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THE PUBLIC POLICY EXCEPTION TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: IGNORING THE PUBLIC POLICY EXCEPTION IS A DETRIMENT TO U.S. LITIGANTS

Abstract

As United States citizens and foreign nationals engage in transnational civil litigation, one approach to warrant fairness among litigants and nations is the public policy exception to the recognition and enforcement of foreign judgments. Yet, the pursuit of fair justice that embodies this exception has failed U.S. litigants who are regularly denied foreign judgment enforcement in the face of public policy, all the while U.S. courts continually embrace notions of comity in disregard of reciprocity. This is because, unlike foreign nations, the United States is not a signatory to a multilateral foreign judgment agreement and seeks a leveraging tool. As a result, foreign tribunals retain a significant advantage in transnational litigation.

This note will address the prejudice U.S. litigants face in foreign tribunals and how U.S. courts are to blame for impractical and timeworn solutions. Furthermore, this note will explore how justice for U.S. litigants begins with federalization of the public policy standard followed by a blueprint of its own foreign judgment agreement. Until the United States assumes this position however, the public policy exception must be reaffirmed through principles of reciprocity. The United States has essentially lost its bargaining power to the detriment of U.S. litigants, and its time to take it back.

Annotasiya

ABŞ vətəndaşları və əcnəbilərin iştirak etdiyi beynəlxalq xarakterli mülki məhkəmə işlərində tərəflər və müxtəlif millətlərə mənsub şəxslər arasında ədaləti təmin etməyin bir üsulu da xarici məhkəmə qərarlarının məcburiliyi və tanınması ilə bağlı ictimai maraqlar istisnasıdır. Bu istisnanı təcəssüm etdirən ədalət mühakiməsinin həyata keçirilməsinə yönəlmiş bir sıra məhkəmə işləri ictimai maraqlar ilə üzləşdikdə, öz işlərinə dair müntəzəm olaraq xarici məhkəmə qərarlarının məcburiliyindən imtina edən ABŞ çəkişmə tərəflərini pis vəziyyətdə qoymuşdur. Bütün bu müddət ərzində ABŞ məhkəmələri davamlı olaraq qarşılıqlı məhkəmə qərarlarının tanınmasında ikitərəfliliyə məhəl qoymamışdır. Bu səbəbdən digər dövlətlərdən fərqli olaraq ABŞ çoxtərəfli xarici məhkəmə işlərinə dair razılaşmanın imzalayan tərəfi olmur və səmərəli istifadə vasitəsi axtarır. Son nəticədə xarici məhkəmələr beynəlxalq xarakterli çəkişmələrdə əhəmiyyətli üstünlüklərini qoruyub saxlayır.

Bu məqalə ABŞ çəkişmə tərəflərinin xarici məhkəmələrə münasibətdə zərərə uğraması və ABŞ məhkəmələrinin məqsədəuyğun olmayan və səriştəsiz həll üsullarının tənqidinə yönəlmişdir. Bundan əlavə, məqalə ABŞ çəkişmə tərəfləri üçün ədalət mühakiməsinin, özünün xarici məhkəmə qərarlarına dair razılaşma layihəsi ilə müşayiət olunan ictimai maraqlar standartının müəyyən olunması vasitəsilə necə başlamasını aşkara çıxaracaq. ABŞ bu mövqeyi qorusa da, ictimai maraqlar siyasəti istisnası qarşılıqlı prinsiplər əsasında yenidən öz təsdiqini tapmalıdır. Amerika Birləşmiş Ştatları çəkişmə tərəflərinin məruz qaldığı ziyana qarşı sövdələşmə gücünü itirir və artıq bunu yenidən əldə etmək vaxtıdır.

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INTRODUCTION

The recognition and enforcement of foreign judgments is a fresh topic.[1] Conventionally, foreigners were subject to local laws because the notion of sovereignty prevented enforcement of foreign judgments beyond their territories.[2] Thus, a conflict of laws question arose as nations began engaging one another in foreign courts.[3] To combat the conflict, Dutch jurists sought a more pragmatic approach "that would reinforce the idea of sovereign independence."[4] The approach envisioned by the Dutch, comity and reciprocity, were later defined by U.S. courts.[5] The idea was that nations will recognize and enforce foreign judgments to the extent that their own judgments will be recognized and enforced.[6] However, problems can and do arise. Nations are reluctant to act first, which punishes litigants.[7] The reverse also suggests truism. Nations acting as a trailblazer to recognize and

[1] Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, *in* Max Planck Encyc. of Public Int'l Law at p. 2 (Rüdiger Wolfrum ed., 2009) available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2699&context=faculty_scholarship.

[2] Joel R. Paul, *The Transformation of International Comity*, 71 Law and Contemp. Probs. 19, at p. 22 (2008) available at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1477&context=lcp.

[3] *Id.*

[4] *Id*. The idea theorized by the Dutch arose during the 1600s as the Dutch sought to "unify the Dutch provinces and create a post hoc rationalization for the application of Spanish law in Dutch courts" before independence, *id*. at p. 22.

[5] Michaels, *supra* note 1, at p. 2. *See Hilton v. Guyot*, 159 U.S. 113 (1895) (defined principle of comity and denied French judgment).

[6] Michaels, *supra* note 1, at p. 2.

[7] *Id*.

enforce foreign judgments can negatively impact their own litigants, as evident in the United States.[8]

U.S. courts are increasingly positioning American litigants at the mercy of foreign tribunals. The reason stems from U.S. courts willingness to enforce foreign judgments, namely European judgments, while reciprocity in foreign courts remains extraneous.[9] Foreign nations readily apply the public policy exception to the recognition and enforcement of U.S. judgments, while the United States ignores this protection in favor of foreign judgments.[10] The public policy exception serves as a defense for foreign judgments that are contrary to an enforcing nation's public policy.[11] Because European nations are members to agreed conventions, recognition and enforcement of member judgments is often not questioned.[12] To the contrary, the United States is not party to any agreed upon convention.[13] Although a justification for reciprocity is to persuade nations to enter conventions, the United States has abused this position to the detriment of its litigants.[14]

This note will explore the public policy exception to the recognition and enforcement of foreign judgments, and attempt to explain how the United States has historically approached the exception when recognizing and enforcing foreign judgments and how the current state of affairs remains. The content of the research will focus on pertinent questions surrounding the public policy exception in the United States, such as: Where did the public

[8] *Id*.

[9] *Id*. at p. 3. European nations agree that comity is vague and reciprocity is "too hard to determine to provide firm foundations, *id*." Additionally, obligation theories or vested rights to the enforcement of foreign judgments begs the question of "when such obligations or rights have been duly acquired, *id*." As such, European nations enter conventions that detail requirements of jurisdiction, notice, and "compatibility with the enforcing [nation's] public policy, *id*." Paul, *supra* note 2, at p. 28. The United States took the opposite approach. Although abandoning principles of vest-rights in favor of interest-balancing, the United States continued to shape the meaning of comity. Courts were not obligated in applying foreign law that conflicted with U.S. public policy, but "principles of interest-balancing … constrained the courts, *id*." Thus comity shifted "from a doctrine of deference based upon courtesy to a doctrine of deference based upon obligation," *id*.

