



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 25 | Number 2

Article 3

3-1-2003

A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgement Recognition and Enforcement: Something Old, Something Borrowed, Something New

Alan Reed

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Alan Reed, *A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgement Recognition and Enforcement: Something Old, Something Borrowed, Something New*, 25 Loy. L.A. Int'l & Comp. L. Rev. 243 (2003).

Available at: <https://digitalcommons.lmu.edu/ilr/vol25/iss2/3>

This Article is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgement Recognition and Enforcement: Something Old, Something Borrowed, Something New?

ALAN REED*

I. INTRODUCTION

In a world where international trading relations increasingly give rise to the possibility of transnational debts, the security of commercial transactions calls for a speedy, cheap and uncomplicated process for ensuring that judgements properly obtained against a debtor can be satisfied, even though his assets may be situated in another law area.¹

The increase in the level of international trade and investment has enhanced the need for a satisfactory means of dispute resolution.² Dispute resolution in domestic courts requires the respective parties to “consider not only the likelihood of a favourable judgement but also the ability to collect on that

* Alan Reed M.A. (Cantab.), LL.M. (University of Virginia), Solicitor and Professor of Criminal and Private International Law at the University of Sunderland. This article is dedicated to the memory of my beloved father, Matthew Alan Reed, who died on September 28, 2002.

1. See J.D. McClean and K.W. Patchett *The Recognition and Enforcement of Judgements and the Service of Process within the Commonwealth*, art. 263 (Commonwealth Secretariat, Marlborough House, London).

2. Ronald A. Brand, *Enforcement of Foreign Money-Judgements in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 255 (1991).

judgement."³ In order to collect a defendant's extra-jurisdictional assets, the second jurisdiction must be willing to recognise and enforce the first jurisdiction's judgement.

Modern trends show that litigants are increasingly seeking remedies in foreign courts, and in this age of transnational investment, losing parties are often found with substantial assets in more than one country.⁴ As *Adams v. Cape Industries* noted,⁵ the basis of enforcing these foreign judgements is "an acknowledgement that the society of nations will work better if some foreign judgements are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found." The crucial question, therefore, is not whether foreign judgements should be recognised and enforced in Anglo-American jurisdictions, but which judgements should be recognised and enforced.

The English response to the dilemma presented demonstrates an ethnocentric and chauvinistic solution. English law reviews the jurisdictional competence of the foreign court at the recognition and enforcement stage. At present, only two forms of jurisdiction are generally regarded at common law (and the statutory regimes, which are based on the common law) as "proper" in an international sense. The court of the state exercising jurisdiction, finds jurisdiction proper when either the defendant was present in the territory of the originating state when the action was commenced; or, when the defendant consented by taking part in the proceedings or by previously agreeing to jurisdiction.

The rationalisation for recognizing foreign judgement depends on the obligation theory.⁶ Obligation theory is accepted by most commentators,⁷ and is defined in *Schisby v. Westenholz* as

3. See *id.* It is noteworthy that the term "judgement" includes both the recognition and enforcement of a final judicial determination, unless otherwise specified.

4. GARY BORN AND DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 3* (Kluwer Law and Taxation Publishers, 1989); see *INTERNATIONAL EXECUTION AGAINST JUDGEMENT DEBTORS* (Campbell ed. 1993); Michael Eberstein, *Federal Republic of Germany*, in *ENFORCEMENT OF FOREIGN JUDGEMENTS WORLDWIDE 142* (Platto ed. 1989).

5. *Adams v. Cape Indus.*, 1 All E.R. 929 (Ch. 1991).

6. DICEY AND MORRIS ON THE CONFLICT OF LAWS (Lawrence Collins ed., 12th ed. 1993).

7. See HORACE EMERSON READ, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS IN THE COMMON LAW UNITS OF THE BRITISH*

“[T]he judgement of a court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay for the sum for which judgement is given, which the courts in [the country of enforcement] are bound to enforce.”⁸

The U.S. position on foreign judgement recognition is a beguiling Hobson's choice⁹ of theoretical perspectives that apply within respective states.¹⁰ When foreign judgements are not barred by federal pre-emption, each state remains free to apply its own rules respecting recognition and enforcement. These rules can be denied on due process grounds if jurisdiction is unreasonable or procedures are egregiously defective. In general, however, each state determines the applicable jurisdiction test, the extent that the court will review the judicial process that produced the judgement in question, whether to impose choice of law tests or reciprocity requirements, and whether the court should conduct a review on the merits.¹¹ As leading commentators have suggested, “obligation,” “reciprocity” or “international comity” are the three main competing theories of the legal topography that states practice for foreign judgement recognition.¹² Moreover, a significant number of states have adopted the Uniform Foreign Money-Judgements Recognition Act (1962),¹³ which entitles a

COMMONWEALTH 52-121 (Harvard University Press, 1938); DICEY AND MORRIS ON THE CONFLICT OF LAWS, *supra* note 6, at 455-56.

8. 6 Eng. Rep. 155, 159 (Q.B. 1870).

9. Hobson's Choice refers to a situation in which there are only bad alternatives that have such poor results that there is no real choice at all.

10. The United States is party to no multilateral convention on judgements. Efforts to conclude a bilateral treaty with the United Kingdom during the 1970s were unsuccessful. See generally David Luther Woodward, *Reciprocal Recognition and Enforcement of Civil Judgements in the United States, the United Kingdom and the European Economic Community*, 8 N.C.J. INT'L L. & COM. REG. 299 (1983).

11. Note that a strong, though by no means universal, tendency exists to give foreign judgements the substantial preclusive effects that sister-state judgements enjoy. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. B (1971). “[J]udgments rendered in a foreign nation are not entitled to the protection of full faith and credit. In most respects, however, such judgements . . . will be accorded the same degree of recognition to which sister state judgements are entitled. This is because the public interest requires that there be an end of litigation. . . .” *Id.*

12. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1146-54, 1187-1212 (3d ed. 2000) [hereinafter SCOLES, CONFLICT OF LAWS].

13. Unif. Foreign Money-Judgements Act, 13 U.L.A. 261 (Supp. 1998). The Act is in force in twenty-seven states, as well as the District of Columbia and the Virgin Islands. For a leading decision on interpretation see *Bank of Montreal v. Kough*, 612 F.2d 467 (9th Cir. 1980). The Colorado, Georgia, Idaho, Massachusetts, Ohio, and Texas versions of the Act

sister state to "full faith and credit" to recognise and enforce the foreign country's judgements.

This power allows a sister state to grant or deny the recovery of a sum of money when certain conditions are fulfilled.¹⁴ The tests for jurisdictional competence under the Act largely mirror those under traditional English common law principles.

Three theories may be superogatory or governing in relation to foreign judgement recognition.¹⁵ The first is the theory of obligation. If the court that originally assumed jurisdiction did so on a proper basis, the court's judgement should be regarded as a *prima facie* obligation between the parties to the foreign proceedings. The obligation is recognisable and enforceable in the eyes of an Anglo-American court. The idea is that a foreign judgement for damages creates a debt that the claimant can enforce in the second jurisdiction.¹⁶

The obligation theory has myriad perceived advantages despite its circuitous means. As commentators have suggested, by perceiving the foreign judgement creditor as enforcing a legal right or obligation, it brings the matter within the penumbra of private international law.¹⁷ It countermands the earlier notion that a foreign judgement is only an issue of a non-obligatory international norm.¹⁸ Furthermore, by comparing a foreign judgement to a simple contract debt, the English judiciary made it easy for creditors to enforce foreign judgements.¹⁹ Thus,

require reciprocity; see SCOLES, CONFLICT OF LAWS, *supra* note 12, at 1146-54, 1187-1212.

14. See SCOLES, CONFLICT OF LAWS, *supra* note 12, at 1146-54, 1187-1212.

15. See Arthur T. von Mehren and Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1602 (1968) [hereinafter von Mehren and Trautman, *Recognition of Foreign Adjudications*]; Robert C. Casad, *Issue Preclusion and Foreign Country Judgements: Whose Law?*, 70 IOWA L. REV. 53 (1984).

16. See von Mehren and Trautman, *Recognition of Foreign Adjudications*, *supra* note 15, at 1602; Casad, *supra* note 15.

17. H. L. Ho, *Policies Underlying the Enforcement of Foreign Commercial Judgements*, 46 I.C.L.Q. 443, 446, n.17 (1997). In *Godard v. Gray* the obligation theory was preceded by an acknowledgement that, "[i]t is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgement of a foreign tribunal." (1870) L.R.6. Q.B. 139, 148.

18. See John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561, 562 (1952); Courtland H. Peterson, *Res Judicata and Foreign Country Judgements*, 24 OHIO ST. L.J. 291 (1963).

19. See BRADFORD A. CAFFREY, INTERNATIONAL JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS IN THE LAWASIA REGION: A COMPARATIVE STUDY OF THE LAWS OF ELEVEN ASIAN COUNTRIES INTER-

obligation theory serves to justify the conclusiveness principle: "conclusiveness originates from the conception that a foreign judgement creates a legal obligation which is itself a sufficient reason for its recognition."²⁰

The difficulty with the obligation theory is its oblique justification.²¹ According to this theory, it is unclear why a foreign judgement creates an obligation, and why the mythical and illusory obligation should be enforced domestically. The purported *per se* allegiance to the foreign sovereign is palpably inapt,²² as the English Court of Appeal highlighted in *Adams v. Cape Industries*.²³ Equally fanciful are commentators' attempts to explain the theory on the ground of implied agreement.²⁴ Overall, a simple recantation of obligation theory is insufficient to resolve all the relevant determinants in this branch of private international law. A complex set of values and concerns are inter-twined.²⁵ The concern of maintaining international relations embodied in the term "comity" are as cogent today, if not more so, than in 1895 when the U.S. Supreme Court recognised the importance of this concept in the seminal case of *Hilton v. Guyot*.²⁶

Reciprocity, the second theory, is a simpler concept than obligation. The premise is that the courts of Country A should recognise and enforce the judgements of Country B if, *mutatis*

SE AND WITH THE EEC COUNTRIES (1985) at 42; SACK, CONFLICTS OF LAWS IN THE HISTORY OF ENGLISH LAW, IN REPPY (ED.), LAW—A CENTURY OF PROGRESS 1835–1935 (1937), at 384–85; and READ, *supra* note 7, at 173–75.

20. Manessia Borm-Reid, *Recognition and Enforcement of Foreign Judgements*, 3 I.C.L.Q. 49, 53 (1954).

21. Ho, *supra* note 17, at 445; Casad, *supra* note 15, at 58.

22. See Ho, *supra* note 17. "The idea is that a person in a foreign territory owes allegiance to its sovereign, which allegiance entails an obligation to respect the judgements given by the courts of the sovereign, in exchange for an obligation by the sovereign to ensure the personal safety and well-being of the foreigner during his stay." *Id.* at 445 n.14; see Carrick v. Hancock, 12 T.L.R. 59 (Q.B. 1895).

23. *Adams v. Cape Indus.*, 1 All E.R. 929, 1038 (Ch. 1991).

24. The argument contends that by instituting or participating in the trial in the foreign jurisdiction the parties have "impliedly agreed" to be bound by the foreign judgement. However, in most cases the defendant cannot realistically be said to have agreed to have the matter adjudicated in the foreign state. There is palpable inconsistency in that the implied agreement rationale does not mesh with the fact that the default nature of a foreign judgement does not, in most legal systems, affect its enforceability; Ernest G. Lorenzen, *The Enforcement of American Judgements Abroad*, 29 YALE L.J. 188, 190 (1919–1920).

25. For a list of these, see von Mehren and Trautman, *Recognition of Foreign Adjudications*, *supra* note 15, at 1603–04.

26. *Hilton v. Guyot*, 159 U.S. 113 (1895).

mutandis, the courts of Country B recognise and enforce the judgements of Country A. A primary illustration of this principle, which is rooted in commercial considerations, is the perspective adopted in the Brussels Convention, and subsequently in the Lugano Convention. The Convention's perspective imposes a communitarian scheme on jurisdictional competence, and a free movement of civil and commercial judgements among European (and EFTA) Contracting States.²⁷ The aim of the Brussels Convention was to ensure that the economic life of the then European Community was not disturbed by the difficulties of enforcement of foreign judgements.²⁸ For civil and commercial matters, the Brussels and Lugano Conventions provide the courts of the contracting states the power to grant reciprocal recognition and enforcement of judgements.

Self-interest may play an important role in the enforcement of foreign judgements. The core of the proposition is that enforcing foreign judgements is universally beneficial, and contrarily, that it is a disadvantage if countries do not enforce other nations' judgements. The hopeful anticipation is founded on a contingency: "We do justice that justice may be done in return."²⁹ This idea formed the basis of early U.S. doctrinal analysis on judgement recognition, but today these principles now represent much more of a hodgepodge.³⁰ The concept of reciprocity, however, lives on; and the perceptions of unfair treatment emboldened the U.S. initiative at the Hague Conference to promote a new multinational convention. It will be fascinating to observe whether reciprocity at the European level can be translated onto the international

27. See *infra* Part II.A for a discussion of the impact and ambit of the Brussels and Lugano Conventions.

28. See Council Report on the Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 1979 O.J. (C59) 1, 3 [hereinafter Council Report].

29. Ho, *supra* note 17, at 434; Herbert Barry, *Comity*, 12 VA. L. REV. 353, 359 (1926); see generally Elliot E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 373-78 (1944-1945); see generally Peter MacAllister-Smith, *Comity*, in Bernhart (Ed.) *Encyclopedia of Public International Law* (1984) Vol. 7, at 41-44.

30. "Any rule which tends to restrict the conclusive effect of foreign adjudication in American courts... tends to diminish the chances for recognition of American judgements in foreign courts... [R]ules which favor the recognition of foreign judgements will promote increased finality for American judgements abroad." Peterson, *supra* note 18, at 307.

playing field.³¹ Some European countries whose self-interests wish to constrain the affairs of the existing Conventions (as well as non-EC states) clearly oppose this concept.³²

The third theory on foreign judgement recognition is that of comity, a principle historically relied upon as an argument for judicial restraint. Comity is the general notion of “friendly dealing[s] between nations at peace.”³³ As such, comity applies not just to the judiciary, but also to the policy-making bodies of the nation. The most well-known definition of comity is arguably that given in the U.S. Supreme Court case of *Hilton v. Guyot*:

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.³⁴

The judicial policy adopted in the United States has traditionally supported the notion of comity in the international legal system. Indeed, one circuit court described the integral nature of this principle as “the mortar which cements together a brick house.”³⁵ Despite the reverent emphasis on the doctrine’s importance, the United States and foreign courts have not offered any specific definition of comity. As a result, it is stigmatised as

31. See Eric B. Fastiff, *The Proposed Hague Convention on the Recognition and Enforcement of Civil and Commercial Judgements: A Solution to Butch Reynold's Jurisdiction and Enforcement Problems*, 28 CORNELL INT'L. L.J. 469, 471-73 (1995).

[T]he U.S. litigants have a severe disadvantage in the global legal system. . . .

[T]he U.S. federal and state judiciaries will enforce any judgement that is valid and fair, but foreign countries are reticent to enforce U.S. federal and state judgements. Thus, foreign plaintiffs easily have their judgements satisfied against U.S. defendants, but U.S. plaintiffs are often left with empty judgements.

Id.

32. Matthew H. Adler, *If We Could Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgements*, 26 LAW & POL'Y INT'L BUS. 79, 107-10 (1994); see generally Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgements: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271 (1994) [hereinafter von Mehren, *Recognition and Enforcement of Foreign Judgements*].

33. *Hilton v. Guyot*, 159 U.S. 113, 162 (1895) (Mr. William G. Choate, argument for defendants in error).

34. *Id.* at 163-64.

35. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

amorphous, and characterised by some as a purely voluntary policy of non-interference among other sovereign forums. Some even describe this policy as a "never-never land whose borders are marked by fuzzy lines of politics, courtesy and good faith."³⁶ This proposition has been criticised as being "uncertain in status and hollow in content . . . because . . . [it] resides in the twilight zone between the realm of obligations and the realm of non-obligation."³⁷

It is suggested, herein, that the true significance and application of "international comity" as a theoretical policy tool was misunderstood. The doctrine's critics have "substituted the policy for the rule."³⁸ True, as a rule, comity is too indeterminate by itself to be practicable. However, if the rule is separated from the underlying policies, the concept of "comity" is relevant to rationalize why foreign judgements are enforced. In *Morguard Investments Ltd v. De Savoye*,³⁹ the Supreme Court of Canada made a striking decision that extended foreign judgement recognition from an inter-provincial to an international level. This case revived the importance of "international comity," as well as the systematic accommodation of foreign laws and judgements in the domestic legal system. Part III explores the *Morguard* decision more fully as an optimal policy tool. The *Morguard* decision sends a significant message that goes to the very heart of judgement recognition on an international playing field; provided that the defendant is not treated unjustly it provides the claimant with an enforceable judgement.

The policy encompassed in the notion of comity is to propagate some frequently used terms, goodwill, cooperation, courtesy and mutual respect among states.⁴⁰ These values, "warm and fuzzy" as they may be, are vital to the establishment and maintenance of a stable international community.⁴¹ The novel

36. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982).

37. Ho, *supra* note 17, at 451.

38. *Id.*

39. 76 D.L.R. 4th 256.

40. For expert articulation of this proposition, see Jonathan Harris, Recognition of Foreign Judgements at Common Law—The Anti-Suit Injunction Link (1997) 17 OXFORD J. OF LEGAL STUD. 47. See also SACK, *supra* note 19, at 382. (stating that the enforcement of foreign judgements was based on the notion that "the justice of one nation should be aiding to the justice of another nation"); Wier's Case, 1 Roll. Abr. 530, 12 (K.B. 1608).

41. Peterson, *supra* note 18, at 305.

solution put forward in this article would deploy international comity theory, but would integrate it with a more certain test that marries together jurisdiction rules and jurisdictional competence. The new model balances a variety of policy concerns: interests of finality and conclusiveness of judgements; conservation of judicial resources; certainty in the judicial process; preclusion; commercial convenience; and sufficient flexibility to allow a dynamic test, which allows an evolution of our recognition rules to meet contemporary conditions.

Regardless of whichever theory is adopted, the recognition and enforcement of foreign judgements is limited by several defences. For example, the defences of fraud, breach of natural or substantial justice, and public policy operate as “safety valves” against “judgements and legal processes which we simply cannot accept.”⁴² Thus, a discretionary element must form a part of the recognised defences. Fortunately, “judicial chauvinism has been replaced by judicial comity.”⁴³ Whilst Anglo-American law has recently become much more tolerant towards the differences in values and procedures across legal systems, there should also be a limit to that tolerance.⁴⁴ The fact that these defences hardly succeed is helpful to our tolerance and standard of foreign justice. Yet nonetheless, they comprise an irreducible minimum safeguard against egregious practices.

Therefore, Part II of this Article explores, in more detail, the Anglo-American legal position on foreign judgement recognition. Although no “American Rule” emerges to solve the issue presented, there exists a significant degree of vacillating *ad-hocery*, and fudging of competing principles.⁴⁵ The English dependence on obligation theory has proved highly unsatisfactory. Thus, dynamic solutions are needed in a changing world to help preserve the possibility of altering the scope of the recognition rules. In

42. Ho, *supra* note 17, at 445. This article focuses on the policy issues surrounding these three key defences.

43. The *Abidin Daver* 1 All. E.R. 398, at 411 (1984).

44. Unsurprisingly, the aforementioned defences form a significant element of the Multilateral Convention’s preliminary draft under the auspices of the Hague Conference. See Preliminary Draft Hague Judgements Convention adopted by the preparatory Special Commission on October 30, 1999 available at <http://www.hcch.net/e/conventions/draft36e.html>; see generally Paul R. Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgements Convention* (1998) 24 BROOKLYN J. INT’L L. 75; Beaumont (1999) 48 I.C.L.Q. 225.

45. See Woodward, *supra* note 10, at 299.

essence, as Harris has intimated, the cornerstone to recognition rules is international harmony and commercial practicality on homogenous grounds; not the fact that different states share similar bases for accepting jurisdiction.⁴⁶

Part III of this Article addresses the need for a reformulated dual test for judgement recognition on both sides of the Atlantic. Rationalisation needs to defer to foreign courts, not merely in the name of comity, but also those of consistency, convenience and certainty. The current law appears hopelessly anachronistic and the solution propounded herein would arguably bridge the perceived ethnocentric gap. Interestingly, for some undefined reason, private international lawyers have generally separated the jurisdiction by the originating court (F1) and the recognition of foreign judgements (by F2) "as two separate and distinct branches of the law, with little in common but much between them: the "in between" part being the rules on choice of law."⁴⁷ The risk of separating the rules on jurisdiction and judgements is that legal thought develops independently in one branch, though the two branches are inherently collinear. The doctrine on recognition "begins with the search for a foreign court which had jurisdiction in the 'international sense.'" The corollary of this is that there is a requirement to integrate the law on recognition of foreign judgements more closely into private international law, and not to view jurisdictional rules as divorced from recognition of foreign judgements. This is the beneficial effect of the novel optimal test considered in detail in Part III: (1) a presumption of judgement recognition derived from international comity principles; (2) a rebuttable presumption of the jurisdictional competence of the foreign court; (3) reversal of the burden of proof to the defendant to show recognition or enforcement to be unjust; and (4) unjustness equiparated to the unconscionability test for restraint of foreign proceedings in the jurisdictional context.

