

HOW WELL DO U.S. JUDGMENTS FARE IN EUROPE?

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ABSTRACT

Transnational cases have become a prominent part of the litigation landscape in the United States. Class actions against foreign defendants are widespread, the Alien Tort Claims Act has emerged as a mainstay of proceedings to enforce international human rights law in U.S. courts, and the globalization of the economy has led to an increase in transnational regulatory litigation. In all these cases, however, the parties need to ask themselves whether an ensuing judgment or settlement can be recognized or enforced abroad. For quite some time, the perception in the United States has been that U.S. judgments do not fare very well when the time comes to recognize or enforce them abroad. If so, the resolution of a considerable number of transnational cases in this country would have no effect abroad—not exactly the result that lofty talk about “transnational adjudication” would seem to entail.

In this Article, I intend to provide some answers to the question of how well U.S. judgments really fare in Europe, where many of the important trading partners of the United States are located. I conclude that, on average, U.S. judgments face more obstacles in Europe than do European judgments in the United States. Nonetheless, much depends on the country, the subject matter involved, the person of the defendant, and the connection of the dispute to the recognition state, among other things. Thus, a multilateral judgments convention, such as the one initiated by the United States in 1992, could indeed bring similar improvements like those resulting from various conventions and EC regulations adopted by the Europeans regarding their own judgments. The same goes for the federal recognition statute just proposed by the American Law Institute.

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I. INTRODUCTION

Transnational cases have become a prominent feature of the litigation landscape in the United States. Class actions against foreign defendants have flourished and they increasingly include a significant number of foreign individuals in the class of absent plaintiffs;¹ the Alien Tort Claims Act² has emerged as a mainstay of proceedings to enforce international human rights law in U.S. courts;³ and the globalization of the economy has caused an increase in transnational regulatory litigation.⁴ Despite the variation in type and subject matter of the increasing number of transnational disputes, a common issue recurs in each setting: may an ensuing judgment or settlement be recognized or enforced abroad?⁵ This issue is crit-

1. See, e.g., Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy – Permitting Foreign Claimants to Be Members of Class Action Lawsuits in Federal Court*, 90 CORNELL L. REV. 1563 (2005); Note, *Actualizing the Trope of Internationalism in Class Action Theory*, 118 HARV. L. REV. 2814, 2814 (2005). For a sampling of recent cases involving foreigners in the (proposed) plaintiff class, see, for example, *F. Hoffmann-Laroche, Ltd. v. Empagran, SA*, 542 U.S. 155 (2004); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002); *Presidential Life Ins. Co. v. Milken*, 94 F.3d 65 (2d Cir. 1996); *In re Royal Ahold N.V. Sec. and ERISA Litig.*, 219 F.R.D. 343 (D. Md. 2003); *In re Daimler-Chrysler AG Sec. Litig.*, 216 F.R.D. 291 (D. Del. 2003); *In re Ski Train Fire in Kaprun, Austria*, 230 F. Supp. 2d 376 (S.D.N.Y. 2002).

2. 28 U.S.C. § 1350 (2000) (granting federal courts subject matter jurisdiction over claims by aliens for torts in violation of international law).

3. See, e.g., Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 832-33 (2006) (“[T]he statute, in the past twenty-six years, has become an iconic vehicle for international human rights litigation in U.S. federal courts.”). The academic commentary on the Alien Tort Claims Act is vast. See, e.g., Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587; Sandra Coliver, *Bringing Human Rights Abusers to Justice in U.S. Courts: Carrying Forward the Legacy of the Nuremberg Trials*, 27 CARDOZO L. REV. 1689 (2006); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. L. REV. 687 (2002); Joel Slavotsky, *Doing Business Around the World: Corporate Liability Under the Alien Tort Claims Act*, 2005 MICH. ST. L. REV. 1065.

4. See, e.g., Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 257-65 (2006) (discussing cases involving the regulation of global cartels and global securities offerings as well as claims by foreign governments to recover lost tax revenue).

5. As professor Casad points out, “[A]s an act of government, [a judgment’s] effects are limited to the territory of the sovereign whose court rendered the judgment.” Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 58 (1984). Ordinarily, the enforcement of a foreign judgment presupposes its recognition (or at least requires the meeting of the same criteria as recognition), while recognition alone may be sufficient, depending both on the kind of judgment and on the party filing suit in the recognition state. See, e.g., ALBERT VENN DICEY & J.H.C. MORRIS, *THE CONFLICT OF LAWS*, ¶¶ 14-002 to 14-005 (13th ed. 2000 & 4th Supp. 2004); LOUISE ELLEN TEITZ, *TRANSNATIONAL LITIGATION* 255-56 (1996); GERHARD WALTER, *INTERNATIONALES ZIVIL-PROZESSRECHT DER SCHWEIZ* 377-79 (4th ed. 2007). For purposes of enforcement, continental Europeans further distinguish the enforceability and the declaration of enforceability of a foreign judgment (*exequatur*) from subsequent enforcement proceedings. Once a foreign judgment has been declared enforceable, it can usually be enforced like a local one.

ical to both parties. From the plaintiff's perspective, the defendant may not own sufficient assets in the United States to satisfy a judgment and thus may easily evade enforcement in this country. Correspondingly, the defendant will need to know whether a judgment in its favor or a settlement will preclude the plaintiffs from re-litigating the matter in foreign lands. This is of particular importance in global class actions, where the number of foreign class members who are not so precluded may be quite large, thus rendering illusory even a semblance of "global peace"⁶ for the defendant.⁷

For quite some time, the perception in the United States has been that U.S. judgments do not fare very well when the time comes to recognize or enforce them abroad.⁸ If so, the resolution of a considerable number of transnational cases in this country would have no effect abroad—not exactly the result that lofty talk about "transnational adjudication" would seem to engender. Aware of this problem, the United States initiated negotiations for a global convention on the recognition of foreign judgments at

See, e.g., BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 394-95 (4th ed. 2006); NAGEL/GOTTWALD, INTERNATIONALES ZIVILPROZESSRECHT 638 (6th ed. 2007); WALTER, *supra*, at 378. For purposes of simplicity, I henceforth use the term "recognition" as encompassing both recognition and enforceability of a judgment. This Article does not focus on the considerable disparities among countries in subsequent enforcement proceedings, however.

6. *Cf.* Edward H. Cooper, *The Cloudy Future of Class Actions*, 40 ARIZ. L. REV. 923, 960 (1998) (noting that "[d]efendants may gain 'global peace' from a broad plaintiff class, and in some mass tort cases have eagerly sought certification of global plaintiff classes.").

7. Some federal courts have thus held that the res judicata effect abroad of a judgment or settlement in the class action must be considered as a factor when determining whether a class action is the superior method of litigating a particular suit. Some of these courts have considered certification impermissible if non-recognition abroad is near certain. *See, e.g.*, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 996 (2d Cir. 1974); *In re Daimler-Chrysler AG Sec. Litig.*, 216 F.R.D. 291, 300-01 (D. Del. 2003) (refusing to include foreigners in the certified class); *Ansari v. New York Univ.*, 179 F.R.D. 112, 116-17 (S.D.N.Y. 1998) (holding that, together with lack of proof to meet numerosity requirement, foreigners in the plaintiff class and attendant possibility of lack of recognition of judgment render certification impermissible). *But see In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 48-54 (S.D. Cal. 1975) (rejecting defendant's argument that certification should be impermissible due to the large number of foreign plaintiffs in the proposed class against whom a U.S. judgment would have no res judicata effect in their respective home countries). A more recent decision by the District Court for the Southern District of New York substitutes a sliding-scale test for the "near certain" standard and thus balances the likelihood of recognition abroad against other factors when deciding whether including foreigners in the class of absent plaintiffs is desirable. *See In re Vivendi Universal, S.A.* 242 F.R.D. 76, 92-95 (S.D.N.Y. 2007).

8. *See, e.g.*, *Bersch*, 519 F.2d at 997 (noting that "European courts are far less inclined to recognize foreign judgments than are American courts"); Matthew H. Adler, *If We Build it, Will They Come? – The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79, 94 (1994) (stating that "U.S. courts are quite liberal in their approach to the recognition and enforcement of judgments . . . whereas the reverse is not true").

The Hague in 1992, hoping that the new treaty would significantly improve the recognition of U.S. judgments in the rest of the world.⁹ Along with those efforts at The Hague, the American Law Institute (ALI) launched a project to draft the necessary implementing legislation to the proposed treaty.¹⁰ After long negotiations, however, the Hague treaty was put on the back burner in favor of a much narrower convention on choice of court agreements.¹¹ The difficulties with the larger project have been, at least on the surface,¹² primarily due to disagreements over personal jurisdiction between the United States and continental Europe,¹³ although other major issues emerged later in the process.¹⁴

9. See, e.g., Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 271-72 (1994). On the Hague negotiations, see generally A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE (John J. Barceló, III et al. eds., 2002); SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS: TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION (2003); Linda J. Silberman & Andreas Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635 (2000).

10. AMERICAN LAW INSTITUTE, INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT, xi-xiii (2000).

11. See, e.g., Jeffrey D. Kovar, *In Memoriam: Arthur T. von Mehren*, 119 HARV. L. REV. 1949, 1954 (2006) ("While not representing the full scope of [the original proposal, the Choice of Court] Convention marks the first significant and achievable step and provides the material basis for believing, as the Secretary-General of the Hague Conference has said: 'We will one day be getting there.'"). The Choice of Court Convention, which regulates jurisdiction and judgments on the basis of forum selection agreements, was successfully concluded in the summer of 2005. See Convention of Choice of Court Agreements of June 30, 2005, 44 I.L.M. 1294, available at http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98. On the Choice of Court Convention, see, for example, Matthew H. Adler & Michele Crimaldi Zarichta, *The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band*, 27 NW. J. INT'L L. & BUS. 1 (2006); Ved P. Nanda, *The Landmark 2005 Convention on Choice of Court Agreements*, 42 Tex. Int'l L. J. 773 (2007); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative for Arbitration*, 53 AM. J. COMP. L. 543 (2005).

12. As I have pointed out elsewhere:

On closer inspection . . . many of the disagreements between the Europeans (especially the continental Europeans) and the Americans reflect deeper assumptions about proper approaches to transnational litigation and about the role international law should play in such litigation, assumptions that have been fostered over more than a century of legal development.

BAUMGARTNER, *supra* note 9, at 7-8.

13. See, e.g., BAUMGARTNER, *supra* note 9, at 4-6; Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1009-11 (2006).

14. BAUMGARTNER, *supra* note 9, at 6-7; Kovar, *supra* note 11, at 1954 (indicating that other obstacles included "the force of constitutional change in Europe—the shift of competence from European Union member states to the European Community in Brussels—and the rise of the Internet economy and the resulting uncertainties caused by new business models, changing technology, and new commercial players").

Despite the impasse in the negotiations for a world-wide jurisdiction and recognition convention at The Hague, the ALI wisely continued its work on uniform federal legislation to deal with the recognition of all foreign judgments and adopted its final proposal in 2006.¹⁵ Yet the negotiations at The Hague confirmed the suspicions of many American lawyers that the United States was already too forthcoming in recognizing the judgments of other countries and, thus, had no incentive to offer.¹⁶ With no real power to encourage an improvement in foreign laws, a majority of the members of the ALI proposed that the federal legislation reintroduce a reciprocity requirement, permitting the recognition of foreign judgments only if “comparable judgments of courts in the United States would . . . be recognized or enforced in the state of origin.”¹⁷ During the discussions over the wisdom of reintroducing such a requirement as well as over how precisely it should be worded, members of the ALI undoubtedly wondered: how well do American judgments really fare abroad?¹⁸ Judges and law reformers likely face the same question as decision makers in transnational litigation for which the question of recognition of U.S. judgments is an important consideration. In this Article, I intend to provide some tentative answers to that question for Europe, where many of the important trading partners of the United States are located.

I say “tentative answers” because actual recognition practice is more diverse than the recognition law on the books and more difficult for a foreigner keen on empirical accuracy to find and analyze. Hence, I will begin in Part II with a look at the setting in which decisions on the recognition of U.S. judgments are made in Europe today. I will then proceed to the recognition law on the books with a focus on the general approaches to recognition in Part III and a brief look at the recognition requirements for judg-

15. AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006) [hereinafter PROPOSED FOREIGN JUDGMENTS ACT].

16. Professor Weintraub put it this way: “Most U.S. jurisdictions recognize and enforce the judgments of other countries, but there is a perception that this favor is not reciprocated abroad.” Russel J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 BROOK. J. INT’L L. 167, 168 (1998).

17. PROPOSED FOREIGN JUDGMENTS ACT, *supra* note 15, § 7(a). Eight U.S. states currently have a reciprocity requirement on the books for the recognition of foreign judgments. In two of those, lack of reciprocity may, but need not, block recognition. *Id.* at 99-100.

18. Professor Weintraub properly posed that question much earlier, while the negotiations at The Hague were still in progress. See Weintraub, *supra* note 16, at 170-73.

ments from non-European countries in Part IV. In Part V, I will narrow my focus to the actual practice of recognizing U.S. judgments in three countries that generally do recognize such judgments—Germany, Italy, and Switzerland—to explore in more detail the kinds of problems that U.S. judgment creditors have encountered in Europe.

II. THE SETTING

For quite some time, scholarship and reform efforts in European judgment recognition law have focused on judgments from the member states of the European Community and those from the European Free Trade Association (EFTA) member states¹⁹ (by way of the Lugano Convention).²⁰ This began in 1973 with the entering into force of the Brussels Convention²¹ and its extensive interpretation by the European Court of Justice. It continued with the negotiation of the parallel Lugano Convention in 1988.²² In early 2002, the European Council replaced the Brussels Convention with secondary community law (now generally referred to as Brussels I).²³ At the same time, the Council passed a new regulation on the recognition of judgments in family law matters (Brussels II);²⁴ a regulation in the area of successions (Brussels III) is in the works.²⁵ Moreover, at its 1999 meeting in Tampere, Finland, the European Council announced as one of its policy goals the free movement of judgments within the Community.²⁶ The idea is that judgments from other member states should be treated the same as judgments from within the recognition state, thus abolishing recognition pro-

19. See, e.g., BAUMGARTNER, *supra* note 9, at 62-66.

20. Convention on jurisdiction and the recognition of judgments in civil and commercial matters, 1988 O.J. (L 319) 40.

21. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, consolidated version, 1998 O.J. (C 27) 1.

22. See, e.g., BAUMGARTNER, *supra* note 9, at 62-66.

23. Council Regulation on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1. For the most part, this regulation took over the provisions of the Brussels Convention. It did, however, make a number of changes, large and small. See, e.g., Astrid Stadler, *From the Brussels Convention to Regulation 44/2001: Cornerstones of a European Law of Civil Procedure*, 42 COMMON MARKET L. REV. 1637, 1639 (2005).

24. Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, 2003 O.J. (L 338) 1.

25. Green Paper, Succession and Wills, COM (2005) 65 final.

26. Tampere European Council 15 and 16 October 1999, Presidency Conclusions, ¶ 33-34, available at http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm.

ceedings and special recognition requirements.²⁷ In a first step, this goal has been achieved with regard to uncontested claims,²⁸ a newly created order-of-payment procedure,²⁹ and small claims judgments.³⁰ Moreover, the European Commission has proposed a regulation abolishing the requirement for recognition in the area of support payments³¹ The end result of all these initiatives is intended to be the free movement of all judgments within the European Community within the next few years.

27. In the cramped style of the Presidency Conclusions, “the European Council calls upon the Commission to make a proposal for further reduction of the intermediate measures which are still required to enable the recognition and enforcement of a decision or judgment in the requested State.” *Id.*

28. European Parliament and Council Regulation of April 2004 creating a European enforcement order for uncontested claims, 2004 O.J. (L 143) 15. Uncontested claims for this purpose roughly are monetary claims to which “the debtor has agreed” and that thus end in a consent judgment, judicially approved settlement, or an “authentic instrument” admitting to the debt or which have been prosecuted in a civil proceeding in a member state in which the debtor has failed to appear to contest the claim and that thus end in a default judgment. *Id.* art. 3. The resulting judgment, settlement, or notarized document can be certified as a European Enforcement Order by the originating court. If so, it must be enforced directly by the competent authorities in any other member state as if it were a judgment of that state’s courts. *Id.* arts. 1, 5.

29. European Parliament and Council Regulation of December 12, 2006, creating a European order of payment procedure, 2006 O.J. (L 399) 1. The procedure allows a creditor who believes to have an uncontested cross-border claim for the payment of a sum of money to obtain an enforceable judgment in no more than three months. The creditor simply fills out a form identifying the debtor, sum of money owed, and a brief description of the cause of action and the evidence supporting the claim, thus obviating the need for filing a full complaint. The court then orders the defendant either to pay the sum claimed or to file an objection. In the latter case, the plaintiff can overcome the objection only by beginning an ordinary civil proceeding. But if the defendant neither pays nor objects within 30 days, the court declares the order an enforceable judgment. This judgment is then enforceable without the need for further recognition proceedings in all member states of the European Community. *See id.* arts. 7-19. As Professor Burbank has recently reminded us, summary judgment in the United States before the promulgation of the Federal Rules of Civil Procedure had a similar function, namely quickly to “expos[e] and eliminat[e] sham defenses to liquidated demands.” Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEG. STUD. 591, 596 (2004).

30. European Parliament and Council Regulation of July 11, 2007, establishing a European Small Claims Procedure, 2007 O.J. (L 199) 1. The Regulation harmonizes small claims proceedings (i.e., proceedings involving claims of €2,000 or less) in cross-border cases. *Id.* Article 20(1) of the Regulation then provides:

A judgment given in a Member State in the European Small Claims Procedure shall be recognized and enforced in another member state without the need for a declaration of enforceability and without any possibility of opposing its recognition.

Id. art. 20(1).

31. *Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*, COM (2005) 649 final.

This is all terribly exciting and has given rise to a significant amount of scholarship. It has properly consumed much of the legislative and negotiating energy not only in Brussels, but also within various member states. The downside is that the law regarding the recognition of judgments from non-member states has not changed much during the past decades. True, there have been some notable innovations in Belgium,³² Italy,³³ and Switzerland.³⁴ Yet they have been part of larger endeavors to pass a modern codification of all of private international law, not just judgments recognition.³⁵ It is further true that improvements in treaty law helped harmonize, and at times liberalize, the municipal recognition law in continental Europe.³⁶ But I suspect that once a certain level of clarification and liberalization has been achieved, domestic recognition law is unlikely to follow the current efforts in Brussels, especially now that those efforts proceed at the level of secondary Community law, rather than negotiated treaty law.

32. The principal change in Belgium consists in the abolition of the *révision au fond*. See Marta Pertegas, *The Belgian Code on Private International Law: a tour d'horizon*, 26 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [hereinafter IPRAX] 53, 57 (2006); see also *infra* text accompanying notes 77-78.