[10] Nadja Vietz, *Will Your U.S. Judgment be Enforced Abroad?*, Wash. State Bar News, Mar. 2009, p. 15. Problems with U.S. judgments typically arise in Europe when "the U.S. court lacked jurisdiction, when the defendant was not properly served, or when there are public policy concerns," *id*. at p. 16. Nadja Vietz is a partner at Harris & Moure, PLLC, *id.* at p. 18. She specializes in international commercial litigation and arbitration, *id*. Additionally, she is licensed to practice law in Germany, Spain, and Washington, *id*.

[11] Michaels, *supra* note 1, at p. 7. Nations allowed to "deny recognition to foreign judgments that violate the enforcing [nation's] public policy," *id*.

[12] *Id*. Conventions often contain specific application and sources of public policy that trigger the exception. Because these sources are clearly defined and agreed to, signatory nations have notice of enforceable and non-enforceable judgments, *id*.

[13] Vietz, *supra* note 10, at p. 15.

[14] *Id*.

policy exception stem from and is it important? What factors indicate that the United States has strayed from implementing the public policy exception? Why has the United States disregarded the public policy exception? What does enforcement of U.S. judgments look like abroad? In conclusion, the note will offer a practical solution for the United States that guarantees U.S. litigants a better seat at the transnational litigation table. Specifically, the United States must federalize the public policy standard to create a single, workable application. Additionally, congressional action must be sought to draft a foreign judgment agreement that requires foreign nations to sign under the principle of reciprocity. Until the United States adopts this position, U.S. courts must increase endorsement of the public policy exception and of the principle of reciprocity. This solution provides the United States with leverage to increase its bargaining power as it attempts to safeguard U.S. litigants in transnational civil litigation.

I. BACKGROUND

A. The Public Policy Exception Generally

With the advent of globalization and the increasing network of transnational business organizations, the prospect of litigation is inevitable. As such, it is imperative to ensure transnational litigation is conducted strategically and fairly for all parties involved. When judgments are awarded by one foreign court, the judgment will demand enforcement in a different foreign court. For example, a U.S. litigant is sued in Paris, France by a French business. The U.S. litigant has conducted business in Paris and has a relationship with the French organization giving the French litigant proper jurisdiction to sue in France. If the French court finds for the French litigant, the French litigant will take its French judgment to a U.S. court for enforcement against the U.S. litigant. On the surface, this seems logical and certainly fair. Nevertheless, problems arise when the foreign judgment, like the French judgment, is contrary to U.S. law or offends U.S. public policy.[15]

The public policy exception is an important defense to the recognition and enforcement of foreign judgments. As in the earlier example, when the French judgment is brought to the U.S. for enforcement, a U.S. court will determine whether the French judgment is subsequently enforceable against the U.S. litigant's assets. This is commonly known as the judgment enforcement doctrine.[16] Historically, U.S. courts have been pro-plaintiff in litigation

[15] Paul, *supra* note 2, at p. 24.

[16] Christopher Whytock, *The Enforcement of Foreign Judgments*, 111 Colum. L. R. 1444, p. 1462 (2011). The judgment enforcement doctrine begs the questions of "[s]hould a U.S. court enforce a judgment rendered by another country's court?," *id*. U.S. courts are constitutionally required to treat judgments of sister U.S. states with full faith and credit, *id*. There are no constitutional requires for foreign judgment however, *id*.

controversies, which resulted in the influx of foreign litigants suing in U.S. courts.[17] Foreign nations were just the opposite in that they were defendant friendly, giving U.S. litigants the desire to seek dismissal in U.S. courts for *forum non conveniens*.[18] However, in recent years, foreign nations have become more pro-plaintiff.[19] U.S. litigants have suffered the effects of this shift as they litigate on foreign soil with substantial judgments resulting against them.[20] A U.S. litigant may pursue alternative justice by asserting that the foreign judgment was the product of a deficiency and should be barred from enforcement.[21] One such deficiency may be that the foreign judgment would offend the enforcing nation's concept of public policy if the judgment were enforced.[22] Where enforcement of a foreign judgment would subsequently offend a nation's public policy, the enforcing court may deem the judgment unenforceable.[23]

The public policy exception is an identifiable principle in the United States. The Restatement (Third) of the Foreign Relations Law of the United States recognizes the public policy exception as one of six grounds for non-recognition of foreign judgments.[24] Additionally, a majority of U.S. states adopted the 1962 Uniform Foreign Money-Judgments Recognition Act (UFMJRA), which recognizes the public policy exception; later revised as the 2005 Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA).[25] Although, given the precedent established in *Erie R.R.*, U.S. federal courts apply state law and precedent to the enforcement of foreign judgments in diversity cases.[26] Yet, most state doctrines were heavily influenced by the decision handed down in *Hilton v. Chilton*.[27] However, recent U.S. court decisions have tended to shift away from *Hilton* precedent.[28]

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[17] *Id.* at p. 1446.

[18] *Id.* at p. 1447. Forum non conveniens doctrine "gives a U.S. court the discretion to dismiss a transnational suit in favor of a more appropriate and convenient foreign judiciary," *id*. at p. 1446.

[19] *Id.* at p. 1447.

[20] *Id*. This is deemed "forum shopper's remorse":

> Having obtained what they wished for—dismissal in favor of a foreign judiciary with a supposedly more pro-defendant legal environment—defendants are encountering unexpectedly pro-plaintiff outcomes, including substantial judgments against them. *Id.*

[21] *Id*.

[22] *Id.* at p. 1473. "The forum non conveniens doctrine does not address the possibilities of … a judgment repugnant to public policy," *id*.

[23] *Id*.

[24] *Id.* at p. 1467.

[25] *Id*. at pp. 1464-65.

[26] *Id.* at p. 1464.

[27] *Id.* at p. 1465.

