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The Recognition and Enforcement of Foreign Equitable Remedies and Other Types of Non-Money Judgments in United States and French Courts: A Comparative Analysis

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by

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CHAPTER I: INTRODUCTION

Courts of each industrialized nation are faced with the adjudication of cases comporting foreign components. It is nowadays very common for those courts to be asked by individuals and legal entities evolving in a transnational environment to determine their rights and obligations with regard to some elements already adjudged in another legal system. Very often, a party will merely ask the court to accept that the foreign adjudication as it was rendered is valid and conclusive of the rights of the parties in the local forum as if it were a local judgment. The question of the effects to be given to such prior adjudications therefore arises. Most countries will agree to recognize some effects to the determination of foreign jurisdictions, granted those determinations will meet some standards which will guarantee the proper integration of the foreign decision into the domestic setting. These problems are at the core of the general theory of recognition and enforcement of foreign-country judgments.

“Renewed interest in choice-of-law problems and in jurisdiction to adjudicate suggests the appropriateness of a fresh discussion on the recognition of foreign adjudications”. The opening statement of one of the most influential pieces of legal literature written upon the recognition of foreign judgments, this sentence is as accurate now as it was thirty years ago at the time it was published in the Harvard Law Review. Opportunities for “fresh discussion” arose on many occasions, whether following changes or negotiations towards changes in the law of recognition, or whether some new

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Restatement of the Law in the field was issued in the United States\textsuperscript{2}, or else an important case was rendered in the field of foreign-judgment recognition, prompting the opportunity for comments.

It is to be observed that these comments were almost always directed at the recognition of what is known as "money-judgments", that is to say

a final order, decree or judgment of a court by which the defendant is required to pay a sum of money in contrast to a decree or a judgment of equity in which the court orders some other type of relief.\textsuperscript{3}

Relatively few comments have been directed at the rules governing the recognition and the enforcement of foreign decrees or judgments issued for a remedy other than a sum of money. Specific categories of non-money judgments and the extent of their recognition in other legal systems have been extensively analyzed: this is for instance the case of judgments affecting family law. However no such analysis was undertaken regarding non-money judgments as a general class with specific characteristics and needs, since the considerations involved when a court undertake to recognize an obligation to pay a sum of money are not the same when that court is faced with a request for recognition of a decree involving specific performance from the debtor.

This study endeavors to review the law applicable to the recognition of foreign non-money judgments, generally or with regard to a particular sub-category when applicable, to assess the particular problems encountered by such judgments with regard to their recognition abroad and subsequently to define their needs with regard to furthered acceptance in foreign legal systems. Finally, this study proposes to review the current alternatives for a reform in the field and define which solution would appropriately lead

\textsuperscript{2} In the United States, the Restatement (Second) of Conflict of Laws was published in 1971, three years after von Mehren & Trautman's article, \textit{supra} note 1, was written, and the Restatement (Third) of the Foreign Relations Laws of the United States was issued in 1986.

\textsuperscript{3} \textsc{Black's Law Dictionary} 695 (abr. 6th ed., 1991).
to heighten the recognition and the enforcement of foreign non-money judgments in a defined system.

The United States and the French practices will be analyzed herein. These two systems offer some very different perspectives in the field of recognition and enforcement of foreign country judgments generally. The American system is shaped by an interstate practice which, because of the requirement of the full faith and credit clause of the Constitution, will bring a favorable opinion towards recognition of foreign-nation judgments even though those nations are not included in the scope of application of the Full Faith and Credit Clause. On the contrary, the French practice is built upon strong notions of legal nationalism and unity of structure which have deeply influenced a restricting practice of recognition of foreign-nation judgments. The countries’ respective approaches towards recognition and enforcement bring into light the factors to be taken into account at the transnational level when trying to draw some conclusions upon the topic. They highlight the difficulties arising from differences and incompatibilities in the laws and the rules of procedures, as well as more generally in the legal philosophies, of the systems at stake. Such differences indeed start with the very definition of “equitable remedy” and more generally “non-money judgment” in each system. Judgments awarding remedies other than the payment of a sum of money may be of various nature and character. The range of such remedies will also greatly vary from one legal system to the other.

In the United States, the distinction between money-judgments and non-money judgments is commonly referred to in legal texts and practice. Remedies other than mere

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4 U.S. CONST. art. 4, § 1. von Mehren & Trautman, supra note 1, at 1601 (synopsis) (“[D]evelopment of sound recognition theory... has been hampered by overly facile generalizations from domestic... practice”.
6 See, e.g., von Mehren & Patterson, Recognition and Enforcement of Foreign Country Judgments in the United States, 6 LAW & POL'Y INT'L BUS. 37, 72, 74 (1974) (distinguishing the two with regard to enforcement procedures).
damages are quite present in the U.S. legal system and are first greatly developed through
the various components of the equity jurisprudence. A notion known only to common
law systems, equity "originated to provide a remedy which justice demanded, but which
the law courts did not provide." As a result, the courts of equity created a range of
remedies designed to provide the plaintiffs with a compensation more adequate to the
specific nature of their injury than the payment of a sum of money as damages. In
modern jurisprudence, these remedies are constituted by the following: specific

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7 See infra note 8 for a brief commentary upon the notion of Equity as understood in the American legal
system. An extensive literature exists in the United States upon the concept of Equity. See, e.g. JOSEPH H.
STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA (1886),
JOHN N. POMEROY, EQUITY JURISPRUDENCE, (1st ed. 1887), GEO T. BISHAM, THE PRINCIPLES OF EQUITY,
A TREATISE ON THE SYSTEM OF JUSTICE ADMINISTERED IN THE COURTS OF CHANCERY (11th ed. 1934), F.
MAITLAND, EQUITY: A COURSE OF LECTURES (2d ed. 1936), H. McCINTOCK, HANDBOOK OF THE
1956), DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES (1985), JOHN F. O'CONNELL, REMEDIES IN A
NUTSHELL (2d ed. 1985), ROBERT N. LEAVELL ET AL., CASES AND MATERIALS ON EQUITABLE REMEDIES,
RESTITUTION AND DAMAGES (4th ed. 1986), ROBERT S. THOMPSON & JOHN A. SEBERT, JR., REMEDIES:
DAMAGES, EQUITY AND RESTITUTION (M. Bender ed.) (New York, 2d ed. 1989), DAN B. DOBBS,
REMEDIES, DAMAGES, EQUITY, RESTITUTION (2d ed. 1993).

8 The word "Equity" may be used in various senses. Equity in the general sense of natural justice, founded
upon notions of honesty and right and arising ex aequo et bono is well-known to all legal systems.
However, Equity Jurisprudence as administered in the United States is peculiar to countries governed by
Common Law and originates in English law through the development of the jurisdiction of the Court of
Chancery in England. For a summary of the origin and history of Equity Jurisprudence in England and in
the United States and the distinction between the different meanings of the word "Equity", see STORY,
supra note 7, at 1-56. In England and in the United States, "Equity has a restrained and qualified meaning".
The word refers to the rights recognized and protected by the Courts of Equity as opposed to the rights
recognized and protected by the Courts of Common Law. STORY, supra, at 19-20. See also DOBBS, supra
note 7, at 28 ("More often today a case is called an equitable one because some equitable remedy, usually
of coercive nature, is sought.").


10 Nowadays, this term refers to the states' superior courts and the federal District courts sitting in Equity,
as Courts of Common Law and Courts of Equity have merged in all but a few States. See DOBBS, supra

11 For these remedies, the term "decree" is often found instead of "judgment". A decree is defined as "the
judgment of a court of equity or chancery, answering for most purposes to the judgment of a court of law",
BLACK'S LAW DICTIONARY (WESTLAW). Since the merger of the courts of law and those of equity, the
term "judgment" has generally replaced "decree", id.

12 See Brill, supra note 9, at 29-30, 32 ("Chancery Courts developed to fill in the gaps where the law and its
remedies were inadequate", id., at 32).

13 The following list of equitable remedies is not exhaustive. It is merely an account of the remedies most
encountered in Equity.
performance\textsuperscript{14}, injunctions (mandatory, prohibitory, interlocutory, perpetual, ex parte, after hearing)\textsuperscript{15}, re-execution\textsuperscript{16}, reformation\textsuperscript{17}, rescission\textsuperscript{18}, restitution\textsuperscript{19}, cancellation\textsuperscript{20}, account\textsuperscript{21}, dower\textsuperscript{22}, partition\textsuperscript{23}, partnership bills\textsuperscript{24}, creditors’ bills\textsuperscript{25}, discovery\textsuperscript{26} and

\textsuperscript{14} BISHPHAM, supra note 7, at 22. Specific performance is one of the most ancient of equitable remedies. It is also one of the most useful, as it can be applied in discretion of the court between original parties and those who claim under them to the sale of real estate, to personal property claims but also to other contracts besides those of sale. BISHPHAM, supra, at 305. However, limitations such as valuable consideration, meritorious consideration, adequacy, performance in specie, mutuality, certainty and practicability must be respected and operate as serious restrictions upon the application of the doctrine. BISHPHAM, supra, at 312-316.

\textsuperscript{15} BISHPHAM, supra note 7, at 22. (“The relief afforded by the writ of injunction is probably the most effective, the most characteristic and the most extensive of equitable remedies”, BISHPHAM, supra, at 327). A mandatory injunction is one that compels the defendant to restore things to their former condition, BISHPHAM, supra, at 327. A Prohibitory (or negative) injunction restrains the defendant from the continuance or continuation of some act which is injurious to the plaintiff, BISHPHAM, supra, at 328. An interlocutory injunction is one granted upon preliminary application and before final hearing. It is a provisional remedy, BISHPHAM, supra, at 329. On the other hand, a perpetual injunction is made on the merits, on final decree, \textit{id.}

\textsuperscript{16} BISHPHAM, supra note 7, at 22. Re-execution is applied to cases in which deeds or other instruments are lost or otherwise destroyed, BISHPHAM, supra, at 378.

\textsuperscript{17} BISHPHAM, supra note 7, at 22. Reformation is the refusal of the court sitting in equity to give any effect to an instrument, or treat it as a nullity, upon proper cause shown, BISHPHAM, supra, at 379.

\textsuperscript{18} BISHPHAM, supra note 8, at 22. Rescission is the right of the complainant to ask for reconveyance of an instrument or order than the instrument be surrendered for cancellation, mainly following fraud or mistake, BISHPHAM, supra, at 383-384.

\textsuperscript{19} DOBBS, supra note 7, at 26. (“Restitution means restoration, but was given an expansive meaning in equity”). \textit{See also} the RESTATMENT OF THE LAW OF RESTITUTION, QUASI CONTRACTS & CONSTRUCTIVE TRUSTS (1937): “A person entitled to restitution is entitled, in appropriate cases, to a remedy by a proceeding in equity, and not merely to a remedy by a proceeding at law”, RESTATMENT, supra, at § 160, introductory note. The Restatement states that restitution in equity includes decrees establishing and enforcing constructive trusts of property, decrees establishing and enforcing equitable liens upon property and decrees that the plaintiff be subrogated to the position of another claimant against the defendant, RESTATMENT, supra.

\textsuperscript{20} BISHPHAM, supra note 7, at 23. Cancellation occurs after the evidence of a void or voidable transaction is presented. It is however considered independently from rescission. BISHPHAM supra, at 384.

\textsuperscript{21} BISHPHAM, supra note 7, at 23. “Account occurs in all instances in which equitable titles are to be protected and equitable rights enforced”, BISHPHAM, supra, at 387.

\textsuperscript{22} BISHPHAM, supra note 7, at 23. “Dower is the right of a married woman to have assigned to her, after the death of her husband, one third of the land in which [he had some rights] and to enjoy the land thus assigned for life”, BISHPHAM, supra, at 397.

\textsuperscript{23} BISHPHAM, supra note 7, at 23. The remedy of partition was created in equity to extend the right of severance of joint-ownership and joint-tenancy to cases other than those created by operation of law, the latter being protected by common law. BISHPHAM, supra, at 392

\textsuperscript{24} BISHPHAM, supra note 7, at 23. Partnership bills will occur for purpose of administering the partnership’s assets after dissolution. They may also be filed for purpose of “obtaining a decree for dissolution and subsequent administration”, BISHPHAM, supra, at 406.

\textsuperscript{25} BISHPHAM, supra note 7, at 23. “Creditors’ bills are filed by creditors for the purpose of collecting their debts out of the [...] debtor”, when “the process of execution at common law could not afford relief”, BISHPHAM, supra, at 416.
receivers. Equity also plays a role in the administration of decedent's estates and in the management of insolvent's estates. However those latter functions are far more limited now than they used to be due to the establishment of probate courts in most States and federal preemption in the field of insolvency. Therefore in general, judgments connected to bankruptcies and successions will be considered as categories of non-money judgments linked with equity, due to the awarding of injunctive relief and orders.

Aside from equitable remedies, American courts award other types of non-money judgments, arising from common law rights and remedies. They comprise all declaratory judgments, such as matters related to personal status, also called self-executory judgments as they are declarative of the rights of the parties, all decrees arising from a source other than equity. Judgments for taxes and penal judgments are also understood to be part of the broad category of non-money judgments.

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26 BISPHAM, supra note 7, at 23. Before the rule for compelling the opposite party to testify and produce documents in his possession was a matter of statutory law, it was an equitable remedy. While the subject is not of as much importance to equity as formerly, certain equity rules regarding this remedy are still in force. BISPHAM, supra, at 437-439.
27 BISPHAM, supra note 7, at 23.
28 See DOBBS, supra note 7, at 24.
29 Id. at 24 n.2.
30 See infra, notes 571-604 and accompanying text (detailing different remedies available in the United States with regard to transnational bankruptcy cases).
31 Whether statutory or arising from case law.
32 A declaratory judgment is a judgment or an order for a declaration as to the rights of the parties: TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS AND ORDERS 26 (Ulla Jacobsson & Jack Jacobs eds., Norwell Massachusetts, Kluwer Law & Taxation Publishers 1988) [hereinafter TRENDS IN ENFORCEMENT OF NON-MONEY JUDGMENTS].
33 See TRENDS IN ENFORCEMENT OF NON-MONEY JUDGMENTS, supra note 32, at 26.
34 Decrees other than in equity encompass matrimonial law, child custody and child support. However such decrees will eventually be enforced in case of non-compliance to their terms by one of the parties by means of equitable remedies (injunction). Accordingly, equity plays a role, to the extent that these decrees are sometimes referred to in the literature as equitable decrees. See, e.g., David Buzard, U.S. Recognition and Enforcement of Foreign Country Injunctive and Specific Performance Decrees, 20 CAL. WEST. INT'L L.J. 91 (1990).
35 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES (1987), § 483 [hereinafter cited as RESTATEMENT (THIRD)]. The Restatement (third) distinguishes penal and tax judgments from "ordinary" judgments. Therefore these categories of judgments are encompassed within the general category of non-money judgments, as opposed to judgments for a sum of money.
Classifying and listing categories of non-money judgments rendered by French courts involves juggling with various categories of judgments and procedures. Money-judgments and non-money judgments\(^\text{36}\) are to be found in each category, as the distinction between those two concepts is not commonly addressed in the French practice. The French Code of Civil Procedure\(^\text{37}\) establishes a distinction between judgments on the substance («Jugements au fond») and judgments other than on the substance\(^\text{38}\). The different types of non-money judgments existing in the French procedure are to be extracted from both categories\(^\text{39}\). In the first category, judgments other than for a sum of money will mostly refer to specific performance\(^\text{40}\), and to other orders and decrees on the substance of the adjudication\(^\text{41}\), including matrimonial law judgments\(^\text{42}\), child custody and child support judgments\(^\text{43}\), receiverships\(^\text{44}\) and administration of insolvent’s estates\(^\text{45}\).

\(^{36}\) French law generally distinguishes types of proceedings (summary, dispositive, declarative, ex-parte...) and procedures but does not formally distinguish such general types of judgments as money and non-money. The latter distinction is therefore arbitrary, for purpose of circumscribing the topic. See LEXIQUE DES TERMES JURIDIQUES 268-269 (Dalloz, Paris, 7th ed. 1988).

\(^{37}\) NOUVEAU CODE DE PROCÈDE CIVILE [C. PR. CIV].

\(^{38}\) See e.g., JEAN-JACQUES BARBIERI, QUE SAIS-JE N°2988: LA PROCÈDE CIVILE (P.U.F., Paris, 5th ed. 1995) for a summary of the characteristics of that distinction. Other more subtle distinctions are established by the literature. They resort to the very nature of the judgment: contradictory proceedings as opposed to ex-parte proceedings, final judgments and interlocutory judgments, judgments of lower as opposed to judgments in Appeal. See JEAN VINCENT & SERGE GUINCHARD, PROCÈDE CIVILE 511-522 (Dalloz., Paris, 22nd ed. 1991).

\(^{39}\) The distinction between judgments on the substance and other judgments is important for the purpose of the topic, as the latter category is generally not recognized any res judicata authority in the French system. See infra, text accompanying notes 330-34. See BARBIERI, supra note 38, at 99.

\(^{40}\) "Obligation de faire". The French Civil Code art. 1142 states that "The obligation to do or not to do something gives rise, on non-performance, to liability in damages", C. Civ., art 1142, and thereby seems to prohibit in terms any judgment which obliges a debtor to act or refrain from acting in a particular way. However the prohibition does not extend to the obligation to give something and specific performance is accordingly widely used as a remedy in contract cases where the action involved is giving ("donner") rather than acting ("faire"). Also, sales contracts are covered by a special provision of the Civil Code, C. Civ., art. 1610, allowing the purchaser to require specific performance rather than damages. See K. ZWEIGER & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 509-510 (Clarendon Press, Oxford, 2d ed. 1992). Moreover, the practice has implemented some exceptions to the general prohibition of art. 1142: See, e.g., ALAIN BENABENT, DROIT CIVIL: LES OBLIGATIONS 316-318 (Montchrétien, Paris, 1987).

\(^{41}\) Both orders and decrees in that sense will be referred to as "jugements au fond" without other specification. See LEXIQUE DES TERMES JURIDIQUES, supra note 36, at 220.

\(^{42}\) "Affaire matrimoniale". See C. PR. CIV., arts. 1070-1148, 1282-1303.

\(^{43}\) Respectively "garde des enfants" and "pension alimentaire". The latter also stands for "alimony".

\(^{44}\) "Administrateur", "administrateur judiciaire". Receivers are nominated by order of the tribunal. See LEXIQUE DES TERMES JURIDIQUES, supra note 36, at 18-19.
bankruptcy judgments\textsuperscript{46}, succession proceedings\textsuperscript{47}, penal and tax judgments\textsuperscript{48}. The second category, judgments other than on the substance, will comprise injunctions\textsuperscript{49}, summary proceedings\textsuperscript{50}, and judgments awarded at the request of a single party, absent any litigation on the substance. The latter category, called «jugements en matière gracieuse»\textsuperscript{51}, is an interesting particularity of the French procedure\textsuperscript{52} that will include personal status judgments\textsuperscript{53}, adoption\textsuperscript{54}, divorce and separation with consent of both

\textsuperscript{45} Called “administrateur judiciaire”, as for receiverships. See supra note 44.

\textsuperscript{46} “Liquidation judiciaire” for companies, “faillite personnelle” for individuals in relation to business activities. See LEXIQUE DES TERMES JURIDIQUES, supra note 36, at 282, 213.

\textsuperscript{47} “Successions”. See C. Pr. Civ., arts. 1304-1327.

\textsuperscript{48} Respectively: “jugement en matière pénale” and “jugement en matière fiscale”.

\textsuperscript{49} “Ordonnances”. The word “injonction”, which is the literal translation of injunction, refers in French law to an order to pay a sum of money (“injonction de payer”), to the order for specific performance or prohibition to act made by a judge to an administrative branch (“Administration”), enforceable indirectly only by means of fines for non-execution, to the order for specific performance in limited cases (limited \textit{in valorem} and \textit{in specie}) (“injonction de faire”), C. Pr. Civ., art. 1425-1 and to the order by a judge in a civil suit made to compel a party to disclose documents or evidence. LEXIQUE DES TERMES JURIDIQUES, supra note 36, at 253-254. All other forms of injunctions are covered by the word “ordonnance”. See C. Pr. Civ., arts. 482-499, 808-813, 848-852, 872-876, 956-959.

The French procedure mostly distinguishes two types of injunctions (“ordonnances ”): interlocutory injunctions (“réré”), comprising interlocutory injunctions for specific performance (“réré injonction”), and injunctions limited to cases defined by statute, requested by one of the parties (“ordonnances sur requête”). Such injunctions may be ex-parte, C. Pr. Civ., art. 812. It is important to note that none of the above-mentioned injunctions are declarative of the rights of the parties and are not part of the substance of the adjudication. They are justified by the circumstances. C. Pr. Civ., arts. 809, 812. See, e.g., TGI Paris May 20, 1974, 1974 G.P. 538 (for interlocutory injunctions).

\textsuperscript{50} “Réré”, see supra note 49, and “jugements avant dire droit”, referring to discovery measures (mesures d’instruction) and interlocutory measures (mesures provisoires). See BARBIERI, supra note 38, at 99.

\textsuperscript{51} See LEXIQUE DES TERMES JURIDIQUES, supra note 36, at 149.

\textsuperscript{52} C. Pr. Civ., art. 25. Article 25 states that the judge will award a judgment of that type when the court has jurisdiction upon the subject-matter, at the request of a party, absent litigation by another of the facts requested to be declared. See DOMINIQUE LE NINIVIN, LA JURIDICTION GRACIEUSE DANS LE NOUVEAU CODE DE PROCÉDURE CIVILE (Litec, Paris, n.d.). This type of judgments is not recognized any res judicata authority, see C. Pr. Civ., art. 480. See also Cass. Civ. 25 Oct. 1905, D.P. 1906, 1, 337, note Planiol.

\textsuperscript{53} “Statut personnel”, for instance declaration of nationality. See LE NINIVIN, supra note 52, at 76.

\textsuperscript{54} “Adoption”. See LE NINIVIN, supra note 52, at 76-84.
parties\textsuperscript{55}, request for re-composition of official acts that were destroyed\textsuperscript{56}, and all other declarative judgments\textsuperscript{57}.

The differences in definition in each system involved are the product of individual legal developments and illustrate the differences in procedure among the two systems. Those differences will indeed be reflected in the general practice of recognition and enforcement of non-money awards in each nation.

\textsuperscript{55} Divorce ou séparation par consentement mutuel. Consent of the parties suppresses the element of litigation and dispute and thereby qualifies this type of proceedings to be included in this category. See LE NINI\textsc{v}IN, supra note 52, at 76-84.

\textsuperscript{56} "Reconstitution d'actes détruits". See LE NINI\textsc{v}IN, supra note 52, at 76-84.

\textsuperscript{57} "Jugement déclaratif". Such judgments recognize and declare the rights of the parties as they stood at the opening of the proceedings. LEXIQUE DES TER\textsc{m}ES JURIDIQUES, supra note 36, at 269. See also LE NINI\textsc{v}IN, supra note 52, at 76-84.
CHAPTER II: PREREQUISITES AND GENERAL PRINCIPLES
DETERMINING THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OTHER THAN FOR A SUM OF MONEY

Before undergoing a study of the general principles governing the recognition and the enforcement of foreign judgments rendered other than for a defined sum of money, the meanings attached to the very words “recognition” and “enforcement” should be examined, for they are to be distinguished. Such distinction will undermine the general understanding of the concepts at stake in this study.

SECTION I: RECOGNITION AND ENFORCEMENT DISTINGUISHED

The difference of meanings between the term “recognition of judgments” and the term “enforcement of judgments” is seldom emphasized in the legal literature and in the judgments rendered in connection with the matter. However, such a distinction is of importance, particularly with regard to the execution of foreign non-money judgments.

A foreign judgment is recognized “when a court concludes that a certain matter has been decided in the [foreign] judgment and therefore will not be litigated further [in the second forum]”. In recognizing a foreign judgment, the court will give effects to that

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58 von Mehren & Patterson, supra note 6, at 38. (“Although the two terms are sometimes used interchangeably by courts, they have distinct meanings”). Jonathan H. Pittman, The Public Policy Exception to the Recognition of Foreign Judgments, 22 VAND. J. TRANSNAT’L L. 969 (1989), n.2 and accompanying text (publication page reference not available for this document) (“Courts and litigants often use the terms ‘recognition’ and ‘enforcement’ interchangeably, but there is an important distinction between the two”). See e.g., 30 AM. JUR. 2D. Executions 524-631 (1994) (treating under the heading “Executions etc.” of problems relating to recognition and enforcement of foreign judgments and using the word “enforcement” in a subsection referring to “Bases for Recognition”. 30 AM. JUR. 2D Executions 524-525 (1994)). However, note of this distinction appears in the Restatement (third) of the Foreign Relations Law of the United States: RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES § 481 (1987).

judgment, but will not necessarily provide the relief granted by the foreign court. The latter will be operated by the procedure of “enforcement”. In other words, enforcement is the actual grant by the local court (second forum) of the relief to which the foreign court (first forum) entitled the party.

In the United States, recognition is considered as a prerequisite to enforcement, which does not guarantee that enforcement will be granted. However, since the enactment by the majority of the states of the Uniform Enforcement of Foreign Judgments Act, recognition and enforcement are often consisting of a single procedure, namely the filing of the foreign judgment with the court of the state in which recognition is sought. It should also be noted that the federal statute regulating the recognition and the enforcement of sister-state judgments pursuant to the Constitution does not distinguish either between the two terms.

In France, no prerequisite character is conferred to recognition. However the distinction between recognition and execution is of importance because some categories of foreign judgments will be granted some effects similar to those of recognition.

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60 von Mehren & Patterson, supra note 6, at 38.
61 Von Mehren & Patterson, supra note 6, at 38. See also von Mehren, Enforcement in the United States, supra note 59, at 400.
65 See, e.g., ALA. CODE §§ 6-9-230 to 6-9-238 (Supp. 1990), GA CODE ANN. §§ 9-12-130 to 9-12-138 (Supp. 1990), ILL. ANN. STAT. ch. 110, §§ 12-601 to 12-617 (Smith-Hurd 1884), MISS. CODE ANN. §§ 11-7-301 to 11-7-309 (Supp. 1990). Before the enactment of the Enforcement Act by the states, recognition and enforcement were often considered to separate steps. The foreign judgment was first recognized by way of a judgment of the U.S. court of the state in which recognition was sought, and only then enforced on the face of the U.S. judgment, see e.g., von Mehren & Patterson, supra note 6, at 38.
independently from the procedure of enforcement ("exequatur")\(^{67}\) that otherwise governs the whole process of recognition and enforcement of foreign judgments in the French system\(^{68}\). Also the Convention providing for recognition and enforcement of European sister-state judgments\(^{69}\) expressly distinguishes the recognition and the enforcement of such judgments\(^{70}\), with important consequences arising from the distinction\(^{71}\).