33. The changes in Italy have been considerable. See Gerhard Walter & Samuel P. Baumgartner, *General Report*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS 1, 19 (Gerhard Walter & Samuel P. Baumgartner eds., 2000); Michele Angelo Lupoi, *Italy*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra*, at 347.

34. The primary changes in Switzerland were the federalization of recognition law and the abolishment of the reciprocity requirement that several cantons had imposed. See, e.g., TEDDY SVATOPLUK STOJIAN, DIE ANERKENNUNG UND VOLLSTRECKUNG AUSLÄNDISCHER ZIVILURTEILE IN HANDELSACHEN 136 (1986).

35. Wet houdende het Wetboek van internationaal privaatrecht [hereinafter Belgian Code of Private International Law], Belgisch Staatsblad of July 27, 2004 (Belgium); Legge di riforma del sistema italiano di diritto internazionale privato e processuale of May 31, 1995, Gazz. Uff. n.128, of June 3, 1995 (Italy), translated in 35 I.L.M. 765 (1996) [hereinafter Italian Private International Law Act]; Bundesgesetz über das internationale Privatrecht of Dec. 18, 1987, SR 291 (Switzerland) [hereinafter Swiss Act on Private International Law]. Hungary passed a new private international law statute, including novel provisions on the recognition of judgments, in 1979. See Francis A. Gabor, *A Socialist Approach to Codification of Private International Law in Hungary: Comments and Translation*, 55 TUL. L. REV. 63, 85-86 (1980); Miklós Kengyel, *Hungary*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 323, 327.

36. BAUMGARTNER, *supra* note 9, at 58-62.

Often, the treaty partners mutually liberalize their recognition reviews as a sign of their special relationship of trust. In turn, due to the insights gained by negotiating the treaty or due to positive experience with its application, the treaty's more liberal regime is then adopted, in whole or in part, as the rule regarding the recognition of judgments from all countries, perhaps even serving as the basis of new treaty negotiations.

Walter & Baumgartner, *supra* note 33, at 7 (footnote omitted).

The Europeans have had a long history of negotiating recognition treaties.³⁷ From the information available to me, I count an average of five multilateral and fourteen bilateral recognition treaties per country. To be sure, those bilateral treaties concluded between member states of the European Community and/or the European Free Trade Association have seen their scope of application considerably limited since being preempted by the Brussels and Lugano instruments.³⁸ Moreover, the European Court of Justice held in its 2006 decision on the power of the European Community to negotiate a new Lugano Convention that the Community now has exclusive power to enter into recognition treaties with non-EC countries,³⁹ leaving EC member states with no original power in this area.⁴⁰ Nevertheless, it is clear that most European countries have a number of multi- and bilateral recognition treaties still in force with some of their most important non-EU trading partners.⁴¹ The United States, which has had a long history of staying out of international commitments in the area of private international law,⁴² is not among them.

As a result of all this, judgments emanating from the United States are recognized under the same regime as are judgments from less important, far-away nations with which there exist no special trading relationships. Indeed, as I have shown elsewhere, there have been countries in which some of the domestic recognition requirements have been interpreted so as to make recognition of U.S. judgments more difficult both to protect domestic firms

37. See BAUMGARTNER, *supra* note 9, at 47-67.

38. Article 69 of the Brussels Regulation, contains a list of the bilateral treaties between EC member states that have been superseded by the Regulation to the extent that those treaties cover the same subject matter as the Regulation. Commission Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 14-16. Article 55 of the Lugano Convention, *supra* note 20, does the same for treaties between Lugano member states.

39. Case C-1/03, 2006 E.C.R. I-1145.

40. See, e.g., Thalia Kruger, Note, *Opinion 1/03, Competence of the Community to Conclude the New Lugano Convention on the Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, 13 COLUM. J. EUR. L. 189, 198 (2006).

41. Austria, for example, has bilateral recognition treaties with non-EU countries Croatia, Macedonia, Yugoslavia, Turkey, and Tunisia. See Walter Rechberger & Ulrike Frauenberger-Pfeiler, *Austria*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 47, 50-52. Greece has entered into bilateral recognition agreements with non-EU countries Bulgaria, Lebanon, Romania, Russia, Syria, Tunisia, and Yugoslavia. See Nikolaos K. Klamaris, *Greece*, in *id.* at 275, 284. And Spain has bilateral recognition treaties with non-EU states Brazil, Bulgaria, China, Columbia, Israel, Mexico, and Uruguay. See José Antonio Pérez Beviá, *Spain*, in *id.* at 499, 500-501.

42. See BAUMGARTNER, *supra* note 9, at 16-46.

from U.S. practices and in response to U.S. approaches to transnational litigation that have been insensitive to sovereignty concerns of those countries.⁴³

The United States has partly itself to blame for this absence of recognition treaties. After all, there was no shortage of proposals from civil law countries to negotiate such treaties in the late 19th and early 20th centuries.⁴⁴ Nonetheless, American impatience—impatience with foreign solutions, impatience with countries refusing to emulate the preferred American approach, and impatience with the time and effort necessary to successful treaty-making in this area—and lack of a willingness to incur a quid pro quo have until recently kept the United States from the negotiating table with civil law countries.⁴⁵ But the continental Europeans are by no means blameless. Their experience of negotiating recognition treaties among themselves for over a century, moving ever closer and negotiating at an ever more technical level with other countries whose Roman legal history they share, have been unwilling to engage more basic questions of procedural philosophy and jurisprudential preferences, without which the successful conclusion of a recognition treaty with the United States is unlikely.⁴⁶

Engaging these questions of procedural philosophy and jurisprudential preferences would also be helpful in reconsidering domestic European recognition law with regard to the United States. Perhaps the negotiations at The Hague, combined with the proposed reintroduction of a reciprocity requirement in the United States as described above,⁴⁷ will provide the necessary impetus for change. After all, the new reciprocity requirement may find its way into the case law of U.S. state courts long before the proposed federal legislation is enacted. At the same time, however, I suspect

43. See Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1338-44 (2004).

44. See, e.g., Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. PA. L. REV. 323 (1954). This is not true with regard to the United Kingdom, with which the United States tried—unsuccessfully—to negotiate a bilateral recognition treaty in the late 1970s. See, e.g., Peter M. North, *The Draft U.S./U.K. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219 (1979); David L. Woodward, *Reciprocal Recognition and Enforcement of Civil Judgments in the United States, the United Kingdom and the European Economic Community*, 8 N.C. J. INT'L L. & COM. REG. 299 (1983).

45. See BAUMGARTNER, *supra* note 9, at 68-73; Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 139-41 (Summer 1994). For further analysis of U.S. unilateralism in law-making for transnational litigation, see BAUMGARTNER, *supra* note 9, at 16-46.

46. See BAUMGARTNER, *supra* note 9, at 68-73, 118-28.

47. See *supra* text accompanying notes 16-17.

that with the impasse over the larger project at The Hague, many European countries are now convinced that their domestic recognition law should remain the same until such time as the United States is willing to conclude a treaty on jurisdiction and recognition on more favorable terms.⁴⁸ Of course, such a treaty may be bilateral in nature, allowing for the accommodation of more specific needs between the United States and the country in question.⁴⁹ After all, this is precisely what the Europeans started with over a century ago.⁵⁰

III. GENERAL APPROACHES

What, then, are the general approaches in the municipal law of the various European jurisdictions to the recognition of judgments from countries that are not members of the European Community or the EFTA? Obviously, it would make sense for all countries generally to recognize foreign judgments under certain conditions. Judicial economy, furtherance of international commerce,⁵¹ and fairness to the litigant who won in the rendering court would seem to require as much.⁵² The public policy of the recognition state and the rights of the losing party can still be guaranteed through the application of the standard recognition requirements.

48. Conversely, those involved in the Hague negotiations on the side of the United States seem firmly convinced that reintroducing a reciprocity requirement into the recognition law of the United States is necessary to bring the Europeans and others back to the negotiating table. See AMERICAN LAW INSTITUTE, 2002 PROCEEDINGS 359-68; 2004 PROCEEDINGS 113-140; 2005 PROCEEDINGS 159-61 (statements by Ronald A. Brand, Stephen B. Burbank, Jeffrey D. Kovar, Louise-Ellen Teitz, and Peter D. Trooboff).

49. See, e.g., Kevin M. Clermont, *A Global Law of Jurisdiction and Judgments: Views From the United States and Japan*, 37 CORNELL INT'L L. J. 1, 24-26 (2004) (suggesting the negotiation of a treaty on jurisdiction and judgments between the United States and Japan).

50. See *supra* note 37 and accompanying text.

51. The importance of this goal has been recognized by the Europeans for a while. See, e.g., Commission Communication to the Council and the European Parliament 'towards greater efficiency in obtaining and enforcing judgment in the European Union,' 1998 O.J. (C-33) 3 *passim* (repeatedly suggesting that current obstacles to judgments recognition impedes inter-EC trade); Paul Jenard, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, 1979 O.J. (C-59) 1, 3 (same). On the relationship between international trade and civil procedure, see, for example, Baumgartner, *supra* note 43, at 1363-69.

52. See, e.g., Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 4 (1988). On the reasons for and against recognition, see generally REINHOLD GEIMER & ROLF A. SCHÜTZE, *INTERNATIONALE URTEILSANERKENNUNG*, Vol. I, 2, 1367-79 (1984); Arthur T. von Mehren & Donald Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601, 1603-05 (1968).

Despite these powerful reasons in favor of recognition, however, European civil law countries have had a history of refusing to give foreign judgments effect. Post-Westphalian notions of sovereignty and nationalism focused on judgments as governmental acts, indeed as commands of a foreign sovereign,⁵³ the compulsory effects of which could not possibly reach beyond the territory of the jurisdiction.⁵⁴ In the German principalities and elsewhere, this led to a “misunderstood striving for sovereignty, the notion that each state was enclosed in a Chinese wall and thus in need to defend its sovereignty against attacks by foreign sovereign powers.”⁵⁵ To alleviate the hardship this approach imposed on private litigants, continental Europeans entered into treaties in which they would guarantee the recognition of the other party’s judgments in exchange for their citizen’s enjoying the same benefits there.⁵⁶ Given the strong sovereignty concerns, however, early recognition treaties and recognition statutes required the formal requisition of the judicial cooperation of the recognition state by the rendering state, rather than a mere application by one of the litigants to the recognizing court, as is possible in most jurisdictions today. This formal process resulted in a sovereign act of recognition by the recognizing government rather than its courts.⁵⁷

Over time, the legislatures and judiciaries of many, but not all, of these countries recognized the unsatisfactory nature of this approach with respect to judicial economy and international commerce as well as the hardship it imposes on individual litigants and thus changed their laws accordingly.⁵⁸ Hence, the general approaches to recognition law today run the gamut. At one end of the spectrum, the Nordic countries generally do not recognize any foreign judgments unless and to the extent there is a treaty requirement to the contrary.⁵⁹ Similarly, Austria only recognizes to

53. See, e.g., DIETER MARTINY, III/1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 19 (1984).

54. See, e.g., BAUMGARTNER, *supra* note 9, at 52-53; Juenger, *supra* note 52, at 5-6.

55. Mittermaier, *Von der Vollstreckung eines von einem ausländischen Gerichte gefällten Urteils*, 14 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 84, 85 (1831).

56. See, e.g., Walter & Baumgartner, *supra* note 33, at 5-6.

57. See, e.g., MARTINY, *supra* note 53, at 19-20. This approach remained much longer in the procedural codes of Latin America. In Mexico, recognition required a letter rogatory from the originating state as late as 1990. See, e.g., Jose Daniel Amado, *Recognition and Enforcement of Foreign Judgments in Latin American Countries: An Overview and Update*, 31 VA. J. INT'L L. 99, 118-19 (1990).

58. See, e.g., MARTINY, *supra* note 53, at 21-32 (Germany); Juenger, *supra* note 52, at 6-7 (France).

59. See, e.g., Walter & Baumgartner, *supra* note 33, at 17.

the extent that reciprocity is formally certified by treaty or by order of the Ministry of Justice;⁶⁰ such certifications by the Justice Ministry, however, exist only with respect to support judgments from certain common law countries, including the United States.⁶¹ At least the Austrian legislation excludes judgments in status matters and matters of parental responsibility from this exacting reciprocity requirement.⁶² The Netherlands, too, would seem to belong to this group of non-recognizers. Article 431 of its Code of Civil Procedure provides that foreign judgments cannot be enforced in the Netherlands if there is no treaty obligation to the contrary.⁶³

At the other end of the spectrum are England,⁶⁴ France,⁶⁵ Germany,⁶⁶ Greece,⁶⁷ Italy,⁶⁸ Spain,⁶⁹ and Switzerland,⁷⁰ all with recog-

60. See, e.g., Rechberger & Frauenberger-Pfeiler, *supra* note 41, at 54-55.

61. *Id.* at 55; Friedrich Schwenk, *Austria*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS 4-5 (Louis Garb & Julian Lew eds., 10th ed. Supp. 2005).

62. Rechberger & Frauenberger-Pfeiler, *supra* note 41, at 54-55.

63. See, e.g., René Ch. Verschuur, *The Netherlands*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 405.

64. The recognition requirements under English common law are, generally, that the rendering court have had jurisdiction; that the proceedings abroad were not opposed to natural justice; that the judgment was not obtained by fraud; and that the judgment does not violate English public policy. See DICEY & MORRIS, *supra* note 5, at ¶¶ 14R-118 to 14-158; J.G. Collier, *England*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 131.

65. The recognition requirements in France are, by case law, that the rendering court have had jurisdiction; that the foreign judgment not violate French public policy, both substantive and procedural; that the judgment was not obtained by fraud; and a choice of law test. See, e.g., Catherine Kessedjian, *France*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 185, 191-205.

66. § 328 of the German Code of Civil Procedure provides:

(1) The recognition of a judgment of a foreign court is impossible:

1. if the courts of the foreign country to which the rendering court belongs have no jurisdiction under German law;
2. if the defendant, who has not entered a general appearance and who invokes this fact, was not properly served or was not served in time for him to be able to defend;
3. if the judgment is inconsistent with an earlier foreign judgment or if the litigation giving rise to the judgment was inconsistent with litigation begun earlier in this country;
4. if the recognition would lead to a result that is obviously incompatible with basic principles of German law, especially when it is inconsistent with basic constitutional rights;
5. if reciprocity is not guaranteed.

(2) [Exception from the reciprocity requirement for non-monetary claims for which there would be no jurisdiction in Germany and for certain status matters.] (translation by the author).

67. The recognition requirements in Greece are: finality of the judgment; the rendering state had jurisdiction under Greek law; the losing party was granted the right to be

dition requirements that are similar to those set up for judgments recognition in the United States and elsewhere.⁷¹ Somewhere in the middle are the Eastern European countries.⁷² Their recogni-

heard; the judgment is not inconsistent with a Greek judgment; and there is no violation of Greek public policy. See Klamaris, *supra* note 41, at 304.

68. Article 64 of the Italian Private International Law Act provides:

A foreign judgment is recognized . . . in Italy if:

- a. the judge who handed down the judgment could hear the case under the rules of jurisdiction of Italian law;
- b. the summons was served in accordance with the law of the place of the proceedings and none of the essential rights of the defense were violated;
- c. if the parties submitted to the court's proceedings according to the law at the place of the proceedings or if default was declared according to that law;
- d. it has become final under the law of the state in which it was handed down;
- e. it is not inconsistent with another final judgment of an Italian judge;
- f. there is no procedure before an Italian judge in the same matter between the same parties that was begun before the foreign proceedings;
- g. its dispositions do not produce effects contrary to the Italian public order.

Italian Private International Law Act, *supra* note 35, art. 64 (translation by author).

69. The recognition requirements in Spain are: that the rendering court have had jurisdiction; that the foreign decision not be in violation of Spanish public policy; that there be no violation of basic procedural rights; and that the foreign judgment not be inconsistent with a Spanish judgment or with ongoing Spanish litigation. See, e.g., Pérez Beviá, *supra* note 41, at 505-09; Francisco Ramos Romeu, *Litigation Under the Shadow of an Exaquetur: The Spanish Recognition of U.S. Judgments*, 38 INT'L LAW. 945, 949-50 (2004).

70. Article 25 of the Swiss Act on Private International Law, *supra* note 35, provides:

A foreign decision will be recognized in Switzerland:

- a. if the court or authority of the foreign state that handed down the decision had jurisdiction;
- b. if an ordinary appeal is no longer possible against the decision or if it is final;
- c. if there is no ground for refusing recognition under Article 27.

Article 27 then provides:

(1) A foreign decision will not be recognized in Switzerland if the recognition would be manifestly inconstant with Swiss public policy.

(2) A foreign decision will equally not be recognized if one party proves:

- a. that it was not properly served either under the law of its domicile or under the law of the place of regular abode, except the party has entered a general appearance without disputing jurisdiction;
- b. that the decision was reached in violation of essential principles of Swiss procedure, especially that the party was refused the right to be heard;
- c. that a proceeding involving the same parties and the same claims was first begun in Switzerland or first decided in Switzerland or that such a proceeding was first decided in a foreign country and the decision of that country can be recognized in Switzerland.

(3) Other than that, the decision may not be reexamined (*au fond*).

Swiss Act on Private International Law, *supra* note 35, art. 27 (translation by the author).

71. See, e.g., Juenger, *supra* note 52, at 11 (noting "a remarkable measure of agreement on the minimum requirements a foreign decision must meet" to be recognized among nations with liberal recognition laws).

72. One could argue that Germany and Spain should be added to this intermediate category because these two countries, unlike England, France, Greece, Italy, Spain, and Switzerland, still impose a reciprocity requirement. See *infra* text accompanying notes 116-129. But that requirement, as applied in practice, has developed a relatively small (although, in the case of Germany, rather significant) area of application with regard to judgments from the United States. See *infra* text accompanying notes 116-129 & 243-247.

tion law looks quite similar to that of France and Germany, but there are some quirks. In addition, actual recognition practice during Socialist times was quite limited, and too few judgments have been handed down since the fall of the Iron Curtain to know for sure whether recognition practice in those countries is truly as liberal as it looks on the books.⁷³ In fact, many of the East European countries have moved almost seamlessly from Socialist rule to the system of Lugano⁷⁴ and Brussels, thus offering limited, if any, time for recognition cases from important trading partners to be decided under domestic recognition law.⁷⁵ Finally, Portugal still imposes a *révision au fond*, that is, the recognition judge must determine whether the judgment both factually and legally conforms to the law of the recognition state.⁷⁶ The same was true in Belgium before an entirely new Code of Private International Law finally did away with *révision au fond* in October of 2004.⁷⁷ However, the new Belgian Code still imposes a relatively stiff choice of law test in a limited number of cases.⁷⁸

If we look more carefully, however, things become a bit more complex. In the Nordic countries, courts have made some inroads into the unforgiving statutory provisions by way of liberal interpretation. In the 1973 *Vakis* case, the Swedish Supreme Court held that a forum selection clause exclusively choosing the rendition state's courts will result in the recognition of that state's judgment in Sweden.⁷⁹ The same rule was later introduced by statute in Nor-

73. See, e.g., Walter & Baumgartner, *supra* note 33, at 4-5.

74. Poland ratified the Lugano Convention on Nov. 1, 1999. See Lugano Convention Depository, <http://www.bj.admin.ch/etc/medialib/data/wirtschaft/ipr.Par.0015.File.tmp/Ratifikationsliste-e.pdf> (last visited May 4, 2008).