[28] *See also* Paul, *supra* note 2 (an analysis on the shifting principles of comity in transnational litigation).

i. Hilton v. Guyot

In 1895, the United States Supreme Court acknowledged the principle of "comity" in *Hilton v. Guyot*.[29] Guyot, a French citizen, sought enforcement of a judgment against American citizen, Hilton, in the Southern District of New York.[30] French courts had awarded Guyot a judgment over Hilton.[31] The question before the court was whether or not Guyot's French judgment had a conclusive effect in the United States?[32] In order to address the issue, the Supreme Court first looked at the "conflict of laws" question that arises in cases of transnational law.[33] Because neither treaties nor statutes exist to guide a conflict of laws question, the responsibility is left to the discretion of judicial tribunals.[34] The rights of litigants moving freely across borders are often blurred by an unwillingness to recognize the rights of foreign nations.[35] As such, the Supreme Court opinioned that "no law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."[36] However, the extent to which rights and laws can, and do cross borders rests in the notion of "comity of nations."[37]

Comity is the recognition that one nation affords within its territory to the "legislative, executive, or judicial acts of another nation."[38] It is neither an absolute obligation, nor a courtesy.[39] Comity is granted to a judgment when "it is shown that the foreign court is a court of competent jurisdiction, and that the laws and public policy of the forum state and the rights of its residents will not be violated."[40] Some jurists might suggest that comity is a "matter of paramount moral duty" because otherwise courts would prefer the laws of their nation to that of another.[41] Chief Justice Story, adopting the words of Chief Justice Taney, summarized the idea of comity as:

> The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered,

[29] *Hilton v. Guyot*, 159 U.S. 113 (1895).
[30] *Id.* at p. 114.
[31] *Id.*
[32] *Id.* at pp. 162-63.
[33] *Id.* at p. 163. Monrad G. Paulsen and Michael I. Sovern, *Public Policy in the Conflict of Laws*, 56 Colum. L. Rev. 969, 969 (1956). Conflict of law questions arise in transnational litigation when the law of one country does not agree with the law of another country, *id*. Deciding which law to implement, as between a forum nation and an enforcing nation, is often limited by a public policy exception, *id*.
[34] *Hilton*, 159 U.S. at p. 163.
[35] Paulsen, *supra* note 33, at p. 969.
[36] *Hilton,* 159 U.S. at p. 163.
[37] *Id.*
[38] *Id.* at p. 164.
[39] *Id.* at p. 163.
[40] *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985).
[41] *Hilton*, 159 U.S. at p. 165.

> and is inadmissible when contrary to its public policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations.[42]

Before comity is applied, however, it is necessary to consider whether foreign judgments comport with jurisdiction, due notice, and are clear of fraud.[43] The comity of nations can be an intelligible and practical principle. Difficulty may arise however when comity is not afforded, leaving foreign judgments challenged and unresolved. Namely, questions arise as to whether or not the cause of action will be tried anew?[44] Additional concerns might include: (1) Is justice really served if the defendant is left to try the merits of the case? (2) Will evidence be preserved? (3) Have witnesses passed? While these questions trigger alarm in many nations, others are hardly disturbed.

According to the June 15, 1629, French royal ordinance, judgments rendered in foreign nations will have no effect in their [France] nation.[45] Defendant Hilton cited the French royal ordinance in his U.S. appeal, reasoning that the French court would have tried the case anew had roles been reversed.[46] Justice Story proclaimed, "if a civilized nation seeks to have the sentences of its own court of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations …"[47] Additionally, Justice Cooley suggested, "true comity is equality. We should demand nothing more and concede nothing less."[48] The United States therefore reasoned that since a similar U.S. judgment would not be enforced in France, then the French judgment ought not be enforced in the United States.[49] The Supreme Court ultimately ruled in favor of mutuality and reciprocity when it failed to recognize the French judgment.[50] However, notwithstanding the importance of the *Hilton* decision, some scholars suggest "reciprocity is no longer a widespread requirement for enforcement of foreign judgments."[51] When reciprocity is lacking, the inquiry of whether or not the public policy

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[42] *Id.*

[43] *Id.* at p. 166.

[44] Brandon B. Danford, *The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve A Comprehensive Treaty?*, 23 Rev. Litig. 381, p. 382 (2004).

[45] *Hilton,* 159 U.S. at p. 118.

[46] *Id.* If the United States had heard the case and issued judgment in favor of Hilton, once Hilton took this judgment to France, French courts would have refused to enforce the U.S. judgment and tried the case over, *id*.

[47] *Id.* at p. 191.

[48] *Id.* at p. 214.

[49] *Id.* at p. 228.

[50] *Id.*

[51] Whytock, *supra* note 16, at p. 1468.

exception will nullify a foreign judgment becomes important. Because U.S. courts no longer utilize the reciprocity holding of *Hilton*, the public policy exception serves as a critical defense for U.S. litigants in transnational litigation. Issues still are raised as to proper standards or measures of public policy offenses that would trigger use of the exception.

ii. Standards for the Public Policy Exception

The recognition and enforcement of foreign judgments is not governed by a common treaty or statute.[52] Nations have identified and agreed to common principles -that include defenses for recognition and enforcement of foreign judgments.[53] First, the court rendering the judgment must maintain proper jurisdiction.[54] The rendering court typically decides the law determining whether or not proper jurisdiction exists.[55] However, just because one nation exerts jurisdiction by its law, does not make it binding on another.[56] Second, a judgment must be "valid, final, and on the merits" so as to protect res judicata proceedings.[57] Third is the understanding that foreign judgments will be void when the rendering court violates fundamental procedures.[58] Important fundamental procedures include adequate notice, proper service, and the opportunity to be heard.[59] Finally, states can deny recognition and enforcement of foreign judgments when enforcement would violate public policy.[60]

The public policy exception exists for many reasons. One reason being that the requested court will not practice "*revision au fond*".[61] Therefore, limitations or guidelines must be adopted to restrict judgments that violate public policy. For example, Middle Eastern conventions, such as the 1983 Arab Convention on Judicial Co-operation ("Riyadh Convention") and the 1995 Protocol on the Enforcement of Judgments Letters Rogatory and Judicial Notices ("the GCC Protocol"), provide member states with the right of refusal when judgments diverge from Islamic laws.[62] Other regimes specify judgments that

[52] *Hilton*, 159 U.S. at p. 163.
[53] Michaels, *supra* note 1, at p. 6.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at p. 7.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* The "requested court" is the court asked to recognize and enforce a foreign judgment, *id*. "Revision au fond" is the practice of the requested court to review a foreign judgment, either under their own laws or under the laws of another state, convention, or treaty, *id*.
[62] *Id.* Pieter Sanders, *Quo Vadis Arbitration?: Sixty Years of Arbitration Practice* 56 (Kluwer Law Int'l 1999). The Riyadh Convention was signed by the 21 members of the Arab League, *id*. However, only 12 ratified the convention: Iraq, Jordan, Libya, Mauritania, Morocco, Palestine, Saudi Arabia, Syria, Tunisia, and the Yemen Republic, *id*. Ilias Bantekas, *An Introduction to*

automatically violate public policy, such as punitive damages.[63] Further, in South Africa and British Columbia, judgments that are contrary to domestic industry practices are said to violate public policy.[64] One principle typically remains the same across the board; "[j]udgments that violate international law must not be enforced or even recognized."[65]

In the United States, a foreign judgment is said to violate public policy when recognition "injure[s] the public health, the public morals, the public confidence in the purity of the administration of law, or…undermine[s] the sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."[66] The United States is not concerned with foreign judgments that merely differentiate from local public policy.[67] Rather, refusal is tolerated when the foreign judgment "contravenes a crucial state public policy affecting a fundamental interest of the forum."[68] Few scholars have explored the public policy exception in depth. However, one scholar, Karen Minehan, does identify three common categories in which U.S. courts are likely to apply the public policy exception.[69]