In each system, the distinction between recognition and enforcement is particularly important with regard to non-money judgments. Often, because of the peculiar circumstances surrounding the execution of foreign non-money judgments\(^{72}\), such execution will comprise recognition but will not be furthered so as to include actual enforcement of the foreign judgment at stake. Given the difficulties encountered in the various legal systems regarding the actual enforcement of local non-money judgments\(^{73}\), the limited enforcement of foreign non-money judgments is all the more understandable and further emphasizes the importance of the distinction between the concepts of recognition and enforcement in connection to the matter. In many cases, the request of a party will be limited to recognition of the foreign judgment, not its enforcement\(^{74}\). A defendant may wish to seek recognition of the res judicata effect of the prior foreign judgment to dismiss a plaintiff's claim in the second forum\(^{75}\), and a plaintiff will ask the second forum to recognize the prior foreign judgment in his favor as "offensive collateral

\(^{67}\) See infra, note 229 and accompanying text.


\(^{70}\) Brussels Convention, supra note 69, at art 26. See infra, notes 128-146 and accompanying text.

\(^{71}\) See Loussouarn & Bourel, supra note 68, at 537-539.

\(^{72}\) See infra, notes 205-210 and accompanying text.

\(^{73}\) See generally TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, supra note 32.

\(^{74}\) Pittman, supra note 58, at nn.6-8 and accompanying text.

\(^{75}\) Id. See infra notes 299, 300-304 and accompanying text for a definition of “res judicata effects”. 
estoppel against the defendant.\textsuperscript{76} without in any case asking for actual enforcement of the foreign judgment involved.

SECTION II : SOURCES GOVERNING RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS OTHER THAN FOR A SUM OF MONEY

In the U.S. system, the sources governing the recognition and the enforcement of "sister-state"\textsuperscript{77} judgments are to be distinguished from the sources governing recognition and enforcement of foreign-country judgments\textsuperscript{78}. Such a distinction must also be made as far as the recognition and the enforcement judgments in France of other European Member State\textsuperscript{79} are concerned. The integration of states into federal (United States) or supra-national (France with the European Union) entities bring similarities of law and procedure in the state of origin and the state addressed for recognition and/or enforcement\textsuperscript{80} as well as a common interest in reciprocal recognition and enforcement of the acts and proceedings of the administration and the courts of one another\textsuperscript{81}. Such similarities and interest, of various degrees depending on the nature and the goal of the state integration\textsuperscript{82}, call for specific rules. These circumstances exist and affect the

\textsuperscript{76} Pittman, supra note 58, at nn.6-8 and accompanying text. See infra, notes 299, 305 and accompanying text for a definition of "collateral estoppel" in relation to recognition.

See infra, note 84 and accompanying text.

\textsuperscript{77} Even though both sister-state judgments and foreign-country judgments are included in the general category of "foreign" judgments for the purpose of this work.

\textsuperscript{78} The European Union was first created by the Treaty of Rome Establishing the European Economic Community, March 25, 1957 [EEC Treaty], to be found under Single European Act, 1987 O.J. (L 169) 1. Treaty on European Union, O.J. 1992 C 191 (29 July 1992). The current EU member states are: Austria, Belgium, Denmark, France, Finland, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.


\textsuperscript{82} Id.
recognition and the enforcement of non-money judgments in both United States and France. They must accordingly be analyzed separately from foreign-country judgment recognition sources\(^3\).

A. THE RECOGNITION AND THE ENFORCEMENT OF SISTER STATE AND OTHER MEMBER STATE NON-MONEY JUDGMENTS

In both the U.S. and the French legal systems, particular dispositions regulate the recognition and the enforcement of so-called “sister-state judgments”\(^4\) in the United States and “other Member State judgments” in France. In the case of the United States, the degree of integration of the states into a federal union is such that the rules provide for a very extensive policy of recognition and enforcement of sister-state judgments, including non-money judgments\(^5\). France being integrated in a looser regional association,\(^6\) the European Union\(^7\), the rules for recognition and enforcement of other Member State non-money judgments, which are to be found in an international treaty specifically drafted for that purpose\(^8\), will also prove looser.

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\(^3\) von Mehren & Trautman, supra note 1, at 1607 (“international recognition practice should be treated separately from federal-system practice”).

\(^4\) These are the judgments issued by the courts of one of the legal entities linked together and integrated in “some sort of a multiple-state association” (von Mehren, Sister State Judgment Recognition, supra note 80, at 1045), “where there are significant nonnational elements in the administration of justice in the several states that comprise the system in question” (id., at 1044). “For convenience of exposition, judgments with such mixed characteristics can be called ‘sister state judgments’” (id., at 1045).


\(^6\) CASAD, supra note 81, at 22.

\(^7\) See supra note 79.

\(^8\) Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968 [hereinafter cited as the Brussels Convention]. The Convention was revised in 1978, (done at Luxembourg on Oct. 9, 1978), 18 I.L.M. 28 (1979), 29 I.L.M. 1417 (1990) (consolidated version including amendments of accession treaties) following the accession of Denmark, Ireland and Great Britain to the Community, and again in 1992 for the accession of Spain and Portugal (done at San Sebastian and signed by France on February 1st, 1992). Safe few differences on the substance, a text similar to that of the Brussels Convention was adopted among the European sister-states and those states of the EFTA (European Free Trade Association), comprising at the time the Convention was signed Austria, Finland, Iceland, Norway, Sweden, Switzerland and Liechtenstein, and today reduced to Switzerland, Norway, Iceland and Liechtenstein due to the integration of the others into the European Union in 1996. The Convention, known as the Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters [hereinafter cited as the Lugano Convention], was signed on Sept. 16, 1988, 1989 O.J.
1. The extensive recognition and enforcement rules of the United States

The U.S. Constitution requires that each state give “full faith and credit” to the public acts, records and judicial proceedings of every other State. The legislation implementing the full faith and credit clause of the Constitution further states that the decisions of the courts of any state are entitled to the same full faith and credit in every court within the United States as in the “courts of such State ... from which they are taken”. The standard for recognition and enforcement is therefore federal, and not state law.

Relatively few exceptions arise to the policy of complete recognition of sister-state judgments regardless of their nature. Accordingly, sister-state non-money judgments will be generally recognized. Public policy is not a valid defense, and the principle of recognition extends to tax and some penal judgments. The general rule, which does not distinguish between money and non-money judgments, is that a judgment is entitled to full faith and credit when the second court’s inquiry discloses that there has been full and fair litigation in the court rendering the original judgment, and that such

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(L. 285) 1. See e.g. GEORGES PEYRARD, RECUEIL DE TEXTES: DROIT INTERNATIONAL PRIVÉ ET DROIT DU COMMERCE INTERNATIONAL 137 (L’Hermès, 1992).

89 U.S. CONST. art. 4, § 1.


91 Emphasis added.


94 CASAD, supra note 81, at 29-30. von Mehren, Sister-State Judgment Recognition, supra note 80, at 1051-53.

95 Fautleroy v. Lum, 210 U.S. 230 (1908).


97 Huntington v. Attrill, 146 U.S. 657 (1892). Judgments that are penal “in the international sense” will generally not be recognized. A judgment is penal “in the international sense” when its “purpose is to punish an offense against the public justice of the state”, as opposed to a penal judgment affording “a private remedy to a person injured by the wrongful act”, 146 U.S. 657, 673-74 (1892). The former will not be recognized under the full faith and credit clause of the Constitution (The Antelope case, 23 U.S. (10 Wheat.) 66 (1825)) while the latter will [Huntington v. Attrill, 146 U.S. 657 (1892)]. See e.g., Mark W. Janis, The Recognition and Enforcement of Foreign Law: The Antelope’s Penal Law Exception, 20 INT’L LAW. 303 (1986).
judgment is final\textsuperscript{98}. It follows therefrom that ex-parte and default judgments may be vulnerable to full faith and credit\textsuperscript{99}, as well as interlocutory orders\textsuperscript{100}. However, modifiable decrees, for alimony, child support or custody will generally be recognized\textsuperscript{101}, and specific legislation will sometimes provide expressly for such recognition\textsuperscript{102}. In principle, recognition of sister-state non-money judgments, includes many equity decrees\textsuperscript{103}, albeit the Supreme Court has ruled that full faith and credit did not require the enforcement of decrees purporting to convey or otherwise affect land lying outside of the territory of the rendering court\textsuperscript{104}.

The full faith and credit clause of the Constitution\textsuperscript{105} does not distinguish between recognition and enforcement\textsuperscript{106}. However, actual enforcement of sister-state judgments may require some further steps to be taken due to the states’ individual sets of rules for procedure. For instance, a sister-state may require that a local judgment be obtained in its courts based on the original judgment the recognition of which is sought, and then enforce this original judgment indirectly, such enforcement arising from the local (second) judgment rather than from the original judgment\textsuperscript{107}. Whereas money-judgments may be easily enforced without further formalities, the above-mentioned procedure may more often be required from non-money judgments, particularly equity decrees, enforceable only by procedures available locally\textsuperscript{108}, and in the absence of “undue burden”

\textsuperscript{98} CASAD, supra note 81, at 29.
\textsuperscript{99} von Mehren, Sister State Judgment Recognition, supra note 80, at 1053. Exclusively the issues that the absent party did not have the opportunity to litigate in the first forum will be affected.
\textsuperscript{100} CASAD, supra note 81, at 29.
\textsuperscript{101} \textit{Id.}, RICHMAN \& REYNOLDS, UNDERSTANDING CONFLICT OF LAWS, § 98 (1984).
\textsuperscript{103} ROGER C. CRAMTON ET AL., CONFLICT OF LAWS 454 (5th ed. 1993).
\textsuperscript{104} Fall v. Estin, 215 U.S. 1 (1909). The exception concerns direct effects upon foreign land. Indirect effects are entitled to full faith and credit. CASAD, supra note 81, at 30.
\textsuperscript{105} U.S. CONST. art 4 § 1. See supra, note 66 and accompanying text.
\textsuperscript{106} Supra, note 66 and accompanying text.
\textsuperscript{107} CASAD, supra note 81, at 26.
\textsuperscript{108} As procedure may vary from state to state: procedural law is state law. See von Mehren, Sister State Judgment Recognition, supra note 80, at 1044-1045.
upon the enforcing court. However, in those states that have adopted the Uniform Enforcement of Foreign Judgments Act, some of the procedural difficulties may be avoided. The Enforcement Act does not limit itself to money-judgments and its dispositions will apply to non-money judgments issued by courts of sister-states. The Enforcement Act provides for enforcement of sister-state judgments in a manner similar to that of local judgments. Upon filing of the foreign judgment in the local court, notice is issued to the debtor of the obligation and after a specified period, local enforcement procedures will be made available to the plaintiff.

Whereas sister-state judgments may not be assimilated to local judgments and indeed do bear the name of “foreign judgments”, the sources providing for their execution are to be found in the federal Constitution and that particular category of “foreign” non-money judgments is granted a degree of recognition far superior to that to be found in the system governing the recognition and the enforcement of other Member State non-money judgments in France.

2. Limited rules for recognition and enforcement of other Member State non-money judgments in France

Rules providing for recognition and enforcement in France of European Member State judgments are embodied in the Brussels Convention on Jurisdiction and

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109 von Mehren & Trautman, supra note 1, at 1608 (citing the 1967 draft of the proposed § 102 of the Restatement (second) of Conflict of Laws).
111 See supra, note 64.
112 By its terms, the Enforcement Act applies to sister state judgments. In States having adopted both the Recognition and the Enforcement Act, the latter is incorporated into the former by the terms of the former but will nevertheless refer to non-money judgments while the Recognition Act will be limited to money-judgments. Ronald A. Brand, Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and Acceptance, 67 NOTRE DAME L. REV. 253, 278 (1991).
113 The filing procedure is a simplification operated by the 1964 version of the Enforcement Act. The earlier version, from 1948, provided for a “registration” procedure. See supra, note 64.
114 ENFORCEMENT ACT, supra note 64.
115 von Mehren, Sister State Judgments Recognition, supra note 80, at 1045.
116 See supra, note 84 and accompanying text.
117 See supra, note 79 for a list of those Member-States.
Enforcement of Judgments in Civil and Commercial Matters\textsuperscript{118}, elaborated to further the “common market” goals\textsuperscript{119} of the founding fathers of the European Community in the field described by article 220 of the founding Treaty\textsuperscript{120} as “simplification of formalities governing the reciprocal recognition and enforcement of [other Member State judgments]”\textsuperscript{121}. The source for recognition and enforcement of other Member State judgments in France is therefore a Treaty, which is independent from the founding Acts. French law provides in its Constitution for the supremacy of Conventions and Treaties over any other source of national law\textsuperscript{122}. Whenever applicable, the Brussels Convention will therefore preempt any other national source in the field.

The Brussels Convention undertakes to harmonize jurisdiction, and recognition and enforcement rules among the Member States of the European Union. The states of the European Union have significant differences in their legal systems\textsuperscript{123}. Accordingly, “it would have been impossible for the Member States to reach agreement on pertinent rules for all possible subjects of litigation”\textsuperscript{124}. Article 1 of the Convention sets a list of matters expressly excluded from the scope of the Convention. The Convention applies to Civil and Commercial matters exclusively\textsuperscript{125} and does not cover personal status, legal capacity, matrimonial property, wills, successions and bankruptcies\textsuperscript{126}, that are areas where local policy is very likely to be very strong\textsuperscript{127} and where judgments granted will be so other than for a defined sum of money. As a result, many types of non-money judgments from other Member States’s courts will not be granted privileged treatment.

\textsuperscript{118}Supra note 88.
\textsuperscript{119}EEC Treaty, supra note 79, art. 2. Article 2 of the EEC Treaty sets the establishment of a “common market” as one of the goals of the -then- newly formed association.
\textsuperscript{120}EEC Treaty, supra note 79, art. 220.
\textsuperscript{121}Id.
\textsuperscript{122}CONST (Fr.), art 55.
\textsuperscript{123}von Mehren, Sister-State Judgment Recognition, supra note 80, at 1048-50.
\textsuperscript{125}Brussels Convention, supra note 88, art.1.
\textsuperscript{126}Id. See also Herzog, supra note 124, at 420, and CASAD, supra note 81, at 36.
\textsuperscript{127}Herzog, supra note 124, at 420. CASAD, supra note 81, at 36.
and will be submitted to the rules governing the recognition and the execution of foreign-country judgments.

For those non-money judgments covered by the scope of the Convention, for instance specific performance in commercial matters, injunctions in civil or commercial matters unaffected by the specific exceptions listed above or judgments for title in civil or commercial matters, the scope of the effects given in France to one of them will depend on whether recognition or enforcement is sought.

Unlike the provisions dealing with the matter in the U.S. sister-states system, the Brussels Convention treats in separate articles -albeit within the same section- of recognition and enforcement. Article 26 of the Convention provides that any judgment covered by the scope of the Convention shall be recognized without the necessity of any formal procedure. Such “automatic”-or de plano- recognition includes res judicata effects and can accordingly be qualified of “complete”. Article 26 applies to non-money judgments unaffected by the exceptions of article 1. Article 27 however sets some exceptions to the de plano recognition of article 26. Such exceptions will comprise the local public policy, lack of notice to the defendant, judgment inconsistent with a prior judgment between the same parties and incorrect choice of law if the suit incidentally involves matters excluded from the scope of the Convention. The scope of

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128 Brussels Convention, supra note 88, arts. 26, 32.
129 Brussels Convention, supra note 88, art. 26. CASAD, supra note 79, at 37.
130 "Reconnaissance de plein droit".
131 LOUSSOUARN & BOUREL, supra note 68, at 538. CASAD, supra note 81, at 37.
132 Unlike the French domestic recognition of some effects de plano to foreign judgments, which may or may not include res judicata effects depending on the category of judgment considered. See infra, notes 233-240 and accompanying text.
134 Brussels Convention, supra note 88, art. 27 (2). See CASAD, supra note 81, at 39.
135 Brussels Convention, supra note 88, art. 27 (3). See CASAD, supra note 81, at 39.
136 Brussels Convention, supra note 88, art. 27 (4). Herzog, supra note 124, at 425. See also CASAD, supra note 81, at 39.
recognition in France of other European Union Member State judgments is, following the above exceptions, less extensive than that in the United State for sister-state judgments\textsuperscript{137}, where notably public policy is excluded from the thin list of grounds for non-recognition of sister-states judgments\textsuperscript{138}. Particularly with regard to non-money judgments, recognition is less extensive in France because unlike the full faith and credit clause of the U.S. Constitution, the Brussels Convention excludes some entire areas from automatic recognition.

Enforcement is to be found under a different article of the Brussels Convention\textsuperscript{139}. Unlike recognition, it is not provided for automatically. Article 34 of the Brussels Convention requires an ex-parte application for enforcement\textsuperscript{140}. The granting of the request may not be refused on grounds other than those of article 27 listed above, provided that the judgment is enforceable in the state of origin\textsuperscript{141}. However, enforcement of non-money judgments may prove more difficult. Because of the differences in the legal systems of the European Member States, much greater than the differences among the sister-states composing the United States\textsuperscript{142}, some remedies available in the country of the original judgment may not be available in the country in which recognition is asked. It could therefore hardly be expected that the latter country provide such relief\textsuperscript{143}. Also the question arises that the public policy exception may be invoked if the remedy sought is available in the country of recognition but not provided for domestically in the particular type of suit involved\textsuperscript{144}.

\textsuperscript{137} von Mehren, Sister-State Judgment Recognition, supra note 80, at 1055.
\textsuperscript{138} Fautleroy v. Lum, 210 U.S. 230 (1908). See supra, notes 95-97 and accompanying text.
\textsuperscript{139} LOUSSOUARN & BOUREL, supra note 68, at 538.
\textsuperscript{140} Brussels Convention, supra note 88. See CASAD, supra note 81, at 37-38, and LOUSSOUARN & BOUREL, supra note 68, at 536.
\textsuperscript{141} Herzog, supra note 124, at 425.
\textsuperscript{142} von Mehren, Sister-State Judgment Recognition, supra note 80, at 1048-50.
\textsuperscript{143} von Mehren & Trautman, supra note 1, at 1609. For instance, the concept of “equitable remedies” as used in England and its methods of enforcement are unknown to the French system. See generally TRENDS IN ENFORCEMENT OF FOREIGN COUNTRY JUDGMENTS, supra note 32.
\textsuperscript{144} Id. For instance, if the first judgment is rendered for specific performance in labor law, when specific performance exists as a remedy in the state where enforcement is sought, but not in relation to labor law.
Therefore, because of the exclusion of specific matters from the scope of the Brussels Convention as well as because of some differences in the degree of similarity between Member-State judgments\(^{145}\), the recognition and the enforcement of Member State non-money judgments in France will be far more limited that for U.S. sister-state judgments. Whereas the Convention applies to some types of non-money judgments, many are excluded from the Convention and will follow the rules for recognition and enforcement of foreign-country” judgments. No such exclusions take place in the U.S. system\(^{146}\).

B. SOURCES GOVERNING THE RECOGNITION AND THE ENFORCEMENT OF FOREIGN-COUNTRY NON-MONEY JUDGMENTS

There are no special rules set for the recognition or the non-recognition of non-money judgments in either the United States or France\(^{147}\). Therefore the general procedure set for recognition is to be followed in each country. The actual enforcement of non-money judgments will prove more delicate in both systems\(^{148}\).

1. Rules governing the recognition of foreign-country non-money judgments the United States

Even if some courts have sometimes based recognition of foreign-country judgments upon it\(^{149}\), the full faith and credit clause of the Constitution\(^{150}\) does not apply to judgments of foreign nations\(^{151}\). However, the application of the clause among sister

\(^{145}\) von Mehren, Recognition: General Theory, supra note 80, at 90.

\(^{146}\) See supra, notes 95-104 and accompanying text.

\(^{147}\) Buzard, supra note 34, at 93 (“A foreign [non-money judgment] is susceptible to the same general conditions and/or affirmative defenses as monetary judgments”).

\(^{148}\) infra, notes 203-210, 269-76 and accompanying text.


\(^{150}\) U.S. CONST, art. 4, § 1.

states has influenced the general recognition practice\textsuperscript{152}, based upon the concept of comity\textsuperscript{153}, into being particularly extensive compared to that of other nations\textsuperscript{154}.

The recognition of foreign-country judgments is not based on federal law as the recognition of sister-state judgments is\textsuperscript{155}. No federal legislation nor any treaty is preempting the field\textsuperscript{156}, even though there is little doubt that by ratification of a treaty or enactment of a statute the Federal Government could adopt laws governing recognition and enforcement of foreign-country judgments\textsuperscript{157}. The treatment accorded to foreign-country judgments is considered a matter of state law\textsuperscript{158}, even though as of today, the Supreme Court has not yet issued any ruling on that particular question\textsuperscript{159}. Following the \textit{Erie R.R. v. Tompkins}\textsuperscript{160} decision as to the application of state law in diversity cases, it has been consistently held that state law also governs issues of recognition and enforcement of foreign nation judgments\textsuperscript{161}.


152 Bishop & Burnette, \textit{supra} note 62, at 426-427.

153 See infra, note 166 and accompanying text.


155 By virtue of the Full Faith and Credit Clause of the Constitution, U.S. CONST. art. 4, § 1. See \textit{supra}, notes 89-93, and accompanying text.

156 Brand, \textit{supra} note 64, at 258. von Mehren & Patterson, \textit{supra} note 6, at 38-39.

157 von Mehren & Patterson, \textit{supra} note 6, at 38-39. The Foreign Commerce Clause of the U.S. Constitution, U.S. CONST. art. 1, § 8 would presumably entitle Congress to such power and the Executive's powers to negotiate in the area of foreign affairs, U.S. CONST. art II, § 2, entitles the President to act. Brand, \textit{supra} note 64, at 257.

158 von Mehren & Patterson, \textit{supra} note 6, at 38-39 ("the recognition of foreign-judgments usually is governed, under current law, by the various state laws").

159 Id., at 39.

160 304 U.S. 64 (1938). In diversity cases, the federal court must apply the law of the state in which it sits, 304 U.S. at 78. The result is that federal judges are compelled to determine what the relevant state courts would decide if faced with the same issue. Brand, \textit{supra} note 64, at 263. Choice of law rules are also those of the state in which the federal court sit, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

In the United States, recognition of foreign-country judgments is generally a matter of common law. Some statutory sources may be found, but their scope of application will however be limited to money-judgments. The Uniform Foreign Money-Judgments Recognition Act is today the cornerstone of such sources. As far as non-money judgments are concerned, the main sources will therefore be the common law of each state. The Restatement (third) of the Foreign Relations Laws of the United States also includes some dispositions regarding non-money judgments.

Common law bases recognition of foreign-country judgments upon the notion of "comity." Not distinguished under the doctrine of comity, judgments other than for a sum of money will therefore follow this general basis for their recognition. Comity provides for "acceptance of foreign judgments as conclusive for res judicata and collateral estoppel effects" unless one of the following grounds justifies the refusal of such recognition: lack of impartiality of the foreign tribunal or lack of due process,

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162 von Mehren & Patterson, supra note 6, at 40-41.
164 22 states have adopted the Recognition Act with some additional requirements of reciprocity in 5 States. See Brand, supra note 64, at 286.
166 Abundant case law and literature exist upon the notion of Comity. The leading precedent on the concept of Comity is Hilton v. Guyot, 159 U.S. 113 (1895). In a very frequently cited paragraph, the Supreme Court identified "Comity" as

Neither a matter of absolute obligation, on one hand, nor of mere courtesy or good will, upon the other. But it is the recognition that 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.
167 von Mehren & Patterson, supra note 6, at 44.
lack of jurisdiction over the defendant\textsuperscript{169} or the subject matter\textsuperscript{170}. absence of sufficient notice to the defendant\textsuperscript{171}, judgment obtained by fraud\textsuperscript{172}, the cause of action or the judgment are repugnant to the public policy of the second forum\textsuperscript{173}, the judgment conflicts with another final judgment entitled to recognition\textsuperscript{174}, or the proceeding was contrary to a choice of forum agreement between the parties\textsuperscript{175}. In most jurisdictions, a finding of reciprocity is no longer a requisite to recognition\textsuperscript{176}. However some states maintain some higher requirement for foreign-judgments recognition\textsuperscript{177}. Based upon the notion of “Comity of Nations”, foreign-country non-money judgments will be recognized in the United States provided they are free of the above-mentioned defects. Some argue

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\textsuperscript{169} Hilton v. Guyot, 159 U.S. 113, 202 (1895) (requiring “an opportunity for a trial abroad...before a court of competent jurisdiction”). \textit{See} Brand, \textit{supra} note 64, at 271. \textit{See also} Recognition Act, \textit{supra} note 163, at § (a), and \textbf{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES} § 482 (1)(b) (1987).
\textsuperscript{174} Ackerman v. Ackerman, 517 F. Supp. 614, 623, 6226 (S.D.N.Y. 1981), aff'd, 676 F.2d 898 (2d Cir. 1982). \textit{See also} Brand, \textit{supra} note 64, at 216, and \textbf{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES} § 482 (2)(e).
\textsuperscript{177} For instance Georgia requires reciprocity and makes all of the above-mentioned exceptions mandatory grounds for non recognition. \textit{GA CODE ANN.} § 9-12-114 (10)(1982). \textit{Brand, supra} note 64, at 286.
that non-money judgments will however be subject to closer scrutiny than money-judgments will\(^{178}\), which may be supported by recent case law\(^{179}\) in certain areas.

