Rome, March 25, 1957, art. 177, 298 U.N.T.S. 3.

¹⁵¹ Protocol Amending the Brussels Convention, art. 2, June 3, 1971, 21 O.J. EUR. COMM. (NO. L 304) at 51.

¹⁵² Art. 177 provides:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning;

(a) the interpretation of this treaty

(b) the validity and interpretation of acts of the institutions of this community;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a member state, against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

Treaty of Rome, March 25, 1957, art. 177, 298 U.N.T.S. 3.

¹⁵³ See Kohler, *supra* note 147, at 5-6. Cf. FLA. CONST. art. V, §3(b)(3) (giving Supreme Court of Florida authority to review district court of appeals decisions that conflict with another decision of a district court of appeal or with a decision of the Florida Supreme Court).

¹⁵⁴ Protocol Amending the Brussels Convention, June 3, 1971, 21 O.J. EUR. COMM. (NO. L 304) at 51 (1978).

¹⁵⁵ *Id.* See Kohler, *supra* note 147, at 6.

egory of preliminary appeals does have a direct influence on proceedings before the national courts.¹⁵⁶

Under the Brussels Convention, there is a presumption that judgments of the courts of member states are in order when presented for registration in the courts of the member states addressed.¹⁵⁷ The court addressed may not substitute its discretion, nor refuse recognition, except in the instance of repugnancy to public policy, improper notice, conflicts of judgments, or when status must be determined as a preliminary matter.¹⁵⁸ It has been suggested that when a defendant seeks to resist the recognition of a judgment on the ground of fraud, the court addressed should stay proceedings for recognition to permit him to seek his relief before the court which rendered the judgment.¹⁵⁹

The fundamental aim of the Brussels Convention is to promote "European integration" through the destruction of national boundaries in the sense that those boundaries affect legal certainty and reduce the ease of "collecting" in commercial matters.¹⁶⁰ Thus, the aim is to unify private international law, but to deter "nationalism."¹⁶¹ With the development of the European Economic Community and the concomitant implementation and application of the Brussels Convention, the judgments of the various member states possess characteristics of sister-state judgments not unlike the posture of the judgments of the constituent states of the United States.¹⁶²

One of the most difficult problems in treaty drafting is agreeing on what legitimately constitutes adjudicatory jurisdiction.¹⁶³ The Brussels Convention uses a *competence directe* approach to jurisdiction rather than the traditional "indirect" approach.¹⁶⁴ Unlike the indirect or functional approach,¹⁶⁵ a "direct" treaty creates jurisdictional union, designating particular courts or types of actions in which the resulting judgments will be recognized. A "direct" treaty also contains provisions for recognition and enforcement.¹⁶⁶ The Brussels Convention is unique among treaties of its sort because it is direct and specifically defines the bases of

¹⁵⁶ See Kohler, *supra* note 147, at 6.

¹⁵⁷ Brussels Convention, *supra* note 146, art. 47, 8 I.L.M. at 239. See Jenard, *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, 22 O.J. EUR. COMM. (No. C 59) 1, 47 (1979).

¹⁵⁸ Brussels Convention, *supra* note 146, art. 27, 8 I.L.M. at 236. See Jenard, *supra* note 157, at 46.

¹⁵⁹ Hartley, *supra* note 150, at 111-12.

¹⁶⁰ Byrne & Greaves, *The Brussels Convention on Jurisdiction and Judgments*, 131 NEW L.J. 395, 629 (1981).

¹⁶¹ Kohler, *supra* note 147, at 113.

¹⁶² See von Mehren, *supra* note 3, at 1045.

¹⁶³ De Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMP. L. Q. 706, 708 (1968).

¹⁶⁴ See Mendes, *The Troublesome Workings of the Judgments Convention of the European Economic Community*, 13 VAND. J. TRANSNAT'L L. 75, 79 (1980).

¹⁶⁵ See generally *supra* note 85.

¹⁶⁶ De Winter, *supra* note 163, at 708-09.

jurisdiction.¹⁶⁷

Under the Brussels Convention, jurisdiction is lodged in the courts at the defendant's domicile, specifically negating the bases of "exorbitant" jurisdiction found in the national law of a number of the member states.¹⁶⁸ Peculiarly, the civilians who drafted this convention adopted the jurisdictional definition of "domicile" or "habitual residence" that arose as a common-law concept in the British Imperial system. It is not, however, so different from the concept used in the United States.¹⁶⁹ Further interpretation of the meaning is left to the national law of the member states.¹⁷⁰ The domicile of the defendant, not his nationality, determines not only the member state in which an action can be brought, but strongly influences which rules of conflicts of law will apply, since forum courts almost always apply their own rule.¹⁷¹

The scheme of the Convention provides that natural persons residing in a member state must be sued in the state of domicile.¹⁷² A plaintiff may also sue at the place of the performance of the contract if: 1) it is in another member state; 2) another member state is the habitual residence of a maintenance creditor; or 3) in the case of a business activity, another member state is the place of the establishment of a branch or agency.¹⁷³ Joint defendants may be sued in the country of residence of any one of them, or in the original court in third-party and counterclaim actions.¹⁷⁴ Even when the existence of the contract is in dispute, suit may be brought pursuant to the place-of-performance rule announced in Article 5(1).¹⁷⁵