First, recognition and enforcement of foreign judgments will fail for want of public policy when the judgment rewards a wrongdoer under the criminal justice system.[70] In *Jaffe v. Snow*, a wife's Canadian tort judgment was denied given her husband's status as a fugitive of justice.[71] The court held that

International Arbitration p. 243 (Cambridge Uni. Press 2015). The Riyadh Convention guides signatory nations in the recognition and enforcement of foreign awards, *id*. Specifically, any award that contradicts "the Islamic sharia, the public order or the rules of conduct of the requested party" will fail for want of public policy, *id*. The reasoning stems from the recognition that Muslim public policy is distinguished from that of non-Muslim nations, *id*. Gulf Cooperation Council, Encyc. Britannica. The GCC members include Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates, *id*. Richard Clark, *The Dispute Resolution Review* p. 669 (4th ed. 2012*).* The GCC Protocol was issued by the Courts of the Member States of the Arab Gulf Cooperation Council, *id*. The GCC Protocol allows a signatory nation to refuse enforcement of an award from another nation if the award sough is contrary to shariah law or public order, *id*.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Karen E. Minehan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis*, 18 Loy. L.A. Int'l & Comp. L. Rev. 795, p. 799 (1996). *See also Goodyear v. Brown,* 155 Pa. 514 (1893) (holding that public policy was violated when the secretary of internal affairs commissioned his own land warrant).

[67] Minehan, *supra* note 66, at p. 799; *See Sw. Livestock & Trucking v. Ramon*, 169 F.3d 317 (5th Cir. 1999) (holding that the district court is not permitted to refuse recognition of a judgment just because that judgment offends Texas public policy).

[68] Minehan, *supra* note 66, at pp. 799-800.

[69] *Id.* at p. 804.

[70] *Id.* at p. 805.

[71] *Id. Jaffe v. Snow*, 610 So.2d 482 (Fla. Dist. Ct. App. 1992).

allowing the wife to recover for loss of consortium would permit recovery of a wrongdoer, and thus violate public policy.[72]

Second, recognition and enforcement will fail for want of public policy when judgments are contrary to the United States Constitution.[73] For instance, in *Matusevitch v. Telnikoff*, a British libel judgment was denied because the standard for libel in England not only contravened Maryland public policy, but also the First and Fourteenth Amendments.[74] Under Constitutional law, a plaintiff is required to prove actual malice in a libel suit.[75] British law requires the reverse; the defendant bears the burden to prove the truth behind the statements.[76] Refusal of foreign judgments is thus "constitutionally mandatory" when judgments are contrary to laws guaranteed under the Constitution.[77]

Finally, recognition and enforcement will fail for want of public policy when judgments reflect penal sanctions.[78] In *Republic of Phil. v. Westinghouse Elec. Corp.*, the Republic of Philippines sought recovery from a U.S. corporation's alleged interference with the Republic president's fiduciary duty.[79] The Republic's judgment was considered penal even under New Jersey's narrow public policy definition.[80] The penal test in New Jersey concerns "whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual."[81] The Republic sought public damages as deterrence for the president's prior wrongdoings and exploitation.[82] The holding affirmed this motive was against state public policy because New Jersey had no intention of crippling the corporation with sanctions for actions that would never reoccur.[83] Even so, "courts of no country execute the penal laws of another."[84]

Although the United States has successfully applied the public policy exception, application of the exception becomes more problematic when

[72] *Id.* at p. 488.

[73] Minehan, *supra* note 66, at 805.

[74] *Id.* at 806. *Matusevitch v. Telnikoff*, 877 F. Supp. (D.D.C. 1995).

[75] *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964).

[76] *Matusevitch*, 877 F. Supp. at p. 4. *See also Abdullah v. Sheridan Square Press, Inc.*, 154 F.R.D. 591 (S.D.N.Y. 1994) (British libel judgment denied for contravening First Amendment protections).

[77] *Bachchan v. India Abroad Publications*, 154 Misc. 2d 228, p. 231 (N.Y.S. 1992) (U.S. court denied English libel judgment on the grounds that the libel standards differed from those guaranteed under the First Amendment).

[78] Minehan, *supra* note 66, at p. 807.

[79] *Id. Republic of Phil. v. Westinghouse Elec. Corp.*, 821 F. Supp. 292, p. 298 (D.N.J. 1993).

[80] *Id.* at p. 296.

[81] *Id.* at p. 297.

[82] *Id.* at p. 298.

[83] *Id.* at p. 300.

[84] *Id.* at p. 295 (quoting Chief Justice John Marshall in *The Antelope*, 23 U.S. 66, 123, 6 L.Ed. 268 (1825)).

foreign judgments do not fall within one of these three categories. It is then, and more often than not, that the United States disregards the public policy exception for various reasons.

iii. The Modern Trend of the Public Policy Exception in the United States

The recognition and enforcement of foreign judgments in the United States appear in a variety of situations—both domestically and internationally. First, the United States recognizes and enforces the judgments issued by courts of other states. Full Faith and Credit is afforded to these judgments under the Uniform Enforcement of Foreign Judgments Act.[85] The Act recognizes in each state the judicial proceedings of another state.[86] Second and the primary focus of this note, the United States recognizes and enforces judgments issued by foreign nations. The United States has increasingly taken issue with this second type of enforceable judgment.

Unlike most foreign nations, the United States is not party to any multilateral agreement on the governing of foreign judgments.[87] Outside the United States, multilateral agreements such as The Brussels Convention, adopted in 1968, allow European nations to automatically recognize and enforce judgments of member nations.[88] U.S. judgments are not given reciprocity and "receive less favorable treatment in Europe than do judgments emanating from courts of Brussels Member States."[89] However, in 1992, the United States made a proposal to The Hague Conference on Private International Law to speak to this concern.[90]

The Hague Conference is composed of eighty member nations.[91] The Conference serves as a "melting pot" of legal systems attempting to develop legal security among its members and nonmembers.[92] Given the success of the Brussels Convention among European nations, the United States desired a similar feature, thus proposing an initiative in 1992 to the 17th Session of The Hague Conference.[93] The proposal sought a global convention on jurisdiction

[85] U.S.C.A. Const. Art. IV §1; Revised Unif. Enforcement of Foreign Judgments Act (1964).

[86] *Id.*

[87] Eric B. Fastiff, *The Proposed Hague Convention on the Recognition and Enforcement of Civil Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems*, 28 Cornell Int'l L.J. 470 (1995).

[88] Lindsay Loudon Vest, *Cross-Border Judgments and the Public Policy Exception: Solving the Foreign Judgment Quandary by Way of Tribal Courts*, 153 U. Pa. L. Rev. 797, p. 798 (2004).