Part IV of this Article examines the defences of public policy, natural justice, and fraud from an Anglo-American perspective. New reformulated tests for these defences call for the recognising courts to intervene only in cases where the enforcement will result in "a violation of a fundamental norm of substantive value or of

46. See Harris, *supra* note 40; Adrian Briggs, *Which Foreign Judgements Should We Recognize Today?*, 36 INT'L & COMP. L.Q. 240 (1987) [hereinafter Briggs, *Which Foreign Judgements?*].

47. Briggs, *Which Foreign Judgements?*, *supra* note 46, at 240.

procedural justice.”⁴⁸ A higher threshold test is suggested in the context that, although the principle of finality is an important factor, there are sometimes other overriding considerations:

Inasmuch as the foreign judgement will have been rendered under a system that may show a difference in the substantive law, and—especially in civil law countries—will almost invariably show a marked difference in the laws of procedure and evidence, in the schooling and selection of judges, and in the general political, social, and economic outlook (always to some extent reflected in the judicial machinery), a second local lawsuit would definitely not be a mere duplication of the prior foreign proceedings.⁴⁹

Under traditional common law principles, a foreign judgement will not be enforceable if it is contrary to the public policy of the enforcement state. The recent decisions of *Bachchan*⁵⁰ and *Telnikoff*,⁵¹ where American courts refused to recognise or enforce English libel judgements, reveal the dangers of undue sensitivity being deployed to this “safety-valve.” They also highlight in sharp focus how difficult it will be to achieve an effective public policy criterion under the proposed world-wide convention.⁵² If English libel law is stigmatised as contrary to the susceptibilities of U.S. state laws, given our shared histories, common law tradition and replication of libel law principles until 1964, the problems involving developing nations or civil codes are vastly multiplied. Chances of successful prediction may be as likely as defining how many angels can dance upon the head of a pin. The solution proposed herein is a very narrowly drawn definition with public policy impacted only where enforcement would violate the state’s most basic notions of morality and justice. In general, the public policy defence sets a limit to accept the

48. Ho, *supra* note 17, at 462. Policy interests are at stake here in relation to finality, preclusiveness, fairness to judgement creditors, and the conservation of judicial resources. Procedural justice in the realm of fairness to the judgement debtor and public policy are also cogent. Interest in finality is prominent in U.S. commentaries and case law. Baldwin v. Iowa Travelling Men’s Ass’n, 283 U.S. 522, 525 (1981); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS 2d, Vol. 1, cmt. § 98, at 298.

49. Hans Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44, 62 (1962).

50. *Bachchan v. India Abroad Publ’n*, 585, N.Y.S. 2d 661 (Sup. Ct. 1992).

51. *Telnikoff v. Matusevitch*, 702 A.2d. 230, 249 (Md. 1997).

52. See Kyu Ho Youm, *The Interaction Between American and Foreign Libel Law: US Courts Refuse to Enforce English Libel Judgements*, 49 INT’L & COMP. L.Q. 131 (2000).

foreign law and legal system as part of the enforcement court's duty to protect the fundamental social norms prevailing in the society in which enforcement is sought. As its name suggests, the public policy defence impacts "public" concerns and these concerns are primarily substantive in origin.

The other defences considered in this article are more relevant to a case-by-case analysis. A foreign judgement will not be enforced if it was obtained by fraud, which essentially concerns matters of procedural justice. Application of the defence does not, as some critics have suggested, unduly subvert the finality of judgements or show an improper lack of respect for the competence of foreign courts.⁵³ If a foreign claimant has obtained a judgement by fraud, he has obtained, by virtue of the judgement itself, a chose in action.⁵⁴ Arguably obtaining the property by fraud equates to the commission of a quasi-tort, separate and distinct from the claim actually brought in the foreign court. On this view, the defendant should be entitled to seek relief for the quasi-tort, requiring a fresh examination of some of the evidence.⁵⁵ The primary issue, thus, becomes the threshold test for the defendant to meet in order to convince the judgement-recognising court to engage in a reappraisal. Again, here is a scenario where jurisdictional rules and recognition principles need to be integrated more closely than at present. The optimal model in Part IV looks to the test of "good arguable case," as interpreted by the House of Lords in *Seaconsar Far East Ltd. v. Bank Markazi Iran*,⁵⁶ which governs extended jurisdiction under the English Civil Procedure Rules. The evidence in support of an application must state the claimant's belief that the claim has a reasonable prospect of success.

Another defence is that the foreign proceedings in which the judgement was obtained were contrary to natural justice, a defense rarely applied. Although administering justice is a priority, justice,

53. GEOFFREY C. CHESHIRE AND SIR PETER NORTH, PRIVATE INTERNATIONAL LAW 444 (Sir Peter North & J.J. Fawcett eds. 13th ed., 1999); see also J. G. Collier, *Fraud Still Unravels Foreign Judgements*, 51 CAMBRIDGE L.J. 441 (1992).

54. Adrian Briggs, *Foreign Judgements, Fraud and the Brussels Convention*, 108 L.Q.R. 532 (1991) [hereinafter Briggs, *Brussels Convention*]; Adrian Briggs, *Foreign Judgements; More Surprises*, 109 L.Q.R. 549, 550 (1992) [hereinafter Briggs, *More Surprises*].

55. Briggs, *Brussels Convention*, *supra* note 54, at 531; Briggs, *More Surprises*, *supra* note 54, at 550.

56. [1994] 1 A.C. 438.

out of deference to international relations, must be interpreted with a tolerant perspective. Part V considers the ambit of natural justice defense, with careful attention to the Brussels and Lugano Conventions to this specific defence, and concerns that the defendant has been given due notice and proper opportunity to be heard.⁵⁷ The reformulated test under the Brussels Regulation,⁵⁸ which came into effect on March 1, 2002, is evaluated against the nebulous concept of natural justice in Anglo-American tradition, as embodied by the decision of the English Court of Appeal in *Adams v. Cape Industries*.⁵⁹

The concluding section of this article reviews the need to reorder interests in the field of recognition and enforcement according to the newly proposed standard of jurisdictional propriety. It sets this standard in the contextual background, successful or otherwise, of a new universalist solution through the auspices of the Hague Conference towards a multilateral Convention. Furthermore, this section also considers the legitimate ambit and composition of discretionary defences to recognition and enforcement. The new dual model integrates jurisdictional principles into a jurisdictional competence test. The solution adopted would bridge the perceived ethnocentric gap that prevails under traditional English common law analysis. The edifice constructed would arguably allow for freer movement of judgements, an appropriate balance between certainty and flexibility and solicitation of legitimate rights of both claimant and defendant.

57. See Part V.

58. Council Regulation 44/2001/EEC, 2000 O.J. (L 12) 1. This replaces the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 8 I.L.M. 229 (entered into force Sept. 27, 1968) in all European Union member states except Denmark [hereinafter Brussels Convention]. The Brussels Regulation, like the Brussels Convention before it, deals with which member states' courts have jurisdiction in civil and commercial disputes.

59. *Adams v. Cape Indus.*, 1 All E.R. 929 (Eng. 1991).

II. JURISDICTIONAL COMPETENCE: ANGLO-AMERICAN PERSPECTIVES

A. *The American Position*

For many years the topic of recognition and enforcement of foreign judgements has been the scholar's delight. Students of conflict of laws, constitutional law, comparative law, international law, and civil procedure have explored its complexities and have proposed reforms. Yet, these efforts have not significantly influenced American law.⁶⁰

The statement above remains true in the modern world today. The existing U.S. jurisprudence on foreign-judgement recognition represents a "coat of many colors."⁶¹ The state recognition laws derive historically in part from the analysis in *Hilton v. Guyot*.⁶² Many domestic states have adopted the law of *Hilton* despite its neutralized precedential value following *Erie Railway Co. v. Tompkins*,⁶³ which did away with federal common law in diversity cases. Furthermore, "some . . . states have adopted the Uniform Recognition Act, the relevant provisions do not differ greatly from the rule of *Hilton*."⁶⁴ Thus, the extant sources of recognition law in the United States are the state common law derived from *Hilton* and the Uniform Recognition Act.⁶⁵

Pittman identified early U.S. decisions which refused to give preclusive effect to foreign judgements. "[A] foreign judgement [served as] prima facie evidence of the underlying claim . . . and that all defences that were or could have been raised in the foreign action[s] could be re-litigated in a North American action."⁶⁶

60. Adolf Homburger, *Recognition and Enforcement of Foreign Judgements: A New Yorker Reflects on Uniform Acts*, 18 AM. J. COMP. L. 367, 368 (1970).

61. See Jonathan Pittman, *The Public Policy Exception to the Recognition of Foreign Judgements*, 22 VAND. J. OF TRANSNAT'L L. 969, 973 (1989); Juan Carlos Martinez, *Recognizing and Enforcing Foreign Nation Judgements: The United States and Europe Compared and Contrasted—A Call for Revised Legislation in Florida*, 4 J. TRANSNAT'L L & POL'Y 49, 80–81 (1995); see Woodward, *supra* note 10, at 305–06.

62. *Hilton*, 159 U.S. 113, 133 (1895).

63. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); Pittman, *supra* note 61, at 973.

64. *Erie*, 304 U.S. 64; Pittman, *supra* note 61, at 973.

65. Pittman, *supra* note 61, at 973.

66. *Id.* (emphasis added); Robert B. von Mehren and Michael E. Patterson, *Recognition and Enforcement of Foreign Country Judgements in the United States*, 6 LAW

Subsequently, U.S. courts “began to recognize foreign judgements as conclusive on the merits as long as basic requirements were met.”⁶⁷ These requirements were set out by the United States Supreme Court in *Hilton v. Guyot*:⁶⁸

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction . . . upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries; and there is nothing to show either prejudice . . . or fraud in procuring the judgement, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgement, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgement was erroneous in law or in fact.”⁶⁹

In addition to these elements, the *Hilton* Court demanded reciprocity, which subsequent decisions largely disregarded;⁷⁰ yet the comity analysis was maintained and further developed by case law⁷¹ and the Uniform Recognition Act.

A second early decision on judgement enforcement is *Erie R.R. v. Tompkins*.⁷² In *Erie*, the Supreme Court eliminated

& POL'Y INT'L BUS. 37, 43 (1974) [hereinafter von Mehren and Patterson, *Foreign Country Judgments*].

67. Pittman, *supra* note 61, at 973.

68. *Hilton*, 159 U.S. 113.

69. *Id.* at 202–03 (1895).

70. *See, e.g.*, *Tahan v. Hodgson*; 662 F.2d 862, 867 (D.C. Cir. 1981); and *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert denied*, 405 U.S. 1017 (1972).

71. Note that the doctrine was further embellished in *Somportex Ltd.* where Judge Aldisert of the Third Circuit opined,

[c]omity is a recognition which one nation extends within its own territory to the . . . judicial acts of another. It is not a rule of law, but one of practice, convenience and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.

Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) *cert. denied*.

72. *Erie*, 304 U.S. 64.

federal common law and held that federal courts sitting in diversity jurisdiction shall apply state law.⁷³ This point was clearly espoused in *Johnson v. Compagnie Generale Transatlantique*,⁷⁴ when the New York state court rejected *Hilton* and determined that New York law unilaterally applied to actions brought in New York, which seek recognition and enforcement of foreign judgements.⁷⁵ The result has been a patchwork of state and federal court decisions interpreting or projecting state law, and more recent statutes. For instance, an English court's judgement might well be enforceable in New York, but not in New Jersey. Consequently, a new solution is needed to meet the goals of uniformity among and between states, as well as the acceptance of U.S. judgements in foreign courts.

Absent federal preemption, the trend is clearly away from *Hilton* and toward recognition similar to that of sister-state judgements. Such is the case with the number of states that adopted the Uniform Recognition of Foreign Judgements Act.⁷⁶ The rationale of the Act is to codify the common law and to increase the probability that U.S. judgements will be recognised abroad in states with reciprocity requirements.⁷⁷ In truth, the Act enjoys significant collinearity with the traditional English common law system.⁷⁸ For example, the Act only applies to foreign judgements that grant or deny recovery of a sum of money, but it does not apply to judgements for tax penalties, or for support in matrimonial matters or family matters.⁷⁹ In addition, it does not embrace orders for specific performance or injunctions. The Act essentially codifies the English requirement of finality in the

73. *Id.* at 78, *see* *Somportex*, 453 F.2d. at 440 (applying state law, as concerning the recognition of foreign judgements, pursuant to *Erie*, 304 U.S. 64).

74. *Johnson v. Compagnie Generale Transatlantique*, 152 N.E. 121 (N.Y. 1926).

75. The court stated, "a right acquired under a foreign judgement may be established in this state without reference to the rules of evidence laid down by the courts of the United States. Comity is not a rule of law, but it is a rule of 'practice, convenience and expediency' . . . It therefore rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgement." *Id.* at 123 (quoting *Froos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900)).

76. Uniform Foreign Money-Judgements Recognition Act, 13 U.L.A. 261 (Master ed. 1986 and 1998 Supp.); *see* *Bank of Montreal v. Kough*, 612 F.2d. 467, 470-71 (9th Cir. 1980).

77. von Mehren and Patterson, *Foreign Country Judgments*, *supra* note 66, at 42.

78. Pittman, *supra* note 61, at 973.

79. Uniform Foreign Money-Judgements Recognition Act, *supra* note 76, § 1.

foreign judgement.⁸⁰ Additionally, foreign judgement need not be recognised if the defendant lacked notice of the suit and an opportunity to defend against any claims,⁸¹ if the judgement was obtained by fraud, or if the underlying cause of action or claim for relief is repugnant to the public policy of the United States.⁸² Moreover, a foreign judgement is not considered conclusive if the foreign court was not impartial,⁸³ did not have personal jurisdiction over the defendant,⁸⁴ or did not have jurisdiction over the subject matter at issue in the case.⁸⁵

As is the position under traditional English principles, the U.S. state court must recognize the foreign court's jurisdictional competence over the defendant in order for the foreign judgement to be considered conclusive.⁸⁶ The Act sets out six instances in which the U.S. state court must recognise a foreign court's jurisdiction.⁸⁷ These instances are constrained to those in which the defendant (1) was personally served in the foreign

80. *Id.* § 2.

81. *Id.* § 4 (b)(1).

82. *Id.* § 4 (b)(3).

83. *Id.* § 4 (a)(1).

84. *Id.* § 4 (a)(2).

85. *Id.* § 4 (a)(3).

86. *See id.* § 4(a)(2). By common law principles developed from *Hilton v. Guyot*, a foreign court must have "jurisdiction over the cause" in the eyes of U.S. law, if the foreign judgement is to be recognized by a U.S. court. *Id.* § 4 Comment. Hence, when a foreign judgement is rendered against a U.S. national, U.S. courts have held that, "jurisdiction should be determined by our own standards of judicial power as promulgated by the Supreme Court under the due process clause of the Fourteenth Amendment." *C.f.*, *Hunt v. DP Exploration Co. (Libya)* 492 F. Supp. 885, 895 (N.D. Tex. 1980). As a consequence, the jurisdictional test replicates that used by U.S. courts to determine if a U.S. state judgement is entitled to full faith and credit, i.e. the "minimum contacts" test derived from *International Shoe v. Washington*, 326 U.S. 310 (1945) and its progeny. Moreover, minimum contacts is traditionally established when the defendant conducted business in the foreign jurisdiction or shipped products there. *C.f.*, *Ackerman v. Levine*, 788 F.2d. 830, 838 (2d Cir. 1986) (applying minimum contacts test of *International Shoe*). Jurisdictional competence may also be predicated upon the defendant consenting to the foreign court's jurisdiction, either explicitly in a prior agreement between the parties, or impliedly through the defendant's appearance and participation in the foreign proceeding. *C.f.*, *Ingersoll Milling Mach. Co. v. Granger*, 631 F. Supp. 314, 317 (N.D. Ill. 1986). It is evident that U.S. courts recognise jurisdiction based on consent, even though the foreign court may not have any other basis for jurisdiction. However, a U.S. court will not deem the defendant to have consented to the foreign court's jurisdiction if the defendant's appearance in the foreign court was solely to contest the foreign court's jurisdiction. *C.f.*, *Royal Bank of Canada v. Trentham Corp.*, 491 F. Supp. 404, 406 (S.D. Tex. 1980).

87. *See* Uniform Foreign Money-Judgements Recognition Act, *supra* note 76, § 5(a).

jurisdiction;⁸⁸ (2) appeared voluntarily in the foreign proceeding other than to contest jurisdiction;⁸⁹ (3) agreed to submit to the jurisdiction of the foreign court prior to the action;⁹⁰ (4) was domiciled in the foreign state;⁹¹ (5) had a business office in the foreign state and the suit arose out of the conduct of that business;⁹² or (6) operated a motor vehicle or aircraft in the foreign jurisdiction and the suit arose out of that operation.⁹³ Evidently, the Act contemplated jurisdiction according to U.S. principles, a fact highlighted by the provision that a U.S. court can recognise the foreign judgement on grounds not specified in the Act.⁹⁴

In evaluating the present U.S. statutes and decisions on foreign judgement recognition, we find a gallimaufry of principles and conclusions. Common law does not entitle a foreign country judgement conclusive "full faith and credit" like the judgements of sister states under the U.S. Constitution; rather the foreign judgement is entitled to comity. Moreover, a foreign country judgement, under the doctrine of *Hilton v. Guyot*, is entitled to conclusive effect only if "the foreign country which rendered the judgement gives reciprocity to judgements rendered in the courts of the U.S."⁹⁵ Clearly, the modern trend in U.S. courts is to recognise the foreign judgement if all the elements of due process and civilized procedures are met; but there still exist certain well-recognised defences to the enforcement of a foreign judgement such as fraud, natural justice or public policy contrary to the judgement. Overall, there is no uniformity in U.S. courts as to when and under what circumstances a foreign judgement will be given conclusive effect. Instead, it is "a matter of individual state common law and whether the particular state has adopted the Uniform Recognition Law."⁹⁶ Not all states have done so,

88. *Id.* § 5(a)(1). *But see id.* § 4(b)(6) (permitting the court not to recognise jurisdiction based solely on personal service if the foreign forum was "seriously inconvenient").

89. *Id.* § 5(a)(2).

90. *Id.* § 5(a)(3).

91. *Id.* § 5(a)(4).

92. *Id.* § 5(a)(5).

93. *Id.* § 5(a)(6).

94. *See id.* § 5(b).

95. Joseph J. Simeone, *The Recognition and Enforceability of Foreign Country Judgements*, 37 ST. LOUIS U. L.J. 341, 357 (1993).

96. *Id.*

creating a situation where there is no national uniformity as to when and under what circumstances a foreign judgement will be enforced in the courts of the United States.⁹⁷

This beguiling uncertainty harms the United States during significant increases in transnational trade and investment.⁹⁸ Foreign distrust of the American judicial system handicaps U.S. negotiations of international trading contracts.⁹⁹ Furthermore, the difficulties attached to reciprocity make U.S. law determinative not only to the enforcement of foreign judgements therein, but also to the enforcement of U.S. judgements abroad. Reciprocity requirements are part of judgements recognition and enforcement law in many foreign nations. A befuddled creditor is consequently placed in an invidious position over identifying apposite state laws in the U.S. In essence, a U.S. judgement creditor seeking enforcement in a country requiring reciprocity will need to establish that a similar judgement would likewise be enforced in the originating U.S. court. This will not be problematic if the state that issued the judgement has adopted the Recognition Act.¹⁰⁰ Reciprocity also presents no difficulty in the context of the Brussels and Lugano Convention between E.U. and EFTA Contracting States, with harmonisation of jurisdiction and recognition principles, reciprocal arrangements, and free circulation of judgements. It will, however, cause severe concerns

97. *Id.* at 343.

98. See generally William Honey and Marc Hall, *Bases for Recognition of Foreign Nation Money Judgements in the U.S. and Need for Federal Intervention*, 16 SUFFOLK TRANSNAT'L L. REV. 405 (1993).

99. See von Mehren, *Recognition and Enforcement of Foreign Judgements*, *supra* note 32, at 278. In many countries, substantially less preclusive effect is accorded U.S. judgements than would be available to a comparable foreign judgement in the United States. U.S. judgements abroad encounter reciprocity requirements and are subject to the imposition of choice of law test. See Andreas F. Lowenfeld, *The Hague Judgements Convention: A Game Worth Playing?*, Paper delivered at the British Institute of International and Comparative Law (Oct. 29, 1998) (on file with author). The real problem with torts is the rest of the world's horror at how torts, particularly personal injury claims, are handled in the United States. The combination of contingent fees, no fee shifting, wide-ranging discovery, the role and behaviour of juries, frequent award of damages for "pain and suffering," less frequent but ever threatening award of punitive damages, and the sheer size of U.S. damage awards, scares the rest of the world, particularly manufacturers and insurance companies. It was this issue, more than any other, which led to the collapse of the U.S.-British negotiations in the 1970s.