The Restatement (third) of the Foreign Relations Laws of the United States (1987) expressly includes as recognizable in the United States some types of non-money judgments in its statement of the law upon recognition of foreign-country judgments, such as divorce\(^{180}\), custody\(^{181}\) and support orders\(^{182}\). The Restatement (third) also lists tax and penal foreign-country judgments as generally not recognizable nor enforceable in the United States\(^{183}\), which is different from the rule governing sister-state judgments upon the matter\(^{184}\). Save that exception, non-money judgments not specifically listed by the Restatement\(^{185}\) will follow the general rule according to which final foreign-country judgments establishing or confirming the status of a person or determining interests in property are entitled to recognition in the United States\(^{186}\) if they are not affected by one of the above-mentioned grounds for non-recognition. A comment to the Restatement also indicates that other types of foreign-country non-money judgments such as judgments granting injunctions or judgments arising from attachment of property may be entitled to


\(^{183}\) *See supra*, note 97 for penal judgments. *See also*, for tax, Her Majesty the Queen in Right of the Province of British Columbia v. Gilbertson, 597 F.2d 1161 (9th Cir. 1979). *See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 483 (1987)* ("courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines or penalties rendered by the courts of other states").

\(^{184}\) *See supra*, notes 96-97 and accompanying text.

\(^{185}\) *Supra* notes 180-183 and accompanying text for a list of those specifically listed.

\(^{186}\) *Supra*, notes 167-79 and accompanying text.
recognition under the Restatement rules, as well as judgments recognizing succession to the property of a decedent and claims recognized or denied by foreign bankruptcy courts.

In its section 98, the Restatement (second) of Conflict of Laws (1971) states a general policy in favor of recognition of foreign-country judgments. It appears that non-money judgments are not included in that declaration of principle, as the Restatement indicates that “[e]xisting authority does not warrant the making of any definite statement” as far as those judgments are concerned. However, the Restatement further indicates in its comments that foreign equity decrees will usually be recognizable and may be enforceable if they will “not impose an undue burden upon the American courts” and if the decree is “consistent with principles of justice and good morals.” The rules for enforcement of foreign non-money judgments are far more restrictive than the rules governing their recognition.

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194 Id.
2. Rules governing the enforcement of foreign non-money judgments in the United States

A foreign-country judgment, even recognized, is generally not directly enforceable in the United States: it must first be reduced to a judgment of the enforcing court and then may be enforced by any means available under local law\textsuperscript{195}. It is to be noted that in the United States, as in any other common law system, the enforcement proceedings is treated as a fresh separate proceeding\textsuperscript{196} the initiative of which is in the hands of the successful party\textsuperscript{197}: unlike in civil law countries\textsuperscript{198}, the court has neither duty nor initiative to enforce a previous judgment or order and must leave this decision to the successful party. Each state has its own detailed rules governing enforcement proceedings\textsuperscript{199}, and uniformity has been reached among some states only as far as money-judgments are concerned, by the combined application of the Recognition Act\textsuperscript{200}, applicable to foreign-country money-judgments, and the Enforcement Act\textsuperscript{201}, applicable only to sister-state judgments originally but extended to foreign-country judgments by incorporation into the terms of the Recognition Act in those states that have adopted both\textsuperscript{202}. Non-money judgments may not be recognized by this simplified proceeding and will therefore follow the local procedure.

U.S. courts will indeed grant actual enforcement of some types of foreign non-money judgments\textsuperscript{203}, provided the form of relief is available under local law\textsuperscript{204}, and that

\begin{itemize}
\item \textsuperscript{195} von Mehren, \textit{Enforcement in the United States}, supra note 59, at 402.
\item \textsuperscript{196} Trends in the enforcement of foreign non-money judgments, supra note 32, at 18.
\item \textsuperscript{197} Id.
\item \textsuperscript{198} See infra, note 276 and accompanying text.
\item \textsuperscript{199} von Mehren, \textit{Enforcement in the United States}, supra note 59, at 404.
\item \textsuperscript{200} Supra note 163.
\item \textsuperscript{201} Supra note 64.
\item \textsuperscript{202} Brand, supra note 64, at 278-79. The Recognition Act provides that a judgment entitled to recognition is enforceable “in the same manner as the judgment of a sister-state which is entitled to full faith and credit”, Recognition Act, supra note 64, at § 3.
\item \textsuperscript{203} See e.g., Roblin v. Long, 60 How.Pr. 200 (N.Y. 1880) (enforcement of specific performance decree).
\item \textsuperscript{204} Boissevain v. Boissevain, 169 N.E. 130 (N.Y. 1929). See von Mehren & Patterson, supra note 6, at 74-75. See supra, note 195.
\end{itemize}
the enforcing court will not suffer an “undue burden”\textsuperscript{205}. However this will be indirect enforcement, since the judgment enforced will really be the \textit{U.S. judgment} rendered following recognition of the foreign judgment\textsuperscript{206}, or a judgment assimilated to a local judgment for enforcement according to the terms of the Enforcement Act in most states\textsuperscript{207}. Given the differences in the remedies available in each of the two legal systems considered, many of the species of non-money judgments awarded in France will not be available in the same form under U.S. rules and therefore may be entitled to recognition, but not enforcement in the United States. The problem is however avoided in a number of cases where the judgment is qualified of “self-enforcing”\textsuperscript{208}, that is capable of producing effects by virtue of its own existence, such as a declaration as to legal rights or a decree of legitimation\textsuperscript{209}. Also, in some cases, the obligation may be convertible into a money “compensation”\textsuperscript{210} by the enforcing court due to the impossible enforcement of the decree granting specific relief.

In the United States, the enforcement of non-money judgments, as that of any other type of judicial decision, rests upon “contempt of court”\textsuperscript{211} and the power of the court to impose therefrom various sanctions of a fairly serious order, including fines and imprisonments, upon the party who is not complying with the non-money decree\textsuperscript{212}

\textsuperscript{205} von Mehren & Patterson, supra note 6, at 74-75. See supra note 192 (Roblin case). See also TRENDS IN THE ENFORCEMENT OF FOREIGN NON-MONEY JUDGMENTS, supra note 32, at 16.

\textsuperscript{206} von Mehren & Patterson, supra note 6, at 74-75.

\textsuperscript{207} Recognition Act, supra note 64. See supra, note 665 (Following the adoption of the Enforcement Act, procedures concerning the recognition and the enforcement of foreign-country judgments are consisting of a single step : the filing of the foreign judgment with the courts of the state in which recognition and enforcement are sought).

\textsuperscript{208} Id., at 17.

\textsuperscript{209} Even though the principle underlying the granting of non-money awards is that there is no such money equivalent to it, see supra, note 11.

\textsuperscript{210} The action of contempt of court is defined as “any act which is calculated to embarrass, hinder or obstruct the administration of justice, or which is calculated to lessen its authority or its dignity”. BLACK’S LAW DICTIONARY (WESTLAW). Failure to comply with the order of a court amounts to contempt of court, id.

\textsuperscript{211} For the use of the term decree instead of judgment in relation to equitable remedies, see supra, note 11.
issued previously by the court. However, contempt of court is limited to in personam decrees, and other means of enforcement are made available to the successful party for other types of decrees. For instance, an order to convey land may be carried out by the court, operating the transfer of property herself. Such a method will be qualified of “indirect enforcement”, as opposed to direct enforcement, that is enforcement realized by the parties themselves. Indirect enforcement may also be used in in personam cases, for instance by appointment of a receiver or other officer of court to carry out the act commanded, the costs of the substitution being charged to the non-complying party.

It is to be noted that once receivership as been chosen over contempt of court for enforcement, the latter is not available any more to the party seeking enforcement. However the most frequently used instrument of enforcement of non-money decrees is perhaps the imposition of fines to require the direct enforcement of the decree or the order by the defendant. Enforcement of non-money judgments in the United States may accordingly be effectuated by various measures. The problem of actual enforcement arises as far as the enforcement of local non-money judgments are concerned, and will be emphasized greatly when the relief sought originates abroad, even though it is reduced to a local judgment by the time it reaches the stage of enforcement.

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213 See supra, note 211. See also DOBBS, supra note 7, at 93.
214 DOBBS, supra note 7, at 93. (“it is a power that exists only to enforce personal orders”).
215 Id., at 91.
217 TRENDS IN THE ENFORCEMENT OF FOREIGN NON-MONEY JUDGMENTS, supra note 32, at 17.
218 DOBBS, supra note 7, at 92. Ohio v. Kovacs, 21 S.Ct 705 (1985) (following the issuance of a clean-up order in an environmental protection case, a receiver was appointed to carry out the order upon non-compliance of the defaulting party).
220 Id.
221 The resort to coercive and compensatory fines is common indeed. On the other hand, punitive fines are rarely, if ever, used in civil contempt proceedings. TRENDS IN THE ENFORCEMENT OF FOREIGN NON-MONEY JUDGMENTS, supra note 32, at 81.
before a U.S. court. Quite different are the procedures used in the French system for recognition and enforcement of non-money judgments. They are not as extensive as the solutions offered generally by the U.S. system.

3. Rules governing the recognition and the enforcement of foreign-country judgments in France

Recognition of foreign judgments in France is one of the few areas of the law which has been extensively developed by case law. The Code of Civil Procedure, which deals with the enforcement and execution procedures for local judgments simply provides that foreign-country judgments will be enforceable in France in statutory-defined cases. The statutory provisions referred to are set forth in the Civil Code and merely provide that enforceability of foreign-country judgments is granted by a special proceeding, bearing the name of *exequatur*, before French civil courts. Such proceeding is an adversary hearing, and requires proper standing from the part of the parties to the action. In many cases, the proceeding of *exequatur* is required for recognition of some *res judicata* effects to foreign-country judgments. Therefore, in those cases, "recognition", meaning the production of *res judicata* effects, and "enforceability" of foreign-country judgments will arise from the same proceeding. However, foreign-country judgments may be recognized some effects independently from the *exequatur* proceeding. First, all foreign judgments will be recognized as elements of

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224. See supra note 206 and accompanying text.
225. LOUSSOUARN & BOUREL, supra note 68, at 519.
227. C. PR. CIV. art 509.
228. C. CIV. art 2123.
229. Id.
232. See infra, notes 299-304. The extent of the *res judicata* and estoppel effects of judgments rendered in France are more limited than those in the United States. See infra, note 290.
proof of the situation created or recorded by the judgment, or of the quality of the parties to the case.

More fundamental is the recognition awarded per se to foreign-country judgments establishing the status of a person or dealing with personal capacity of the parties. Case law has consistently held that such judgments will be recognized res judicata effects in France independently from the proceeding of *exequatur*, provided however that the "international regularity" of the judgment be established. *Exequatur* will only be required for those judgments if some measures of execution upon persons and/or property are requested. Since judgments ruling upon status and capacity will be forms of non-money decrees, the recognition of those categories of non-money judgments, being automatic, will prove less burdensome in France than the recognition of the same in the United States. Safe this exception all other types of non-money judgments will not be recognized res judicata effects without fulfilling the requirements of the *exequatur* proceeding. Since the French procedure does not expressly distinguish between money and non-money judgments, the *exequatur* proceeding applies to the latter as it applies to the former. However the distinction will prove significant, even before actual enforcement is required.

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236 "Régularité internationale". Alexandre, *supra* note 233, at 60.
237 *Id.*
239 *Supra*, notes 53, 57.
240 *Supra*, notes 38-39, and accompanying text.
The conditions to be met by a foreign-country judgment in order to be recognized and enforceable in France have been issued by case law. If they are met, *exequatur* will be granted to the judgment, thereby rendering it recognizable and enforceable on the French territory without further action\textsuperscript{241}. France does not have a general policy of recognition\textsuperscript{242}. Rather, the control of the judge will focus on four conditions, and unless all four conditions are met\textsuperscript{243}, the foreign judgment\textsuperscript{244} will not be recognized any *res judicata* effects in France, and will not be enforceable\textsuperscript{245}.

These four conditions are the following: the foreign tribunal had jurisdiction over the parties and the subject-matter\textsuperscript{246} and did not infringe upon a rule granting exclusive jurisdiction to the French tribunals under French law\textsuperscript{247}, the foreign tribunal applied the law that French conflict of law rules would have designated\textsuperscript{248} or a law producing the same effect\textsuperscript{249}, the foreign judgment respects public policy\textsuperscript{250} as understood in private

\begin{itemize}
\item \textsuperscript{241} LOUSSOUARN & BOUREL, supra note 68, at 522.
\item \textsuperscript{242} Supra, notes 152-54 and accompanying text.
\item \textsuperscript{244} Safe the exception concerning judgments upon status and capacity, *supra* notes 234-237 and accompanying text.
\item \textsuperscript{245} Prior to Munzer, French tribunals practiced the highest degree of control prior to granting exequatur to a foreign judgment. The procedure included review of the merits ("révision au fond"). LOUSSOUARN & BOUREL, supra note 68, at 523. See also G. Holleaux, *Remarques sur l’évolution de la jurisprudence en matière de reconnaissance des décisions étrangères d’état et de capacité*, TRAV. COM. FR. DR. INT. PR., 1948-1952, 179, Bredin, *supra* note 5, at 19-20 (commenting upon the disappearance of the review of the merits).
\item \textsuperscript{246} According to the local rules governing jurisdiction and to the French rules governing jurisdiction.
\item \textsuperscript{248} Munzer, *supra* note 243, and Bachir, *supra* note 243.
\item \textsuperscript{249} Munzer, *supra* note 243. See also Cass. civ. Oct. 2, 1986, Rev.cr.dr.int.pr., 1986.91, note Jobard-Bachellier. The "same effect" principle is called theory of equivalence ("théorie de l’équivalence").
\item \textsuperscript{250} "ordre public". Public policy may be defined as "community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare and the like".
\end{itemize}
international law\textsuperscript{251} and the judgment is rendered free of fraud\textsuperscript{252}. There is no requirement of reciprocity under French law for recognition of foreign-country judgments\textsuperscript{253}.

Once the above-mentioned conditions have been fulfilled, \textit{exequatur} will be granted by the competent tribunal\textsuperscript{254} and the foreign judgment will be recognized the same res judicata effects and the same enforceability character as would a decision of a French tribunal\textsuperscript{255}. It is to be noted that none of the effects which arose prior to the issuance of the exequatur will be recognized thereafter\textsuperscript{256}.

Whereas in principle there is no exception regarding the recognition of foreign non-money judgments as opposed to money-judgments\textsuperscript{257} under \textit{exequatur} proceedings, the conditions to be met as stated above will affect non-money judgments much more than they will affect money-judgments. First, some categories of non-money judgments will not pass the muster of "public policy", such as judgments for taxes and penal judgments\textsuperscript{258}. Public policy will also limit the recognition of the judgment awarding a remedy that is not available under French rules of law and procedure. Also, non-money judgments, decrees and orders are issued in areas in which each country has developed

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\textsuperscript{251} \textit{Messageries Maritimes}, \textit{supra} note 250, Munzer, \textit{supra} note 243. The satisfaction of the public policy requirement comprises the insurance that due process has been respected, Bachir, \textit{supra} note 243, and the verification that the judgment does not offend public order on its merits, LOUSSOUARN & BOUREL, \textit{supra} note 68, at 530, Bredin, \textit{supra} note 5, at 21.

\textsuperscript{252} Munzer, \textit{supra} note 243. Bredin, \textit{supra} note 5, at 21-22.

\textsuperscript{253} LOUSSOUARN & BOUREL, \textit{supra} note 68, at 531.

\textsuperscript{254} The competent tribunal is the Court of First Instance ("Tribunal de Grande Instance") of the place where recognition and/or enforcement are sought, LOUSSOUARN & BOUREL, \textit{supra} note 68, at 531-32.

\textsuperscript{255} Id.

\textsuperscript{256} Id., at 532.

\textsuperscript{257} \textit{Supra}, notes 38-39, 240 and accompanying text.

\textsuperscript{258} LOUSSOUARN & BOUREL, \textit{supra} note 68, at 520. However, penal judgments awarding punitive damages may be recognized and enforced, Cass. civ., Dec. 7, 1936, S. 1937.1.63, \textit{Rev. cr. dr. int. pr.}, 1938.494.
policies\textsuperscript{259} and particularisms in their approach as well as complex procedural regulations\textsuperscript{260}. In such areas, French rules for jurisdiction or applicable law may call for the designation of a tribunal or a law that may differ from the foreign rules upon the matter much more frequently than rules awarding money-damages will, because the matter has stronger ties to public policy\textsuperscript{261}. In connection to money-judgments, it has been observed that French and foreign rules will generally meet or produce an equivalent effect as requested for the granting of \textit{exequatur}\textsuperscript{262}. Such statement will not be found in connection to non-money judgments, subject to more scrutiny with regard to the fulfillment of the conditions necessary to the obtaining of an \textit{exequatur}\textsuperscript{263}. Indeed, it has been commented upon the conditions for obtaining an \textit{exequatur} that the distinction between money-judgments and non-money judgments, not generally considered domestically, will impose itself in private international law\textsuperscript{264}.

To provide for uniformity with that regard, one branch of the French doctrine has pleaded in favor of the extension of the principle of automatic recognition of judgments upon status and capacity of the person\textsuperscript{265} to all types of foreign judgments\textsuperscript{266}, but as of today this plea has not produced any effects upon the jurisprudence\textsuperscript{267} and \textit{exequatur} proceeding is required in most cases to insure \textit{res judicata} effects and enforceability to foreign-country judgments.

\textsuperscript{259} See infra, note 444.
\textsuperscript{260} Id.
\textsuperscript{261} Supra, note 249.
\textsuperscript{262} Bredin, supra note 5, at 31 ["there is a general equivalence of the laws regarding money-judgments (il y a une équivalence des lois en matière patrimoniale)]."
\textsuperscript{263} Id.
\textsuperscript{264} Id. ("C'est une distinction qui s'imposera un jour ou l'autre en matière de droit international plus qu'en matière de droit interne").
\textsuperscript{265} Supra, notes 234-37 and accompanying text.
\textsuperscript{266} Alexandre, supra note 233, at 61-80 (Ms Alexandre's communication is followed by the transcript of a discussion among the members of the French International Law Committee upon the topic of the effects to be given to foreign judgments independent from \textit{exequatur} proceedings).
\textsuperscript{267} For an account of the justifications of such plea, and arguments against extension of the principle, see Alexandre, supra note 233, at 61-80.
Unlike the system in force in the U.S., the French proceeding treats recognition and enforceability in one single step, namely the *exequatur*. Indeed, for money-judgments, *exequatur* proceedings guarantee that public force will be imposed upon the defendant to carry out the execution of the debt. It is not to be forgotten that unlike in common law systems, the enforcement of the judgment in France and most civil law countries is directly ordered by the judge, and not left to the initiative of the successful party. However, the actual enforcement of foreign non-money judgments may raise some difficulties that will be shared by local non-money award winners. If *exequatur* was granted to the judgment which enforcement is sought, it will be understood that the judgment is fit to be enforced in France by the local means of execution. It other words, remedies not properly available under French law and rules of procedure in the circumstances were ruled out at a previous stage. Unlike in the U.S. system, the party seeking enforcement of its non-money award will not be found in a position in which its award was recognized but not actually for cause of “undue burden” to the enforcing court or because the remedy was not available in such court. The granting of *exequatur* guarantees that no such “undue burden” will be found later. Actual enforcement of non-money judgments however depends on the convincing force of the means available for their enforcement. The concept of “contempt of court” or an equivalent of that notion are unknown to the French procedure. Indeed, acts of coercion upon the very person of the defendant are not permitted. As opposed to the U.S. system with regard to the

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268 LOUSSOUARN & BOUREL, supra note 68, at 522.
269 See supra, note 197 and accompanying text.
270 LOUSSOUARN & BOUREL, supra note 68, at 519 [“les moyens d’exécution sont adaptés à une décision étrangère” (the means of execution are adapted to the foreign award)].
271 Supra note 193 and accompanying text.
272 Supra note 211 and accompanying text.
matter\textsuperscript{275}, the French procedure knows little of direct enforcement and makes great use of indirect enforcement for non-money judgments\textsuperscript{276}. Direct enforcement is provided for the delivery of specific goods or the conveyance of land\textsuperscript{277}. It is not provided for specific performance because of the general prohibition of coercion upon the persons mentioned above\textsuperscript{278}, and even though some provisions of the Civil Code\textsuperscript{279} suggest a “possible coercive subrogation of the debtor’s performance, provisions regulating the realization of such subrogation [were not implemented]”\textsuperscript{280}. Neither does French law provide for subrogated performance by a third party\textsuperscript{281}. The most generalized coercive measures aimed at obtaining compliance with non-money awards are \textit{astreintes}\textsuperscript{282}. \textit{Astreintes} are orders for the payment of a certain amount of money for each unit of time, usually a day, during which the defendant delays in complying with a judgment or order for [specific performance]\textsuperscript{283}.

An \textit{astreinte} may be either provisional, that is set as a penalty and subject to revision or suppression\textsuperscript{284}, or definitive and payable to the plaintiff with no possibility of revision\textsuperscript{285}. \textit{Astreintes} are independent from damages\textsuperscript{286}. An order setting an \textit{astreinte} is currently regarded as the most effective means of securing enforcement of non-money judgments in France\textsuperscript{287}. However, the limit of this indirect coercion is reached by the

\textsuperscript{275} See \textit{supra}, notes 212-213 and accompanying text.
\textsuperscript{276} TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, \textit{supra} note 32, at 157.
\textsuperscript{277} \textit{Id.}
\textsuperscript{278} \textit{Supra} note 274.
\textsuperscript{279} C. CIV. art 1143 (providing for possible coercive destruction of material contravening to contact provisions).
\textsuperscript{280} TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, \textit{supra} note 32, at 159.
\textsuperscript{281} C. CIV. art. 1237, TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, \textit{supra} note 32, at 157.
\textsuperscript{282} TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, \textit{supra} note 32, at 161. L. 72-526 of July 3rd, 1972, arts. 5-8.
\textsuperscript{283} TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, \textit{supra} note 32, at 161.
\textsuperscript{284} YORIO, \textit{supra} note 274, at 563. L. 72-526 of July 3rd, 1972, art. 6.
\textsuperscript{285} \textit{Id.}
\textsuperscript{286} TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, \textit{supra} note 32, at 162. L. 72-626 of July 3rd, 1972, art. 6.
\textsuperscript{287} YORIO, \textit{supra} note 274, at 563.
insolvency of the debtor\textsuperscript{288} and therefore can not be said to replace direct coercion as practiced in the United States\textsuperscript{289}.

\textsuperscript{288} TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, supra note 32, at 199.
\textsuperscript{289} Supra note 211 and accompanying text.
CHAPTER III: SCOPE AND EXTENT OF THE EFFECTS TO BE GIVEN TO FOREIGN NON-MONEY JUDGMENTS FOLLOWING THEIR RECOGNITION: MODIFYING THE BOUNDARIES OF DOMESTIC RES JUDICATA

Once a foreign judgment has been recognized following the conditions and procedures described in the previous chapter for each of the two systems considered, the question of the extent to be given to such foreign judgment arises. Indeed, each system defines the scope of the conclusive effects that one of its judgments is to be given with regard to the parties to the action as well as regarding third parties. Such scope will vary from system to system, and generally it can be said that American courts recognize greater conclusive effects to their judgments than French courts to theirs290. Given those differences, there is a two-fold inquiry as to the effects to be granted to foreign awards: will the court be willing to give to a foreign judgment it has just recognized some conclusive effects comparable to those it grants to its own judgments, or will the court refer to the foreign law and rules of procedure to determine the effects to be granted to the foreign judgment291? These questions have been one focus of the American legal literature upon recognition of foreign judgments292 for more than thirty years293.

290 von Mehren & Patterson, supra note 6, at 65 (“under U.S. law the effect of res judicata and collateral estoppel is broader than it is under the laws of most countries [...]”), John D. Brummett, Jr., The Preclusive Effect of Foreign Country Judgments in the United States and Federal Choice of Law: The Role of the Erie Doctrine Reassessed, 33 N.Y.L. SCH. L. REV. 83, 95 (1988) (“the nations outside of the Anglo-American common law tradition have extremely limited preclusion law”).
291 Reference to foreign law with regard to this matter is described as “equivalence of effects”, von Mehren & Trautman, supra note 1, at 1681-82.
292 Inclusive of sister-state judgments. See supra note 78.
However, the literature has concentrated its analysis on general considerations and on money-judgments\textsuperscript{294}, partly because the issue of recognition and enforcement of foreign non-money awards is a somewhat recent development in areas other than personal status matters\textsuperscript{295}. However, the matter is crucial for non-money awards in two respects. First, non-money awards are rendered in connection to situations where relativity of status, depending on the geographical position of individuals in a world of international exchanges is particularly unbearable for the parties\textsuperscript{296}. Indeed, we have seen that the incompatibility between the creation of a status that requires permanence and the system-based relativity of this status has justified automatic recognition of effects to such foreign judgments by French courts\textsuperscript{297}. The fact that specific provisions may be found in each of the two systems considered to provide for or to define the effects to be given to particular categories of non-money awards is the other justification of a study specifically oriented towards non-money judgments in the broader field of the scope to be given to foreign awards generally. This study will uncover some of the policies behind recognition that do not constitute the actual sources studied in the previous chapter. In turn, those policies,

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\textsuperscript{294}See e.g., Casad, Issue Preclusion, supra note 293, at 70 ("The present study focuses on judgments granting or denying a money-award") (explaining that judgments granting non-money awards "pose somewhat different problems").
\textsuperscript{295}TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, supra note 32, at 7 (viewing non-money judgments as the "juridical response to the profound and extensive changes taking place in our increasingly complex, industrialized and plural society").
\textsuperscript{296}Notably concerning the relativity of personal status, for instance regarding divorce, child custody, nationality decrees. LOUSSOUARN & BOUREL, supra note 68, at 534-536. Cass Feb. 28, 1860, D.P., 60.1.57, S. 60.1.210 (Buckley case). Smit, International Res Judicata, supra note 85, at 64-65
In matter of personal status, certainty and stability are considerations of great moment [...] relitigation in such matters will ordinarily reach the point of harassment much more quickly than in cases in which certainty and stability are not considerations of overriding importance".
Smit, supra, at 64-65.
\textsuperscript{297}Buckley case, supra. See also supra, note 235 and accompanying text.
because they will often highlight the specific characteristics of some types of non-money judgments, may lead the way toward advocating more extensive recognition and greater scope of effects of foreign non-money awards altogether.