Recognition is mandatory within the EEC unless: 1) the judgment is contrary to the public policy of the state addressed; 2) the judgment was entered upon a default either without due service or without adequate time to effectively defend; 3) the judgment conflicts with another judgment; or 4) in personal matters, the result in the adjudicatory court differs from the result in the court addressed.¹⁷⁶ The last category of actions concerns preliminary matters involving legal capacity of the litigant and rights in property arising out of a matrimonial situation, wills or succession, all of which potentially conflict with the laws of the state addressed.¹⁷⁷ In addition, the Convention contains specific rules on in-

¹⁶⁷ Mendes, *supra* note 164, at 79.

¹⁶⁸ von Mehren, *supra* note 3, at 1049-50. See *infra* notes 196-203 and accompanying text.

¹⁶⁹ Mendes, *supra* note 164, at 82-83.

¹⁷⁰ *Id.* at 83.

¹⁷¹ Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention of Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INT'L. & COMP. L. Q. 44, 46-47 (1975).

¹⁷² Brussels Convention, *supra* note 132, art. 2, 8 I.L.M. at 232.

¹⁷³ *Id.* art. 5, 8 I.L.M. at 232-33.

¹⁷⁴ *Id.* art. 6, 8 I.L.M. at 233.

¹⁷⁵ *Effer SpA v. Kantner*, 1982 E. Comm. Ct. J. Rep. 825, 3 COMMON MKT. REP. (CCH) ¶ 8820.

¹⁷⁶ Brussels Convention, *supra* note 146, art. 26, 8 I.L.M. at 236.

¹⁷⁷ *Id.* art. 27, 8 I.L.M. at 236.

insurance contracts, installment sales, and loans in conjunction with such installment sales and consumer transactions.¹⁷⁸

An insurance company domiciled in a member state may be sued at its domicile or at the domicile of the policy-holder. If there are multiple insurers or policy-holders, the insurance company may be sued in any of the member states or at the domicile of the agent or branch.¹⁷⁹ Nondomiciliary insurers may be sued in the member state where the agent or representative is domiciled.¹⁸⁰ In tort, the action is brought at the place of the tort, and direct action is permitted if the law of the member state so permits.¹⁸¹ After a dispute has arisen, the parties may agree to depart from the rules of venue even as to events that may have occurred outside the member states.¹⁸²

In installment sales contracts and loans facilitating such sales, the lender may be sued at either the domicile of the lender or the debtor, but the lender may sue only at the debtor's domicile. Counterclaims may not be frustrated.¹⁸³ Like the insurance provision, the parties may agree to a different venue.¹⁸⁴ Exclusive jurisdiction is lodged in the national courts in proceedings concerning land, internal corporate affairs, validity of public records, recognition of rights in intellectual property, and the enforcement of judgments.¹⁸⁵

Unlike the English rule that gives the plaintiff the option of suing on the cause of action or seeking recognition,¹⁸⁶ the Convention prohibits new suits.¹⁸⁷ The enforcement procedure of the Convention must be followed even if the actual cost of registration exceeds the costs of a *de novo* proceeding.¹⁸⁸ The judgment that ought to have been enforced under the terms of the Convention has *res judicata* effect, and may be used defensively in such an instance.¹⁸⁹

The European Court has ruled that the definition of "civil and commercial matters" is broad and applies to the types of causes of action that may arise rather than to the traditional jurisdiction of national courts.¹⁹⁰ Further, the application of the term "civil and commercial matters" is made with reference to EEC law, and not to national law.¹⁹¹ Also, the

¹⁷⁸ *Id.* arts. 7-15, 8 I.L.M. at 233-34.

¹⁷⁹ *Id.* art. 8, 8 I.L.M. at 233.

¹⁸⁰ *Id.* art. 9, 8 I.L.M. at 233.

¹⁸¹ *Id.* art. 10, 8 I.L.M. at 233.

¹⁸² *Id.* art. 12, 8 I.L.M. at 234.

¹⁸³ *Id.* art. 14, 8 I.L.M. at 234.

¹⁸⁴ *Id.* art. 15, 8 I.L.M. at 234.

¹⁸⁵ *Id.* art. 16, 8 I.L.M. at 234-35.

¹⁸⁶ See *supra* text accompanying note 93.

¹⁸⁷ Brussels Convention, *supra* note 146, arts. 26, 31, 8 I.L.M. at 236, 237.

¹⁸⁸ *De Wolf v. Harry Cox B.V.*, 1976 E. Comm. Ct. J. Rep. 1759, [1977] 2 Comm. Mkt. L.R. 43. See *Kohler*, *supra* note 147, at 110.

¹⁸⁹ *Hartley*, *supra* note 150, at 105.

¹⁹⁰ *LTU Lufttransportunternehmen GmbH & Co. K.G. v. Eurocontrol*, 1976 E. Comm. Ct. J. Rep. 1541, 1552, [1977] 1 Comm. Mkt. L.R. 88, 101.