100. Note that explicit in the purposes of the Recognition Act, is the hope that "[c]odification by a state of its rules on the recognition of money-judgements rendered in a foreign court, will make it more likely that judgements rendered in the state will be recognized abroad." Uniform Foreign Money-Judgements Recognition Act, *supra* note 76.

where a state has twinned the Recognition Act with a reciprocity criterion. The spectre of *renvoi* is implicated, in which the forum's jurisdiction rule "may require reference to the granting jurisdiction's rule for private international law purposes."¹⁰¹

It is self-evident that the possibility of over fifty separate and different rules continues to make matters difficult in explaining U.S. law to a foreign court.¹⁰² The laudable attempt to simplify and unify state law through the Uniform Recognition Act has been unsuccessful due to a large number of dissenting states. These states refuse to enter into the scheme because they are allied to the inclusion by some adopting states of *Hilton v. Guyot's* reciprocity requirement.¹⁰³ Hence, it is simply "not possible to discuss U.S. judgements recognition law in generalities without constant reference to exceptional cases."¹⁰⁴

A new standard test, based on the jurisdictional propriety model suggested herein, would reduce the present complexity and array of variables, and should lead to a better understanding of the relevant U.S. law by foreign courts. This universalist model would efficiently identify the tenets of international comity and integrate jurisdictional precepts, thus facilitating foreign enforcement of U.S. judgements. First, it is instructive to briefly analyse the ethnocentric and chauvinistic perspective that operates under English common law to judgement recognition.

101. See Ronald A. Brand, *Enforcement of Judgements in the United States and Europe*, 13 J.L. & COM. 193, 200-01 (1994).

102. See Robert B. von Mehren, *Enforcement of Foreign Judgements in the United States*, 17 VA. J. INT'L L. 401, 404-08 (1977) (arguing for a federal common law rule on the enforcement of judgements for practical reasons).

U.S. judgements may be denied enforcement abroad because a foreign court erroneously assumes that U.S. courts would not enforce its judgements. The presence of a single federal common law of enforcement would reduce the present complexity and should lead to a better understanding of the relevant U.S. law by foreign courts. This would make it simpler to show U.S. reciprocity and therefore easier to obtain foreign enforcement of U.S. judgements.

Id.

103. GA. CODE ANN. §§ 9.12-114 (1993); IDAHO CODE § 10-1404(2) (g) (Michie 1990); MASS. GEN. LAWS ANN. Ch. 235 § 23A (West 1986); OHIO REV. CODE ANN. § 2329.92 (2001) Table T-1 under Ohio section; N.H. REV. STAT. ANN. § 524.11 (1997) (requiring reciprocity to enforce a Canadian judgement); see, e.g., *Corporacion Salvadorena de Calzado, S.A. v. Injection Footwear Corp.*, 533 F. Supp. 290, 299 (S.D. Fla. 1982); see EUGENE F. SCHOLES ET AL., CONFLICT OF LAWS at 1191 (3d ed. 2000).

104. See Brand *supra* note 101, at 200.

B. *The English Common Law Position*

Since the seventeenth century, English courts have recognised and enforced foreign judgements at common law.¹⁰⁵ The older cases based this privilege solely on the ground of comity, with reference to the law of nations requirement that one country's courts assist those of another.¹⁰⁶ The doctrine of obligation, however, supplanted the doctrine of comity in the nineteenth century and prevails to modern days. The doctrine vested a new right in the creditor and imposed a new obligation on the debtor at the instance of the foreign court.¹⁰⁷ In no sense does the foreign judgement creditor ask an English court to enforce a foreign-created right, for his obligation was created inherently from English private international law.¹⁰⁸ Furthermore, the available defences for such an action are exclusively English legal creations. In essence, the English court enforces an English-created, not a foreign-created, obligation.¹⁰⁹ As this section exemplifies, the "obligation" is peculiarly English-centric and fails to consider the jurisdictional principles of a foreign, non-English court.

The traditional English common law model operates as a corollary to the Brussels and Lugano Convention principles relating to recognition and enforcement, and upon consistent jurisdiction between Contracting European and EFTA States.¹¹⁰ While the Convention's scope is limited to "civil and commercial" matters, English recognition and enforcement of judgements in matters outside civil and commercial issues will still be based on the common law, or if a bilateral treaty exists under Part II of the Administration of Justice Act 1920, or the Foreign Judgements

105. SACK, *supra* note 19, at 342, 381–82.

106. *Roach v. Garvan*, 1 Ves. Sen. 157, 158 (1748).

107. *Russell v. Smyth*, 9 M & W 810, 819 (1842); *Williams v. Jones*, 13 M & W 628, 633 (1845); *Schibsby v. Westenholz*, 6 L.R. QB. 155, 159 (1870), where Blackburn J. asserted:

We think that . . . the true principle on which the judgements of foreign tribunals are enforced in England is . . . that the judgement of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgement is given which the courts in this country are bound to enforce; and consequently that anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action.

Id.

108. Dennis Campbell and Dharmendra Popat, *Enforcing American Money Judgements in the United Kingdom and Germany*, 18 S. ILL. U. L.J. 517, 528–29 (1994).

109. J.D. MCLEAN, *THE CONFLICT OF LAWS*, 136–56, 137 (Sweet and Maxwell 2000).

110. Collier, *supra* note 53, at 442–43.

(Reciprocal Enforcement) Act 1933.¹¹¹ Significantly, these traditional common law principles are still determinative to judgements from the Americas, Africa, Asia and most countries in Eastern Europe and the Middle East.¹¹² Consequently, judgements from the United States, Japan, China, Brazil or Egypt can only be enforced at common law.

A fundamental dichotomy exists between the enforcement of judgements under the Brussels and Lugano Conventions and common law, a distinction significant to the judgement debtor.¹¹³ The Conventions' tenets of simplification and speed allow for expedited recognition and enforcement of judgements throughout the Contracting States.¹¹⁴ Basically, it is provided that no defence will generally exist where the defendant alleges either a lack of jurisdiction in the original court or that it decided the dispute incorrectly. Hence, the requisite advice for such a client would be to fully contest the matter before the first adjudicating court, and not to allow a judgement by default. Clearly, "he has little to gain from keeping his powder dry."¹¹⁵ The position, however, radically differs from common law, which allows a direct challenge to the adjudicating court's jurisdiction and a far wider range of effective defences. Tactically, the client's position depends upon whether the adjudicating court is a Contracting State or non-Contracting State.

111. The Foreign Judgements (Reciprocal Enforcement) Act of 1933 provides for the recognition and enforcement of money judgements given by foreign countries (including those of Commonwealth countries). Like the 1920 Act, it applies only to judgements of countries to which it has been extended by Order in Council, on the basis of their having made reciprocal provision for the recognition and enforcement of U.K. judgements. This Act is more important than the Act of 1920 because it is drafted in much more detail, and contains specific rules on when foreign courts are deemed to have jurisdiction for the purposes of the Act, and on what defences the defendant may set up in opposition to an application to register a foreign judgement. These rules are modeled very closely on those of the common law. Registration of a judgement under the Act is available as of right instead of merely at discretion as under the Act of 1920.

112. Collier, *supra* note 53, at 442.

113. *Id.* at 442-43. Note that a judgement creditor seeking to enforce a foreign judgement in England at common law cannot do so by direct execution of the judgement, but must bring an action on the foreign judgement. Hence, a creditor can apply for summary judgement under Part 24 of the Civil Procedure Rules on the ground that the defendant has no real prospect of successfully defending the claim; and if the application is successful, the defendant will not be allowed to defend at all.

114. Collier, *supra* note 53, at 442-43.

115. ADRIAN BRIGGS AND PETER REES, NORTON ROSE ON CIVIL JURISDICTION AND JUDGEMENTS 239 (Lloyds of London Press, 1993).

1. English recognition of the originating court's jurisdictional competence

A judgement debtor's best defense is to assert that the foreign adjudicating court lacked jurisdiction over him. Thus, the English court must recognise the foreign court's jurisdiction. Having jurisdiction under its own rules is insufficient.¹¹⁶ Since the second half of the nineteenth century when English common law relating to jurisdiction was based on presence and submission, a radical transformation extended exorbitant jurisdiction (now under Rule 6.20 of the Civil Procedure Rules), and the test of appropriateness (jurisdictional propriety) came to dominate the jurisdictional enquiry. No longer is it true to simply assert that an English court assumes jurisdiction on the grounds of presence and submission. An English court may assume jurisdiction over an absent defendant if England is the *forum conveniens*, but may decline jurisdiction against a defendant who is present in England if another forum is more appropriate.¹¹⁷ Unfortunately, there has not been a reciprocal shift in attitude to jurisdictional competence issues in cases concerning foreign judgements where antediluvian and anomalous treatment still governs. No integration applies between jurisdictional principles and foreign judgement recognition.¹¹⁸

a. presence or residence

Of the five cases listed in *Emanuel v. Symon* in which English courts will enforce a foreign judgement, "residency," "presence," and submission remain active concepts in discussing modern jurisdictional competence.¹¹⁹ Specifically, courts will enforce a foreign judgement "where [the defendant] was a resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; [and] where he has contracted to submit himself to the forum in which the

116. *Buchanan v. Rucker* (1808) 32 Eng. Rep. 546 (K.B. 1808); see also *Singh v. Rajah of Faridkote* A.C. 670, 684 (1894) (appeal taken from India).

117. See Patrick Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 128 (1992).

118. JAFFEY ON THE CONFLICT OF LAWS 157 (C.M.V. Clarkson & Jonathan Hill eds., 1997).

119. *Emanuel v. Symon*, 1 K.B. 302, at 309 (1908) (repeating observations made by Fry J. in *Rousillon v. Rousillon*, 14 Ch. D 351, 371 (Eng. 1880)).

judgement was obtained.”¹²⁰ In evaluating the test of “residence,” it is necessary to examine whether residency or mere transitory presence when process is issued, will suffice. Additionally, the connection test is important for corporations, being an artificial concept and not a natural individual, for which the concept of residence/presence can only be applied in a superficial and attenuated form.

A. Presence or Residence of Corporations within the Jurisdiction of the Foreign Court

The reference in *Emanuel* to “when the action began,” relates to when process of the foreign courts was served on the defendant, and not when it was issued from that court.¹²¹ This time reference makes irrelevant the fact that the defendant was present in the foreign country when the cause of action accrued, but subsequently departed before proceedings commenced. Until quite recently, foreign jurisdictional competence required residence, not simply transitory presence.¹²² In *Adams v. Cape Industries*,¹²³ however, the Court of Appeal affirmed, *en passant*, that presence, not residence, sufficed. Their Lordships referred to the early authority of *Carrick v. Hancock*,¹²⁴ which asserted that serving the defendant during his short visit in Sweden gave Swedish courts sufficient jurisdiction over him. In any event, he submitted to foreign jurisdiction by taking part in the proceedings. *Carrick* predicated jurisdiction by presence upon territorial dominion with “all persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its Courts.”¹²⁵ *Adams*, following earlier authorities,¹²⁶ held that physical presence was sufficient,

120. *Emanuel v. Symon*, 1 K.B. 302, 309 (1908) (citing *Rousillon v. Rousillon*, 14 Ch. D 351, 371 (Eng. 1880)).

121. Collier, *supra* note 53, at 442-43

122. DICEY AND MORRIS ON THE CONFLICT OF LAWS, *supra* note 6, Rule 37.

123. 1 All. E.R. 929 (Ch. 1991); J. G. Collier, *Conflicts and Company Law Combine to Bar Enforcement of Asbestos Damages*, CAMBRIDGE L.J. 416 (1990); P. B. Carter, *Private International Law*, 61 BRIT. Y.B. INT'L. L., 395, 402-03 (1991):

124. *Carrick v. Hancock*, 12 T.L.R. 59, 59-60 (Q.B. 1895).

125. *Id.*

126. *Adams v. Cape Indus.*, 1 All E.R. 929, 1002 (Ch. 1991) (citing *Singh v. Rajah of Faridkote*, A.C. 670P.C. (1894)); *id.* at 1003 (citing *Employers Liab. Assurance Corp. Ltd. v. Sedgwick, Collins & Co. Ltd.* 1927 A.C. 95).

leaving uncertain the issue of whether residence without presence at the time of service of process would also suffice.¹²⁷

Presence, as opposed to residence, enjoys the virtues of simplicity and ease of application. It also replicates a basis of English court jurisdiction.¹²⁸ However, where English jurisdiction is invoked on the basis of mere temporary presence, the *forum non conveniens* doctrine will allow a stay of action if England is an inappropriate forum.¹²⁹ Here, jurisdictional principles and jurisdictional competence diverge as international comity principles have unfortunately been subjugated in favour of the obligation theory viewed introspectively through blinkered English eyes.

As for the presence or residence of corporations within the foreign court's jurisdiction, the fact that a corporate defendant is not a natural person, makes somewhat artificial the ascription of jurisdictional competence. Prior to *Adams*, courts had held a company present in a foreign country where it conducted business on a definite and somewhat reasonably permanent place at the time proceedings commenced.¹³⁰ A corporation could also establish presence through a representative who possessed the power to conclude contracts on the corporation's behalf without submitting them to the company for prior approval.¹³¹ Thus, a representative that was a mere "mouthpiece" or channel of communication was insufficient to establish presence.

*Adams v. Cape Industries*¹³² reveals that matters of jurisdictional competence have been left to the judiciary's solipsistic determination. The plaintiffs in 205 consolidated actions sought to enforce a default judgement against the defendants in a U.S. District Court sitting in the State of Texas. The main question was whether the defendant, an English parent company of a group of subsidiaries which mined and marketed asbestos in South Africa, and a wholly owned subsidiary, Capasco, were present for the purposes of the jurisdiction of the Texas court. The

127. *Id.* at 1004.

128. *Colt Indus., Inc. v. Sarlie*, 1 W.L.R. 440, 444 (1966); *Baroda v. Wildenstein* 2 Q.B. 283, 292 (1972); *Campbell and Popat*, *supra* note 108, at 535.

129. JONATHON HILL, *THE LAW RELATING TO INTERNATIONAL COMMERCIAL DISPUTES* 243 (Lloyds of London 1994).

130. *Littauer Glove Co. v. F.W. Millington*, 44 T.L.R. 746 (K.B. 1928).

131. *See, e.g., Sfeir & Co. v. Nat'l. Ins. Co. of New Zealand Ltd.*, 1 Lloyd's Rep 330 (Q.B. 1964); *Vogel v. R. & A. Kohnstamm Ltd.*, 1973 Q.B. 133 (Eng C.A.).

132. 1 All. E.R. 929 (Ch. 1991).

plaintiffs' actions, which alleged personal injuries from exposure to asbestos dust ("Tyler 2" actions), were brought between April 1978 and November 1979. The defendants had no place of business in the United States, but NAAC, their wholly owned American marketing subsidiary, incorporated in Illinois, had a place of business there until 31 January 1978. Cape then promoted a new Illinois corporation, CPC, whose shares were all owned by the former chief executive of NAAC. In marketing asbestos in the United States, neither NAAC, nor CPC, sold it for Cape or Capasco, but brought the asbestos from Cape's South African subsidiaries and resold it in the United States.

In a Texas federal district court, the plaintiffs were awarded damages for personal injuries and consequential losses allegedly suffered as a result of their exposure to asbestos fibres emitted from a Texas factory. The plaintiffs contended that the defendants failed to give direct or indirect proper warning of the dangers of asbestos. The plaintiffs sought to enforce the unsatisfied Texas judgement in English proceedings, but the Court of Appeal dismissed the judgement for lack of jurisdiction and failure to comport with the requirements of natural justice. The nebulous test for the natural justice defence will be discussed in Part IV. In relation to jurisdiction, Cape was "present" within the United States via the subsidiary presence in Illinois, allowing jurisdiction of the Texan court internationally. The Court of Appeal rejected this argument since neither subsidiary, NAAC or CPC, had the power to bind the defendants contractually, since it was *prima facie* their own businesses and not possible to lift the corporate veil, the principle of *Salomon v. Salomon & Co. Ltd.*¹³³ being applied in the ordinary way. Additionally, the court rejected the suggestion that where a group of companies forms an "economic unit" it may be treated as one company.¹³⁴

After a lengthy examination of relevant authorities, Slade LJ concluded that a company would be present in a foreign jurisdiction if demonstrated that either servants at the corporation carried on its business from a fixed place of business maintained by the corporation or, alternatively, that a representative of the corporation carried on the business of the corporation from a fixed

133. *Salomon v. Salomon & Co.*, A.C. 22 (1897). The principle is that from the date of incorporation the company is a legal entity separate from its members, who may deal with it in the same way as outsiders.

134. Carter, *supra* note 123, at 404.

place of business.¹³⁵ The difficulty, of course, with the English Court of Appeal's review of the Texas court's jurisdictional competence, and subsequent refusal to enforce their judgement, is that it shows a flagrant disregard for principles of international comity, commercial convenience, and free movement of judgements.¹³⁶ A more efficacious model needs to be constructed.

2. Submission

The only alternative basis of international jurisdiction in the eyes of English law is that of submission. The adjudicating foreign court will be internationally competent if the defendant voluntarily appears to defend the merits of the claim,¹³⁷ or if a contract provides that a foreign court is to have jurisdiction to settle a dispute. Prior to section 33 of the Civil Jurisdiction and Judgements Act 1982 it was implicitly determined in *Henry v. Geoprosco International*¹³⁸ that where a defendant had appeared before the foreign court to ask it to stay the action, and remit it to arbitration in accordance with an agreement between the parties, he had thereby submitted. However, section 33 was enacted to reverse such an assumption, and no submission will occur when the defendant contends: (a) that the court has no jurisdiction, (b) that he is seeking a stay or dismissal because the dispute should be arbitrated or adjudged by the courts of another jurisdiction; or (c) that his property should be protected from seizure in the proceedings.¹³⁹

It is noteworthy that no express provision applies to the defendant's voluntary challenge requesting the court not to allow service on him out of the jurisdiction under the foreign equivalent to Civil Procedure Rule 6.20 of the Civil Procedure Rules (formerly order 11, rule 1(1) of the Rules of the Supreme Court). The preponderance of academic opinion would consider such a contention as a submission, given the patent lacuna covering such a challenge in Section 33(1)(b) of the 1982 Act. If, as some foreign

135. *Adams v. Cape Indus.*, 1 All E.R. 929, 1014 (Ch. 1991).

136. *Id.* at 1001-02. Their Lordships inclined to the view that presence in the United States alone would be sufficient. *Id.* at 1002.

137. See *Murthy v. Sivajothi*, 1 All E.R. 721, 730 (1999).

138. *Henry v. Geoprosco Int'l Ltd.*, Q.B. 726 (1976).

139. *Indus. Maritime Carriers Inc. v. Sinoca Int'l Inc.*, 2 Lloyd's Rep. 552 (Q.B. 1996) (finding that a counterclaim to obtain the release of property threatened with seizure did not amount to a submission).

laws require, it is incumbent upon a defendant to file possible defences on the merits, whilst contesting jurisdiction, this does not equate to submission—provided he does not actually argue on the merits.¹⁴⁰ If an unsuccessful challenge to jurisdiction is followed by a defense on the merits, the defendant has submitted for section 33, whereas if the defendant thereafter decides not to contest the merits and to let the action go by default, he has not submitted to the jurisdiction for the purposes of section 33.¹⁴¹ As Kaye stresses, the choice for the defendant is clear: in the latter case, risk his assets in the judgement-state so as to preserve property elsewhere against enforcement; or, in the former case, try to safeguard judgement-state assets, but, in the process, risk rendering property elsewhere open to enforcement proceedings or losing the defense.¹⁴²

A defendant who expressly agrees to invoke the jurisdiction of state A will have submitted, even where he fails to appear and judgement is entered in default. For example, a foreign company's taking of shares on the contractual basis that disputes over membership be referred to a specific foreign court will amount to the shareholder's submission to that foreign court.¹⁴³ Agreement to submit to a specific court in state A is not tantamount to submission to all courts within that state.¹⁴⁴ Additionally, any written agreement to submit must be expressly made and cannot be implied.¹⁴⁵

Jurisdictional competence of the foreign court is, thus, strictly circumscribed in the chauvinistic eyes of traditional English common law. Apart from presence and submission, no other bases of jurisdiction will suffice: nationality of the parties; suitability of forum; place of accrual of the cause of action; the fact an English

140. *Marc Rich & Co. AG v. Societa Italiana Impianti PA* (No. 2) 1 Lloyd's Rep. 624, 633 (1992).