SECTION I: THE SCOPE OF THE EFFECTS TO BE GIVEN TO FOREIGN NON-MONEY AWARDS

In the United States, a specific terminology is attached to the concept of the effects given to judgments generally. Because the literature upon the topic uses different terms to define those effects, confusion may arise. It is therefore useful acknowledgment to bear in mind the definition of those key concepts before analyzing them.

The terms most commonly associated with this area of the law are *res judicata* and the related concept of collateral estoppel. These two doctrines, referred to as “fundamental precept of common law adjudication” are defining that “a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties and their privies...” *Res judicata*, strictly speaking, is the rule that

a judgment, once rendered, is the full measure of the relief to be accorded to the same parties on the same ‘claim’ or ‘cause of action’. Under these rules...the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial.

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298 See, e.g., the works cited supra, note 293.
300 Id, at 48-49. See also Montana v. United States, 440 U.S. 147, 153 (1979).
302 Kasper Wire Works, Inc. v. Leco Eng'g and Mach., Inc., 575 F.2d 530, 535-36 (5th Cir. 1978) (emphasis added).
Accordingly, under the doctrine of res judicata, "a judgment on the merits in a prior suit bars a second suit involving the same parties and their privies"\(^{303}\) based on the same cause of action\(^{304}\). Collateral estoppel occurs when a suit involves issues litigated in a prior action among same parties or their privies but is based upon a different cause of action. Collateral estoppel then bars the "relitigation of issues actually adjudicated and essential to the judgment in [the] prior litigation"\(^{305}\).

This distinction between res judicata and collateral estoppel may be defined as "traditional"\(^{306}\). Some alternative terminologies have used the term res judicata as a very general concept, comprising the meaning of both res judicata and collateral estoppel as defined above\(^{307}\). Under that broad definition, res judicata would be divided between "claim preclusion" and "issue preclusion"\(^{308}\), issue preclusion covering direct estoppel\(^{309}\) as well as collateral estoppel. This terminology was adopted by the Restatement (second) of Judgments (1982)\(^{310}\). The terms "merger"\(^{311}\) and "bar"\(^{312}\) may also found to express

\(^{303}\) A privy is a non-party who "had sufficient interest in the prior action or sufficient control over it" for the judgment to be asserted against him, von Mehren & Trautman, supra note 1, at 1682-83. The privies include "those who controlled the earlier action, those whose interests were represented by a party to that action, and successors in interest to prior parties and their privies". \textit{id.}


\(^{305}\) Kaspar Wire Works, Inc. v. Leco Eng'g and Mach., Inc, 575 F.2d 530, 535-536 (5th Cir. 1978). \textit{See also} Parklane Hosiery Co. v. Shore, 99 S.Ct. 645, 649 ("[collateral estoppel] precludes the relitigation of issues actually litigated and necessary to the outcome of the first action"). Collateral estoppel is "a bar or impediment which precludes allegations or denial of a certain fact or state of facts, in consequence of previous ... final adjudication of the matter in a court of law", \textit{BLACK'S LAW DICTIONARY} 383 (abr. 6th ed., 1991).


\(^{308}\) \textit{BLACK'S LAW DICTIONARY} (WESTLAW) (to be found under the entry RES).

\(^{309}\) "Direct estoppel" occurs when the second suit is upon the same claim cause of action as far as disputed issues are concerned, \textit{CRAMTON ET AL.}, supra note 103, at 403-405.

\(^{310}\) \textit{CRAMTON ET AL.}, supra note 103, at 403-404.

\(^{311}\) Expressing that the claim is extinguished if the judgment in the first action was in favor of the plaintiff, \textit{BLACK'S LAW DICTIONARY} (WESTLAW). \textit{See also} \textit{RESTATEMENT (SECOND) OF JUDGMENTS}, § 45, comment a.
that a claim is extinguished\textsuperscript{313}. Whenever possible, the terminology used in the following developments will follow the traditional distinction\textsuperscript{314} between \textit{res judicata} and collateral estoppel\textsuperscript{315}, because most developments upon the subject occurred at a time no alternative terminology was commonly used.

A. SCOPE OF THE EFFECTS TO BE GIVEN TO FOREIGN NON-MONEY AWARDS IN FRANCE

Foreign non-money awards will not be recognized in France the effects they were able to produce in their original forum\textsuperscript{316}. Once the recognition process has been satisfied, foreign judgments in general will be recognized some \textit{res judicata} effects based upon the French rules of Civil Procedure. It is first in the Civil Code, article 1351\textsuperscript{317}, that the boundaries of French \textit{res judicata}\textsuperscript{318}. Under article 1351, \textit{res judicata} is limited to some parts of the judgment, namely the "dispositive" part, as opposed to the "motive" part\textsuperscript{319}. Article 1351 also limits the \textit{res judicata} effects of judgments to the parties involved in the judgment, to the cause of action and to the subject-matter, or object, of the action taken together. Should one of these three components vary, no \textit{res judicata} is recognized\textsuperscript{322}. Also, this definition limits the "negative" effects of judgments to direct estoppel: no collateral estoppel is to be found under the French rule due to the above-

\begin{footnotesize}
\begin{enumerate}
\item[312] Expressing that the claim is extinguished if the judgment in the first action was in favor of the defendant. BLACK'S LAW DICTIONARY (WESTLAW).
\item[313] \textit{Supra}, notes 311-312.
\item[314] \textit{Supra} note 306 and accompanying text.
\item[315] These terms have been used with such meaning in the previous chapter. \textit{See supra}, note 232.
\item[316] LOUSSOUARN & BOUREL, \textit{supra} note 68, at 518.
\item[317] C. Civ., art. 1351.
\item[318] \textit{Id}. The term used in the code is "\textit{autorité de la chose jugée}". Literally, "\textit{autorité de la chose jugée}" is to be translated by "authority conferred to a matter adjudicated", and therefore bears the general meaning given to the words "\textit{res judicata}" by the terminology of the Restatement (second) of Conflicts of Laws rather than the traditional definition followed by the Supreme Court in the United States, \textit{supra} notes 304-305. \textit{Autorité de la chose jugée} thereby conveys the meaning of both \textit{res judicata} and collateral estoppel under the traditional terminology adopted herein.
\item[320] C. Civ., art 1351.
\item[321] "\textit{Objet}". C. Civ., art 1351. \textit{See also} VINCENT & GUINCHARD, \textit{supra} note 38, at 90-98.
\item[322] VINCENT & GUINCHARD, \textit{supra} note 38, at 96.
\end{enumerate}
\end{footnotesize}
mentioned combined requirement of identity\textsuperscript{323}. As in the United States, judgments do not create any rights nor obligations towards non-parties to the action\textsuperscript{324}.

Only final judgments may be recognized as having \textit{res judicata} effects\textsuperscript{325}. Accordingly, some categories of injunctions\textsuperscript{326} and all judgments said to be “other than on the substance”\textsuperscript{327}, including interlocutory orders\textsuperscript{328}, will not be recognized as \textit{res judicata} nor as having direct estoppel effects\textsuperscript{329}. If foreign non-money awards of such kind were to be recognized in France, their effects would be accordingly greatly limited.

**B. The scope of the effects to be given to foreign non-money awards by American courts**

American courts generally recognize broad preclusive effects to domestic judgments. These effects may vary in detail from state to state, but “the major features of this largely judge-created law are very similar throughout the United States”\textsuperscript{330}. Such effects will include \textit{res judicata} and collateral estoppel among the parties and their privies\textsuperscript{331}.

Traditionally, \textit{res judicata} forbids the relitigation upon the same cause of action of matters actually decided and of matters that could have been decided but were not actually raised in the prior action\textsuperscript{332}. Collateral estoppel “gives preclusive effect to

\begin{enumerate}
\item\textsuperscript{323} Casad, \textit{Issue Preclusion}, supra note 293, at 64.
\item\textsuperscript{324} See supra, notes 300-302 for references to the law in the United States with that regard. In the French terminology, the absence of rights and obligation towards those who are not party to the judgment is referred to as “\textit{la relativité de la chose jugée}”. VINCENT \& GUINCHARD, supra note 38, at 96-97.
\item\textsuperscript{325} C. PR. CIV., arts. 480, 482, 488.
\item\textsuperscript{326} Supra, note 49.
\item\textsuperscript{327} Supra, notes 49-57.
\item\textsuperscript{328} Supra, note 49.
\item\textsuperscript{329} VINCENT \& GUINCHARD, supra note 38, at 91.
\item\textsuperscript{330} CRAMTON \& AL., supra note 103, at 403.
\item\textsuperscript{331} Supra, note 303.
\end{enumerate}
essential findings necessarily determined in an earlier litigation on another cause of action between the same parties."\textsuperscript{333} As far as collateral estoppel is concerned, non-parties may be permitted in some jurisdictions to assert a prior judgment against a party to the previous action\textsuperscript{334}. It used to be that party identity or privity in collateral estoppel was a uniform requirement\textsuperscript{335}, "preventing use of a fact or issue determination by a person who would not be bound by [it] in the other litigation had it been decided the other way"\textsuperscript{336}. As far as some specific types of non-money awards are concerned, slightly different rules may apply. Domestic status judgments "conclusively determine status with respect to all persons"\textsuperscript{337} but will bind individuals only if proper in personam jurisdiction was acquired upon them\textsuperscript{338}. Domestic in rem judgments are conclusive upon all persons concerning the determination of the interest at stake\textsuperscript{339}, while quasi in rem judgments are conclusive of the interest but only in between the parties to the proceedings\textsuperscript{340}.

The preclusive effects of domestic American judgments are far greater than those accorded to domestic judgments by French courts. While French law limits \textit{res judicata} to an identity of parties, cause of action and object, as well as to a strictly defined part of the judgment, American law extends the effects of its judgment beyond a same cause of action and to some extent beyond the parties to the first action. Necessarily, such extensive scope of effects will affect the scope of the effects given to foreign

\textit{International Res Judicata, supra} note 85, at 57. The original claim is said to be barred if the judgment was in favor of the defendant, and merged if it was in favor of the plaintiff, \textit{Cramton et al., supra}, at 404. See also \textit{supra}, notes 312-313.

\textsuperscript{333} \textit{Cramton et al., supra} note 103, at 404. See Kaspar Wire Works, Inc. \textit{v. Leco Eng'g and Mach., Inc}, 575 F.2d 530, 535-536 (5th Cir. 1978). \textit{See also Parklane Hosiery Co. v. Shore}, 99 S.Ct. 645, 649 ("[collateral estoppel] precludes the relitigation of issues actually litigated and necessary to the outcome of the first action").


\textsuperscript{335} Called "mutuality of estoppel", or "mutuality doctrine". \textit{Cramton et al., supra} note 101, at 405. \textit{Vom Mehren \& Trautman, supra} note 1, at 1683.

\textsuperscript{336} \textit{Cramton et al., supra} note 103, at 405.

\textsuperscript{337} \textit{Id.}

\textsuperscript{338} \textit{Id.}

\textsuperscript{339} \textit{Id.}

\textsuperscript{340} \textit{Id.}
judgments. American courts may be faced with a problem quite opposite from that encountered by French courts while determining the scope of effects to be given to foreign judgments. While French courts applying as a matter of policy its domestic law of preclusion may be faced with judgments afforded greater preclusive effects in their jurisdiction of origin -for instance if the foreign judgment is American-, United States courts will almost always be faced with the dilemma that applying their local law may confer greater or different effects to a judgment than those created in the jurisdiction of origin of that judgment.

The American practice distinguishes the debate upon the scope of the effects of sister-state judgments and that upon the scope of the effects of foreign-country judgments. The full faith and credit clause of the Constitution and its implementing legislation require that the judgment of a sister-state be given in the recognizing state the same effects it would have in the state of origin. All non-money awards entitled to recognition will follow such rule and be accorded the scope of effects they were meant to produce in their original environment. However, the term “same” as it appears in the implementing legislation has been occasionally interpreted as requiring “at least as great effects”, leaving the door opened to the possibility of granting sister-state judgments.

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341 See von Mehren & Trautman, supra note 1, at 1682.
342 Supra, note 316 and accompanying text.
343 U.S. CONST., art. 4, § 1.
345 28 U.S.C. 1738 states that the courts of any state are entitled to the same full faith and credit in any courts of any state as they are in the courts of such state from which they are taken. von Mehren & Patterson, supra note 6, at 65.
346 Supra, notes 95-98 and accompanying text.
347 See, e.g., Bigelow v. Old Dominion Copper Mining & Smelting, 225 U.S. 111, 135 (1912), Allen v. McCurry, 449 U.S. 90, 96 (1980) (federal courts are required to give preclusive effects to state-court judgments). For the possibility of the jurisdiction of origin to determine the extraterritorial effects of its domestic awards, see Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943) (state not permitted to award supplementary compensation for worker’s injury after the plaintiff had obtained recovery from another state’s worker’s injury compensation board), Industrial Comm’n of Wisconsin v. McCartin, 330 U.S. 622 (1947) (holding that only unmistakable language from state legislature precluding further compensation would warrant such preclusion), Thomas v. Washington Gas Light Co, 448 U.S. 261 (1980) (controversially overruling Magnolia Petroleum Co. in favor of McCartin).
greater effects than they would have in that sister-state courts. Such view is dismissed by the Restatement (second) of Conflict of Laws, but no definitive statement exists in favor of one position or the other and the Supreme Court has not ruled upon the topic. It is also worth noting that a recognizing state may apply its own statute of limitations on judgments to bar a suit upon a sister-state judgment not barred in that sister-state. However, it appears that the solution reached in the U.S. federal system in dealing with the scope of the effects to be given to sister-state judgments reaches a result much different from that of the Brussels Convention dealing with the same issue. While the Brussels convention provides for automatic recognition of res judicata effects in any court of any other sister-state, the scope of these effects is to be found in the law of the recognizing state, whereas the United States system provides for determination according to the law of the rendering state, save the exception of “greater effects”.

Rules governing the scope of the effects to be given to foreign-country judgments create more controversy. It appears that “a majority of U.S. courts apply their local [preclusion] rules ... to foreign judgments most often without considering the issue of what law should apply.” Other courts have positively taken position in favor of the application of domestic rules, or rules governing the effects of sister-state

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352 Brussels Convention, supra note 88, art. 26. See supra, notes 130-131 and accompanying text.

353 Supra, note 349.


judgments\textsuperscript{356}. Since U.S. law affords broader preclusion rules\textsuperscript{357} than that of most countries, including France, as seen above\textsuperscript{358}, resorting to local rules to determine the scope of the effects of a foreign judgment amounts to confer greater effects to that judgment than it would enjoy in its forum of origin\textsuperscript{359}. Accordingly, some writers suggested that foreign law should really govern the scope of the effects to be accorded to the foreign award\textsuperscript{360}. Indeed, some courts have ruled that the law of the rendering country determines the preclusive effect of the foreign judgment in a United States court\textsuperscript{361}. As a result, it appears that United States practice offers a diversity of solutions as to the determination of the law governing the scope of the effects to be given to foreign-country judgments\textsuperscript{362} which creates a debate that French law knows only as far as legal theory is concerned, since all judgments recognized whether de plano or following the grant of an exequatur are ruled by French domestic law as far as the scope of their effects are concerned\textsuperscript{363}.

In a landmark article written more than 30 years ago, Professor H. Smit\textsuperscript{364} proposed an analysis by category of judgments of the scope of the res judicata and

\textsuperscript{357} von Mehren & Patterson, supra note 6, at 65.
\textsuperscript{358} Supra, text following note 340.
\textsuperscript{359} von Mehren & Patterson, supra note 6, at 65.
\textsuperscript{360} von Mehren & Trautman, supra note 1, at 1677-81, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98, comment f, 371-72 (proposed official draft 1967) (stating that normally an American court would apply the foreign rules as to [splitting a cause of action or collateral estoppel] if these rules are substantially the same as the rules of American courts”). Statement to this effect was to be found in the Revised Restatement of Foreign Relations Law of the United States, § 491, comment c (Tent. Draft N\textsuperscript{o}4, 1983) but later disappeared from the Restatement (third) of the law of the Foreign Relations of the United States (1986), Restatement (first) of Conflict of Laws § 450 (2) (1934) (stating that the scope of the effects of a foreign-country judgment is determined by the law of the state where the judgment was rendered).
\textsuperscript{361} See, e.g., Bata v. Bata, 163 A.2d 493 (1960), cert. denied, 366 U.S. 964 (1961) (applying the law of Switzerland to determine the scope of the preclusive effects to be given to a judgment of that country and subsequently ruling that it had no binding effect due to the absence of recognition of collateral estoppel effects in the law of Switzerland).
\textsuperscript{362} See Silberman, supra note 93, at 735-37, Casad, Issue Preclusion, supra note 293, at 53-58, von Mehren & Trautmann, supra note 1, at 1677-1681.
\textsuperscript{363} Supra, notes 324-325.
\textsuperscript{364} Smit, International Res Judicata, supra note 85.
collateral estoppel effects which should be granted to foreign judgments by U.S. courts.\(^{365}\)

According to Professor Smit’s study, some categories of non-money awards were to receive the most extended scope of effects, stating that with regard notably to personal status and child custody decrees, uniformity was a high priority.\(^{366}\) Professor Smit argues that judgments relating to personal status are normally recognized domestically as *res judicata*\(^{367}\) in the United States. Also these judgments should be entitled to collateral estoppel effects, but only as far as the determination of status is argued in a different cause of action.\(^{368}\) Subsequent proceedings concerning different subject matter should not be given collateral estoppel effects.\(^{369}\) The second category of non-money awards considered by Professor Smit comprises in rem and quasi in rem judgments. Professor Smit advocates the recognition of *res judicata* effects to judgments determining “an interest in, or the fate of, specific property”\(^{370}\) due to the resulting harassment, in some respect similar to that which would affect judgments regarding personal status, if the matter was to be litigated again.\(^{371}\) However, collateral estoppel effects would not be recognized, “except insofar as the determination of the specific interest in the property is concerned”\(^{372}\), because there would be no justification for an extension of effects beyond those granted before the foreign court.\(^{373}\) The third category indicated by Professor Smit is that of judgments *in personam*, for which “certainty does not have the same eminent importance it has in connection with judgments relating to status ... and judgments

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\(^{365}\) *Id.*, at 64-74.  
\(^{366}\) *Id.*, at 64 (“the interests of the litigants to have their relationship determined once and for all is especially great when the decision rendered will affect important other relationships”).  
\(^{367}\) *Id.*, at 65.  
\(^{368}\) *Id.*  
\(^{369}\) *Id.*. The author draws a parallel with the effects of domestic personal status judgments.  
\(^{370}\) *Id.*, at 66.  
\(^{371}\) *Id.*  
\(^{372}\) *Id.*, at 70.  
\(^{373}\) *Id.*
adjudicating interests in specific property". Accordingly, Smit advocates an attenuated application of the principles of *res judicata* and collateral estoppel, and introduces a distinction as to effects upon domiciliaries of the foreign forum and non domiciliaries. *Res judicata* and collateral estoppel effects should be found in relation to the former, but not to the latter.

Smit’s proposed approach is of particular interest concerning the scope of the effects to be granted to some categories of non-money awards. It has been argued consistently in the legal literature on recognition and enforcement of foreign judgments that a careful analysis of the policies behind the concept of recognition may uncover that the real basis for recognition is not that advanced by the courts in support of recognition, but is rather to be found in the policies underlying the scope of the effects to be given to foreign-judgments, such as *res judicata*.

SECTION II: RETHINKING RECOGNITION OF NON-MONEY AWARDS IN LIGHT OF RES JUDICATA PRINCIPLES

In the United States, commentators in recent times have questioned the notion of “comity” on which the courts base their rationale for granting recognition to foreign-country judgments. Professor Reese, in his first important post-war article written on the recognition of foreign-country judgments, was prompt to qualify the concept as “a word of loose and uncertain meaning at best, [with] little significance ... other than as a

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374 Id., at 67.
375 Id., at 67-68, 71.
376 Id.
377 See supra note 293 for a list of selected landmarks regarding this very topic.
378 Reese, supra note 151, at 784 (“we must therefore look beyond the usual reasoning of the courts to discover the real basis for their decisions”).
379 See supra, note 166.
381 Reese, supra note 151.
statement of the conflict of law rules of the forum"\(^{382}\). Later, other commentators have concluded that comity is merely a "general mode of expression...at the most [expressing] an attitude or a disposition"\(^{383}\), "leav[ing] hidden in obscure abstractions the reasons for which recognition may be given"\(^{384}\).

According to these scholars, reasons behind recognition are to be found in other relevant policies. Professors von Mehren and Trautman believed that at least five basic policies were important with regard to judgment recognition\(^{385}\). Those policies are: (1) the "desire to avoid duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated"\(^{386}\), (2) protection of the successful litigant from subsequent harassment on the part of the previously unsuccessful party\(^{387}\), (3) "a policy against making the availability of local enforcement the decisive element ... in the plaintiff's choice of forum"\(^{388}\), (4) "an interest in fostering stability and unity in an international order"\(^{389}\), and finally (5) "a belief that the rendering jurisdiction is [overall] a more appropriate forum than the recognizing jurisdiction"\(^{390}\). According to the writers, each of these basic policies will receive a different weight in each jurisdiction considered, depending in part upon the attitude of that jurisdiction on related questions\(^{391}\). One or a combination of these policies would be the broad basis underlying recognition practice. Following conclusions previously developed\(^{392}\), at least policies number (2), (3) and (4) would argue in favor of an heightened recognition of non-money awards related to status and capacity of the person. Policy number (5) would highlight principally the reasons

\(^{382}\) Id., at 784.
\(^{383}\) von Mehren & Trautman, supra note 1, at 1603. See also Casad, Issue Preclusion, supra note 293, at 58. See generally the works mentioned supra, note 293.
\(^{384}\) Smit, International Res Judicata, supra note 85, at 54.
\(^{385}\) von Mehren & Trautman, supra note 1, at 1603-1605.
\(^{386}\) Id., at 1603.
\(^{387}\) Id., at 1603-04.
\(^{388}\) Id., at 1604.
\(^{389}\) Id.
\(^{390}\) Id.
\(^{391}\) Id.
\(^{392}\) Supra, notes 296-297 and accompanying text.
behind a strong national policy oriented approach such as that of the French test for
*exequatur.*

However, most authors have searched for a more immediate basis of recognition
than those proposed by von Mehren and Trautman, and have concentrated their analysis
of the policies underlying recognition principally on the notion of "*res judicata*".

Earlier, another concept, that of "vested rights", had been a substitute for
"comity" as a basis for recognition of foreign judgments. The notion of "vested rights" is
an early concept in modern legal literature\(^{394}\) and sets as a principle that the recognition
of a right "cannot be called into question anywhere"\(^{395}\). Like any obligation, that arising
from a suit should "follo[w] the [debtor of the obligation], and may be enforced wherever
the person may be found"\(^{396}\). The doctrine of "vested rights", while calling for an
extensive recognition practice which would encompass the recognition of all categories
of *created* obligations, and thereby of all categories of *in personam*\(^{397}\) non-money
awards, gave rise to some criticisms that are similar to those regarding comity. The theory
of vested rights is virtually absent from United States post-second world war recognition
practice and commentaries\(^{398}\).

Starting with Professor Reese's article in 1950\(^{399}\), modern scholars have mainly
analyzed "*res judicata*" as the true rationale for recognition of foreign judicial awards\(^{400}\).

\(^{393}\) *See supra* notes 246-253 and accompanying text. *See also the Messageries Maritimes* case, Cass. Civ.

\(^{394}\) In relation to conflict of laws problems generally, the "vested rights" theory blossomed in the U.S. in
the early years of the Twentieth century, mainly due to the influence of Professor Joseph Beale, who first
urged to replace the principle of "comity" by that of "vested rights". *Cramton & Al., supra* note 103, at 5,
R.R.*, 194 U.S. 120, 126 (1904) for a case law endorsement of the vested rights theory.

\(^{395}\) *Beale, supra* note 394, at 105.


\(^{397}\) In the vested rights theory, the right created by the judgment is attached to the person and follows her
wherever she may go. In rem judgments being attached to the rem, not the person, are per se excluded.

\(^{398}\) *See Casad, Issue Preclusion, supra* note 293, at 58.

\(^{399}\) *Supra* note 151.

\(^{400}\) Professor H. Smit also analyzed the concept of "legal obligation" as a basis for recognition of foreign
judgments. According to this doctrine, "a foreign judgment creates an obligation that the local courts will
For Reese, the real basis for recognition of foreign judgments, “it seems clear, is no other than the doctrine of res judicata that ‘[p]ublic policy dictates that there be an end of litigation’”, such public policy applying to all judgments, “whether local or foreign”. The meaning given by Reese to res judicata would appear to cover policies number (1) and (2) of the study undertaken by Professors von Mehren and Trautman, relating to avoiding duplication of judicial effort and reliability for the successful litigant.

Accordingly, such reasoning adopted as a basis for recognition of foreign judgments argues in favor of a heightened recognition of awards purporting to establish, modify or confirm the status of a person or dealing with personal capacity as areas in which the interest of the successful litigant in asserting a worldwide reliability is crucial.

Professor Reese’s reasoning has been subsequently followed and further developed by other legal analysts. Notably, Professor Smit, in his article discussed above, gives a similar definition of res judicata and agrees that “the principles underlying the doctrine of res judicata provide the only logical and satisfactory explanation for recognition of foreign judgments”. However, Smit dissents from Reese’s theory on one important point. Whereas Reese sees res judicata as applying to both local and foreign judgments and does not distinguish any further between the two

enforce as any other obligation created under foreign law”, Smit, International Res Judicata, supra note 85, at 54. While bearing some aspects in common with the “vested rights” theory, the doctrine of legal obligation is qualified of “superficial”, Smit, supra, at 54, and “unsound legal construction”, id., at 55. The doctrine of legal obligation originates in England and is used there as a basis for recognition of foreign judgments.

Reese, supra note 151, at 784.

Id.

Supra, notes 386-387 and accompanying text.

See Casad, Issue Preclusion, supra note 293, at 60-61.

See supra, note 296.

The RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971), for which Reese was reporting, indicates that the rationale for recognition of foreign nations judgments rests upon the “public interest” that “requires that there be an end of litigation”, RESTATEMENT, supra, Explanatory notes § 98, comment b, at 298.


Smit, International Res Judicata, supra note 85, notes 372-387 and accompanying text.