¹⁹¹ *Id.*

European Court has ruled that *ex parte* preliminary proceedings are not covered by the Convention and need not be recognized in the courts of the state addressed.¹⁹² Service must be accomplished in due form, and allow the defendant sufficient time to respond, and the court in which enforcement is sought has a duty to consider such sufficiency.¹⁹³ When local procedural rules do not permit special appearances to test jurisdiction, the European Court has ruled that, pursuant to Article 18, the defendant may plead to the merits at the same time he objects to jurisdiction.¹⁹⁴

Prior to the conclusion of the Brussels Convention, the state of the law in some of the continental EEC countries violated the fundamental tenet of Article 7 of the Treaty of Rome which prohibited discrimination on the basis of nationality.¹⁹⁵ The "chauvinistic development" of "excessive" or "exorbitant" jurisdiction came about in the Nineteenth Century, prior to any cooperation in the international sense.¹⁹⁶ Since the initial drafting stage of the Brussels Convention, these "excessive" or "exorbitant" bases of jurisdiction have not been permitted as against domiciliaries of the member states,¹⁹⁷ although they are allowed against nondomiciliaries. By the abolition of these exorbitant bases affecting member state domiciliaries, due process is enforced,¹⁹⁸ but such due process does not extend to defendants residing outside the EEC.¹⁹⁹ The binding effect of the Brussels Convention prohibits attack in the court of the member state that is addressed unless it would otherwise be contrary to the public policy of the court addressed.²⁰⁰

The rule permits a national of the country exercising exorbitant jurisdiction to sue a nondomiciliary in the plaintiff's national court and, upon entry of judgment, to use the mechanics of the Brussels Convention to execute on property the defendant may have in another member state. Assuming proper notice, if the defendant should choose not to appear, the resulting judgment is enforceable. The rule has variations, but it has been said that "[a]n alien who leaves his slippers in a hotel room in Germany can be sued there for a debt of, [for example], 100,000 deutschmarks due to the presence of assets within the jurisdiction."²⁰¹

¹⁹² *Denilauler v. S.n.c. Couchet Freres*, 1980 E. Comm. Ct. J. Rep. 1553, [1981] 1 Comm. Mkt. L.R. 62.

¹⁹³ *Kloms v. Michel*, 1981 E. Comm. Ct. J. Rep. 1593, [1982] 2 Comm. Mkt. L.R. 773.

¹⁹⁴ *Etablissements Rohr S.A. v. Ossberger*, 1981 E. Comm. Ct. J. Rep. 2431, [1982] 3 Comm. Mkt. L.R. 29.

¹⁹⁵ *Mendes*, *supra* note 164, at 76. See Treaty of Rome, March 25, 1957, art. 7, 298 U.N.T.S. 3.

¹⁹⁶ *De Winter*, *supra* note 163, at 706.

¹⁹⁷ Brussels Convention, *supra* note 146, art. 3, 8 I.L.M. at 232.

¹⁹⁸ See Bartlett, *supra* note 171, at 60.

¹⁹⁹ *von Mehren*, *supra* note 3, at 1050.

²⁰⁰ *Id.* at 1054. The "contrary to public policy" test may not be applied to purely jurisdictional rulings, however, as those decisions interpret "Convention" law (the policies of which were adopted by all EEC nations). *Id.*

²⁰¹ *De Winter*, *supra* note 163, at 707.

Under French law, a nonresident French plaintiff may require a defendant to defend in France even though the defendant never even contracted with any Frenchman,²⁰² although other cases seem to evidence a retreat from this view.²⁰³

The Brussels Convention creates a serious problem for outsiders who may be subject to suit in a member state exercising exorbitant jurisdiction while possessing assets in another member state.²⁰⁴ Opting out of this situation is permitted under Article 59 of the Brussels Convention by the use of a bilateral convention such as the United Kingdom/United States Draft.²⁰⁵

In summary, the Brussels Convention departs from the traditional indirect methods of defining bases for jurisdiction which enunciate specific rules to alter jurisdictional bases of the member states when both litigants are community domiciliaries demanding unquestioned recognition of the resulting judgment in the courts of the member state addressed.

IV. Conclusion

Absent a convention on recognition of judgments, uncertainty will exist in the area of recognition and enforcement.²⁰⁶ The United States Supreme Court has never determined whether the domestication of the judgments of foreign courts presents a federal question.²⁰⁷ Although reciprocity may be said to exist between those states that have enacted the legislation and those countries that have traditionally relied on reciprocity as a basis for recognition,²⁰⁸ it has been demonstrated here that state legislation concerning recognition and enforcement along the lines of Uniform Acts proposed by the Commissioners on Uniform State Laws has met with a resounding lack of success. Many civil-law nations, unaccustomed to decisional law and the doctrine of stare decisis, have refused to recognize the existing case authority based upon reciprocity and have denied recognition to the judgments of American courts.²⁰⁹

Under present practice, some courts in the United States have devel-

²⁰² De Winter, *supra* note 163, at 706-07 (citing Re "La Metropole" in Paris v. W.H. Muller in London, Cour de Cassation, March 21, 1966, *Dalloz* 1966 II, 429).