75. The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia joined the European Community, and thus became subject to the Brussels Regulation, in May 2004.

76. In Portugal, *révision au fond* applies only to judgments against Portuguese nationals to the extent that the rendering court did not apply Portuguese law and Portuguese law would be more favorable to the Portuguese citizen. Obviously, this is still a considerable limit to the recognition of foreign judgments in Portugal. See, e.g., Carlos Manuel Ferreira Da Silva, *Portugal*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 465, 480-81.

77. See Pertegas, *supra* note 32, at 57; Belgian Code of Private International Law, *supra* note 35, art. 25(2).

78. The foreign decision will not be recognized if it "was obtained, in a matter in which the parties may not dispose of their rights [i.e. primarily in certain areas of family law], with the sole goal of circumventing the law applicable under the present Code." Belgian Code of Private International Law, *supra* note 35, art. 25(1)(3).

79. See Mikael Berglund, *Sweden*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 529, 532; Claes Lundblatt, *Sweden*, in ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 208, 210-11 (Charles Platto & William G. Horton eds., 2d ed. 1993).

way.⁸⁰ Similarly and somewhat more broadly, the Finnish courts have recognized judgments in cases where, because of lack of personal jurisdiction, the claim could never have been brought in Finland from the outset.⁸¹ Moreover, the courts of all Nordic countries increasingly have been willing to respect the foreign judgment as evidence of the existence or non-existence of the debt, as the case may be, when re-litigating the claim.⁸² The judge may, however, still decide to hear other evidence as needed. In addition, this recognition through the back door is entirely in the discretion of the “recognition” judge and thus is by no means guaranteed.⁸³

In the Netherlands, the Supreme Court initially interpreted Article 431 of the Code of Civil Procedure, modeled after the French Code Michaud of 1629,⁸⁴ to mean that neither recognition nor enforcement of foreign judgments is possible.⁸⁵ But in 1916, the Court began to change course. At first, it made clear that because the Code only proscribes *enforcement*, a foreign divorce decree could be *recognized*.⁸⁶ Following that decision, the Court began to repeat the confusing holding that Article 431 “prohibits execution and the giving of res judicata effect to foreign judgments, but that the Dutch courts are free to determine in each particular case whether and to what extent recognition should be given to such

80. See Henrik Bull, *Norway*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 425, 428-29.

81. See Juha Lapalainen, *Finland*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 169, 169-70. Finnish law also provides for the recognition of foreign divorce decrees. *See id.* at 169.

82. See, e.g., Bull, *supra* note 80, at 429 (Norway); Berglund, *supra* note 61, at 4; Petrik Obstbaum, *Finland*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 61, at 3-4; Jens Rostock Jensen & Anne-Mette Ekljaer Andersen, *Denmark*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 61, at 4.

83. See, e.g., Berglund, *supra* note 79 (“The foreign judgment *might* be recognised as evidence within the framework of the local court’s free evidence evaluation.”) (emphasis added).

84. See, e.g., Verschuur, *supra* note 63, at 404.

85. See, e.g., Norel Rosner, *The Requirements for Execution of Foreign Money Judgments in the Netherlands Absent a Treaty*, <http://www.llrx.com/features/norel.htm> (published Jan. 2, 2003).

86. The Court allowed the recognition of a New York divorce decree between two Dutch citizens as an incidental manner in a Dutch insurance dispute. Hoge Raad, Nov. 24, 1916, 1917 NEDERLANDSE JURISPRUDENTIE 5.

judgments.”⁸⁷ The Court echoed this holding in a line of decisions that were seemingly inconsistent and that confused the lower courts for some time.⁸⁸

Today, the lower courts and the commentators, although still expressing a degree of uncertainty, interpret this jurisprudence to mean that all foreign judgments can be recognized in the Netherlands, even foreign money judgments requiring enforcement.⁸⁹ In the latter case, the judgment debtor must bring a new claim in the Netherlands. The foreign judgment will then usually be recognized, allowing the debtor only the kinds of defenses that are available in recognition proceedings in countries with a more liberal approach.⁹⁰ This, in effect, seems little different from the English action on the foreign judgment.⁹¹ But the Dutch court may review the substance of the foreign judgment,⁹² and it may, at least in theory, nevertheless refuse recognition—a privilege the Dutch Supreme Court again asserted in a 1996 divorce case from France, much to the dismay of Dutch commentators.⁹³ The only situation in which recognition seems truly guaranteed is, again, the situation where the rendering court had been chosen by a valid forum selection agreement between the parties.⁹⁴

At the other end of the spectrum, actual recognition practice in Germany, Greece, Italy, and Spain is in some ways more liberal than that in England, France, and Switzerland. The reason has to do with the jurisdictional test applied in the latter countries. In France, the *Cour de Cassation* has long interpreted Article 15 of the

87. Hans Smit, *International Res Judicata in the Netherlands: A Comparative Analysis*, 16 *BUFF. L. REV.* 165, 196 (1966). As Professor Smit pointed out, this holding is confusing because one of the effects of recognition is generally understood to be the granting of res judicata effect to the foreign judgment. *Id.*

88. See, e.g., *id.* at 196-200. Professor Smit concluded in 1966 that recognition is usually granted in the Netherlands for status judgments and for judgments *in rem* involving things located in the rendering jurisdiction, while *in personam* judgments would be recognized in the Netherlands only against a litigant who was a domiciliary of, or who selected, the rendering forum. *Id.* at 201-08.

89. See, e.g., Rosner, *supra* note 85.

90. These defenses are: (1) that the judgment was rendered by a court having jurisdiction or that the defendant have agreed to the court's jurisdiction, (2) that the judgment is final, (3) that there is no violation of Dutch public policy, (4) and that due process was not violated. See Verschuur, *supra* note 63, at 407-08.

91. On the English action on the foreign judgment, see DICEY & MORRIS, *supra* note 5, ¶ 14-009.

92. See Verschuur, *supra* note 63, at 409.

93. See *id.* at 408-09 (mentioning that one can argue that this case did not involve the same claim and, thus, that preclusive effects would not attach under Dutch law).

94. Hoge Raad, Dec. 17, 1993, 1994 *NEDERLANDSE JURISPRUDENTIE* 349. See Verschuur, *supra* note 63, at 409.

Code Civil so as to block recognition of judgments against French nationals who have not renounced this jurisdictional privilege.⁹⁵ As in the Nordic countries and in the Netherlands, this protection does not extend to judgments from courts chosen by a French plaintiff or by both parties in an exclusive forum selection clause and to cases in which the defendant entered a general appearance without protesting the court's jurisdiction.⁹⁶ Somewhat more liberal, the Swiss legislation generally disallows the recognition of judgments against parties that were domiciled in Switzerland at the time the judgment was rendered.⁹⁷ There are exceptions not only for validly chosen fora and general appearances,⁹⁸ as in France, but also for counterclaims,⁹⁹ claims out of the operation of a Swiss business' local agency in the rendering state,¹⁰⁰ and claims by consumers in the rendering state who had bought a product from a Swiss domiciliary in that state or on the basis of advertisements there,¹⁰¹ among others.¹⁰² Finally, English courts have recognized foreign judgments *in personam* only when the defendant was present in the rendering state—however briefly—or when the defendant had submitted to the jurisdiction of the rendering state through a valid forum selection agreement, by entering a general appearance, or by becoming a plaintiff in the foreign proceedings.¹⁰³ For *in rem* judgments, English courts have accepted the jurisdiction of the court at the place where the thing was located.¹⁰⁴ The upshot of these rules is obvious: French nationals, Swiss domiciliaries, and English defendants who are not covered by any of the exceptions mentioned, may choose to risk a default judgment in the United States that will not be recognized in their respective home state.

95. See, e.g., AUDIT, *supra* note 5, at 379-80; Kessedjian, *supra* note 65, at 193; Thomas E. Carbonneau, *The French Exequatur Proceeding: The Exorbitant Jurisdictional Rules of Articles 14 and 15 (Code Civil) as Obstacles to the Enforcement of Foreign Judgments in France*, 2 HASTINGS INT'L & COMP. L. REV. 307 (1979).

96. See, e.g., AUDIT, *supra* note 5, at 379-80; Kessedjian, *supra* note 65, at 193.

97. Swiss Act on Private International Law, *supra* note 35, art. 149.

98. *Id.* art. 26(b) & (c).

99. *Id.* art. 26(d).

100. *Id.* art. 149(2)(d).

101. *Id.* arts. 149(2)(b), 120(1).

102. There are further exceptions for divorces (arts. 50, 58 & 65), parentage (arts. 70 & 73), adoptions (art. 84), successions (art. 96), and immovables (art. 108). *Id.*

103. See, e.g., DICEY & MORRIS, *supra* note 5, ¶¶ 14R-048 to 14-098; Collier, *supra* note 64, at 138-42.

104. See, e.g., DICEY & MORRIS, *supra* note 5, ¶¶ 14R-099 to 14-108.

IV. RECOGNITION REQUIREMENTS

A. *In General*

To the extent that European countries do recognize foreign judgments, their requirements for doing so are considerably similar to those prevailing in the United States.¹⁰⁵ Thus, in order to be recognized, a foreign judgment must be:¹⁰⁶

- (1) Final;
- (2) Based on a proper exercise of personal jurisdiction;
- (3) Based on proper service of process of the document initiating the lawsuit;
- (4) Based on proceedings that are fair;
- (5) Not violate the recognition state's public policy;
- (6) Not be based on fraud;¹⁰⁷
- (7) Not be inconsistent with certain proceedings or decisions involving the same cause of action between the same parties.¹⁰⁸

In addition, reciprocity and a choice-of-law test—usually limited to certain areas of family law and the law of succession—are further requirements in some, but not all, European countries.¹⁰⁹

B. *Reciprocity*

A closer look at reciprocity may be useful, given that the ALI proposes to include a reciprocity requirement in its International Jurisdiction and Judgments project.¹¹⁰ In Austria, reciprocity must be formally guaranteed.¹¹¹ That is, there must be either a treaty with the rendering nation providing for the recognition of Austrian judgments there or the Justice Ministry must have formally declared that the rendering jurisdiction recognizes Austrian judg-

105. For more extensive treatment of the various recognition requirements in Europe, see Walter & Baumgartner, *supra* note 33, at 17-35.

106. See *supra* notes 64-71, 76, 78 & 90; see also Walter & Baumgartner, *supra* note 33, at 21-35.

107. Despite agreement on a fraud exception, which is considered part of the public policy exception in some countries, there are quite different purposes that exception is intended to serve. They reach from preventing abuse of a country's rules on personal jurisdiction to control of choice of law to procedural fraud to substantive fraud. See Walter & Baumgartner, *supra* note 33, at 31.

108. Here, again, there are quite some differences. England follows the first-in-time rule with regard to judgments. Most civil law countries, on the other hand give preference to judgments and sometimes to proceedings before their own courts. See *id.* at 33-34.

109. See *id.* at 32-33, 34-35. The choice of law test has historically been used in the Romanic countries, but it has been strongly criticized by commentators and has subsequently been loosened by the courts in many of them. Only in Portugal does the choice of law test remain a serious potential impediment to recognition. See *id.* at 32-33.

110. See *supra* text accompanying notes 17-18.

111. See, e.g., Rechberger & Frauenberger-Pfeiler, *supra* note 41, at 54-55; *supra* text accompanying notes 60-62.

ments of the type at issue in the recognition proceedings. As discussed above, the latter has occurred only with regard to support judgments from some common law countries, including the United States.¹¹² Thus, in effect, the Austrian reciprocity requirement renders recognition outside a treaty framework, including the recognition of U.S. judgments, impossible in all but a few instances.

Poland, in 1996, replaced a reciprocity requirement similar to the one controlling in Austria with one that only blocks the enforcement of judgments from countries that fail to recognize Polish judgments in similar circumstances.¹¹³ In Hungary, the reciprocity requirement can only be used to block the enforcement, but not the mere recognition, of a foreign judgment.¹¹⁴ And in the Czech Republic, the reciprocity requirement is limited to judgments against Czech nationals.¹¹⁵ In all three countries, the requirement occasionally does serve to avoid the recognition or enforcement, as the case may be, of a foreign judgment.

In Germany, strong and persistent scholarly criticism¹¹⁶ has led the legislature to abandon reciprocity in family matters and with regard to non-litigious decisions (*freiwillige Gerichtsbarkeit*).¹¹⁷ Moreover, courts have developed an increasingly liberal interpretation of the requirement where it still applies.¹¹⁸ Unfortunately, the German Supreme Court (*Bundesgerichtshof*) has counteracted that trend to the extent that it has held that a foreign court can be regarded to have had personal jurisdiction over the defendant pursuant to the assets jurisdiction of § 23 of the Code of Civil Proce-

112. See *supra* text accompanying note 61.

113. Compare Juenger, *supra* note 52, at 26 n.129 & 31 n.170 (describing former Polish reciprocity requirement), with Mieczyslaw Sawczuk, *Poland*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 449, 453 (describing reciprocity requirement in 1996 statute).

114. See, e.g., Kengyel, *supra* note 35, at 328; Péter Nógrádi, *Hungary*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 61, at 5.

115. See, e.g., Gabriel Brenka, *Czech Republic*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 61, at 6.

116. See, e.g., MARTINY, *supra* note 53, at 233, 573-80.

117. See, e.g., GEIMER & SCHÜTZE, *supra* note 52, at 219, 239. The term non-litigious matters or *freiwillige Gerichtsbarkeit* includes matters that have historically been conceptualized as one private party asking for a decision by an administrative agency rather than suing another private party. In practice, this includes matters such as appointments of guardians, decisions on securing a deceased's assets, decisions on entries in the commercial register and other registers, and the formal acts of notaries public.

118. See, e.g., *id.*

dure¹¹⁹ only if the rendering forum would likewise recognize a German judgment based on assets jurisdiction.¹²⁰

In Spain, reciprocity can be used affirmatively as well as defensively. Instead of proving the presence of all statutory recognition requirements, the judgment creditor may simply prove that courts in the rendering country would recognize a Spanish judgment under similar circumstances (positive reciprocity).¹²¹ Conversely, the judgment debtor may prove that reciprocity is not guaranteed and thus recognition should be refused (negative reciprocity).¹²² In the past decades, however, neither approach has proved very successful before the Spanish Supreme Court,¹²³ which was the only court to hear recognition requests until January 1, 2004.¹²⁴ There appears to be no case in which negative reciprocity was established and only one in which the Supreme Court found positive reciprocity.¹²⁵ The result is that the great majority of cases have been decided on the basis of the statutory recognition requirements, which apply when neither positive nor negative reciprocity can be established.¹²⁶

In the rest of Europe, reciprocity either has never caught on as a recognition requirement—such as in Greece, England, France, Italy, and the countries influenced by them¹²⁷—or it has recently been abolished, such as in Switzerland¹²⁸ and the Slovak Republic.¹²⁹

119. § 23 provides in pertinent part: “For claims based on pecuniary causes of action [as opposed to causes of action not valuable in monetary terms] against a person who has no domicile within the country, the court of the district in which this person has property or where the claimed object is located has jurisdiction.”

120. 52 BGHZ 251, 258-59 (1969). In Germany, as in a number of other jurisdictions, the rules applicable to determine the jurisdiction of the rendering court for purposes of recognition—usually referred to in civil-law Europe as “indirect jurisdiction”—are the same as those applicable to determine the jurisdiction of the German courts for purposes of primary adjudication—“direct jurisdiction.” See, e.g., Walter & Baumgartner, *supra* note 33, at 22-23.

121. See, e.g., Pérez Beviá, *supra* note 41, at 502.

122. *Id.* at 27-28.

123. See, e.g., Romeu, *supra* note 69, at 947-48.

124. *Id.* at 951.

125. *Id.* at 947-48.

126. See, e.g., Pérez Beviá, *supra* note 41, at 503-04. When the judgment creditor seeks recognition under the statutory recognition requirements rather than by asserting and proving positive reciprocity, the courts still consider possible negative reciprocity. See Romeu, *supra* note 69, at 948 n.20.

127. See, e.g., MARTINY, *supra* note 53, at 532-33.

128. See *supra* note 34.

129. See, e.g., Jozef Mesároš & Eva Komrsková, *Slovak Republic*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 6.

C. *Judgment in a Civil or Commercial Matter*

Perhaps the only limitation that may, at first blush, look surprising to a lawyer from the United States is the requirement in all civil law countries of Europe that the foreign decision be one in a civil and commercial matter.¹³⁰ This limitation is grounded in the common distinction in the civil law world between public and private law and the concomitant separation of the court system into civil courts and administrative courts.¹³¹ Civil courts only hear disputes of private law, administrative tribunals most of the non-criminal public law cases,¹³² which one can define roughly as cases brought by or against the government if the government acts in a public function.¹³³ Private law is then further divided into civil law and commercial law, again in many civil law countries with special commercial tribunals hearing only commercial cases.¹³⁴ Because the recognition and enforcement of foreign judgments has long been discussed only for judgments in private law matters in these countries, the limitation to civil and commercial matters seems to make eminent sense. It is also in line with the long-standing policy that foreign criminal judgments and administrative policies should not be furthered by domestic civil courts unless there is a good reason to do so.¹³⁵ This latter policy is of course entirely familiar to U.S. lawyers, although usually limited to foreign criminal and revenue judgments.¹³⁶

130. See, e.g., Walter & Baumgartner, *supra* note 33, at 12-15.

131. See, e.g., RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 262-76 (6th ed. 1998); ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 144 (1981).

132. See, e.g., SCHLESINGER ET AL., *supra* note 131, at 539-76.

133. See *infra* note 138.

134. The reason is largely historical: The rules and principles developed by the commercial guilds and their tribunals since the Middle Ages long existed alongside the civil law courts of the time before they were adopted into the civil law during the period of codification. At that time, most civil law countries drafted a separate commercial code alongside the civil code and created separate commercial courts, usually with merchants sitting as lay judges together with the professional judges, because the existence of a separate body of law and separate tribunals for merchants had become entrenched. See, e.g., SCHLESINGER ET AL., *supra* note 131, at 276-79.

135. Note, however, that in regard to criminal judgments and criminal law, civil law and other countries have long recognized the need to cooperate internationally. Thus there is both treaty and domestic law providing for the recognition and enforcement of foreign criminal judgments by one's own criminal justice system. See, e.g., MARTINY, *supra* note 53, at 243; Kessedjian, *supra* note 65, at 193; Bundesgesetz über die internationale Rechtshilfe in Strafsachen, articles 94-99, SR 351.1 (Switzerland).

136. See, e.g., *Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979); *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 483.