Smit, International Res Judicata, supra note 85, at 56.
categories as far as the policy is concerned. Smit points out that foreign judgments provide a "somewhat different setting" for the application of the res judicata doctrine from that of local judgments. Particularly, due to differences in substantive law and rules of procedure among various systems, "a second local suit would definitely not be a mere duplication of the prior foreign proceeding." Based upon this assertion, Smit proceeded to classify by category of judgments (in rem, judgments upon the status of the person, quasi-in rem and in personam) the res judicata (and collateral estoppel) effects that should be recognized to local and foreign judgments of each category. As we have seen, this analysis argued for the recognition of a greater scope of effects for in rem and status-related foreign-judgments.

It has been argued that the policy of res judicata as a litigation-ending policy was the justification beyond the "automatic" recognition granted to foreign status and capacity judgments in the French system, and generally res judicata, as "autorité de la chose jugée" is said to be the basis of the French recognition practice as a whole. However, the presence of strong national policies in the test for exequatur, such as the public policy exception, may weaken the scope of recognition granted by the French courts.

The presence of those other strong policies aside res judicata in the recognition process is one major issue discussed by Professor Peterson in a 1963 article on res judicata and foreign country judgments, later qualified of "perceptive", and again in a 1972 article treating of recognition of foreign judgments in connection with the

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410 Id.
411 Id., at 62. See also Casad, Issue Preclusion, supra note 293, at 59 (analyzing the reasoning of Smit).
412 Supra, notes 369-374 and accompanying text.
413 Supra, notes 374-377 and accompanying text.
414 Supra, note 231 and accompanying text.
415 Supra, note 318.
416 A litigation ending policy seem to determine recognition in France. See supra, note 235.
417 As found in the general conditions required prior to the grant of an exequatur, supra notes 242-248, particularly with regard to the condition related to "public policy", supra, note 246.
418 Peterson, Res Judicata, supra note 293.
419 Casad, Issue Preclusion, supra note 293, at 59.
Restatement (second) of Conflict of Laws. In both articles, Peterson acknowledges that American courts, "even when they offer comity as a rationale" are in fact "analyzing foreign country judgments in terms of res judicata theory". However, "the complexities that intrude when judgments of foreign tribunals are at issue" bring different implications than the policy of ending litigation has at a domestic level. On the international level, *res judicata* would therefore involve more than a litigation ending policy as described by concepts (1) and (2) of Professors von Mehren and Trautman, and the rationale for recognition in such a case would be "a bundle of complementary policies", among which importance is given to "ordering relations between countries", insisting upon the legal relationships of the litigants rather than upon the relationships of the national entities as comity does. Peterson further takes the example of child custody decrees to illustrate how in some cases "the justification for giving conclusive effects is even stronger in international cases than in comparable interstate cases" due to the extent of the impact of the potential change of culture depending from the outcome of the case. In those cases, *res judicata* is re-examined in view of other policies specific to an international environment, and principally that of ordering legal relationships among countries with focus on the litigants. Such policies, absent of the domestic scene, may direct the scope of recognition. Such scope, according to the author, might be articulated around

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420 Peterson, *Foreign Judgments and Restatement Second*, supra note 190.
421 Id.
422 Id., at 239.
423 Id., at 240.
424 See supra, notes 386-87 and accompanying text.
427 Id., at 305-306. According to the author, insistence upon relations between countries instead of relations between private litigants is one inexactitude of the doctrine of comity, *id.*, at 305, 308.
a preference for predictability and stability in status relationships, and a goal of securing the mobility of the persons by assuring that the acquisition or the loss of a status in one place will be recognized elsewhere.\footnote{Id., at 244.}

It would therefore appear that the existence of additional policies on the international recognition scene would, in certain cases, favor the recognition of some types of non-money awards, in a manner even more compelling than that governing recognition within a system.

The \textit{res judicata} rationale for recognition of foreign country judgments was re-examined under yet another policy light by Professor A.T. von Mehren in a 1980 lecture at the Hague Academy of International Law\footnote{Arthur T. von Mehren, \textit{Recognition, General Theory}, supra note 80.}. Professor von Mehren took the view that the recognition of foreign country judgments depends on the "proper accommodation [by the court] of the conflicting principles of correctness and repose"\footnote{von Mehren, \textit{Recognition, General Theory}, supra note 80, at 21.}. According to von Mehren, the principle of correctness "expresses the concern that legal justice ... in both substantive and procedural terms, be done"\footnote{Id., at 22.}. The principle of repose, on the other hand, accepts the inherent imperfection of human knowledge and institutions and the need to put to rest quarrels and disputes that have arisen so that the energies of individuals and the resources of society can be devoted to more constructive tasks.\footnote{Id.}

Recognizing that none of these two principles may be assigned an absolute value for the result would be intolerable\footnote{Id. ("Assigning an absolute value to correctness would create an enormous social and economic burden [...] on the other hand, giving full scope to the principle of repose would require that full and absolute finality be given to every determination made by an adjudicator of first instance").}, von Mehren acknowledges that the balance between the value assigned to each factor will determine the scope of recognition of foreign country judgments in an international environment, and those values may be different...
from those assigned to the same factors in a purely domestic setting\textsuperscript{435}. Particularly, the principle of repose may be outweighed by the local idea of "correctness". The local-recognizing court may disagree with the foreign definition of correctness and proceed to give to its own definition a higher value than that it would give to respecting prior adjudication. Such analysis rationally explains that non-money judgments granted in areas in which strong local policies are to be found may not be recognized in foreign jurisdictions\textsuperscript{436}. However it does not provide a key to advocacy of a greater recognition of non-money awards, except insofar as it may be insisted upon the value of the principle of repose over that of correctness locally defined as a tool to expand recognition.

It results from the above analysis that judgments affecting status and capacity of the person as well as in \textit{rem} judgments appear to be granted a privileged treatment for their recognition itself as well as for the scope of the effects to be given to them\textsuperscript{437} in almost each of the rationale considered under the general term of res judicata. Similar privilege is granted to the same, excluding in \textit{rem} judgments, under French law, based upon a rationale of compelling interest in ending litigation which relates to res judicata as well\textsuperscript{438}.

It may be argued that rethinking recognition in terms of res judicata may further privilege the recognition of yet other categories of non-money awards. In modern legal developments of industrialized nations, non-money judgments may be qualified of "juridical response to the profound and extensive changes taking place in our increasingly complex ... society"\textsuperscript{439}. They are usually granted in areas and circumstances in which no money equivalent may compensate the victim. Indeed, this rule, known as the

\textsuperscript{435} \textit{Id.}, at 32-37.
\textsuperscript{436} \textit{Supra}, notes 248-251 and accompanying text.
\textsuperscript{437} \textit{Supra}, notes 366-74 and accompanying text, text following note 392, note 406 and accompanying text, note 429 and accompanying text.
\textsuperscript{438} \textit{Supra}, note 236 and accompanying text.
\textsuperscript{439} \textsc{Trends in the Enforcement of Non-Money Judgments}, \textit{supra} note 32, at 7.
“irreparable injury” rule\textsuperscript{440}, is the condition governing the delivery of equitable remedies in the United States system\textsuperscript{441}. It may also be remembered that granting non-money compensation is an exception to the general money-damages rule of the French tribunals\textsuperscript{442}. Indeed, in each of these two systems, non-money damages are granted in cases in which circumstances urge that it so be done because the harassment borne by the victim will not be put to an end by damages\textsuperscript{443}.


\textsuperscript{441} Even though it appears that courts are now granting equitable remedies instead of money compensation without existence of such “irreparable injury”, thereby creating some flaws in the application of the general principle. See generally Laycock, \textit{supra} note 440.

\textsuperscript{442} \textit{Supra}, note 40.

\textsuperscript{443} This principle is sometimes called, in civil law systems, “the greatest possible coincidence principle”, in which the remedy should be evaluated in its capacity to produce a result as near as possible to the ideal of coincidence. TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, \textit{supra} note 32, at 87.
CHAPTER IV: THE BOUNDARIES OF THE RECOGNITION AND ENFORCEMENT OF FOREIGN NON-MONEY JUDGMENTS: ANALYSIS OF THE CURRENT PRACTICE IN SELECTED AREAS

The following are selected examples of the practice of recognition of particular types of non-money awards in the United States and in France. They aim at highlighting the particular difficulties arising in connection with recognition when the interests at stake involve issues of sovereignty, public and legal national policies as well as the mere obligation of the debtor. Most non-money awards generally include and highlight such intricate policies.\textsuperscript{444}

Among the many categories of non-money awards practice is confronted with, family law is the most common kind to arise, and the boundaries of the practice in that field should be underlined as far as they provide for an enlightened example of the application of the policies studied in the previous chapter. The second example is dictated by modern developments of the law: when money does not adequately compensate the plaintiff’s alleged injury, the courts of some industrialized countries may grant injunctive relief.\textsuperscript{445} In the past ten years, it has been observed that parties entitled to injunctive relief have tried to secure their award wherever their interest was present, including on territories beyond the reach of the issuing jurisdiction.\textsuperscript{446} The answer of foreign jurisdiction to such claims is at present extremely unclear and raises interesting questions of sovereignty and practicability. As a third example, a model of international cooperation may be found in the American practice regarding bankruptcies bearing international ties. It will provide an interesting tool to acknowledge that thoughtful

\textsuperscript{444} See supra, text accompanying note 259, notes 439-441 and accompanying text.
\textsuperscript{445} See TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, supra note 32, at 157.
\textsuperscript{446} See generally Buzard, supra note 34.
legislation may suppress harassment for the parties and the various courts involved in international legal battles.

SECTION I: FAMILY LAW: DOMINANT EXAMPLE OF UNCLEAR BOUNDARIES

The subject of recognition of foreign family law awards is much too wide to be reviewed here in its entirety. It should principally be underlined that both U.S. and French practice have been receptive to the compelling need for recognition surrounding decisions relating to the status of the person. While stretching their recognition practice to accommodate the requirements of transnational occurrences in family relations, both systems have left the boundaries of such recognition unclear and have emphasized the role played by the res judicata doctrine in both systems, as argued by commentators and scholars. Family law is also a field in which international conventions have developed, thereby rendering possible the confrontation between the result of internationally coordinated practice and the struggles of the unilateral accommodation of domestic rules to suit the most compelling needs of a mobile society.

Foreign divorce awards form a main and long-standing branch of the family law recognition practice. Extensive recognition is granted in both the U.S. and the French system to foreign divorce decrees. Albeit in very different ways, both practices build up evidence that the res judicata rationale as studied above is greatly present beyond recognition of such decrees and therefore strengthens the approach of some scholars what they view as the “true basis” behind recognition practice generally.

Under French law, foreign divorce decrees are among the judgments on status and capacity of the persons that are recognized without need for exequatur proceedings unless some material act of coercion upon individuals or their property is required in connection

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447 See supra, notes 180-182,234-238 and accompanying text.
448 See supra, note 401 and accompanying text.
449 Supra, notes 300-304, 401-443 and accompanying text.
450 Reese, supra note 151, at 784. See supra, note 401 and accompanying text.
to the award\textsuperscript{451}. The \textit{Cour de Cassation} case which initiated such type of recognition without exequatur was indeed a foreign divorce case\textsuperscript{452}. In the \textit{Buckley} case\textsuperscript{453}, the \textit{Cour} stated that a foreign person should be able to rely without further proceedings on her status of divorcée following a foreign divorce award in order to remarry in France. The \textit{Cour} acknowledged that personal status should be uniform rather than dependant on geography. The rationale behind such statement was that of \textit{res judicata}, or the acknowledgment that once adjudicated, the rights of a party to an action and the status of such parties arising from that action were final and should not be questioned again.\textsuperscript{454} If coercion is required in connection with the decree, regular \textit{exequatur} proceedings will be applied, with their control over jurisdiction and choice of law rules\textsuperscript{455}. Family law in general and divorce in particular is an area in which the "theory of equivalence" with regard to choice of law\textsuperscript{456} has played a role to expand recognition. Without such "equivalent effects" allowed, awards originating from countries such as the U.S. in which choice of law designate the law of domicile would otherwise not qualify for recognition following the \textit{exequatur} proceeding because French rules of conflict in the matter do not apply the law of domicile\textsuperscript{457}.

In the United States, the recognition of foreign divorce decrees follows the general rules arising out of the "comity" doctrine as set by the courts of each state\textsuperscript{458}. The Restatement (Third) of the Foreign Relations Laws of the United States\textsuperscript{459} indicates that U.S. courts will recognize a foreign divorce decree rendered by a jurisdiction in which

\textsuperscript{451} LOUSSOUARN & BOUREL, supra note 68, at 534-36.
\textsuperscript{452} Cass., Feb. 28, 1860 [the Buckley case], D.P. 60.1.57, S. 60.1.210.
\textsuperscript{453} Id.
\textsuperscript{454} See supra, note 235 and accompanying text.
\textsuperscript{455} Supra, notes 246-249 and accompanying text.
\textsuperscript{456} Supra, note 249 and accompanying text.
\textsuperscript{457} See C. Civ., art. 310.
\textsuperscript{458} Supra, notes 158, 166-177 and accompanying text.
\textsuperscript{459} RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES (1987).
both parties to the action were domiciled\textsuperscript{460}. The Restatement (Third) further provides that if the rendering court was located in the state of one of the parties' residence only, or if only one party appeared but the other party received notice and had opportunity to be heard, the U.S. court may recognize the foreign decree, but need not do so\textsuperscript{461}. Sister-states are required by the full faith and credit clause of the Constitution\textsuperscript{462} to give full faith and credit to sister-state divorce decrees, including those for ex-parte divorces, provided that the court of the sister state had \textit{in personam} jurisdiction over the parties\textsuperscript{463}. The United States foreign divorce recognition practice is therefore strongly tinged with considerations of jurisdiction. However, these considerations may be accommodated with regard to particular circumstances. In \textit{Gould v. Gould}\textsuperscript{464}, the New York Court of Appeals recognized a French divorce decree despite the fact that neither party was domiciled in France at the time of the decree. Since the parties were of American nationality and the French court, following its conflict of laws rule in the matter, applied the law of New York to the case, the New York court before which recognition of the French decree was sought found that "under the circumstances of the case, [recognition], in conformity to the principle of comity, would not offend our public policy"\textsuperscript{465}.

Concerns for "the parties or the underlying factual situation"\textsuperscript{466} are therefore very much present in the divorce recognition practice in the United States and may be factored in to counter balance the differences in jurisdictional bases (\textit{i.e.} domicile under U.S. law, nationality domicile or discretionary power to assume jurisdiction under French law\textsuperscript{467}) and applicable law (law of the domicile under U.S. rules, law of nationality if French

\begin{itemize}
  \item\textsuperscript{460} \textit{Restatement (Third) of the Foreign Relations Laws of the United States}, § 484 (1) (1987).
  \item\textsuperscript{461} \textit{Hilton v. Guyot}, 159 U.S. 113 (1895).
  \item\textsuperscript{462} \textit{Id.}, § 484 (2).
  \item\textsuperscript{463} \textit{Williams v. State of North Carolina}, 65 S.Ct. 1092 (1945).
  \item\textsuperscript{464} 138 N.E. 490 (N.Y. 1923)
  \item\textsuperscript{465} 138 N.E. 490 (N.Y. 1923), at 494-95.
  \item\textsuperscript{466} von Mehren & Trautman, \textit{supra} note 1, at 1639.
  \item\textsuperscript{467} C. Civ. arts 14, 15, 310.
\end{itemize}
citizen, or law of the domicile or discretionary application of French law under French rules\textsuperscript{468} which would otherwise pose problem for recognition of foreign divorce decrees in the U.S.\textsuperscript{469}. Indeed, the factual situation has had considerable weight in the recognition practice of the so-called migratory divorces\textsuperscript{470}, recognized in some states such as New York\textsuperscript{471} but not in other states, such as New Jersey\textsuperscript{472}. The differences in practice and the impact of factual elements underline that unclear boundaries of recognition with regard to the matter.

A convention on foreign divorce recognition\textsuperscript{473} has been negotiated by the Hague Conference on Private International Law\textsuperscript{474}. Neither France nor the United States have signed it, but the unclear boundaries set up by the practice highlights the need for international coordination of the rules for jurisdiction primarily, and of the choice of law rules secondarily.

Other areas of family law, such as child custody and support decrees bear similar problems of jurisdiction and choice of law in their international recognition. Unlike divorce decrees, such orders must pass the muster of exequatur under French law prior to their recognition, and considerations of jurisdiction and choice of law therefore arise in connection to the matter\textsuperscript{475}.

Those orders first pose the specific problem of finality as far as they generally take the form of modifiable decrees. Under both French and American practice, finality is

\begin{footnotes}
\item[468] C. Civ. art 310.
\item[469] See DOBBS, supra note 7, at 494.
\item[470] Migratory divorces arise in situations in which American domiciliaries seek consensual divorce in foreign jurisdictions where jurisdictional basis allow easier proceedings, such as Mexico before 1971. See DOBBS, supra note 7, at 497.
\item[474] See infra, note 755.
\item[475] See supra, notes 243-252 and accompanying text.
\end{footnotes}
a prerequisite to recognition. However, in the United States, the Restatement (third) extends to the international practice the interstate rule according to which modifiable orders are enforceable for past payments and may subsequently be modified by the recognizing jurisdiction if it has jurisdiction over both parties. Identically, French courts will recognize such orders if they are otherwise valid from the exequatur standpoint in spite of their modifiable character. Out of similar concern for the situation of the parties, custody orders have been recognized on broader jurisdictional basis. The traditional notion of the competence of the child’s domicile to judge custody cases has first been modified in the U.S. interstate practice by the Uniform Child Custody Jurisdiction Act in force in all of the States. The Act applies to international practice. In Klont v. Klont, the Michigan Court of Appeals applied the UCCJA to recognize a German custody decree, stating that “even if the foreign jurisdiction has not adopted the Act, so long as the foreign court’s exercise of jurisdiction conforms with the criteria enumerated in the Act” the decree should be enforced. Prior to the enactment of the Act, it was possible to acknowledge that international recognition bore to some degree more consideration than interstate recognition. Some states were entitled by a Supreme Court decision to require that a rendering court had jurisdiction over both parents before granting interstate recognition of a custody decree. Urgent circumstances surrounding transnational custody cases again justified the acceptance of looser

476 Supra, text following note 185 (for the United States).
479 von Mehren & Trautman, supra note 1, at 1657.
484 ld., at 259.
jurisdictional requirements such as the "child's habitual residence" criterion later adopted by the UCCJA, when public policy was not offended. This is indeed the very example taken by Professor Peterson in his article treating of the "bundle of complementary policies" he saw as the rationale behind recognition in general. The UCCJA was indeed drafted to prevent the states from setting severe and inconsistent jurisdictional requirements in the field. A good example is provided by Ali. Ali, a New Jersey Superior Court case. In this case, the court, based on public policy, refused to recognize an ex-parte divorce decree awarded by the Sharia Court of Gaza to the defendant, a Palestinian national. The Palestinian decree awarded custody of the child born from the marriage to the defendant/father. The New Jersey court took jurisdiction pursuant to the UCCJA over the custody issue as the child's home state for two years prior to his leaving the country with his father, stating that "physical presence [of the child], while desirable, is not a prerequisite for jurisdiction to determine custody". The UCCJA was ruled applicable to the case: "the UCCJA apparently applies to international decisions as long as they are made by legal institutions similar in nature". The court justified its refusal to enforce the foreign custody decree by stating that the Gaza decree did not consider "the best interest of the child", whereas it is the New Jersey standard for custody determinations. It further concluded that "although the logistics were daunting, this court cannot refuse to exercise its proper jurisdiction under the UCCJA as the "home state of the child".

488 Peterson, Res Judicata, supra note 291, at 304.
489 Supra, note 425 and accompanying text.
490 See e.g., Cramton et al., supra note 103, at 491.
492 Id., at 261.
493 Id., at 258.
494 Id., at 259.
495 Id.
An international convention in the field\textsuperscript{496}, to which France is a party\textsuperscript{497}, attempts to fulfill the same goals as the UCCJA at a strictly international level and adopts rules of jurisdiction similar to that in force in the current U.S. system. It therefore appears that the recognition of foreign child custody orders is assured by an identity or an equivalence of rules of jurisdiction in the field among the various nations, and that such position would be strengthened by an extended application of the convention in the field.

Family law is therefore an area of law in which the negative effects of differences in jurisdiction and choice of law rules have been compensated by a greater concern for international stability of the situation of the parties. It is a field in which premises of international conventions are in development, but do not so far as to erase the unclear boundaries of the recognition practice. Family law which adds credence to the \textit{res judicata} rationale considered by most scholars as the true basis for recognition. The following section illustrates how this rationale is weakened with regard to the recognition practice of foreign injunctive relief.

\textbf{SECTION II: INJUNCTIONS AND SPECIFIC PERFORMANCE: THE TEMPTATION OF UNILATERALISM}

The various legal systems of the industrialized world may have different answers to similar legal problems. When the remedy involved is the mere payment of a sum of money, the only issue at stake when two legal systems are involved at one stage or the other of the same dispute is the determination of whether the winner of the claim in the first forum is entitled to relief in the second system. There is no question about the \textit{nature} of such relief, and the central inquiry is whether the laws and policies of the second forum warrant the relief.


\textsuperscript{497} See infra note 803.
When dealing with the recognition and/or the enforcement of foreign injunctive relief, the question of the availability of the remedy with consideration for its very nature arises. Also, some types of injunctive relief may involve some additional considerations of disregard for the recognizing jurisdiction’s sovereignty, as it is the case with anti-suit injunctions. A brief overview of the problems arising in the field with regard for the French practice and the United States practice proves to be an illustration of the difficulties faced by tribunals and litigants in an area that practice -unilateral and coordinated- did not shape the same way nor accord the same degree of importance as it did with family-law judgments. The demonstration is highlighted by the great differences in the two legal systems considered regarding the matter.


“In today’s societies, attention towards [enforcement] of non-money obligations is spurred by the inadequacy of mere awards of damages to restore the rights injured ...”498. Injunctive relief is often considered as the modern expression of prevention of further damaging behavior as well as compensation of past injuries499. Such expression is to be newly found in connection with rights inherent to the person’s sphere -enhanced by the capital role of the media in modern societies-, with the right to work -job security and equality of opportunity-, and with the so-called new rights in environmental control and consumer’s protection500.

The French legal system gives a limited importance to injunctive relief. For instance, specific performance is generally prohibited when the action involved is performance of an act501, albeit it is available for conveyance of a res502. A few

498 TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS, supra note 32, at 157.
499 Id.
500 Id.
501 C. Civ. art. 1142. See supra, note 40.
502 C. Civ. art. 1610. See supra, note 40.
exceptions arise in the modern development of some areas of the law, such as Labor Law503, but mainly the remedy available instead of specific performance under French Law is damages504. Because of their historic development of equitable remedies505, American courts have much more leeway, in appropriate circumstances506, to issue orders for specific relief. A major exception arises with specific performance of contracts for personal services, which may not be enforceable through injunctive relief safe few exceptions507. The issuance of negative injunctions, preventing the debtor of the personal service to provide such service to any party other than the plaintiff, may however be granted508. It is notably the practice in the entertainment industries509.

The lack of adequacy in the availability of injunctive remedy to an identical cause of action in the legal systems involved in a transnational action does certainly bar the enforcement in the second forum of the remedy granted in the first forum, as seen above,510 because

a system that does not provide for specific performance or some other particular form of relief could hardly be expected to provide such relief for a foreign judgment.511

For instance in Boissevain v. Boissevain512, the Court of Appeals of New York refused to grant the relief demanded in the complaint after it had declared the foreign judgment

504 C. CIV., art. 1142. See supra, note 40.
505 See supra, notes 7-8 and accompanying text.
506 Supra, note 8.
507 4 POMEROY, EQUITY JURISPRUDENCE [5th ed.], § 1343, at 943-44.
510 Boissevain v. Boissevain, 169 N.E. 130 (N.Y. 1929). See von Mehren & Patterson, supra note 6, at 74-75. See supra, note 204 and accompanying text.
511 von Mehren & Trautman, supra note 1, at 1609.
512 169 N.E. 130 (N.Y. 1929).
“entitled to recognition in this state” on the ground that “the complaint seeks enforcement of the foreign judgment by a form of equitable relief that is inappropriate to the facts as pleaded”. The court held that the foreign judgment was of a type “for which no provision is made for enforcement in the same manner as a judgment [of the same nature] rendered by the courts of this state”. The court further interpreted the local statute controlling the remedies for local judgments of the type of the foreign judgment submitted for recognition and held that “those remedies are applicable only to such judgments as have been obtained in one of the states of this Union [but] does not include judgments which are truly foreign.

Some however argue that in cases specific performance is utilized domestically albeit not in connection with a particular type of cause of action arising from a foreign decree the enforcement of which is sought, the second forum could nevertheless consider appropriate to enforce the remedy.

The issue of recognition remains at stake, because one of the parties may request the second forum to take into account as res judicata the injunctive relief granted by the first forum, to bar further action from the other party in the second forum. The party granted injunctive relief in the first forum may also ask the court to recognize the injunctive relief and enforce it by its own “usual” means. This hypothesis materialized on a few occasions in the American practice. In Roblin v. Long, the first case of recognition of foreign specific performance decree in the United States even before the doctrine of comity firmly established itself in the United States law of recognition, the New York Supreme Court agreed to recognize and enforce a Canadian decree dealing

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513 Id., at 131.  
514 Id.  
515 Id.  
517 von Mehren & Trautman, supra note 1, at 1609.  
519 See supra, note 166.
with property located in Canada, based upon the acquisition of personal jurisdiction over
the debtor of the obligation as well as upon comity\textsuperscript{520}. In the modern practice, \textit{Pilkington Bros. v. AFG Indus.}\textsuperscript{521} is the case commonly referred to by commentators to illustrate the
state of the law regarding recognition of foreign country injunctive relief\textsuperscript{522}. A British
injunction barred a Delaware corporation from diffusing information relating to
technology licensed by the plaintiff, a British corporation. Fearing that the British courts
would not be able to secure the enforcement of the injunction in the United States, the
plaintiffs sought to have a duplication of this injunction by the U.S. District Court for the
District of Delaware. The court held that “comity [did] not require, and in fact militate[d]
against, the issuance of a duplicative order ...”\textsuperscript{523}, expressing that “duplication” was
indeed independent from “recognition”. However, the commentators have read the
\textit{Pilkington} case as requesting that parties come to the second forum after the violation of
the foreign injunctive remedy has occurred, that is once “irreparable injury” has already
arisen\textsuperscript{524}. \textit{Pilkington} thereby illustrates the flaws of the recognizing practice with regard
to the safeguard of the injured party’s interests in cases compelling injunctive relief for
the protection of those interests. Commentators have further argued that \textit{Pilkington} “on
its face militates against recognition of a foreign ... injunction ...”\textsuperscript{525}.