141. Peter Kaye, *Forensic Submission as a Bar to Arbitration*, 12 CIV. JUST. Q. 359, 366 (1993).

142. *Id.*

143. *Copin v. Adamson*, 1 Ex. D. 17 (1875).

144. *S.A. Consortium Gen. Textiles v. Sun & Sand Agencies Ltd.*, 1 Q.B. 279, 281 (C.A. 1978) (Goff & Shaw L.J.J.). It will be a matter of construction as to whether the submission through contractual agreement is to courts generally, or to a specific court. If the latter and the claim is brought in a different court within State A, then the contractual clause does not constitute submission, but the defendant's voluntary appearance may be if challenge is to the merits.

145. *Id.*

court would have itself taken jurisdiction upon similar facts,¹⁴⁶ and foreign equivalents of service of a claim form out of the jurisdiction are all rendered nugatory as bases of international competence. There is a lack of rationality between the appropriateness of venue test that now governs arrogation of *in personam* jurisdiction of an English court and the antediluvian rationale, rooted in nineteenth century concepts, that continue to prevail on the issue of jurisdictional competence.

III. A NEW MODEL OF JURISDICTIONAL PROPRIETY

If an international order lacking a supranational administration of justice is to be reasonably efficient and just, plaintiffs must be able to select a forum for litigation without according, in the general run of cases, decisive weight to whether the resulting judgement can, as practical matter, be enforced locally. . . . In the final analysis, rules and practices respecting the recognition and enforcement of foreign judgements should serve the same purposes as rules and practices respecting choice of law and the assumption of adjudicatory jurisdiction; they should foster stability and coherence in an inchoate international order where many aspects of life are not fully contained within any single State, but the administration of justice remains the charge of individual States.¹⁴⁷

It is submitted that the present Anglo-American tests for recognising foreign judgements need to be reformulated. The current law appears hopelessly anachronistic, and rationalisation is needed, as Harris has previously suggested, to show deference to foreign courts, in the name of comity, consistency and convenience.¹⁴⁸ English law presently recognises only two forms of jurisdiction as “proper” in an international sense, namely, the “presence of the defendant in the territory of the originating state when the action was commenced or the defendant’s consent—by taking part in the proceedings or by previous agreement—to the courts of that state exercising jurisdiction over the defendant.”¹⁴⁹

146. *Schibsy v. Westenholz*, 6 Eng. Rep. 155, 159 (Q.B. 1870).

147. Arthur T. Von Mehren, *Recognition and Enforcement of Foreign Judgements—General Theory and the Role of Jurisdictional Requirements*, 167 *Recueil Des Cours* 9, at 360 (1981).

148. Harris, *supra* note 40, at 482.

149. Joost Blom, *The Enforcement Of Foreign Judgements: Morguard Goes Forth Into The World*, 28 *CAN. BUS. L.J.* 373, 376 (1997).

Moreover, the law on recognition of foreign judgements needs to be integrated more closely into private international law.¹⁵⁰ The disparity in English law was heightened by the appellate decision in *Adams v. Cape Industries*, which drew a chasm between the common law principles that determine the English court's jurisdiction and those which, at the enforcement stage, determine whether a foreign court is to be regarded as a court of competent jurisdiction.

As for U.S. law, with some high profile exceptions,¹⁵¹ U.S. courts have taken a liberal stance on the recognition and enforcement of foreign judgements, but are clearly showing frustration that other states have not reciprocated in equal measure.¹⁵² At present, U.S. law is something of a smorgasbord with competing and varied state recognition principles dependent upon reciprocity, obligation, comity, the Uniform Foreign Money-Judgements Recognition Act, or a combination of each of these.¹⁵³ In truth, "there emerges no 'American Rule' for the recognition and enforcement of foreign judgements, but rather a crazy quilt arrangement of methods for their domestication."¹⁵⁴

An appropriate Anglo-American theoretical test for jurisdictional propriety twins together jurisdictional and recognition rules as one integrated process. Moreover, it is necessary to create freer movement of judgements at common law, which is arguably more appropriate for the modern world. There should be a realisation that, "in the twenty-first century the number of countries in which litigation may "belong" but in whose courts the quality of the judicial process would make us uneasy is small."¹⁵⁵ No doubt, the amount of respect we have for a particular foreign legal system is contingent on our familiarity with

150. Briggs, *Which Foreign Judgements?*, *supra* note 46, at 240; Borchers, *supra* note, 117, at 128.

151. See *supra* Part IV for discussion of foreign libel judgements and non-enforcement in the United States.

152. Fastiff, *supra* note 31, at 476.

153. von Mehren, *Recognition and Enforcement of Foreign Judgements*, *supra* note 32, at 271 (1994); Andreas Lowenfeld, *Thoughts About Multinational Judgements Convention: A Reaction to the Von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289 (1994).

154. Woodward, *supra* note 10, at 305.

155. J. D. MCLEAN & K. W. PATCHETT, THE RECOGNITION AND ENFORCEMENT OF JUDGEMENTS AND ORDERS AND THE SERVICE OF PROCESS WITHIN THE COMMONWEALTH, art. 263 (Commonwealth Secretariat, Marlborough House London).

it and on the degree of trust and confidence that we repose in it.¹⁵⁶ Indeed, it has been argued that this distrust is particularly acute in the context of the relationship between developing and developed nations.¹⁵⁷

The solution propounded herein would bridge this perceived ethnocentric gap. In essence, the cornerstone to extending recognition rules is "international harmony, and commercial practicality, not the fact that different states share similar bases for taking of jurisdiction."¹⁵⁸ Any new test needs to be dynamic, so that it can preserve the possibility of altering the scope of the recognition rules in a changing world. As von Mehren has stated, "an effort to state exhaustively the bases upon which jurisdiction can be asserted is stultifying and prevents changes in jurisdictional practice that may be needed to take into account future legal or economic developments."¹⁵⁹ A modern solution allows each legal system to tailor its rules concerning recognition of foreign judgements to the needs of the day.¹⁶⁰

A vital starting point in the move towards a new recognition and enforcement test, dynamic in nature, and promoting jurisdictional propriety, was provided by the striking contribution of the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*.¹⁶¹ Although the case itself was concerned with inter-provincial recognition in Canada, the adopted approach has been discussed to the recognition and enforcement of common law judgements granted outside Canada.¹⁶² A defendant served out of the jurisdiction of Alberta, let judgement against him go by default. As he had never been present within Alberta, nor had submitted to the jurisdiction of the Albertan court, he resisted enforcement of the judgement against him in British Columbia. Traditional common law principles under *Adams v. Cape*

156. Michael Quilling, *The Recognition and Enforcement of Foreign Country Judgements and Arbitral Awards: North-South Perspective*, 11 GA. J. INT. & COMP. L. 635, 638 (1981).

157. *Id.*

158. Harris, *supra* note 40, at 483.

159. von Mehren, *Recognition and Enforcement of Foreign Judgements*, *supra* note 32, at 281.

160. *Morguard Investments Ltd. v. De Savoye*, 76 D.L.R. 4th 256, 273 (1990); see *Symposium, Recognition of Extraprovincial and Foreign Judgements: The Implications of Morguard Investments Ltd. v. De Savoye*, 22 CAN. BUS. L.J. 2 (1993).

161. *Morguard Investments Ltd. v. De Savoye*, 76 D.L.R. 4th 256, 273 (1990).

162. *Id.* at 270.

Industries would not have obligated him by the Albertan judgement. The Supreme Court of Canada, however, took the contrary view. The court found that the Albertan court had taken jurisdiction in an appropriate manner upon the facts; its judgement was therefore entitled to recognition. The court possessed a *real and substantial connection* with the action brought before it and was therefore entitled to be jurisdictionally competent.¹⁶³ The *Morguard* test provides a much more flexible test than that under traditional Anglo-American principles, and may be met in the situation where the defendant neither resided in the judgement-granting state nor submitted to its courts.¹⁶⁴ The approach promoted international harmony and universality in that it was not concerned solely with Canadian federalism, but more generously with, "the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner."¹⁶⁵

It is instructive to look further at the rationale behind both the *Morguard* decision and the merits or otherwise of the "real and substantial connection test" taking centre-stage as a theoretical policy basis. First, the decision declared that the notion of comity would, moving forward, provide the touchstone for Canadian private international law. Although the court, through La Forest J., spoke as if this orientation was well-established, no Canadian court in modern times had put comity at the epicentre, as "the informing principle of private international law."¹⁶⁶ Prior to the decision, as Blom cogently identifies, the courts saw comity as unhelpful either as a justification or guide for private international law. The underlying premise for this conceptual misapprehension was that it was "grounded in the idea of the voluntary deference that a sovereign, or the sovereign court's, chose to pay to the courts of another sovereign." That pre-conception made it difficult, if not impossible, to extrapolate any definite test as to when comity should yield to the sovereign's self-interest and vice-versa. The *Morguard* Court, however, held that, "the real nature of . . . comity [is] an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among

163. *Id.* at 277.

164. *Id.* at 274.

165. *Id.* at 269.

166. *Id.* at 270.

sovereign states of adopting a doctrine of this kind.”¹⁶⁷ That doctrine, La Forest J. articulated, was reflected in rules of private international law that were “grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. What must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.”¹⁶⁸

Furthermore, the decision in *Morguard* stressed that the “modern conditions of international commerce and the movement of people were directly relevant to determining the appropriate response of conflict of laws to particular issues, such as the enforcement of monetary judgements.”¹⁶⁹ Subsequently, in *Hunt v. T & N*, the court “made it clear that the [appropriate manner] to decide whether an assumption of jurisdiction was proper was “not a mechanical counting of contacts or connections” but a decision guided by the requirements of order and fairness.”¹⁷⁰ The practical impact of this new governing test, as extended to international cases, was that a defendant who received notice that they were being sued in any Canadian court, or before a foreign court, would *ex necessitate* have to defend the action therein. An unpalatable alternative was the default judgement, enforceable in the defendant’s home territory under *Morguard* with no domestic avenue to defend the claim on the merits.¹⁷¹ The implication of the *Morguard* judgement is that the old common law recognition rules were based on a view of the world subject to discreditation, that much freer movement of judgements was required, and that the development of a world economy demanded reappraisal of the rules.¹⁷²

Although there is much to be carried forward from the *Morguard* decision, the demerit of the test originates from the flexibility in La Forest J.’s phrase, “order and fairness,” as well as the nebulosity of “a real and substantial connection” model. The *Morguard* decision holds a foreign judgement is enforceable provided the defendant is not treated unjustly. The unjustness

167. *Id.* at 268; Blom, *supra* note 149, at 373–75.

168. *Morguard Investments*, 76 D.L.R. 4th at 269; Blom, *supra* note 149, at 375.

169. Blom, *supra* note 149, at 375.

170. 109 D.L.R. 4th 16, at 42 (1993).

171. Blom, *supra* note 149, at 381.

172. *Id.*

question is answered by examining whether the judgement originating court was a natural or appropriate forum in that it meets the criteria of real and substantial connection-cum-order and fairness test.¹⁷³ This appears nebulous in opening up a limitless array of variables.¹⁷⁴ The difficulty, as Blom has identified, is in leaving "order and fairness" to a solipsistic, case-by-case evaluation.¹⁷⁵ It smacks of *ad-hocery*. The limitless vista of variables may encompass such factors as the language and traditions of the foreign legal system, the organisation of the local bar, the nature of the plaintiff's claim, the geographical situation of the foreign court, and the content of the relevant foreign law.¹⁷⁶ In reality, the current structure of Canadian law will have to develop incrementally those foreign judgements binding on Canadian defendants, as distinct from a minority that are not. The theoretical tools for squaring this circle on recognition and enforcement are the real and substantial connection-cum-order and fairness test, operating in tandem with the various common law defences to the enforcement of foreign judgements which, *prima facie*, take on new significance in the post-*Morguard* new legal order.

There are also a number of policy considerations in an optimal Anglo-American test for foreign judgement recognition: interests of finality in judgements; conservation of judicial resources and certainty in the process; preclusion; and sufficient flexibility to allow our recognition rules to evolve with contemporary conditions. A balance needs to be struck between certainty and flexibility. A negative of the *Morguard* approach is the open-textured result that is produced and the uncertainty of the test is exponentially greater in the international rather than the inter-provincial sphere.

Comity has a vital role to play in the overall structure of the new model, embodying concerns of both an international nature and of the individual parties. Comity principles reveal a beneficial deference to foreign courts, and fulfillment of the criterion described as "the need to become more tolerant of the systems of

173. *Id.* at 383.

174. *Id.*; see Black & Swan, *New Rules for the Enforcement of Foreign Judgements: Morguard Investments Ltd. v. De Savoye*, 12 ADV. Q. 489, 508-09 (1990).

175. Blom, *supra* note 149, at 383.

176. *Id.*

other countries.”¹⁷⁷ The exact constituents of comity requirements may be shifted to meet the needs of a new world order within the overall framework as defined.¹⁷⁸ A twin model is thus suggested. First, a presumption of recognition should apply with a rebuttable presumption of jurisdictional competence of a foreign court in the view of Anglo-American law.¹⁷⁹ Second, it should be incumbent on the defendant, a reversal of the existing burden, to show that it would be unjust to accord jurisdictional competence to the originating court, and to recognise or enforce the judgement.¹⁸⁰ As propounded, this new test would arguably provide a legitimate and effective counter-balance between the *scylla* of due deference to the foreign legal system and commercial practicality on one side of the scales, and *charybdis* of the judgement debtor’s concerns on the other.¹⁸¹ This new test put forward begs the question: When does unjustness to the defendant occur to tip the scales, and on what predicate does it become operable?

Morguard’s answer looked to whether the judgement originating court was a natural or appropriate forum in that it meets the criteria of the real and substantial connection-cum-order and fairness test. As identified there are certain problems with this approach. The test of appropriateness is fundamentally open-textured and turns on the exercise of the court’s discretion.

A more restrictive test is therefore preferred. At the outset of this section, it was stated that the reformulated test needed to integrate more effectively the jurisdictional rules with foreign judgements recognition. The threshold for a defendant’s effective challenge to the jurisdictional competence of a foreign court should equate to the unconscionability standard over restraint of foreign proceedings.¹⁸² Anglo-American courts, in certain circumstances, may grant an injunction restraining a party from

177. *Amchem Products Inc. v. British Columbia (Worker’s Compensation Board)*, 102 DLR (4th) 96, 104 (1993).

178. Harris, *supra* note 40, at 482.

179. *Id.* at 484.

180. *Id.*

181. *Id.*

182. See generally Stephen Males, *Comity and Anti-Suit Injunctions*, 1998 LLOYD’S MAR. & COM. L. W. 543; Trevor Hartley, *Comity and the Use of Antisuit Injunctions in International Litigation*, 35 AM. J. COMP. L. 48 (1987). In relation to powers of the English High Court in respect of injunctions, see the Supreme Court Act 1981, s. 37.

commencing or continuing as claimant in foreign proceedings.¹⁸³ They will only be persuaded by a party to the litigation dispute so to act in limited cases.

The rationale for this restrictive perspective concerns international comity. Although the claim form is directed at the individual, there is still an implicit interference with the foreign court's jurisdiction whenever an Anglo-American court grants an injunction restraining foreign proceedings. There are intrinsic comity problems attached to the exercise of the power to restrain foreign proceedings, and these impacted concerns have led to the discretionary power being cautiously exercised.¹⁸⁴ In a similar vein, refusal to recognise or enforce a foreign judgement also impinges on international comity as it can denigrate the processes of the foreign legal system. Caution should also be exercised in this regard. The extant position under English law, however, is that an anti-suit injunction will not be granted in circumstances which amount to a breach of comity.¹⁸⁵

The advantage of the unconscionability test is that it presents a high hurdle for a party to step over, and consequently will promote free movement of judgements, whilst allowing discretionary flexibility to meet rare cases of unjustness. The clear merit of the test is that it sends a significant message that goes to the very core of judgement recognition on an international playing field—it provides the claimant with an enforceable judgement provided that the defendant is not treated unjustly. It will not be easy to persuade the court that there has been unconscionable conduct. The English common law decisions in *South Carolina Insurance Co. v. Assurantie NV*¹⁸⁶ and *Midland Bank v. Laker Airways Ltd.*¹⁸⁷ provide an interesting comparison, and point of reference, for demarcating the constituents of unconscionability.

183. See BRIGGS AND REES, *supra* note 115, at 239; Richard Fentiman, *Current Issues in Int'l Commercial Litigation* (ed. Cheong et al) at 44-71.

184. See, e.g., *British Airways Board v. Laker Airways Ltd.*, 1 A.C. 58, 95 (H.L. 1985); *Société Nationale Industrielle Aerospatiale v. Jak*, 1 A.C. 871, 878 (P.C. 1987) (appeal taken from Brunei).

185. As a general rule, before an anti-suit injunction can properly be granted by an English court to restrain a person from pursuing proceedings in a foreign jurisdiction in cases of the kind under consideration in the present case, comity requires that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the indirect interference with the foreign court which an anti-suit injunction entails. *Airbus Indus. G.I.E. v. Patel*, 1 A.C. 119, at 138 (1999).

186. 1 A.C. 24 (H.L. 1987).

187. 1 Q.B. 689 (1986).

In the *South Carolina* case, a party to an English action sought to obtain discovery of documents from a third party in the United States. English procedure refuses this evidence to be obtained whilst it is permissible in U.S. pre-trial proceedings. The House of Lords determined that there was no unconscionable conduct as there was no interference with the due process of the English courts. Moreover, the English courts were still masters of their own procedure as it was incumbent upon the parties to obtain, either in England or abroad, the relevant evidence.¹⁸⁸ The simple fact that extra cost and inconvenience to the respective parties was implicated could not be characterised as interference with the court's control of its own process.¹⁸⁹

A different outcome occurred in *Midland Bank*, where the English Court of Appeal held that it was unconscionable conduct for Laker to bring an anti-trust suit in the United States against the Midland Bank and an injunction was therefore permissible to restrain those threatened proceedings. What was the policy rationale for this significant determination? In essence, the appellate court asserted that the bank had never submitted to U.S. anti-trust law or U.S. jurisdiction; there was no claim against it in England; and the alleged liability of the Bank arose out of banking acts done in England and intended to be governed by English law.¹⁹⁰ As in *South Carolina*, the exposure of a party to U.S. pre-trial discovery proceedings is not *prima facie* to be viewed as unjust or unconscionable. In exceptional cases such as *Midland Bank Plc.*, where it is palpably obvious that the action abroad is bound to fail, the claimant's foreign action will *per se* be stigmatised as unconscionable, as being frivolous and vexatious.¹⁹¹

The optimal dual test propounded presumes in favour of foreign judgement recognition, but reverses the burden on the defendant to demonstrate to the English court that enforceability is unjust, in the sense of unconscionability, thereby replicating the jurisdictional test for restraint of foreign proceedings. The efficacy of this model can be illustrated through the following hypothetical,

188. 1 A.C. 24, 41-43 (H.L.1987).

189. *Id.* at 42-43.

190. *Midland Bank v. Laker Airways*, 1 Q.B. 689, 700, 712-13 (1986). Another cogent factor was that the evidence of conspiracy under U.S. law was unsubstantiated, although the court hesitated to evaluate the overall weight of evidence in depth at the point of the anti-suit application. *Id.* at 698.

191. 1 Q.B. 689, 700-02, 712-13 (1986).

a slight variant of that expertly presented by Briggs, concerning a defendant against whom an action is brought in a foreign country. Let us suppose that X Ltd., a car manufacturer based in England, exports some of their products to Ontario, Canada, and through a succession of sales one of them ends up in the U.S. state of Virginia. Through a latent defect such as a defectively manufactured petrol pump system, the vehicle explodes in use and seriously injures a local Virginian resident. Suppose too that the Virginian sues the English manufacturer in Virginia. By applying traditional common law principles, unless the defendant is resident/present at the time of the originating process of the foreign courts, or alternatively submits to jurisdiction, then they may "cock a snook" at the Virginian proceedings. This solicitude in favour of the defendant defies rationalization. In this illustration, if an English court were to deny recognition to the Virginian judgement, even if Virginia were an appropriate forum for the litigation (local resident suing for harm negligently inflicted in home state), it still does not prevent the Virginia action from proceeding. The corollary of this is that the defendant's decision whether to appear to defend the merits will have to reflect the fact that if he suffers judgement against him, it precludes him from simply moving assets to Virginia. This probably will be of no concern to the English car manufacturer defendant because under pre-existing English common law principles on jurisdictional competence of a foreign court, his domestic assets are protected.¹⁹²

A different, more efficacious outcome, results under the suggested new model for Anglo-American foreign judgement recognition. The foreign Virginian judgement and jurisdiction would be presumptively valid and enforceable through the eyes of the foreign adjudicating court. No longer would the scales be skewed in favour of the defendants' solicitude. By reversing the burden on the defendant, X Ltd. would be swimming against the tide in raising an unjustness argument. If the claimant has brought proceedings in a presumptively valid foreign court, which is not an inappropriate forum to resolve the dispute, what substantial justification can there be for denying him recognition of his judgement? There are legitimate interests of the claimant that should be crystallised by adopting the dual model propounded.