²⁰³ Nadelmann, *supra* note 107, at 243 (citing Charr v. Hasim, Paris App. (1st Ch.), Oct. 21, 1955, 1955 Recueils Dalloz & Sirey Jurisprudence 61).

²⁰⁴ Hay & Walker, *The Proposed U.S.-U.K. Recognition-of-Judgments Convention: Another Perspective*, 18 VA. J. INT'L L. 753, 757 (1978).

²⁰⁵ Brussels Convention, *supra* note 146, art. 59, 8 I.L.M. at 241.

²⁰⁶ Brenscheidt, *The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 11 INT'L LAW. 261, 276 (1977) (referring specifically to the uncertainties in comity between the United States and Germany).

²⁰⁷ See Note, *Foreign Nation Judgments: Recognition and Enforcement of Foreign Judgments in Florida and the Status of Florida Judgments Abroad*, 31 U. FLA. L. REV. 588, 591 (1979). See generally Comment, *Judgments Rendered Abroad — State Law or Federal Law?*, 12 VILL. L. REV. 618 (1967).

²⁰⁸ See Brenscheidt, *supra* note 206, at 270.

²⁰⁹ Carl, *Proposed Legislation: Uniform Foreign Country Judgments Recognition Act*, 40 TEX. B.J. 40, 40 (1977).

oped a presumption that not only do the results in English law procedurally and substantially comport with general concepts of the law of an American state,²¹⁰ but that they are not violative of the American concept of due process.²¹¹ The failure of the United States to "speak with one voice" is a particular defect in recognition practice. One of the objectives of any convention between the United States and another country would be to impose a uniform federal standard internally, whether recognition is sought in state or federal court.²¹²

An examination of the United Kingdom/United States Draft reveals how political considerations in the area of excessive jury verdicts and multiple damages in actions such as antitrust have been traded to reach a recognition formula that sacrifices the rights of individual litigants for the protection of business interests. The English abhorrence of these elements of American practice can only be matched by what, to the American mind, are the excesses of continental jurisdiction. The obvious principal consideration on the part of the United States in the concluding of such a treaty would be simply to avail itself of the benefits of Article 59 of the Brussels Convention.²¹³

²¹⁰ See, e.g., *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 34 A. 714 (1895).

²¹¹ See Comment, *The Effect of the Proposed U.S./U.K. Reciprocal Recognition and Enforcement of Civil Judgments Treaty on Current Practice in the United States*, 78 COLUM. J. TRANSNAT'L L. 119, 128 (1975). This deference to English procedural safeguards is unique, however, and probably due to the "deep roots of the American Legal System in the British Legal tradition." *Id.* at 122-23.

²¹² *Id.* at 120.

²¹³ Smit, *supra* note 1, at 445.

APPENDIX

**CONVENTION BETWEEN THE UNITED KINGDOM OF
GREAT BRITAIN AND NORTHERN IRELAND AND
THE UNITED STATES OF AMERICA
PROVIDING FOR THE RECIPROCAL RECOGNITION AND
ENFORCEMENT OF JUDGMENTS IN CIVIL MATTERS***

The United Kingdom of Great Britain and Northern Ireland and the United States of America:

Desiring to provide on the basis of reciprocity for the recognition and enforcement of judgments in civil matters;

Have agreed as follows:

CHAPTER I: USE OF TERMS

Article 1

In this Convention:

- [(a-) "consumer" means a person who enters into an agreement for a purpose outside his trade or profession;]
- (a) "counterclaim" includes a cross action;
- (b) "court addressed" includes any authority to which application is made for recognition or enforcement of a judgment under this Convention;
- (c) "court of a Contracting State" means any court exercising jurisdiction for a "territory" of a Contracting State, but does not include any international court;
- (d) "court of origin" means the court which gave a judgment for which recognition or enforcement is sought under this Convention;
- (e) "defendant" means the ~~defendant in~~ [person against whom] the original proceedings [were brought] including, where appropriate, ~~a defendant to~~ [the person against whom] a counterclaim [was brought];
- (f) ~~"plaintiff" means the plaintiff in the original proceedings including, where appropriate, a counter-claimant;~~
- (g) "respondent" means the person against whom recognition or enforcement is sought;
- (h) "review" includes appeal;
- (i) "territory" means, as may be appropriate, the United Kingdom, a constituent part thereof, or the area adjacent to the United Kingdom over which its courts exercise jurisdiction, the United States, a constituent part thereof, the area adjacent

* Material enclosed in brackets constitutes revisions proposed in the course of the UK-US negotiations that began on September 18, 1978. Material that is lined through constitutes deletions proposed in the course of the same negotiations.

to the United States over which its courts exercise jurisdiction, the area in or adjacent to the United States over which a federal court of the United States exercises jurisdiction, or any territory to which this Convention shall have been extended under Article 23; ~~and~~

- (j) "territory of origin" means the "territory" for which the court of origin was exercising jurisdiction; [and]
- (k) the "law generally applicable" in a court does not include treaties or international arrangements on the general recognition and enforcement of foreign judgments
 - (i) to which a Contracting State is a party when this Convention enters into force or
 - (ii) ancillary to the Treaty, establishing the European Economic Community signed at Rome on 25th March 1957, or legislation implementing such treaties or arrangements.]