In the French system, the limited availability of injunctive relief is also an
obstacle to recognition because the single proceeding of \textit{exequatur} determine both the res
judicata effects and the potential for enforcement of the foreign remedy\textsuperscript{526}. A remedy not
enforceable because of its absence of availability in the French system would therefore
prevent the granting of \textit{res judicata} effects. It should be remembered that foreign

\textsuperscript{520} Roblin v. Long, 60 How. Pr. 200, 205 (N.Y.Sup.Ct. 1880).
\textsuperscript{522} See, e.g., Buzard, supra note 34, at 96-97.
\textsuperscript{523} Pilkington Bros. v. AFG Indus., 581 F. Supp. 1039, 1046 (D. Del. 1984). See supra, note 179 and
accompanying text.
\textsuperscript{524} See Buzard, supra note 34, at 100-103.
\textsuperscript{525} Id., at 102.
\textsuperscript{526} Supra, note 268 and accompanying text.
judgments produce some effects independent from *exequatur* in France\textsuperscript{527}, and a foreign injunctive relief will always have value of *fact* ("*fait"\textsuperscript{528}).

B. SPECIFIC CONSIDERATIONS REGARDING INTERLOCUTORY AND ANTI-SUIT INJUNCTIONS

The recognition of interlocutory injunctions\textsuperscript{529} may pose a problem with regard to their finality, since, again, both the French and the U.S. system require that a judgment be final before it be subject to recognition\textsuperscript{530}. Among the two countries, the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters\textsuperscript{531} is in force and is supposed to provide for cooperation with regard to discovery injunctions\textsuperscript{532}. However, the mechanism is weakened from both ends. With regard to French discovery injunctions\textsuperscript{533}, the U.S. Supreme Court ruling in the *Aerospatiale* case held that the Hague Convention did not provide exclusive and mandatory procedure for obtaining documents and information located within foreign territory. Accordingly, courts in the United States may order parties before them to produce evidence physically located abroad pursuant to the federal rules of civil procedure\textsuperscript{534}. With regard to American discovery orders, the Convention has permitted a reservationas to discovery, which France has made. Rules which are the foundation of the American discovery system\textsuperscript{535}.

\textsuperscript{527} *Supra*, notes 233-239 and accompanying text.

\textsuperscript{528} LOUSSOUARN & BOUREL, *supra* note 68, at 533-34. See *supra*, note 233 and accompanying text.

\textsuperscript{529} See *supra*, notes 15, 49.

\textsuperscript{530} See *supra*, note 476.


\textsuperscript{532} Hague Evidence Convention, *supra* note 531, arts. 1-14 (providing for three different original procedures to obtain evidence abroad). Article 23 of the Convention opens the possibility for the contracting states to make a reservation concerning American pre-trial discovery so as to exclude such discovery from the scope of application of the Convention. France made such a reservation. See Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 565 (1987)(Blackmun, J., dissenting) (referring to Article 23 exception and the reservation made by France).

\textsuperscript{533} *Ordonnance de référé*, see *supra* note 49.

\textsuperscript{534} Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 532, 542-544 (1987). See also infra, note 818 and accompanying text.

\textsuperscript{535} For a general description of this system, see 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2007-2008 (1970 & 1988 Supp.). For a description of the French system, see e.g. generally
are thereby excluded from the scope of application of the Convention as applicable in between France and the United States. Should orders for discovery be otherwise submitted for recognition under the general rules for *exequatur*, there is little doubt that French public policy and considerations of sovereignty would dictate the rejection of U.S. powerful discovery injunctions:\(^{536}\):

The French objection is not merely that American discovery violates French procedural law. Rather, the French believe that American discovery disregards important. French policies embodied in their notions of judicial sovereignty and what they perceive as the permissible limits of litigation within their country’s borders:\(^{537}\)

Moreover, should be remembered that the French rules of procedure do not grant any *res judicata* effects to interlocutory injunctions\(^{538}\), which would in any case limit the benefit of the potential recognition of a foreign order of such type.

The American practice with regard to the recognition of foreign so-called “anti-suit injunctions” is an illustration of compromises to be made between the interests of the litigants with consideration for “comity” and “*res judicata*” and the principles of sovereignty of nations.

An international anti-suit injunction “prohibits a party from proceeding with his suit in a foreign forum that had concurrent jurisdiction over the case”\(^{539}\). These

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\(^{537}\) Muse, *supra* note 535, at 1090.

\(^{538}\) *Supra*, note 335.

injunctions may be “offensive” or “defensive” in nature, depending on their purpose.\textsuperscript{540} Injunctions drawn to protect the court’s jurisdiction by preventing interdictory proceedings in a foreign court and orders restraining a party from enforcing a foreign antisuit injunction are of a defensive nature.\textsuperscript{541} On the contrary, injunctions “broadly drawn to seize exclusive jurisdiction...by preventing parallel proceedings abroad”\textsuperscript{542} are said to be offensive. In an international environment, the issuance of injunctions of the latter type especially may “escalate disputes of a political character beyond judicial resolution”\textsuperscript{543} and “take on a political character”\textsuperscript{544}, especially since they often involve extraterritorial applicability of the first forum’s laws\textsuperscript{545} and subsequent opposed policies of the second forum. The famous Laker litigation between the courts of England and the courts of the United States proved to be a highlighted illustration of those considerations.\textsuperscript{546} U.S. courts have a traditional “liberal” approach to injunctions\textsuperscript{547}, and the power of a court of equity to enjoin a person within its jurisdiction from litigating abroad has been recognized early.\textsuperscript{548} Courts will indeed sometimes enjoin a person within their jurisdiction from litigating abroad, when the foreign litigation would

\textsuperscript{541} Raushenbush, *supra* note 540, at 1040.
\textsuperscript{542} *Id.* See also Schimek, *supra* note 540, at 500-501.
\textsuperscript{543} Schimek, *supra* note 540, at 505.
\textsuperscript{544} *Id.*
\textsuperscript{545} *Id.*
\textsuperscript{547} *Id.* at 1049.
\textsuperscript{548} Cole v. Cunningham, 133 U.S. 107 (1890).
“frustrate a policy of the forum issuing the injunction, be vexatious or oppressive”\(^{549}\) or would result in prejudice to other equitable consideration\(^{550}\). In *Princess Lida of Thurn & Taxis v. Thompson*\(^{551}\), the Supreme Court has however ruled that parallel proceedings in “strictly in personam [cases]”\(^{552}\) in courts of concurrent jurisdiction were acceptable “at least until judgment is obtained [in one of the courts] which may be set up as res judicata in the other”\(^{553}\). There remains the question of the effects a U.S. court will generally give to a foreign anti-suit injunction. The *Laker* litigation and its high policy note saw the refusal of the Delaware District Court to recognize British anti-suit injunctions\(^{554}\) in the case. However, some courts have recognized such injunctions\(^{555}\), when no important “regulatory policies”\(^{556}\) were at stake. In *Blanchard v. Commonwealth Oil Co.*\(^{557}\), the Court of Appeals for the fifth Circuit recognized “as a matter of comity”\(^{558}\) a Florida state court injunction on the ground that Florida had a “valid state court interest”\(^{559}\). The Court of Appeals held that it “[did] not feel that federal courts should be a party to the ignoring of a state court injunction if the grounds assert[ed] a valid state court interest and [were] not clearly insufficient”\(^{560}\). The Court further observed that an added factor was that the appellant was already litigating before the state court issuing the injunction\(^{561}\).

The divided practice of anti-suit injunctions highlights the temptation for unilateralism to be found with regard to injunctive generally. While the differences in the

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\(^{550}\) Raushenbush, *supra* note 540, at 1050.

\(^{551}\) 505 U.S. 456 (1939).

\(^{552}\) Id., at 466.

\(^{553}\) Id.

\(^{554}\) *Supra*, note 546.


\(^{556}\) Raushenbush, *supra* note 540, at 1054.

\(^{557}\) 294 F.2d 834 (5th Cir. 1961).

\(^{558}\) Id., at 840.

\(^{559}\) Id.

\(^{560}\) Id.

\(^{561}\) Blanchard v. Commonwealth Oil Co., 294 F.2d 834, 841 (5th Cir. 1961).
use of injunctive relief among the various systems threaten their recognition and often bar their enforcement, anti-suit injunctions come as a reminder of the multiple policies and sovereignty issues underlying the recognition of injunctive relief, and the emphasize the need for uniformity and coordinated practice in the field of recognition of foreign equitable relief.

SECTION III: INTERNATIONAL BANKRUPTCY PROCEEDINGS: THE AMERICAN MODEL OF COOPERATION

"A bankruptcy proceeding [becomes] an international bankruptcy when the assets and creditors of [an] insolvent debtor are located in more than one country". Two theories coexist in the industrialized world regarding the scope to be given to such international bankruptcy. One theory, adopted by most systems, including the French one, is that the effect of a determination for bankruptcy is limited to the rendering jurisdiction. Such an approach is characterized as "territorial", and allows local creditors to pursue an independent action before the forum at which they are located, under protection of local law. The United States also has a territorial approach, since bankruptcy jurisdiction under United States federal law extends to "persons who have property in the United States" regardless of their nationality, domicile, residence or place of business.

562 Tandi Armstrong Panuska, The Chaos of International Insolvency - Achieving Reciprocal Universality Under Section 304 or MIICA, 6 TRANSNAT'L LAW. 373, n.24 and accompanying text (publication page reference not available for this document).
564 DOBBS, supra note 7, at 907.
565 Id.
566 It is worth remembering that on the French territory, all creditors to a bankruptcy proceeding must unite in a "masse". They subsequently to the formation of the union loose their power to act independently for recovery. Such power is vested into a "syndic", which is a trustee with legal personality. SEE CORINNE ST ALARY-HOUIN, DROIT DES ENTREPRISES EN DIFFICULTE 19 (Montchretien, 1995). See also, e.g., Cass. Com. Jan. 17, 1956, D.1056.55 (note Houin).
Another approach is the “universality” theory\textsuperscript{568}. According to this theory, “one bankruptcy adjudication over all the debtor’s assets is held in the jurisdiction of the debtor’s domicile to settle all claims [regarding the debtor’s estate]”\textsuperscript{569}. Such approach is seldom found in the practice\textsuperscript{570}.

Some difficulties may easily be foreseen when an international bankruptcy proceeding arises with property and/or creditors in two countries using a territorial approach to the matter, such as France and the United States\textsuperscript{571}. The international practice has failed to address the matter through international agreements\textsuperscript{572}. In France, absent any specific provision regarding the matter, foreign bankruptcy judgments and bankruptcy proceedings may be recognized following regular \textit{exequatur} proceedings. The United States have taken unilateral action to encourage international cooperation and consistency of solution in the field. The enactment of Section 304 and 305 of the federal Bankruptcy Code\textsuperscript{573} introduced some elements of universality for international bankruptcies. Section 304\textsuperscript{574} gives a court discretion to allow, on a case by case basis, the administration by a foreign bankruptcy proceeding of assets located in the United States\textsuperscript{575}. It thereby proceeds to recognize a specific category of foreign non-money award otherwise ignored. Five forms of relief are available to foreign representatives under the federal Bankruptcy Code\textsuperscript{576}. First, section 304 offers the possibility for a foreign representative to commence

\begin{small}
\textsuperscript{568} See DOBBS, supra note 7, at 908.
\textsuperscript{570} It is however the practice of Belgium and Luxembourg as well as that of some isolated treaties, DOBBS, supra note 7, at 908.
\textsuperscript{571} The matter may be further complicated by exorbitant rules for jurisdiction, French C. Civ. arts. 14 & 15 which may impair the potential granting of exequatur for the recognition in France of foreign bankruptcy proceedings. See infra, note 621.
\textsuperscript{572} See Panuska, supra note 562, at nn.187-191 and accompanying text (publication page reference not available for this document) (the author makes a summary of the attempted negotiations and the main reasons behind their failure).
\textsuperscript{575} Panuska, supra note 562, at nn. 15-16 and accompanying text (publication page reference not available for this document).
\textsuperscript{576} Unger, supra note 569, at 1170.
\end{small}
an action under chapter 7 or chapter 11 (involuntary proceeding) as an ancillary case to the foreign proceeding\textsuperscript{577}. The court may also enjoin the commencement or the continuation of any action against the debtor\textsuperscript{578} or his property\textsuperscript{579}, enjoin the enforcement of "any judgment against the debtor with respect to such property"\textsuperscript{580} or any judgment proceeding to "create or enforce a lien" upon such property\textsuperscript{581}. A third remedy available is the request for order by the court to turn the property of the debtor over to the foreign representative\textsuperscript{582}. The last remedy provided by section 304 is the request for an order of "appropriate relief"\textsuperscript{583} from the court, which allow a flexibility in perfect accordance with the principle of "adequacy of remedy" which governs the grant of non-money awards\textsuperscript{584}.

The last remedy available to a foreign representative is provided by section 305, which states that the court "may dismiss a case [...] or may suspend all proceedings in a case" if the interests of both creditors and debtors "be better served by such dismissal or suspension"\textsuperscript{585}, or if there is pending a foreign proceeding\textsuperscript{586}. Also, the foreign representative is allowed to request such dismissal or suspension\textsuperscript{587}.

To decide whether to grant relief\textsuperscript{588}, the courts are requested to consider a list of six factors set by section 304(c)\textsuperscript{589}. Such factors include just treatment of all creditors to

\textsuperscript{577} 11 U.S.C.A. 304(a)(1992). See Unger, supra note 569, at 1170. Under the former act, local U.S. creditors had to petition on behalf of foreign representatives in order for the position of the latter to be considered, 2 COLLIER BANK. §304.01 at 304-4 (L. King ed., 15th ed. 1985). The foreign proceeding could also be recognized under the comity doctrine, see supra note 163. see also Unger, supra note 569, at n.69 and accompanying text.


\textsuperscript{581} Id.


\textsuperscript{584} See supra, note 439-441 and accompanying text.


\textsuperscript{588} Relief occurs on a case by case basis, supra note 575 and accompanying text.

the estate, protection of U.S. creditors against inconvenient foreign proceedings or comity.

Case-law in the field has shown a general will from the part of the U.S. courts to grant recognition to foreign bankruptcy proceedings following section 304. For instance in *Cunard Steamship Company Ltd v. Salen Reefer Services AB*, the Court of Appeals for the Second Circuit affirmed the District Court’s grant of comity as “appropriate relief” under section 304 to a Swedish bankruptcy proceeding and subsequently vacated the attachment by an English corporation of the debtor’s assets located in the United States. Courts have interpreted section 304 in different manners. For instance, in *Kilbarr Corporation v. Business Systems Incorporated, B.V.*, the Court of Appeals for the Third Circuit recognized a Dutch bankruptcy proceeding subject to the Dutch court’s willingness to recognize in its proceedings an American judgment for damages awarded to an American creditor in the case. The latter example points that uniformity of solution will however not be attained under §§ 304-305.

*Clarkson Co. v. Shaheen* is an example of a case arising prior to the enactment of §§ 304-305 of the federal Bankruptcy code. In *Clarkson*, the Court of Appeals for the second Circuit recognized a Newfoundland bankruptcy court order requesting the turnover of documents located in New York. The Court of Appeals held that “as long as the foreign court had jurisdiction over the bankrupt and the foreign proceeding ha[d] not resulted in injustice to New York citizens, prejudice to creditors’ New York statutory remedies, or violation of the laws or public policy of the state”, it would recognize the foreign court order under the doctrine of comity.

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593 773 F.2d 452 (2d Cir. 1985).
594 *Id.*, at 544.
595 990 F.2d 83 (3d Cir. 1993).
596 544 F.2d 624 (2d Cir. 1976).
597 *Id.*, at 629.
It should therefore be noted that the universality encouraged by sections 304 and 305 of the federal Bankruptcy code is in accordance with the broad recognition of foreign judgments by the United States courts. However, such consideration should not lessen the importance of §§ 304-305 as an example of unilateral goodwill towards international cooperation and recognition. Indeed, the enactment of section 304 has activated a debate upon the reform of the present system of international insolvency.

Because attempts to negotiate a multilateral convention in the field fell short due to the presence of so many issues and policies, the international legal community, through a special committee of the International Bar Association (IBA), proposed a draft for a model act which could be implemented a domestic legislation by the various countries interested. The Model International Insolvency Cooperation Act (MIICA) would follow the spirit of section 304, except so far as it would include some reciprocity and

598 Supra, note 569 and accompanying text.
599 However some commentators have expressed the regret that section 304 be not accompanied by a reciprocity requirement, see Panuska, supra note 562, at nn.149-179 and accompanying text (publication page reference not available for this document).
600 Panuska, supra note 562, at n.191 and accompanying text (publication page reference not available for this document).
601 Id., at n.185 and accompanying text.
602 The MIICA draft is reprinted in John A. Barret and Timothy E. Powers, Proposal for Consultative Draft of Model International Insolvency Cooperation Act for Adoption by Domestic Legislation with or without Modification, 17 INT’L BUS.LAW. 323, 327 (1989).
choice of law considerations\textsuperscript{603}. Both France and the United States are among the countries interested in the MIICA project\textsuperscript{604}.

Section 304 therefore illustrate a model of international cooperation unilaterally implemented but eventually resulting in a much broader debate than its original scope of application. It perfectly illustrates that the solutions towards some much needed uniformity and furthering of the law of recognition worldwide may take various forms and definitely may be achieved in areas dealing with non-money awards.

\textsuperscript{603} Panuska, \textit{supra} note 562, at nn.203-208 and accompanying text (publication page reference not available for this document).
\textsuperscript{604} Id., at nn.215-218 and accompanying text.
CHAPTER V: OF UNIFORMITY AND ACCEPTANCE: PROPOSED ALTERNATIVES

SECTION I: THE NEED FOR UNIFORMITY RESTATED IN LIGHT OF SPECIFIC CHARACTERISTICS OF NON-MONEY JUDGMENTS

The developments studied in the previous three chapters underline that, in the U.S. legal system, and also to some extent in the French legal system, the question of the force and the effects to be given to foreign country judgments is answered in a manner more uncertain and confusing than in almost any other area of law. It has been established both by scholars and by some courts that while recognition of foreign-country judgments is needed for satisfactory dispute resolution in all cases, it is of a particularly crucial importance when the status of individuals and property (though in rem actions) is at stake. While awarding money-damages is the rule in each of the two systems considered in this paper, it may not adequately deal with supplying the appropriate remedy for the claimant. For an injured party for whom money damages are no adequate compensation in a transnational setting, obtaining a specific relief limited by sovereign boundaries when the debtor of the injury is not within those boundaries is often equivalent to an absence of relief. Unlike a money-award situation, the presence within the jurisdiction of the court issuing the award of some assets of the defendant will not provide the expected relief if the defendant is absent. The hardship to the plaintiff entitled to a just remedy may thereby be greater than in situations in which the grant of money awards is the just compensation. Accordingly, "in a world in which business

605 And, however to some lesser extent, the question of what effects to be given to sister-state judgments.
606 Brand, supra note 64, at 255.
607 Supra, notes 8, 40 and accompanying text.
608 See supra, note 296 and accompanying text.
transactions and people are constantly crossing sovereign barriers\textsuperscript{609}, certainty and uniformity of solutions in the field of recognition of non-money awards granting specific relief, confirming or establishing the status of a person or of property appear to be factors of highlighted importance\textsuperscript{610}.

Yet, uniformity of solutions may have several meanings. First, uniformity may be understood as uniformity of result among the various recognizing courts of a legal system. Such uniformity is reached by French law, in which a single test is used to determine whether to recognize a foreign judgment\textsuperscript{611}. As a matter of course, it may indeed appear that some elements of the test itself, such as the public policy exception\textsuperscript{612}, bring some element of uncertainty. However, this would result in lack of predictability rather than lack of uniformity, and uniformity is indeed attained under due control of the decisions of lower courts by the \textit{Cour de Cassation}\textsuperscript{613}. Also some precise rules are set by way of the European Community convention on the recognition of sister-state judgments\textsuperscript{614}.

Much different is the problem in United States where state law governs\textsuperscript{615}. We have seen that a few different approaches to recognition of foreign country judgments are taken by the various courts\textsuperscript{616}. Since the practice of recognition is very wide, with the exception of a few jurisdictions which have maintained a requirement of reciprocity\textsuperscript{617}, the problem of uniformity is not as present at the recognition stage than it is when the actual scope of effects to be given to foreign country judgments arise\textsuperscript{618}. At that latter

\textsuperscript{609} Brand, \textit{supra} note 108, at 323.
\textsuperscript{610} \textit{Supra}, note 296 and accompanying text.
\textsuperscript{611} \textit{Supra}, text following note 239.
\textsuperscript{612} \textit{Supra}, note 250 and accompanying text.
\textsuperscript{613} \textit{Supra}, note 225 and accompanying text.
\textsuperscript{614} \textit{Brussels and Lugano Conventions, supra}, note 88.
\textsuperscript{615} \textit{Supra}, note 158 and accompanying text.
\textsuperscript{616} \textit{Supra}, notes 177, 354-55 and accompanying text.
\textsuperscript{617} \textit{Supra}, note 177 and accompanying text.
\textsuperscript{618} \textit{Supra}, notes 366-67 and accompanying text.
stage, the diversity of solutions reached by the different courts\textsuperscript{619} may make the various attempts of pattern analysis difficult. The practice on recognition of judgments in the United States therefore calls for attempts to reach greater uniformity of practice so as to provide international litigants with more certainty as to the outcome of their case.

Yet uniformity of result is only one aspect of the quest for uniformity in connection with recognition of foreign-country judgments. A second aspect relates to uniformity of substantive laws or rules of procedure among various sovereign nations. As seen in the previous chapter, certain areas in which non-money judgments are sought coincide with those in which generally strong local policies arise\textsuperscript{620}. Such policies may result in the enactment of exorbitant or exclusive rules of jurisdiction\textsuperscript{621}, in a greater extraterritorial application of local laws\textsuperscript{622}, or simply in laws or rules of procedure marked by such strong policy that their application to a case for which recognition of the resulting judgment will bar recognition of that judgment in another forum on the basis of a policy of the recognizing forum\textsuperscript{623}. The resulting disparity of rules among sovereign nations in those policy-sensitive areas undoubtedly leads to a degree of recognition

\textsuperscript{619} Id.

\textsuperscript{620} Supra, notes 259-60, 444 and accompanying text.

\textsuperscript{621} For instance, France has developed very extensive rules of exorbitant jurisdiction which go far beyond specific areas of law. According to article 14 and article 15 of the Civil Code, a plaintiff or a defendant of French nationality may claim exclusive jurisdiction of French tribunals to hear the dispute. The failure of a foreign forum to respect an expressed claim for exclusive jurisdiction will result in denial of effects to the foreign judgments within the French territory, LOUSSOUARN \& BOUREL, \textit{supra} note 68, at 527. Other exclusive rules of jurisdiction in French law will include disputes affecting land located in France and other in rem matters, nationality (when the dispute affects French nationality of a party), patents (French register), personal status (\textit{état civil}) of French nationals, contracts of employment (to be executed in France). LOUSSOUARN \& BOUREL, \textit{supra} note 68, at 527. Exclusive rules of jurisdiction in the U.S. legal system will notably include those relating to decrees affecting land [Fall v. Estin, 215 U.S. 1 (1903)].


\textsuperscript{623} See, e.g. the opposition of France (or England) to grant enforcement of interlocutory orders for discovery granted under extensive U.S. rules, \textit{supra}, notes 536, 546 and accompanying text, and the refusal to grant enforcement to U.S. antitrust decrees, British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., 2 All E.R. 780 (C.A. 1952).
inferior to that of cases in which a de facto equivalence of result is reached among those same nations, as it is in many instances involving money judgments in civil and commercial matters.\textsuperscript{624}

One way to enhance the practice of recognition is those areas in which disparities of substance, procedure or policy may be found is to unify those rules by means of international conventions and agreements specifically dealing with the issues at stake. Some of these international conventions will also specifically provide for some rules of recognition and enforcement of the matters at stake, and thereby encompass both approaches towards uniformity: (1) uniformity of the rules for recognition itself, and (2) uniformity of substantive rules of law so as to lessen the disparities among different systems of law. The Brussels and Lugano Conventions\textsuperscript{625} are examples of such approach, for both Conventions, said to be "multilateral and double"\textsuperscript{626} in regard of their dual purpose, deal with rules for asserting jurisdiction among domiciliaries of the member states\textsuperscript{627}, fulfilling approach (2), as well as with substantive provisions for recognition and enforcement of member-state judgments\textsuperscript{628}, fulfilling approach (1). By unifying the rules of in rem, personal and subject-matter jurisdiction among member states\textsuperscript{629} and specifically ruling out exorbitant rules of jurisdiction as non-applicable among the

\textsuperscript{624} Supra, note 258 and accompanying text. See also Frank Vischer, General Course on Private International Law, 232 R.C.A.D.I. 9, 241

Especially in the field of status, family relationships and hereditary matters ... [d]ivergencies in the national conflict systems, especially the dichotomy between States adhering to the nationality and the domicile principles ... would in many cases block recognition.

\textit{Id}

\textsuperscript{625} Supra, note 88.


Conventions bearing a single purpose are said to be "simple", i.e. single.

\textsuperscript{627} Brussels and Lugano Conventions, supra note 88, arts. 2-4 (general rules for personal jurisdiction), arts.5-6 (specific rules for personal jurisdiction with regard to the subject-matter of the controversy), arts 7-12 (subject matter jurisdiction with regard to insurance matters), arts. 13-15 (subject matter jurisdiction with regard to matters involving consumers law), and art 16 (exclusive rules of jurisdiction).

\textsuperscript{628} Brussels and Lugano Conventions, supra note 88, arts 25-49.