[89] Danford, *supra* note 44, at p. 398 (the U.S. State Department likewise holds this view).

[90] Vest, *supra* note 88, at p. 806.

[91] Hague Conference, http://www.hcch.net/index_en.php?act=text.display&tid=1 (last visited Aug. 4, 2015).

[92] *Id.*

[93] Vest, *supra* note 88, at p. 806. *See also* Danford, *supra* note 44, at p. 392 (regarding the Brussels Convention as successful for the enforcement of judgments because it removed difficulty and uncertain litigation procedures).

and the recognition and enforcement of foreign judgments.[94] However, the United States did not estimate that over two decades would pass with little to no steps taken towards the initiative.[95]

The question then becomes, what is the United State's current system for the recognition and enforcement of foreign judgments and, is this technique advantageous and equitable? Given the shift away from reciprocity requirements, the public policy exception becomes an important safeguard for U.S. litigants. However, an interesting distinction exists between the United States' stance on the public policy exception in comparison with European nations. Is the United States weakening its application of the public policy exception to the detriment of its litigants? In order to answer in the affirmative, it is critical to analyze how U.S. judgments are enforced abroad in comparison with the enforcement of foreign judgments on U.S. soil.

II. ANALYSIS

A. The Concerning Nature of the Public Policy Exception in the United States

Since 1895, the United States has seemingly withdrawn from the principle of reciprocity established in *Hilton v. Guyot* and adopted a more general idea of comity.[96] The reason for this shift is important as it relates to U.S. litigants. Some scholars suggest that the shift comes at a time when "comity demands respect for the market."[97] Even so, the United States' desire to have its judgments enforced by foreign nations, regardless of how those nations treat U.S. judgments, is likely fixed on the idea of leveraging a common convention. Since the United States is not a member to any multilateral body, it does not have automatic recognition and enforcement, and often sees its judgments denied.[98] However, the United States is approaching the problem entirely wrong. It is as though the United States believes the idiom of "I'll scratch your back, if you scratch mine" applies to foreign judgments. Many factors contribute to this notion of the United States retreating from the concept of reciprocity.

i. State Centered Public Policy

In 1938, the United States Supreme Court held that "except in matters governed by Federal Constitution or by acts of Congress, the law to be applied

[94] *Id.*

[95] *Id.*

[96] *Hilton v. Guyot*, 159 U.S. 113 (1895). Juan Carlos Martinez, *Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted*, 4 J. Transnat'l L. & Pol'y 49, 53 (1995).

[97] *E.g.* Paul, *supra* note 2, at 37. "[T]he Court sacrificed an important U.S. public policy embodied in U.S. statutes to the requirements of the global market," *id.*

[98] Vietz, *supra* note 10, at p. 15.

in any case is law of the state."[99] The court was essentially rejecting the idea of a federal common law in favor of state law.[100] The application of state law to foreign judgments becomes complicated, however.

Currently, state courts are free to govern foreign litigation by their own definition.[101] For example, in New Jersey, the appellate court held that foreign money judgments may be filed and enforced without court authorization.[102] The foundation for enforcement comes from the Foreign Country Money-Judgment Recognition Act (FCMJRA).[103] Judge Yannotti, commenting on the Act, stated, "because judgments entitled to full faith and credit may be enforced in New Jersey without a prior determination by the Superior Court recognizing those judgments, the same procedure is available for judgments of foreign countries."[104] The New Jersey court noted that as long as due process is met, the recognition and enforcement is not improper.[105]

The Hague Conference proposal would certainly work to bind federal courts, but when litigation does not concern federal question or diversity of citizenship, matters become more complicated.[106] Having a dual system of foreign litigation, in which states enforced their own public policies, while federal courts recognized foreign judgments under a different standard, would create confusion and unpredictability; not to mention foreign nations would never support such a proposal.[107] It appears that a favorable seat at the multilateral table for the United States is contingent upon a federalized public policy standard.

In 2005, the American Law Institute developed a comprehensive project, The Proposed Federal Statute on the Recognition and Enforcement of Foreign Judgments.[108] The project initiated a federalization effort of foreign judgments.[109] Specifically, the project proposed: (1) the federal government,

[99] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, p. 78 (1938).
[100] *Id.*
[101] Vest, *supra* note 88, at p. 808.
[102] Robert G. Seidenstein, *Foreign Judgments Get Go-Ahead May be Filed Without Court Ok*, The NJ Lawyer Weekly Inc., June 6, 2005, at p. 3.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Vest, *supra* note 88, at p. 808.
[107] *Id*.
[108] The American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, (2005) available at, https://ali.org/publications/show/recognition-and-enforcement-foreign-judgments-analysis-and-proposed-federal-statute/#_tab-volumes. The American Law Institute is an independent organization that drafts and publishes scholarly work such as the Restatement of the Law, Model Codes, and Principles of Law, *id*.
[109] Ronald A. Brand, *Fed. Judicial Ctr. Int'l Litig. Guide: Recognition and Enforcement of Foreign Judgments* 29 (2012) available at http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf.

shared between Congress and the Executive, has the power to govern foreign judgments and, (2) a uniform federal statute is the best way to address relations with foreign nations.[110] As Justice Sutherland said, "in respect of our foreign relations generally, state lines disappear."[111] Still, the problem with this shift is the standard currently afforded to the public policy exception.

ii. Narrow Standards for Application

U.S. courts have narrowly defined the public policy exception, making its application difficult and rare.[112] For example, in *Ackerman v. Levine*, a West German plaintiff sought enforcement of a judgment against a New York defendant.[113] The defendant argued that the German judgment violated New York public policy.[114] The Court of Appeals for the Second Circuit held otherwise, narrowing the scope of the public policy exception.[115] The reason for this narrow scope rests upon a compromise between res judicata and fairness to litigants.[116] However, U.S. courts seem to distribute more weight to the notion of res judicata.

Recently, the District Court of Columbia defined the public policy exception in *BCB Holdings Ltd. v. Gov't of Belize* as "extremely narrow" and applicable "only where enforcement would violate the forum state's most basic notions of morality and justice."[117] The public policy must be defined and dominant so as to reference laws and legal precedents, not alleged public interests.[118] The court went further to say that the public policy exception, although frequently raised as a defense, is hardly successful.[119] As such, foreign judgments hardly fall within the purview of the public policy exception making their enforcement more likely.

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[110] *Id.*

[111] Willis L. M. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50, Colum. L. Rev. 783, 788 (1950) (quoting Justice Sutherland, *U.S. v. Belmont*, 301 U.S. 324 (1937)).

[112] Minehan, *supra* note 66, at p. 799. *See also* Danford, *supra* note 44, at p. 431 (noting that the public policy exception is so narrowly construed by the courts that "it now must be characterized as a defense without meaningful definition").

[113] 788 F.2d 830, p. 834 (2d Cir. 1986).