The upshot is that all public law judgments are generally incapable of recognition in civil law Europe.¹³⁷ As indicated, public law judgments, for this purpose, includes roughly all judgments by or against the government to the extent the government acts in a governmental function.¹³⁸ Of course, there are disagreements both among and within civil law countries about how to determine whether the government truly acted in a governmental function in a particular case and thus about the precise way to define public law judgments.¹³⁹ For example, the government may act as a private person on the market, such as when it purchases computers for government employees. On the other hand, some corporations are partly owned by private shareholders as well as by the government, such as airlines, public transportation companies, and electric utility enterprises. Not all jurisdictions decide in the same way whether cases by or against such entities are to be characterized as public or private. Most of the civil law countries of Europe do, however, agree that the decision should be made on the basis of the nature of the claim and according to recognition state law.¹⁴⁰ Thus, a decision may be recognized as a civil or commercial judgment even if handed down by an administrative agency or by a criminal court abroad. This frequently includes decisions by administrative agencies that essentially regulate private matters, such as regarding status (marriages, adoptions, appointments of guardians, and certifications of death) and decisions by supervisors

137. See, e.g., Thierry Hoscheit, *Luxemburg*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 375, 378; Kessedjian, *supra* note 65, at 188; Pérez Beviá, *supra* note 41, at 510. With regard to criminal judgments, see *supra* note 135.

138. See, e.g., KARL LARENZ, ALLGEMEINER TEIL DES DEUTSCHEN BÜRGERLICHEN RECHTS 1-5 (5th ed. 1980); MARTINY, *supra* note 53, at 233; FRITZ GYGI, VERWALTUNGSRECHT 36-42 (1986).

139. Among the tests used are (1) whether the government acts in the public interest; (2) whether the government, qua government, is in a more powerful position than the private individual it faces in a particular situation; (3) and whether the government directly acts to enforce and implement the laws of the jurisdiction. See, e.g., LARENZ, *supra* note 138; GYGI, *supra* note 138. Occasionally, the legislature will have preordained the test to be used, even if that test appears outdated today. For example, for purposes of determining the appropriate court at the federal level, Swiss statutory law until recently considered any monetary claim against the government a civil claim. Compare GYGI, *supra* note 138, at 36-37, with Bundesgesetz über das Bundesgericht, June 17, 2005, SR 173.110, art. 120.

140. See, e.g., Ferreira Da Silva, *supra* note 76, at 468; Daphné Fevery, *Belgium*, in RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS, *supra* note 33, at 86; Kengyel, *supra* note 35, at 331; Kessedjian, *supra* note 65, at 188; Lupoi, *supra* note 33, at 352.

of registries, such as the registry of deeds or the register of commerce.¹⁴¹

On the other hand, a European civil law country may decide that even though the foreign decision emanated from a civil court, it is in fact a public law decision not subject to recognition. For a recent example, consider a decision by the German Supreme Court (*Bundesgerichtshof*).¹⁴² In June of 1944, soldiers of the Waffen-SS entered the Greek village of Distomo and indiscriminately killed some 300 partisans and civilians, including women and children, in a reprisal against partisan resistance.¹⁴³ In 1960, Germany and Greece settled their wartime disagreements in a treaty obligating Germany to pay some \$67 million in reparations. Dissatisfied with a small payment from that treaty, several family members of those killed in Distomo brought suit against Germany in Greek court, where they received roughly \$27 million in damages. The judgment was confirmed by the Greek Supreme Court in 2000.¹⁴⁴ Attempts to recognize the Greek award in Germany, where the plaintiffs had begun a parallel suit in 1997, were refused by the German courts, including the *Bundesgerichtshof* in the mentioned decision, because the Greek judgment was a judgment against the German government and thus not a judgment in a civil and commercial matter in the sense of either the Brussels Regulation or the domestic German recognition statute.¹⁴⁵ Recognition was thus

141. See, e.g., Ferreira Da Silva, *supra* note 76, at 468; Fevery, *supra* note 140, at 86; Kessedjian, *supra* note 65, at 188; Lupoi, *supra* note 33, at 352. In Germany, however, non-litigious decisions (*Entscheide der freiwilligen Gerichtsbarkeit*) are recognized according to a distinct statute that differs from the regular recognition statute in detail only. See, e.g., Reinhold Geimer, *Germany*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OUTSIDE THE SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS*, *supra* note 33, at 219, 234-37.

142. Decision of June 23, 2003, reproduced in 56 NEUE JURISTISCHE WOCHENSCHRIFT [hereinafter NJW] 3488 (2003), translated in 42 INT'L LEG. MAT. 1030 (2003). Ultimately, the decision was partly reviewed and confirmed by the German Constitutional Court. See Bundesverfassungsgericht, 2 BvR 1476, Feb. 15, 2006, available at http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html.

143. See *supra* note 142.

144. Greek Supreme Court, decision of Apr. 13, 2000, translated [into German] in DIKE INTERNATIONAL 31, 722 (2000) (deciding that direct appeal by the Federal Republic of Germany on the basis of foreign sovereign immunity without merit). See Bernard Oxman et al., *International Decision*, 95 AM. J. INT'L L. 198 (2001).

145. As in most other civil law countries of Europe, the limitation to judgments in civil and commercial matters in Germany is not to be found in the language of the statute, § 328 of the German Code of Civil Procedure. See *supra* note 66. Rather, it is an interpretation given to it by courts and commentators based on the reasoning presented above and on the basis of legislative intent. See, e.g., MARTINY, *supra* note 53, at 232, n.1520.

impossible.¹⁴⁶ For those for whom that holding was not clear enough, the Court continued that the Greek court also lacked personal jurisdiction under both domestic German recognition law and the Greek-German recognition treaty of November 4, 1961¹⁴⁷ because the lawsuit was clearly based on *acta iure imperii* and thus that the German government enjoyed foreign sovereign immunity pursuant to customary international law.¹⁴⁸

This decision should be noteworthy from the point of view of the United States, where human rights plaintiffs have frequently argued that foreign sovereign immunity should not apply where the foreign sovereign had acted in gross violation of basic human rights or in other ways had violated *ius cogens* norms.¹⁴⁹ The *Bundesgerichtshof* clearly rejected that view as violating long-standing customary international law.¹⁵⁰ U.S. courts have thus far concluded the same as a matter of interpreting the Foreign Sovereign Immunities Act (FSIA).¹⁵¹ But should other U.S. courts come to a

146. 56 NJW at 3488-89; *see also* Sabine Pitroff, *Compensation Claims for Human Rights Breaches Committed By German Forces Abroad During the Second World War: Federal Court of Justice Hands Down Decision in the Distomo Case*, 5 GERMAN L.J. 1 (2003).

147. BGBl. II 1963, 109 (F.R.G.).

148. 56 NJW at 3489. Because most countries rejected absolute immunity during the early part of the twentieth century, customary international law is generally understood to distinguish claims that are based on true governmental actions, *acta iure imperii*, for which immunity is granted, from claims that are based on private or commercial behavior of the state, for which it is not. *See, e.g.*, MALCOLM SHAW, INTERNATIONAL LAW, 433, 436 (3d ed. 1994). In a parallel case involving a similar massacre by the German Army in the Greek town of Kalavitra in 1943, the European Court of Justice similarly held that compensation for acts perpetrated by armed forces in the course of warfare is not a civil and commercial matter in the sense of Article I of the Brussels Convention and thus that jurisdiction of the Greek courts could not be based on the jurisdictional provisions of that Convention. *See* Case C-292/05, *Lechitrou v. Federal Republic of Germany*, 2007 E.C.R. 1519 (Feb. 15, 2007).

149. These arguments have not only been made by U.S. litigants. *See, e.g.*, *Al-Adsani v. United Kingdom*, 2001-XI Eur. Court H.R. 761 (Rozakis & Caflisch, JJ., dissenting) (opining that “[t]he prohibition of torture, being a rule of *jus cogens*, acts in the international sphere and deprives the rule of sovereign immunity of all its legal effects in that sphere”); Juliane Kokott, *Missbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen*, in RECHT ZWISCHEN UMBRUCH UND BEWAHRUNG, FESTSCHRIFT FÜR RUDOLF BERNHARDT 135, 148 (arguing that to the extent a state commits serious human rights violations, it forfeits its sovereign immunity).

150. 56 NJW at 3489. The Court there acknowledged that there “has been a recent push to limit the application of foreign sovereign immunity under international law in cases of claimed violations of customary international law.” Nevertheless, said the Court, that push had not resulted in a change of existing customary international law protecting states from being sued in other countries.

151. 28 U.S.C. §§ 1602-1611; *see, e.g.*, *Hwang Geum Joo v. Japan*, 332 F.3d 679, 686-87 (D.C. Cir. 2003); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001); *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 344-45 (2d Cir. 1996); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718-19 (9th Cir. 1992). *But see*

different conclusion or should Congress amend the FSIA in the sense requested by human rights groups and thus allow suits against governments that have committed *ius cogens* violations,¹⁵² any judgments that will emanate from U.S. courts rejecting the foreign government's sovereign immunity defense under these circumstances are likely to face non-recognition in Germany on the basis of the *Bundesgerichtshof's* decision.

V. RECOGNITION PRACTICE

A. *Empirical Evidence*

Reliable data on the way the various recognition requirements are actually applied to U.S. judgments in practice are difficult to find.¹⁵³ First, most European jurisdictions do not compile information at a level that is sufficiently detailed to pinpoint recognition matters, let alone recognition matters involving U.S. litigants.¹⁵⁴ Thus, researchers interested in such data would have to produce them first by combing through large numbers of judicial records. In most countries, this would have to be done at several levels of government (federal, state, and local) at various locales throughout the country. Second, making accurate statements about the way U.S. judgments fare in a particular jurisdiction would require

Princz v. Federal Republic of Germany 26 F.3d 1176, 1179-86 (D.C. Cir. 1999) (Wald, J., dissenting).

152. There already is a narrow exception to foreign sovereign immunity that has been introduced by amendment of the FSIA in 1996: the so-called terrorist state exception. 28 U.S.C. § 1605(a)(7). The exception is narrow because it requires, among other things, that the defendant state have been declared a state sponsor of terrorism. Only a handful of countries (Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria) have been so declared thus far. Prohibited Exports and Sales to Certain Countries, 22 C.F.R. § 126.1(d) (1999).

153. On the need for empirical research to advance our knowledge of the reality of the litigation landscape, see, for example, Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 705-08 (2002); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 120 (2002); Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 105 (1997).

154. The practice for civil courts in most civil law jurisdictions is to report, by judicial body, the number of cases pending both at the beginning and at the end of the year, number of new cases filed, and number of cases adjudicated, settled, or withdrawn. See, e.g., Loïc Cadiet, *Civil Justice Reform: Access, Cost, and Delay: The French Perspective*, in CIVIL JUSTICE IN CRISIS (Adrian A.S. Zuckerman ed., 1999); Federal Statistical Office, Germany, available at http://www.destatis.de/themen/e/thm_rechts.htm; Verwaltungsbericht des Obergerichts des Kantons Bern für 2003, available at http://www.jgk.be.ch/site/og_statistiken_og_03_d.pdf (Supreme Court of the State of Bern, Switzerland). Published data for England and Wales are considerably more detailed, but still do not allow for the identification of recognition proceedings. See Department for Constitutional Affairs, *Judicial Statistics, Annual Report 2004*, available at <http://www.official-documents.co.uk/document/cm65/6565/6565.pdf>.

data on what is going on outside of the courthouse as well as within it.¹⁵⁵ There may be a significant number of judgment creditors who do not bother to bring certain recognition claims or judgment debtors who choose to pay up rather than to risk a court battle. This is particularly important in jurisdictions such as Germany, where relatively strict standards of professional liability tend to prevent lawyers from pressing claims and defenses that are considered to have little likelihood of success.¹⁵⁶

Engaging in this line of research requires a significant amount of time and money.¹⁵⁷ In the meantime, we are forced to look at the second best source of information: published decisions. While published cases are incomplete sources for making claims about what is really going on in a particular area of law,¹⁵⁸ they nevertheless offer a window on the kinds of problems that American judgments face in individual European jurisdictions.¹⁵⁹ In what follows, I focus on three European countries that are particularly interesting from this perspective.

155. Cf. Kevin Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1133-35 (1996) (hypothesizing that their finding that foreigners fare significantly better in federal civil actions in the United States than do their domestic opponents may be due to various reasons that lead foreigners only to bring their stronger cases while American litigants may not be so constrained); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1504 (2003) (noting that “it is difficult to calculate the extent to which foreign party success or failure at trial is a vestige of differential willingness to sue or to settle”).

156. See MAX VOLLKOMMER & JOERN HEINEMANN: ANWALTSHAFTUNGSRECHT 149-56 (2d ed. 2003) (explicating requirement that the attorney follow the safest path in representing a client); see also Hans-Jürgen Ahrens, *Die Stellung des Rechtsanwaltes – Berufspflichten und prozessuale Fairness*, in PROFESSIONAL ETHICS AND PROCEDURAL FAIRNESS 89, 141 (Gerhard Walter ed., 1991) (noting that the courts have always imposed high standards and that the German attorney’s obligation is to follow the safest path).

157. See, e.g., Burbank, *supra* note 153, at 706-07 (pointing to the investments of time and money as well as the lack of a perceived pay-off and lack of training in the relevant research methods as factors that have long prevented law professors from engaging in much needed empirical research on the civil justice system).

158. Cf. Stephen B. Burbank, *The United States’ Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT’L ECON. L. 1, 10 (1998) (noting that “[i]t is risky business to paint a picture of a litigation landscape in the United States with only the view afforded by published opinions, since, in area after area, study of decisions published and unpublished reveals that such a picture is likely to be distorted”).

159. See, e.g., Walter & Baumgartner, *supra* note 33, at 41-42.

B. *Germany*

1. The Setting

Germany is probably the country with the largest literature on the recognition of U.S. judgments. There are numerous books,¹⁶⁰ commentaries,¹⁶¹ law review articles and book chapters¹⁶² that discuss aspects of U.S. procedure and substantive law that may pose a problem at the recognition stage. As I have demonstrated elsewhere, this interest in the recognition of U.S. judgments and the skepticism about numerous aspects of substantive law and the litigation process in the United States is the result of a number of factors. First, several large German companies that had invested heavily in the United States in the 1970s soon found themselves more heavily involved in U.S. litigation than anticipated,¹⁶³ an experience that turned out to be considerably more costly and time-consuming than they had assumed on the basis of German

160. See, e.g., DIRK BROCKMEIER, PUNITIVE DAMAGES, MULTIPLE DAMAGES UND DEUTSCHER ORDRE PUBLIC (1999); CHRISTOPH GREINER, DIE CLASS ACTION IM AMERIKANISCHEN RECHT UND DEUTSCHER ORDRE PUBLIC (1998); DAVID HERRMANN, DIE ANERKENNUNG US-AMERIKANISCHER URTEILE IN DEUTSCHLAND UNTER BERÜCKSICHTIGUNG DES ORDRE PUBLIC (2000); JOACHIM ROSENGARTEN, PUNITIVE DAMAGES UND IHRE ANERKENNUNG IN DER BUNDESREPUBLIK DEUTSCHLAND (1994); HILKA SCHNEIDER, CLASS ACTIONS – RECHTSPOLITISCHE FRAGEN IN DEN USA UND ANERKENNUNG IN DEUTSCHLAND (1999); JOACHIM ZEKOLL, US-AMERIKANISCHES PRODUKTHAFTPFLICHTRECHT VOR DEUTSCHEN GERICHTEN (1987).

161. By “commentaries” I mean the extensive books explicating in great detail every single article of a particular code in the civil law world—in this case Section 328 of the German Code of Civil Procedure. See *supra* note 66. For examples, see ADOLF BAUMBACH ET AL., KOMMENTAR ZUR ZIVILPROZESSORDNUNG (65th ed. 2007); 1 GERHARD LÜKE ET AL., MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG (3d ed. 2007); 5 FRIEDRICH STEIN ET AL., KOMMENTAR ZUR ZIVILPROZESSORDNUNG (Herbert Roth ed., 22d ed. 2006); RICHARD ZÖLLER ET AL., KOMMENTAR ZUR ZIVILPROZESSORDNUNG (26th ed. 2007).

162. For a small sample see Burkhard Heß, *Die Anerkennung eines Class Action Settlement in Deutschland*, 55 JURISTENZEITUNG [hereinafter JZ] 373 (2000); Bernd von Hoffmann & Wolfgang Hau, *Zur Anerkennungszuständigkeit US-amerikanischer Zivilgerichte*, 44 RECHT DER INTERNATIONALEN WIRTSCHAFT [hereinafter RIW] 344 (1998); Heinz-Peter Mansel, *Streitverkündung (vouching in) und Drittklage (third party complaint) im US-Zivilprozeßrecht und die Urteilsanerkennung in Deutschland*, in HERAUSFORDERUNGEN DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS (Andreas Heldrich & Toshiyuki Kono eds., 1994); Rolf A. Schütze, *Probleme der Anerkennung US-amerikanischer Zivilurteile in der Bundesrepublik Deutschland*, 1979 WERTPAPIERMITTEILUNGEN 1167 (1979); Ernst C. Stiefel & Rolf Stürner, *Die Vollstreckbarkeit US-amerikanischer Schadensersatzurteile exzessiver Höhe*, 38 VERSICHERUNGSRECHT 829 (1987); Friedrich Graf von Westphalen, *Punitive Damages in US-amerikanischen Produkthaftungsklagen und der Vorbehalt des Art. 12 EGBGB*, 27 RIW 141 (1981); Joachim Zekoll & Nils Rahlf, *US-amerikanische Antitrust-Treble-Damages-Urteile und deutscher ordre public*, 54 JZ 384 (1999). For a recent take on recognition in English, see Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175 (2005).

163. Baumgartner, *supra* note 43, at 1315.

procedure.¹⁶⁴ The resulting war stories told by counsel for those companies in the Federal Republic, along with steady reporting on the arguments and cases used by U.S. tort reformers¹⁶⁵ in both the popular press and academic journals, led to a picture of U.S. law and litigation that raised serious questions about its fairness and evenhandedness, indeed its ability to distinguish the serious from the trivial, an important attribute of the rule of law.¹⁶⁶ Second, the inability and unwillingness of U.S. courts and procedural lawmakers sufficiently to respect German sovereignty concerns in the areas of service of process and transnational discovery in the mid- to late 1980s—what German commentators have called the *Justizkonflikt* (judicial conflict)¹⁶⁷—quickly solidified the perception among courts and scholars that something needed to be done to protect German sovereignty and German approaches to civil litigation as well as German companies from transnational litigation in the United States.¹⁶⁸ Third, this provided fertile ground for German companies involved in U.S. litigation successfully to argue for their protection by German law.¹⁶⁹

Recognition law proved to be an area in which to exercise some leverage.¹⁷⁰ Given the relatively liberal approach of the German

164. *Id.* at 1338-44. See also Joachim Zekoll, *Recognition and Enforcement of American Products Liability Awards in the Federal Republic of Germany*, 37 AM. J. COMP. L. 301, 301 (1989) (pointing out that “[c]onstantly increasing litigation between the domestic export industry and American plaintiffs under the new rules transformed open-minded interest into widespread concern and, at times, even outright rejection”).