\textsuperscript{629} See supra, note 125.
domiciliaries of the member states\textsuperscript{630}, the Brussels and Lugano Conventions proceed to create uniformity in a domain in which disparity of rules could definitely have impaired the recognition mechanisms among the member states\textsuperscript{631}. The presence of rules directly regulating recognition and enforcement of member-state judgments provides for \textit{direct} uniformity of the recognition practice among the member states in an area in which, again, such practice was greatly varying from one country to another. However, the goal of unification of the two Conventions is not furthered completely, since the Conventions do not apply to some topics specifically listed\textsuperscript{632} in which it was felt that no agreement could be reached due to strong disparities in the laws of the member states in areas recognized as policy-sensitive\textsuperscript{633}. Since these areas, principally dealing with the status of the person, wills, estates and bankruptcy proceedings are associated with the issuance of non-money awards, in some respects the Brussels and Lugano Conventions, in spite of unique efforts of unification, fail to further the badly needed recognition of some major categories of non-money awards. The double method employed by the Brussels Convention to reach unification, coupled with the fact that the interpretation of its provisions is in the hands of a single entity rather than being left to the individual countries\textsuperscript{634} would be the most effective means of unifying and furthering the recognition process for non-money judgments. It remains to be seen that attempts of unification may be unilateral as well as bilateral or multiple, all of these methods presenting advantages as well as disadvantages.

\textsuperscript{630} Brussels and Lugano Conventions, \textit{supra} note 88, art.3.
\textsuperscript{631} See Brand, \textit{supra} note 64, at 289-290.
\textsuperscript{632} Brussels and Lugano Conventions, \textit{supra} note 88, art. 1.
\textsuperscript{633} \textit{Supra}, notes 124, 126-27 and accompanying text.
SECTION II: UNIFORMITY THROUGH UNILATERAL SOLUTIONS

France has a single unified legal system and thus French rules for recognition of foreign-country judgments are unified among the various lower courts under the authority of the “Cour de Cassation”\(^{635}\). Nevertheless, unilateral improvement of current practice of French courts could be achieved by means of enactment of comprehensive statutory law in the field. At present, the rules for recognition and enforcement of foreign-nation judgments in France are one of the few areas of judge-made law\(^{636}\). Enactment of comprehensive legislation\(^{637}\) would be an opportunity to further extend recognition of foreign awards, currently limited by the multiple requirements of the test determining the grant or the denial of *exequatur*\(^{638}\). It would potentially be the opportunity to introduce a formal distinction between money and non-money awards in the French system, as this distinction has been acknowledged by commentators in the field of private international law\(^{639}\) but is not part of the general classification of judgments in the French system\(^{640}\). Such legislation could potentially secure the recognition of categories of non-money judgments currently unrecognizable under the test determine by case-law. However there is no intent on the part of the French legislature to implement such a legislation in the near future.

The debate on the unification of the domestic rules for recognition and enforcement of foreign-country by unilateral action is relevant to the United States. Reaching uniformity among the rules on recognition and enforcement of foreign-country judgments is an issue which has been widely debated by scholars in the United States\(^{641}\). Notably, it has been thought that a “truly national approach to the recognition and

\(^{635}\) The French “Supreme Court”.
\(^{636}\) Supra, note 225 and accompanying text.
\(^{637}\) CONST. art 34.
\(^{638}\) See supra, notes 243-255 and accompanying text.
\(^{639}\) See supra, note 264 and accompanying text.
\(^{640}\) Supra, note 36 and accompanying text.
\(^{641}\) Brand, supra note 64, at 255.
enforcement of foreign-money judgments was a very conceivable means of unilaterally providing uniformity and international certainty in the field. The goals of unilateral unification within the United States may be stated as follows: (1) uniformity among the various states, (2) uniformity between state and federal court systems, and (3) to some extent increased recognition of United States judgments abroad by enactment of a comprehensive legislation which would facilitate the identification of sources and solutions for those countries requiring reciprocity before enforcing a foreign judgment.

Given particular constitutional surroundings, the field of recognition and enforcement of foreign-nation judgments in the United States may be approached through several legal alternatives.

1. Uniform State Laws

The first of the suggested alternatives would be regulation by means of enactment of uniform state laws so as to further uniformity of rules among the various states and also between state and federal courts, because in diversity cases, the latter have so far held that state law governs the matter. Currently, such regulation exists partially through the uneven implementation of the Uniform Foreign Money-Judgments Recognition Act and the Uniform Enforcement of Foreign Judgments Act. However, such implementation is quite limited as far as the Recognition Act is concerned since

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642 Id.
643 Brand, supra note 64, at 285.
644 Id.
645 Id.
646 Due to the potential relevance of the Commerce with Foreign-Nations Clause of the U.S. Constitution, U.S. CONST. art. I, § 8. See infra, note 663 and accompanying text.
647 Brand, supra note 64, at 257, 285.
649 Supra, note 163.
650 Supra, note 64.
651 See Brand, supra note 64, at 329 for a list of the States in which the Act is implemented.
that less than half the States have integrated it into their legislation within thirty years of availability of the Act\textsuperscript{652}, some with changes which damage uniformity rather than further it\textsuperscript{653}. Further, the Recognition Act is limited to the recognition of money-judgments\textsuperscript{654}. The implementation of the Enforcement Act has proven more successful since most states have adopted it with little variations\textsuperscript{655}. The Enforcement Act is not limited to money-judgments. However, its scope of application will apply to foreign-country judgments only to the extent the adopting state has also adopted the Recognition Act. By its terms, the Enforcement Act applies to sister-state judgments\textsuperscript{656}. In states having adopted both the Recognition and the Enforcement Act, the latter is incorporated into the former. The terms of the Recognition Act will accordingly apply to the Enforcement Act. Since the Recognition Act applies to foreign-country judgments, the Enforcement Act, when implemented through the Recognition Act, will also cover foreign-country judgments as well as sister-state judgments\textsuperscript{657}. Whereas proving successful in areas such as commercial law, company law or else probate law, the enactment of uniform legislation by the various states does not seem to generate similar “national” consequences\textsuperscript{658} in the area of recognition\textsuperscript{659}.

\textbf{2. Comprehensive Federal Legislation}

Another means of unilaterally furthering uniformity of rules -among states and in between state and federal courts- for the recognition and enforcement of foreign-country judgments in the United States is the suggestion that Congress may enact comprehensive

\footnotesize \textsuperscript{652} \textit{Id.}

\footnotesize \textsuperscript{653} \textit{See}, for instance, the reciprocity requirement added by some of the states to the original wording of the uniform act. \textit{See} Brand, \textit{supra}, note 64, at 329 (the author lists those states which have added requirements to the Act’s original version).

\footnotesize \textsuperscript{654} \textit{Supra}, note 112.

\footnotesize \textsuperscript{655} \textit{Brand}, \textit{supra} note 64, at 329

\footnotesize \textsuperscript{656} \textit{See} \textit{supra}, note 112.

\footnotesize \textsuperscript{657} \textit{Id.}

\footnotesize \textsuperscript{658} \textit{Id.}

\footnotesize \textsuperscript{659} In spite of the Recognition Act’s similarities to existing common law, \textit{see} Brand, \textit{supra} note 64, at 287.

\footnotesize \textsuperscript{659} \textit{See} Brand, \textit{supra} note 64, at 286-288 for an account of the advantages and disadvantages of the uniform act approach in the field.
federal legislation in the field, thereby preempting any existing state law. Federal law has indeed preempted state rules in some areas affecting recognition and enforcement of some categories of non-money judgments, such as child custody or international bankruptcy (the latter being part of a wider federal question). The type of legislation considered here would affect the field of recognition and enforcement as a whole. Scholars agree that such power would be consistent with the Commerce Clause of the U.S. Constitution, at least when “the process threatens to impinge on foreign relations” in a domain otherwise reserved to state power. Arguably, “federal legislation may be the most direct path to true unification of United States law on the matter.” Uniformity would thereby be reached in a more secure way than through uniform state legislation, since the states would be deprived of the opportunity to individually deviate from the terms of the act as some did with the terms of the Recognition Act.

As a single source, federal legislation would provide a much needed certainty in the field and could possibly clarify the state of the law as far as the various categories of non-money judgments are concerned. For non-money awards, the implementation of a comprehensive federal legislation may achieve some of the purposes of furthering recognition and providing for certainty and predictability. However, the unilateral character of the approach would make it unfit for purpose of debating the international unification of substantive rules in areas in which such unification would further recognition of categories of judgments, often granting non-money relief, that are currently in an uncertain state as to their potential for recognition, due to wide differences

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660 U.S. Const. art. VI, (“supremacy clause of the Constitution”).
661 Supra, notes 481-90 and accompanying text.
662 Supra, note 573 and following text.
663 U.S. CONST. art I, § 8. (granting to Congress the power to “regulate commerce with foreign Nations...”). Brand, supra note 64, at 298.
664 Brand, supra note 64, at 299.
665 Id., at 298.
666 Supra, note 641 and accompanying text.
667 See Brand, supra note 64, at 300. See also supra, notes 595-96 and accompanying text.
in substantive rules among legal systems\textsuperscript{668}. Neither would enactment of federal legislation truly advance the recognition of United States judgments abroad, least of all in matters involving non-money awards\textsuperscript{669}. With regard to foreign courts dealing with an issue of recognition of a judgment of a United States court, federal legislation could clarify the identification of the law applied by the United States courts\textsuperscript{670}. The enactment of federal legislation is generally considered as “the most likely alternative”\textsuperscript{671} for unifying unilaterally United States law in the field. In spite of wide scholarly support, there has not been -so far- any significant effort by Congress to provide for such legislation\textsuperscript{672}.

3. Federal Common Law

Another issue seldom addressed by scholars and commentators as a possible unilateral source of unified law in the field of recognition of foreign-nation judgments is federal common law\textsuperscript{673}.

Before the U.S. Supreme Court decided \textit{Erie Railroad v. Thompkins}\textsuperscript{674}, recognition issues could arise as federal common law\textsuperscript{675}. The landmark case of \textit{Hilton v. Guyot}\textsuperscript{676}, decided by the Supreme Court before \textit{Erie} and its progeny and cited by most state courts dealing with recognition of foreign-country judgments is an example of a unifying case in a field otherwise dominated by state law.

\textsuperscript{668} See supra, e.g., note 469 and accompanying text.

\textsuperscript{669} Except in areas dealing with status of the person, in which recognition is always more favorably considered in industrialized countries due to the particular necessity of international certainty surrounding such awards. Supra, notes 186-88, 238 and accompanying text.

\textsuperscript{670} Supra, note 645 and accompanying text.

\textsuperscript{671} Brand, supra note 64, at 258.

\textsuperscript{672} Id., at 255, 258. Brumett, supra note 290, at 109.

\textsuperscript{673} See generally, Brumett, supra note 290.

\textsuperscript{674} 304 U.S. 64 (1938).

\textsuperscript{675} Erie Railroad v. Thompkins, 304 U.S. 64 (1938) stated that “Except in matters governed by the federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. [T]here is no general federal common law.”, id., at 78.

\textsuperscript{676} 159 U.S. 113 (1895).
Some argue that there would be room for such federal common law in the field of recognition after *Erie*, since the Supreme Court determined that there were areas "in which federal courts appropriately may mold special common law" and preempt state rules in that field. Federal common law after *Erie* may be found when the area involves a "uniquely federal interest" and when there is "a significant conflict" between such identifiable "federal policy or interest and the [operation] of state law". Recent cases lead scholars to consider the possibility of the development of federal common law in areas relating to transnational commercial relations. These scholars have put forward the idea that the recognition of foreign-nation judgments could be governed by federal common law. Such a rule would provide uniformity among state laws as well as uniformity in between state and federal courts through preemption. Just as federal legislation, federal common law could bring certainty, uniformity and predictability in the recognition of foreign non-money awards. However, this theory shares the incapacity of other unilateral rules to provide for greater recognition of U.S. judgments abroad generally and their impossibility to provide for the unification of substantive rules among

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679 Boyle, at 507.

680 Id., at 507-508. See also Brand, supra note 64, at 300-304.


682 Supra, note 692.

683 See, e.g., Brand, supra note 64, at 306, stating that:

A rule on foreign judgments would simply extend [the act of state doctrine] to provide deferences to the acts of the judicial branches of foreign governments in appropriate circumstances”.

Id.
nations as a major tool to further the recognition of non-money awards. Such unification may therefore only be carried by means of coordinated transnational practice.

SECTION III: UNIFORMITY THROUGH COORDINATED TRANSNATIONAL PRACTICE

Coordinated transnational practice appears as the most efficient method of furthering recognition and enforcement of foreign-country judgments generally, and of non-money awards specifically. The negotiation, the signature and the ratification of international treaties which may provide for unification of substantive rules of law among nations party to the agreement as well as for direct provisions regarding recognition and enforcement\(^\text{684}\) will indeed further all of the goals mentioned in the precedent section\(^\text{685}\). Treaties provide the means to further uniformity among the states of a federal or supranational system, they increase the recognition of foreign country judgments in signing nations whose rules are otherwise not favorable to extensive recognition, and they generally provide for uniformity and predictability for the recognition of the types of judgments included in their scope of application.

Negotiating treaties is a delicate exercise in the practice of international relations between nations. Treaties presuppose that each party will abandon some of its domestic rules for a common solution which is the product of a legal, political and economic balance among the various positions of the participants to the negotiations\(^\text{686}\). Often, the agreement necessitates some common features among the different systems represented\(^\text{687}\), so that the compromised solution integrates as smoothly as possible in the domestic law of each nations\(^\text{688}\). With regard to the rights and obligations of individuals

\(^{684}\) Treaties providing for both bear the name of “double” conventions, or "conventions doubles", see \textit{supra}, note 626.

\(^{685}\) \textit{Supra}, text following note 624, notes 643-45 and accompanying text.

\(^{686}\) See \textit{LOUSSOUARN} & \textit{BOUREL}, \textit{supra} note 68, at 19-20.

\(^{687}\) \textit{Id.}, at 20.

\(^{688}\) \textit{Id.}
and private parties under a treaty[^689]. The above-mentioned difficulties are particularly acute[^690]. Also, states are only indirectly interested by the provisions of a treaty binding individuals and other private interests, which may manifest in slow process of negotiation and ratification[^691], particularly in policy-stricken areas such as recognition and enforcement. Indeed, some examples of these difficulties were encountered in the practice with regard to proposed international agreements in the field of recognition and enforcement[^692].

In France as in the United States, the authority to negotiate international agreements is vested in the President[^693] and the ratification process later lies within parliamentary powers in the United States[^694]. There is no doubt in either country about the possibility to enter into international agreements regulating rights and obligations of individuals and private entities[^695]. However, the practice vary greatly between France and the United States as far as the actual negotiation, signature and ratification of international agreements regulating the recognition and enforcement of foreign-nation judgments. Whereas France appears to be party to numerous bilateral and multilateral

[^689]: As opposed to treaties dealing with rights and obligations of the state itself. Treaties dealing with individuals and private parties will be part of “Private International Law”; treaties dealing with states themselves will be part of “Public International Law”. See, e.g., LOUSSOUARN & BOUREL, supra note 68, at 19.
[^690]: LOUSSOUARN & BOUREL, supra note 68, at 19.
[^691]: Id., at 19-20.
[^692]: See, e.g., the failure of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, infra notes 786-89, 849 and accompanying text.
[^693]: CONST., art 52 for France, and for the United States: U.S. CONST., art II, § 2 (“[The President] shall have power, by and with the advice and consent of senate, to make Treaties, provided that two thirds of the Senators present concur...”), United States v. Curtiss-Wright Export Corp., 57 S. Ct. 216 (1936) (defining the presidential powers in respect of foreign affairs).
[^694]: U.S. CONST., art II, § 2 (supra note 678). It France, only certain categories of Treaties, notably affecting the status of the person or modifying matters regulated by law or by the Constitution must be approved by the Parliament, CONST., arts. 53 & 54. More than half the treaties signed by France are ratified by the president without need to Parliamentary approval.
[^695]: Brand, supra note 64, at 288 (pointing that any doubts are reduced to the state of a “historic footnote in a world in which the distinctions between public and private international law are increasingly less visible.”).
conventions in the field, the United States has entered very few such agreements, none of which are bilateral.\(^{696}\)

A. BILATERAL SOLUTIONS

When two nations maintain regular economic and business relations, it is only natural for them to further such relations by mutually allowing their courts to recognize and enforce each other’s decisions.\(^{697}\) Such result will often be made possible by the presence of specific ties binding the two countries, whether relating to common features in their legal systems or simply to strong common interests in furthering relations. A common solution suitable to the interests of each party bound by an international agreement\(^{698}\) is certainly facilitated by the bilateral character of such agreement, because the interests to accommodate are not so numerous and may be enhanced by those specific ties linking the two nations concerned.\(^{699}\) For this reason, bilateral treaties dealing with recognition and enforcement of foreign country judgments may be more likely to address specific issues relating to non-money awards. Indeed, this is the experience of the French practice in the field. Whether through “single” or “double” conventions\(^{700}\), France has reached agreements for mutual recognition and enforcement of judgments with various foreign nations. Before the implementation of the Brussels and Lugano Conventions\(^ {701}\), France individually negotiated and ratified recognition conventions with each nation of

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\(^{696}\) For an account of some of the reasons behind the difficulties of ratification of conventions in private international law matters by the United States, see Willis M. Reese, *The Hague Conference on Private International Law: Some Observations*, 19 Int’l Law 881, 885-86 (1985). It is not the purpose of the following development to review such reasons.

\(^{697}\) Droz, supra note 626, at 100.

\(^{698}\) See supra note 686 and accompanying text.

\(^{699}\) See LOUSSOUARN & BOUREL, supra note 68, at 24, 537.

\(^{700}\) Supra note 626. “Single” conventions are dominant in the field, LOUSSOUARN & BOUREL, supra note 66, at 537.

\(^{701}\) Supra, note 88.
the current European Union\textsuperscript{702}. Also, bilateral conventions have been signed with some Asian partners and with all French-speaking African nations (former colonies)\textsuperscript{703}.

Some flaws of the early practice are illustrated by the provisions of some of the older convention signed with African countries\textsuperscript{704}. These conventions allowed the exorbitant rules of jurisdiction of the French Civil Code, art. 14 and art. 15\textsuperscript{705}, to be used with respect to French nationals residing in the African country concerned\textsuperscript{706} by providing that the jurisdictional rules to be taken into account were those of the recognizing country\textsuperscript{707}. This practice illustrates how “single” conventions may be easier to negotiate but will not prove as efficient as “double” conventions which lock the recognition practice by providing for direct unification of substantive rules of law.

To alleviate the possibility of the above-mentioned flaw, many “single” conventions in the field of recognition include some indirect rules of jurisdiction\textsuperscript{708}. Instead of establishing substantive rules as a “double” convention would, the “single” convention may list the various jurisdictional rules in use in the two nations party to the agreement that are considered as being acceptable under the convention\textsuperscript{709}. Exorbitant rules will generally not be listed as being acceptable\textsuperscript{710}. While not binding upon the judge of the court of origin\textsuperscript{711}, this rule of indirect verification of competence provides for

\textsuperscript{702} Droz, \textit{supra} note 626, at 100. These conventions were abolished individually when the Brussels and Lugano Conventions were signed in place of bilateral conventions, LOUSSOUARN & BOUREL, \textit{supra} note 68, at 24-25.

\textsuperscript{703} For a detailed list of those conventions, see H. Muir Watt, \textit{Effets en France des décisions étrangères}, JURISCLASS. DROIT INTERNATIONAL, fasc. 584-1.

\textsuperscript{704} Namely Ivory Coast, Benin, Niger, Burkina Faso, Mauritania, the Republic of Central Africa, Gabon, Congo, Morocco, Algeria and Mali, see Droz, \textit{supra} note 626, at n.162 and accompanying text.

\textsuperscript{705} C. Civ., art. 14 and art. 15. See \textit{supra} note 621.

\textsuperscript{706} Droz, \textit{supra} note 626, at 101.

\textsuperscript{707} \textit{Id}.

\textsuperscript{708} Indirect rules of jurisdiction are used by the recognizing forum, as opposed to direct rules found in “double” conventions, which “limit the adjudicatory authority of the rendering forum” (forum of origin), Peter Hay and Robert J. Walker, \textit{The Proposed U.S.-U.K. Recognition-of-Judgments Convention: Another Perspective}, 18 \textit{Va. J. INT’L L.} 753, 759 (1978).

\textsuperscript{709} Droz, \textit{supra} note 626, at 101.

\textsuperscript{710} \textit{Id}., at 101-102.

\textsuperscript{711} \textit{Id}., at 101.
predictability and certainty in a field in which it is much needed, particularly is the convention applies to some types of non-money awards.

However allegedly easier to negotiate that multilateral conventions, bilateral conventions have not yet entered the American practice, for the United States are not party to any bilateral convention in the field of recognition and enforcement of foreign country judgments.

The only serious attempt to negotiate such bilateral treaty arose with the United Kingdom starting in 1976. The proposed U.S.-U.K. Judgments Convention was set as a “single” convention, and included a catalog of indirect rules for jurisdiction such as that described above. As drafted, the Convention fulfilled its goal of unifying the practice recognition of the judgments of the United Kingdom’s courts in the United States and reciprocally, providing for uniformity, certainty and predictability in the field covered by the scope and the convention and within the limits of a “single” convention. Also, the convention defined the scope of the effects to be reciprocally given to the other party’s judgments once recognized. These effects, according to the convention, should have been the same as those given to a local judgment. That is to say that those particular foreign judgments would have been entitled to collateral estoppel

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714 Supra, notes 708-11 and accompanying text.


716 See supra, notes 612 and accompanying text. A “single” convention does not allow to further the goal of unification of substantive rules for choice of law and jurisdiction, see supra, text following note 624.

717 U.S.-U.K. Judgments Convention, supra note 712, art. 13 (1).

718 Id.
effects in the United States, which might be contested by scholars\textsuperscript{719}. Such provision illustrated successfully the unifying role of the convention on a point very much debated in the U.S. domestic practice. However, the unifying role of the convention generally was not carried to its maximum potential, since the scope of application of the Convention was limited to certain categories of judgments and left aside entire areas for which uniformity and certainty are key issues. Namely, the convention excluded subject areas generally considered as raising “special problems”\textsuperscript{720}, such as judgments in matters of personal nature\textsuperscript{721}, judgments on the status and power of legal persons\textsuperscript{722}, judgments for disclosure of evidence\textsuperscript{723}, judgments for punitive and multiple damages\textsuperscript{724}. It appears that the convention therefore applied principally to money judgments. However, non-money judgments were not excluded expressly from the scope of the convention. Indeed, the convention provided that

\begin{quote}
[t]o the extent that a judgment orders forms of relief other than the payment of money, the [recognizing court] may refuse enforcement or may order any measure of enforcement which the law of the [recognizing court] permits for similar domestic judgments\textsuperscript{725}.
\end{quote}

On the contrary, it therefore appears that the convention indeed extended to non-money judgments as far as they are within the scope of application as defined by the convention. Unfortunately, the scope of application of the convention did not include those types of judgments resulting in the award of non-money relief in areas in which


\textsuperscript{720} Hay & Walker, \textit{supra} note 708, at 758.

\textsuperscript{721} U.S.-U.K. Judgments Convention, \textit{supra} note 712, art. 2 (3). \textit{See also} Smit, \textit{U.S.-U.K. Judgments Convention}, \textit{supra} note 715, at 451. This exception notably includes personal status, maintenance, marriage, succession, bankruptcy and administration of estates.


\textsuperscript{725} U.S.-U.K. Judgments Convention, \textit{supra} note 712, art 15(1).
certainty and uniformity of status is most needed. Those awards being excluded from the scope of the convention were those that prove troublesome to enforce under general rules in the field. This is true especially as far as U.S. judgments in England are concerned, since most U.K. judgments of such kind would be recognized in many U.S. courts, albeit not under uniform rules and not in those jurisdictions requiring reciprocity before granting enforcement. Most of the goals of uniformity, certainty and predictability were therefore lost under the Convention as far as non-money awards were concerned. Such statement is emphasized by the consideration that recognizing courts were not obliged under the convention to grant the non-money remedy initially sought, even in areas within the scope of the convention.

The U.S.-U.K. Judgments convention was signed and initialed, but was never implemented. Since its negotiation could allegedly have represented the most likely successful attempt for the United States in the field, due to the bilateral and “single” character of the treaty and to close legal ties between the two systems involved, it appears that “the possibility for [further] such agreements is [as of today] ... remote at best.”

It therefore appears that while the French system arguably illustrates a successful bilateral coordinated practice in the field of recognition of foreign-nation judgments generally, -albeit in a much more limited manner as far as non-money awards are

726 Supra, notes 292, 596 and accompanying text.
727 Because uniform rules, through the Recognition Act, supra note 163, limit their scope of application to money judgments, Supra, text following note 111 and note 202 and accompanying text. For the reciprocity requirement, see generally Paul Lagarde, La Réciprocité en Droit International, 154 RECUEIL DES COURS D’ACADÉMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 103 (1977), and see supra, note 175-76 and accompanying text.
729 Supra, note 712.
730 See e.g. Brand, supra note 64, at 298.
731 See supra, text accompanying note 713.
732 Brand, supra note 64, at 298.
concerned— the United States failed to implement uniformity, certainty and predictability through bilateral transnational practice.

Such failure does not induce regrets with regard to the status of non-money awards. The doomed U.S.-U.K. Judgments Convention points out that a “single” bilateral convention is not ultimately effective in dealing with the specific problems encountered with regard to non-money judgments. The convention, negotiated between two countries with close legal systems, eliminated up front most categories of non-money awards and offered derogatory enforcement provisions for those falling within the scope of the convention.

While their major advantage is a better and easier assessment of the nations’ reciprocal interests, so that they may be more likely to encompass the recognition of non-money awards otherwise stricken by incompatible rules of law among the various nations, bilateral conventions do not seem to further this possibility and offer only a limited unification of the law when they are implemented.

In spite of greater difficulties of negotiation, multilateral treaties appear more appropriate a means to fulfill the particular requirements of the recognition and enforcement of non-money awards.