[114] *Id.*

[115] *Id.*

[116] *Id.* at p. 841.

[117] 110 F. Supp.3d 233, p. 250 (D.C. Cir. June 24, 2015). *See also Karen Maritime Ltd. v. Omar Intern., Inc.*, 322 F. Supp.2d 224, p. 226 (E.D.N.Y. 2004) (quoting *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, p. 315 (2d Cir. 1998) public policy is applied "only where enforcement would violate our most basic notions or morality and justice").

[118] *BCB Holdings Ltd.*, 110 F.Supp.3d at p. 250.

[119] *Id. See also Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010 (5th Cir. 2015) (holding that the public policy defense of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards did not preclude enforcement of arbitral award).

B. The Effect of the United States' Public Policy Stance

The effect of U.S. courts enforcing foreign judgments absent reciprocity and in disregard of public policy is detrimental to U.S. litigants. The United States does not make it a practice to discriminate in favor of their citizens against foreign participants.[120] Rarely are foreign judgments denied on public policy grounds in the United States.[121] Thus, the concern becomes whether U.S. litigants receive fair and equitable justice in the realm of global litigation?

The U.S. Constitution finds no application in foreign tribunals. When U.S. courts elect to enforce a foreign judgment while the same proceeding abroad would fail, the United States has denied itself due process.[122] U.S. courts have generally adopted the notion that all foreign judgments will be enforced "regardless of the law under which acquired."[123] Although U.S. courts identify the public policy exception as a defense to comity, they have failed to apply the defense in comparison with foreign nations.[124]

The Brussels Convention allows European nations to recognize and enforce foreign judgments without public policy apprehension because these nations have existing relations.[125] The concern that one EU nation would enforce a judgment contrary to another EU nation's public policy is rare.[126] However, since the United States is not a party any multilateral agreement, like the Brussels Convention, foreign nations are more likely to apply the public policy exception against U.S. judgments.[127] European nations are guided by public policy standards outlined in Article 6 of the European Convention on Human Rights and case law from the European Court of Justice (ECJ).[128] Although the public policy exception is discretionary, and nations may choose to adopt their own national law when enforcing foreign judgments, most European nations abide by one common standard.[129] Historically, the ECJ has denied application of the public policy clause.[130] Yet, in recent cases, namely

[120] Reese, *supra* note 111, at p. 785.
[121] Brand, *supra* note 109, at p. 21.
[122] Reese, *supra* note 111, at p. 796.
[123] *Id.* at p. 797.
[124] *Id*.
[125] Vest, *supra* note 88, at p. 800.
[126] Burkhard Hess and Thomas Pfeiffer, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law,* at 13 PE 453.189 (2011) available at, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf.
[127] Sarah Garvey, *Brussels Regulation (Recast): Are you Ready?*, allenovery.com, Mar. 18, 2015, http://www.allenovery.com/publications/en-gb/Pages/BRUSSELS-REGULATION-(RECAST)-ARE-YOU-READY.aspx (last visited May 9, 2016).
[128] Hess, *supra* note 126, at p. 13.
[129] *Id.*
[130] Aurelio Lopez-Tarruella, *The Public Policy Clause in the System of Recognition and Enforcement of the Brussels Convention*, The European Legal Forum 122 (2000).

Krombach v. Bamberski, the court has adopted an alternative trend, which seeks to establish principles of "ordre public" that national judges preserve.[131] While this new trend asserts reasonable application of the public policy exception within European member states, it is only rational to assume a heighten application of the exception to non-member states, i.e. the United States.

One of the leading public policy violations inhibiting enforcement of U.S. judgments is a punitive damage award.[132] According to Nadja Vietz, few European nations will enforce U.S. judgments because punitive damages attached to the judgment are excessive.[133] In addition, Vietz asserts that U.S. courts ignore international law and exercise "extraterritorial jurisdiction."[134] Whether a foreign nation will recognize and enforce a U.S. judgment is determinative of the local law in that nation, as well as international comity.[135] Most European nations will deny U.S. judgments that contravene their laws.[136] Conversely, U.S. courts may not deny a foreign judgment merely because it differs from a state's local policy.[137] U.S. litigants often feel the effect of these differing court values.

i. Reynolds v. The Int'l Amateur Athletic Federation

A leading case exhibiting this injustice is *Reynolds v. The Int'l Amateur Athletic Federation* (IAAF).[138] Butch Reynolds, Jr., an Olympian, tested positive in a French lab for a performance-enhancing drug, which prohibited him from competing in the 1992 Olympics.[139] Reynolds submitted a subsequent negative drug test but, IAAF later denied the result.[140] Reynolds sued IAAF in federal district court in Ohio, only to have his claim dismissed on appeal by

[131] *Id.* "Ordre public" is a safeguard for European Member States when public policy becomes a concern, *id*. Case C-7/98, Krombach v. Bamberski, 2000 E.C.R. I-1956. The question concerning the recognition and enforcement of a foreign judgment pursuant to Article 27, Section 1 of the Brussels Convention arose between a French and German litigant, *id*. Article 27, Section 1 outlines the public policy exception if a judgment is contrary to local public policy, *id*. The court was seeking to interpret the term "public policy" and held:

> [W]hile it is not for the Court to define the content of the public policy of a Contracting State, it is none the less required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition to a judgment emanating from a court in another Contracting State.

Id. The court drew on common principles which member nations signed onto in the form of treaties, *id.*

[132] Vietz, *supra* note 10, at p. 15.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] Minehan, *supra* note 66, at p. 799.

[138] Fastiff, *supra* note 87, at 489. *Reynolds v. The Int'l Amateur Athletic Federation*, 23 F.3d 110 (6th Cir. 1994).

[139] Fastiff, *supra* note 87, at p. 489.

[140] *Id.*

the Sixth Circuit.[141] Reynolds proceeded to court a second time and was granted a temporary restraining order that prevented IAAF from banning him in competition.[142] Although Reynolds was able to compete, he lost significant funding.[143] Reynolds sought damages in the Southern District of Ohio; $6 million in compensatory and $18 million in punitive.[144] When Reynolds attempted to enforce his judgment in the United States, IAAF appealed and the Sixth Circuit reversed the judgment and dismissed the claim.[145]

Reynolds intentionally brought his judgment to the United States because foreign nations deny U.S. judgments with substantial punitive damages as it conflicts with their notion of public policy.[146] If the United States had been a party to a multilateral agreement, Reynolds would have faired better in having his judgment enforced abroad. Yet, Reynolds was wedged between valid and invalid U.S. and foreign judgment enforcement. For example, the United States would have recognized Reynolds' judgment, but could not enforce for lack of jurisdiction.[147] Additionally, jurisdiction was adequate abroad, however the judgment failed for public policy concerns.[148]

ii. Principle of Res Judicata

To understand why U.S. courts enforce foreign judgments absent reciprocity is to understand the principle of res judicata. Res judicata "is the policy favoring the enforcement and recognition of judgments of foreign nations."[149] In recent years, the United States has placed considerable weight on the principle of res judicata in the transnational litigation realm.[150] For U.S. justices, the real public policy concern is "that there be an end of litigation that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."[151] Res judicata is engrained in the principles of common law, creating a substantial influence in the minds of U.S. justices.[152]

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[141] *Id.* at p. 490.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at p. 491.