165. On the problems with the global characterizations, atrocity stories cited out of context, and assertions about aggregate patterns unsupported by empirical evidence used by many tort reform advocates in the United States see, for example, Marc Galanter, *An Oilstrike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).

166. See, e.g., Heinrich Honsell, *Amerikanische Rechtskultur*, in DER EINFLUSS DES EUROPÄISCHEN RECHTS AUF DIE SCHWEIZ 39 (Peter Forstmoser et al. eds., 1999) (using these and further examples, such as three-strikes-and-you-are-out legislation and the impeachment of President Clinton to argue that U.S. law is unable to distinguish the serious from the trivial).

167. See Baumgartner, *supra* note 43, at 1317-38.

168. See *id.* at 1320-23. While most of these developments unfolded during the mid- to late- 1980s, new talk of a judicial conflict and of a need to protect German sovereignty and German businesses from U.S. litigation has recently emerged as a result of the Holocaust litigation in U.S. courts and related political pressure on the German state and perhaps also as a result of increased involvement of German industry as defendants in global class actions in the United States. See, e.g., Burkhard Hess, *Aktuelle Brennpunkte des transatlantischen Justizkonflikts*, 50 Aktiengesellschaft 897 (2005); Christoph G. Paulus, *Abwehrstrategien gegen unberechtigte Klagen in den USA*, 52 RIW 258 (2006); Rolf A. Schütze, *Klagen vor US-amerikanischen Gerichten – Probleme und Abwehrstrategien*, 51 RIW 579 (2005).

169. See Baumgartner, *supra* note 43, at 1338-44.

170. *Id.* at 1338. The same thinking has prompted some courts and commentators to continue to refuse to serve U.S. complaints involving punitive or treble damages on Ger-

recognition statute,¹⁷¹ there were obviously limits to this enterprise. Yet the public policy exception is sufficiently indeterminate to house all kinds of grounds for non-recognition.¹⁷² Suggested public policy violations include the service of process and discovery in violation of German sovereignty, the imposition of seemingly absolute liability in product liability cases, the low threshold levels to find causation, “disproportionately high” damages for pain and suffering, and punitive and treble damages (except to the extent that they compensated for damages not already included in the compensatory portion of the award), to name only the most widely supported claims.¹⁷³ Indeed, one commentator has recently gone so far as to suggest that U.S. judgments should be viewed as presumptively violating German public policy.¹⁷⁴ Fortunately, the courts have not followed this recommendation. Yet, the many suggestions of reasons for non-recognition and the perception of a “judicial conflict” have taken their toll on the application of the public policy exception with regard to U.S. judgments in Germany. They

man nationals under the Hague Service Convention, despite earlier case law that seems to have settled the issue in favor of service. On this earlier case law, see *id.* at 1335-36. In *In re Bertelsmann AG*, 108 BVerfGE 238 (2003), the German Constitutional Court preliminarily stayed a decision of the Oberlandesgericht Düsseldorf, which had refused to serve a complaint over \$ 17 million in a proceeding pending in federal court in New York because the claim might violate German public policy and thus Article 13 of the Hague Service Convention. The Constitutional Court never handed down a final ruling in the matter because Bertelsmann later withdrew its objections to service as part of a settlement. See, e.g., *Bertelsmann verzichtet auf Hilfe vom Verfassungsgericht*, HANDELSBLATT, NOV. 11, 2005. In a more recent decision, the Oberlandesgericht Koblenz refused to serve a large antitrust class action complaint on a German defendant because it included a potentially large claim for treble damages and thus, the court argued, was not a civil and commercial matter falling within the scope of application of the Hague Service Convention. Decision of June 27, 2005, reproduced in 26 IPRAX 25 (2006). As Professor Stürner has pointed out, however, it is unclear how German courts could exercise leverage in U.S. proceedings or even be helpful to German businesses by attempting to stop service of U.S. process on German defendants through the Hague Service Convention when U.S. courts permit plaintiffs to serve process outside of the Convention in certain circumstances. See Rolf Stürner, *Die verweigerte Zustellungshilfe für U.S.-Klagen oder der „Schuss übers Grab*,” 61 JZ 60 (2006).

171. See *supra* note 66.

172. On the indeterminacy of the public policy exception and the attempt by courts and commentators conceptually to limit judicial discretion within it see Walter & Baumgartner, *supra* note 33, at 10-11, 28-30.

173. See, e.g., Stiefel & Stürner, *supra* note 162. These suggestions of limiting the enforcement of U.S. judgments appear outright moderate when compared to some of the propositions that had been made earlier. See, e.g., Schütze, *supra* note 162, at 1175-76 (suggesting that the mere use of discovery and of contingent fees renders a U.S. judgment unenforceable in Germany).

174. Rolf A. Schütze, *Überlegungen zur Anerkennung und Vollstreckbarerklärung US-amerikanischer Zivilurteile in Deutschland – Zur Kumulierung von Ordre Public Verstößen*, in EINHEIT UND VIELEFALT DES RECHTS: FESTSCHRIFT FÜR REINHOLD GEIMER ZUM 65. GEBURTSTAG 1025, 1041 (Rolf A. Schütze ed., 2002).

have also affected a few pockets of the doctrine of personal jurisdiction as relevant to recognition law.

The Supreme Court (*Bundesgerichtshof*) has addressed the question of recognition of U.S. judgments in three decisions during the last 15 years. Given that virtually all published lower court decisions in this area have made their way to the *Bundesgerichtshof*,¹⁷⁵ I will limit myself to these three cases here.¹⁷⁶ In the first of these cases, decided in 1992, the Court addressed a considerable number of the public policy issues scholars had raised up to that point.¹⁷⁷ The *Bundesgerichtshof* rendered the opinion as one would a landmark decision, carefully weighing all aspects of possible public policy violations by a U.S. tort judgment. But the U.S. judgment to be recognized in the case was hardly the kind of tort judgment—the large product liability or antitrust award against a German corporation—that the commentators had previously discussed. Rather, it involved a \$750,260 award for battery against a U.S.-German double citizen who had lived most of his life in California, where he had sexually abused a fourteen-year-old boy. After being convicted of the crime in California, but before the civil case on the same facts had been adjudicated, the defendant fled to Germany, refusing to appear in the civil case in California. The California court then rendered the \$750,260 award, consisting of \$150,260 for past and future medical expenses, \$200,000 for pain and suffering, and \$400,000 for punitive damages.¹⁷⁸

Upon request by the plaintiff, the *Landgericht* Düsseldorf granted the enforcement of the award against the defendant in Ger-

175. As in most other civil law countries, appeals to the Federal Supreme Court in Civil Matters (BGHZ) were always of right. Only since the 2002 reform is leave of the *Oberlandesgericht* or of the Supreme Court required for review. See, e.g., Peter Gottwald, *Civil Procedure in Germany after the Reform Act of 2001*, 23 C.J.Q. 338, 348-50 (2004).

176. For a description of two Supreme Court cases from 1969 and 1975 and a case decided by the *Landgericht* Berlin in 1989, all refusing to enforce a U.S. judgment, but all at least to some extent overruled by intervening case law, see, for example, BGH, decision of April 21, 1998, reproduced in 19 IPRAX 466 (1999) (holding that the protection of non-commercial parties from margin accounts no longer represents German public policy blocking the recognition of a foreign judgment in Germany), and for commentary, see ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS 129-33 (1996).

177. 118 BGHZ 312 (1992), reproduced in 13 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT UND INSOLVENZPRAXIS [hereinafter ZIP] 1256 (1992). For commentary on the case in English, see, for example, Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany – The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729 (1992); Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 COLUM. J. TRANSNAT'L L. 641 (1992).

178. 13 ZIP at 1257.

many.¹⁷⁹ The *Oberlandesgericht* Düsseldorf, the court of appeal, upheld in part and reversed in part, limiting the enforceable portion of the award for pain and suffering to \$70,000 and the award for punitive damages to \$55,065.¹⁸⁰ The *Bundesgerichtshof* upheld that decision in so far as it allowed the enforcement of the compensatory award, but reversed with regard to the other two parts. It reinstated the first instance court's enforcement of the \$200,000 award for pain and suffering. But it also found the entire \$400,000 award for punitive damages to be in violation of German public policy and thus unenforceable in Germany. All three courts acknowledged, however, that the award could be recognized to the extent that it did not violate German public policy. This was a significant improvement over the approach suggested by the defendant and a lower court, according to which a public policy violation would vitiate the entire judgment.¹⁸¹

2. Compensatory Damages

As a matter of substantive public policy,¹⁸² the *Bundesgerichtshof* first had to deal with a difference between German and California law in calculating damages for the compensatory award. Under German law, only expenses already incurred can be awarded as damages.¹⁸³ In the present case, however, plaintiff's medical expenses had only amounted to \$260. The remaining \$150,000 had been awarded for psychological treatment and placement in an educational facility in the future, whether or not the plaintiff would ultimately choose to undergo such treatment. That California law allowed for damages not permitted pursuant to German law did not violate German public policy as long as the actual result of that law's *application* did not violate German public policy, the Court reasoned.¹⁸⁴ The Court noted a systemic reason for U.S. courts to award damages not yet incurred: U.S. preclusion law

179. *Id.*

180. *Oberlandesgericht* Düsseldorf, decision of May 28, 1991, reproduced in 37 RIW 594 (1991).

181. See, e.g., *Landgericht* Berlin, decision of June 13, 1989, reproduced in 35 RIW 988, at 990 (1989).

182. German courts and commentators generally distinguish substantive public policy from procedural public policy. See, e.g., Walter & Baumgartner, *supra* note 33, at 27. In the United States, Judge Posner has coined the term "international due process" to refer to the latter recognition requirement so as to "distinguish it from the complex concept that has emerged from American case law." *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

183. See, e.g., BGH, decision of Jan. 1, 1986, 97 BGHZ 14, 18-20 (1986).

184. 13 ZIP at 1263-64.

requires a single proceeding for the determination of all claims, whereas German law allows the plaintiff to return with further claims once future damages have been incurred. Therefore, the California court did not violate German public policy by allowing the plaintiff to claim expenses that, once incurred, would equally be recoverable in Germany, and to do so at the only time allowed under California law.¹⁸⁵

3. Damages for Pain and Suffering

As opposed to uncertain future medical expenses, German law does provide for damages for pain and suffering.¹⁸⁶ A plaintiff, however, could have hoped to receive no more than \$17,500 pursuant to German case law at the time. \$200,000 thus seemed excessive to the *Oberlandesgericht*, which reduced the award to \$70,000.¹⁸⁷ This was roughly four times that available under German law and thus at the upper limit of what is reasonable under German public policy, the *Oberlandesgericht* opined.¹⁸⁸ The *Bundesgerichtshof* disagreed. It pointed out that this case had only a tenuous connection to Germany (*Inlandsbezug*),¹⁸⁹ given that it involved a dispute between two U.S. citizens for behavior occurring entirely in the United States, and thus a more liberal standard of reasonableness controlled in application of the public policy defense.¹⁹⁰ Implicit in this reasoning is the suggestion that a more exacting standard will apply once a case against a German corporation selling a product made in Germany is involved.

4. Punitive Damages

Despite this tenuous connection of the case to Germany, however, the Court concluded that the entire award for punitive damages violated German public policy.¹⁹¹ Punitive damages contravene the essential decision made by the German legislature to separate, once and for all, criminal law from civil law and thus to limit damages in tort suits to expenses actually incurred, while

185. *Id.* at 1264.

186. Bürgerliches Gesetzbuch (BGB), § 847.

187. 35 RIW at 596.

188. *Id.*

189. Professors Hay and Zekoll translate *Inlandsbezug* somewhat loosely as “forum contacts.” See Hay, *supra* note 177, at 740; Zekoll, *supra* note 177, at 652. The important thing is that *Inlandsbezug* (“connection” or “relationship to the forum country”) in this instance refers to the interest of the forum in a close policing of its public policy. See, e.g., MARTINY, *supra* note 53, at 465.

190. 13 ZIP at 1269-70.

191. *Id.* at 1265-69.

directing punishment to criminal proceedings and their increased constitutional protections for the defendant.¹⁹² Only damages for pain and suffering may exceed actually incurred costs and even their calculation is not based on the culpability of the defendant, but rather on the extent of the pain inflicted.¹⁹³ The Court considered irrelevant that parties to a contract may agree to pay punitive damages for violation of the contract's terms in Germany because such a scheme requires the consent of the parties, something that is routinely absent in tort cases.¹⁹⁴

The Court did point out that German public policy would allow for the enforcement of any portion of the punitive award that was in reality purely compensatory.¹⁹⁵ The *Oberlandesgericht* had thus allowed \$55,065 to be enforced as compensation for the plaintiff's attorneys' fees.¹⁹⁶ This was lower than the forty percent of attorneys' fees agreed to by plaintiff in his contingent fee arrangement that the *Oberlandesgericht* considered unreasonably high and thus to violate German public policy. The reason for nevertheless allowing plaintiff to enforce a twenty-five percent fee award in Germany was that, in German procedure, the losing defendant would have had to pay the plaintiff's reasonable attorney's fees and thus the plaintiff would not have had to use his award to pay his attorney.¹⁹⁷ The *Bundesgerichtshof*, however, remained unfazed by this argument. It pointed out that the rendering judgment did not indicate that a portion of the punitive award is meant to compensate for the plaintiff's attorneys' fees.¹⁹⁸ The Court further relied on suspicions in the literature that American juries often know about the American rule and thus may well be generous even with the compensatory award.¹⁹⁹ Having allowed damages for future treatment, which the plaintiff may or may not incur, and an amount for pain and suffering far larger than that available under German law, the Court was thus unwilling to grant any further allowances for attorneys' fees.²⁰⁰

192. *Id.* at 1266.

193. *Id.* at 1267.

194. *Id.* at 1266-67.

195. *Id.* at 1267.

196. 35 RIW at 596.

197. *Id.*

198. 13 ZIP at 1267.

199. See, e.g., ZEKOLL, *supra* note 160, at 153; Hans-Viggo von Hülsen & Töns Grüning-Brinkman, *Produktshaftung USA 1983/84*, 31 RIW 187, 187-88 (1985).

200. 13 ZIP at 1267.

5. Contingent Fees

The *Bundesgerichtshof* also addressed a number of other reasons for non-recognition that had been raised in the literature and by the defendant in this case. First, it held the mere fact that the plaintiff's attorney had worked on a contingent fee basis failed to render the emanating judgment in violation of German public policy.²⁰¹ Although German law has traditionally considered contingent fee contracts illegal and unethical,²⁰² the primary purpose of this proscription is to ensure that attorneys keep the necessary distance from their clients' causes both to be able to function as officers of the court and to serve their clients well.²⁰³ It is thus not a rule that is primarily set up to protect the defendant. As a result, the Court concluded that a contingent fee that is legal in the rendering state does not by itself violate German public policy.²⁰⁴ However, the Court went on to hold that an award will be unenforceable in Germany to the extent that the contingent fee contract leads to a compensatory award far exceeding what is necessary to compensate the plaintiff for damages incurred and a reasonable portion for attorneys' fees.²⁰⁵

6. American Rule

Similarly, the Court refused to follow those commentators who had argued that the American rule of costs violates procedural public policy²⁰⁶ because, as a matter of economics, it may force a German defendant in U.S. litigation to settle rather than to pursue a costly but meritorious defense.²⁰⁷ The Court pointed out that the American rule operated to grant access to justice in a litigation system that, unlike the German system, largely lacks public support for litigants who would otherwise lack funds to sue.²⁰⁸ It further

201. *Id.* at 1264-65.

202. Bundesrechtsanwaltsordnung (BRAO) Sept. 9, 1994, § 49b(2) (BGBl I S. 2278). The German Constitutional Court recently held, however, that provision to be unconstitutional to the extent that it fails to provide for an exception from the rule where a contingent fee would be the only reasonable way for a litigant to obtain legal representation because the financial risk of litigation would be too high given the litigant's assets, yet the litigant is too affluent to qualify for legal aid. *See Bundesverfassungsgericht, 1BvR257604, Dec. 12, 2006, available at* http://www.bverfg.de/entscheidungen/rs20061212_1bvr257604.html.

203. *See, e.g.,* Ahrens, *supra* note 156, at 113; Bundesverfassungsgericht, *supra* note 202.

204. 13 ZIP at 1264-65.

205. *Id.* at 1265.

206. *See supra* note 182.

207. *See, e.g.,* Schütze, *supra* note 162, at 1175-76.

208. 13 ZIP at 1262.

reasoned that the U.S. policy of requiring litigants to pay their own court costs was simply the outgrowth of a different procedural philosophy—one in which the outcome of litigation is considered an insufficient measure of which litigants have been wrong all along and should thus pay for the costs caused by insisting on litigation. This difference in procedural philosophy did not, however, suffice to violate German public policy.²⁰⁹

7. Discovery

Finally, the Court clarified that the use of discovery by the parties did not by itself violate procedural public policy.²¹⁰ While any other holding may seem puzzling to an American lawyer, a few German commentators had advocated just the opposite.²¹¹ Partly, this stemmed from an initial misunderstanding that is still visible today when most Germans speak of “pre-trial discovery” rather than just of “discovery” as if there were such a thing as “at-trial discovery.”²¹² The misunderstanding is rooted in German civil procedure, where the gathering of the evidence is the primary obligation of the judge during the main proceeding.²¹³ The notion that a party would have to disclose information to its opponent before the main proceedings seems untenable from this perspective.²¹⁴ Why not wait until trial, when the judge can make an informed decision on what

209. *Id.*

210. *Id.* at 1261.

211. *See, e.g.*, Schütze, *supra* note 162, at 1175.

212. *See, e.g.*, 13 ZIP at 1262; Hans-Viggo von Hülsen, *Gebrauch und Missbrauch US-amerikanischer „pre-trial discovery“ und die internationale Rechtshilfe*, 28 RIW 225 (1982); Stephan Lorenz, *Die Neuregelung der pre-trial-Discovery im US-amerikanischen Zivilprozessrecht – Inspiration für den deutschen und europäischen Zivilprozeß?*, 111 ZEITSCHRIFT FÜR ZIVILPROZESS [hereinafter ZJP] 35 (1998); Martin J. Reufels, *Pre-trial discovery-Maßnahmen in Deutschland: Neuauflage des deutsch-amerikanischen Justizkonflikts?*, 45 RIW 667, (1999); Astrid Stadler, *Schriftliche Zeugenaussagen und pre-trial discovery im deutschen Zivilprozessrecht*, 110 ZJP 137 (1997); Stiefel & Stürner, *supra* note 162, at 830; Wurmnest, *supra* note 162, at 175.

213. *See, e.g.*, David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745, 753-55 (1986); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826-30 (1985).