CHAPTER II: SCOPE OF THE CONVENTION

Article 2

(1) This Convention shall apply to judgments given [in proceedings instituted] after this Convention enters into force, by courts of the Contracting States in the exercise of their civil or commercial jurisdiction and, for the purposes of Article 18, to civil or commercial judgments given by courts of third States [where recognition or enforcement is sought after the entry into force of this Convention]. Such application shall be irrespective of the name given to the proceedings which gave rise to the judgment or of the name given to the judgment, such as order or decree.

(2) Except for the purposes of Article 18, this Convention shall not apply to judgments:

- (a) for customs duties, taxes and other charges of a like nature;
 - (b) to the extent that they are for punitive or multiple damages [or civil penalties];
 - (c) ~~which are interlocutory~~ [granting provisional or interim relief or protection];
 - (d) for disclosure of evidence [or otherwise concerned with the conduct of proceedings];
 - (e) given by or on appeal from administrative tribunals;
 - (f) against States, including their constituent units;
 - (g) determining the existence or constitution of legal persons or the powers of their officers or directors; or
 - (h) determining questions relating to damage or injury resulting from a nuclear incident.
- (3) This Convention shall not apply to judgments which determine:

- (a) the status or legal capacity of natural persons;
- (b) matters of family law, including marital rights in property;
- (c) maintenance claims, obligations assumed in whole or in part to satisfy a legal obligation to support another, or claims seeking to recover all or part of amounts paid by another for maintenance;
- (d) matters of succession to, or the administration of, estates of deceased persons;
- (e) issues in bankruptcy proceedings, in proceedings for the reorganisation or winding-up of companies or other legal persons, or in proceedings for judicial arrangements, compositions and analogous matters;
- (f) matters of social security or public assistance to the extent that the claim lies against a public fund or authority;
- (g) matters concerning the judicial supervision of the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs.

(4) This Convention shall apply to a judgment where the court of origin, in order to determine an issue not falling under paragraph (2)(g) or (h) or paragraph (3) of this Article, had to determine a matter falling within these provisions as a preliminary issue. [Such preliminary determinations shall, however, be entitled to binding effects under Article 13 only where recognition or enforcement of the judgment on the issue for which the preliminary determination was required is in question.]

(5) Severable parts of a judgment in respect of different matters [only some of which fall within the scope of this Convention] shall be entitled to recognition or enforcement under this Convention if [to the extent that] such parts would have been so entitled had they taken the form of separate judgments.

Article 3

~~The provisions of this Convention shall not prevent the recognition or enforcement of a judgment of a court of a Contracting State if that judgment would be recognizable or enforceable in accordance with the law otherwise applicable in the court addressed.~~

CHAPTER III: CONDITIONS OF RECOGNITION AND ENFORCEMENT

Article 4

~~(1) A judgment given by a court of a Contracting State shall, subject to the provisions of this Convention, be recognized in the territory of the other Contracting State if:~~

- ~~(a) it was given by a court having jurisdiction under Article 10 or 11; and~~

~~(b) it has binding effects within the territory of origin, notwithstanding that an application for review may be pending against it, or that it may still be subject to review, in that territory.~~

[(1) Subject to the provisions of this Convention, a judgment given by a court of a Contracting State shall be recognized in the territory of the other Contracting State if it was given by a court having jurisdiction under Article 10 or 11, notwithstanding that an application for review may be pending against it or that it may still be subject to review.]

(2) A judgment entitled to recognition under paragraph (1) shall, subject to the provisions of this Convention, be enforced in the territory of the other Contracting State if it is entitled to enforcement in the territory of origin.

(3) To the extent that judgments given by courts of a Contracting State are inconsistent, priority shall be determined for the purposes of paragraphs (1) and (2) as follows:

- (a) where the judgments were given in more than one territory of the Contracting State, any priority accorded by the law of that State shall be recognised; and
- (b) where the judgments were given in a single territory of the Contracting State, any priority accorded by the law applicable in the courts of that territory shall be recognised.

Article 5

(1) Where a judgment is subject to any form of review under the law applicable in the court of origin, and the respondent satisfies the court addressed that review has been or will be sought, the court addressed may grant or defer recognition or enforcement in accordance with the law applicable in that court.

(2) Where recognition [of a judgment] is sought in proceedings respecting a different cause of action [from that on which the judgment was given], binding effects shall not be accorded to the judgment until all ordinary forms of review [available under the law applicable in the court of origin] have been exhausted. However, the court [addressed] may suspend the proceedings.