[146] Vietz, *supra* note 10, at p. 18. *See also* Hess, *supra* note 126, at 146 (citing Cass. Civ. 1ère, 1er décembre 2010, n° 09-13303, Recueil Dalloz 2011, 423 note Licari (French court denied recognition and enforcement of a U.S. judgment on the grounds that the judgment contained punitive damages contrary to French public policy)), at 147 (citing Junker in MüKo-BGB, 2010, Art. 26 Rom II-VO para 21, 23., (German legal literature refused excessive damages, such as treble damages that are recognized by U.S. courts)).

[147] Fastiff, *supra* note 87, at pp. 491, 493.

[148] *Id.*

[149] Reese, *supra* note 111, at p. 785.

[150] *Id.* at p. 800.

[151] *Id.* at p. 784.

[152] *Id.* at pp. 784-85.

Although limited scholarship, another theory attempting to explain U.S. court's foreign judgment enforcement practice is the United States desire to join a multilateral recognition and enforcement agreement.[153] If the United States were party to such an agreement, U.S. litigants would not only receive equitable justice in comparison to their European counterparts, but would likely see their judgments enforced more often than current trends.[154] However, before reaching an enforcement compromise, many foreign nations will require reciprocity from the rendering court.[155] A U.S. judgment must therefore show that similar effect would be granted to a foreign judgment in a U.S. rendering court.[156] Thus, the United States has continually enforced foreign judgments under the general comity notion with little to no reciprocity from other nations.[157]

Reciprocity is the countervailing policy to comity that was crucial to the Supreme Courts ruling in *Hilton v. Guyot*.[158] Reciprocity is the understanding that judgments rendered in one nation will be afforded the same effect in another nation.[159] In other words, the classic idiom of "ill scratch your back, if you scratch mine." U.S. courts appear to have exchanged the principle of reciprocity with comity and res judicata.[160] As a result, the United States continues to scratch at the backs of foreign nations by enforcing judgments that are counter to U.S. public policy. Yet, foreign nations do not reciprocate and currently enjoy their litigation advantage because let's face it, who doesn't enjoy a free favor? Lindsay Vest, quoting Professor Kevin Clermont, described the effect of this inequitable litigation practice on U.S. litigants:

> In short, Americans are being whipsawed. Not only are they still subject in theory to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but also U.S. judgments tend in practice to receive short shrift in European courts.[161]

U.S. courts have taken to recognize the injustice faced by their litigants and have sought solutions, one being the 1992 proposal to The Hague

[153] Danford, *supra* note 44, at p. 390. The Brussels convention has been regarded as "the single most important private international law treaty in history," *id*. It serves as a "federal system of recognition of judgments" within the European Community and moves judgments freely among member nations, *id*. The United States has grown envious.

[154] *Id.* at p. 400 (argues that "[m]ember [s]tates have a significant advantage over U.S. parties when it comes to judgment enforcement").

[155] *Id.* at p. 389.

[156] *Id*.

[157] *Id.* at p. 387.

[158] *Id.* at p. 785. *Hilton v. Guyot*, 159 U.S. 113, p. 162 (1895).

[159] Reese, *supra* note 111, at p. 785.

[160] Danford, *supra* note 44, at p. 387.

[161] Vest, *supra* note 88, at p. 806.

Conference.[162] The original proposal began in 1992, with preliminary work extending into 1996.[163] From 1997 to 1999, preparation for a preliminary draft was conducted.[164] 2003 marked the start of the Working Group's drafting process of the proposal into an agreeable document, which continues through present day.[165] Needless to say, work has sufficiently been stalled on any judgments project. Twenty-three years have passed and the proposal has yet to be ratified. Is there a satisfactory reason for this delay?

iii. Barriers to Ratification

The world is composed of many judicial systems. While organizations like The Hague Conference attempt to categorize each system into a useful global structure, nations will always remain reluctant.[166] One barrier to ratification of a multilateral convention is an enforcing nation's unwillingness to enforce a rendering nation's judgment that is counter to its concepts of right and wrong.[167] For the United States, ratification of a transnational agreement may mean recognizing conflicting and unfavorable foreign judgments.[168] This hesitation is combatable however as courts reserve the right to refuse judgments that conflict with their public policies.[169] Thus, the public policy defense becomes an integral part of multilateral conventions.[170] Still, a different category of barriers exists that triggers greater apprehension to ratification of a multilateral convention.[171]

First, procedural barriers can contravene public policies.[172] A procedural barrier that is typically triggered is jurisdiction.[173] Butch Reynolds met jurisdictional challenges in his claim against IAAF.[174] The judgment rendered to Reynolds was void because jurisdiction over IAAF was invalid.[175] U.S. courts have unanimously determined that jurisdiction and all procedural conditions must be satisfied to ensure fair trials for litigants.[176] Second, and

[162] Danford, *supra* note 44, at p. 402.
[163] *The Judgments Project*, The Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=text.display&tid=150 (last visited Aug. 3, 2015).
[164] *Id.*
[165] *Id*. The Council on General Affairs and Policy is charged with operations of The Hague Conference, *id*. The Working Group on the Judgments Project is subgroup charged with drafting and implementing the judgments project, *id*.
[166] Danford, *supra* note 44, at pp. 404-05.
[167] Reese, *supra* note 111, at p. 785.
[168] Vest, *supra* note 88, at p. 799.
[169] *Id.*
[170] *Id*.
[171] *Id.* at p. 806.
[172] *Id.* at p. 807.
[173] *Id.*
[174] *Reynolds v. The Int'l Amateur Athletic* Federation, 23 F.3d 110 (6th Cir. 1994).
[175] *Id.*
[176] Michaels, *supra* note 1, at p. 7.

more complex, is substantive barriers.[177] Substantive barriers trigger the public policy concern, however, because the public policy exception is open to discretionary interpretation, the defense has the potential to be abused or ignored.[178]

Another reason for the delay in ratification is the fact that European nations may remain reluctant given the state of U.S. public policy standards.[179] Concern over the state centered public policy exception may give these nations apprehension as to a loose public policy exception.[180] Not to mention, foreign nations likely enjoy their present advantage in transnational litigation as U.S. courts continue to recognize and enforce foreign judgments.