B. MULTILATERAL SOLUTIONS

In the field of recognition and enforcement of foreign nation judgments, multilateral conventions appear to take two different forms. First, these conventions may deal with recognition as a general concept, whether including substantive provisions

733 supra, notes 730-735 and accompanying text.
734 supra, note 725 and accompanying text.
735 “Bilateral negotiation and treaty-making in this field permit far greater accommodation of competing interests and concerns than a multilateral convention would provide”, Hay & Walker, supra note 708, at 767-68.
unifying rules for jurisdiction or other conflict of law rules\textsuperscript{737} ("double" convention) or simply settling the issue of recognition and enforcement of those foreign country judgments falling within the scope of application of the convention ("single" convention)\textsuperscript{738}. Other conventions are topical, or "substantive". Instead of dealing with recognition and enforcement generally, these agreements settle the law of recognition on one definite issue raising some rather specific and urgent problems, like divorce\textsuperscript{739}, international child support\textsuperscript{740} or child custody\textsuperscript{741}. General conventions have been the focus of the attention of commentators and have caused lengthy negotiation proceedings. They appear as the most efficient method of ensuring widespread uniformity and certainty in the field, but so far substantive conventions have had a dominant role in furthering the recognition of chosen categories of non-money awards.

1. General conventions

Among existing multilateral conventions in the field of recognition and enforcement of foreign nation judgments, the Brussels and Lugano Conventions\textsuperscript{742} signed the members of the European Union and these of the EFTA\textsuperscript{743} greatly drew the attention of commentators.

The circumstances surrounding the establishment of the conventions and their general provisions have been discussed above\textsuperscript{744}, as well as their "double" character as

\textsuperscript{737}The French practice distinguishes between "conflict of laws" ("conflits de lois") and conflicts of jurisdictional rules ("conflits de juridiction"). "Conflits de lois" is limited to choice of law issues, and "conflits de juridiction", as its name indicates, deals with questions relating to personal, in rem (and quasi in rem) and subject matter jurisdiction. "Conflict of laws" is herein employed in its larger American definition, encompassing what modern French law describes as "Private international law" ("Droit international privé") with the exclusion of the issue of "national law and aliens" ("condition des étrangers"). See LOUSSOUARN & BOUREL, supra note 68, at 3-10.

\textsuperscript{738} Supra, note 639.

\textsuperscript{739} See infra, notes 806-09 and accompanying text.

\textsuperscript{740} See infra, note 805.

\textsuperscript{741} See infra, note 802 and accompanying text.

\textsuperscript{742} Supra, note 88.

\textsuperscript{743} Supra, note 79 for those states member of the European Union, and note 88 for those member of the EFTA.

\textsuperscript{744} Supra, notes 119-141 and accompanying text.
international agreements\textsuperscript{745} and their impact upon unification of the law of recognition of
member-state judgments generally and with regard to non-money awards specifically\textsuperscript{746}. Another much discussed feature of the two conventions is set by article 59 of each Treaty\textsuperscript{747}. Articles 59 provide that the member states may enter into a bilateral agreement with non-member states and therein agree to extend to the domiciliaries of such non-member state the jurisdictional rules set by the Brussels and Lugano Conventions for the judgments of member-states to which the non-domiciliary is a party\textsuperscript{748}. Indirectly, the Brussels and Lugano Conventions may therefore further the recognition of sister-state awards falling outside of the scope of the convention. Such agreement was part of the negotiations between the United States and the United Kingdom towards mutual recognition of their courts’s judgments\textsuperscript{749}, but such agreement remains not enforced together with the other provisions of the doomed convention\textsuperscript{750}.

However providing for substantive rules for jurisdiction as well as uniform rules of recognition and offering to extend these rules outside of their initial scope, the Brussels and Lugano Conventions fail in bringing any true answer to the specific problems of the recognition of non-money judgments. These conventions nevertheless remain unique examples of double conventions in the field of recognition and enforcement among countries with very different legal background\textsuperscript{751}.

Outside of the European Union, other general multilateral conventions relating to recognition and enforcement of foreign-nation judgments have been negotiated, but the United States have signed none\textsuperscript{752}. The United States have been active participants to international organizations purporting to unify and accommodate the rules of law in

\textsuperscript{745} Supra, notes 626, 631 and accompanying text.
\textsuperscript{746} Supra, text following note 633.
\textsuperscript{747} Brussels Convention, supra note 88, art. 59, Lugano Convention, supra note 88, art. 59.
\textsuperscript{748} Id. Arts. 2-18 of the Brussels & Lugano Conventions, supra note 88, set those rules for jurisdiction.
\textsuperscript{749} U.S.-U.K. Judgments Convention, supra note 712.
\textsuperscript{750} Supra, note 732 and accompanying text.
\textsuperscript{751} Supra, text accompanying note 634.
\textsuperscript{752} Brand, supra note 64, at 289.
relation to "private legal transactions and relationships"753, such as the Hague Conference on Private International Law754, the International Institute for the Unification of Private Law (UNIDROIT)755 and the United Nations Commission on International Trade Law (UNCITRAL)756. The Hague Conference has worked since 1963 on establishing a general convention on recognition and enforcement of foreign judgments in civil and commercial matters, and the United States have actively participated to the preparatory work and the negotiations757. The Hague Recognition Convention, negotiated at the same time as the Brussels Convention758, is of a "single"759 character760 and sets indirect rules for jurisdiction761 instead of providing for direct rules as the Brussels and Lugano Conventions do762. Under the 1971 Hague Recognition Convention, recognition and enforcement may be denied on limited grounds only763, which notably include fraud and "incompatible policy of the State addressed"764. The convention was understood as being multilateral, but an additional requirement of individual agreements among states prior to

756 Established by G.A. Res. 2205 (XXI) of December 17, 1966. See generally Pfund, supra note 753 for an account of the participation of the United States to the work of these organizations and an account of such work.
758 Droz, supra note 626, at 101.
759 Supra, note 626.
760 The debate among the members of the Conference as whether to establish a "single" convention or a "double" one is illustrated in ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE DE LA CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE. “EXECUTION DES JUGEMENTS” (1966), Memoire, at 10-11 [hereinafter referred to as ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE].
761 Supra, notes 709-711 and accompanying text. Droz, supra note 626, at 107.
762 Supra, notes 122, 763 and accompanying text.
763 HAGUE CONVENTION, supra note 757, art. 5.
764 Id.
the entry into force of the convention was adopted\textsuperscript{765}, and the convention is therefore subject to "bilatéralisation"\textsuperscript{766} before being enabled to produce its effects\textsuperscript{767}. The scope of application of the Hague Recognition Convention was defined as applying to "decisions rendered in civil and commercial matters by the jurisdictions of one of the contracting states"\textsuperscript{768}, with the exception of decisions upon the status and the capacity of person\textsuperscript{769}, family law\textsuperscript{770}, succession\textsuperscript{771}, maintenance obligations\textsuperscript{772}, bankruptcies and analogous procedures\textsuperscript{773}. In a manner comparable to that of the Brussels (or Lugano) Convention\textsuperscript{774}, the 1971 Hague Recognition Convention therefore excludes of most categories of judgments issuing awards and decrees other than for a sum of money. However, non-money judgments are not expressly excluded from the scope of the convention and may appear within such scope in areas of civil and commercial obligations\textsuperscript{775} and accordingly may be dealt with, as with the Brussels Convention\textsuperscript{776}, under the provisions of the Hague Recognition Convention. The risk of possible difficulties in connection with areas of the law in which choice of law rules -and substantive provisions of the law- are incompatible among national legal systems was highlighted in the memorandum (“mémorie”) accompanying the draft of the convention in the Acts and Documents of the Hague Conference on the topic\textsuperscript{777}. The memorandum

\textsuperscript{765}Droz, supra note 626, at 101.
\textsuperscript{766}"Bilatéralisation" is the process of rendering the instrument bilateral. See Droz, supra note 626, at 101.
\textsuperscript{767}See ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE, supra note 760, Commission spéciale, Rapport, at 24-25 (explaining that recognition and enforcement of foreign country judgments is a topic for which the ratification of a "classical" general convention would show some reluctance from the part of the nations).
\textsuperscript{768}HAGUE CONVENTION, supra note 757, art. 1.
\textsuperscript{769}HAGUE CONVENTION, supra note 757, art. 1(1).
\textsuperscript{770}Id.
\textsuperscript{771}HAGUE CONVENTION, supra note 757, art. 1(2).
\textsuperscript{772}HAGUE CONVENTION, supra note 757, art. 1(3).
\textsuperscript{773}HAGUE CONVENTION, supra note 757, art. 1(4).
\textsuperscript{774}Supra, note 88, and text accompanying notes 12-28.
\textsuperscript{775}ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE, supra note 760, Mémoire, at 13.
\textsuperscript{776}Supra, text following note 128.
\textsuperscript{777}ACTES ET DOCUMENTS DE LA SESSION EXTRAORDINAIRE, supra note 760, Mémoire, at 13-14.
justifies the elimination of each category excluded from the scope of the Convention on grounds of deep differences in the laws various nations relating to these particular subjects. It is therefore interesting to note that the Convention, instead of furthering uniformity in those categories calling for it most, discarded them from its scope of application. However it is to be remembered that the Brussels Convention excluded the same categories of judgments, mostly non-money awards, while it undertook to provide for maximized recognition and enforcement in order to further the goals of the - then- European Common Market. The 1971 Hague Recognition Convention certainly did not have such heightened unification goals and the Conference on Private International Law faced with the difficulties of multilateral negotiations, had many interests to accommodate.

It is worth noting that the position of the United States and common law nations, notably through the International Law Association was marked by their will to limit the scope of the convention to foreign money judgments. The United States ultimately agreed to extend the scope of the proposed convention beyond money judgments.

The convention, opened for signature in 1969, came into force on February 1, 1971 with only three parties. The United States never ratified the convention, not are they party to any other multilateral general convention upon recognition and enforcement of foreign country judgments.

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778 See supra, notes 753-758 and accompanying text.
779 Actes et Documents de la Session Extraordinaire, supra note 760, Mémoire, at 13-14.
780 Supra, notes 125-27 and accompanying text.
781 Supra, notes 119-121.
782 See supra, notes 687-92 and accompanying text.
783 See Actes et Documents de la Session Extraordinaire, supra note 760, Mémoire, at 10-20.
784 Id., at 13.
785 Id. Emphasis added.
786 Supra note 757.
787 Id.
788 Cyprus, the Netherlands and Portugal. See Brand, supra note 64, at 289.
789 Brand, supra note 64, at 289.
It therefore appears that both major general multilateral agreements in the field of recognition and enforcement have failed to bring uniformity and to further recognition of non-money awards. Being by definition “general”, those conventions face the difficulties of accommodating very different and multiple interests. The Brussels Convention succeeds in implementing uniformity of rules of jurisdiction because it sets direct rules\textsuperscript{790} whereas the Hague Recognition Convention is limited to indirect rules\textsuperscript{791} of jurisdiction binding the recognizing jurisdiction but not the issuing jurisdiction\textsuperscript{792}. In that light, multilateral “double” conventions of general character appear to offer attractive features for widespread uniformity in the field. However, it is within “substantive” conventions that the recognition of some particular categories of non-money awards is currently best served.

2. Substantive conventions

Many “single-subject-choice of law” conventions have arisen in private international law since 1950. The Hague Conference on Private International Law\textsuperscript{793}, notably has played an important role in the development of conventions purporting to unify the rules for jurisdiction and the choice of law solutions adopted by various nations on a particular topic affecting the status and the relationships of individuals and legal entities in international law\textsuperscript{794}. Some other conventions will undertake to unify the substantive rules of law in a particular field\textsuperscript{795}, so that the question of choice of law would be solved by the uniformity of the law in that field. Also, some of these conventions will directly apply to recognition and enforcement of foreign country judgments in particular areas.

\textsuperscript{790} Supra, text preceding note 123.
\textsuperscript{791} Supra, note 761 and accompanying text.
\textsuperscript{792} See supra, note 711 and accompanying text.
\textsuperscript{793} Supra, note 754.
\textsuperscript{794} See supra, note 737
\textsuperscript{795} LOUSSOUARN & BOUREL, supra note 68, at 23.
The importance of single subject-choice of law conventions unifying choice of law rules and substantive rules of law among nations parties to the agreement should not be understated with regard to recognition of foreign-nation judgments. Indeed, we have observed that in those legal systems, such as the French system, that control the law applicable to the case and require the choice of law to match their own or produce equivalent results, unification of choice of law rules or of substantive rules of law in a particular area of law will indeed allow recognition to take place in a field in which differences would otherwise impeach such recognition.

Single subject-choice of law international conventions are numerous and will indeed appear in areas in which non-money awards commonly arise. For instance, among many others, France has signed and ratified the Hague Convention on the Law Applicable to Marital Property, the Hague Convention on the Civil Aspects of International Child Abduction, the Hague Convention concerning the Law Applicable to Child Support, or the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters. The latter has also been signed and ratified by the United States.

Among substantive conventions specifically dealing with recognition and execution of contracting-states judgments in the particular field concerned, the Hague Convention on the Recognition of Divorces and Legal Separation [hereinafter the

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796 Supra, note 249 and accompanying text.
797 Supra, note 469 and accompanying text (for divorces).
798 See LOUSSOUARN & BOUREL, supra note 66, at 20-24.
799 Are listed here a few conventions particularly significant due to their impact on recognition and enforcement of related categories of non-money awards.
802 Recueil des Conventions de La Haye 32 (1973).
804 Id.
Divorce Convention is said to have greatly contributed to further the recognition of foreign divorce and/or separation procedures awarded by the courts of a contracting state. The Divorce Convention sets some indirect rules for jurisdiction but unlike a typical “single” convention, it also sets some additional requirements for asserting jurisdiction. The convention otherwise forbids the denial of recognition based upon choice of law or upon differences in the national laws in the field. Neither France nor the United States are parties to this convention which however represents a good example of a substantive multilateral convention purporting to further the recognition of a particular category of non-money award.

The high number of single issue-choice of law conventions into force in the field of unification of private international law illustrate their suitability to the matter, particularly with regard to the recognition of non-money awards even though actual recognition and enforcement may not be the primary purpose of some of those conventions. For instance, the Child Abduction Convention, in force among 14 States, has for principal goal to ensure the restoration of children wrongfully removed from their custodian. In the course of fulfilling this general goal, the convention provides for the means to ensure recognition of custody decrees and orders issues by the courts of one the contracting states. The convention provides for substantive rules of law as well of direct rules for jurisdiction and thereby sets the uniform rules required for recognition.

However, the practice and the uniformity of the rules may be impaired by the individual interpretation made by the contracting states of the provisions or scope of

806 Droz, supra note 612, at 188.
807 Divorce Convention, supra note 791, arts. 2.3°2, 2.3°4, 2.3°5.
808 Id., art. 6. See Droz, supra note 612, at 189.
809 Supra, note 787.
810 See Peter M. North, Reform But Not Revolution: General Course on Private International Law, 220 R.C.A.D.I. 9, 141 (1990) for a list of those States.
811 Id.
812 Id., at 141-142.
application of the conventions. For instance, the functioning of the Child Abduction Convention\(^{813}\) was impaired by the individual interpretations of the concept of "wrongfulness"\(^{814}\), and as seen in the previous chapter\(^{815}\), the Hague Convention on the Taking of Evidence Abroad\(^{816}\) was greatly weakened by the ruling of the U.S. Supreme Court that the convention "was not the exclusive method of discovery, nor even the required method of first resort"\(^{817}\), leaving the litigants free to use domestic rules of discovery instead of the rules set by the convention\(^{818}\). Aside from directly affecting the functioning of the conventional instrument, such interpretations may very well affect the recognition of foreign orders in the field concerned in those contracting states whose interpretation of the convention in question would differ.

Because of the way they harmonize choice of law rules, rules for jurisdiction and in some cases substantive law among the countries that sign them, unilateral single subject-choice of law conventions currently provide, whether directly or indirectly, for a heightened recognition of judgments issued in the particular field of law object of the convention. They indeed seem to suit the specific needs of those areas of strong differences in the laws of the various nations. Since a multilateral substantive convention may provide for indirect or direct rules of jurisdiction and substantive rules of law in the field as well as provide for direct provisions regarding recognition and enforcement\(^{819}\), and is specifically drafted to suit the needs of the area concerned and thereby supercede the efficiency of a "general" convention in fields in which specific categories of non-money awards are at stake. However, a "general" convention such as the Brussels -or Lugano- convention\(^{820}\) has proven to be the most efficient tool for recognition of foreign country judgments

\(^{813}\) Supra note 787.

\(^{814}\) See North, supra note 810, at 142.

\(^{815}\) Supra, notes 531-38 and accompanying text.

\(^{816}\) Supra note 530.

\(^{817}\) Muse, supra note 535, at 1078 (1989).


\(^{819}\) As the Brussels (and Lugano) Convention does, see supra, note 123 and accompanying text.

\(^{820}\) Supra, note 88.
among nations with very different legal backgrounds, especially if, as the Brussels Convention provide, the interpretation of the provisions of the convention is left to a single entity agreed upon by the contracting states. Such a convention may play a model role in developing similar agreements encompassing wider categories of non-money judgments in their scope of application.

C. Proposals

In 1992, the United States proposed that the Hague Conference on Private International Law "resume work in the field of recognition and enforcement of judgments with a view to preparing a single convention [in that field]." Not being a party to any bilateral nor multilateral convention on recognition and enforcement of foreign nation judgments, the United States occupy an "isolated position in the global [recognition] scheme." We have analyzed the existing methods for providing uniformity in the field of recognition and enforcement of foreign-country judgments as well as the methods for furthering such recognition. The United States proposal takes the form of a "mixed convention", as opposed to a "single" or a "double" convention such as those analyzed above. The proposed convention first sets some direct rules for

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821 Supra, note 634 and accompanying text.
823 Supra, note 754.
826 "Convention mixte". See Fastiff, supra note 825, at 480.
827 Supra, note 627.
828 Id
jurisdiction as a "double" convention would do: this is the "white list" of the proposed convention. But unlike a double convention, the proposed draft also includes a "gray area" of rules for jurisdiction under which foreign judgments are not entitled to recognition under the convention, but the enforcing state may decide to recognize and enforce the judgment under its general law. It further includes a "black list" of impermissible rules for jurisdiction, mainly composed by well-known examples of "exorbitant jurisdiction" rules as found in the various legal systems. Indeed, the draft refers to provisions of other conventions instead of specifically listing its own rules. The proposed draft, as a "double" convention would, then proceeds to state its rules for the actual recognition and enforcement of contracting-nations judgments. The exceptions listed as valid basis for refusal of recognition include public policy.

The proposed draft openly refers to the Brussels and Lugano Conventions in each of its components apart from the "gray area", which confirms these two conventions in their role model for recognition and enforcement of foreign country judgments. Like the Brussels and Lugano Conventions, the proposed draft would also exclude from its scope of application "problem areas" such as family law, succession,

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829 Fastiff, supra, note 825, at 480.
830 Draft Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, arts. 2, 5, 6, 6A. The "white list" includes domicile of the defendant (Draft Convention, supra, art.2), the "contracting State" for those dispute involving notably contracts, torts and agency relationships, (Draft Convention, supra, art.5), and special jurisdictional bases for complex contractual areas (Draft Convention, supra, art. 6 & 6A).
831 Fastiff, supra note 825, at 482-83.
832 Id., at 483. Draft Convention, supra note 830, art.3.
833 Draft Convention, supra note 830, art.4. Fastiff, supra note 835, at 483.
834 For instance, transient jurisdiction in the United States, see Burnham v. Superior Court of California, 110 S.Ct. 2105 (1990) (affirming the principle of transient jurisdiction in the United States), see also jurisdiction based upon nationality, French CIV. CODE arts. 14 & 15. See also supra note 621.
835 Draft Convention, supra note 830, art.4. Fastiff, supra note 825, at 484.
836 Draft convention, supra note 830, art.26.
837 Draft Convention, supra note 830, art.27.
838 Supra, note 88.
839 See Fastiff supra note 825, at n.33.
840 Supra, notes 125-127, 633 and accompanying text.
status of the person and bankruptcy proceedings\textsuperscript{841}. Indeed, just as the Brussels and Lugano Conventions from which it borrows its language, the draft convention would further uniformity and certainty of recognition of foreign country judgments except as far as major categories of non-money awards are concerned. However, unlike their position during the drafting of the 1971 Hague Convention\textsuperscript{842}, the United States do not wish to exclude all categories of non-money judgments from the scope of application of their proposal, since all types of awards falling within the scope of application would be subject for recognition, as they are under the Brussels (or Lugano) Convention\textsuperscript{843}.

Submitted to the Seventeenth Session of the Hague Conference\textsuperscript{844}, the U.S. proposal was not given a priority status\textsuperscript{845}. Instead, it was referred to a Special

\textsuperscript{841} Draft Convention, \textit{supra} note 830, art.1.


\textsuperscript{843} \textit{Supra}, text following note 127.

\textsuperscript{844} Hague conference on Private International Law, Seventeenth Session, May 5-20, 1993.

\textsuperscript{845} It is also believed that the low number of ratifications of Hague conventions by the United States has the unfortunate result that American delegates do not have the same influence that they otherwise would. Regarding the decision as whether or not to adopt an American suggestion, foreign delegates today will not be influenced by fear that if they do not, the United States will not ratify the convention under consideration. U.S. ratification in any event is improbable.

Commission instructed to make recommendations to the next (Eighteenth) session of the Conference\textsuperscript{846}.

As of today, it therefore appears that the drafting of a general convention on recognition and enforcement of foreign country judgments does not generate the enthusiasm of the international community otherwise eager to promote uniformity of the rules of law in private international law\textsuperscript{847}.

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\textsuperscript{847} See supra, text accompanying note 753.
CHAPTER VI: CONCLUSION

American and French courts offer two very different approaches towards the recognition and the enforcement of foreign-judgments. In France, courts follow the four-prong test for granting an *exequatur* which consider issues of jurisdiction, choice of law, due process and public policy of the forum. United States courts concentrate on jurisdiction and due process and generally recognize foreign country judgments meeting these requirements. The comparison between the two methods and their results has highlighted the specific needs of litigants who, in a transnational environment, are facing uncertain situations with regard to their status and capacity, or risks with regard to their property which mere money damages could not compensate.

In such situations, hardship over the parties may be much greater than in situations compensated by money damages. Courts in both systems analyzed above appreciate those particular circumstances to some extent and accordingly act to relieve the concerned parties of the burden created by the relativity of their status according to territorial boundaries. However, much uncertainty and unpredictability remains present in the field. The availability of specific remedies other than money damages indeed differ from one system to the other. While these differences underline the limits of the possible enforcement of non-money judgments from one system to the other, they should not weaken the possibility of recognition of these remedies. Over the past thirty years, the doctrine in the United States have worked to identify what they qualify as the "true basis" beyond recognition. The concepts revealed therefrom have in turn pleaded for a heightened recognition of equitable remedies and other types of non-money judgments as may be found in various practices.
Legal commentators have identified different components to be included within the general goal of certainty and uniformity in the field. Ideally, recognition of non-money awards would be furthered by unification of the rules regarding such recognition among the various nations and by unification of substantive rules of law and procedure, particularly with regard to jurisdictional requirements which, when different as is often the case in areas dealing with non-money awards, may easily block the recognition process. It does so in both systems analyzed.

Methods to reach unification include unilateral reform and coordinated solutions. Out of all the proposed methods of furthering uniformity and acceptance, unilateral federal legislation seems currently the most likely of all possibilities for the United States\(^{848}\), but it would fall short of most goals of a worldwide scheme of uniformity and acceptance in the field. Such goals would only be furthered by means of international treaty in the field.

Because they are easier to negotiate, bilateral conventions presently dominate the field, and France has signed a significant number of these. Multilateral conventions appear in more limited number and shadowed success, but substantive multilateral conventions exist in areas in which need for coordinated practice is particularly acute, such as family law, and they have proven -so far- to be the most efficient manner of furthering actual recognition and unification of the rules of law in the field. Here again, while France has engaged in such practice, the United States have not.

It is felt that recognition of non-money awards will only be significantly heightened by the negotiation of a general convention in the field\(^{849}\). The success of the

\(^{848}\) Brand, supra note 64, at 257-58. See also Pfund, supra note 753, at 517 ("While the international process of law unification by convention is a deliberate and ponderous one, there remains a long and arduous process before the United States can actually become a party...").

\(^{849}\) Id., at 326.
Brussels and Lugano Conventions signed among the Member States of the European Union and of the EFTA has provided the international community with a model.

The first attempt at such a general convention, achieved by the approval of the 1971 Hague Convention, proved to be a failure. It is believed that the 1971 Hague Convention was completely shadowed by the Brussels Convention, negotiated at the same time. Another draft with provisions similar to those of the Brussels Convention was recently proposed by the United States to the international community acting through the Hague Conference on Private International Law. Addressing a larger community than that of the Brussels Convention, the draft proposes a few additional concessions to the states' sovereignty, such as a "gray area", and accordingly it may seem the most appropriate solution to further and unify the recognition of foreign country judgments generally.

That such a proposal is initiated by the United States, historically absent from the conventional scene in the area of recognition, is significant. The United States have been victim of a lack of recognition worldwide of the judgments issued by its federal and state courts, whether because its rules of law and jurisdiction are generally incompatible with other nation's rules, or because other countries have a restricted recognition practice. Absent from any treaty in the field, the United States have not been able to further the recognition of their own judgments abroad, and such furthering is now one of the goals of the general search for uniformity and acceptance in the field of recognition of foreign judgments.

It must however be remembered that the Brussels and Lugano Treaties are part of a much wider goal of unification among the nations parties to each, and that such

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850 Supra, note 88.
851 Supra, note 742.
852 Droz, supra note 626, at 107.
853 Supra, note 830 and accompanying text.
854 See Brand, supra note 64, at 257-58, and Fastiff, supra note 825, at 498.
855 Supra, note 88.
856 See supra, notes 117-20 and accompanying text.
goal had already triggered and disrupted the usual mechanisms of sovereignty of the member states at the time the two Convention were implemented. Such factors are absent from the international stage, and the United States’ proposal has not generated enthusiasm.

The difficulties arising in connection to the negotiation of a general convention in the field are much heightened as far as non-money judgments are concerned. While non-money judgments are not expressly excluded per se from the existing and proposed general conventions, the scope of application of those conventions leaves out some major categories of non-money awards such as those regarding status of the person and family law presently regulated on the international stage by way of substantive conventions of limited application.

Accordingly, any proposal for a general treaty in the field of recognition and enforcement of foreign judgments should ideally expressly consider the specific problems of some categories of non-money judgments which present urgent need for uniform solution and furthered acceptance.
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