Article 6

Recognition or enforcement of a judgment is not required by the Convention if:

- (a) by reason of the subject-matter of the action, exclusive jurisdiction over the claim adjudicated lies, under the law applicable in the court addressed, in courts or authorities other than those of the territory of origin; or
- (b) the judgment was given in proceedings brought [, in the view of the court addressed,] in violation of an agreement between the parties to the original proceedings giving exclusive juris-

- diction to a court or other authority, or to an arbitral tribunal;
or
- (c) the judgment relates to an issue, arising under a trust instrument, in respect of which, by virtue of the terms of that instrument, exclusive jurisdiction lies [, in the view of the court addressed,] in courts or authorities other than those of the territory of origin.

Article 7

Recognition or enforcement of a judgment is not required by this Convention:

- (a) where recognition or enforcement of the judgment would be manifestly repugnant to public policy;
- [(aa) the subject matter of the action was one that, under the law applicable in the territory of the court addressed, could, in principle, give rise only to penal measures or measures coercive at the instance of the government or an agency thereof.]
- (b) where the judgment was obtained by fraud;
- (c) if proceedings based on the same transaction or occurrence:
 - (i) have resulted in an irreconcilable judgment by a court or authority of the Contracting State of the court addressed;
 - (ii) are pending before a court or authority of the Contracting State of the court addressed, were the first to be instituted, and may result in such an irreconcilable judgment; or
 - (iii) have resulted in an irreconcilable judgment by a court or authority of a third State that qualifies for recognition or enforcement under the law applicable in the court addressed;
- (d) if, in the view of the court addressed, either respondent enjoys immunity from the jurisdiction of that court or the defendant should have enjoyed immunity in the original proceedings; or
- (e) where, to give its judgment, the court of origin had to decide a question relating to a matter specified in paragraph 2(g) or (h) or (3) of Article 2, and the decision differs from that which would have followed from the application to that question of the rules of private international law applicable in the court addressed.

Article 8

If the defendant or his successor in interest so requests, recognition or enforcement of a judgment is not required by this Convention:

- (a) where the defendant did not receive either actual notice of the proceedings in sufficient time to enable him to present his case

- or constructive notice substantially equivalent to that accepted by the law applicable in the court addressed;
- (b) where jurisdiction for the purposes of paragraph (1) of Article 4 is based on the agreement of the parties, the defendant did not appear, and in the view of the court addressed the agreement is invalid;
 - (c) to the extent that recognition or enforcement would afford a recovery exceeding monetary limits upon liability fixed by a statute of the territory of the court addressed which applies under that court's rules of private international law;
 - (d) where, ~~under the rules of private international law of~~ [if the case had been brought in] the court addressed, its own [substantive] law would have been applicable ~~to the case if it had been brought in that court~~ and the judgement disregards [any] provisions of that law which ~~would~~ [could not] have been applied [excluded] by ~~that court~~ even if [agreement of] the parties ~~had chosen another system of law~~;
 - (e) where the judgment is one recognizing or enforcing another judgment; or
 - (f) to the extent that the judgment gave relief directly against a person, natural or legal, whose liability results from an obligation of indemnification and that liability does not, under the law selected in accordance with the rules of private international law applicable in the court addressed, arise until liability has been established on the part of the person entitled to indemnification.

[Article 8A

Where the respondent establishes that the amount awarded by the court of origin is greatly in excess of the amount, including costs, that would have been awarded on the basis of the findings of law and fact established in the court of origin, had the assessment of that amount been a matter for the court addressed that court may, to the extent then permitted by the law generally applicable in that court to the recognition and enforcement of foreign judgments, recognize and enforce the judgment in a lesser amount.]

Article 9

Except as permitted by this Convention, there shall be no review of the judgment given by the court of origin, and recognition or enforcement shall not be refused for the reason that the court of origin reached a result different from that which would have been reached by application of the law selected in accordance with the rules of private international law applicable in the court addressed.

Article 10

A judgment is given by a court having jurisdiction for the purposes of paragraph (1) of Article 4 where one of the following can be established:

- (a) the respondent or his predecessor in interest brought the original proceedings;
- (b) the defendant had, at the time when the proceedings were instituted, a place of habitual residence within the territory of origin, or, if the defendant is not a natural person, had a principal place of business there, or was incorporated, or if unincorporated had its headquarters, there;
- (c) the defendant had a branch or other establishment (other than a subsidiary [or other affiliated] corporation) within the territory of origin and the proceedings were in respect of a transaction or occurrence arising from business done by or through that establishment;
- (d) the defendant, not acting pursuant to a statutory requirement, by an agreement in writing or by an oral agreement confirmed in writing [or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware,] had agreed expressly in respect of disputes which had arisen or might arise regarding a specified legal relationship, to submit to the jurisdiction of the court of origin, or of the courts of the territory of origin;
- (e) the defendant had been conducting business on a continuing basis within the territory of origin otherwise than through a subsidiary [or other affiliated] corporation, had appointed an agent to receive service of process there in respect of such business, and the proceedings were in respect of a transaction or occurrence arising from such business;
- ~~(f) in the case of a contract to supply goods or services the conclusion of the contract was preceded by an invitation to treat made by advertisement or otherwise either in or specifically directed to the territory of origin and the use of the goods or the performance of the services was in the contemplation of the parties to the contract to occur in whole or in substantial part within that territory;~~
- [(f) in the case of a contractual claim arising out of an agreement to supply goods or services concluded with a consumer, the conclusion of the agreement was in the territory of origin preceded by a specific invitation addressed to him or by advertising and the consumer took, in that territory,

the steps necessary on his part for the conclusion of the agreement;]