C. A Solution for the United States

Although the public policy exception to the recognition and enforcement of foreign judgments is ultimately discretionary, U.S. courts have abused the system leaving U.S. litigants at a "severe disadvantage" in foreign tribunals.[181] The intent of the public policy exception was to function as a transnational safety net, with the understanding that nations should refuse recognition and enforcement of foreign judgments when public policy is violated.[182] However, overlooking the exception in an attempt to gain leverage in a transnational agreement has left U.S. litigants in a vulnerable position.[183] Perhaps twenty-three years ago, when the United States made its proposal to The Hague Conference, the idea of a transnational agreement seemed more plausible. Yet, foreign nations have maintained an advantage over the United States absent an agreement, making ratification seem irrelevant and frankly, not in their best interest.[184] Therefore, the United States needs a new solution.

The principle of comity and reciprocity identified in *Hilton v. Guyot* provides a critical framework in identifying a new tactic for the United States.[185] In *Hilton*, the court refused recognition and enforcement because the

[177] Vest, *supra* note 88, at p. 807.
[178] *Id.* at p. 808.
[179] *Id*. at p. 800.
[180] Danford, *supra* note 44, at p. 424.
[181] *Id.* at p. 400.
[182] *Id.* at p. 431 (The "public-policy exception in the Brussels Convention has been likened to building a machine with a safety valve.").
[183] *Id*. (argues that empirical data suggests that the U.S. has not "exhibited the rampant denial of enforcement that doubters of the public-policy exception fear"). This contention further supports the idea that the United States has ignored the exception. If the United States is not abusing the public policy as suggested, it is this note's author's opinion that they must be using the exception fairly, minimally, or not at all.
[184] *See also* Vest, *supra* note 88, at p. 800 ("[T]he U.S. is left without a key negotiating chip because, in comparison to other nations, the U.S. historically has been generous in recognizing and enforcing [foreign] judgments.").
[185] *Hilton v. Guyot*, 159 U.S. 113, p. 162 (1895).

French court would not have recognized a reciprocal U.S. judgment.[186] Following *Hilton*, the court in *Johnston v. Compagnie Generale Transatlantique* rejected the reciprocity standard and adopted a more general application of comity.[187] Many states agreed with the *Johnston* court, reasoning that the reciprocity requirement punished the judgment holder "for the policy of his government."[188] States did not entirely disregard the *Hilton* court, but rather adopted the requirements of jurisdiction, proper service and notice, fair trial procedures, and clear of fraud.[189] While these requirements are decent, U.S. litigants continue to remain defenseless in foreign litigation because foreign nations are not simultaneously adopting these practices. Instead, foreign nations apply the public policy exception, which U.S. courts have become reluctant to do.

In order for U.S. litigants to fair evenly in transnational litigation, the United States must federalize the public policy standard.[190] Under *Erie R.R. Co. v. Tompkins*, states sitting in diversity jurisdiction apply state law.[191] States have differing notions of public policy standards, which compromises any uniform enforcement standard.[192] Foreign nations will be more inclined to sign a recognition and enforcement agreement under a single U.S. public policy standard.[193] Therefore, the United States requires congressional action to draft a federalized public policy standard. Subsequently, the United States can implement its own foreign judgment agreement requiring nations to sign under the principle of reciprocity.[194] Clearly, an agreement under the existing

[186] *Id.*

[187] Martinez, *supra* note 89, at p. 53. *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 383-84 (N.Y. 1926).

[188] Martinez, *supra* note 89, at p. 53.

[189] *Id.* at pp. 53-4.

[190] Danford, *supra* note 44, at p. 426.

[191] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, p. 78 (1938).

[192] Yuliya Zeynalova, *The Law on Recoginition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?* 31 Berkeley J. Int'l L. 150, p. 195 (2013) (argues that States applying their own public policy standards is inconsistent with *Hilton's* notion of comity). Although Hilton was decided before Erie, the idea of comity resided within a federal structure, *id.*

[193] See Danford, *supra* note 44, at p. 425. With current state centered public policy standards, foreign nations must assess fifty-one matters of law, *id.* If a single federalized application controlled the enforcement of judgments, "it is believed that Congress would better facilitate the movement of U.S. judgments abroad and increase their value," *id.*

[194] Zeynalova, *supra* note 192, at p. 172. There is no "empirical data on the need for [or against] a judgments convention," id. However, the 1998 Study Group for the U.S. Department of State opinion that no "great need for a convention" exists is outdated, id. Scholars generally opinion that U.S. judgment suffer great risk abroad; this given the substantial rise in transnational litigation disputes between 2000-2010, id. at pp.172-73. The U.S. Department of Commerce and Justice claim to have received "frequent inquiries from litigants having enforcement problems," id. at p.174. Still, research on current U.S. foreign judgment treatment is lacking, id. at p.173.

Hague Conference has proved ineffective. The United States demands a written document that will: (1) alert foreign nations of its federalized public policy standard; (2) outline the boundaries in which the U.S. is willing to agree to foreign judgments pursuit to public policy concerns; (3) regain a credible litigation reputation, while quashing the notion of a liberal court; and (4) reaffirm U.S. litigants that their judiciary is concerned with the disposition of its litigants in transnational litigation.[195] In the meantime, U.S. courts should reaffirm the principle of reciprocity established in *Hilton*.[196] Eliminating general comity will not only protect U.S. judgment holders, but will also guarantee fairness and equity to all transnational litigants.

CONCLUSION

In terms of recognizing and enforcing foreign judgments, the United States has continually disregarded the public policy exception as compared to foreign tribunals. In doing so, the United States has crippled its own litigants in transnational litigation. The United States has moved away from the standard established in *Hilton* in favor of generalized comity. The expectation was to achieve ratification of a multilateral agreement that would curb judgments in violation of public policy. Although the United States recognized the necessity for an agreement, the approach towards acquisition has proved unfavorable to U.S. litigants. Enforcing foreign judgments contrary to public policy while reciprocity abroad is absent, has resulted in the United States losing any bargaining power for a multilateral agreement—the U.S. has effectively created its own gridlock. A solution for the United States begins with the federalization of the public policy standard, creating uniform and predictable public policies nationwide. U.S. courts cannot continue to disregard public policy in favor of foreign judgments. The overall goal is to abandon the notion of general comity and cultivate a system of judgment recognition between the United States and foreign nations that afford equal justice to U.S. litigants without discounting U.S. public policy considerations.

[195] *See also* Danford, *supra* note 44, at p. 432. (argues that incorporating a public policy exception into a multilateral judgments convention is imperative for without "likely would spell doom").

[196] *See also* Danford, *supra* note 44, at 417. Commentators argue in favor of reviving the reciprocity requirement in order for the United States to gain leverage in ascending to a multilateral agreement, and ending the "free ride" foreign nations currently enjoy, id. Still, others oppose the revival of reciprocity arguing that it would "diminish the likelihood of a judgment convention being concluded," *id.* at p. 419. The overall results are inclusive. However, it is this note's author's opinion that a reciprocity requirement will not stifle a judgments convention. The majority of European nations retain such requirements and "they are not routinely enforced," *id*. at p. 417-18. As such, the reciprocity requirement is likely tactical and may just be that extra punch that the United States needs.