214. *See, e.g.*, Zekoll, *supra* note 164, at 331 (relating the argument that “discovery prior to trial inevitably leads to unduly intrusive ways of obtaining evidence”); *cf.* Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard and Taruffo Project*, 33 TEX. INT'L L. J. 463, 466-68 (reporting strong resistance among surveyed German and Swiss judges, lawyers, and academics against introducing procedural rules into their domestic litigation systems that put the responsibility of collecting evidence into the hands of the attorneys, separate the present process of taking evidence into a pre-trial gathering and an at-trial presentation of the evidence by the attorneys, the separation of issues of relevancy for purposes of discovery and for purposes of admissibility at trial into two different stages, among other things).

evidence is truly relevant rather than forcing a litigant to divulge large amounts of information that may or may not be material.²¹⁵

Today, of course, most German commentators understand to some extent why this is not the way things operate in U.S. litigation given the structural requirements arising from the different roles of lawyers and judges in the litigation process and from the presence of a jury trial.²¹⁶ Most of the discussion, however, still revolves primarily around the different balances struck between finding the truth and protecting the privacy of litigants and non-litigants in German and U.S. procedural law.²¹⁷ Thus, the concern remains that discovery can be abused for fishing expeditions.²¹⁸ Fishing (*Ausforschungsbeweis*,²¹⁹ literally “proof by invasive investigation”) amounts to a violation of the constitutional protection of one’s privacy and, possibly, trade secrets.²²⁰ In the more liberal view, it includes every attempt to have the court order the release of information without any showing that that information is likely to have probative value.²²¹ In much of the case law and the prevailing doctrine, however, it goes further and includes attempts to force one’s opponent to disclose unfavorable evidence, no matter how probative, via the judge.²²² In addition to this very different balance that German procedural law strikes between access to information and privacy, many German commentators are concerned about discovery abuse.²²³ Interestingly, when one reads those commentators, it seems as though discovery abuse and overuse only or primarily occurs in the hands of plaintiffs’ attorneys in the United States. But given the sources and original reasons for this scholarship,²²⁴ this is not surprising.

215. See, e.g., Gerber, *supra* note 213, at 761-63.

216. See, e.g., ABBO JUNKER, DISCOVERY IM DEUTSCH-AMERIKANISCHEN RECHTSVERKEHR 78-96, 108-14 (1987).

217. See, e.g., Lorenz, *supra* note 212, at 48-49; Christoph Paulus, *Discovery, Deutsches Recht und das Haager Beweisübereinkommen*, 104 ZJP 397 (1991); Stadler, *supra* note 212.

218. See, e.g., Lorenz, *supra* note 212, at 45, 47.

219. EGBERT PETERS, AUSFORSCHUNGSBEWEIS IM ZIVILPROZESSRECHT (1966).

220. See, e.g., Gerber, *supra* note 213, at 761-67.

221. See, e.g., ROLF STÜRNER, DIE AUFKLÄRUNGSPFLICHT DER PARTEIEN DES ZIVILPROZESSES (1976); Lorenz, *supra* note 212, at 56-65; Peter Schlosser, *Die lange deutsche Reise in die prozessuale Moderne*, 46 JZ 599 (1991).

222. See, e.g., BGH, decision of June 11, 1990, reproduced in 43 NJW 3151 (1990); STEIN ET AL., *supra* note 161, at ¶¶ 22-23; Peter Arens, *Zur Aufklärungspflicht der nicht beweisbelasteten Partei im Zivilprozeß*, 96 ZJP 1 (1983). To what extent the 2002 amendments to the ZPO have changed this situation is a matter of some debate in the literature. See, e.g., Gottwald, *supra* note 175, at 341-42; Urs Peter Gruber & Erik Kiessling, *Die Vorlagepflicht der §§ 142 ff. ZPO nach der Reform 2002*, 116 ZJP 305, 309-14 (2003).

223. See, e.g., Lorenz, *supra* note 212, at 49-51.

224. See *supra* notes 163-169.

Despite these concerns, the *Bundesgerichtshof* reasoned that mere fishing in violation of German standards did not violate German public policy.²²⁵ Instead, the entirety of German law and policy with regard to access to information should be considered.²²⁶ Because substantive German law contains numerous duties of individuals and businesses to disclose information outside of litigation,²²⁷ an order to disclose based on a U.S. procedural rule would not automatically violate public policy.²²⁸ None of this presented a problem in the instant case. The defendant had refused to return to California to be deposed, and in response, the rendering court had assumed the facts uncovered by the criminal investigation to be true, to which the defendant did not object in the recognition proceeding.²²⁹ But the *Bundesgerichtshof* did say in dictum that discovery clearly exceeding German standards as well as discovery in violation of German sovereignty would lead to a public policy violation and thus to non-recognition of a U.S. judgment in an appropriate case.²³⁰

The Court's decision was generally considered liberal in Germany. While some commentators considered the Court's holdings and dicta too liberal, particularly with regard to the \$200,000 for pain and suffering,²³¹ others agreed with the outcome.²³² In the United States the reaction was guardedly positive.²³³ However, the Court did consider punitive damages to be in violation of German public policy. In the intervening years, some commentators have argued that the case against punitive damages is not as clear-cut as the *Bundesgerichtshof* had put it.²³⁴ Yet, theirs remains a minority

225. 13 ZIP at 1262.

226. *Id.*

227. *See, e.g.*, Paulus, *supra* note 217, at 402-09.

228. 13 ZIP at 1262.

229. *Id.*

230. *Id.*

231. *See, e.g.*, Haimo Schack, *Anmerkung*, 106 ZJP 104, 113 (1993).

232. *See, e.g.*, Hartwin Bungert, *Vollstreckbarkeit US-amerikanischer Schadensersatzurteile in exorbitanter Höhe in der Bundesrepublik*, 1992 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 1707; Harald Koch & Joachim Zekoll, *Zweimal amerikanische 'punitive damages' vor deutschen Gerichten*, 13 IPRAX 288, 289-92 (1993).

233. *See, e.g.*, LOWENFELD, *supra* note 176, at 136; Hay, *supra* note 177, at 749-50; Zekoll, *supra* note 177, at 652. Even the U.S. negotiators at The Hague seem to have thought from the beginning that they would have to accept that other nations will not recognize punitive damages awards. *See* BAUMGARTNER, *supra* note 9, at 188.

234. *See, e.g.*, PETER MÜLLER, PUNITIVE DAMAGES UND DEUTSCHES SCHADENSERSATZRECHT 360-68 (2000); Volker Behr, *Punitive Damages in American and German Law-Tendencies Towards Approximation of Apparently Irreconcilable Concepts*, 78 CHI-KENT L. REV. 105, 161 (2003); Joachim Rosengarten, *Der Präventionsgedanke im deutschen Zivilrecht*, 49 NJW 1935 (1996).

view.²³⁵ Moreover, it is clear from the Court's dicta that damages for pain and suffering may not fare as well in a case having a closer connection to Germany and that extensive discovery and discovery in violation of German sovereignty concerns are likely to lead to non-recognition in future cases.²³⁶

8. Personal Jurisdiction

Having settled a number of large matters of public policy, the Court next addressed two subtle issues of personal jurisdiction that had been used to further limit recognition of U.S. judgments in lower courts. In 1988, the *Landgericht* Munich held German courts would recognize judgments from nations with a federal form of government only if the personal jurisdiction of the courts in the relevant individual state rather than the jurisdiction of the courts of the entire nation is established.²³⁷ Thus, the court refused to enforce the judgment of an Arizona state court for lack of jurisdiction, although the courts of California and, arguably, those of Virginia would have had personal jurisdiction over the defendant under German law.²³⁸ This interpretation, new at the time,²³⁹ developed a considerable following among academics.²⁴⁰

The *Bundesgerichtshof*, however, refused to follow this approach in a 1999 decision where the U.S. judgment had emanated from a

235. See, e.g., Wurmnest, *supra* note 162, at 196-97.

236. See *supra* text accompanying notes 189-190 & 230.

237. Landgericht München I, decision of June 28, 1988, reproduced in 34 RIW 738 (1988).

238. *Id.* at 738.

239. The reason for the reference to the jurisdiction of "the courts of the rendering state" or "the rendering nation" rather than to jurisdiction of the rendering court derives from a distinction in the civil law between international jurisdiction—the jurisdiction of the courts of a particular country—and territorial jurisdiction—the personal jurisdiction of a court within a particular country. Only the former can be reexamined at the recognition stage to ensure fairness to the defendant, while territorial jurisdiction remains an issue of the internal organization of the rendering country and is thus beyond the purview of the recognition tribunal. See, e.g., REINHOLD GEIMER, INTERNATIONALES ZIVILPROZESSRECHT 905 (5th ed. 2005). From this perspective, the Munich court's holding is difficult to fathom given that "[f]or local interests, the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power . . ." The Chinese Exclusion Case, 130 U.S. 581, 606 (1889).

240. See, e.g., Oberlandesgericht Hamm, decision of June 4, 1996, reproduced in 42 RIW 960; HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT 389 (3d ed. 2002); Oliver Sieg, *Internationale Anerkennungszuständigkeit bei US-amerikanischen Urteilen*, 16 IPRAX 77 (1996); Rolf Stürner & Jens Bormann, *Internationale Anerkennungszuständigkeit US-amerikanischer Bundesgerichte und Zustellungsfragen im deutsch-amerikanischen Verhältnis*, 55 JZ 81, 81-85 (2000). But see NAGEL/GOTTWALD, *supra* note 5, at 576-77; Hoffman & Hau, *supra* note 162.

federal court.²⁴¹ But at the same time, the *Bundesgerichtshof* did leave open the question whether the same result would obtain for judgments from U.S. state courts.²⁴² Moreover, the Court to some degree took with one hand what it had given with the other—it reiterated its earlier jurisprudence, according to which the foreign court's jurisdiction must be supported not only by a mirror-image application of German rules of personal jurisdiction, but also by reciprocity.²⁴³ For purposes of reciprocity, however, the Court stuck to its earlier case law requiring reciprocity with regard to the individual state rather than to the federal government.²⁴⁴ Because all three defendants owned property in the state of Illinois, assets jurisdiction²⁴⁵ would have allowed recognition in Germany of the judgment rendered by the federal court sitting in Wisconsin.²⁴⁶ But because it was not clear to the *Bundesgerichtshof* whether the state of Wisconsin, in which the rendering federal court sat, would recognize a judgment against Wisconsin residents by a German court in the reverse situation, it sent the case back to the lower courts to make that determination.²⁴⁷

The other decision on jurisdiction, handed down in 1993, involved the default judgment of a Washington state court in a dispute over an exclusive distribution contract.²⁴⁸ Because the underlying claim was based on RICO violations, the only conceivable jurisdictional basis for recognizing the judgment under German law was the place at which the alleged tort had been committed.²⁴⁹ Whether the tort had in fact been committed in the rendering state, the *Bundesgerichtshof* held, was a question that could be fully litigated before the German recognition court under the regular

241. BGHZ, decision of April 29, 1999, reproduced in 52 NJW 3198 (1999).

242. *Id.* at 3199.

243. See *supra* text accompanying notes 119-120.

244. 52 NJW at 3201. As opposed to the determination of jurisdiction, it is sensible to rely on state law for the determination of reciprocity where state law, rather than federal law, provides the rules of recognition. *Id.* In this regard, as in others, the passage of a uniform federal statute of judgments recognition in the United States would improve the fate of U.S. judgment creditors in Germany.

245. See *supra* note 119 and accompanying text.

246. 52 NJW at 3199.

247. *Id.* at 3201-02.

248. BGH, decision of November 25, 1993, 124 BGHZ 237 (1993).

249. On the *locus delicti commissi*, the place of the commission of the tort as a proper basis for jurisdiction under the law of Germany and other civil law countries, see, for example, SCHLESINGER ET AL., *supra* note 131, at 390-92. On the same jurisdictional basis in the Brussels Convention and Brussels Regulation, see, for example, BAUMGARTNER, *supra* note 9, at 163-65.

standard of proof.²⁵⁰ This decision allowed a partial reopening of the foreign proceedings. In support of its holding, the *Bundesgerichtshof* argued that the only alternative would be to forgo any examination of the rendering court's jurisdiction in default judgments based on an alleged tort. This option would deny German defendants the right to refuse to appear before a foreign court whose assertion of jurisdiction they consider exorbitant and subsequently to test the propriety of that assertion by collaterally attacking the resulting judgment at home.²⁵¹ Without this right to default, the Court further reasoned, German law would support plaintiffs who sue German defendants in favorable fora on trumped-up charges in the hope the defendant would be unable to mount an effective defense.²⁵²

Apparently, it did not occur to the Court that there might be a *via media*—re-litigation of this twice relevant issue in the German recognition proceedings, but with a significantly lower standard of proof.²⁵³ Thus, combined with the Court's further indication that its holding allowed the defendant in the present case to avoid the high costs of defending a lawsuit in the United States,²⁵⁴ its reasoning reflects a thinly veiled reference to prevalent views in Germany of a U.S. litigation system in which strike suits are rampant and in which defending such suits is an unreasonably expensive proposition.²⁵⁵ As a result of the Court's decision, German defendants with few or no assets in the United States can effectively force U.S. tort claimants to litigate in Germany the issue of whether, in fact, a tort had been committed.

In sum, in its three decisions, the *Bundesgerichtshof* has refused to follow some of the more extreme anti-recognition arguments involving judgments from the United States. As a result, the recognition of U.S. judgments in Germany remains comparatively liberal. Nevertheless, the German perception of a need to protect

250. On the usually higher standard of proof in civil litigation in civil law countries compared to that in the United States, see, for example, Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243 (2002).

251. *Id.* at 242-43.

252. *Id.* at 244.

253. See, e.g., MARTINY, *supra* note 53, at 354 (arguing that a prima facie showing of commission of a tort should suffice). For an argument for just such a lowered standard of proof in cases of direct jurisdiction and a helpful analysis of the issues involved in U.S. law, see Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973 (2006).

254. *Id.* at 246.

255. See also Harald Koch, Anmerkung, 108 ZJP 367, 372 (1995) (criticizing that, in its attempt to protect the German defendant, the Court went further than the German recognition statute required).

Germans from U.S. litigation and German sovereignty from U.S. intrusion clearly seems to have influenced the Court's recent jurisprudence, leading to complications in regard to the jurisdictional test and to limiting dicta on the public policy test in the context of non-compensatory damages, contingent fees, and discovery. It remains to be seen whether the renewed sense of urgency in protecting Germans from U.S. litigation, that has recently become apparent, will continue to influence German recognition practice in this fashion.²⁵⁶

C. *Italy*

1. The Setting

Italy considerably liberalized its recognition law in 1996.²⁵⁷ Before that, Italian litigants abroad had a number of ways at their disposal to avoid the recognition of an unfavorable judgment. Article 797(1)(6) of the Code of Civil Procedure (CPC) prohibited recognition whenever an Italian proceeding involving the same parties and the same cause of action had been begun before the foreign judgment had become final.²⁵⁸ Because the jurisdiction of Italian courts could be established with relative ease²⁵⁹ and because Article 3 CPC directed the Italian judge to disregard any parallel case pending abroad, Italian litigants, unhappy with developments in litigation abroad, could easily block recognition of the ensuing

256. See *supra* note 168. For example, in the *Bertelsmann* case, see *supra* note 170, the German Constitutional Court justified its grant of a preliminary stay of the lower court's refusal to serve a U.S. class action complaint as follows: "If proceedings before state courts are utilized in an obviously abusive manner so as to force a competitor into accepting one's demands through concomitant media pressure and the risk of losing [sic] the suit, this might violate German constitutional law." 108 Ver. G. at 248. There was no evidence of this happening at that stage of the case. Yet the implication is clear: Because U.S. law provides few safeguards for defendants against strike suits and undue settlement pressure, German constitutional law could play such a protective role. While that may be illusory at the stage of service, the same is not true when it comes time to recognize an ensuing judgment. See, e.g., Stürmer, *supra* note 170, at 66-67.

257. See *supra* text accompanying notes 32-35.

258. Final meant no longer appealable. See, e.g., Gerardo Brogini, *Riconoscimento ed esecuzione delle sentenze civili straniere nel ius commune italiano*, 29 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE [hereinafter Riv. Dir. Int'l Priv. Proc.] 833, 849-50 (1993).

259. Article 4(2) CPC, similar to § 23 of the German ZPO, for example, provided for assets jurisdiction and Article 4(4) granted an Italian court jurisdiction whenever the defendant's home forum would assert jurisdiction in a reciprocal case. There were other rules favoring, ever so slightly, the jurisdiction of Italian courts. For instance, contract disputes could be brought in Italy not only when the obligation in question was to be performed in Italy, cf. Brussels Regulation, art. 5(1), but also when the contract had been concluded there.

judgment. Moreover, the jurisdictional provision of Article 2 CPC made it virtually impossible for a foreign judgment against an Italian defendant to be recognized,²⁶⁰ and foreign default judgments were subject to *révision au fond* (*riesame del merito della causa*).²⁶¹

The new private international law codification put an end to such practices.²⁶² But the new law only applies to proceedings begun on or after December 31, 1996.²⁶³ Given the serious delay in Italian courts,²⁶⁴ most of the published decisions since handed down regarding U.S. judgments apply the old rules.²⁶⁵ At the same time, it seems as though the courts have been more liberal in applying the old law in light of the changes that were passed over ten years ago. Thus, these “interim” decisions must be treated with some caution. Nevertheless, they contain interesting and valuable information on the practice of recognizing U.S. judgments in Italy. As a matter of procedure under the old law and the new, the court of appeals has jurisdiction over the initial judicial decision on recognizability of a foreign judgment (*delibazione*).²⁶⁶

260. See, e.g., Broggin, *supra* note 258, at 837.

261. CPC art. 798.

262. See, e.g., Lupoi, *supra* note 33, at 347-48.

263. See Italian Private International Law Act, *supra* note 35, art. 74(1).

264. See, e.g., Lupoi, *supra* note 33, at 368-69. Italy has attempted to address its slow pace of justice with a series of procedural reforms since 1990, the last of which took effect on March 1, 2006. See, e.g., Michele Taruffo, *Recent and Current Reforms of Civil Procedure in Italy*, in *THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE* 67 (Nicoló Trocker & Vincenzo Varano eds., 2005).

265. See, e.g., Alessandro Barzaghi, *Recognition and Enforcement of United States Judgments in Italy*, 18 N.Y. INT'L L. REV. 61, 109 (2005).