- (g) in the case of a contractual claim the parties to the contract [were resident] or, if not natural persons, had a place of business, in the territory of origin at the time the contract was concluded and the obligation in issue was to be wholly or mainly performed there;
- (h) in the case of an action whose object was to determine rights of ownership, use, possession or security in immovable or tangible movable property, that property was situated within the territory of origin when the action was instituted;
- (i) in the case of an action whose object was to decide upon the validity, construction, interpretation, variation or implementation of a trust instrument or to determine disputes under that instrument between or among trustees and beneficiaries, the trust's principal place of administration was within the territory of origin, or the trust instrument provided expressly or by implication that the courts of that territory should have jurisdiction in such actions;
- ~~(j) in the case of an action to recover damages for physical injuries to the person or for damages to tangible property, the acts or omission that occasioned the injury or damage substantially occurred, and the injury or damage was suffered, in the Contracting State in which the court of origin was exercising jurisdiction, and either those acts or omissions substantially occurred or that injury or damage was suffered in the territory of origin.~~
- [(j) in the case of an action to recover damages for physical injury to the person or for damage to tangible property:
 - (i) the acts or omissions that occasioned the injury or damage were committed by the defendant or his employee or, in the case of a legal person, its officer or employee, who was physically present in the territory of the Contracting State in which the court of origin was exercising jurisdiction;
 - (ii) the acts or omissions substantially occurred and the injury or damage was suffered in that territory; and
 - (iii) either the acts or omissions substantially occurred or the injury or damage was suffered in the territory of origin.]
- [(k) any other ground then admitted for the purposes of recognition of foreign judgments by the law generally applicable in the court addressed.]

Article 11

A judgment on a counterclaim is given by a court having jurisdic-

tion for the purposes of paragraph (1) of Article 4 where one of the following conditions is satisfied:

- (a) the respondent or his predecessor in interest voluntarily brought the counterclaim;
- (b) the court of origin would have had jurisdiction to try the counterclaim as a principal claim under sub-paragraphs (b)-(j) [(k)] of Article 10; or
- (c) the court of origin had jurisdiction under Article 10 to try the principal claim and the counterclaim arose out of the transaction or occurrence on which the principal claim was based.

Article 12

In determining whether jurisdiction for the purposes of paragraph (1) of Article 4 is established under Articles 10 and 11, the court addressed shall not be bound by any conclusions [of law] reached by the court of origin ~~relevant to the application of these Articles~~. The court addressed shall, ~~however~~, be bound by findings of fact made by the court of origin unless the respondent establishes that they are incorrect. The respondent may not dispute such findings where the defendant appeared in the court of origin and failed to ~~challenge its jurisdiction~~ [dispute there the relevant issue of fact].

CHAPTER IV: EXTENT OF RECOGNITION

Article 13

(1) A judgment entitled to recognition under this Convention shall, in any proceedings in the other Contracting State between the same parties, be given the same binding effect as if it were a judgment of the court addressed. However, the court addressed may, if the interests of justice so require, and shall, if the respondent so requests, give the judgment such binding effects as it would be given under the law of the territory of origin.

(2) For the purpose of this Article, parties shall include all persons who were represented by parties in the original proceedings and the successors and assigns of such persons or parties.

CHAPTER V: PROCEDURES FOR RECOGNITION AND ENFORCEMENT

Article 14

~~Recognition under this Convention shall be accorded upon presentation of such of the documents specified in Article 15 as the court addressed considers requisite.~~

[The procedures for recognition shall, except as otherwise provided in this Convention, be governed by the law applicable in the court addressed.]

Article 15

(1) A judgment for the payment of money which is entitled to enforcement under this Convention shall, to the extent that it has not been fully satisfied or carried out, be enforced by the court addressed. To the extent that a judgment orders forms of relief other than the payment of money, the court addressed may refuse enforcement or may order any measures of enforcement which the law of the court addressed permits for similar domestic judgments.

(2) The court addressed may require [that an application for enforcement be accompanied by]:

- (a) a copy of the judgment authenticated by the court of origin;
- (b) unless the required information is set forth in the judgment, ~~documentary evidence as to~~ [proof of] the form and modalities of the notice given the defendant ~~and to the grounds upon which jurisdiction was assumed;~~
- (c) a statement of the grounds relied upon to establish the jurisdiction of the court of origin under Articles 10 and 11; and
- (d) ~~an affidavit~~ [proof] of such other ~~facts~~ [matters] as may be required by the rules ~~of~~ [applicable in] the court addressed.

[(3) The procedures for enforcement shall, except as otherwise provided in this Convention, be governed by the law applicable in the court addressed.]