192. See Briggs, *Which Foreign Judgements?*, *supra* note 46, at 254-56 (where this hypothetical situation is cogently identified and evaluated).

Also, the optimal solution will promote more obedience to foreign judgements in that fewer will now be denied recognition. An effective balance is struck between the policy concerns of certainty and flexibility.

Discretion is also built in to the system through the applicable defences to recognition of foreign judgements, but it is argued that any equitable system of recognition must provide fluid exceptions.¹⁹³ Defences to recognition will protect the legitimate interest of the defendant who received inadequate notice of proceedings, who had no opportunity to appear, or against whom the judgement was procured by fraud, or, if for some other reason, its recognition would be contrary to public policy. The scales are appropriately balanced between the legitimate interests of claimant and defendant, with a beneficial realignment of the rules on jurisdictional touchstones and jurisdictional competence in international disputes. We now focus our attention to the reformulated optimal tests for the defences, predicated on the grounds of public policy, fraud, and natural justice.

IV. DEFENCES TO RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS: NEW OPTIMAL TESTS

A. Present Anglo-American Public Policy Defenses

The public policy exception is an essential political tool to encourage reluctant member states to join the Hague Convention because it serves as a 'safety valve' for unforeseeable changes in the law. . . . In fact, the inclusion of the public policy exception in the Brussels Convention was 'excused, on the ground that it was seen to be an essential 'safety-valve', which would facilitate ratification of the Convention by Member States, jealous of preserving existing fundamental controls on recognition and enforcement of foreign judgements.' It may be better to include a mechanism where a member state may 'base refusal of [enforcement and recognition of a foreign judgement] upon a Convention provision, however vague [rather] than 'deliberately . . . violate the text of an international treaty.' Consequently, the public policy exception is an absolutely necessary political measure to

193. *Id.* at 256.

the adoption of the Hague Convention because it counters the fears of recalcitrant countries.¹⁹⁴

The public policy defence impinges upon state rather than individuated concerns, providing a limited discretionary role in the recognition and enforcement of foreign judgements. In general, U.S. courts have exhibited a tendency towards enforcing foreign judgements liberally, which would not normally be awarded in an intra-state context.¹⁹⁵ On both sides of the Atlantic, the public policy exception has been applied solicitously and rarely. One exception is provided by the recent U.S. state courts' refusal to accept English libel judgements.¹⁹⁶ The deleterious consequences of the misuse of this defence are evaluated in the following subsection and a new test is proposed to reflect the legitimate ambit of this "safety-valve."

In *Hilton v. Guyot*, the U.S. Supreme Court made it clear that it would not recognize a foreign judgement if doing so would contravene U.S. public policy.¹⁹⁷ The public policy exception, however, is not very well-defined. Although U.S. courts have uniformly exempted themselves from recognizing or enforcing a foreign judgement that contravenes state public policy, they have seldom actually denied recognition or enforcement. A notable aspect is that different policies or procedures within the foreign and U.S. forums will not necessarily trigger public policy concerns and deny recognition or enforcement.¹⁹⁸ The standard for denying

194. Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgements: Necessary or Nemesis?*, 18 LOY. L.A. INT'L & COMP. L. REV. 795, 817-18 (1996).

195. Note that the proposed Hague Convention is not likely to cover the following areas of law, where U.S. courts have applied the public policy exception: *Overseas Inns S.A. P.A. v. United States*, 685 F. Supp. 968 (N.D. Tex. 1988) (tax assessment); *Laker Airways Ltd v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (antitrust); and *Barry E. v. Ingraham*, 371 N.E. 2d 492 (N.Y. 1977) (adoption).

196. *Telnikoff v. Matusевич*, 702 A.2d 230, 249 (Md. 1997). *But see* Robert L. Spellman, *Spitting in the Queen's Soup: Refusal of American Courts to Enforce Foreign Libel Judgements*, 16 COMM. & L. 63 (1994).

197. *Hilton v. Guyot*, 592 U.S. 113, 164-65 (1895). *But see* *Adamsen v. Adamsen*, 195 A.2d 418 (1963); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3rd Cir. 1971), *cert. denied* 405 U.S. 1017 (1972).

198. *See* *Somportex*, 453 F.2d at 443 (enforcing English judgement even though substantial portion was for compensatory damages for loss of goodwill and for attorney fees items or which Pennsylvania law did not allow recovery); *Neporany v. Kir*, 5 A.D. 2d 438, 173 N.Y.S. 2d 146 (App. Div. 1958) (enforcing Quebec judgement for seduction and criminal conversation even though similar actions had been abolished in New York); *Compania Mexicana Radiodifusora Franteriza v. Spann*, 41 F. Supp. 907, 909 (N.D. Tex.

recognition is high and can only be invoked in clear-cut cases.¹⁹⁹ The U.S. Court of Appeals for the Third Circuit in *Somportex Ltd.* found grounds to deny enforcement when it “tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property.”²⁰⁰ A forum will estop a party from attacking a judgement on public policy grounds if that party initiated the foreign proceedings, unless the enforcing forum perceives an interest in the action besides protecting the litigant.²⁰¹

Liberal foreign judgement recognition frequently occurs in U.S. courts. The fact that a judgement obtained abroad could not have been obtained domestically, or that a cause of action pursued abroad could not be invoked in U.S. jurisdiction is insufficient to deny enforcement on public policy grounds.²⁰² In *Neporany v. Kir*,²⁰³ for example, the New York Appellate Division supported the enforcement of a Canadian judgement for seduction because “our public policy is not contravened by the enforcement of a money judgement arising from causes of action proscribed by Article 2-A, but which are recognized in the jurisdiction where the acts took place.”²⁰⁴ Subsequently, in *Gutierrez v. Collins*, the Texas Supreme Court enforced a Mexican judgement in a negligence action that included damages for moral reparations and injuries to plaintiff’s “reputation, dignity or honor,” even though such a cause of action did not exist under Texan law.²⁰⁵ The court determined that “the mere fact that these aspects of the law differ

1941), aff’d 131 F.2d 609 (5th Cir. 1942) (awarding costs and attorney fees against unsuccessful plaintiff in Mexican action notwithstanding fact that they would not be granted by the enforcing forum in similar circumstance).

199. U.S. courts have applied the public policy defence with laudable caution and solicitude. A blot on the landscape, however, is the recent treatment of English libel judgements. *Bachchan v. India Abroad Publications*, 585 N.Y.S. 2d 661 (N.Y. Sup. Ct. 1992); *Telnikoff v. Matusevitch*, 702 A.2d. 230, 249 (Md. 1997); *Ackerman v. Levine*, 788 F.2d 830, at 841 (2d Cir. 1986).

200. *Somportex Ltd.*, 453 F.2d at 443 (citing *Goodyear v. Brown*, 115 Pa. 514, 515 (1893)).

201. Note that this rule has generally been applied in divorce recognition cases. See, e.g., *Perrin v. Perrin*, 408 F.2d 107 (3d Cir. 1969); *Unruh v. Indus. Comm’n*, 301 P.2d 1029 (1956); *Rediker v. Rediker*, 221 P.2d 1 (1950).

202. *Minehan*, *supra* note 194, at 804; *Knothe v. Rose*, 392 S.E. 2d 570 (Ga. Ct. App. 1990).

203. *Neporany v. Kir*, 173 N.Y.S. 2d 146 (App. Div. 1958).

204. *Id.* at 148.

205. *Gutierrez v. Collins*, 583 S.W. 2d 312, 321–22 (Tex. 1979).

from ours does not render them violative of public policy” and that “there is nothing in the substance of these laws inimical to good morals, natural justice, or the general interests of the citizens of this state.”²⁰⁶

Although the Uniform Recognition Act covers most differences in law, it is vital to narrow the public policy exception for concerns over international comity, certainty in judgements, and international co-operation. Otherwise any differences in law could fall within this catch-all loophole:

As commerce becomes increasingly international in character, it is essential that businessmen recognize and respect the laws of those foreign nations in which they do business. They cannot expect foreign tribunals to have one set of laws for their own citizens and another, more favorable, set for the citizens of other countries. It is also essential that American courts recognize and respect the judgements entered by foreign courts to the greatest extent consistent with our own ideals of justice and fair play. Unfettered trade, good will among nations, and a vigorous and stable international—and national—economy demand no less.²⁰⁷

In truth, principles of international comity, deference to foreign legal systems, and *res judicata* demand a limited reading of the public policy defence. Forums should avoid being unduly sensitive to imagined superior judicial processes or substantive enactments at a state level. Interestingly, U.S. courts have been called upon to examine the limited public policy exception in a far wider variety of situations than their English counterparts. U.S. courts have enforced foreign default judgements. The high-water mark case is that of *Tahan v. Hodgson*, where the Appellate Court of the District of Columbia upheld an Israeli default judgement that a U.S. court would not have awarded.²⁰⁸ As Minehan identified, a U.S. court would refrain enforcing an Israeli judgement for two reasons.²⁰⁹ First, “the Israeli court entered a default judgement based on Israeli notice requirements which are inconsistent with U.S. notice requirements.”²¹⁰ Second, by piercing the corporate veil and entering a judgement against the

206. 583 S.W. 2d 312, 322 (Tex. 1979).

207. *Tahan v. Hodgson*, 662 F.2d 862, 868 (D.C. Cir. 1981).

208. *Id.*; Minehan, *supra* note 194, at 802.

209. *Tahan*, 662 F.2d at 868.

210. *Id.* at 867; Minehan, *supra* note 194, at 802–03.

defendant, the Israeli court violated U.S. public policy.”²¹¹ The *Tahan* court found that Israeli notice requirements are not so “repugnant to fundamental notions of what is decent and just” that U.S. public policy requires non-enforcement of the Israeli judgement.²¹² The court articulated that because the defendant was capable of, but chose not to, appear and present a viable defence in the Israeli court, he could not “fail to contest the Israeli plaintiff and then declare that he would have won.”²¹³ The court held that the Israeli court did not act repugnantly when it decided to pierce the corporate veil, particularly since the defendant did not present a case in the Israeli action.²¹⁴

Situations where U.S. courts enforce prejudgement interest awards, even where local law reviles such awards, illustrate another example of how the United States have adopted a generally constrained public policy defence. In *Ingersoll Milling Machine Co. v. Granger*, the appellate court enforced a Belgian judgement that embraced prejudgement interest.²¹⁵ The court determined that, “the mere fact that Belgian law permits prejudgement interest while Illinois law might not is not fatal to the Belgian award.”²¹⁶ The *Ingersoll* court followed the perspective adduced in *Hunt v. B.P. Exploration Co.*, where a Texas district court enforced an English judgement including prejudgement interest.²¹⁷ Despite the state law’s prohibition on prejudgement interest, the court found that this delineation, in an international context, did not violate “good morals and natural justice” as to fall within the public policy exception.²¹⁸ Local law concerns significantly vary from those required in an international setting.

In some cases where courts find public policy violations, there is some forum interest greater than merely protecting the litigant. *Laker Airways v. Sabena, Belgian World Airlines* illustrates how

211. *Tahan*, 662 F.2d at 867.

212. *Id.* at 866; Minehan, *supra* note 194, at 802–03.

213. *Tahan*, 662 F.2d at 867.

214. *Id.*; Minehan, *supra* note 194, at 802–03.

215. *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680, 691 (7th Cir. 1987).

216. *Id.*

217. *Hunt v. BP Exploration Co.*, 492 F. Supp. 885 (N.D. Tex. 1980); Minehan, *supra* note 194, at 802.

218. *Hunt*, 492 F. Supp. at 901.

states' interests impact public policy concerns.²¹⁹ The litigation arose out of Laker's antitrust suit against numerous other airlines, originally filed in the U.S. courts. Certain British airlines defendants responded by filing suit in the British courts, seeking an injunction preventing Laker from pursuing its claims against them in the U.S. courts.²²⁰ The British court ultimately granted the injunction. However, in the interim, Laker filed an action in the U.S. District Court for the District of Columbia seeking an anti-suit injunction which would prevent the remaining defendant airlines from seeking injunctions against Laker in the British courts. Laker contended that the egregious price-fixing behavior forced them out of business. The D.C. District Court granted the injunction and the defendants appealed.²²¹ The U.S. Court of Appeals for the District of Columbia Circuit subsequently held that the injunction was warranted on public policy grounds.²²²

The court recognized the foreign judgement, but determined that the public policy concerns behind issuing an anti-suit injunction were the same as those behind nonrecognition of foreign judgements. This, of course, mirrors the jurisdictional and propriety test and the optimal new model suggested in Part III of this Article. The court in *Laker Airways*, as Pittman has identified, "specifically held that the forum has a great interest in seeing that its important public policies are not evaded."²²³ The court then determined that "the defendants in this case were attempting to escape application of the antitrust laws to their conduct of business here in the United States. Since the antitrust laws were of admitted economic importance to the United States, the court held that U.S. interest and, hence, public policy, mandated issuance of the anti-suit injunction."²²⁴ In this limited sphere, state interests legitimately prevailed over foreign recognition.

219. *Laker Airways, Ltd. v. Sabena, Belgian World Airways*, 731 F.2d 909, 918 (D.C. Cir. 1984).

220. *Id.*

221. *Id.* at 919.

222. *Id.* at 932; Pittman, *supra* note 61, at 992.

223. *Laker Airways*, 731 F.2d at 931; Pittman, *supra* note 61, at 992.

224. *Laker Airways*, 731 F.2d at 931; Pittman, *supra* note 61, at 992.

U.S. courts have also refused, on public policy grounds, to enforce judgements that are penal in nature or involve taxation.²²⁵ A Luxembourg judgement that calculated an insolvent company's U.S. federal income tax debt at less than two hundred thousand dollars, when the Internal Revenue Service claimed it was a million dollars, was determined to violate the "inexpugnable public policy that favors payment of lawfully owed federal income taxes."²²⁶ In general, however, U.S. courts have applied the exception very narrowly (with the exception of foreign libel judgements) because the other grounds for nonrecognition serve adequately to protect the parties involved. The vital difference with this defence, in contrast to others, is that it serves the forum-recognizing interests and not individuated concerns. Thus, it is entirely rationale that the defence should be limited in scope.

English courts will refuse to enforce foreign judgements that are contrary to internal notions of public policy.²²⁷ The predominant case law on public policy has been focused on family law matters. For example, in *Vervaeke v. Smith*,²²⁸ it was determined by the House of Lords that to recognise a Belgian nullity decree invalidating a sham marriage, where the parties had no intention of living together as husband and wife, would be contrary to public policy.

Outside of the family law arena, it has been extremely difficult to determine the ambit of the public policy doctrine.²²⁹ Common examples usually stated include orders to pay damages for breach of a contract to kidnap or contrary to fundamental human rights.²³⁰ In other areas a more liberal approach has been applied, and exemplary damage awards, for instance, are recognised as totally acceptable. In *SA Consortium General*

225. See *Republic of the Philippines v. Westinghouse Electric Corp.*, 821 F. Supp. 292 (D.N.J. 1993). Note that some U.S. courts will also refuse to enforce foreign judgements that relate to a wrongdoer's malfeasance.

226. *Overseas Inns SA P.A. v. U. S.*, 685 F. Supp. 968, 972 (N.D. Tex. 1988).

227. See generally *Ottis Kahn-Freund*, 39 *Grotius Society* 39 (1953); F.A. MANN, *FOREIGN AFFAIRS IN ENGLISH COURTS* Ch. 8.

228. 1 A.C. 145 (1983).

229. In *Soleimany v. Soleimany*, 3 W.L.R. 811, 821 (C.A. 1998) for example, there are *obiter dicta* in the Court of Appeal to the effect that it would be against public policy to recognise a foreign judgement enforcing a contract in the situation where the foreign court has found as a fact that it was the common intention of the parties to commit an illegal act in a state which England regards as a foreign and friendly state.

230. BRIGGS AND REES, *supra* note 115, at 265.

Textiles v. Sun and Sand Agencies Ltd.,²³¹ it was clearly stated by Lord Denning that there was, "nothing contrary to English public policy in enforcing a claim for exemplary damages, which is still considered to be in accord with the public policy in the United States and many of the great countries of the Commonwealth."²³² Certainly, it would be egregious to widely stigmatise foreign judgements as contrary to internal concepts of English public policy, and the famous statement of Justice Cardozo in *Loucks v. Standard Oil Co. of New York*,²³³ seems particularly apposite as a guiding standard:

We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.²³⁴

As with the American perspective on public policy, it is the recognizing court's state interests that are impinged, not individual party matters.

B. Public Policy Defense and the New Model

This Article has proposed a new optimal model of jurisdictional propriety that is based upon international comity theory combined with a certain test that integrates jurisdictional rules more fully. It would be unfortunate if the beneficial effects of this optimal solution were downplayed via overbroad use of the public policy defence. International comity, as defined in *Morguard*, also has a crucial role to play in determining the legitimate ambit of any discretionary element in the process, whether it be public policy, fraud or natural justice. In balancing the public policy exception with the enforcement of foreign libel judgements, for example, Judge Chasanow added his imprimatur to the relevant policy debate:

231. SA Consortium General Textiles v. Sun and Sand Agencies Ltd., 1 Q.B. 279, 300 (1978).

232. *Id.*

233. *Loucks v. Standard Oil Co. of New York*, 22 N.Y. 99 (1918).

234. *Id.* at 111.

Our interest in international goodwill, comity and *res judicata* fostered by recognition of foreign judgements must be weighed against our minimal interest in giving the benefits of our *local* libel policy to residents of another country who defame foreign public figures in foreign publications and who have no reasonable expectation that they will be protected by the Maryland constitution. Unless there is some United States interest that should be protected, there is no good reason to offend a friendly nation like England by refusing to recognize a purely *local* libel judgement for a purely *local* defamation.²³⁵

The apposite test for any public policy defence in libel is of generic rationality. The public policy exception should be limited to cases of serious injustice in which the original claim is repugnant to fundamental notions of what is decent and just in the recognition forum.²³⁶ The public policy defence, unlike natural justice or fraud, is not rooted by individuated concerns but properly operates to serve the interests of the *state*. Any acceptable system on recognition and enforcement of foreign judgements must leave some kind of "safety valve" for violation of public policy. In article 28(1)–(f) of the Preliminary Draft of the multilateral convention, there is a defence provided if "recognition and enforcement would be manifestly incompatible with the public policy of the State addressed."²³⁷ Understandably, no definition is provided on the constituents of "manifest incompatibility." What is vital is that any convention, among states with basically shared values, should contain a definition of public policy that is narrowly drawn. From the analysis herein, enforcement should only be denied where it "would violate the forum's state's most basic notions of morality and justice."²³⁸ Public policy sets a limit on acceptance of foreign laws and legal systems. The operable limit is the duty of the enforcement court to protect the fundamental social norms prevailing in the society in which enforcement is sought.

235. *Telnikoff v. Matusevitch*, 702 A.2d. 230, 257 (Md. 1997).

236. *Id.* at 255–56.

237. See Preliminary Draft Hague Judgements Convention, *supra* note 44.

238. *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*, 508 F.2d. 969, 974 (2d. Cir. 1974).

C. Fraud As A Defence: A Reappraisal

1. The English experience

In both a foreign judgement and an English judgement, a defendant usually cannot ask the court to reopen the merits of the case or put forward fresh evidence, unless it was not reasonably discoverable at the time of the trial abroad, at which time it would have altered the result.²³⁹ However, the one exception is fraud. Fraud will unravel most things, and certainly unravels a foreign judgement.²⁴⁰ Fraud has been defined as extending to incorporate, "every variety of *mala fides* and *mala praxis* whereby one of the parties misleads and deceives the judicial tribunal."²⁴¹

*Abouloff v. Oppenheimer & Co.*²⁴² and *Vadala v. Lawes*²⁴³ clearly established that a judgement debtor may defend himself in England by showing that the judgement was obtained by fraud, regardless of whether the foreign court already investigated the alleged fraud. In England, a separate trial will investigate credible allegations of fraud, even though it consequentially necessitates a re-trial of the merits of the decision of the original court. Fraud, in effect, drives a coach and horses through the policy favouring conclusiveness of foreign judgements and finality of litigation. It comports to the *révision au fond* doctrine under French law.

The ambit of the fraud defence is not restricted to the preliminary requirement of fresh evidence which would be required in a purely domestic case. As stated in *McIlkenny v. Chief Constable of the West Midlands*,²⁴⁴ a case involving perjury, "where the issue at the first trial was which of two parties or their witnesses was committing perjury, it was not sufficient to aver that the judgement was obtained by perjury, since that is no more than to say the decision ought to have gone the other way. There must be sufficient fresh evidence to support the allegation."²⁴⁵

239. Collier, *supra* note 53, at 441.

240. BRIGGS AND REES, *supra* note 115, at 262.

241. *Jet Holdings v. Patel*, 1 Q.B. 335, 347 (1990).

242. *Abouloff v. Oppenheimer & Co.*, 10 Q.B.D. 295 (1882).

243. *Vadala v. Lawes*, 25 Q.B.D. 310 (1890). At issue here was a false claim by the plaintiff that certain bills of exchange were mercantile when in reality they had been given for gambling debts.

244. *McIlkenny v. Chief Constable of the West Midlands*, 1 Q.B. 283 (1980).

245. *Id.* at 333.

Moreover, *Syal v. Heyward*²⁴⁶ established that it does not matter that the unsuccessful party in the foreign proceedings refrained from raising the fraud defense in those proceedings, although the facts were known to him at all material times. This laxity to judgement debtors has been castigated as materially and illogically prejudicing the finality of judgements.²⁴⁷ Certainly it will be viewed abroad as chauvinistic in that it supposes unfair results in certain foreign jurisdictions. It is supported herein on the premise that the fraud defence is of transcendent importance.

2. U.S. treatment of the fraud defence

A different rationale on the fraud defence is applied by U.S. courts. In *Hilton v. Guyot*, the U.S. Supreme Court determined that a foreign judgement is not entitled to recognition if the judgement was procured by fraud.²⁴⁸ A delineation is made by courts in the United States between intrinsic and extrinsic fraud. On one side of the scales, if the fraud in procuring the foreign judgement is intrinsic—that is, if the fraud is “related to matters that were or could have been litigated”²⁴⁹ in the foreign proceedings, then U.S. courts generally will recognise the foreign judgement.²⁵⁰ On the other side of the scales, if the fraud is extrinsic—that is, “if the fraud deprives a party of an opportunity to present adequately his claim or his defence,”²⁵¹ then U.S. courts will bar recognition of the foreign judgement.²⁵² Moreover, as Pittman states, “[a]t least one court held that extrinsic fraud must also be a “fraud on the foreign court” in order to bar recognition of the foreign judgement.”²⁵³

246. *Syal v. Heyward*, 2 K.B. 443 (1948).

247. See, e.g., *CHESHIRE AND NORTH*, *supra* note 53, at 444.

248. *Hilton v. Guyot*, 159 U.S. 113, 205 (1895); see *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 442 (3d Cir. 1971), *cert denied*, 405 U.S. 1017 (1972); see generally von Mehren and Patterson, *Foreign Country Judgments*, *supra* note 66, at 59 (explaining that U.S. courts uniformly state that recognition of a foreign country judgement will be denied if the judgement was procured by fraud).

249. *Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co.*, 470 F. Supp. 610, 615 (S.D.N.Y. 1979) (quoting *Overmyer v. Eliot Realty*, 83 Misc. 2d 694, 705, 371 N.Y.S. 2d 246, 258 (1975)).

250. von Mehren and Patterson, *Foreign Country Judgments*, *supra* note 66, at 60.

251. R. Doak Bishop and Susan Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L & COMP. L. Q. 425, 434 (1982).

252. von Mehren and Patterson, *Foreign Country Judgments*, *supra* note 66, at 60.

253. *Fairchild*, 470 F. Supp. at 615; Pittman, *supra* note 61, at 980.

The Uniform Recognition Act provides that a court may deny recognition of a foreign judgement if the judgement was obtained by fraud.²⁵⁴ This language has been construed by the preponderance of courts in the United States to mean extrinsic fraud.²⁵⁵ The fraud provision of section 4(b) of the Uniform Act has been substantially litigated. The decision in *Bank of Nova Scotia v. Tschabold Equipment Ltd.*,²⁵⁶ demonstrates the court's willingness to reject this argument for nonrecognition. Based on the plaintiff's sworn statement that "this action is founded on a contract executed in the Province of Alberta [Canada]" an Alberta court entered an order allowing for service on the defendant in the United States.²⁵⁷ The court exercised its long arm jurisdiction pursuant to an Alberta Court Rule which allows service outside of Alberta when "the proceeding is to enforce . . . or otherwise affect a contract . . . made within Alberta."²⁵⁸ Subsequently, at a hearing, counsel for the plaintiff asserted some facts concerning an indebtedness which later proved to be untrue.²⁵⁹ The Alberta court ultimately entered a default judgement, and the plaintiff sought enforcement of that judgement in a Washington state court.

In proceedings before the Washington Court, the defendant stipulated that the statements by plaintiff's counsel concerning the location of the contract's formation and the issue of indebtedness were false and thus, that the judgement was obtained by fraud.²⁶⁰ The court rejected the fraud contention on two grounds:

First, the court contended that there exists different types of fraud, and that, assuming the false statement concerning indebtedness was in fact fraudulent, that is not the type of fraud envisioned by the Uniform Act because such fraud involves the merits of the case which could have been litigated. Second, the court found no fraud in the false statement because they were

254. Uniform Foreign Money-Judgements Recognition Act, *supra* note 76, at 5.4(b)(2).

255. *See, e.g.*, Fairchild, 470 F. Supp. at 615.

256. *Bank of Nova Scotia v. Tschabold Equipment Ltd.*, 754 P. 2d 1290 (Wash. Ct. App.).

257. *Id.* at 1292.

258. Alberta Court Rule 30 (f)(i).

259. *Bank of Nova Scotia*, 754 P. 2d. at 1293.

260. *Id.* at 1294. Note that on appeal the defendant ultimately abandoned the argument that the statement concerning formation of the contract constituted fraud, conceding that it waived that argument by later appearing before the Alberta Court and submitting to jurisdiction.

not satisfied that the plaintiff deliberately made a false statement to the court.²⁶¹

3. Fraud: A new conceptual model

In our new optimal model of jurisdictional propriety, the fraud defence ought to be of transcendent importance. Fraud is rightly regarded by English law as a particularly offensive matter, distinct from other issues. The claimant who has obtained a foreign judgement by fraud is not just a litigant who deliberately caused the foreign court to come to a wrong decision. As Briggs highlights, the general rule that foreign judgements are conclusive as to their merits, even if the judgement is wrong, may justifiably tend to increase the international enforceability of such judgements; it does not follow that it should be extended to benefit egregious claimants.²⁶² In essence, that the defendant should be entitled to seek relief in relation to the quasi-tort is hardly surprising, and that this requires a fresh examination of some of the evidence is hardly surprising either.²⁶³

In a new model of jurisdictional propriety the fraud defence has a vital role to play as an appropriate safety-valve. The Preliminary Draft of the Multilateral Convention contains in Article 28 (1)(e) a ground for refusal of, recognition, or enforcement of a foreign judgement where: "the judgement was obtained by fraud in a matter of procedure."²⁶⁴ This is too restrictive. There are two identifiable grounds for supporting the widened view that prevails under English common law doctrine.²⁶⁵ Firstly, the fraudulent foreign judgement itself may be viewed as the procurement of a chose in action by fraud.²⁶⁶ This judgement itself can be equated with quasi-tort, the commission of the tort completed at the moment the court is falsely induced to rule in the plaintiff's favour, and not before that point.²⁶⁷ Hence, an English recognizing court can logically rule on this quasi-tort. Secondly, the defendant ought not to be limited to raising the

261. *Id.* at 1294–95.

262. *See* Briggs, *More Surprises*, *supra* note 54, at 549.

263. *Id.*

264. Preliminary Draft Hague Judgements Convention, *supra* note 44.

265. *See* Briggs, *Brussels Convention*, *supra* note 54, at 531; Briggs, *More Surprises*, *supra* note 54, at 549.

266. Briggs, *More Surprises*, *supra* note 54, at 549.

267. *Id.*

fraud issue before the court specifically chosen by the plaintiff.²⁶⁸ He ought to be entitled to have, "one post-judgement bite of the cherry,"²⁶⁹ either in England or elsewhere, for the hearing of his allegation. Such arguments seem logically compelling with fraud operating as a panacea to curtail unmeritorious conduct by foreign litigants.

No clearer distinction exists between the Brussels Convention and common law principles on recognition and enforcement of foreign judgements than the contextual treatment of the fraud defence. In *Interdesco S.A. v. Nullifire*,²⁷⁰ Philips J. held that when articles 27(1) and 34 of the Brussels Convention provide that a judgement of an EC country shall not be recognised or enforced if to do so would be contrary to public policy, including one obtained by fraud.²⁷¹ Even when fresh evidence is adduced, the *Abouloff* common law rule, he held, will be inapplicable. Axiomatically, under the Convention, if the defendant has a means of redress in the foreign courts, then the defendant must seek his remedy there. Thus, fraud will hardly ever be a defence at the enforcement stage in England.²⁷² An unsatisfactory dividing line has, thus, been created between EC and EFTA judgements on the one side of the scales, and foreign judgements of the rest of the world on the other.

A new Anglo-American reformulated defence of fraud needs to demonstrate the link between taking jurisdiction and foreign judgement recognition, treating the latter as the mirror image of the former. The burden needs to be on the defendant to prove fraud in the procurement of the foreign judgement by clear and convincing evidence. An optimal model suggested is to adopt the test of "good arguable case," as interpreted by the House of Lords in *Seaconsar Far East Ltd. v. Bank of Markazi Iran*.²⁷³ This case governs extended jurisdiction under the Civil Procedure Rules. The supporting evidence must state the claimant's belief that the claim has a reasonable prospect of success.²⁷⁴ To satisfy an Anglo-American court to re-open a foreign judgement on the ground of

268. *Id.* at 532.

269. BRIGGS AND REES, *supra* note 115, at 263.

270. *Interdesco S.A. v. Nullifire*, [1992] 1 Lloyd's Rep. 180.

271. Collier, *supra* note 53, at 443.

272. *Id.*

273. *Seaconsar Far East Ltd. v. Bank of Markazi Iran* [1994] 1 AC 438.

274. English Civ. Pro. Rule 6.21 (1)(b).

fraud, the defendant would need to establish a serious issue to be tried on the merits. Also, the defendant would have to establish that there is a substantial question of fact or law or both arising on the facts disclosed by the written evidence that the defendant bona fide desires to have tried.²⁷⁵ Criticism of the fraud defence, namely that it unduly subverts the finality of judgements, and shows an improper lack of respect for the competence of foreign courts, may be tempered by a new test based on jurisdictional propriety and certainty in application.

D. The Natural Justice Defence

1. U.S. general principles on natural justice

The traditional premise of Anglo-American judicial experience is that a court will not recognise or enforce a foreign judgement which was obtained in a manner contrary to natural justice. The common starting point for mutual understanding of the natural justice defence is that it requires two conditions to be satisfied: first, the litigant must have given notice of the foreign proceedings; second, the litigant must have been given a proper opportunity of presenting his case before the court.²⁷⁶ The deficiency of either of these elements is an issue which should be determined by the Anglo-American recognizing court, rather than by the law of country of origin.

In *Hilton v. Guyot*, the U.S. Supreme Court demanded that there be “due citation” of the defendant in a foreign action before the judgement would be recognized by U.S. courts.²⁷⁷ This requirement has subsequently been interpreted by domestic courts to mean that the defendant must receive such notice of the foreign action as would give him an opportunity to defend the action.²⁷⁸ As Pittman asserts, “this issue only arises in the case of default judgements because a defendant’s appearance in a foreign action is conclusive proof of sufficient notice.”²⁷⁹ Moreover, although the rule seems to be that “effective service of process” is required for

275. See *Newcastle P & I v. V Ships*, 2 Lloyd’s Rep. 515 (1996); *The Kurnia Dewi*, 1 Lloyd’s Rep. 552 (1997).

276. *Jacobson v. Frachon*, 138 L.T.R. 386, 392 (1927).

277. *Hilton v. Guyot*, 159 US 113, 202 (1895); Pittman, *supra* note 61, at 978.

278. *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981); Pittman, *supra* note 61, at 978.

279. Pittman, *supra* note 61, at 978.

adequate notice,²⁸⁰ U.S. courts are preordained to determine the issue "whether the defendant had actual notice and do not generally consider the sufficiency of the foreign state's statutory notice provisions."²⁸¹ Furthermore, service of process need not comply with U.S. statutory notice provisions.²⁸²

Interestingly, U.S. courts established proper notice in the form of proper service of process, and as a precondition to recognition or enforcement of a foreign judgement.²⁸³ The jurisprudence reveals that "proper service" has two possible definitions. The first definition requires compliance with the foreign country's statutory notice provisions.²⁸⁴ In the alternative second definition, proper service is that which gives adequate notice of the proceedings.²⁸⁵ A very limited number of cases have claimed a lack of opportunity to be heard. In the event that the court determines service to be proper and the defendant is represented by counsel, later arguments about that representation appear unlikely to constitute a lack of opportunity to be heard.²⁸⁶

The case precedents seem inconsistent. In *Tahan v. Hodgson*, the U.S. Court of Appeals for the District of Columbia Circuit determined that personal service on a defendant in Israel was sufficient even though the service papers were in Hebrew, a language which the defendant did not comprehend.²⁸⁷ Also relevant were the circumstances that the defendant transacted business in Israel for a number of years and that he was aware of the legal nature of the papers.²⁸⁸ In such a scenario the defendant "should have surmised that the papers being served upon him were legal in nature and that he could ignore them only at his own

280. *Tahan*, 662 F.2d at 864.

281. Pittman, *supra* note 61, at 978.

282. *Tahan*, 662 F.2d. at 866 (finding that it would be unrealistic for the United States to require all foreign judicial systems to adhere to the Federal Rules of Civil Procedure).

283. *Id.* at 864; *Corporación Salvadoreña de Calzado v. Injection Footwear Corp.*, 553 F. Supp. 290, 296 (S.D. Fla. 1982).

284. *Tahan*, 662 F.2d. at 866 (stating that though Israeli procedure is inconsistent with federal rules requirement of second notice for default judgement, United States is unrealistic to require all foreign judicial systems to adhere to federal rules).

285. *Id.* at 865-66 (finding that personal service in Israel was sufficient when suit papers were prepared in Hebrew, even though the defendant did not read Hebrew).

286. *See, e.g.*, *Laskowky v. Laskowsky*, 504 So. 2d. 726 (Miss. 1987) (holding that later withdrawal of counsel does not constitute lack of opportunity to be heard).

287. *Tahan v. Hodgson*, 662 F.2d 862, 866 (D.C. Cir. 1981).

288. *Id.* at 865.

peril.”²⁸⁹ As a consequence, the court found that the defendant received sufficient notice to compile a defense. On the other hand, in *Julen v. Larson*,²⁹⁰ the court refused to enforce a German judgement on the ground that service of process in Germany on a U.S. defendant without an English translation was insufficient. It is hardly surprising that dyspeptic litigants are left in confusion over the legitimate ambit of the natural justice defence and its open-textured scope.

The Uniform Recognition Act states that a court may, at its discretion, refuse to recognize a foreign judgement if there is insufficient notice of the foreign action to the defendant.²⁹¹ The discretionary process implicated was evaluated by Martinez in his discussion of the significant decision in *Gondre v. Silberstein*.²⁹² As Martinez states, “a French court entered a judgement of guilt on a criminal charge, holding the defendant in default due to his failure to appear.” Following judgement, the court sentenced the defendant to prison and ordered him to pay civil damages.²⁹³ The defendant filed an “opposition” to the entry of default, in accordance with the terms of the French Code of Criminal Procedure.²⁹⁴ Despite the fact that the defendant did not submit to arrest as required by the Code, the opposition was declared void.²⁹⁵ Subsequently, the plaintiff began an action in New York to effect the enforcement of the civil element of the earlier judgement and requested summary judgement. In response, the defendant claimed that he failed to receive fair notice of the French proceedings and thus, the judgement should not be supererogatory pursuant to the Uniform Act as activated in New York.²⁹⁶

289. *Id.*

290. *Julen v. Larson*, 101 Cal. Repr. 796, 798 (Cal. Ct. App. 1972).

291. Uniform Foreign Money-Judgements Recognition Act, *supra* note 76, §§ 4 (b)(1)–4(b)(2).

292. *Gondre v. Silberstein*, 744 F. Supp. 429 (E.D.N.Y. 1990); Martinez, *supra* note 61, at 60–61.

293. *Gondre*, 744 F. Supp. at 430; Martinez, *supra* note 61, at 60, n.71. Under French law a victim of a crime may file a civil action for money damages caused by a criminal defendant. The civil and criminal actions are then joined. *Gondre*, 744 F. Supp. at 430–31.

294. Note that Article 489(1) of the French Code of Civil Procedure provides that a default judgement, “becomes void in all its provisions if the accused submits an opposition to its execution.” *Gondre*, 744 F. Supp. at 431.

295. *Id.*

296. *Id.*

The Court in *Gondre* began its determination by quoting language from the U.S. Supreme Court:

[A]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.²⁹⁷

Additionally, the court referred in detail to section 4(b)(1) of the Uniform Act as activated in New York and rationalized that the defendant did not receive notice. The court rejected the argument that notice through diplomatic channels, as attempted in this case, was sufficient under French law. In essence, the court asserted that, "a description of the notice attempt was lacking in the case, and thus, the plaintiff failed to show sufficient notice so as to resolve the material issues of fact."²⁹⁸ Furthermore, the court declared that, "although an "opposition" to a default judgement cures any defects in notice under French law, the manner in which the judgement was rendered raised due process concerns, and that indeed, where the defect in notice offends traditional due process standards, the fact that the defendant was served in accordance with the foreign rules, or that the judgement is valid in the first state, will not necessarily save the judgement."²⁹⁹

It is significant that the court in *Gondre* deploys a synergy between notice requirements (natural justice) and due process (jurisdictional competence test).³⁰⁰ This synergy exemplifies the

297. *Id.* (quoting from *Mullane v. Central Hanover Trust Co.*, 399 U.S. 306, 314 (1950)).

298. *Id.* at 435 (denying plaintiff's motion for summary judgement).

299. *Id.* at 433 (quoting Kulzer, "The Uniform Foreign Money-Judgements Recognition Act" 13 N.Y. Jud. Conf. Rep. 194, 213). Additionally, the *Gondre* court cited *Somportex* as the proper standard. "The ultimate question, therefore, is whether a reasonable method of notification was employed and reasonable opportunity to be heard was afforded to the person affected." *Id.* at 434 (quoting *Somportex Ltd v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971)).

300. Martinez, *supra* note 61, at 61. Regarding notice and its interplay with service, Judge Easterbrook, writing for the Seventh Circuit in *Ma v. Continental Bank N.A.*, 905 F.2d 1073 (7th Cir. 1990), opined as follows:

Although service of process is an ingredient of personal jurisdiction as that term often is used in the United States, not all of the technical requirements of service are sufficient grounds for a collateral attack. Service is designed to produce knowledge; although rules may and usually do require formal service in order to make very sure of knowledge, and courts may dismiss a case when proper service has not been secured, the sort of jurisdiction pertinent to a collateral

integration in the recognition process and overlap between the requirements of the Uniform Act. A heightened degree of collinearity should also apply to the fraud defence. A judgement obtained fraudulently violates standards of due process envisioned in the Constitution. Moreover, a court may vouchsafe its decision on alternative theories, one that provides for mandatory nonrecognition, or one that provides for discretionary nonrecognition. The ability to utilize alternative theories is precluded by the Brussels Convention template explored in Part V. The harmonised scheme adduced allows a very limited purview of discretionary nonrecognition defences. The natural justice test on due notice and opportunity to defend is clearly defined after the European Court of Justice's extensive interpretations.³⁰¹

2. Natural justice and the English common law approach

The concrete and defined nature of the natural justice defence under the auspices of the Brussels Convention contrasts markedly with the nebulous Anglo-American traditional approach. It is extremely difficult to determine prophylactically the exact ambit of the natural justice defences under English common law principles. Courts applied the defence in a chauvinistic and English-centric manner. Prior to *Adams v. Cape Industries*, it was assumed that the defence applied to ensure that the defendant received due notice and a proper opportunity to be heard by the foreign court, embraced within the maxims of the rule *audi alteram partem* or *nemo iudex in rem suam*.³⁰² For example, English standards would consider it unfair to deny the defendant a hearing, where the plaintiff in the foreign action agrees to extra time for filing a defence but proceeds to obtain a default judgement in breach of the agreement.³⁰³ *Jet Holdings Inc. v. Patel*³⁰⁴ held that even where the defendant actually raised the issue of natural justice in the adjudicating court, it could still be validly raised again at the enforcement stage.³⁰⁵ The Court of Appeal in *Adams*,

attack depends on whether the plaintiff uses a method reasonably calculated to produce actual notice.

Id. at 1076.

301. Art. 27 (2) as amended by the Brussels Regulation, effective from 1 March, 2002; see *infra* Part V.C.

302. *Rudd v. Rudd*, P. 72, 77-78 (1924).

303. *Levin v. Gladstein*, 55 SE 371 (1906).

304. *Jet Holdings Inc. v. Patel*, 1 Q.B. 335 (1990).

305. CHESHIRE AND NORTH, *supra* note 53, at 443.

however, clearly extended the natural justice defence to cases involving procedural defects, leading to "a breach of an English court's views of substantial justice."³⁰⁶ Such a test is inherently uncertain and loosely defined. It remains to be seen how English courts apply it as a safeguard device. It is submitted that the natural justice defence, as under the Brussels Convention, be limited to the rules of *audi alteram partem* or *nemo iudex in rem suam*. Where cases arise of procedural unfairness, which do not involve a lack of due notice or opportunity to be heard, they would be more satisfactorily dealt with under the defence of public policy.

In *Adams*, the defendant company had proper notice of the proceedings but consciously decided not to contest them. The Texas trial judge, in default of their appearance, directed a total award representing an average payment of \$75,000 per plaintiff, 206 in total, but it was the plaintiffs' counsel who was subjectively empowered to select the level of the bands and to identify the plaintiffs to be placed in each band in order to produce the directed average award. The Court of Appeal determined that this assessment was not in any real sense based upon an objective assessment by the judge upon evidence as to the condition of these plaintiffs.³⁰⁷ English notions of substantial justice required, according to Slade LJ, that: "the extent of the defendant's obligation is to be assessed objectively by the independent judge upon proof by the plaintiff of the relevant facts."³⁰⁸ The amount of compensation should not be fixed subjectively by or on behalf of the plaintiff.

The question was also raised in *Adams* whether it was incumbent upon the defendants to have sought a remedy in Texas in regard to the lack of natural justice.³⁰⁹ Their Lordships answered this proposition in the negative on the facts of the case. No evidence existed that the defendants had any knowledge of the "bizarre" damage assessment method in the United States until the late stage when enforcement was requested by the plaintiff in England. It was apparently unreasonable to expect the defendant to avail itself of a foreign court's remedy, where the breach was

306. *Adams v. Cape Indus.*, 1 All E.R. 929, 965 (1991).

307. *Id.*

308. *Id.* at 967.

309. CHESHIRE AND NORTH, *supra* note 53, at 452.

fundamental and deprived it of notice and opportunity to participate in the adjudicating court.³¹⁰

A tactical dilemma exists for defendant corporations in deciding whether to challenge foreign jurisdiction and judgement abroad. The directors of a defendant corporation may reasonably believe, based upon sound advice, that the corporation was not present within the jurisdiction of the foreign court at the date of the issue of process. If they are correct, they can contemptuously ignore foreign proceedings vis-à-vis the safety of their assets within the jurisdiction of the English courts. However, if their assumption is incorrect, which following *Adams* may be a question of considerable complexity to determine, then they may be sued in England on the basis of a judgement which cannot be questioned in relation to the merits and substance of the decision upon which the judgement is based.³¹¹ Furthermore, the default judgement itself may be inflated as it will be based upon evidence presented purely by the plaintiff alone. A similar odious choice is presented to the unfortunate defendant over reliance upon breach of natural justice as a defence. A defendant who formally complains to the foreign court directly about a procedural irregularity will, by the act of submission, have presumptively conferred jurisdiction on the foreign court which may not otherwise have existed. Alternatively, by keeping his powder dry, he may be debarred from relying on breach of natural justice at the recognition stage if, contrary to *Adams*, it is considered eminently reasonable to challenge abroad, where the breach is not fundamental, and evidence exists that the defendant has notice.³¹² Corporate defendants may be presented with a beguiling Hobson's Choice over how to proceed.

It is also important to reiterate that the concept of denial of substantial justice is more general, and far wider, than the traditional notion of natural justice. It represents an explicit policy-oriented device for English courts to apply with great care. In essence, it is far more akin to public policy, which would have been the obvious defence to have applied in *Adams*. The nature of "substantial justice" has been expertly summarised by Carter as follows:

310. BRIGGS AND REES, *supra* note 115, at 264.

311. *Cape Indus.*, 1 All E.R. at 960.

312. BRIGGS AND REES, *supra* note 115, at 264.

The thrust of the defence of contravention of English notions of substantial justice is different and more general. It could almost be seen as an ultimate discretion to withhold recognition simply because in the eyes of the English *forum* justice was palpably not done. In the final analysis it represents a prerogative of the *forum* - but, of course, a prerogative not to be abused.³¹³

The inherent danger of the overbroad "prerogative" adopted by the English Court of Appeal in *Adams* is that it serves to expand unduly the basis for impeachment of judgements rendered in the United States, and puts unnecessary inroads into doctrines of preclusion and international comity. In this sense it is the unfortunate corollary of the U.S. public policy decisions in *Bachchan* and *Telnikoff* on English libel judgements.³¹⁴ The overbroad "safety-valve" created by reference to "substantial justice," as determined on an *ad hoc* fashion by English judiciary, reveals more deep-seated fears over the American litigation system. There is a strong English dislike for American punitive damages, the trebling of compensatory damages as a penalty, damages fixed by juries, the unpredictability of actions, class actions, and onerous pre-trial discovery.³¹⁵ In order to have a successful multilateral Convention, these barricades need to be broken. More specifically, the imprecise Anglo-American perspectives on the natural justice defence need to be remedied. An optimal template is provided by the Brussels Convention analysis, as recently amended by the Brussels Regulation. This Convention is analogous to other strictly defined defences, laid down at a European level.

V. THE BRUSSELS CONVENTION PERSPECTIVE: RESIDUAL RULES FOR THE DEFENCES OF FRAUD, PUBLIC POLICY AND NATURAL JUSTICE

A. General Principles

The central tenet of the Brussels Convention is to create a free market in judgements,³¹⁶ ensuring that a judgement rendered

313. P.B. Carter, *Decisions of British Courts During 1988*, 59 BRIT. Y.B. INT'L L. 360, 363 (1989).

314. Simeone, *supra* note 95, at 341.

315. *Cassell and Co. v. Broome*, A.C. 1027, 1087-88 (1972).

316. Julie E. Dowler, *Forging Finality: Searching for a Solution to the International Double-Suit Dilemma*, 4 DUKE J. COMP. & INT'L L. 363, 390-391 (1993).

by one Contracting State may be recognised and enforced in all other Contracting States expeditiously.³¹⁷ International agreement in bases of jurisdiction significantly simplifies the recognition and enforcement of judgements.³¹⁸ This comports to the new model of jurisdictional propriety put forward in the Anglo-American context in Part III.

The jurisdictional rules of the Brussels Convention provide significant guarantees for the defendant. As a general rule, subject to special provisions, a defendant can only be sued in the courts of his domicile. If a defendant does not appear, the court on its own motion declares that it lacks jurisdiction, unless stated otherwise in the Convention. Furthermore, the court must stay the proceedings unless satisfied that the defendant had an opportunity to be heard. The strictness of these jurisdictional provisions is counter-balanced by the liberal circulation of judgements among the Contracting States. The Brussels Convention essentially ensures that judgements within the "common market" of European Contracting States maintain their worth and enforceability within that community.³¹⁹

As Reuland has described, "the Brussels Convention does not merely simplify the formalities governing the mutual recognition and enforcement of judgements, it introduces a novel and streamlined body of laws applicable to the recognition and enforcement of judgements in Europe."³²⁰ In exchange for an "indirect" system of enforcement of the pre-community era, the Brussels Convention provides for "direct" enforcement where the judgements of one Contracting State are *per se* enforceable in the courts of another.³²¹ Indeed, it has been legitimately stated that judgements of the various Contracting States are not unlike the sister-state judgements of the United States.³²² In contrast to the English common law position, Title III of the Convention simplifies the regime by making it generally impermissible to object to original jurisdiction at the recognition stage. Thus, it is

317. C.M.V. CLARKSON & JONATHAN HILL, *JAFFEY ON THE CONFLICTS OF LAWS* 175-76 (1997).

318. *Id.* at 176.

319. MCLEAN, *supra* note 109, at 163.

320. Robert C. Reuland, *The Recognition of Judgements in the European Economic Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 MICH. J. INT'L L. 559, 574 (1993).

321. *Id.*

322. Woodward, *supra* note 10, at 316.

incumbent on the defendant to raise jurisdictional challenges from the outset.

A striking feature of the Convention rules is that they apply to all civil and commercial judgements that comport to Title I. They do not depend at the enforcement stage upon the domicile or nationality of the plaintiff or defendant. The Title III provisions on recognition and enforcement are not expressly linked to the jurisdictional grounds of Title II, as far as "outsiders" to the scheme are concerned. This has caused great concern among American commentators as it arguably operates in a parochial and self-serving manner against non-Contracting States.³²³ In essence, the principle of largely unquestioning judgement recognition includes judgements against persons not domiciled in the European Union, and thus not protected by the Convention, even if the judgement is entered on an admittedly exorbitant jurisdictional basis under Article 3. One illustration is a German court in a civil and commercial matter that takes jurisdiction under Article 23 of the German Code of Civil Procedure³²⁴ over a U.S. domiciliary who left his umbrella behind in a hotel room in Germany.³²⁵ Other national courts within the Brussels Convention members would be duty-bound to recognise this decree. The rules for recognition, unlike those of jurisdiction, are not based upon domicile.

B. Article 25: The Meaning of Judgement Given in a Contracting State

Article 25 provides a wide definition of "judgement" in the Brussels Convention as, "any judgement given by a court or tribunal of a Contracting State."³²⁶ Thus judgements of inferior and superior courts fit under this umbrella, as do tribunal awards which are of a nonprivate body.³²⁷ Unlike the traditional Anglo-American common law position, the Convention is not restricted to money judgements, but embraces injunctions, decrees of

323. See, e.g., Arthur Taylor von Mehren, *Recognition and Enforcement of Sister-State Judgements: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 Colum. L. Rev. 1044 (1981); Bruce M. Landay, *Another Look at the EEC Judgements Convention: Should Outsiders Be Worried?*, 6 DICK. J. INT'L L. 25 (1987).

324. This concerns temporary presence of property as a jurisdictional basis.

325. CHESHIRE AND NORTH, *supra* note 53, at 480-519.

326. Brussels Convention, *supra* note 58.

327. CHESHIRE AND NORTH, *supra* note 53, at 483.

specific performance, and interlocutory orders provided they are not simply regulating procedural matters.³²⁸

C. Article 27: Defences to Recognition

The Convention defences to foreign judgement recognition are very strictly circumscribed. The primary defence contained within Article 27(2) (as revised) provides for refusal of recognition. When read together with Article 34, this primary defence provides for refusal of enforcement in exceptional cases where the laws of the judgement state and in the Convention are insufficient to ensure the defendant's opportunity to present his defence. Following minor amendments on 1 March, 2002 via the Brussels Regulation, it is an appropriate juncture to evaluate the Convention model defences and related ECJ jurisprudence. The revised natural justice defence may now provide a suitable Anglo-American common law model.

1. Article 27(1): Public Policy

Article 27(1) of the Brussels Convention states that a judgement shall not be recognised, "if such recognition is contrary to public policy in the State in which recognition is sought."³²⁹ The revision retained the public policy exception in the Brussels Convention, but with the requirement that recognition must be *manifestly* contrary to public policy.³³⁰ Clearly, broadening the public policy defence would undermine the Convention's aim towards the free movement of judgements throughout Contracting States. Hence, as stated in the Jenard Report, Article 27(1) "ought to operate only in exceptional cases."³³¹ In keeping with this expression, Article 28 narrows this "safety-valve release" which precludes courts from applying the public policy exception to jurisdictional matters. The European Court of Justice strictly

328. A Mareva injunction is an interlocutory injunction restraining a defendant from removing his assets out of the jurisdiction pending trial. In Germany the two main interlocutory remedies are the *Arrest* and the *einstweilige Verfügung*, which have increasingly become of vital importance in "the daily work of the courts for the purposes of the effective administration of justice." Jens Grunert, *Interlocutory Remedies in England and Germany: A Comparative Perspective*, 15 Civ. Just. Q. 18 (1996).

329. Brussels Convention, *supra* note 58, art. 27(1), 5; PETER KAYE, *LAW OF THE EUROPEAN JUDGEMENTS CONVENTION* 4028 (Barry Rose Law Publishers Ltd, 1987).

330. W.A. Kennett, *The Brussels I Regulation*, 50 Int'l & Comp. L.Q. 725, 733 (2001).

331. Council Report, *supra* note 28, at 44.

applied this principle in the recent case of *Bamberski v. Krombach*.³³²

Although the 1968 Convention does not state specifically whether recognition may be refused under Article 27(1) pursuant to a fraud defense, such conduct is generally considered grounds for applying the public policy doctrine.³³³ The Schlosser Report included fraud within the ambit of public policy, reasoning that obtaining a fraudulent judgement can "in principle constitute an offence against the public policy of the State addressed."³³⁴ The treatment of fraud sharply illuminates the rationality gap between Convention and non-Convention defences. As described in the previous section, fraud under the common law unravels all. English courts will re-investigate the merits of a foreign judgement where credible evidence of fraud is presented even though no direct fresh evidence need be adduced; and U.S. courts have shown a willingness to re-investigate the merits on allegations of extrinsic fraud. This re-investigation contradicts the fundamental requirements under Articles 29 and 34 of the Convention that "under no circumstances may a foreign judgement be reviewed as to its substance."³³⁵ The strict delineation was applied in *Interdesco SA v. Nullifire Ltd.*³³⁶

In *Interdesco*, the plaintiffs were manufacturers of intumescent paint which had special fire protection properties.³³⁷ When heated, the paint expanded to form a meringue over the painted surface; the longer it survived in a fire, the better protection it afforded. Their best-selling product was marketed as "S60," indicating that it gave protection for at least sixty minutes. The defendant, an English company, entered into a five-year distribution agreement with the plaintiffs that gave the defendant exclusive distribution rights in the United Kingdom and Ireland for the paints. Subsequently, the defendant terminated the agreement claiming that Interdesco's S60 failed to satisfy the United Kingdom standard for sixty-minute paint, making it unmarketable. The plaintiff contended that the defendant acted pursuant to a carefully prepared plot, in breach of their contractual

332. *Bamberski v. Krombach*, 3 W.L.R. 488 (2001).

333. Schlosser Report, O.J. 1979 (C59) 128 ¶ 192(a).

334. *Id.*

335. Brussels Convention, *supra* note 58, arts. 29, 34.

336. *Interdesco S.A. v. Nullifire Ltd.*, 1 Lloyd's L. Rep. 180, 187 (1992).

337. *Id.* at 182.

duty, to replace Interdesco and steal their market.³³⁸ The French *Cour d'Appel de Paris*, relying on expert evidence from tests conducted in Paris while disregarding English tests showing the product to be sub-standard, awarded substantial damages to the plaintiff.³³⁹ When the plaintiffs attempted to enforce the award in England pursuant to the Convention, the defendant argued that recognition of the French judgement was contrary to public policy in England because it was procured by fraud.³⁴⁰ The defendant submitted fresh evidence, not previously submitted before the French court, which allegedly established that the plaintiff's assertions were falsehoods that deliberately concealed and suppressed tests, demonstrating that the S60 paint was sub-standard.³⁴¹

The English court, rejecting the defendant's defence predicated on public policy via fraud, established that fundamentally different criteria apply to Convention and non-Convention principles.³⁴² First, where the Contracting State has, "in its judgement, ruled precisely the same matters that a defendant seeks to raise when challenging the judgement on the ground of fraud, the Convention precludes the Court from reviewing the conclusion of the foreign court."³⁴³ Thus, the English court is necessarily estopped from reviewing the matter already addressed by another Contracting State. As Kaye asserted, this means that "Article 27(1), including its application to fraud, is subordinate to the Convention no-review-of-substance principle."³⁴⁴

Additionally, when a Convention judgement is challenged on the ground that the foreign court was fraudulently deceived, the English court has a duty to initially consider whether the foreign jurisdiction offers a remedy for such fraud.³⁴⁵ If the foreign jurisdiction offers such a remedy, the logical corollary is to leave the defendant to pursue that remedy in the original jurisdiction.³⁴⁶

338. *Id.*

339. *Id.*

340. *Id.* at 183.

341. *Id.*

342. *Id.* at 185.

343. *Id.* at 187.

344. PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF JUDGEMENTS 1447 (Barry Rose Law Publishers Ltd., 1987).

345. *Interdesco S.A. v. Nullfire Ltd.*, 1 Lloyd's L. Rep. 180, 188 (1992).

346. *Id.*

Affirming the primacy of the adjudicating court has attendant benefits. It accords with "the spirit of the Convention that all issues should, so far as possible, be dealt with by the State enjoying original jurisdiction," and presumes that the original court can better "assess whether the original judgement was procured by fraud."³⁴⁷

At issue here is which court should actually adjudicate upon the issue of fraud. Deference to the adjudicating court is generally apposite within the scheme of the Convention, given the uniform level of judicial competence throughout the Contracting States. The Schlosser Report addressed this perspective as follows:

[T]here is no doubt that to obtain a judgement by fraud can in principle constitute an offence against the public policy of the State addressed. However, the legal system of all Member States provide special means of redress by which it can be contended, even after the expiry of the normal period for an appeal, that the judgement was the result of a fraud. . . . A court in the State addressed must always, therefore, ask itself whether a breach of its public policy still exists in view of the fact that proceedings for redress can be, or could have been, lodged in the court of the State of origin against the judgement allegedly obtained by fraud.³⁴⁸

The principles derived from *Interdesco* were similarly applied in *Société d'Informatique Service Réalisation Organisation v. Ampersand Software BV*.³⁴⁹ SISRO obtained a French judgement against Ampersand and others in the *Tribunal de Grand Instance de Paris*, wherein they successfully claimed that the defendant's computer programs infringed their copyright.³⁵⁰ Enforcement was sought in England where the issue was whether the alleged fraud on the part of the plaintiff made the issue contrary to English public policy.³⁵¹ Ampersand appealed in France against the judgement, but the appeal had not been heard before the application for registration in England.³⁵² Arguably fraud, as a public policy defence, is inapplicable unless (1) no adjudicating court offers a means of redress; (2) cogent evidence is adduced

347. *Id.*

348. Schlosser Report, 1979 O.J. (C59) 128 ¶ 192.

349. *Société d'Informatique Service Réalisation Organisation v. Ampersand Software B.V.*, 2 CEC (CCH) 580 (1995).

350. *Id.* at 582-83.

351. *Id.* at 583, 594.

352. *Id.* at 593.

which could not have been expeditiously raised before the foreign court; and (3) this evidence is causally essential to the outcome of the matter.³⁵³ Because of these restrictions a client would be well-advised to raise challenges before the adjudicating court, and not at the recognition or enforcement stage. Reliance on evidence of fraud at the enforcement stage that could, and ought, to have been raised earlier before the foreign court is generally fatal under the Convention.³⁵⁴ The underlying policy is to achieve the central tenet of ensuring the simplification of recognition and enforcement procedures.

More generally, the ambit of “public policy” itself was evaluated by the European Court of Justice in the recent case of *Bamberski v. Krombach*.³⁵⁵ The court’s rationale, which looks at whether a fundamental right of the recognizing court would be unduly impinged,³⁵⁶ mirrors to a significant degree the optimal model suggested in Part IV of this article.³⁵⁷ In general, public policy is a state and not an individuated concern.

In *Bamberski*, the defendant, a doctor of German nationality, administered an injection of Cobalt-Ferrlecit to a young girl, the claimant’s daughter, who was staying at his home in Lindau, Germany.³⁵⁸ The girl died in July 1982 and, as a result, the German authorities instituted criminal proceedings against the defendant for manslaughter.³⁵⁹ The proceedings, which lasted several years, were discontinued for lack of evidence.³⁶⁰

The claimant lodged a complaint with the French authorities against the defendant, whom he held responsible for his daughter’s death. In 1993 the defendant was committed for trial before the Cour d’Assises, Paris (Paris Assizes), on a charge of wilful murder. The claimant introduced a civil claim in the proceedings. A summons to appear before that court was served on the defendant at his home in Lindau, together with the civil claim for damages associated with the criminal proceedings. The Cour d’Assises, Paris, subsequently issued a warrant for his arrest to compel him to

353. HILL, *supra* note 129, at 276.

354. KAYE, *supra* note 344, at 1447–48 (discussing the difficulty in reviewing judgements on the basis of fraud).

355. *Bamberski v. Krombach* [2001] 3 WLR 488, 490–91.

356. *Id.* at 497.

357. *See infra* Part IV.

358. *Bamberski*, [2001] 3 WLR at 490.

359. *Id.*

360. *Id.* at 490–91.

appear at the trial. The Cour d'Assises found that he had failed to appear in person and consequently refused to allow his lawyers to represent him and ruled that the written statements of defence presented by them were inadmissible.³⁶¹ The French court ordered the defendant to pay the claimant a total of Fr 350,000 in damages and Fr 100,000 in reimbursement of court and defence costs.

Enforcement of the judgement was sought in Germany. The Bundesgerichtshof referred the question, *inter alia*, to the European Court of Justice, whether refusal to allow the defendant to have his defence presented, unless he appeared in person, contravened the public policy defence of Article 27(1). A positive response was elicited from the Court. Recourse to the public policy clause in Article 27(1) of the Convention can be envisaged only where recognition or enforcement of the judgement delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought in as much as it infringes a fundamental principle.³⁶² This correlates to the new optimal model for public policy suggested in Part IV. In order for the prohibition of any review of the foreign judgement as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order.³⁶³ With regard to the right to be defended, to which the question submitted to the Court in *Bamberski* referred, that unsurprisingly was viewed as occupying a prominent position in the organisation and conduct of a fair trial and as one of the fundamental rights deriving from the constitutional traditions common to the member states.

2. Article 27(2): Natural Justice and inadequate notice of the original action

The preponderance of Convention case law on applicable defences have focused on ensuring the defendant's right to a fair hearing, adequate notice, and protection against default judgements. Article 27(2) provides a fundamental guarantee that

361. *Id.* at 509.

362. *Id.*

363. *Id.*

enshrined rights of a defendant are not abrogated, and that procedural protection is given as a shield.³⁶⁴ In accordance with Article 27(2) a judgement shall not be recognised “where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence.”³⁶⁵ The revisions provided by the Brussels Regulation have further restricted this natural justice defense, no longer requiring “due” service on the defendant, but only service “in sufficient time and in such a way as to enable him to arrange for his defence.”³⁶⁶

Additionally, there has been amendment made along the lines previously argued for in *Isabelle Lancray SA*³⁶⁷ and *Minalmet GmbH*.³⁶⁸ If the defendant was unable to arrange for his defence, the judgement shall not be recognised “unless the defendant failed to commence proceedings to challenge the judgement when it was possible for him to do so.”³⁶⁹ It should now, therefore, no longer be possible for a defendant who had notice of proceedings pending in another Member State to ignore them, knowing that they will not be recognised in his home state. It is also noteworthy that Article 46(2) requires documentation that establishes that the party in default was served with the document instituting the proceedings. The protection provided by Article 27(2) is cumulative with the due notice protection before the adjudicating court under Article 20(2)³⁷⁰ and Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial

364. Note that under the Human Rights treatment the right to a fair hearing has been treated as a fundamental, inviolable and sacred right, which implies the right to adequate time and facilities for preparation of a defence; see Arts. 7 and 8 of the Universal Declaration of Human Rights, approved by the General Assembly of the United Nations Organisation on 10 December 1948; and Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950.

365. Brussels Convention, *supra* note 58.

366. Council Regulation 44/2001/EEC, 2000 O.J. (L 12) 1.

367. Case 305/88, *Lancray SA v. Peters and Sickert KG*, 1990 E.C.R. 2725, 2725–26.

368. Case C-123/91, *Minalmet GmbH v. Brandeis Ltd.*, 1992 E.C.R. 5661.

369. *Id.*

370. It is provided by Article 20(2) that, where a defendant who is domiciled in one Contracting State is sued in another Contracting State, the court should stay the proceedings unless it is shown that, “the defendant has been able to receive the document instituting the proceedings . . . in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.”

Matters.³⁷¹ The cumulative protection at both stages was clearly set out by the European Court in *Plendy Plastic Products v. Pluspunkt*.³⁷²

Indeed, it is instructive to further examine the European Court of Justice jurisprudence on the legitimate ambit and policy of the natural justice "safety-valve" defence. The solution provided is more constrained than the nebulous and open-textured defence of Anglo-American common law tradition. In *Plendy Plastic Products*, a writ issued by a Dutch court was forwarded to Germany for service upon the defendant, apparently in accordance with the regulatory provisions of the 1965 Convention. Judgement in default was given by the Dutch court, subsequent to their receipt from a German local court that it had not been possible to serve the document in question because of a change in residence. The plaintiff then attempted to enforce the Dutch award in Germany and the *Bundesgerichtshof* referred the matter to the ECJ. It was held that the court addressed may refuse recognition under Article 27(2) even though the adjudicating court regarded it as proven, in accordance with Article 20(3) of the Brussels Convention, in conjunction with Article 15 of the 1965 Convention, that the defendant who failed to enter an appearance had an opportunity to receive service of the document instituting the proceedings in sufficient time to enable him to make arrangements for his defence.³⁷³ However, it is vital to stress that whereas the protection of Article 27(2) at the stage of recognition and enforcement embraces every defendant,³⁷⁴ irrespective of their domicile or residence, the initial protection within Article 20 and, of course, Article 15 of the 1965 Convention, at the stage of

371. By the material parts of Article 15 it is stated that:

where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgement shall not be given until it is established that (1) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory; or (2) the document was actually delivered to the defendant or to his residence by another method provided for by the Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov., 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

372. *Plendy v. Pluspunkt*, E.C.R. 2723, 2736 (1982).

373. *Id.*

374. This was confirmed by *Debaecker v. Bouwman*, Case 49/84, 1985 E.C.R. 1779.

judgement before the adjudicating foreign court, is restricted to a defendant either domiciled in another Contracting State to the Convention, or alternatively is actually resident within a state which forms a party to the 1965 Convention.³⁷⁵ Thus this forms another example of discriminatory and anomalous treatment between domiciliaries of Contracting and non-Contracting States to the Convention, as elaborated earlier.

a. judgement given in default of appearance

The leading authority on the natural justice defence under the Brussels Convention is the ECJ judgement in *Klomps v. Michel*.³⁷⁶ The case involved the enforcement in the Netherlands of a German judgement given to recover a debt, known as *mahnverfahren*. The debt concerned agency fees in connection with the purchase of land in Germany. The court did not effect a personal service of the order for payment, but in the defendant's absence, the order was lodged at a German Post Office. Written notice of the order was left at the address in Germany provided by the creditor, which, according to the adjudicating court, constituted service at that address. Under the legislation in force at the time, the defendant was allowed at least three days to submit an objection to the order for payment. If no objection was forthcoming, the plaintiff could ask for an enforcement order *vollstreckungsbefehl*.³⁷⁷ A further period allowed the defendant to have the enforcement order set aside. The defendant in *Klomps*, however, allowed four months to pass before submitting such an objection, and claimed that at the time of the summary proceedings his habitual residence was in the Netherlands. The objection was dismissed as untimely, following the German court's holding that the defendant was habitually resident at the address where service was effected.

The first issue which the European Court had to determine was the meaning ascribed to the words "document instituting the proceedings." Basically, was it necessary to account for the period for submitting an objection to the payment order, or should

375. STONE, *THE CONFLICT OF LAWS* 340 (Longman, 1995).

376. *Klomps v. Michel*, E.C.R. 1593 (1981).

377. *Id.* at 1605-06.

account also be taken of the time allowed for a defendant to lodge an objection to the enforcement order?³⁷⁸ The Court stated that:

Article 27(2) is intended to ensure that a judgement is not recognised or enforced under the Convention if the defendant has not had an opportunity of defending himself before the court first seised. It follows that a measure, such as the order for payment . . . in German law, service of which on the defendant enables the plaintiff, where no objection to the order is made, to obtain a decision which is enforceable under the Convention, must be duly served on the defendant in sufficient time to enable him to arrange for his defence and accordingly that such a measure must be understood as being covered by the words, "the document which instituted the proceedings" in Article 27, point 2. On the other hand a decision, such as the enforcement order . . . in German law, which is issued following service of an order for payment and which is in itself enforceable under the Convention, is not covered by those words even although the lodging of an objection against the enforcement order, like the objection to the order for payment, transforms the procedure into adversary proceedings.³⁷⁹

Thus, the European Court of Justice has succinctly interpreted the meaning given to "document instituting the proceedings." It covers any document, such as the payment order in German law, service of which enables the plaintiff under the adjudicating State laws, to obtain, in default of appropriate action taken by the defendant, a decision capable of being freely recognised and enforced throughout the Contracting States.³⁸⁰ A similar jurisprudence was applied in *Hengst Import BV v. Campese*,³⁸¹ where the plaintiff in a contractual dispute in Italy commenced summary proceedings for a *decreto ingiuntivo* requiring the defendant to pay the debt with interest and costs. She sought to enforce the judgement in the Netherlands. The defendant opposed this on the ground that the order could not be considered to be a document which instituted proceedings under Article 27(2) of the Brussels Convention. Applying the principles established in *Klomps*, the court held that the *decreto ingiuntivo*, together with the application instituting the proceedings, must be

378. *Id.* at 1606.

379. *Id.* at 1605-06.

380. *Id.* at 1606.

381. Case C-474/93, 1995 E.C.R I-2113.

regarded as, “the document which instituted proceedings or . . . an equivalent document” within the meaning of Article 27(2).³⁸²

Klomps also gave interpretative guidance on the correct meaning of “default of appearance.” Appearance cannot be a matter purely for the law of the adjudicating court, but must be given a community meaning.³⁸³ A default judgement remains within the ambit of Article 27(2) even where, after the judgement has been given, the defendant subsequently applies to the adjudicating court to have it set aside, if his application has been dismissed because it was made outside the subsisting time limit.³⁸⁴ The objection’s dismissal means that the decision given in default remains intact. For that reason, the objective of Article 27(2) requires that the state addressed should carry out the examination prescribed by that provision.³⁸⁵

By way of contrast, the Court of Justice stressed in *Sonntag v. Waidmann*³⁸⁶ that Article 27(2) was inapplicable where the defendant had entered an appearance in the original proceedings. The defendant, a German teacher, was criminally prosecuted in Italy for manslaughter in respect of the death of a German pupil on a school trip to Italy. The pupil’s family joined these proceedings as civil parties, seeking damages against the defendant. Before the court in Bolzano, the teacher was represented by a lawyer, and was found guilty of manslaughter and ordered to pay twenty million lira to the pupil’s family plus costs. At the enforcement stage, he contended, *inter alia*, that the civil award ancillary to criminal proceedings breached Article 27(2), and thus should be unenforceable in Germany. It was determined that the provision was inapplicable where the defendant had appeared, provided he had been informed of the substance of the case and been enabled to arrange his defence.³⁸⁷ Where a represented defendant was able to state his case on the criminal charges made against him, while being aware of the civil law debt in the context of the criminal proceedings, that statement of his case was in principle to be regarded as an appearance in the proceedings as a whole. It was unnecessary to distinguish between

382. *Id.*

383. Case 166/80, *Klomps v. Michel*, 1981 E.C.R. 1593, 1607.

384. STONE, *supra* note 375, at 340.

385. *Klomps*, E.C.R. 1593 at 1607.

386. C-172/91, *Sonntag v. Waidmann*, 1993 E.C.R. I-1963.

387. *Id.* at 488.

the criminal and the civil proceedings, provided that the defendant's lawyer representative was present when the court dealt orally with the civil claim.³⁸⁸

b. sufficiency of time

It will be a factual matter as to whether a defendant has been allocated sufficient time to arrange for his defence. The recognizing court evaluates this time period independently, and does not confine the analysis to the law of the original court.³⁸⁹ Generally, the clock commences ticking from the moment of service as determined by the law of the adjudicating court. What if the defendant only became aware of the document at a date subsequent to the initial service? The European Court in *Klomps* identified such a scenario and helpfully elaborated on sufficiency as follows:

[T]he court in which enforcement is sought may take account of all the circumstances of the case in point, including the means employed for effecting service, the relations between the plaintiff and the defendant or the nature of the steps which had to be taken in order to prevent judgement from being given in default. If, for example, the dispute concerns commercial relations and if the document which instituted the proceedings was served at an address at which the defendant carries on his business activities the mere fact that the defendant was absent at the time of service should not normally prevent him from arranging his defence, above all if the action necessary to avoid a judgement in default may be taken informally and even by a representative.³⁹⁰

The constituents of "exceptional circumstances" in relation to sufficient time were considered in *Debaecker v. Bouwman*,³⁹¹ a case involving a defaulting tenant decamping without payment. The plaintiff had let commercial premises in Antwerp to the defendant, a Dutch national, for the duration of nine years. Shortly after the commencement of the lease Bouwman vacated the premises without any notice and failed to submit notification of any forwarding address. The plaintiff immediately brought proceedings against him in the courts of Antwerp, and the writ was

388. STONE, *supra* note 375, at 341.

389. Case 228/81, Plendy Plastic Products B.V. v. Pluspunkt, 1982 E.C.R. 2723.

390. Case 166/80, Klomps v. Michel, 1981 E.C.R. 1593, 1608-09.

391. Case 49/84, Debaecker v. Bouwman, 1985 E.C.R. 1779.

served on him at the local police station in accordance with Belgian procedural law—the defendant was still registered as resident in Antwerp. After a gap of only a few days, the plaintiff received from the defendant a registered letter announcing his repudiation of the lease and confirming details of a new address which was a post office box number. The plaintiff, however, made no attempt to serve the writ at the new address or even to inform the defendant of the pending action. The Belgian court gave a default judgement in favour of the plaintiff for over a million Belgian francs. Proceedings were brought to enforce the judgement in the Netherlands, and at issue was whether the Article 27(2) criteria had been met. Essentially it was necessary to decide whether exceptional circumstances applied. Although proper service had been adopted under Belgian law, nevertheless the defendant had not received notification of the legal proceedings. Could factors after due service be ascribed to the equation focusing on the behaviour of both the defendant and plaintiff?

The Court of Justice considered significant the circumstances after service was effected. It was relevant that the plaintiff became aware of the defendant's new address four days after service of the writ. Although the plaintiff has no overriding obligation to communicate with him at the new address, wilful failure to do so means that the recognising court ought to assess whether the "exceptional circumstances" proviso becomes operative.³⁹² Despite "circumstance" operating as merely a relevant factor, it would be imprudent not to advise a plaintiff client to notify the defendant of the proceedings at the latter's new address. Although the gesture may prejudice their position, it may be counter-balanced by the egregious conduct of a blameworthy defendant. In the final analysis, the recognising court must evaluate all the facts, weigh them against each other, and decide what justice demands on sufficiency:

The defendant's behaviour cannot automatically rule out the possibility of taking into account exceptional circumstances which warrant the conclusion that service was not effected in sufficient time. Instead, such behaviour may be assessed by the court in which enforcement is sought as one of the matters in

392. Trevor Hartley, *The Enforcement of Judgements and the Requirements of Proper Service under Article 27(2)*, 12 E.L. REV. 220, 221 (1987).

the light of which it determines whether service was effected in sufficient time. It will therefore be for that court to assess, in such a case as the present, to what extent the defendant's behaviour is capable of outweighing the fact that the plaintiff was apprised after service of the defendant's new address.³⁹³

Thus, national courts need to appraise sufficiency in the context of the surrounding circumstances. No single factor is decisive, but relevant matters include the distance involved, the commercial relationship between the parties, the need to obtain a legal adviser, and requirements of translation.³⁹⁴ A surprising feature has been the disparity between differing national courts. German courts have held that twenty days was inadequate for a German defendant to arrange a defence before a Belgian court. The Italian courts have found adequate periods of twenty to thirty days for Italian defendants to mount a defence before the original European court.³⁹⁵ As far as English authorities are concerned, a pragmatic approach was adopted in *Noirhomme v. Walklate*³⁹⁶ on proper service, allowing service by post of a Belgian summons even where it had not been translated into English.³⁹⁷

D. A New Model

The lack of uniformity over the constituent elements of "due service" in Article 27(2) necessitated numerous recourse to the European Court, with delay and cost implications for common ascertainable debts. It should be remembered that it is important to reduce or eliminate the acerbities inevitable in litigation. It represented a rare breach from the avowed aim of free movement of judgements, and the Pavlovian response of rectification via the Brussels Regulation provisions, effective from March 1, 2002, is to be welcomed.³⁹⁸ The natural justice defence, as restructured,

393. Case 49/84, *Debaecker v. Bouwman*, 1985 E.C.R. 1779, 1801.

394. Case 166/80, *Klomps v. Michel*, 1981 E.C.R. 1593, 1621.

395. Wendy A. Kennett, *Reviewing Service: Double Check or Double Fault?*, 1 CIV. JUST. Q. 115, 143 (1992).

396. [1991] I.L.Pr. 581 (Q.B. 1991).

397. The case concerned damage allegedly caused by the defendant to rented property in Belgium. It was determined that Article 10 of the Hague Service Convention permitted postal service of the recongising court did not object, which was accepted by English law.

398. Council Regulation 44/2001/EEC, 2000 O.J. (L 12) 1. Note that the further defences provided for in Articals 27(3)–(5), as amended by the regulation are outside the ambit of this discussion. Article 27(3) relates to irreconcilable judgements. See *Hoffman v. Kreig*, 1988 E.C.R. 645; *Case 414/92, Solo Kleinmotoren GmbH v. Boch*, 1999 E.C.R.

reads as follows in that recognition or enforcement may be refused: "Where the judgement was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgement when it was possible for him to do so."

This reformulated test is an optimal model for the confines of the natural justice defence in Anglo-American law, and for the proposed multilateral Convention. The Preliminary Draft of the Convention, strongly influenced by the Brussels Convention test, refers in Art. 28(1)(d) to the natural justice "safety-valve." A judgement in accordance with this provision may be denied recognition or enforcement if, "the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence."³⁹⁹ The essence of natural justice as an operational tool is implicated when a defendant fails to receive notice of foreign proceedings or want of opportunity to participate. A certain standard by which to evaluate these fundamental rights is vitally significant for a new model of jurisdictional propriety for Anglo-American foreign judgement recognition. There are a number of beneficial consequences attached to the constrained reformulated test. The chauvinistic and illusory notion of "substantial justice" adopted in *Adams* is avoided: the precepts of the defence are not illegitimately skewed; the solipsistic *ad-hocery* that infects Anglo-American tradition is ameliorated; and vagaries of inconsistency can be avoided by an effective test that protects individual concerns.

VI. CONCLUSIONS

In order for an economic union to function efficiently, a legal judgement—like any other property interest—must not have its value impaired merely by crossing a geographic border within the union, and both the property interest represented by the

2237. The former Article 27(4) on preliminary issues as to status does not find a place in the Regulation. Status issues are primarily a matter for the Brussels II legislation and any future European legislation dealing with problems of family law.

399. See Preliminary Draft Hague Judgements Convention, *supra* note 44; see generally Paul Beaumont, *supra* note 44.

judgement, and the legal mechanism for enforcing rights in that property interest, must be respected throughout the union.⁴⁰⁰

A clear need exists for a global solution to the dilemma presented by foreign judgement recognition. An effective panacea may develop under the auspices of the Hague Conference and a new multinational convention embracing jurisdictional concerns and recognition and enforcement provision. Opposition, especially at a European level, may stultify this initiative. As currently structured, Anglo-American perspectives on foreign judgement recognition appear hopelessly anachronistic. Rationalisation is needed to show deference to foreign courts in the name of comity, consistency, and convenience. It is suggested that a new optimal model be crafted on the basis of respect for one another's legal systems, and not on the basis of Maginot lines that will not hold and should not hold.

A reformulated test is needed to allow for the systematic accommodation of foreign laws and judgements in the domestic legal system. There must be a transmogrification away from the lack of consistency and array of variables that apply in the United States to foreign judgement recognition. In England, the ethnocentric and chauvinistic doctrinal analysis, rooted in nineteenth century theories, needs to be resiled in the strongest possible terms. A new reformulated Anglo-American doctrine on recognition should begin with an appropriate search for a foreign court that had jurisdiction in the international sense. A suitable predicate involves the substantial integration of jurisdiction principles with the test for jurisdictional competence. The overriding policy concerns in this arena should refocus upon interests of finality and conclusiveness of judgements; conservation of judicial resources and certainty in the process; preclusion; commercial convenience; and sufficient flexibility to allow a dynamic test which allows for evolution of our recognition rules to meet contemporary conditions.

This Article has suggested that a new optimal solution can be crafted on the basis of jurisdictional propriety. The striking decision of the Supreme Court of Canada in *Morguard*, promoting concerns of "international comity," can be the ideal starting point

400. Ronald A. Brand, *Recognition of Foreign Judgements as a Trade Law Issue: The Economics of Private International Law*, in ECONOMIC ANALYSIS OF INTERNATIONAL LAW 593 (Bhandari and Sykes eds., 1997).

for a new reformulation. This is solidified by more concrete precepts, inter-twinning commercial practicality on homogenous grounds. The new template provides for a rebuttable presumption of jurisdictional competence of the foreign court, but imposing a reversed burden of proof upon the defendant to show that recognition or enforcement would be unjust. The unjustness criterion would then be equated in a novel manner to the unconscionability test for restraint of foreign proceedings in the jurisdictional context. Of course, barriers exist to this desired reformulation. What, however, would justify the required Anglo-American effort would be a genuine commitment to the principle that civil controversies that cannot be settled by negotiation or arbitration should be submitted to appropriate courts—but *prima facie* only once.⁴⁰¹ If the new model of jurisdictional propriety, as suggested, can be attained, the world's democracies can respect each other's judicial systems and have a shared perception of essential fairness.

A discretionary element must form part of this new model in the commitment to recognised defences of public policy, fraud, and natural justice. These comprise an irreducible minimum standard against egregious practices. Jurisdictional propriety demands that the recognizing court should intervene only in extreme cases where enforcement would result in violation of a fundamental norm of substantive value or of procedural justice. If acceptance of such discretionary elements is the price for being labeled an idealist rather than an ideologue, it is one worth paying.

401. See Lowenfeld, *supra* note 153, at 303.