266. See, e.g., Lupoi, *supra* note 33, at 364. This decision to bypass the first-instance courts for the recognition decision, variably supported by arguments for efficiency, predictability, and higher guarantees of correct application of the law, can still be found in a number of civil law jurisdictions, including in some Swiss cantons, but not in Germany. See also *supra* note 124 and accompanying text (noting jurisdiction of Supreme Court for these matters in Spain). What has changed with the new law in Italy, however, is that such a judicial decision is no longer necessary before a foreign judgment will be recognized. As in Germany and Switzerland, a foreign decision is now automatically effective in Italy as soon as the recognition requirements are met, so that a judicial decision on recognizability is technically declaratory rather than constitutive. The practical importance of this lies primarily in streamlined proceedings: Now a decision on recognition can be made ancillary to any decision in which the question of recognizability arises, including in decisions by administrative agencies, whereas before, the interested party first had to obtain a judgment of recognizability (*delibazione*) before the competent court of appeals. *Id.* at 363-64. But unlike in Germany and Switzerland, this streamlined procedure does not apply, and the judgment creditor still needs to obtain a judgment of recognizability in two important cases: (1) when recognition is contested by the debtor and (2) before the foreign judgment can be enforced. See Italian Private International Law Act, *supra* note 35, art. 67(1); Andrea Bonomi, *The Italian Statute on Private International Law*, 27 INT'L J. LEGAL INFO. 247, 266 (1999). On the differences among European jurisdictions in this regard, see Walter & Baumgartner, *supra* note 33, at 35.

2. Punitive Damages

The most recent such decision is a 2007 judgment of the *Corte di Cassazione*, the Italian Supreme Court,²⁶⁷ in which the Court upheld a 2001 refusal by the Court of Appeals of Venice to declare enforceable a \$1 million product liability award handed down by an Alabama court.²⁶⁸ The case arose out of an automobile accident in which Mr. Parrot was hit by a car, flew off his motorcycle, and hit his head violently against the ground. Mr. Parrot died of head injuries at least partly because his helmet had slipped off during the fall. As his sole heir, Judy Parrot then sued the Italian helmet manufacturer Fimez (together with the driver of the car, the manufacturer of the motorcycle, and the U.S. distributor of the helmet), claiming that the buckle that should have held the helmet's straps in place had been defective. After contesting jurisdiction, Fimez abandoned the proceedings in Alabama.²⁶⁹ As the German *Bundesgerichtshof* had done before,²⁷⁰ the *Corte di Cassazione* upheld the court of appeals' holding that punitive damages violate the country's public policy.²⁷¹ But it was unclear how much of the \$1 million award consisted of punitive damages. The Alabama judge had explained his basis for liability only, but not his calculation of the damages. The Venice court had thus held that, although the lack of reasoning of the default judgment failed to violate Italian public policy, the lack of clarity on this point would be held against the Plaintiff because there was no other way to ensure the protection of Italian public policy.²⁷² It had thus refused to enforce the entire award, following in the footsteps of an earlier and heavily criticized decision by the *Landgericht* Berlin in Germany.²⁷³ Moreover, the Venice court had said it was unable to determine what portion of the award was owed by Fimez, as opposed to that owed by its co-defendants.²⁷⁴ Apparently, no one had informed the court of the concept of joint and several liability. This lack of clarity, too, had to be charged against the plaintiff, the Venice court had decided, because Fimez would otherwise risk to

267. P.J. v. Fimez, Cass. civ., Jan. 19, 2007, n.1183.

268. Parrot v. Fimez, App. Venezia, Oct. 15, 2001, reproduced in 37 RIV. DIR. INT'L PRIV. PROC. 1021 (2002).

269. *Id.* at 1022.

270. See *supra* notes 191-200 and accompanying text.

271. P.J. v. Fimez at 2.

272. 37 RIV. DIR. INT'L PRIV. PROC. at 1027-28.

273. See Landgericht Berlin, decision of June 13, 1989, reproduced in 35 RIW 988, at 990 (1989); see also *supra* notes 176 & 181.

274. 37 RIV. DIR. INT'L PRIV. PROC. at 1030.

be forced to pay too much. The *Corte di Cassazione* saw nothing wrong with this approach and considered it consistent with its earlier holding that the lack of a written opinion alone fails to render a foreign judgment unenforceable in Italy.²⁷⁵

3. Service of Process

Other recent recognition decisions have been more favorable to U.S. judgment creditors. In a 1999 decision, the *Corte di Cassazione* reversed a lower court decision that had refused recognition of a California judgment for lack of proper service.²⁷⁶ The Court held the plaintiff's proper service on the defendant under California law satisfied the Italian recognition statute.²⁷⁷

4. Default Judgments

A year later, the *Corte di Cassazione* upheld the enforcement of a New York judgment.²⁷⁸ In doing so, the Court rejected a number of the defendant's arguments. First, it found the New York default judgment failed to violate Italian standards. Default judgments can be problematic in Italy because the right to be heard, under Italian procedure, requires the court to inquire to some extent into the justification of plaintiff's claim even when the defendant chooses not to appear.²⁷⁹ The Court held, however, that the U.S. approach to default judgments is not by definition at odds with Italian notions of justice. In addition, the New York court had given the defendants additional time to defend. Because they refused to take advantage of that opportunity, the Court held, they had to

275. See *infra* note 280 and accompanying text. The Court further held that the question whether in fact the \$ 1 million judgment consisted of punitive damages that were not recoverable in Italy and thus were contrary to Italian public policy in the case at hand was a question of fact not reviewable on appeal to the Court of Cassation. *P.J. v. Fimez* at 2.

276. *Rivkin v. Etablissement Clamose*, Cass. civ., Nov. 29, 1999, reproduced in 36 *Riv. DIR. INT'L PRIV. PROC.* 162 (2000).

277. *Id.* Note that this holding is likely to leave unaffected a 1994 decision by the Court of Appeals of Milan, in which that Court held that a 30-day deadline to file an answer in an American proceeding is too short for an Italian defendant to mount an effective defense. See App. Milano, Jan. 25, 1994, reproduced in 95 *IVI* 697 (1995). The reason is that the old law in CPC Article 797(1)(2) & (1)(3), as well as the new law, Italian Private International Law Act, *supra* note 35, art. 64(1)(b), distinguishes between formal service, which is to be made according to the law of the rendering jurisdiction, and the fundamental right of the defendant to mount an effective defense, which is likely to be judged according to Italian law. See, e.g., Barzaghi, *supra* note 265, at 77-78.

278. *Burra v. Trawfik*, Cass. civ., Mar. 22, 2000, n.3365.

279. See, e.g., Barzaghi, *supra* note 265, at 84-85. This is true in some other jurisdictions as well. See, e.g., Canton of Bern, Switzerland, Code of Civil Procedure, art. 283a. *But see* German Code of Civil Procedure, §331.

suffer the consequences. Second, the Court held that the lack of reasoning did not violate Italian public policy. Third, the Court failed to see a public policy violation in holding an individual responsible on behalf of the company, as the judgment debtor had argued.²⁸⁰

5. Personal Jurisdiction and Service

In a 2000 decision, the Court of Appeals of Bari granted recognition to yet another New York judgment.²⁸¹ The defendant had claimed that the New York court did not have jurisdiction pursuant to Italian standards because the contractual obligation at issue was to be performed exclusively in Italy. The court pointed out, however, that the judgment involved tort as well as contract claims. The effects of the tort occurred in the United States, thus providing the U.S. court with jurisdiction.²⁸² Second, in response to the claim that service of process had been improper, the court pointed out that the defendant had been personally served, rendering that claim invalid.²⁸³

Finally, in a more recent decision, the *Corte di Cassazione* enforced the plain meaning of the new law—that the (indirect) personal jurisdiction of the rendering court is to be determined according to the (direct) jurisdictional provisions of Italian law.²⁸⁴ The new law also deleted Article 2 CPC,²⁸⁵ which had granted Italian judges exclusive jurisdiction over Italian citizens. In the past this had led to the non-recognizability in Italy of foreign judgments against Italian citizens.²⁸⁶ But with Article 2 CPC no longer on the books, the Court held that a divorce decree between an Italian American plaintiff and his Italian wife at the place where the marriage had been celebrated could be recognized in Italy.²⁸⁷

In sum, it is difficult to tell to what extent the Italian recognition decisions that have been rendered after the enactment of the drastically more liberal 1996 law but nonetheless decided under the pre-1996 law, remain valid. But it seems clear that the Supreme

280. *Burra v. Trawfik*, *supra* note 278.

281. *Semerano & Confezioni Mario Valente-Firenze S.R.L. v. Mario Valente Collezioni Ltd.*, App. Bari, May 11, 2000.

282. *Id.*

283. *Id.*

284. *P.V. v. E.C.*, Cass. civ., May 24, 2004, n.10378, *reproduced in* 2005 *RIVISTA DI DIRITTO INTERNAZIONALE* 209.

285. *See* Italian Private International Law Act, *supra* note 35, art. 73(1).

286. *See supra* text accompanying note 260.

287. *P.V. v. E.C.*, 2005 *RIVISTA DI DIRITTO INTERNAZIONALE* 209, at 210.

Court's holding that punitive damages awards violate Italian public policy is widely accepted.²⁸⁸ Other than that, the Italian courts have been quite generous with the recognition of U.S. judgments.

D. Switzerland

1. The Setting

As indicated above, the relevant Swiss statute generally does not allow for the recognition of judgments against Swiss domiciliaries, although there are significant exceptions.²⁸⁹ Outside of those limitations, the Swiss Supreme Court has been quite liberal with the recognition of foreign judgments, including judgments from the United States. This is quite significant because even non-Swiss defendants frequently have Swiss bank accounts in which a foreign judgment can be enforced.

The Private International Law Act, passed in 1988, federalized Swiss recognition law.²⁹⁰ This presented an opportunity for those unhappy with state recognition decisions to appeal those decisions to the Federal Supreme Court, which hears claims of violations of federal law.²⁹¹ But in the first case it heard on appeal, (a case in which the Supreme Court of Basel had allowed the enforcement of a \$120,060 California judgment on a contract counterclaim against a Swiss company), the Swiss Supreme Court held it could review recognition decisions for violations of federal constitutional law only, most likely for arbitrariness.²⁹² Despite this limitation in its

288. See, e.g., Serena Corongiu, *Pregiudizio subito e quantum risarcitorio nelle sentenze di punitive damages: l'impossibile riconoscimento in Italia*, 2004 INT'L LIS 89; Zeno Crespi Reghizzi, *Sulla contrarietà all'ordine pubblico d una sentenza straniera di condanna a punitive damages*, 37 RIV. DIR. INT'L PRIV. PROC. 977 (2002).

289. See *supra* notes 97-101 and accompanying text.

290. See *supra* notes 34-35.

291. Because the Federal Supreme Court has, until most recently, been the only federal court in the country, appeal to it is generally of right rather than by certification. Simplifying just a little bit, any case with a certain value in controversy can be appealed, although there are cases for which there is no minimum value in controversy. The requisite value in controversy was raised from 8,000 Swiss Francs (\$6,400) to 15,000 Swiss Francs (\$12,000) in labor matters and 30,000 Swiss Francs (\$24,000) in all other cases in January of 2007. *Compare* Bundesgesetz über die Organisation der Bundesrechtspflege, Dec. 16, 1943, SR 173.110, arts. 44-47, with Bundesgesetz über das Bundesgericht [BGG], June 17, 2005, AS 2005, 4045, art. 74.

292. Decision of July 12, 1990, 116 II 376 (1990). The reason is peculiar to Swiss law and can be only sketched here: Appeals to the Swiss Supreme Court in civil matters are limited by statute to "civil disputes," which, in traditional interpretation have excluded state enforcement proceedings and state recognition decisions. The Court concluded that the federalization of recognition law in the Private International Law Act did nothing to change that. Thus, the Court decided, recognition decisions cannot be brought to the Supreme Court by civil appeal, leaving only a constitutional appeal for violation of the

standard of review, the Supreme Court has since been quite happy to overturn state court recognition decisions it deems too narrow-minded. In fact, of the five recognition decisions involving U.S. judgments that the Court has handed down since the passage of the Private International Law Act, all granted recognition or affirmed decisions granting recognition.

2. Punitive Damages

In the mentioned Basel decision, the Zivilgericht Basel-Stadt declared enforceable the \$120,060 California judgment despite the fact that this award included \$50,000 for punitive damages.²⁹³ The court noted that the punitive award in this case had the same effect as an unjust enrichment claim under Swiss law would have had²⁹⁴ and that the size of the award was not excessive.²⁹⁵ The court was thus able to distinguish the California judgment from the antitrust treble damage awards and punitive awards in products liability cases that some Swiss commentators, applying German arguments,²⁹⁶ had criticized as violating Swiss public policy.²⁹⁷ Finally, applying the same test of closeness to the jurisdiction as the German Supreme Court would bring to bear three years later,²⁹⁸ the Basel court pointed out (1) the Swiss defendant was a corporation offering its services worldwide, (2) the claim had arisen out of a contract that obligated the Swiss firm to transport military goods between the United States and England, and (3) the parties had agreed to apply English law to their contract. These factors rendered the case too remote from Swiss interests to apply too strict a

requirement of non-arbitrary state decision-making. Because no such constitutional claim had been made, the Court let the Basel judgment stand. *Id.* at 378. This jurisprudence was overturned by the legislature on January 1, 2007. Since then, recognition decisions, too, have been subject to a civil appeal to the Supreme Court. *See* BGG, *supra* note 291, art. 72(2)(b).

293. Decision of Feb. 2, 1989, reproduced in 1990 BASLER JURISTISCHE MITTEILUNGEN 31.

294. *Id.* at 36.

295. *Id.* at 37.

296. *See supra* text accompanying notes 191-200.

297. *See, e.g.*, HANS ULRICH WALDER, EINFÜHRUNG IN DAS INTERNATIONALE ZIVILPROZESS-RECHT DER SCHWEIZ 149 n.174a (1989); Jens Drolshammer & Heinz Schärer, *Die Verletzung des materiellen ordre public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen „punitive damages-Urteils“*, 82 SCHWEIZERISCHE JURISTENZEITUNG 309, 318 (1986); Gabrielle Kaufmann-Kohler, *Enforcement of United States Judgments in Switzerland*, 1983 WIRTSCHAFT UND RECHT 211, 244. Swiss scholars currently disagree on the matter, however. *See, e.g.*, WALTER, *supra* note 5, at 399. For a more favorable view, see, for example, ADRIAN DÖRIG, ANERKENNUNG UND VOLLSTRECKUNG US-AMERIKANISCHER ENTSCHEIDUNGEN IN DER SCHWEIZ 356-67; Felix Dasser, *Punitive Damages: Vom „fremden Fötzel“ zum „Miteidgenoss?“* 96 SCHWEIZERISCHE JURISTENZEITUNG 101 (2000).

298. *See supra* text accompanying notes 189-190.

standard within the public policy test.²⁹⁹ The decision was later confirmed on appeal³⁰⁰ and the Swiss Supreme Court affirmed for appellant's failure to advance an argument that its constitutional rights were violated.³⁰¹

This decision can be distinguished from the holdings on punitive damages by the German *Bundesgerichtshof*³⁰² and the Venice Court of Appeals³⁰³—here, the court awarded a relatively small amount of punitive damages that, at least partially, contained a recoverable amount under the rubric of unjust enrichment in Swiss law. Nevertheless, this is the only Swiss decision on punitive damages since passage of the Private International Law Act and one that fully enforced the award.³⁰⁴

3. Right to Be Heard

The same year in which the Swiss Supreme Court decided to limit its standard of review in recognition cases, it overturned as arbitrary a decision of the Geneva Supreme Court that had refused to enforce a \$60.9 million default judgment by the U.S. District Court for the Southern District of New York.³⁰⁵ The case involved a contract dispute between a Grand Cayman Island corporation and an individual identified only as "P."³⁰⁶ The defendant had failed to designate a new attorney within the district court's 30-day deadline. The district court then, as it had threatened, entered a default judgment on the basis of plaintiff's complaint. Affirming the findings of the Geneva courts, the Swiss Supreme Court rejected the judgment debtor's claim that the lack of notification of the default judgment violated his right to be heard.³⁰⁷ The Court noted that Federal Rule of Civil Procedure 77(d) provides for notice of judgment only on parties not in default. Thus, the defendant knew that defaulting on his duty to appoint counsel

299. *Id.* at 35.

300. Appellationsgericht Basel-Stadt, decision of Dec. 1, 1989 (unpublished opinion).

301. *See supra* note 292.

302. *See supra* text accompanying notes 191-200.

303. *See supra* text accompanying notes 268-274.

304. There is an earlier decision of the *Bezirksgerichtspräsidium Sargans* of 1982, in which that court refused to recognize a U.S. judgment that included a treble damages award. Decision of October 1, 1982, reproduced in Drolshammer & Schärer, *supra* note 297, at 309. Yet the decision was based on the law of the canton of St. Gallen rather than on the public policy exception of the new Swiss Private International Law Act, *supra* note 35, which has since been interpreted rather narrowly by the Swiss Supreme Court as indicated in the text.

305. Decision of December 19, 1990, 116 II 625 (1990).

306. *Id.*

307. *Id.* at 630-31.

would result in a lack of notification. The Swiss Supreme Court held that by nevertheless defaulting, the defendant accepted the consequences.³⁰⁸

4. Lack of Opinion

The Geneva courts, however, had held that the U.S. judgment violated Swiss public policy by failing to provide a reasoned opinion.³⁰⁹ Under Swiss constitutional law, the litigants have a right to a reasoned opinion.³¹⁰ The Supreme Court, however, pointed out that the defendant knew that refusing to follow the order of the district court would result in a default judgment without a reasoned opinion. And the Swiss Supreme Court reasoned that the defendant could simply read the complaint on which the default judgment was based if he wanted to find out why he lost. Thus, withholding recognition in this case would simply favor the party who defaults abroad, and therefore, would be arbitrary.³¹¹

5. Invalid Judgment

A few years later, in 1994, the Swiss Supreme Court confirmed a decision of the *Kantonsgericht* Graubünden, declaring enforceable a \$5.4 million California default judgment against a U.S. citizen who had moved to Switzerland after the entry of judgment.³¹² The defendant argued that the California judgment was void under California law because service of the summons had not been properly recorded.³¹³ In Switzerland, as in many other countries, recognition generally requires that the judgment to be recognized be valid in the rendering jurisdiction. Otherwise, the recognizing state runs the risk of giving effect to a judgment that is invalid where rendered.³¹⁴ Without delving into California law, however, the Swiss Supreme Court decided that it is sufficient for the judgment creditor to present a copy of a valid judgment along with a declaration of the rendering court that the judgment is final and, in case of a default judgment, that the defendant had been given notice so as to enable him to effectively defend himself.³¹⁵ The Court noted

308. *Id.* at 631.

309. *Id.*

310. *See, e.g.*, decision of April 16, 1986, 112 Ia 109 (1986).

311. 116 II at 632-34.

312. Decision of January 19, 1994, 120 II 83 (1994).

313. 120 II at 85.

314. *See, e.g.*, WALTER, *supra* note 5, at 379.

315. 120 II at 85-86. Article 29(1) of the Swiss Private International Law Act, *supra* note 35, provides in pertinent part:

that it was not for the recognition court to engage in a review of the validity of the judgment that the California court had specifically confirmed to be enforceable, and it certainly was not arbitrary for the *Kantonsgericht* to refuse to engage in such a review.³¹⁶

6. Forum Selection Clause

In 1996, then, the Swiss Supreme Court upheld the decision of another state supreme court, the *Kantonsgericht Zug*, to declare enforceable a \$5.1 million judgment of the U.S. District Court for the Southern District of New York against a Swiss citizen.³¹⁷ The defendant first disputed the existence of a valid forum selection clause to support the jurisdiction of the U.S. court under U.S. law on the grounds that he was not a U.S. citizen (contrary to the U.S. district court's assumption), thus vitiating federal diversity jurisdiction.³¹⁸ The *Kantonsgericht* had responded that the validity of the forum selection clause for purposes of recognition was to be determined exclusively pursuant to Swiss law and that the clause was valid under Swiss law.³¹⁹ This is a sensible decision if the question at the time of recognition is exclusively one of fairness to the defendant from the perspective of the law of the recognition state.³²⁰ Accordingly, the Swiss Supreme Court saw nothing wrong with this approach.³²¹

The Court's response to defendant's second argument was more remarkable. The defendant claimed that he had not been served in accordance with the relevant treaty—presumably the Hague Ser-

The request for recognition or enforcement is . . . to be accompanied by:

- a) a complete and confirmed copy of the judgment; and
- b) a confirmation that the judgment is final or that it can no longer be appealed;
- c) in case of a default judgment, a document that makes clear that the losing party was properly served and served early enough to provide him the opportunity to defend.

316. 120 II at 86.

317. Decision of Oct. 31, 1996, 122 III 439 (1996).

318. Diversity jurisdiction under 28 U.S.C. 1332 as well as pursuant to Article 3, Section 2, Clause 1 of the U.S. Constitution requires that there be at least one U.S. citizen as a party. The second sentence of 28 U.S.C. § 1332(a) provides that “[f]or the purposes of this section . . . an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.” Apparently, there had been a dispute before the District Court over whether defendant had abandoned his status as a permanent resident of the United States by moving abroad before the suit was begun.

319. *Id.* at 441.

320. See, e.g., Walter & Baumgartner, *supra* note 33, at 22-23.

321. 122 III at 441-46.

vice Convention³²²—thus rendering recognition of the resulting judgment in Switzerland impossible. But the *Kantonsgericht* pointed out that, obviously, if defendant still had his domicile in the United States at the time of service no recourse to the treaty needed to be had. Even if he did not, however, the court held, refusal to use the treaty procedures did not lead to non-recognition in Switzerland. The Supreme Court agreed.³²³ The Court found that Article 27 of the Private International Law Act, which requires proper notice as a prerequisite to recognition, merely served to assure adequate notice to the defendant so as to allow him to defend.³²⁴ Because the defendant had learned of the proceedings against him and because he was actually represented by an attorney, he had obviously been given adequate notice. Under these circumstances, the Supreme Court held, it was not arbitrary for the lower courts to recognize the judgment; indeed, the Court said, refusing recognition would have been unduly formalistic.³²⁵

This decision is utterly sensible from a U.S. perspective, where the authoritative aspect of service has long been submerged by its notice-giving purpose.³²⁶ But in Switzerland, service of process has consistently been viewed as an authoritative act, for which governmental approval is necessary if it is to occur within the country's borders.³²⁷ Such approval is usually obtained by employing the Hague Service mechanisms.³²⁸ If not, service from abroad is viewed in Switzerland as a violation of the country's sovereignty and thus of international law.³²⁹ In line with this conceptual framework, most Swiss commentators have argued that Article 27 of the Private International Law Act requires service in accordance with the Hague Service Convention, where applicable, as well as service adequately calculated to give notice as a prerequisite for recognition.³³⁰ A 1979 decision of the Supreme Court arguably

322. Convention on the Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

323. 122 III at 447.

324. *Id.*

325. *Id.* at 447-48.

326. See, e.g., BAUMGARTNER, *supra* note 9, at 79-80.

327. See, e.g., Federal Office of Justice, Guidelines for International Judicial Assistance in Civil Matters, 5-6, available at <http://www.bj.admin.ch/etc/medialib/data/sicherheit/rechtshilfe.Par.0053.File.tmp/wegl-ziv-e.pdf> (2003); Arthur R. Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069, 1075-86 (1965).

328. Federal Office of Justice, *supra* note 327, at 8-10.

329. *Id.* at 6.

330. See, e.g., DÖRIG, *supra* note 297, at 396-99; Paul Volken, in KOMMENTAR ZUM IPR-GESETZ, Art. 27, para. 84 (Paul Volken et al. eds., 2d ed. 2004); Fridolin M.R. Walther,

supports this view. In that case, the Court noted in dictum that a state court's refusal to recognize a Canadian judgment under (what was at the time) state law when the defendant had been served by direct mail without involving the relevant Swiss authorities, was not arbitrary.³³¹ But in that decision the Court had already indicated its willingness to depart from such a rigid approach to service as a recognition requirement.³³² Thus, depending on one's point of view, the 1996 decision by the Supreme Court marks either a significant change or a significant clarification.

7. Pension Fund Allocations in Divorce Decrees

Finally, a 2004 decision of the Supreme Court dealt with the thorny issue of pension-fund allocations in divorce decrees.³³³ The case involved a decree in which the U.S. judge had ordered the following:

that the Pension Fund of the Swiss Confederation [with which the defendant had an account as a Swiss civil servant] shall transfer to Plaintiff fifty percent (50%) of the accumulated value in Defendant's Pension Fund of the Swiss Confederation from the date of the parties' marriage on April 11, 1972 through the date that the judgment of divorce is entered (the defined marital portion).³³⁴

Plaintiff's attempt to enforce this order against the Pension Fund encountered three distinct problems. First, the Pension Fund had never been a party to the divorce proceedings and thus could not be directly bound by the order. Second, Swiss pension funds are governmental or semi-governmental organizations heavily regulated by federal law, under which the funds' relationship with its members is one of public law.³³⁵ Thus, pension funds are arguably subject to foreign sovereign immunity before the courts of foreign nations. Third, because Swiss pension funds mix pay-as-you-go features with an accumulating account, determining fifty percent of the "defined marital portion" involves application of a complex

Erläuterungen zum Haager Übereinkommen über die Zustellung gerichtlicher und aussergerichtlicher Schriftstücke im Ausland in Zivil- und Handelssachen von 1965, in INTERNATIONALES PRIVAT- UND VERFAHRENSRECHT, TEXTE UND ERLÄUTERUNGEN, no. 61a E, 9 (Gerhard Walter et al. eds., 11th ed. 2005).

331. Decision of May 4, 1979, 105 Ia 307 (1979).

332. *Id.* at 311-12.

333. Decision of March 11, 2004, 130 III 336 (2004).

334. *Id.* at 338 (English in original).

335. *See supra* text accompanying notes 131-136.

formula.³³⁶ In Swiss divorce proceedings, this results in a requirement that the parties provide the divorce judge with a detailed declaration by the pension fund that the envisaged division of funds is feasible.³³⁷ Without such a declaration, the divorce judge is limited to deciding on the division in general terms, having to refer the matter to an administrative court for the precise calculations and final order on the amount the fund must pay.³³⁸

Given these problems, the Bern *Obergericht* held that the order was not enforceable against the Pension Fund. It further found that the U.S. court had no business ordering a Swiss governmental agency to pay its funds, rendering the order unrecognizable. The court then reasoned that reallocating the pension funds under Swiss law might undermine the U.S. decree's underlying balance of marital payments. Thus, the entire divorce decree could not be recognized in Switzerland.³³⁹

The Swiss Supreme Court reversed this decision as arbitrary. Unlike the Bern *Obergericht*, the Supreme Court did not interpret the U.S. decree as an order directly addressed to the Swiss Pension Fund, but merely as an order determining the respective share of the litigants in the existing Fund interest (fifty percent each). Thus, the Court found nothing wrong with the order as such.³⁴⁰ But with that finding there was no determination of how much precisely the Pension Fund owed each litigant. To deal with this problem, the Court simply reasoned that, just as in a Swiss proceeding in which there was no valid declaration of the pension fund, the Swiss administrative court would later need to enter a final order on precisely how much the Fund owes.³⁴¹ Preliminary to that final order, the Court held the U.S. decree recognizable in Switzerland, including its 50% division of the pension account.³⁴² This is a sen-

336. See, e.g., Bundesamt für Justiz, *Die Teilung von Vorsorgeguthaben in der Schweiz im Zusammenhang mit ausländischen Scheidungsurteilen, Stellungnahme vom 28. März 2001*, 137 ZEITSCHRIFT DES BERNISCHEN JURISTENVEREINS 493, 497 (2001). Moreover, in subsequent proceedings, the parties fought over whether the marriage lasted until the date of the U.S. judgment or the date on which the U.S. judgment became final to determine the defined marital portion. See Decision of March 28, 2006, 132 V 236 (2006). The Supreme Court held for the latter. It did so in application of Swiss law without even considering the fact that the rendering court had determined the defined marital portion to extend only to the date of entry of judgment. *Id.* at 239-41.

337. Schweizerisches Zivilgesetzbuch [ZGB], Code civil suisse [Cc], Codice civile swizzero [Cc] [Civil Code] Dec. 10, 1907, SR 210, RS 210, art. 141 (Switz.).

338. *Id.* art. 142.

339. Decision of July 25, 2003 (on file with author).

340. 130 III at 340.

341. See *supra* text accompanying note 338.

342. 130 III 341-43.

sible solution to a problem made difficult because of complicated interlocking federal statutory provisions.³⁴³

In sum, the Swiss Supreme Court has been very liberal in the recognition of U.S. (and other) judgments. While the limitations of jurisdiction against Swiss domiciliaries of the Private International Law Act impose considerable limitations,³⁴⁴ the Swiss Supreme Court has yet to declare a U.S. judgment non-recognizable.

VI. CONCLUSION

The Europeans—including, to a lesser degree, England—have had a long history of negotiating bilateral and, more recently, multilateral recognition treaties among themselves.³⁴⁵ In the last two decades, the pace of this development has accelerated and shifted to secondary Community Law. In the process, the recognition and enforcement of judgments from other European nations has consistently been liberalized. It is planned, within the European Community, to be replaced in due course with the free movement of judgments, a scheme even more liberal than Full Faith and Credit in the United States.³⁴⁶ The United States, on the other hand, has had an equally long history of avoiding entanglements in recognition treaties, indeed in treaties having anything to do with private international law.³⁴⁷ The result is as simple as it is disadvantageous for U.S. judgment creditors: The law applicable to the recognition of U.S. judgments in Europe is purely domestic law. It is law that has not changed—and thus been liberalized—much during the last few decades and is thus the least open-minded among the various recognition regimes applicable in European courts today. It is law, moreover, that usually applies only to judgments from states with which European nations have few, if any, trade relations.³⁴⁸

The ensuing practice is most deplorable in the Nordic countries and in Austria, where most U.S. judgments simply are not recognized.³⁴⁹ Such judgments may be accorded preclusive effect as a

343. See, e.g., Samuel P. Baumgartner, *Die Anerkennung und Vollstreckung ausländischer Zivilurteile in der Schweiz: Neuere Entwicklungen*, in RECHTSHILFE UND VOLLSTRECKUNG 111, 134 (Christoph Leuenberger & Jacques-André Guy eds., 2004).

344. See *supra* text accompanying notes 97-101.

345. See *supra* text accompanying notes 37-41.

346. See *supra* text accompanying notes 28-29.

347. See *supra* text accompanying notes 42 & 44-46.

348. See *supra* text accompanying note 43.

349. See *supra* text accompanying notes 59-62.

matter of evidence, but there is no guarantee.³⁵⁰ Dutch law is no better on the books, but is applied more liberally in practice.³⁵¹ The written law in most other European countries seems little different from U.S. recognition law.³⁵² However, Belgium, France, and Portugal still impose a choice-of-law test in certain family law matters, and Portugal has retained a *révision au fond* for judgments against its nationals.³⁵³ Moreover, in England, France, and Switzerland, the jurisdictional test is more exacting than Americans might expect,³⁵⁴ and in most formerly socialist countries, there have been too few cases decided since the fall of the Iron Curtain to know whether their domestic recognition regimes are as liberal as they look on the books.³⁵⁵

Where there are no such limitations, such as in Germany, Greece, Italy, and Spain, recognition law is truly similar to that of the United States. But in those and in other European countries, more subtle factors come into play. As I have demonstrated elsewhere, the law applicable to transnational litigation in one jurisdiction has a tendency to affect transnational litigation law in another and vice versa, often in ways unintended, because not contemplated, by the lawmakers.³⁵⁶ This is especially true for recognition law, which affords European countries the opportunity to exercise some leverage in response to what they see as power play by U.S. courts and lawmakers and to other real or imagined problems they perceive with U.S. law and procedure.³⁵⁷ Despite relatively liberal recognition statutes, such leverage may be exercised through subtle adverse interpretations of the jurisdictional test and the due process and public policy requirements.³⁵⁸ Needless to say, adverse interpretations, applicable to all future cases falling within the scope of application of the statute, are easier to impose when the only other countries affected are far away and connected through little, if any, trade.

Much of this more subtle process is visible in the development of the practice of recognizing U.S. judgments in Germany through-

350. See *supra* text accompanying notes 79-83.

351. See *supra* text accompanying notes 84-94.

352. See *supra* text accompanying notes 64-71.

353. See *supra* text accompanying notes 76-78; see also *supra* note 65.

354. See *supra* text accompanying notes 95-104.

355. See *supra* text accompanying notes 73-75.

356. See Baumgartner, *supra* note 43, at 1305-06, 1313-53, 1361-78.

357. See *supra* text accompanying notes 163-170.

358. See *supra* text accompanying notes 171-174.

out the 1990s.³⁵⁹ It is also clear that at least some of the vast scholarly discussion of these issues in the 1980s and 1990s in Germany has affected the attitude towards recognizing U.S. judgments in other European countries. For example, punitive damages, once considered unproblematic,³⁶⁰ soon became a clear public policy violation in Germany with the strong influence of war stories, assertions of aggregate patterns, and arguments taken from the tort reform movement in the United States.³⁶¹ Since then, punitive damages have been discussed as a potential public policy violation in many other countries.³⁶² At the same time, more careful analysis has since shown that the case against punitives is perhaps less clear,³⁶³ and some European courts have so held.³⁶⁴ But the decisions by the German *Bundesgerichtshof*³⁶⁵ and the Italian *Corte di Cassazione*,³⁶⁶ holding punitive damages in violation of public policy, remain.

Many other violations of due process and public policy have been asserted by commentators in Germany and have similarly traveled elsewhere. This is particularly true with regard to the recognition and enforcement of judgments and settlements in U.S. class actions.³⁶⁷ Fortunately, few of those objections have been accepted by the courts with final authority, although in the area of class actions much remains open. Because the recognition of class action judgments or settlements rarely becomes relevant in continental European practice, where such actions are mostly unavailable, there are few, if any, judicial pronouncements on the matter.³⁶⁸ But here, as elsewhere, empirical work may reveal some

359. See *supra* text accompanying notes 175-255.

360. Baumgartner, *supra* note 43, at 1339.

361. See *id.* at 1339-42; see also *supra* text accompanying notes 165-166.

362. See *supra* text accompanying notes 268-274 & 293-304; Romeu, *supra* note 69, at 968 (Spain); Christos D. Triadafilidis, *Anerkennung und Vollstreckung von "punitive-damages"-Urteilen nach kontinentalem und insbesondere nach griechischem Recht*, 22 IPRAX 236 (2002) (Greece).

363. See *supra* text accompanying notes 234-235.

364. See *supra* text accompanying notes 293-304; Romeu, *supra* note 69, at 968 (Supreme Court of Spain).

365. See *supra* text accompanying notes 191-200.

366. See *supra* text accompanying notes 268-274.

367. See, e.g., GREINER *supra* note 160; SCHNEIDER *supra* note 160; Heß, *supra* note 162; Isabelle Romy, *Class actions américaines et droit international privé suisse*, 1999 ARCHIV FÜR DIE JURISTISCHE PRAXIS 783 (1999).

368. But see Landgericht Stuttgart, decision of Nov. 24, 1999, reproduced in 21 IPRAX 240, 241-42 (2001) (opining that a U.S. class action judgment cannot be binding on absent class members in Germany because such a binding effect would be counter to German public policy and the underlying right of potential German claimants to bring their suit whenever they see fit).

surprising facts about recognition practice, particularly if it includes in its scope advice given to judgment creditors and debtors by local European attorneys.³⁶⁹

In sum, in those European jurisdictions that do not dismiss the recognition of U.S. judgments out of hand, recognition law is, with a few notable exceptions, similar to that in the United States. But recognition practice may prove less liberal in areas such as personal jurisdiction, service, discovery, and default judgments, as well as punitive and other large damages.³⁷⁰ But there are also courts, such as the Italian and Swiss Supreme Courts, which have been quite liberal with the recognition statute within which they operate.³⁷¹ In short, whether U.S. judgments fare better,³⁷² the same, or worse in Europe than do European judgments in the United States depends on a number of factors—the country, the subject matter, the relief granted, the closeness of the dispute to the recognition country, and, in some instances, on who the defendant was in the American proceedings—among others. Thus, painting an adequate picture of the recognition landscape in Europe requires as much attention to detail as does painting a true picture of the litigation landscape in the United States.³⁷³ A multilateral treaty between the United States and European countries could alleviate the negative treatment U.S. judgments currently receive in some countries, in some cases, or under certain circumstances. Such a treaty could also simplify recognition requirements and the diversity of recognition procedures. Getting there, however, will require

369. See *supra* text accompanying notes 153-159.

370. See *supra* text accompanying notes 182-255 & 268-274.

371. See *supra* text accompanying notes 276-280 & 289-344.

372. Although there are not many, I can think of some cases in which the recognition of a European judgment was refused in U.S. court, although the courts of some European nations would have likely granted recognition in reverse circumstances. See, e.g., *Ackerman v. Levine*, 788 F.2d 830, 841-45 (2d Cir. 1986) (refusing to recognize part of a German judgment for attorney fees for violating New York public policy due to lack of sufficient evidence of work product or agreement by defendant to have plaintiff attorney engage in certain work); *Sarl Lois Feraud Int'l v. Viewfinder, Inc.*, 406 F. Supp. 2d 274, 281-85 (S.D.N.Y. 2005) (refusing to enforce, on First Amendment grounds, a French judgment of copyright violation based on posting infringing photographs of a fashion show on a web page); *Telnikoff v. Matusевич*, 702 A.2d 230, 239-51 (Md. 1997) (refusing recognition of British libel judgment for violation of freedom of speech); *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661, 662-65 (N.Y. Sup. 1992) (same).

373. Cf. Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1467 (1987) (book review) (noting tendency of certain descriptions of the litigation landscape in the United States “to blur distinctions between types of cases (including complex litigation and other litigation), between litigation in federal and state courts, between cases filed and cases tried, and between use and over-use of the courts”).

both Americans and Europeans to engage deeply held preferences and jurisprudential assumptions underlying their respective litigation systems.