Article 16

(1) A judgment given in the United Kingdom shall be enforced in the United States by that procedure which provides for a form of notice to the respondent and is the simplest and most rapid provided by the law applicable in the court addressed for the enforcement of non-local judgments. Application for enforcement may be made to any court which exercises jurisdiction for the territory where enforcement is sought and which is competent to afford the relief requested.

(2) A judgment given in the United States shall be registered for enforcement in the United Kingdom upon application made to a court of competent jurisdiction.

Article 17

(1) A period of six years from the date of the original judgment, if review has not been sought in a court of the territory of origin, or from the date of the most recent judgment if review has been sought, shall be allowed for applications for enforcement under Article 16. However, no application shall be entertained where the judgment is no longer entitled to enforcement in the territory of origin.

(2) No security for costs may be required of any person applying for enforcement of a judgment entitled to recognition under this Convention

except where enforcement is granted of a judgment still subject to review.

(3) Interest recoverable on a judgment enforced under this Convention shall, in respect of the period preceding the date on which enforcement is granted under paragraph (1) of Article 16 or registration for enforcement is effected under paragraph (2) of Article 16, be at such rate, if any, as may be specified in the judgment or in a certificate given by the court of origin.

(4) From the date on which enforcement is granted under paragraph (1) of Article 16 or registration for enforcement is effected under paragraph (2) of Article 16, the judgment shall, for enforcement purposes, including prescriptive time limits and interest charges, be treated as a judgment given on that date by the court addressed.

(5) Money judgments entitled to enforcement under this Convention may be enforced by the court addressed either in the currency specified in the judgment or in the local currency at the buying rate in the place where and on the date when enforcement is granted under paragraph (1) of Article 16 or registration for enforcement is effected under paragraph (2) of Article 16.

CHAPTER VI: RECOGNITION AND ENFORCEMENT OF THIRD STATE JUDGMENTS

Article 18

(1) Subject to any obligations under a treaty existing at the date of entry into force of this Convention or arising as the result of the accession of further States to such a treaty, a judgment given by a court or other authority of a third State against a person who is a national of a Contracting State or who has a domicile, a place of residence or a place of business, or which is incorporated or has its registered office, in a Contracting State shall be refused recognition or enforcement by the courts of the other Contracting State at the request of the respondent:

- (a) where, pursuant to a treaty obligation, the courts of the third State would be precluded from exercising jurisdiction in proceedings against a person having the same connection with the State of the court addressed as the person sued had with the other Contracting State, or
 - (b) where the judgment would, if it had been given against a person having the same connection with the State of the court addressed, be denied recognition or enforcement on jurisdictional grounds or because proper notice was not given.
- (2) The provisions of paragraph (1) shall also be subject to any new treaty obligations assumed by a Contracting State where the consent of the other Contracting State has been obtained.

CHAPTER VII: FINAL PROVISIONS

Article 19

This Convention shall not prevail over other treaties in special fields to which both Contracting States are or shall have become Parties.

Article 20

A Contracting State may, on the exchange of instruments of ratification or at any time thereafter, declare that it will not apply the Convention to judgments given by courts of the other Contracting State in respect of cultural objects which, having been determined by the competent authorities of the declaring Contracting State to be of cultural significance, are imported in the State for temporary display or exhibition pursuant to an agreement entered into between the object's foreign owner or custodian and that State or one or more cultural institutions therein.

Article 21

Either Contracting State may, on the exchange of instruments of ratification or at any time thereafter, declare that it will not apply the Convention to a judgment that imposes a liability which that State is not under a treaty obligation toward any other State not to recognize or enforce. Any such declaration shall specify the treaties containing the said obligations.

Article 22

The Contracting States may, by an exchange of notes, define the meaning of the term "habitual residence" as used in this Convention.

Article 23

(1) Either Contracting State may, on the exchange of instruments of ratification or at any time thereafter, declare that this Convention shall extend to any territory for the international relations of which it is responsible. Any extension of the Convention under this Article shall enter into force three months after the date of the notification, and may be terminated by six months' notice of termination.

(2) Termination of the Convention in accordance with Article 25 shall, unless otherwise expressly agreed by both Contracting States, terminate it in respect of any territory to which it has been extended in accordance with paragraph (1) of this Article.

Article 24

Any difficulties which may arise in connection with the interpretation or application of this Convention shall be settled through the diplomatic channel or through any other means agreed by the Contracting

States. Any such difficulty which is not settled by agreement may be submitted by either Contracting State to the International Court of Justice for decision upon three months' notice to the other Contracting State.

Article 25

This Convention shall be subject to ratification. Instruments of ratification shall be exchanged at _____. The Convention shall enter into force three months after the date on which the instruments of ratification are exchanged and shall remain in force for three years. If neither of the Contracting States gives notice to the other, not less than six months before the expiration of the said period of three years, of intention to terminate the Convention, it shall remain in force until the expiration of six months from the date on which either of the Contracting States gives notice of termination.

Article 26

This Convention shall be known as the "United Kingdom/United States Civil Judgments Convention 197. . ."

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed this Convention.

Done in duplicate at _____ this ____ day of 19____.

For the United Kingdom of Great Britain and Northern Ireland:

For the United States of America: