WHOSE LAW OF PERSONAL JURISDICTION? THE CHOICE OF LAW PROBLEM IN THE RECOGNITION OF FOREIGN JUDGMENTS

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It is black-letter law that in order to recognize and enforce a foreign judgment, the rendering court must have had personal jurisdiction over the defendant. While the principle is clear, it is an open question as to whose law governs the question of personal jurisdiction: that of the rendering court or that of the recognizing court. In other words, is the foreign court's jurisdiction over the defendant governed by foreign law (the law of F1), domestic law (the law of F2), or some combination thereof? While courts have taken a number of different approaches, it seems that many courts regard foreign law as relevant to the question of whether the foreign court possessed personal jurisdiction over the defendant.

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In this Article, I argue that U.S. courts should not be looking to foreign law (in whole or in part) to determine whether a foreign court had jurisdiction over the defendant in the original action. I present five arguments in support of this contention: (1) there is no statutory authority pointing to the application of foreign law; (2) U.S. courts are not well-positioned to apply foreign jurisdictional law; (3) re-examining assertions of jurisdiction under foreign law violates international comity; (4) an examination of foreign law is usually unnecessary because jurisdiction is also assessed according to U.S. standards; and (5) U.S. courts do not do a good job applying foreign jurisdictional law. Instead, I argue that courts should apply American law to assess whether a foreign court was jurisdictionally competent. This, in turn, raises the question: What is "American" law? I maintain that courts should apply broad federal standards of jurisdiction, and not state-based ones, to determine whether the rendering court had personal jurisdiction over the defendant.

This Article also looks closely at two particular areas of jurisdiction law that are particularly complicated as they relate to the choice of law issue: submission and notice. With respect to submission, U.S. courts seem to be unclear as to whose law applies in assessing whether a defendant in a foreign action submitted to the jurisdiction of the foreign court. In particular, many U.S. courts defer to the foreign court's interpretations as to whether the acts of the defendant constituted submission. With respect to notice, there is a lack of clarity as to how notice relates to personal jurisdiction in the context of the recognition and enforcement of foreign judgments. Here too, there is confusion as to whose law of notice applies in assessing whether a defendant received adequate notice of the proceeding. Consistent with the argument above, this Article takes the position that U.S. standards, and not foreign ones, should ultimately guide the submission and notice inquiries in the recognition context.

Finally, because much of the law in this area is codified in either the 1962 Uniform Foreign Money-Judgments Recognition Act or the 2005 Uniform Foreign-Country Money Judgments Recognition Act, I propose concrete changes to the language of the uniform acts that would address the choice of law problem in the recognition of foreign judgments and would clarify the intersection between notice and personal jurisdiction in the uniform acts.

INTRODUCTION

U.S. courts are being asked to recognize and enforce foreign judgments[1] with increasing frequency.[2] Scholars predict that this trend is likely to continue into the future as litigation goes global. For instance, Christopher Whytock and

[1] In this Article, I use "foreign" to denote foreign country judgments. The term "foreign" is also sometimes used to refer to judgments from sister-states.

[2] *E.g.*, Samuel P. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 N.Y.U. J. INT'L L. & POL. 965, 965 (2013) ("Recent empirical work suggests that there has been a marked increase in the frequency with which U.S. courts are asked to recognize and enforce foreign judgments.").

Marcus Quintanilla observe that an increase in the multipolarity[3] of international litigation means that there will be a "potential proliferation of foreign judgments brought to the United States for recognition or enforcement."[4] They argue:

> In 2021, more foreign country judgments than ever will be brought to the United States for recognition or enforcement. This second dimension of multipolarity follows from the first: if there is more litigation in foreign courts, there will be more foreign court judgments—and whenever those judgments involve U.S.-based defendants or other defendants with significant assets in the United States, plaintiffs are likely to seek enforcement here.[5]

Similarly, Stacie Strong notes that "[e]xperts forecast a significant increase in the number of foreign judgments."[6] She expresses concern that the current U.S. approach to the recognition and enforcement of foreign judgments "involves a great deal of cost, complexity, and uncertainty, which creates numerous problems for both U.S. and foreign parties."[7]

The most heavily litigated issue in the recognition and enforcement of foreign judgments is that of personal jurisdiction.[8] Prior to recognizing a

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[3] Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 32 (2011) ("Our overarching conjecture is that this unipolar (or bipolar) era—if it ever existed at all—has passed, and that transnational litigation is entering an era of ever increasing multipolarity.").

[4] *Id.*

[5] *Id.* at 35.

[6] S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 50 (2014); *see also* Quintanilla & Whytock, *supra* note 3, at 37 (projecting an increase in opinions involving foreign judgments from 2010 to 2019); Katy Dowell, *International Litigants in London Rise by a Third in Three Years*, THE LAWYER (May 7, 2013), http://www.thelawyer.com/news-and-analysis/practice-areas/litigation/international-litigants-in-london-rise-by-a-third-in-three-years/3004520.article [https://perma.cc/J48S-SVRJ] (noting rise of U.S. litigants in English courts).

[7] Strong, *supra* note 6, at 50.

[8] J. Chad Mitchell, *A Personal Jurisdiction Dilemma: Collateral Attacks on Foreign Judgments in U.S. Recognition Proceedings*, 4 B.Y.U. INT'L L. & MGMT. REV. 123, 127 (2008) ("Thus, it is no surprise that the foreign-court-lacked-jurisdiction-over-the-defendant defense is the most common defense to recognition of foreign judgments in the United States."); *see also* 1 LINDA SILBERMAN, TRANSNATIONAL JOINT VENTURES § 5:3(A) (Thomson Reuters 2015) ("Lack of judicial jurisdiction of the rendering court is the most common defense to recognition or enforcement of foreign judgments."); Ronald Brand, *Recognition and Enforcement of Foreign Judgments*, FED. JUD. CTR. INT'L LITIG. GUIDE, Apr. 2012, at 1, 17 ("Lack of jurisdiction over the defendant or the property involved in the judgment is the most common ground for refusal to recognize or enforce a foreign judgment.").

foreign judgment, a U.S. court must be satisfied that the foreign court had personal jurisdiction over the defendant.[9] It is unclear, however, whether personal jurisdiction must be assessed from the perspective of the U.S. court or the foreign court. That is, should a U.S. court apply U.S. law or foreign law to the question of personal jurisdiction?[10] Essentially, this is a choice of law problem embedded within the recognition and enforcement inquiry.[11]

Some U.S. courts require that the judgment creditor show that the assertion of jurisdiction was appropriate under foreign law, or under both foreign and domestic law. For instance, if the judgment came from Germany, the party seeking recognition would need to show that jurisdiction was appropriately assumed either under German law, or under German and U.S. law. While the cases are not clear on why personal jurisdiction should be assessed by reference to foreign law, the answer seems to be based on the view that if the foreign court did not have jurisdiction under its law, then there is no valid judgment that can be recognized and enforced in the United States.

This Article takes the position that the question of personal jurisdiction should be assessed solely by reference to U.S. law, and documents the myriad concerns with applying foreign law to this question. It uses recent cases, such as the First Circuit's decision in *Evans Cabinet Corp. v. Kitchen International, Inc.*,[12] to illustrate the pitfalls of applying an approach to personal jurisdiction that requires U.S. courts to assess jurisdiction by reference to foreign law.[13] Additionally, this Article deals separately with two issues—submission and notice—that have caused particular consternation for U.S. courts in the judgment recognition inquiry.

This Article proceeds as follows: In Part I, I discuss the general framework for the recognition and enforcement of foreign judgments in the United States. This provides a backdrop for the discussion of the choice of law issue that follows. In Part II, I argue that U.S. courts should not look to foreign law to determine whether a foreign court had jurisdiction over the defendant in the

[9] *See* UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(2) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 2005) [hereinafter 2005 UNIFORM ACT] ("A court of this state may not recognize a foreign-country judgment if . . . the foreign court did not have personal jurisdiction over the defendant . . . ."); UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(2) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1962) [hereinafter 1962 UNIFORM ACT] ("A foreign judgment is not conclusive if . . . the foreign court did not have personal jurisdiction over the defendant . . . .").

[10] *See* LAURA LITTLE, CONFLICT OF LAWS: CASES, MATERIALS, AND PROBLEMS 966 (2013) ("A frequent question, however, is which law should govern the adequacy of jurisdiction: foreign or United States law.").

[11] Another choice of law problem in the recognition context involves determining whose law of issue preclusion applies. *See generally* Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53 (1984).

[12] 593 F.3d 135 (1st Cir. 2010).

[13] *Id.* at 143-49.

original action. I present five arguments in support of this contention: (1) there is no statutory authority pointing to the application of foreign law; (2) U.S. courts are not well-positioned to apply foreign jurisdictional law; (3) re-examining assertions of jurisdiction under foreign law violates international comity; (4) an examination of foreign law is usually unnecessary because jurisdiction is also assessed according to U.S. standards; and (5) U.S. courts do not do apply foreign jurisdictional law particularly well. From there, I argue in Part III that American courts should be applying American law to the question of jurisdiction. But what *is* "American" law? Part III explores this question in detail. In Part IV, I look more closely at two particular areas of jurisdiction law that tend to cause confusion for courts: submission and notice. In Part V, I propose some changes to the language of the Uniform Act that would address the choice of law problem in the recognition of foreign judgments and would clarify the intersection between notice and personal jurisdiction in the Uniform Act. Finally, I provide some concluding remarks.

I. THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UNITED STATES

The terms "recognition" and "enforcement" tend to be used interchangeably in this area of law, but each has a distinct meaning.[14] Recognition of a foreign judgment means that a U.S. court recognizes the validity of the foreign judgment and gives it a legal effect equivalent to a judgment of a court in the United States. For instance, a foreign court might have concluded that the defendant is not liable in a foreign tort action. If the plaintiff attempts to sue again in the United States, the defendant may seek to have the foreign judgment *recognized* in the United States so as to preclude domestic litigation. Enforcement, on the other hand, involves asking a U.S. court to lend its power to help a party collect a sum of money that has been awarded to that party by a foreign court. For instance, a foreign court might have ordered the defendant to pay the plaintiff $20 million in damages; the plaintiff would come to the United States seeking to *enforce* the foreign judgment.[15]

[14] Yuliya Zeynalova distinguishes the two principles as follows:

> To "recognize" a foreign judgment is in essence to domesticate it, thus making it equal to any other judgment produced by a U.S. court, as well as to judgments of other state courts that benefit from the Full Faith & Credit Clause. A recognized judgment is also considered res judicata upon other actions in the recognizing jurisdiction because it is seen as producing the same effect and having the same authority as a case originally decided in the jurisdiction. "Enforcement," on the other hand, requires the aid of the courts and law enforcement of the enforcing jurisdiction, which may or may not be afforded along with recognition of the judgment.

Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 155 (2013).

[15] *See* Brand, *supra* note 8, at 1.

There is no national U.S. law on the recognition and enforcement of foreign judgments.[16] Thus, it is somewhat of a misnomer to refer to the law of judgment recognition or enforcement "in the United States." Instead, and much to the chagrin of some,[17] the law of foreign judgment recognition and enforcement is decidedly state based. State courts apply state law to determine whether to recognize and enforce a foreign judgment.[18] Federal courts sitting in diversity also apply state law in recognition and enforcement actions,[19]

[16] There is no federal statute or treaty governing the recognition and enforcement of foreign judgments. In 2005, however, the American Law Institute proposed a draft statute that would federalize the law related to the recognition and enforcement of foreign judgments. *See* THE FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT (AM. LAW. INST., Proposed Final Draft 2005).

[17] Kevin L. Cope, *Reconceptualizing Recognition Uniformity*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 166, 166 (Paul B. Stephan ed., 2014) ("[T]he bulk of scholars and policy-makers appears to favor 'federalization,' that is, the adoption of a nationwide judgment recognition standard."); Linda Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 101, 110 (Paul B. Stephan ed., 2014) ("Not only is federal law imperative as the only way to achieve maximum uniformity, but also a national law standard for foreign judgment enforcement is justified by independent federal interests. A foreign judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state."); Strong, *supra* note 6, at 56-57 ("Professor Paul Stephan, one of the reporters on the upcoming Restatement (Fourth) of the Foreign Relations Law of the United States, has suggested that 'U.S. law regarding the recognition and enforcement of foreign judgments is rather odd. Almost all the law is state [sic], even though the federal interest in international relations is pervasive. As a result, the risk of local interests interfering with national policy is significant.' Professor Linda Silberman enunciated similar concerns during her testimony to Congress regarding the propriety of a federal statute on enforcement and recognition of foreign judgments, suggesting that the highly fragmented nature of existing U.S. law has a detrimental effect on the foreign relations of the United States." (citations omitted)); *see also* 9 AM. JUR. 3D *Proof of Facts* § 5 (1990) ("Several commentators have discussed the question of whether the recognition and enforcement of foreign judgments is so closely related to foreign affairs that one uniform federal body of law should govern this field rather than a number of potentially conflicting state bodies of law.").

[18] *Cf.* Strong, *supra* note 6, at 59 ("Most foreign parties involved in U.S. litigation prefer to be in federal court, since federal judges are perceived as being less prone than state judges to bias based on nationality.").

[19] *But see* Brand, *supra* note 8, at 4. Brand writes:

> Despite the mostly uniform application of state law in diversity cases, there is no definitive authority on the source of law for foreign judgment recognition cases in federal courts exercising federal subject matter jurisdiction. Nevertheless, many cases have cited the comment found in the 1988 revision to the Restatement (Second) of Conflict of Laws § 98:
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> > The Supreme Court of the United States has never passed upon the question whether federal or State law governs the recognition of foreign nation judgments. The

pursuant to the mandate in *Erie Railroad Co. v. Tompkins*.[20] Thus, whether an action proceeds in state or federal court, it is likely that state law will govern the recognition and enforcement proceedings.

At first blush, it may seem that the law of foreign judgment recognition in the United States is a patchwork of disparate state laws. In actuality, however, the law of foreign judgment recognition is actually quite uniform and cohesive—and is all largely based on the seminal case of *Hilton v. Guyot*.[21] The Supreme Court in *Hilton* established that foreign judgments should be recognized and enforced on the basis of "comity."[22] The Court defined comity as follows:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[23]

Hilton also laid out the general prerequisites to the enforcement of foreign judgments: (1) that the foreign court was "a court of competent jurisdiction"; (2) that the court "conduct[ed] the trial upon regular proceedings, after due

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> consensus among the State courts and lower federal courts that have passed upon the question is that, apart from federal question cases, such recognition is governed by State law and that the federal courts will apply the law of the State in which they sit. It can be anticipated, however, that in due course some exceptions will be engrafted upon the general principle. So it seems probable that federal law would be applied to prevent application of a State rule on the recognition of foreign nation judgments if such application would result in the disruption or embarrassment of the foreign relations of the United States.
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> . . . From this practice, it has been extrapolated that, "in determining whether to recognize the judgment of a foreign nation, federal courts also apply their own standard in federal question cases." Thus, federal question cases provide the exception to the normal use of state law for purposes of recognition of a foreign judgment.

Id. (footnote omitted) (quoting Hurst v. Socialist People's Libyan Arab Jamahiriya, 474 F. Supp. 2d 19, 32 (D.D.C. 2007) (citation omitted)).

[20] 304 U.S. 64, 79-80 (1938); *see also* Strong, *supra* note 6, at 62-63.

[21] 159 U.S. 113, 163 (1895); *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION pt. IV, ch. 1, intro. note (AM. LAW INST., Tentative Draft No. 1, 2014) ("Although most of the law governing this subject today is State legislation and, in a few jurisdictions, State common law, these authorities largely accept and elaborate on the rules stated in *Hilton*."); Strong, *supra* note 6, at 58-59; Zeynalova, *supra* note 14, at 156 (explaining that although "there are fifty individual sets of state law describing the circumstances under which foreign judgments are to be recognized and enforced . . . there is also a semblance of uniformity among the states' approaches to foreign judgment recognition").

[22] *Hilton*, 159 U.S. at 228-29.

[23] *Id.* at 163-64. Unlike foreign country judgments, judgments of sister states are recognized and enforced under the Full Faith and Credit Clause. *Id.* at 181.

citation or voluntary appearance"; (3) that the case was adjudicated "under a system of jurisprudence likely to secure an impartial administration of justice"; and (4) that there was no "fraud in procuring the judgment."[24]

While *Hilton* provides the general conceptual backdrop for judgment recognition,[25] states generally follow one of two specific approaches to foreign judgment recognition: they recognize foreign judgments at common law as a matter of comity, or they recognize foreign judgments under the state's version of a model act.[26] Courts that follow the first approach have developed their own jurisprudence on the recognition of foreign judgments, guided by *Hilton* and often influenced by either the Restatement (Third) of Foreign Relations Law,[27] or the Restatement (Second) of Conflict of Laws.[28] The majority of states, however, have enacted one of the two model acts promulgated by the Uniform Law Commission:[29] (1) the 1962 Uniform Foreign Money-Judgments Recognition Act, or (2) the 2005 Uniform Foreign-Country Money Judgments Recognition Act (the "1962 Act" and "2005 Act," respectively, and the "Uniform Act," collectively). The 1962 Act is currently in force in thirteen states plus the Virgin Islands, while the 2005 Act is in force in twenty states plus the District of Columbia.[30]

The Uniform Act provides that a U.S. court is not permitted to recognize a foreign judgment in circumstances where the foreign court (often referred to as "the rendering court") did not have personal jurisdiction over the defendant in the original action.[31] Stated differently, in order for a U.S. court to be able to

[24] *Id.* at 202-03. The Court in *Hilton* also imposed a "reciprocity" requirement: a foreign judgment would only be recognized where the foreign country would recognize a U.S. judgment in similar circumstances. *Id.* at 234.

[25] *See, e.g.*, RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION pt. IV, ch. 1, intro. note (AM. LAW INST., Tentative Draft No. 1, 2014) ("In the United States, recognition and enforcement of foreign judgment derives from principles articulated as general common law by the Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895). Although the Supreme Court abolished the regime of general common law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the doctrine of comity that *Hilton* articulated remains pervasive in U.S. law.").

[26] Strong, *supra* note 6, at 59 ("[A] majority of states have adopted one of two model acts promulgated by the Uniform Law Commission . . . regarding recognition and enforcement of foreign judgments.").

[27] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (AM. LAW INST. 1987).

[28] RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1971).

[29] Previously known as the National Conference of Commissioners on Uniform State Laws ("NCCUSL").

[30] *See* Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law* 20-21 (Univ. Pittsburgh Law Sch. Legal Studies Research Paper Series, Working Paper No. 2015-37, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670866 [https://perma.cc/T9BT-RXCT].

[31] 2005 UNIFORM ACT, *supra* note 9, at § 4(b)(2); 1962 UNIFORM ACT, *supra* note 9, at § 4(a)(2).

recognize a foreign judgment, the foreign court must have had personal jurisdiction over the defendant. The Uniform Act enumerates the permitted bases for personal jurisdiction in Subsection 5(a):

> (1) the defendant was served with process personally in the foreign country;
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> (2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;
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> (3) the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
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> (4) the defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;
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> (5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country; or
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> (6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of that operation.[32]

The Uniform Act then provides in Subsection 5(b): "The list of bases for personal jurisdiction in subsection (a) is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subsection (a) as sufficient to support a foreign-country judgment."[33] This residual basis for jurisdiction has generally been interpreted to mean that a U.S. court can recognize a foreign judgment in circumstances where it could have asserted jurisdiction under its own law.[34] For instance, if the defendant

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[32] 2005 UNIFORM ACT, *supra* note 9, at § 5(a)(1)-(6). The 1962 Act is identical except for Subsection 5(a)(4), which provides that the foreign court had personal jurisdiction over the defendant if the defendant was "a body corporate" that "had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state." 1962 UNIFORM ACT, *supra* note 9, at § 5(a)(4). Subsection 5(a)(4) of the 2005 Act extends that concept to forms of business organization other than corporations. 2005 UNIFORM ACT, *supra* note 9, at § 5(a)(4).

[33] 2005 UNIFORM ACT, *supra* note 9, at § 5(b). The 1962 Act provides in Subsection 5(b) that "[t]he courts of this state may recognize other bases of jurisdiction." 1962 UNIFORM ACT, *supra* note 9, at § 5(b).

[34] *See, e.g.*, SILBERMAN, *supra* note 8, § 5:3(C)(1) ("Not surprisingly, American courts have recognized judgments where the basis of the foreign court's jurisdiction is similar to accepted bases in the United States, such as state long-arm statutes providing for jurisdiction

had minimum contacts with the foreign country, then the foreign court would be regarded as jurisdictionally competent and a U.S. court could recognize the resultant judgment. Importantly, this residual basis for jurisdiction applies irrespective of the grounds for jurisdiction relied upon by the foreign court. That is, if the foreign court asserted jurisdiction on a basis not recognized under American law, but the assertion of jurisdiction would nonetheless have been consistent with American law in the particular circumstances of the case, a U.S. court will recognize the foreign judgment.[35]

Defendants resisting recognition and enforcement of a foreign judgment in the United States often raise jurisdictional challenges.[36] In fact, Ronald Brand notes that "[l]ack of jurisdiction over the defendant or the property involved in the judgment is the most common ground for refusal to recognize or enforce a foreign judgment."[37] Ved Nanda and David Pansius write that "[p]ersonal jurisdiction issues in the rendering court are arguably the most important

where the cause of action arises from business transacted in the state or the claim arises from the commission of a tort in the state.").

[35] *See, e.g.*, Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1230-31 (E.D.N.Y. 1990). The court in *Nippon* explained that:

> Simply because the articulated bases of jurisdiction would have been deemed insufficient under New York law does not lead to the conclusion that the Tokyo Court improperly asserted jurisdiction, however; if ETI's contacts with Japan were sufficiently well-developed to support jurisdiction, there would be little reason to deny recognition to the Japanese Judgment just because the Tokyo Court's stated rationale differed from that which a New York court would follow. In this case, uncontested facts readily lead to the conclusion that, judged by the standards of New York and federal constitutional law, jurisdiction could properly have been asserted in Japan.

Id.

[36] Another jurisdictional issue that arises with some frequency is whether the recognizing court needs personal jurisdiction over the defendant as a prerequisite to enforcing a foreign judgment. Courts are divided on the issue. Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. 459, 467 n.26 (2013) ("States differ on whether a debtor must be subject to personal jurisdiction in order for the court to entertain a recognition action or whether the mere presence of in-state assets is sufficient for jurisdictional purposes." (citing 2005 UNIFORM ACT, *supra* note 9, at § 6, cmt. 4)). *Compare* Lenchyshyn v. Pelko Elec., Inc., 723 N.Y.S.2d 285, 289-90 (N.Y. App. Div. 2001) (explaining that the recognizing or enforcing state need not have personal jurisdiction over a judgment debtor to enforce a foreign judgment and interpreting a litany of cases as standing for this proposition), *and* Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 910 (N.D. Iowa 2002) ("The court finds the rationale of the New York court in *Lenchyshyn* to be persuasive. The Iowa statute itself contains no requirement of personal jurisdiction over the judgment debtor."), *with* Electrolines, Inc. v. Prudential Assurance Co., 677 N.W.2d 874, 885 (Mich. Ct. App. 2003) (departing from the reasoning in *Lenchyshyn* and holding that "in an action brought to enforce a [foreign] judgment, the trial court must possess jurisdiction over the judgment debtor or the judgment debtor's property").

[37] Brand, *supra* note 8, at 17; *see also* SILBERMAN, *supra* note 8, § 5:3(A).

consideration in assessing the enforceability of foreign judgments."[38] Since this is such a heavily litigated area of law, it is important that the principles governing the question of jurisdiction be clear, coherent, and consistently applied. Unfortunately, the principles are not clear. American courts have not yet resolved an important issue: Is the propriety of a foreign court's assertion of jurisdiction gauged by foreign or U.S. standards? In other words, whose law applies to the question of personal jurisdiction: the law of the rendering court ("F1") or the law of the enforcing court ("F2")?[39] It is to this issue that I now turn.

II. WHOSE LAW OF PERSONAL JURISDICTION?

It is black-letter law that in order to recognize and enforce a foreign judgment, the rendering court must have had personal jurisdiction over the defendant. In *Hilton*, Justice Gray emphasized that a foreign judgment could only be enforced where the defendant has had an "opportunity for a full and fair trial abroad before a court of *competent jurisdiction*."[40] Similarly, the Uniform Act provides that "[a] court of this state may not recognize a foreign-country judgment if: . . . the foreign court did not have personal jurisdiction over the defendant."[41] As discussed above, the Uniform Act goes on to enumerate acceptable grounds for jurisdiction and to provide a residual basis for jurisdiction.[42]

While the principle is clear, it is an open question as to whose law governs the question of personal jurisdiction: that of the rendering court (F1), that of the enforcing court (F2), or some combination of both.[43] Many courts hold—at

[38] 3 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 20:9 (2d ed. 2014).

[39] *See, e.g.*, George Rutherglen & James Y. Stern, *Sovereignty, Territoriality, and the Enforcement of Foreign Judgments*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 13, 14 (Paul B. Stephan ed., 2014) (referring to the original adjudicating court as "conventionally designated F1" and the enforcing court as F2, and using F1 and F2 throughout as references for the rendering court and enforcing court, respectively).

[40] 159 U.S. 113, 202 (1895) (emphasis added).

[41] 2005 UNIFORM ACT, *supra* note 9, at § 4(b)(2). Subsection 4(a)(2) of the 1962 Act states that "[a] foreign judgment is not conclusive if . . . the foreign court did not have personal jurisdiction over the defendant." 1962 UNIFORM ACT, *supra* note 9, at § 4(a)(2).

[42] *See* 2005 UNIFORM ACT, *supra* note 9, at § 5; 1962 UNIFORM ACT, *supra* note 9, at § 5.

[43] Silberman, *supra* note 17, at 107 n.26 ("Both the 1962 Uniform Act (in §4(a)(2)) and the 2005 Uniform Act (in §4(b)(2)) prohibit recognition of a foreign country judgment if 'the foreign court did not have personal jurisdiction over the defendant.' . . . Questions have been raised as to whether jurisdiction must be proper according to the law of the rendering jurisdiction, the law of the enforcing jurisdiction, or both."); *see also* Rutherglen & Stern, *supra* note 39, at 23 (noting that U.S. courts seldom refuse recognition of a foreign judgment on the basis of lack of personal jurisdiction, "typically finding sufficient contacts for jurisdiction under a combination of foreign, domestic, and international law"); SILBERMAN, *supra* note 8, § 5:3(E)(1) ("If the exercise of jurisdiction is improper under the

least implicitly—that the law of F2 governs the question of personal jurisdiction in the rendering court.[44] Some courts, however, have held that the question of personal jurisdiction should be governed by the law of F1, or by both the laws of F1 and F2. For instance, the New Mexico Supreme Court in *Monks Own Ltd. v. Monastery of Christ in the Desert*[45] held that under the New Mexico version of the Uniform Act "[t]he correct answer seems to be that the laws of both jurisdictions are applied, first the foreign law as to the foreign court's jurisdiction, and then American constitutional principles regarding due process of law."[46] In *EOS Transport Inc. v. Agri-Source Fuels LLC*,[47] a Florida court also endorsed this two-pronged approach to personal jurisdiction, stating, "[w]e adopt the analytical approach applying the two-part test and hold that in assessing whether the exercise of personal jurisdiction is proper under the Act, the trial court must determine whether the exercise is proper under both the law of the foreign jurisdiction and under U.S. Constitutional Due Process requirements."[48] The First Circuit Court of Appeals in *Evans Cabinet Corp. v. Kitchen International, Inc.*[49] accepted the district court's determination that the personal jurisdiction analysis should proceed "by assessing the facts in light of the personal jurisdiction law of both the Province of Québec [the rendering jurisdiction] and the Commonwealth of Massachusetts [the recognizing jurisdiction]."[50] In *Canadian Imperial Bank of Commerce v. Saxony Carpet*

law of the country rendering the judgment or the foreign court's assertion of jurisdiction does not meet American standards, enforcement and/or recognition would not be permitted.").

[44] Many, if not most, courts do not explicitly address the issue and simply proceed by analyzing the personal jurisdiction law of the recognizing forum.

[45] 168 P.3d 121 (N.M. 2007).

[46] *Id.* at 126. The New Mexico Supreme Court implied that the lower court had too readily assumed that the law of New Mexico applied to the question of whether the foreign court had personal jurisdiction, explaining:

> In applying this Section, the Court of Appeals continued to use New Mexico law, specifically this state's long-arm statute, to determine personal jurisdiction. However, [New Mexico's long-arm statute] is not clear on what law, that of New Mexico or that of the foreign jurisdiction, applies to determine "other bases of jurisdiction."

Id. (citation omitted).

[47] 37 So. 3d 349 (Fla. Dist. Ct. App. 2010).

[48] *Id*. at 352-53.

[49] 593 F.3d 135 (1st Cir. 2010).

[50] *Id.* at 143. The First Circuit further explained:

> The Massachusetts version of th[e] [Recognition] Act is codified at Massachusetts General Laws chapter 235 § 23A. This section clearly requires that the *rendering* court have personal jurisdiction over the defendant in order for the resulting judgment to be recognized in Massachusetts. The statute does not state explicitly, however, whether the correctness of that exercise of jurisdiction by the rendering court ought to be determined according to the law of the rendering or the enforcing jurisdiction. The district court suggested that there is currently a division of authority on this question among the states that have enacted a form of the Recognition Act. The district court

Co.,[51] the district court for the Southern District of New York also approved of the two-pronged approach to jurisdiction, looking at the personal jurisdiction law of both Québec and New York.[52] And, in *Osorio v. Dole Food Co.*,[53] a Florida federal court proceeded to analyze whether jurisdiction was appropriate under foreign (Nicaraguan) law and under domestic law.[54]

Very few courts that look to the law of the rendering country in assessing the propriety of the assertion of jurisdiction provide much by way of rationalization or justification for the decision.[55] They simply assert that jurisdiction must be assessed under foreign standards, or under both foreign and domestic standards. Similarly, the Uniform Act is silent on whose law applies to the question of personal jurisdiction.

There is, however, some persuasive authority in support of looking to foreign law, or some combination of foreign and domestic law, to determine whether the rendering court had personal jurisdiction over the defendant. Section 482 of the Restatement (Third) of Foreign Relations Law provides that "(1) [a] court in the United States may not recognize a judgment of the court of a foreign state if: . . . (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421."[56] A court is thus directed to look *both* to the jurisdictional law of the rendering state and to the law of the recognizing state prior to recognizing a foreign judgment. In the Comments to this section, the drafters write:

> If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state. Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting

also noted that the Supreme Judicial Court of Massachusetts has not yet spoken squarely on the matter.

Id. at 142-43.

[51] 899 F. Supp. 1248 (S.D.N.Y. 1995).

[52] *Id.* at 1251-52.

[53] 665 F. Supp. 2d. 1307 (S.D. Fla. 2009).

[54] *Id.* at 1324-26; *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 403 rep. nn. 5-7 (AM. LAW INST., Tentative Draft No. 1, 2014) ("A substantial number of courts . . . will withhold recognition if the foreign court under its own law lacked personal jurisdiction over the party opposing recognition. . . . Most States also allow a person opposing recognition of a foreign law judgment to raise defects in the rendering court's jurisdiction under the local law applicable to that court.").

[55] The most comprehensive discussion seems to be in *Monks Own*—but even in that case, the court does not explain *why* the analysis should take into account both the laws of F1 and F2.

[56] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (AM. LAW INST. 1987).

> jurisdiction in the light of international concepts of jurisdiction to adjudicate.[57]

Additional support for looking both to the law of the rendering state and to the law of the recognizing state in assessing whether the foreign court had personal jurisdiction over the defendant can be found in the American Law Institute's 2005 proposed federal statute on the recognition and enforcement of foreign judgments ("ALI Proposed Statute").[58] Section 3(b) of the ALI Proposed Statute provides that in order for a foreign judgment to be recognized

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[57] *Id.* § 482 cmt. c. Unlike the Restatement (Third) of Foreign Relations Law, the draft Restatement (Fourth) of Foreign Relations Law does not explicitly endorse an approach that looks to both the law of the rendering court and the recognizing court. Section 403 of the Restatement (Fourth) of Foreign Relations Law provides that "[a] court in the United States will not recognize a judgment of a court of a foreign state if: . . . (b) the court that rendered the judgment did not have personal jurisdiction over the party resisting recognition." RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 403(b). In the Reporter's Notes, however, the drafters recognize the choice of law issue:

> 5. *Personal jurisdiction under U.S. standards*. U.S. courts will not enforce a foreign judgment if the court rendering the judgment would have lacked personal jurisdiction over the person opposing recognition of the judgment under the minimum requirements of due process imposed by the U.S. Constitution. A few cases go further and also assess the foreign court's jurisdiction against the standards set in the recognition forum's long-arm statute. A substantial number of courts also will withhold recognition if the foreign court under its own law lacked personal jurisdiction over the party opposing recognition.
>
> . . . .
>
> 7. *Personal jurisdiction under the law of the state of origin.* Most States also allow a person opposing recognition of a foreign judgment to raise defects in the rendering court's jurisdiction under the local law applicable to that court. If these defects would prevent recognition locally, the person seeking recognition of the judgment should not be able to avoid them simply by exporting the judgment. There is authority, however, for the proposition that a U.S. court generally will not look behind a foreign court's finding of personal jurisdiction under its own law.

Id. § 403 rep. nn. 5, 7 (citations omitted). As of June 2016, the majority of the sections of the Restatement (Fourth) of Foreign Relations Law remain in preliminary draft form. *See Restatement of the Law Fourth, The Foreign Relations Law of the United States*, AM. LAW INST., https://www.ali.org/projects/show/foreign-relations-law-united-states/#_status [https://perma.cc/5TGL-X7KH] (last visited June 21, 2016). If the remaining preliminary draft sections pass council approval, those sections will then be submitted to the American Law Institute's full membership for final approval, resulting in the publication of a tentative or final proposed draft. *See id.* Then, this proposed draft will "represent[] the most current statement of ALI's position on the subject and may be cited in opinions or briefs . . . until the official text is published." *Id.*

[58] The ALI Proposed Statute uses a different model for assessing jurisdictional competence. Rather than enumerating permissible bases of jurisdiction, the ALI Proposed Statute emphasizes that foreign judgments are enforceable unless the foreign court assumed jurisdiction on a prohibited ground. *See* Strong, *supra* note 6, at 123-24 ("The ALI Proposed Statute . . . lists the types of foreign jurisdiction that are considered unacceptable, thereby allowing U.S. courts to recognize or enforce judgments in all other circumstances.").

in the United States, the foreign court must have had jurisdiction over the defendant under its laws, and the basis for that jurisdiction cannot have been unacceptable in the United States. The commentary to the ALI Proposed Statute emphasizes that "the court in the United States must be satisfied that the . . . rendering court had jurisdiction, both under its own law and under standards accepted in the United States."[59]

Thus, it appears to be an open question whether personal jurisdiction should be assessed according to the law of F1, the law of F2, or some amalgam of the laws of F1 and F2.[60] Below, I examine five reasons why U.S. courts should not look to the law of F1 in assessing jurisdiction. First, there is no statutory authority in the Uniform Act for assessing jurisdiction according to the law of the rendering state. In fact, the Uniform Act largely suggests the contrary: that the assessment of the rendering court's jurisdiction should be made by reference to U.S. law. Second, U.S. courts are generally ill-equipped to apply foreign law to assess whether a foreign court was jurisdictionally competent. The case of *Evans Cabinet*,[61] discussed in detail in Section II.B, illustrates why U.S. courts should not be in the business of interpreting foreign jurisdictional principles.[62] Third, applying the law of the rendering country to assess jurisdiction can result in an affront to international comity when a U.S. court interprets that foreign law in a way that differs from the foreign country's interpretation of its own law. Fourth, the common practice of applying both foreign and U.S. law to the question of personal jurisdiction results in U.S. law essentially having "veto" power; if the assertion of jurisdiction in the foreign country does not pass U.S. jurisdictional muster, the foreign judgment will not be recognized. Accordingly, looking to foreign law does not add anything to the analysis that could not have been achieved simply by looking to U.S. law. And, fifth, those courts that choose to apply foreign law to the question of jurisdiction end up doing so half-heartedly, calling into question why they are applying foreign law in the first place.

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[59] THE FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 3 cmt. c (AM. LAW. INST., Proposed Final Draft 2005).

[60] *See* NANDA & PANSIUS, *supra* note 38, § 20:9. Nanda and Pansius write:

> Few courts expressly consider whose law applies to personal jurisdiction: the personal jurisdiction law of the U.S. court or the personal jurisdiction law of the court that rendered the judgment. The better rule applies foreign law to assess procedural issues and U.S. law to assess due process issues. Some courts seem to proceed directly to an analysis under U.S. law. Those courts that undertake a conflict of law analysis often support a conclusion that personal jurisdiction exists by duplicate reference to U.S. law.

Id. (citations omitted).

[61] 593 F.3d 135 (1st Cir. 2010).

[62] *Id.* at 143-49.

A. *There Is No Statutory Authority for Assessing Jurisdiction According to the Law of F1*

Even though courts,[63] academics,[64] and influential secondary sources[65] suggest that personal jurisdiction should be assessed (at least in part) by foreign standards of jurisdiction, the statutory basis for this position is unclear. The Uniform Act has a general prohibition on recognizing a foreign judgment unless the foreign court had personal jurisdiction over the defendant.[66] The Act then lists enumerated bases for jurisdiction, and provides for a residual basis for jurisdiction.[67] Which section impels the conclusion that U.S. courts should look to foreign law in this determination? Strangely, none of the authorities provide an answer to this pivotal question.

Section 4 of the Uniform Act simply provides that "[a] court of this state may not recognize a foreign-country judgment if: . . . (2) the foreign court did not have personal jurisdiction over the defendant."[68] This furnishes the overarching rule, which, in turn, is qualified by Section 5. In other words, Section 4 tells courts that they may not recognize a foreign judgment if the foreign court did not have jurisdiction, and Section 5 tells courts which bases for jurisdiction are acceptable. Section 4 must be read in conjunction with Section 5 for it to have any meaning. Reading Section 4 to somehow include an examination of foreign jurisdictional principles, *in addition to* an examination of the grounds for jurisdiction in Section 5, seems to be too much weight for the section to bear.

So, if not Section 4, does the view that jurisdiction must be assessed by reference to foreign law come from Section 5 of the Uniform Act? Section 5 is divided between the enumerated bases for jurisdiction and the residual basis for jurisdiction—Subsection 5(a) and Subsection 5(b), respectively. Subsection 5(a) lists six grounds that are acceptable bases for jurisdiction: (1) personal service in the foreign country; (2) voluntary appearance/submission; (3) agreement to submit disputes to the court in question; (4) domicile; (5) business office in the foreign jurisdiction and the claim arose out of the business done in that foreign jurisdiction; and (6) operation of a motor vehicle

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[63] *See, e.g.*, Osorio v. Dole Food Co., 665 F. Supp. 2d. 1307, 1326 (S.D. Fla. 2009); Canadian Imperial Bank of Commerce v. Saxony Carpet Co., 899 F. Supp. 1248, 1253 (S.D.N.Y. 1995); EOS Transp. Inc. v. Agri-Source Fuels LLC, 37 So. 3d 349, 352-53 (Fla. Dist. Ct. App. 2010).

[64] *See, e.g.*, NANDA & PANSIUS, *supra* note 38; SILBERMAN, *supra* note 8.

[65] *See* THE FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT (AM. LAW. INST., Proposed Final Draft 2005); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (AM. LAW INST. 1987).

[66] 2005 UNIFORM ACT, *supra* note 9, at § 4(b)(2); 1962 UNIFORM ACT, *supra* note 9, at § 4(a)(2).

[67] 2005 UNIFORM ACT, *supra* note 9, at § 5; 1962 UNIFORM ACT, *supra* note 9, at § 5.

[68] 2005 UNIFORM ACT, *supra* note 9, at § 4(b)(2); 1962 UNIFORM ACT, *supra* note 9, at § 4(a)(2).

or airplane in the foreign country and the claim arose out of that operation.[69] The only way that an examination of foreign law would fit into Subsection 5(a) would be if the foreign law related to the six enumerated bases for jurisdiction. For instance, Subsection 5(a)(3) provides that jurisdiction is appropriate where a defendant agreed to submit disputes to the foreign court.[70] The question of whether the parties had a valid jurisdiction agreement that covered the dispute at issue could logically be decided by reference to either U.S. or foreign law. However, none of the cases which look to foreign law seem to do so in the context of interpreting the enumerated bases of jurisdiction, with the exception of Subsection 5(a)(2) (voluntary appearance/submission).[71]

This leaves Subsection 5(b), the residual basis of jurisdiction, which states: "The list of bases for personal jurisdiction in subsection (a) is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subsection (a) as sufficient to support a foreign-country judgment."[72] It seems like this must be the section of the Uniform Act that courts rely on in their decision to look to foreign law. However, it is not clear that this section supports the practice of looking to foreign jurisdictional law as a predicate to recognizing a foreign judgment in the United States. The statute provides that U.S. courts may recognize bases of jurisdiction "other than" those listed in Subsection 5(a). The bases that the Uniform Act contemplates seem to be *American* bases of jurisdiction, not foreign bases of jurisdiction.

Consider the case of *Evans Cabinet Corp. v. Kitchen International, Inc.*[73] In that case, the First Circuit Court of Appeals examined whether the foreign court (a Québec court) had jurisdiction under either Article 3136 or Article 3148 of the Québec Civil Code.[74] Although the court did not ultimately come to a conclusion on whether the Québec court had jurisdiction under Québec law, if it had, the U.S. court would not have been "recogniz[ing]" Articles 3136 or 3148 as "bases of personal jurisdiction" under Subsection 5(a) of the Uniform Act.[75] Instead, the U.S. court would simply be saying that a Québec court had jurisdiction under Québec law. Consequently, Subsection 5(b) does not support an inquiry into foreign law, but instead appears to contemplate "bases of personal jurisdiction" recognized in American law, yet not explicitly

[69] 2005 UNIFORM ACT, *supra* note 9, at § 5(a); 1962 UNIFORM ACT, *supra* note 9, at § 5(a).

[70] 2005 UNIFORM ACT, *supra* note 9, at § 5(a)(3); 1962 UNIFORM ACT, *supra* note 9, at § 5(a)(3).

[71] See *infra* Section IV.A.

[72] 2005 UNIFORM ACT, *supra* note 9, at § 5(b). The 1962 Act provides in subsection (b) that "[t]he courts of this state may recognize other bases of jurisdiction." 1962 UNIFORM ACT, *supra* note 9, at § 5(b).

[73] 593 F.3d 135 (1st Cir. 2010).

[74] *Id.* at 143-45.

[75] 2005 UNIFORM ACT, *supra* note 9, at § 5(a); 1962 UNIFORM ACT, *supra* note 9, at § 5(a).

enumerated in Subsection 5(a).[76] In short, it is unclear where the requirement for looking to foreign law as a predicate to judgment recognition even comes from. Neither Section 4 nor Section 5 provides a statutory basis (much less a *clear* statutory basis) for employing the law of the rendering state to assess the question of personal jurisdiction.

At most, the silence in the Uniform Act could be read as leaving open the possibility that legislators intended for this question to be resolved by reference to foreign law, or by reference to a combination of foreign and domestic law. For instance, one commentator observes that there is "broad statutory leeway for courts to interpret Section 5 [of the Uniform Act] . . . liberally."[77] The better understanding, however, is that legislators intended for the silence to mean that the issue of jurisdiction would be governed by domestic law. Had legislators intended for foreign law to govern the question of personal jurisdiction, they could have explicitly provided for that in the Uniform Act itself. For instance, Section 2 of the 1962 Act provides that "[t]his Act applies to any foreign country judgment that is final and conclusive and enforceable *where rendered*."[78] Thus, a prerequisite to the recognition of a foreign judgment is that the judgment is final—and that finality is assessed according to the law of the rendering country. Section 2 contains an explicit reference to choice of law: U.S. courts are to assess finality according to foreign, rather than U.S., standards. No such comparable provision appears in any of the sections addressing jurisdiction.[79] By operation of the maxim *expressio unius*,[80] one could argue that the drafters did not intend for the question of

[76] 2005 UNIFORM ACT, *supra* note 9, at § 5(a)-(b); 1962 UNIFORM ACT, *supra* note 9, at § 5(a)-(b).

[77] Audrey Feldman, *Rethinking Review of Foreign Court Jurisdiction in Light of the Hague Judgments Negotiations*, 89 N.Y.U. L. REV. 2190, 2220 (2014). Note that this commentator's position is not that courts should answer the jurisdictional question by reference to foreign law (or foreign and domestic law), but rather by reference to international concepts of jurisdiction. *Id.* at 2214 ("Under the international due process test, American courts ask only whether foreign procedures conformed to international norms of 'basic fairness'—as opposed to asking whether those procedures were compatible with Fourteenth Amendment due process strictures—to determine whether a foreign judgment is enforceable." (footnote omitted)).

[78] 1962 UNIFORM ACT, *supra* note 9, at § 2 (emphasis added). The 2005 Act is slightly different, stating that the Act applies to a foreign country judgment to the extent that "under the law of the foreign country where rendered, [the judgment] is final." 2005 UNIFORM ACT, *supra* note 9, at § 3(a)(2).

[79] *See* 2005 UNIFORM ACT, *supra* note 9, at §§ 4-5; 1962 UNIFORM ACT, *supra* note 9, at §§ 4-5.

[80] "[T]he expression of one is the exclusion of others . . . ." United States v. Wells Fargo Bank, 485 U.S. 351, 357 (1988) (defining *expressio unius*—short for *expressio unius exclusio alterius*—to mean that a legislature's inclusion of one term in a statute implicitly means the exclusion of others); *see, e.g.*, Attorney Gen. of Can. *ex rel.* Her Majesty The Queen in Right of Can. v. Tysowski, 800 P.2d 133, 135 (Idaho Ct. App. 1990) (interpreting

personal jurisdiction to be answered by reference to foreign law. Had they intended that personal jurisdiction be gauged by foreign law, the personal jurisdiction provisions could easily have been drafted to provide for such a result. In the words of one court, "[o]nly once, in [Section 2], does [the Uniform Act] call for reference to the law of the foreign country, namely for a determination of whether a foreign country judgment is final, conclusive and enforceable; any such reference to foreign law is conspicuously absent from [Subsection 5(a)(2)'s] provisions on jurisdiction."[81] Thus, because the drafters included a choice of law provision pointing to foreign law in Section 2 and did not include one in either Section 4 or 5 (both of which address jurisdiction), it is likely that they did not intend for jurisdiction to be assessed according to foreign law.

With that said, the argument is partially undercut by the statutory provision dealing with subject matter jurisdiction. The Uniform Act prohibits recognition of a foreign judgment where "the foreign court did not have jurisdiction over the subject matter."[82] Courts and commentators agree that subject matter jurisdiction must be assessed with reference to foreign law.[83] Yet the provision on subject matter jurisdiction, which all agree is governed by foreign law, does not contain any reference to the appropriate governing law. While this may weaken the *expressio unius* argument somewhat, it does not negate it. This is because questions of finality or personal jurisdiction could conceivably be assessed according to domestic or foreign standards. For instance, one could apply the finality rules of F1 or F2 to come to a conclusion as to whether or not a foreign judgment is final. Questions of subject matter jurisdiction, however, are different in kind. They cannot be divorced from the legal system in which they originated. Subject matter jurisdiction is part and parcel of the original foreign proceedings and cannot meaningfully be reviewed according to U.S. standards.[84] The application of particular notions of U.S. subject matter

the Idaho statute of limitations for enforcing judgments and holding that "by expressly *including* judgments of the United States and its states and territories, the [state] legislature impliedly *excluded* from the scope of the statute all other foreign judgments").

[81] Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1219 n.5 (E.D.N.Y. 1990).

[82] 2005 UNIFORM ACT, *supra* note 9, at § 4(a)(3); 1962 UNIFORM ACT, *supra* note 9, at § 4(a)(3).

[83] *See, e.g.*, Brand, *supra* note 8, at 20 ("In contrast to the test for personal jurisdiction, where U.S. courts apply U.S. legal concepts to foreign court determinations, when ruling on the question of subject matter jurisdiction, U.S. courts apply the jurisdictional rules of the foreign court.").

[84] *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 403 cmt. g (AM. LAW INST., Tentative Draft No. 1, 2014) ("A court that lacked the capacity under its national law to render a judgment cannot expect that judgment to gain recognition elsewhere. The assignment of designated subjects to the jurisdiction of particular courts is, however, solely a matter of foreign law, and the consequences of a mistaken assertion of subject-matter jurisdiction also must depend on foreign law.").

jurisdiction (e.g., federal question, diversity) would make no sense when superimposed on a foreign legal system that does not have these constructs. Consequently, it could be that legislators did not believe an explicit choice of law reference was necessary in the subject matter jurisdiction section since it seems obvious that subject matter jurisdiction must be determined using foreign law.

It appears that the Uniform Act does not provide clear authority for applying foreign law to assess whether a foreign court had personal jurisdiction over the defendant. Neither Section 4 nor Section 5 contains a reference to choice of law, and a close examination of these sections suggests that legislators intended for questions of jurisdiction to be governed by domestic, and not foreign, law. Moreover, the structure of the Uniform Act as a whole—and in particular the choice of law reference built into the finality provision—further bolsters the argument that there is no statutory authority for U.S. courts to look to foreign standards to assess jurisdiction.

B. *U.S. Courts Are Ill-Equipped to Assess Whether a Foreign Court Had Personal Jurisdiction Under Foreign Law*

Aside from whether there is authority under the Uniform Act to examine foreign jurisdictional law as a predicate to judgment recognition, U.S. courts are ill-equipped to ascertain and apply foreign jurisdictional principles.[85] This critique can certainly be made more broadly—i.e., U.S. courts are not good at ascertaining and applying foreign law *in general*. Indeed, many commentators and courts have critiqued the ability of U.S. courts to engage in this enterprise, arguing that pleading and proving foreign law is "[a]t best . . . confusing and cumbersome" and "[a]t worst . . . incoherent and unpredictable."[86]

U.S. courts encounter a variety of problems when ascertaining and applying foreign law. A U.S. court confronted with the potential applicability of foreign law must first figure out what the law is. This is true in both a practical and a legal sense: A court must determine what the foreign words *are* and what the foreign words *mean*. This process raises issues ranging from locating the proper law to solving translation problems.[87] Once a U.S. court has identified

[85] See Peter Hay, *The Use and Determination of Foreign Law in Civil Litigation in the United States*, 62 AM. J. COMP. L. 213 (2014) for a general overview of the use of foreign law in U.S. courts.

[86] Roger M. Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207, 1207 (2011); *see also* Matthew J. Wilson, *Improving the Process: Transnational Litigation and the Application of Private Foreign Law in U.S. Courts*, 45 N.Y.U. J. INT'L L. & POL. 1111, 1121 (2013) (laying out the problems U.S. judges face in applying foreign law, which include: a general unfamiliarity with foreign laws and their concepts; a lack of training in applying foreign law; administrative demands that drain time and energy; and a general "lack of resources and disparities in language, legal practice, and the different role of judges in foreign countries").

[87] *See* Thomas O. Main, *The Word Commons and Foreign Laws*, 46 CORNELL INT'L L.J.

the applicable foreign law, it then must apply it. This is an unwieldy process, whereby the U.S. court must engage in a time-consuming and burdensome exercise of parsing through a battle of foreign law experts or searching for answers on its own.[88] While some foreign concepts may be familiar to the U.S. legal system, neither U.S. courts, nor the paid experts put before them, are well-situated to sift through complicated foreign law while simultaneously wrangling with the procedural and substantive intricacies of the U.S. legal system.[89]

The problems may be more acute when U.S. courts are looking at very specific and nuanced details of foreign procedural law.[90] How is a U.S. court to understand and apply the specific jurisdictional principles of a foreign legal system as the foreign court would? The "rules" cannot be adequately divorced from the procedural, constitutional, and cultural norms of the foreign legal system. The point is perhaps best illustrated by looking at the issue from the reverse perspective: a foreign court looking to apply American jurisdictional law. One would rightfully be skeptical about the ability of a foreign court to accurately divine what jurisdictional outcomes would result under American law in a given scenario.[91] Similarly, U.S. courts would be equally hard-pressed to determine the outcome of jurisdictional determinations in other legal

219, 230-31 (2013). Main explains that:

> Language is famously indeterminate. Even within a single discourse community, one word can have multiple meanings. Multiple words can share one meaning. The meaning of words can change over time. New ideas and concepts spawn new words. And ambiguity, vagueness, and generality are *de rigueur*. Accordingly, the study of meaning can be the study of something ephemeral, elusive, and enigmatic.

Id. (citations omitted). Moreover, U.S. courts incur substantial costs beyond translating the law—those courts that endeavor to identify the various idiosyncrasies within different legal systems are undoubtedly moored in combing through procedural and substantive legal concepts naturally associated with unfamiliar foreign law. *Id.*

[88] *See* Michalski, *supra* note 86, at 1245-48 (explaining the practical problems U.S. courts encounter when simply determining what foreign law to apply and how to apply it).

[89] Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to A Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 891 (2011) (discussing various issues that arise when courts rely on the adversarial process to produce expert testimony on foreign law, such as litigants who attempt to "'muddy the waters' by painting an overly complicated picture of foreign law, even if the law is simple and fairly straightforward"); *see also* Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 MICH. J. INT'L L. 37, 87 (1997) (discussing the difficulties U.S. courts encounter when presented with foreign law questions and explaining that statutory interpretation may suffer in the face of an overemphasis on foreign law experts and the reliance on applying plain meaning to a language that may not be as plain as it appears).

[90] It is a well-established principle in the conflict of laws that the law of the forum, the *lex fori*, governs matters of procedure, including judicial jurisdiction. For administrative reasons, it is thought that such matters are particularly unsuited to being governed by the law that applies to the case, the *lex causae*.

[91] *See generally* Wilson, *supra* note 86.

systems. And yet, this is exactly what the inquiry into the law of the rendering country requires that they do.

The case of *Evans Cabinet* provides a good example of why U.S. courts should not look to foreign jurisdictional law as a predicate to recognizing a foreign judgment. In *Evans Cabinet*, Kitchen International ("Kitchen") and Evans Cabinet ("Evans") entered into an agreement whereby Evans would supply Kitchen with manufactured cabinetry for several residential construction sites on the east coast of the United States.[92] Kitchen placed the order from its headquarters in Québec, Canada, with Evans's Georgia offices. According to Kitchen, the parties also agreed that they would create a product showroom at Kitchen's office in Montreal, Canada; Evans denied the existence of this separate agreement. After the cabinetry was shipped pursuant to the original contract, issues arose with respect to the quality and conformity of the goods.[93] In May 2006, Kitchen filed suit against Evans in the Superior Court of Québec. Evans was served with process and provided with notice of the Québec proceeding. Evans chose not to defend the action and, ultimately, Kitchen was awarded a default judgment by the Québec court in the amount of nearly $150,000.[94] In April 2007, Evans brought suit alleging breach of contract against Kitchen in federal court in Massachusetts. Kitchen, in turn, sought to dismiss the action on the basis that the action was res judicata by virtue of the prior Québec judgment against Evans.[95] Evans opposed the motion, arguing that the Superior Court of Québec did not have jurisdiction over Evans and as such, its judgment should not be recognized by the Massachusetts court.[96]

The federal district court identified the choice of law issue inherent in the personal jurisdiction inquiry. It noted that "courts in other jurisdictions have split over whether to apply the personal jurisdiction law of the rendering country, the forum state, or both" and concluded that "[w]ithout deciding the choice of law issue, this court will address both Quebec and American law in determining whether the Quebec Superior Court properly exercised personal jurisdiction over [the Defendant]."[97] After a cursory analysis of both laws, the district court concluded that Québec did have jurisdiction over the defendant both under Québec and U.S. law, and that the judgment should be recognized under the Massachusetts version of the Uniform Act.[98] The First Circuit Court of Appeals proceeded on the same basis as the district court—that the issue should be resolved by applying both the law of the rendering jurisdiction and

[92] Evans Cabinet Corp. v. Kitchen Int'l, Inc., 584 F. Supp. 2d 410, 412 (D. Mass. 2008), *rev'd*, 593 F.3d 135 (1st Cir. 2010).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 414.

[98] *Id.* at 417.

the law of the enforcing jurisdiction.[99] Ultimately, it concluded that the district court erred in its analysis of Québec law and that there were factual issues left to be resolved, which precluded granting summary judgment.[100] Accordingly, it reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion.[101]

Both the district court and First Circuit opinions reveal the pitfalls of a U.S. court looking to foreign jurisdictional law as a predicate to judgment recognition. The district court, relying on an affidavit provided by a Québec lawyer on behalf of Kitchen, appeared to accept that Article 3136 of the Québec Civil Code governed the question of whether the Québec court had jurisdiction. Article 3136, in its English translation, provides:

> Even though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required.[102]

The district court was wrong to look to Article 3136 as providing the framework for personal jurisdiction in Québec. Article 3136 is commonly understood as Québec's "forum of necessity" provision, which grounds jurisdiction in cases where courts otherwise do not possess personal jurisdiction over the defendant. It recognizes that there may be cases where the court does not have the requisite degree of connection with the dispute to establish personal jurisdiction, but that concerns for access to justice nonetheless warrant the assumption of jurisdiction. It is actually unclear whether a provision of this nature passes constitutional muster in Canada,[103] but certainly it would not have been the provision that the Superior Court of

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[99] Evans Cabinet Corp. v. Kitchen Int'l, Inc., 593 F.3d 135, 143 (1st Cir. 2010). The First Circuit noted that "[o]n appeal, neither party has contended that the district court erred in this regard. Nor has either party argued that Massachusetts would apply any other rule." *Id.*

[100] *Id.* at 147-48.

[101] *Id.* at 149.

[102] Civil Code of Québec, S.Q. 1991, c 64, art 3136 (Can.).

[103] *See* Tanya J. Monestier, *(Still) A "Real and Substantial" Mess: The Law of Jurisdiction in Canada*, 36 FORDHAM INT'L L.J. 396, 455 (2013) ("It is equally unclear how to reconcile the doctrine of forum of necessity with the real and substantial connection test as a constitutional principle. The very nature of the forum of necessity doctrine is that it only applies when there is no real and substantial connection with the forum. . . . Since the real and substantial connection test acts as a constitutional constraint on the assumption of jurisdiction, it may be impossible for a court to assume jurisdiction (and for other provincial courts to enforce a resultant judgment) absent the requisite territorial connection. . . . If courts simply do not have the authority to hear matters in which there is no real and substantial connection to the forum, then the forum of necessity doctrine is unconstitutional.").

Québec relied on in a fairly standard contract dispute. To its credit, the First Circuit readily recognized this egregious error:

> [T]he Québec provision relied upon by Kitchen International, Article 3136, is clearly a provision that permits Québec courts to assume personal jurisdiction over parties in exceptional cases when there is no other available jurisdiction to which the parties may litigate their dispute. Such a situation is clearly not the case here. The litigants are American corporations which are amenable to suit in the state of their corporate domicile and, with respect to particular transactions, in the states where they have the requisite minimum contacts with the other party and with the transaction at issue in the lawsuit. Because there obviously are other forums quite able to assume jurisdiction over the parties, we must conclude that Kitchen International has not carried its burden of establishing that this provision can serve as an adequate basis for jurisdiction over Evans in the courts of that province.[104]

It is surprising that a federal district court could get the analysis of the law so wrong. Even on its face, it does not make sense to apply Article 3136 of the Québec Civil Code to the dispute at issue.[105] As if identifying the incorrect source of the Québec court's jurisdiction were not bad enough, the district court embarked on an unintelligible discussion of Québec law, somehow morphing it into a discussion of U.S. law:

> Article 3136 implies "that in some instances Quebec courts may decline or acquire jurisdiction depending on the connection with Quebec." The "danger" of Article 3136 is that "in borderline cases 'where there is no one forum that is the most appropriate, the domestic forum wins out by default[,] . . . provided it is an appropriate forum.'" The Southern District of New York has recognized that a Quebec court may exercise personal jurisdiction if "the contract [at issue] was concluded in Quebec *or* if the cause of action arose in Quebec."
>
> In the United States, "[a] district court may exercise authority over a defendant by virtue of either general or specific jurisdiction." A court has general jurisdiction "when the defendant has engaged in 'continuous and systematic activity' in the forum, even if the activity is unrelated to the suit." Defendant does not argue that the Quebec Superior Court could have exercised the Quebec equivalent of general jurisdiction over Plaintiff. To establish personal jurisdiction, then, a district court sitting in Massachusetts must find "that the Massachusetts long-arm statute grants jurisdiction and, if it does, that the existence of jurisdiction under the statute is consistent with the [U.S. C]onstitution."

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[104] *Evans Cabinet*, 593 F.3d at 144.

[105] *See* S.Q. 1991, c 64, art 3136. The section starts off with "[e]ven though a Québec authority has no jurisdiction to hear a dispute"—which should give any court pause about whether this is the right jurisdictional provision on which to rely. *Id.*

> . . . .
>
> The Quebec Superior Court's exercise of personal jurisdiction over Plaintiff did not contravene "traditional notions of fair play and substantial justice." Plaintiff had several contacts with Quebec. All the "orders, communications, payments, correspondence and dealings" between Parties occurred through Defendant's Montreal office. Moreover, Parties agreed to create a product showroom at Defendant's Montreal office, which was ultimately constructed. The purpose of this showroom was to display Plaintiff's products to potential customers and sales agents from Canada and New England. Because under either Quebec or Massachusetts law the Quebec Superior Court properly exercised personal jurisdiction over Plaintiff, Plaintiff's argument that the Quebec default judgment is not conclusive fails.[106]

The court's analysis is almost impossible to follow. It starts off ostensibly talking about Article 3136—but in reality, appears to be talking about the doctrine of forum non conveniens (something that has no bearing on the question of personal jurisdiction).[107] The opinion then switches gears and throws in a complete non sequitur: that the Southern District of New York has previously recognized that a Québec court may assert jurisdiction where "the contract [at issue] was concluded in Quebec *or* [where] the cause of action arose in Quebec."[108] It does not cite a section of the Québec Civil Code or explain how, if at all, this basis of jurisdiction relates to Article 3136, upon which it previously seemed to rely.[109] With no more discussion of this (apparently) alternative basis of jurisdiction, the opinion then delves into U.S. law, explaining the difference between specific and general jurisdiction. After analyzing whether the Québec court had jurisdiction under U.S. law, it cursorily concludes that "under either Quebec or Massachusetts law the Quebec Superior Court properly exercised personal jurisdiction over Plaintiff."[110] The "analysis" of why the district court believed Québec had jurisdiction over the defendant in *Evans Cabinet* is wholly nonsensical and illustrates why U.S. courts should tread lightly before deciding to embark upon an examination and application of foreign procedural law.

The First Circuit readily recognized that the district court erred in applying Article 3136 to ascertain whether the Québec court had jurisdiction. However, it endorsed what appeared to be the district court's alternative basis for finding jurisdiction, stating:

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[106] Evans Cabinet Corp. v. Kitchen Int'l, Inc., 584 F. Supp. 2d 410, 415-16 (D. Mass 2008).

[107] The court cited Jean-Gabriel Castel in this regard, discussing the doctrine of forum non conveniens, not Article 3136. *See id.* at 415 nn.28-29.

[108] *Id.* at 415.

[109] In reality, there is no relationship between the two.

[110] *Evans Cabinet*, 584 F. Supp. 2d at 416.

> Kitchen International may be able to demonstrate that the Québec court was authorized to exercise jurisdiction *if* it can demonstrate that a contractual relationship was established with Evans in Québec or that there was a breach of that agreement in Québec or that one of the obligations arising from the contract was to be performed in the Province.[111]

It cited Article 3148 of the Québec Civil Code in support of this proposition.[112] There are a couple of problems with the First Circuit's analysis. First, the grounds cited by the First Circuit as supporting the exercise of personal jurisdiction in Québec do not actually correspond with the cited Civil Code provision. For instance, Article 3148 provides that jurisdiction is appropriate where one of the obligations arising from a contract was to be performed in Québec; it does not provide that jurisdiction is appropriate where "a contractual relationship was established . . . *in* Québec."[113] The place of formation and the place where an obligation is to be performed may (coincidentally) be coextensive, but they are two very different things. Second, the First Circuit fails to recognize that the inquiry into whether "a fault was committed in Québec" or "damage was suffered in Québec" must be undertaken from the perspective of the Québec court, applying Québec law. A U.S. court would need to ask itself questions like: "What constitutes 'a fault'?" "What does it mean for a fault to be committed in Québec?" "What sort of 'damage' falls within the purview of Article 3148?"[114] A U.S. court cannot apply its own understanding of these legal concepts in assessing whether a Québec court had jurisdiction under its own law; instead, it would need to approach the inquiry under Québec law.[115] The First Circuit ultimately

[111] Evans Cabinet Corp. v. Kitchen Int'l, Inc. 593 F.3d 135, 145 (1st Cir. 2010). Article 3148 provides that a Québec court can exercise personal jurisdiction over a foreign defendant if "a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec." Civil Code of Québec, S.Q. 1991, c 64, art 3148 (Can.).

[112] *Evans Cabinet*, 593 F.3d at 145.

[113] S.Q. 1991, c 64, art 3148 (emphasis added).

[114] *See* Infineon Techs. AG v. Option consommateurs [2013] 3 S.C.R. 600, para. 45 (Can.) ("The plain language of art. 3148(3) does not preclude economic damage . . ." [and] "[i]t is clear from the Québec jurisprudence that economic damage can serve as a connecting factor under art. 3148(3)."); Rapid Collect, Inc. v. Moneygram Payment Sys. Inc., 2009 CarswellQue 9612, para. 27 (Can. Que. Sup. Ct.) ("It is sufficient in order that the Québec Courts may assume jurisdiction [under art. 3148(3)], that at least one of the obligations flowing from a contract be required to be performed in Québec. The obligations in question can be those of either contracting party and not only those of the defendant contesting the Court's jurisdiction.").

[115] The inquiry is more complicated than it may facially appear. *See, e.g.*, Option consommateurs, [2013] 3 S.C.R. at para. 59; Spar Aerospace Ltd. v. Am. Mobile Satellite Corp., [2002] 4 S.C.R. 78, para. 26-43 (Can.) (discussing in detail the respective meanings of "injurious act" and "damage" under Article 3148(3)).

concluded that there are some unresolved factual issues that precluded summary judgment, but never attempted to marry up those factual issues with the actual bases of jurisdiction it identifies under the Québec Civil Code.[116]

Evans Cabinet illustrates many of the problems inherent in trying to delve into foreign law to determine whether a foreign court had jurisdiction under its own law. U.S. courts may not understand the particular intricacies of foreign law, whether it be because of language or systemic barriers. U.S. courts also tend to bring domestic legal constructs to bear on the analysis, rather than foreign ones.[117] While this is a natural inclination, ascertaining whether a foreign court had jurisdiction under its own law necessarily entails a jurisdictional analysis through the lens of foreign legal principles. There are also pragmatic difficulties of proof that accompany any analysis of foreign law, including, and perhaps especially, those related to determining whether a foreign court had jurisdiction under foreign law. Among the complicated issues that courts must consider: What sources are appropriate to examine in establishing foreign law? How much weight should U.S. courts give to the different sources? How authoritative are prior U.S. cases in deciding issues of foreign law (i.e., should deference be given to previous U.S. courts' determinations of foreign law)?[118] What is the role of lawyer affidavits in the analysis?[119] Are U.S. courts limited to the facts that the foreign court had at its disposal, or may they consider new facts? How are those facts to be established? Are U.S. courts bound by any factual determinations made by a

[116] The First Circuit explained:

> Evans disputed that it had accepted in Québec any contractual obligation with Kitchen International or had engaged, through its representatives, in any business in Québec. Indeed, it denied the existence of any agreement with Kitchen International other than various agreements to sell the allegedly defective material. Evans denied, explicitly, any joint venture to establish a showroom in Montreal. Indeed, none of the affidavits make explicit the precise relationship between the alleged showroom and the specific sales of allegedly defective products by Evans. Under these circumstances, it is clear that genuine issues of fact remain to be resolved before the authority of Québec to exercise personal jurisdiction over Evans can be established.

Evans Cabinet, 593 F.3d at 145.

[117] *See* Hay, *supra* note 85, at 221-22 ("American judges view foreign law through an American lens . . . . For example, the premise that judicial opinions serve the same function in the French legal system as they do in the American legal system is false." (quoting Philip D. Stacey, *Foreign Law: Rule 44.1,* Bodum USA v. La Cafetiere*, and the Challenge of Determining Foreign Law*, 6 SEVENTH CIR. REV. 472, 494-95 (2011))).

[118] In *Evans Cabinet* itself, the court relied on an opinion from the Southern District of New York. Evans Cabinet Corp. v. Kitchen Int'l, Inc., 585 F. Supp. 2d 410, 415 (D. Mass. 2008) (citing Can. Imperial Bank of Commerce v. Saxony Carpet Co., 899 F. Supp. 1248, 1253 (S.D.N.Y. 1995)).

[119] It seems that in many cases, courts uncritically rely on affidavits supplied by the lawyer hired by the party seeking recognition of the foreign judgment. *See, e.g.*, *Evans Cabinet*, 593 F.3d at 147; *Saxony*, 899 F. Supp. at 1251. One could readily question the reliability of these affidavits. *See* Michalski, *supra* note 86, at 1246.

foreign court? Certainly, none of these issues are insurmountable, but when coupled with the other reasons for caution, they should give courts pause about the practice of attempting to determine whether a foreign court had jurisdiction under its own law as a prerequisite to judgment recognition and enforcement.

One New York federal court recognized the difficulties associated with pleading and proving foreign law in this context and used it as a basis for refusing to apply Japanese law to the question of whether the foreign court had jurisdiction over the defendant. The defendant in *Nippon Emo-Trans Co. v. Emo-Trans Inc.*[120] argued that it had not submitted to the jurisdiction of the Japanese court under Japanese law.[121] The plaintiff, in turn, argued the opposite—that the defendant had, in fact, submitted to the jurisdiction of the Japanese court.[122] Both parties provided the court with "affidavits from Japanese attorneys and impressive citations to Japanese legal authorities."[123] The court, however, found these unavailing, noting that there is no indication in Section 5 of the Uniform Act that whether a party had voluntarily appeared was intended to be governed by foreign law.[124] It continued:

> If anything, [the Uniform Act] was meant to simplify the task of a court in determining what effect to give to the judgments of foreign courts, often based on legal principles vastly different from the common-law and constitutional traditions familiar to New York judges and attorneys. To introduce, even potentially, a difficult legal issue requiring the pleading and proof of the law of another jurisdiction would magnify the cost and effort required beyond reasonable bounds. While Japanese law is relevant to the jurisdictional inquiry in other ways, without some firm indication in the statute pointing the Court to the law of the foreign country, it appears eminently more reasonable to view this as a question of New York law.[125]

The *Nippon* court saw the wisdom in looking solely to U.S. law in resolving the question of whether the foreign court had personal jurisdiction over the defendant. The court rightly concluded that looking to foreign law to answer this question would "magnify the cost and effort beyond reasonable bounds."[126]

C. *Second Guessing a Foreign Court Is an Affront to International Comity*

Perhaps the most compelling reason for U.S. courts to refrain from examining foreign court assertions of jurisdiction under foreign law is that the

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[120] 744 F. Supp. 1215 (E.D.N.Y. 1990).

[121] *Id.* at 1218.

[122] *Id.* at 1219.

[123] *Id.*

[124] *Id.* at 1225.

[125] *Id.* at 1219-20.

[126] *Id*.

exercise is a serious affront to international comity. After all, who is a U.S. court to say that a Brazilian court did not have jurisdiction over the defendant under Brazilian law? Or that a Russian court did not have jurisdiction over the defendant under Russian law? Clearly, Brazilian or Russian courts would be best placed to determine whether they possessed jurisdiction over the defendant according to their own laws. Again, it is important to examine this issue from the perspective of a foreign court engaging in the same exercise with respect to a U.S. judgment. Imagine a German court opining that it did not believe that New York had minimum contacts with the defendant so as to ground jurisdiction in New York. The very notion that a German court would see itself as better placed than a New York court to decide on the issue of personal jurisdiction under New York law is laughable. And yet, this is exactly what U.S. courts are doing when they examine foreign court jurisdiction through the lens of foreign law.[127]

The case of *Osorio v. Dole Food Co.*[128] provides a prime example of why U.S. courts should not attempt to use foreign law to determine whether the rendering court had jurisdiction over the defendant prior to recognizing a foreign judgment.[129] In *Osorio*, Nicaraguan citizens who worked on banana plantations and were exposed to the pesticide dibromochloropropane ("DBCP") brought an action against the banana grower and chemical manufacturer in Florida, seeking to enforce a $97 million Nicaraguan judgment.[130] The judgment was rendered by a Nicaraguan trial court under "Special Law 364," a law enacted in 2000 by the country's legislature specifically to handle DBCP claims.[131] The U.S. defendants had originally

[127] It is important to note that most foreign countries do not undertake an analysis of foreign law as a predicate to judgment recognition. Instead, they examine the issue of jurisdiction solely from the perspective of domestic law. *See* Zeynalova, *supra* note 14, at 165-66 ("When it comes to determining whether the rendering U.S. court had jurisdiction and gave due notice, however, many foreign countries will use much stricter standards than a U.S. court making the same determination. For example, many countries, including China, Japan, and Italy, do not recognize the American 'long-arm' basis for personal jurisdiction and will likely refuse to recognize and enforce judgments rendered on such jurisdictional grounds. Furthermore, courts in Greece, Japan, Korea, Mexico, Portugal, South Africa, Germany, and Taiwan will not enforce a judgment 'if a local court (i.e., the court of the foreign country) would not have had jurisdiction under the facts.'" (citations omitted)).

[128] 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1277 (11th Cir. 2011).

[129] *Id.* at 1311.

[130] *Id.*

[131] *Id.* at 1322. This case is part of a series of cases brought under the Nicaraguan Special Law. *See, e.g.*, Dow Chem. Co. v. Calderon, 422 F.3d 827, 830 (9th Cir. 2005) (explaining that Nicaraguans suing American companies under the Special Law have obtained more than $715 million in judgments); Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2005 WL 6184247, at *13 (C.D. Cal. Nov. 10, 2005) (determining that the Nicaraguan court lacked personal jurisdiction over Shell Oil and thus "granting declaratory relief that the Nicaraguan Judgment will not be recognized or enforced in the United States"); Franco v.

challenged the Nicaraguan court's jurisdiction under the Special Law; the Nicaraguan trial court, however, found that it did indeed possess personal jurisdiction over each of the defendants.[132]

In resisting recognition of the Nicaraguan judgment in Florida, the U.S. defendants again sought to make the argument that the Nicaraguan court did not have personal jurisdiction under the Special Law.[133] The Florida district court ultimately agreed with the defendants, explaining:

> In this case . . . the trial court did not follow the interpretation of the Nicaraguan Supreme Court, and Article 7 expressly provides that it is the defendant's right to "decide that the proceedings are to continue in the Nicaraguan courts," or not. The conclusion that the defendants can opt out of Nicaragua's jurisdiction is not only the finding of this Court, but also that of Nicaragua's highest court, the Ninth Circuit, and at least one legal commentator. Accordingly, the Court finds that Defendants effectively invoked their opt-out rights under Article 7 of Special Law 364. This act divested the Nicaraguan trial court of jurisdiction.[134]

In so concluding, the district court went into great detail about various provisions of the Special Law, the Advisory Opinion offered by the Nicaraguan Attorney General as to the constitutionality of the Special Law, and the Nicaraguan Supreme Court's guidance on the interpretation of the Special Law.[135]

There is something decidedly unsettling about the district court's opinion: it smacks of judicial hubris and overreaching. The Nicaraguan court heard arguments on the jurisdictional issue and interpreted the Special Law as permitting it to exercise jurisdiction in these circumstances. The U.S. court, unsatisfied with this result, then proceeded to analyze the Special Law according to its own legal worldview and concluded, in essence, that the Nicaraguan court did not know what it was doing. Why is the finding of the U.S. court as to personal jurisdiction under the Special Law more compelling than the finding of the court that was actually hearing the case pursuant to its own law? It is one thing to say that a foreign court did not have jurisdiction under U.S. standards and therefore any resulting judgment should not be recognized; it is quite another to say that a court did not have jurisdiction under

Dow Chem. Co., No. CV 03-5094 NM (PJWx), 2003 WL 24288299, at *8 (C.D. Cal. Oct. 20, 2003) ("Because the Nicaraguan court lacked personal jurisdiction over The Dow Chemical Company, the foreign judgment . . . must be rejected . . . .").

[132] *Osorio*, 665 F. Supp. 2d at 1318.

[133] *See id.* at 1312. Note that the Florida district court was somewhat vague on whether this analysis was one of personal or subject matter jurisdiction.

[134] *Id.* at 1326 (citations omitted).

[135] *Id.* at 1324-26. One author refers to the district court's re-examination of Nicaragua's jurisdiction under Nicaraguan law as "fancy footwork." Pamela K. Bookman, *Once and Future U.S. Litigation*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 35, 44 (Paul B. Stephan ed., 2014).

its own law and therefore its judgment should not be recognized. The latter determination is offensive, contrary to international standards of comity, and does not give due deference to a foreign court's interpretation of its own laws.[136]

The appropriate jurisdictional exercise in *Osorio* would have involved deferring to the Nicaraguan court's interpretation of the Special Law, but examining whether the connection between Nicaragua and the American defendants was sufficiently strong to ground personal jurisdiction under U.S. law.[137] Ultimately, the court would have gotten to the same place—that there was not personal jurisdiction over the defendant to support the recognition of the foreign judgment in the U.S.—without having to call into question the competence of the original Nicaraguan trial court.

D. *Assessing Whether a Foreign Court Had Jurisdiction Under Foreign Law Is an Exercise in Futility*

Most courts that acknowledge the choice of law problem in the recognition of foreign judgments conduct a two-part inquiry: first, they look to the law of the foreign country to ensure that jurisdiction was appropriate there, and second, they look to domestic law to ensure that jurisdiction was also appropriate under domestic standards.[138] If the judgment is jurisdictionally

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[136] The Florida district court concluded: (1) the Nicaraguan trial court lacked personal and/or subject matter jurisdiction under Special Law 364, (2) the judgment was rendered under a system which does not provide procedures compatible with due process of law, (3) enforcing the judgment would violate Florida public policy, and (4) the judgment was rendered under a judicial system that lacks impartial tribunals. *Osorio*, 665 F. Supp. 2d at 1352. The Eleventh Circuit Court of Appeals affirmed the district court's determination—but only on a limited basis. *See* Osorio v. Dow Chem. Co., 635 F.3d 1277, 1279 (11th Cir. 2011) (per curiam).

[137] *See* Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWX), 2005 WL 6184247, at *12 (C.D. Cal. Nov. 10, 2005). The court concluded:

> In sum, Claimants' stream of commerce argument boils down to the following syllogism: Shell Oil sold DBCP product with the expectation that it would be shipped to Honduras and Costa Rica; Honduras and Costa Rica are in Central America; Nicaragua is in Central America; therefore, Shell Oil knew or should have known that its DBCP product would end up in Nicaragua. This "reasoning" is unsupported by any evidence that Shell Oil's DBCP product was ever shipped to Nicaragua, and only the unreliable Barrel Affiants suggest Shell Oil's DBCP product ever found its way to Nicaragua.

Id. at *10 (footnote omitted).

[138] There is very little authority for the proposition that personal jurisdiction should be measured solely by reference to foreign law. Although some courts suggest the possibility of the law of F1 alone as guiding the personal jurisdiction inquiry, there are few instances of a U.S. court simply looking to foreign law to provide the answer to the question of personal jurisdiction. One case that does appear to look solely to foreign law to assess jurisdiction is Manches & Co. v. Gilbey, 646 N.E.2d 86, 87 (Mass. 1995). There the court stated, "[t]he English court had jurisdiction over the defendants. Manches received court permission to

deficient under the law of either F1 or F2, it will not be recognized. This inquiry effectively grants the law of F2 "veto" power over the recognition of a foreign judgment. Stated differently, even if a U.S. court determines that a foreign court had jurisdiction under its own laws,[139] the judgment will still not be recognizable if the U.S. court finds that the foreign court lacked jurisdiction under U.S. law.

At least when a U.S. court finds that the foreign court did not have jurisdiction under U.S. law—and therefore, the judgment is not entitled to recognition—it seems superfluous to perform an analysis of whether the rendering court had jurisdiction under its own law. In other words, there is no need to assess whether the foreign court had jurisdiction under the law of F1 when a U.S. court decides that the foreign court did not have jurisdiction under the law of F2. Whether personal jurisdiction was lacking under the law of F2, or under a combination of the law of F1 and F2, the result is the same: the judgment will not be recognized and enforced. Analyzing the law of F1 in these circumstances appears to be an exercise in futility.

The one possibility not yet considered is that the assertion of personal jurisdiction is improper under the law of F1, but proper under the law of F2. To the author's knowledge, no case has ever found that the foreign court improperly asserted jurisdiction under its own law, but that the assertion of jurisdiction would nonetheless have been appropriate under the law of the enforcing state. However, there is an important conceptual snag if the rendering court did not have jurisdiction under its own law: the judgment would be void. How can a U.S. court enforce a judgment that is void, even if jurisdiction would have been appropriate under U.S. law? The point is a fair one—and appears to be the primary motivator behind the decision of U.S. courts to look at foreign law in assessing jurisdiction in the first place.[140]

This, however, raises another important question: Who decides whether the foreign court had jurisdiction under its own law? Those courts that apply the two-step approach assume that they should be deciding the issue of whether the foreign court had jurisdiction according to foreign law. There is, of course, another possibility: that the foreign court itself decides whether it has jurisdiction under its own law.[141] This is the solution that best balances the necessity of ensuring that the foreign judgment has been rendered by a court with appropriate authority to do so, without second-guessing that court's jurisdictional determinations.

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serve the defendants outside the jurisdiction. The contract for legal services to be rendered in England was governed by English law, and thus under English law the court there had jurisdiction over the parties." *Id.*

[139] Either because the U.S. court has conducted its own de novo inquiry into the foreign law, or because it has simply deferred to the foreign court's interpretation of its own laws.

[140] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (AM. LAW INST. 1987).

[141] The fact that there is a final and conclusive judgment emanating from a foreign legal system seems to presuppose that the foreign court had the authority to render that decision.

E. *U.S. Courts Do Not Engage in an Adequate Analysis of Foreign Law*

In the majority of cases that approve of the two-pronged approach to the jurisdictional question, courts only pay lip service to the necessity of verifying that the foreign court had jurisdiction under its own law prior to recognition. In these cases, any analysis of foreign law tends to be short and conclusory. In reality, whether a foreign court had jurisdiction under U.S. law is what drives the train on judgment recognition.

For example, in *EOS Transport Inc. v. Agri-Source Fuels LLC*,[142] a Florida state court approved of the two-pronged approach to determining whether the jurisdictional requirement was satisfied.[143] Almost immediately after endorsing this combination F1/F2 approach to jurisdiction, the court seemed to abandon it, noting that since "Agri-Source did not argue before the circuit court . . . that jurisdiction did not exist under the laws of Canada . . . that issue is not properly before this court."[144] The court then added that "given our finding that the exercise of personal jurisdiction in this case did not comport with U.S. Constitutional Due Process requirements, we need not consider whether the exercise of personal jurisdiction was proper under Canadian law."[145] Accordingly, the court addressed only whether the defendant had sufficient contacts with Canada to satisfy U.S. standards of jurisdiction. Ultimately, the Florida court concluded that the Canadian court did not have jurisdiction under the U.S. minimum contacts test and that the judgment was not entitled to recognition.[146]

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[142] 37 So.3d 349 (Fla. Dist. Ct. App. 2010).

[143] *Id.* at 352-53. Specifically, the court stated:

> We adopt the analytical approach applying the two-part test and hold that in assessing whether the exercise of personal jurisdiction is proper under the Act, the trial court must determine whether the exercise is proper under both the law of the foreign jurisdiction and under U.S. Constitutional Due Process requirements.

Id.

[144] *Id.* at 353.

[145] *Id.*

[146] *Id.* at 354. The court held:

> Here, Agri-Source initiated contact with EOS for EOS to transport goods from Canada to Florida. Payment was to occur in Canada and ultimately EOS alleged that Agri-Source failed to make all payments due under the contract. Aside from the shipments from Canada and the payments in Canada, no other substantial services in performance of the contract occurred in Canada. Given the facts of this case, Agri-Source did not purposely avail itself of the privilege of conducting activities in Canada. Accordingly, Agri-Source would not have reasonably anticipated being haled into Canada based upon such random, fortuitous, and attenuated contacts. We, therefore, find that Agri-Source did not have sufficient minimum contacts with the Canadian forum to satisfy U.S. Constitutional Due Process requirements.

Id. Note also that the U.S. court should have been considering whether there were minimum contacts with British Columbia (the provincial forum), not with "Canada." *See id.*

Similarly, in *Canadian Imperial Bank of Commerce v. Saxony Carpet Co.*,[147] a New York federal district court approved of the two-pronged test for assessing foreign court jurisdiction. The court's analysis of foreign law (in that case, Québec law) was brief and conclusory, relying entirely on the declaration of a lawyer offered by the proponent of recognition.[148] The bulk of the court's analysis was focused on whether the exercise of jurisdiction was appropriate under U.S. law, which the court ultimately concluded it was.[149]

In *Monks Own, Ltd. v. Monastery of Christ in the Desert*,[150] the New Mexico Supreme Court engaged in what is perhaps the most sustained discussion of the jurisdictional choice of law problem in the recognition of foreign judgments.[151] The court analyzed in detail the Uniform Act and ultimately differentiated between the enumerated bases for jurisdiction and the residual basis for jurisdiction.[152] With respect to the former, the court concluded that New Mexico law governed the question of personal jurisdiction. With respect to the latter, however, the court stated that because the section was "not clear on what law, that of New Mexico or that of the

[147] 899 F. Supp. 1248 (S.D.N.Y. 1995).

[148] *Id.* at 1253. The court reasoned:

> According to the offer of proof, Saxony was subject to in personam jurisdiction in Quebec if the contract was concluded in Quebec *or* if the cause of action arose in Quebec. Further, according to the affiant, both standards for obtaining in personam jurisdiction over Saxony in Quebec were fulfilled, though it appears that satisfaction of either standard alone would have been sufficient. The declaration states that "the contract was concluded in Quebec, as the last act necessary to bind Elite took place in Quebec upon written confirmation by Elite of Saxony's purchase order. The cause of action arose in Quebec because Saxony's nonpayment caused prejudice to Elite at its place of business in Quebec."

Id. (citations omitted).

[149] *Id.* The district court stated:

> The action arose in the business relationship between Elite and Saxony; that business relationship arose out of a contract between the two corporations for the manufacture of carpeting at Elite's plant in Quebec. On this basis, a clear nexus existed between the cause of action and the contacts Saxony had to the Canadian forum. Even if that were not the case, sufficient contacts existed to require this Court to recognize the Canadian judgment as a matter of comity. The business relationship between Elite and Saxony involved a number of purchase orders over a period of years, and, as the carpeting was manufactured in Canada at Elite's facilities, substantial portions of the contracts were performed in Canada. While the exact nature of the visit by two principals of Saxony to Canada is in dispute, both parties admit that the trip involved a tour of Elite's mills. Moreover, the record indicates that Elite and Saxony may have embarked upon further negotiations regarding a proposal to distribute Saxony's designs in Canada, and that a letter was sent to Canada in which Saxony sought to collect copyright royalties for designs on certain carpets.

Id.

[150] 168 P.3d 121 (N.M. 2007).

[151] *See id.* at 124-27.

[152] *See id.*

foreign jurisdiction, applies" then it would seem that "the laws of both jurisdictions are applied, first the foreign law as to the foreign court's jurisdiction, and then U.S. constitutional principles regarding due process of law."[153] The court supported its conclusion with reference to case law[154] and the ALI Proposed Statute.[155] But despite the comprehensive introduction of the issue, the New Mexico court quickly glossed over the issue of jurisdiction under foreign (Canadian) law in one short paragraph, indicating that "Monks Own presented evidence to the district court that the Ontario court had personal jurisdiction over the Monastery according to Canadian law" and that "[t]he Monastery does not dispute the court's finding."[156] It then proceeded for the remainder of the judgment to analyze whether the defendant had sufficient minimum contacts with the foreign court to support the assertion of jurisdiction under U.S. law.[157] Ultimately, the *Monks Own* court concluded that the foreign court appropriately exercised jurisdiction according to U.S. standards.[158]

The courts in *EOS Transport*, *Saxony*, and *Monk's Own* ostensibly embraced an approach to personal jurisdiction that would look to both the law of F1 as well as the law of F2 in assessing jurisdiction. However, they focused their inquiries almost exclusively on whether jurisdiction was appropriate under the law of F2. The inquiries into foreign law were entirely perfunctory. The fact that the courts endorsing the two-pronged framework are not actually applying it should raise doubts about the propriety of looking to foreign jurisdictional law as a predicate to the recognition of a foreign judgment.

III. WHAT IS THE LAW OF F2?

It is not helpful or necessary for U.S. courts to look at whether a foreign court had jurisdiction under foreign law prior to recognizing a foreign judgment. Perhaps implicit in this position is that U.S. courts should instead

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[153] *Id.* at 126.

[154] *Id.* (citing Bank of Montreal v. Kough, 612 F.2d 467, 470 (9th Cir. 1980); Pure Fishing, Inc. v. Silver Star Co., 899 F. Supp. 2d 905, 912 (N.D. Iowa 2002)).

[155] *Id.* at 127 (citing THE FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 3(b) (AM. LAW. INST., Proposed Final Draft 2005)).

[156] *Id.* The details here are a little unclear. The New Mexico Court of Appeals had found that only the law of F2 governed the question of personal jurisdiction. *Id.* Accordingly, the Monastery may not have disputed that the Canadian court had personal jurisdiction because it was not an issue that the intermediate court had decided.

[157] *Id.* at 127-29.

[158] *Id.* at 129. The court held:

> [W]hile the contract was not actually executed in Canada, the Monastery traveled to Canada for business purposes, met with Canadian government officials for business purposes, and agreed to have Canadian law govern the contract. If a Canadian company were to perform similar acts in New Mexico resulting in a legal dispute, our courts would likely have jurisdiction over the Canadian party; there would be sufficient contacts between the Canadian company and this state to satisfy due process.

Id.

look to U.S. law to assess whether the rendering court had personal jurisdiction over the defendant. This, in turn, raises the question: What is "U.S." law?

Since judgment recognition and enforcement is state-based, one might be inclined to apply state law to the question of personal jurisdiction. In other words, one would apply state-specific jurisprudence on personal jurisdiction to assess whether the foreign court properly asserted jurisdiction according to U.S. standards. Several courts have done just that.[159] For instance, in *Sung Hwan Co. v. Rite Aid Corp.*,[160] the plaintiff brought an action to recognize and enforce an approximately $5 million South Korean default judgment arising from the sale of contaminated ice cream from a U.S.-based manufacturer to a Korean company.[161] The defendant resisted recognition of the judgment in part on the basis that the foreign court did not have jurisdiction over the defendant.[162] The New York court started its analysis by noting that absent a finding of personal jurisdiction under Subsection 5(a), New York courts "typically look[] to the framework of CPLR 302, New York's long-arm statute, using it as a parallel to assess the propriety of the foreign court's exercise of jurisdiction over a judgment debtor."[163] The court then proceeded to apply the relevant long-arm provision, along with attendant New York-specific case law, to assess whether the South Korean court's assertion of jurisdiction would have fit within the New York long-arm statute. The court identified the salient issue as whether the plaintiff sufficiently alleged that the defendant committed "a tortious act" outside South Korea, causing injury in South Korea within the meaning of CPLR 302(a).[164] The defendant argued that the plaintiff's "claim [was] nothing more than an allegation of breach of contract under the guise of a tort since New York does not award economic damages for a tort cause of action, and accordingly [fell] outside the scope of CPLR 302(a)(3)."[165] The court went to great lengths to address this argument, and ultimately concluded that the defendant's actions did constitute "a tortious act" within the meaning of the long-arm statute:

> Rite Aid erroneously focuses on the remedy sought—damages for economic loss—in arguing that no tortious act occurred since New York does not allow recovery for economic loss based on negligence. This argument is contrary to our case law and would undermine the principles of comity by supplanting New York substantive law in place of that of the foreign jurisdiction. . . .

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[159] *See* Silberman, *supra* note 17, at 106 n.24 (noting that in assessing whether the rendering court had personal jurisdiction, "states may look to a due process standard, or alternatively, to the limits of their own long-arm statutes" (citations omitted)).

[160] 850 N.E.2d 647 (N.Y. 2006).

[161] *Id.* at 649.

[162] *Id.*

[163] *Id.* at 651.

[164] *Id.*

[165] *Id.*

> . . . .
>
> For purposes of establishing long-arm jurisdiction, a tort should be broadly defined to encompass one that causes economic injury. Certainly such recovery, although not recognized in New York, is neither repugnant to our public policy nor offensive to our notions of fairness. . . . Here, although Korean law appears more expansive than New York law in imposing liability for economic loss under a tort theory, we see no reason to foreclose the use of CPLR 302(a)(3) as a basis for Korea's exercise of personal jurisdiction over Rite Aid merely because of this difference in the substantive tort law of the two jurisdictions.[166]

Sung Hwan illustrates how complicated this exercise can be if courts attempt to directly employ domestic civil procedure rules to assess whether a foreign court's assertion of jurisdiction was appropriate. First, the New York court in *Sung Hwan* had to clarify that the terminology in CPLR 302 now had to be read as applying to South Korea, not to New York.[167] Second, and more importantly, the court had to grapple with whether the actions of the defendant could constitute "a tortious act" despite the fact that New York does not recognize damages for purely economic loss in tort.[168] The analysis was messy, to say the least. Courts should not shoehorn the jurisdictional inquiry at the recognition stage into ill-fitting, forum-specific civil procedure rules. These rules were developed for use in domestic litigation, not to assess whether a foreign court properly asserted jurisdiction in a foreign action. Nothing in the Uniform Act or state long-arm statutes mandates the application of state-specific law in answering the jurisdictional question.

So what law should be applied in determining whether the foreign court had personal jurisdiction over the defendant, such that the foreign judgment should be recognized? Federal law, not state law, should be applied to assess the question of personal jurisdiction. If the foreign court's assertion of jurisdiction comports with federal due process standards, the judgment should be recognized.[169] State-specific rules, including state long-arm statutes, should not be used in determining whether the foreign court was jurisdictionally competent for recognition and enforcement purposes.

The analysis in *Sung Hwan*, for instance, would have been much simpler if the court did not look to the New York long-arm statute to determine jurisdiction. Instead of getting into the intricacies of whether the proceeding involved a "tortious act" within the meaning of CPLR 302, the court should have asked instead whether the actions of the defendant in selling ice cream to a Korean-based company for ultimate distribution in Korea met the minimum

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[166] *Id.* at 652-53 (citation omitted).

[167] *Id.* at 651 ("For purposes of this inquiry, Korea is '"the state"' referenced in CPLR 302(a)(3).").

[168] *Id.*

[169] Absent, of course, some other basis for nonrecognition.

contacts test for jurisdiction. The question would then have focused on issues of foreseeability and purposeful availment,[170] rather than the technical requirement of whether the defendant's conduct amounted to a tortious act. A key benefit to using federal law is that it does away with the necessity of trying to export state civil procedure rules to a context (recognition) for which they were not designed. It also ensures that the case law on the interpretation of a state long-arm statute is not inadvertently muddied by courts looking at the long-arm statute for recognition purposes.[171]

Using federal law, rather than state-specific law, also ensures consistency across jurisdictions. This is very important in the foreign judgment recognition context, an area of law that is typically thought of as involving the United States as a whole and its relations with foreign countries.[172] If courts apply state-specific law to the question of personal jurisdiction, they could conceivably come to different determinations on whether it is appropriate to recognize a foreign judgment. It would be odd, say, if a foreign judgment was recognizable in North Dakota, but not South Dakota, because the latter applied state-specific law to the question of jurisdiction and the former applied federal law. This is particularly true considering that a foreign judgment that has been domesticated in North Dakota would, at least in theory, be enforceable in South Dakota under the Full Faith and Credit Clause.[173] It would be preferable to avoid what one author calls "judgment arbitrage"—the practice of domesticating a foreign judgment in one jurisdiction and then seeking to have it enforced in other jurisdictions—by having all courts apply the same federal standards of jurisdiction to the recognition question.[174]

Several courts have recognized that it is appropriate to use federal law, and not state law, in assessing the question of personal jurisdiction for recognition purposes. For instance, in *Monks Own*, the Supreme Court of New Mexico identified the appropriate jurisdictional inquiry as follows:

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[170] *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2783 (2011) ("[I]t is the defendant's purposeful availment that makes jurisdiction consistent with 'fair play and substantial justice' notions.").

[171] Courts construing a state long-arm statute in the context of a recognition proceeding may unintentionally create precedent that parties and other courts will rely on when construing the statute in the context for which it was actually intended (i.e., determining whether jurisdiction can be exercised over an out-of-state defendant).

[172] Indeed, in recent years there has been a push towards federalizing judgment recognition via the adoption of the ALI Proposed Statute. *See generally* THE FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT (AM. LAW. INST., Proposed Final Draft 2005).

[173] *See* U.S. CONST. art. IV § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

[174] *See* Shill, *supra* note 36, at 463. *But see* Silberman, *supra* note 17, at 108 n.29 ("[Shill] assumes that a state must give full faith and credit to a sister state judgment recognizing a foreign country judgment, but existing law on the point . . . is actually unclear and unsettled.").

> The precise inquiry is not so much whether the New Mexico long-arm statute has been satisfied when determining whether the Monastery had sufficient minimum contacts to satisfy American due process standards. The inquiry is focused on constitutional principles, but the long-arm statute can be used to illustrate the types of contacts that clearly meet constitutional standards. While the long-arm statute can be used as an illustration, we acknowledge that, at least hypothetically, there could be other such contacts that satisfy traditional notions of fair play and substantial justice under due process, yet not be included in a particular state's long-arm jurisdiction statute.[175]

Accordingly, the *Monks Own* court recognized that there might be situations that do not satisfy the state long-arm statute, but where the assertion of jurisdiction is nonetheless constitutionally permissible. In these cases, the appropriate inquiry would be whether the foreign court's assertion of jurisdiction comports with federal due process, not the relevant state's long-arm statute. Other courts have recognized that the choice of federal vs. state law is an open question, but have failed to provide an answer. For instance, in *Nippon* the district court observed that "[w]hether a New York court would recognize a judgment in a case where New York law would not authorize personal jurisdiction but where the requirements of due process were satisfied remains to be seen."[176]

One argument that could be raised in opposition to applying federal law is that it results in more favorable standards for jurisdiction in international cases than in domestic cases. For instance, assume that a plaintiff brought an action in State X. The State X court refuses to hear the case because the case does not fit within the state's long-arm statute (though the assertion of jurisdiction would actually have been constitutionally permissible). In other words, the case operates in the "gap" between the state's long-arm statute and the fullest permissible reach of the Constitution. In such a case, the plaintiff would be out of luck in State X. However, if State X applied federal law to the recognition question, then a foreign judgment would be recognized where the foreign court asserted jurisdiction in that "gap" area. To some extent, the rule would privilege a foreign plaintiff vis-à-vis a domestic defendant, provided one assumes that recognition will be sought in a U.S. defendant's home state. That is, if a domestic plaintiff wanted to sue in certain circumstances in State X, the answer would be "no." However, if the domestic plaintiff was sued on that same basis in a foreign country, State X would recognize and enforce the ultimate judgment. The result is certainly possible. However, the theoretical possibility of a litigant being treated differently in these circumstances is not a sufficiently compelling reason to use state law in assessing whether a foreign

[175] Monks Own, Ltd. v. Monastery of Christ in the Desert, 168 P.3d 121, 127-28 (N.M. 2007) (citation omitted).

[176] Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1228 (E.D.N.Y. 1990).

court properly asserted jurisdiction. As discussed above, the law of judgment enforcement would be much more conceptually coherent and uniform if all states were to apply federal law to the personal jurisdiction question. Given the federal nature of the subject matter, and the potential for judgment recognition and enforcement to implicate matters of international relations, comity, and sovereignty, it is much more sensible to apply a unified and standardized body of law to the issue of personal jurisdiction.

IV. ADDITIONAL JURISDICTIONAL COMPLEXITY

There are two specific areas in the recognition inquiry—submission and notice—that warrant particular attention, both because of their prevalence in the jurisdictional discourse and because of their potential to confuse the analysis. In this Part, I will address each in turn.

A. *Submission*

American courts agree that submission is an acceptable basis for personal jurisdiction. If a defendant submits to the jurisdiction of a foreign court, a U.S. court will recognize that court's jurisdictional competence over him.[177] Submission is a form of implied consent where a defendant, by his actions, signals that he has consented to the jurisdiction of the court.[178] Broadly speaking, submission involves a defendant appearing in court and in some way arguing the merits of the case. Every forum has different rules on what actions constitute submitting to a court's jurisdiction.[179] In the United States, for

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[177] *See* Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704-05 (1982). The Court explained:

> [T]he requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual. The plaintiff's demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law—*i.e.*, certain factual showings will have legal consequences—but this is not the only way in which the personal jurisdiction of the court may arise. The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.

Id.; *see also* Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 729 (2d Cir. 1998) ("The requirement that a court have personal jurisdiction is a due process right that may be waived either explicitly or implicitly." (citation omitted)); S.C. Nat'l Bank v. Westpac Banking Corp., 678 F. Supp. 596, 599 (D.S.C. 1987) (finding that when a jurisdictional defense is implicitly waived, waiver can be through either an intentional or unintentional submission to a court's jurisdiction).

[178] 35A C.J.S. FEDERAL CIVIL PROCEDURE § 513 (2014) ("The court will obtain, through implied consent, personal jurisdiction over a defendant if the actions of the defendant during litigation amount to legal submission to the jurisdiction of the court, whether voluntary or not."); *see also Ins. Corp. of Ir.*, 456 U.S. at 703 ("[A]n individual may submit to the jurisdiction of the court by appearance.").

[179] *See* Chi. Life Ins. Co. v. Cherry, 244 U.S. 25, 29-30 (1917) ("But when the power of

instance, some states provide that a party may file a special appearance and argue preliminary or jurisdictional matters without being held to have submitted to the court's jurisdiction.[180] The theory behind submission as a basis of personal jurisdiction is that a defendant cannot participate in proceedings, an action that presupposes the court's legitimate exercise of authority, while simultaneously maintaining that the court has no authority over him.

Submission as a basis for jurisdiction is a universal and uncontroversial principle of private international law.[181] It is codified in Section 5 of the Uniform Act, which essentially provides that the foreign judgment will not be refused recognition for lack of personal jurisdiction if the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property or of contesting the jurisdiction of the court over him.[182] The Supreme Court in *Hilton*, the seminal case on foreign judgment enforcement, also referred to the "defendant's voluntary appearance" as basis for jurisdiction.[183]

Even though the principle is clear, U.S. courts sometimes struggle with its application when it comes to the recognition of foreign judgments. In particular, U.S. courts disagree on whether they are to decide the question of submission, or whether they are to defer to the foreign court on its own interpretation of whether the defendant submitted to the foreign court's jurisdiction. Although no court has overtly recognized it as such, this presents

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the court in all other respects is established, what acts of the defendant shall be deemed a submission to its power is a matter upon which States may differ.").

[180] *See, e.g.*, 735 ILL. COMP. STAT. 5/2-301 (2016); TEX. R. CIV. P. 120a.

[181] *Ins. Corp. of Ir.*, 456 U.S. at 703-05 (tracing the Court's long history recognizing submission as a well-settled basis for personal jurisdiction). Article 26 of the Brussels Regulation (recast), Council Regulation 1215/2012 On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 26, 2012 O.J. (L 12) (EC), reads:

> Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

Id.

[182] 2005 UNIFORM ACT, *supra* note 9, at § 4(b)(2); 1962 UNIFORM ACT, *supra* note 9, at § 4(a)(2); *see also* Hilton v. Guyot, 159 U.S. 113, 202-03 (1895). In *Hilton*, the Court explained:

> [A]fter due citation *or voluntary appearance of the defendant*, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, [when] there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . . .

Id. at 202-03 (emphasis added).

[183] *Hilton*, 159 U.S. at 202.

the same choice of law problem described above: Should U.S. courts gauge a defendant's submission by foreign or U.S. standards? If the former, should U.S. courts conduct the review de novo, or defer to a foreign court's determination that a defendant has submitted to the jurisdiction of the court?

A number of U.S. courts defer to the foreign court in its determination that the defendant's conduct constituted submission.[184] In other words, these courts apply the law of F1—or more accurately, defer to the foreign court's interpretation of the law of F1—in assessing whether a defendant submitted to the jurisdiction of a foreign court. For instance, in *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*,[185] the plaintiff sought to enforce in Pennsylvania a default judgment rendered by an English court in a breach of contract action.[186] The defendant originally entered a conditional appearance in England and filed a motion to set aside the writ of summons.[187] Several months later, the defendant notified the court that it elected not to proceed with the summons or to contest the jurisdiction of the English court; rather, it intended to obtain leave of the court to withdraw its appearance.[188] The master hearing the case granted the defendant's motions. On appeal, however, the court held that the appearance by the defendant, through its counsel, was unconditional and that the defendant had therefore submitted to the jurisdiction of the court.[189] The defendant thereafter decided to no longer participate in the English proceedings.[190] The English court ultimately proceeded to render a

[184] *See* Christina M. Manfredi, Note, *Waiving Goodbye to Personal Jurisdiction Defenses: Why United States Courts Should Maintain a Rebuttable Presumption of Preclusion and Waiver Within the Context of International Litigation*, 58 CATH. U. L. REV. 233, 242-43 (2008) (arguing that courts tend to adopt one of several approaches to the issue of submission/waiver in the judgment enforcement context). Manfredi writes:

> Some U.S. courts hold that subsequent litigation of a claim on the merits, after a defendant loses the personal jurisdiction argument, precludes the defendant from challenging recognition. Some courts go further, holding that subsequent litigation on the merits amounts to a waiver of defenses during the enforcement stage. By contrast, other courts hold that subsequent litigation on the merits of a claim does not preclude a defendant from challenging recognition. Although it is rare to hold that a defendant has not waived his jurisdictional challenge upon subsequent litigation, in holding that a defendant is not precluded from challenging recognition, these courts are implicitly permitting a defendant to raise a defense to enforcement that would otherwise be waived. These differing approaches create a lack of uniformity in the law, consequently causing unpredictability.

Id. (footnotes omitted).

[185] 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972). *Somportex* is probably the most cited case on the issue of waiver and submission in the context of foreign judgment enforcement.

[186] *Id.* at 437.

[187] *Id*.

[188] *Id.* at 438.

[189] *Id.*

[190] *Id.* at 438-39.

default judgment, which the plaintiff sought to have enforced in the United States.[191] A district court in Pennsylvania granted plaintiff's motion for summary judgment in the recognition and enforcement proceedings and the defendant, in turn, appealed.[192]

In the recognition and enforcement proceedings before the Third Circuit Court of Appeals, the defendant argued that the district court "failed to make an independent examination of the factual and legal basis of the jurisdiction of the English Court."[193] The Third Circuit disagreed, focusing on the fact that the defendant had ample opportunity to argue the issue of jurisdiction in the English court:

> Indeed, we do not believe it was necessary for the court below to reach the question of whether the factual complex of the contractual dispute permitted extraterritorial service under the English long-arm statute. In its opinion denying leave of defense counsel to withdraw, the Court of Appeal specifically gave Philadelphia the opportunity to have the factual issue tested before the courts; moreover, Philadelphia was allocated additional time to do just that. . . . Under these circumstances, we hold that defendant cannot choose its forum to test the factual basis of jurisdiction. It was given, and it waived, the opportunity of making the adequate presentation in the English Court. . . . Thus, we will not disturb the English Court's adjudication.[194]

The Third Circuit in *Somportex* appeared to be saying that the defendant must choose the forum in which he is to contest jurisdiction; he does not get to do it once in the original proceeding and then again in the recognition and enforcement proceeding. Accordingly, the U.S. court deferred to the English court's determination that the defendant had submitted to its jurisdiction via a conditional appearance.[195] Interestingly, the Third Circuit did not specifically test submission according to U.S. standards—i.e., by asking whether the defendant's conduct before the foreign court would be consistent with what U.S. courts consider submission.[196] This deference to a foreign court's

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[191] *Id.* at 439.

[192] *Id.* At the time, judgments in Pennsylvania were enforced as a matter of comity. *Id.* at 440-41 (citing *In re* Christoff's Estate, 192 A.2d 737, 739 (Pa. 1963)); *see also* Commonwealth *ex rel.* Thompson v. Yarnell, 169 A. 370, 373 (Pa. 1933) ("Foreign judgments are recognized and enforced in this country because of the comity due by one nation to another and to its courts and decrees." (citing Hilton v. Guyot, 159 U.S. 113 (1895))). In 1990, however, Pennsylvania adopted the 1962 Act. *See* 1990, Nov. 21, P.L. 559, No. 139 §§ 1-9 (codified at 42 PA. CONS. STAT. §§ 22001-22009 (2015)).

[193] *Somportex*, 453 F.2d at 441.

[194] *Id.* at 441-42.

[195] *Id.*

[196] *See id.* The court did, however, mention that:

> [A]ppellant attacks the English practice wherein a conditional appearance attacking jurisdiction may, by court decision, be converted into an unconditional one. It cannot

assessment of jurisdiction is in glaring contradiction to the common practice of U.S. courts re-examining the factual and legal basis for the foreign court's jurisdiction under U.S. standards.[197]

By contrast, *South Carolina National Bank v. Westpac Banking Corp.*[198] provides an example of a case where a U.S. court engaged in an appropriate analysis of the submission issue.[199] In that case, Westpac Banking Corp. ("Westpac") sought to enforce a money judgment rendered against South Carolina National Bank ("SCN") by an Australian court.[200] SCN argued that the Australian court did not have personal jurisdiction over it because Australia lacked sufficient minimum contacts under U.S. law to support the assertion of jurisdiction.[201] Westpac conceded the lack of minimum contacts, but argued that SCN voluntarily submitted to the jurisdiction of the Australian court and thereby waived its right to personal jurisdiction.[202] The court concluded that under South Carolina law, SCN had indeed waived its right to personal jurisdiction:

> Initially, SCN clearly asserted its jurisdictional right by contesting the trial court's jurisdiction. When that jurisdictional challenge was rejected, however, SCN took no further actions to assert its right, but, to all appearances, acquiesced in the court's decision. SCN's subsequent conduct was inconsistent with the continued assertion of its right to personal jurisdiction. SCN participated fully in the trial on the merits. It made no effort to pursue an interlocutory appeal, although it does not dispute that it could have sought leave to appeal the jurisdictional ruling. Nor did SCN reassert its jurisdictional objection at any time during the trial on the merits or during the two subsequent appeals. Instead SCN appeared to voluntarily submit to the Australian courts' jurisdiction throughout the litigation process.[203]

> effectively argue that this practice constitutes "some special ground . . . for impeaching the judgment," as to render the English judgment unwelcome in Pennsylvania under principles of international law and comity because it was obtained by procedures contrary or prejudicial to the host state. The English practice in this respect is identical to that set forth in both the Federal and Pennsylvania rules of civil procedure.

Id.

[197] *See also* Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., Ltd., 470 F. Supp. 610, 615 (1979) ("[B]y litigating and losing the issue of personal jurisdiction in Britain, FAS has no right to contest the jurisdiction of that court in a collateral action." (citations omitted)).

[198] 678 F. Supp. 596 (D.S.C. 1987).

[199] *Id.* at 599; *see also* Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215, 1218 (E.D.N.Y. 1990).

[200] *Westpac*, 678 F. Supp. at 597.

[201] *Id.* at 598.

[202] *Id.*

[203] *Id.* at 599 (footnote omitted).

Notably, the South Carolina court did not defer to the Australian court's determination that it had jurisdiction.[204] Instead, it looked at SCN's actions—specifically, participating fully in a trial on the merits—and determined that they were inconsistent "with the continued assertion of its right to personal jurisdiction" under South Carolina law.[205]

There is no reason why the analysis should be any different for submission than it is for any other basis for personal jurisdiction. U.S. courts should assure themselves that the conduct of the defendant before the foreign court would have sufficed to ground personal jurisdiction under American standards of jurisdiction. Obviously, foreign and domestic rules will differ; U.S. courts cannot wholesale transplant domestic concepts for assessing whether a defendant submitted to the jurisdiction of a foreign court. Fundamentally, a U.S. court must ask itself—irrespective of the particular mechanisms and procedures in the foreign court—whether the defendant in the foreign court did enough that we might rightly say that he appeared in the foreign court other than for the purpose of challenging personal jurisdiction. If so, then the foreign court should be regarded as possessing personal jurisdiction and, absent some other basis for nonrecognition, the judgment should be recognized in the United States. The commentary to New York's version of the Uniform Act is instructive in this respect, noting that "[i]f the judgment debtor did any more than she had to do . . . to preserve her jurisdictional objection in the foreign court, she would thereby have submitted voluntarily to its jurisdiction and forfeited the right to claim an exception for herself under this paragraph."[206] U.S. courts need not (and, in fact, should not) defer to a foreign court's interpretations of whether a defendant submitted under foreign law.[207]

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[204] If there even was one.

[205] *Id.* The court also indicated the defendant "waived its right to challenge the jurisdiction of the Australian courts." *Id.* at 598. This is where the *Westpac* court goes slightly astray. The defendant did not waive its right to challenge the jurisdiction of the Australian courts—indeed, the defendant did challenge the jurisdiction of the Australian courts in the U.S. enforcement proceedings. *Id.* at 597. However, under U.S. law, the actions of the defendant constituted submission to the Australian court's jurisdiction; accordingly, Australia had an appropriate basis for exercising jurisdiction. *Id.* at 599. In other words, the actions of the defendant in the Australian proceedings constituted a waiver of jurisdiction under American law, as assessed during the recognition proceeding. That is not the same thing as saying that the defendant "waived its right to challenge the jurisdiction of the Australian courts." *Id.* at 598. This statement implies that there is no opportunity in a U.S. recognition proceeding to challenge the basis for the Australian court's jurisdiction.

[206] N.Y. C.P.L.R. 5305 cmt. 1 (McKinney 2015).

[207] *See* CIBC Mellon Trust Co. v. Mora Hotel Corp., 792 N.E.2d 155, 161-62 (N.Y. 2003). The court in *CIBC Mellon Trust Co.* stated:

> Accordingly, the pertinent question here is whether defendants' applications to the High Court amounted to a voluntary appearance within the meaning of CPLR 5305(a)(2). . . . When defendants applied to the High Court to set aside the English judgments and to defend on the merits, they did more than they had to do to preserve a

B. *Notice*

In resisting recognition and enforcement of a foreign judgment, a defendant will often argue that the notice provided in the foreign litigation was deficient and thus, the foreign court lacked personal jurisdiction over him.[208] U.S. courts have been all over the map on what law governs the issue of whether notice in the original action was sufficient—foreign law, domestic law, the Hague Service Convention,[209] or some combination thereof.

The disagreement over what law to apply in assessing notice reveals deeper questions about how notice relates to personal jurisdiction, and how notice fits within the framework of the Uniform Act. It is black-letter law that in order for a U.S. court to have jurisdiction over a defendant, the court must have a proper basis for jurisdiction and the defendant must be provided with adequate notice of the suit.[210] Accordingly, there are actually two parts to personal jurisdiction as it is conceptualized in the United States: basis and notice.[211] The basis of jurisdiction refers to the grounds upon which a court assumes jurisdiction (e.g., minimum contacts, domicile, presence, place of incorporation, principal place of business), whereas notice refers to the process by which the defendant learns of the case being brought against him. Both are necessary in order for due

> jurisdictional objection . . . and so they voluntarily appeared in the foreign proceeding within the meaning of CPLR 5305(a)(2).

Id.

[208] *See, e.g.*, Syncrude Can. Ltd. v. Highland Consulting Grp., Inc., 916 F. Supp. 2d 620, 624-25 (D. Md. 2013) ("[T]he Maryland Defendants' main contention is that the default judgment issued against them by the Court of Queen's Bench of Alberta . . . is unenforceable under the Recognition Act because the Alberta Court lacked personal jurisdiction over them due to Syncrude's ineffective service of process.").

[209] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 [hereinafter Hague Service Convention]. The Hague Service Convention was ratified with three objectives in mind:

> First, the Hague Conference intended to create a simple and expeditious procedure for service of process in an effort to encourage international judicial cooperation. Second, the Convention attempts to prescribe means of service that would withstand attack in later suits to enforce a foreign judgment. Third, the Conference adopted provisions directed at avoiding default judgments. By satisfying these objectives, the Convention ensures adequate and timely notice.

Leonard A. Leo, *The Interplay Between Domestic Rules Permitting Service Abroad by Mail and the Hague Convention on Service: Proposing an Amendment to the Federal Rules of Civil Procedure*, 22 CORNELL INT'L L.J. 335, 340-41 (1989) (footnotes omitted).

[210] Providing adequate notice to the defendant via service of process is sometimes said to "perfect" jurisdiction. *See, e.g.*, Bos. Chicken, Inc. v. Mkt. Bar-B-Que, Inc., 922 F. Supp. 96, 98 (N.D. Ill. 1996) (referring to serving a defendant as "perfecting personal jurisdiction").

[211] DeJoria v. Maghreb Petroleum Expl., S.A., 804 F.3d 373, 386 (5th Cir. 2015) ("Personal jurisdiction consists of two components: service of process and amenability to jurisdiction."); *see also* LITTLE, *supra* note 10, at 6 ("[P]roper service of process is a necessary condition for the court to have jurisdiction over the case.").

process to be satisfied: there must be an adequate basis for personal jurisdiction, and notice (content, form, manner, etc.) must be adequate.[212]

Much of the confusion in the recognition case law stems from the Uniform Act's failure to adequately account for how "notice" fits into the jurisdictional inquiry.[213] Section 5 of the Uniform Act enumerates the acceptable grounds for jurisdiction and includes a residual basis for jurisdiction. But nowhere in Section 5—or anywhere else in the Uniform Act—does it say that notice is also required in order for a court to have jurisdiction. A plain reading of the Uniform Act would suggest that jurisdiction is proper simply when the case falls within one of the Section 5 bases for jurisdiction. The Uniform Act, in other words, does not explicitly provide that notice is a component of personal jurisdiction.

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[212] *See, e.g.*, Galliano, S.A. v. Stallion, Inc., 930 N.E.2d 756, 758 (N.Y. 2010). In *Galliano*, the court wrote:

> We agree with Stallion that if recognition of a foreign money judgment were sought in New York and the defendant had received no meaningful notice of the foreign proceeding, that lack of notice would serve as a legitimate basis for not enforcing the judgment in our state, as the entry of such a judgment would not comport with our conception of personal jurisdiction or our notion of fairness.

Id.

[213] *See* Naves v. Nat'l W. Life Ins. Co., No. 03-08-00525-CV, 2009 WL 2900755, at *1 (Tex. App. Sept. 10, 2009). In *Naves*, the Texas court focused exclusively on the propriety of service of process on the defendant, assessing the issue solely by reference to foreign (Brazilian) law. *Id.* at *2. The court ultimately came to the conclusion that service was not proper under Brazilian law. *Id.* at *5. The court then stated:

> Finally, Naves attempts to rely on section 36.006(b) of the Act, which provides that a Texas court may recognize "other bases" of personal jurisdiction. Naves argues that we should follow New York courts in relying on such statutory authority to hold that a state should "recognize a foreign judgment predicated on any jurisdictional basis it recognizes in its internal law." To the extent Naves is arguing that regardless of the proceedings before the district court this Court should recognize another basis for jurisdiction, we decline to do so. There is no Texas authority for the proposition that section 36.006(b) should be applied to recognize an independent basis for jurisdiction. Moreover, based on the translations in the record, Brazilian law already provides for methods by which Naves could have properly served National Western with process even if it had no branch, agency, or office opened or incorporated in Brazil.

Id. at *4 (citations omitted). This passage evidences confusion about the difference between notice and basis under the Uniform Act. Section 36.006(b) refers to the conceptual basis for jurisdiction, and permits for consideration of whether jurisdiction would have been proper under U.S. standards (i.e., minimum contacts). *See id.* at *4. The court appears not to have recognized the distinction between the two, implicitly suggesting that notice is the "be-all-and-end-all" of jurisdiction. Certainly, the court's conclusion that notice was ineffective under Brazilian law meant that, regardless of the basis of jurisdiction, the court would not have recognized the judgment. However, the court did not phrase its conclusion in this manner; instead it simply stated that "[t]here is no Texas authority for the proposition that section 36.006(b) should be applied to recognize an independent basis for jurisdiction." *Id.*

Further confusing the issue is the fact that there actually is a reference to notice in the Uniform Act, albeit not in Section 5. Rather, Section 4 provides that a court need not recognize a foreign judgment where "the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend."[214] This raises the question: Is Section 4 simply the counterpart to Section 5? Otherwise stated, does Section 5 cover the bases of jurisdiction and Section 4 cover notice, such that satisfying both provisions results in personal jurisdiction? The answer is "no." First, Section 4 is a discretionary ground for nonrecognition; a court "need not" recognize a foreign judgment in circumstances where the defendant did not receive notice in time to defend the action.[215] By contrast, the personal jurisdiction section is mandatory; a court "may not" recognize a foreign judgment in the absence of personal jurisdiction.[216] If Section 4 was intended to be a codification of the notice requirement for personal jurisdiction, then it would not (and could not) be phrased in discretionary terms. Second, the Section 4 notice provision focuses exclusively on the timing of notice—i.e., notice must be received so as to allow a defendant sufficient time to defend.[217] Notice, however, encompasses much more than timing. Manner of service and the content of the notice are equally important to the concept of notice.[218]

Could it be that the Uniform Act intended to dispense with the notion that notice is a component of personal jurisdiction? That is, did the drafters intend that "personal jurisdiction" under the Uniform Act would refer only to the bases of personal jurisdiction in Section 5, and that notice would be dealt with exclusively by way of Section 4? Probably not. The idea that personal

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[214] 2005 UNIFORM ACT, *supra* note 9, at § 4(c)(1); 1962 UNIFORM ACT, *supra* note 9, at § 4(c)(1).

[215] *See* 2005 UNIFORM ACT, *supra* note 9, at § 4(c) ("A court of this state need not recognize a foreign-country judgment if . . . the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable to defendant to defend.").

[216] 2005 UNIFORM ACT, *supra* note 9, at § 5; 1962 UNIFORM ACT, *supra* note 9, at § 5.

[217] 2005 UNIFORM ACT, *supra* note 9, at § 4(c).

[218] *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("[N]otice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance." (citations omitted)). *But see* Israel v. Flick Mortg. Inv'rs, Inc., 23 So. 3d 1196, 1198 (Fla. Dist. Ct. App. 2008). In *Flick* the court interpreted Florida's version of the Uniform Act as follows:

> As an initial matter, we note that an attack on the *manner* of service of process is not expressly set forth as one of the ten grounds for nonrecognition or nonenforceability that may be asserted under the Act. Rather, section 55.605(2)(a)—the only provision of the Act potentially authorizing an attack on a foreign money-judgment relating to insufficiency of service of process—focuses not on *how* the defendant received notice of the foreign lawsuit, but on whether the defendant received "notice of the proceedings in sufficient time to enable him or her to defend."

Id. (citation omitted).

jurisdiction necessarily presupposes adequate notice is so firmly entrenched in U.S. law that it would be unreasonable to read the Uniform Act in such a way.[219] Accordingly, courts must (and do) read an "adequate notice" requirement into the Uniform Act that goes beyond that addressed in Section 4 of the Act.[220] However, courts diverge on whose law governs the issue of adequate notice: domestic law, foreign law, international law, or some variation of the above.[221]

For many of the same reasons discussed above, courts should not use the law of F1 to assess whether the defendant received adequate notice.[222] To determine whether notice was adequate under the law of F1, a U.S. court would first need evidence of the law of F1. Accordingly, litigants would have to introduce evidence of, and potentially expert testimony on, the peculiarities of service of process in a foreign jurisdiction.[223] Then, the U.S. court would need to determine whether service was properly effected under those rules, bearing in mind the entire body of foreign law on the topic (including discretionary principles and doctrines that might excuse ineffective service). Such an exercise is time-consuming, burdensome, and inherently unreliable. However, leaving aside these practical issues, applying foreign law to the question of notice could allow recognition in circumstances that a U.S. court might find offensive. Consider the following example: Assume that the law of the state of Ruritania always allowed notice to be effected by printing an ad in

[219] *See generally* 58 AM. JUR. 2D *Notice* § 2 (explaining that notice is intertwined with fundamental fairness).

[220] *See, e.g.*, Baker & McKenzie Zurich v. Frisone, 18 N.Y.S.3d 577, at *8 (N.Y. Sup. Ct. 2015) ("'[A]lthough [a] want of fair notice and time to defend in the foreign forum is made a [discretionary] ground for refusing recognition' under New York law, it is a fundamental of due process and nonrecognition is mandatory rather than discretionary.'" (quoting Gondre v. Silberstein, 744 F. Supp. 429, 433-34 (E.D.N.Y. 1990))).

[221] Some U.S. courts even disagree on whether it is their role to assess the adequacy of notice. *See* Galliano, S.A. v. Stallion, Inc., 930 N.E.2d 756, 759 (N.Y. 2010) ("Stallion disputes that these service efforts complied with the Hague Convention because the papers written in French were not accompanied by an English translation. However, as long as we do not find the procedure used to be fundamentally unfair, the propriety of the service under the Hague Convention was an issue for the court in France."); *Flick*, 23 So. 3d at 1199 ("In Florida, failure to raise insufficiency of service of process as a ground for dismissal at the earliest opportunity constitutes a waiver of that defense. The same appears to be true in Israel. Thus, Flick's failure to raise this recognized defense in Israel constitutes a waiver of that defense and precludes collateral attack on the Israeli judgment here." (citations omitted)).

[222] *But see* DeJoria v. Maghreb Petrol. Expl., S.A., 804 F.3d 373, 387 (5th Cir. 2015) (applying Moroccan law to the question of service of process); Naves v. Nat'l W. Life Ins. Co., No. 03-08-00525-CV, 2009 WL 2900755, at *2 (Tex. App. Sept. 10, 2009) (applying Brazilian law to the question of service of process).

[223] *See, e.g.*, *Frisone*, 18 N.Y.S.3d, at *1 (discussing the plaintiff's expert testimony offered in the form of an affidavit that explained Swiss law).

a newspaper with the details of the lawsuit. If the plaintiff complied with Ruritanian notice law by having that ad printed and the U.S. court used the law of Ruritania to gauge whether notice was adequate, then the Ruritanian judgment would be enforceable in the United States.[224] Equally, if foreign notice standards were determinative of the issue of notice in U.S. enforcement proceedings, judgment debtors could escape liability on the basis of a technicality. If the judgment debtor received actual notice of the proceedings, he might still be able to argue that service was not compliant with foreign procedural law.[225] Ultimately, what should matter is not whether the plaintiff properly followed foreign law on service of process (an issue for a foreign court to decide), but whether the defendant against whom the judgment will operate can be said to have received adequate notice according to U.S. standards of due process.[226]

Some courts also look to the Hague Service Convention in determining whether the defendant received proper notice in the foreign proceedings. There are several issues with looking to the Hague Service Convention in this context. First, it is unlikely that the Hague Service Convention applies directly to the question of whether notice given in a foreign proceeding was proper for the purpose of assessing whether to recognize and enforce a foreign judgment. The Convention states in Article 1 that it "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or

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[224] *See id.* at *8 ("Indeed, where the defect in notice offends traditional due process standards, [t]he fact that the defendant was served in accordance with the foreign rules, or that the judgment is valid in the first state, will not necessarily save the judgment." (citations omitted)).

[225] *See, e.g.*, K & R Robinson Enters. Ltd. v. Asian Exp. Material Supply Co., 178 F.R.D. 332, 340-46 (D. Mass. 1998) (holding that a British Columbia judgment was not enforceable because service was not in accordance with British Columbia or Massachusetts law; this is despite the fact that one of the defendants entered an appearance in British Columbia to set aside service of process, indicating that the defendant had actual knowledge of the proceedings against it).

[226] *See DeJoria*, 804 F.3d at 387. The Fifth Circuit Court of Appeals explained that:

> Though DeJoria disputes whether service was technically proper, it is evident from the record that DeJoria had actual notice of the Moroccan lawsuit. Regardless, foreign courts are not required to adopt "every jot and tittle of American due process." Instead, only "the bare minimum requirements" of notice must be met. The Supreme Court has emphasized that a basic requirement of due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Thus, while due process requires only "reasonably calculated" notice, DeJoria had actual notice of the Moroccan lawsuit, which "more than satisfie[s]" his due process rights and meets the bare minimum requirements of notice sufficient to enforce a judgment.

Id. (citations omitted); *see also* Ma v. Cont'l Bank N.A., 905 F.2d 1073, 1076 (7th Cir. 1990) ("[N]ot all of the technical requirements of service are sufficient grounds for a collateral attack. Service is designed to produce knowledge.").

extrajudicial document for service abroad."[227] In the recognition context, there is not "occasion to transmit" a document for service abroad; rather, a court is simply deciding whether service was properly effected in a foreign proceeding as a component of the personal jurisdiction inquiry. At most, the Hague Service Convention can provide guidance on generally accepted international principles of notice, but it should not be used as the be-all-and-end-all of whether the defendant received adequate notice. Second, even if the Hague Service Convention did apply (directly or indirectly), there is also a host of other issues to consider: What sources can U.S. courts look to in interpreting the Convention? Is a court limited to considering only domestic sources in interpreting the Convention, or should a court also look to cases decided under foreign law (and, in particular, the law of the foreign country that rendered the judgment)? If service did not comply with the Convention, would recognition and enforcement of the judgment automatically be denied?[228] Third, there is the problem of what to do if the foreign country from which the judgment originates is not a signatory to the Hague Service Convention. What law would apply in that case? Would a U.S. court apply U.S. law to judgments emanating from nonsignatory countries, such that the standards for notice would vary depending on which country issued the foreign judgment?

Although many U.S. courts look to the Hague Service Convention to supply the standards to use in assessing notice, not all do. For instance, in *Galliano, S.A. v. Stallion, Inc.*[229] the judgment debtor disputed that service complied with the Hague Service Convention because the papers prepared in French were not accompanied by an English translation.[230] The *Galliano* court was of the view that "as long as . . . the procedure used [was not] fundamentally unfair, the propriety of the service under the Hague Convention was an issue for the court

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[227] Hague Service Convention, *supra* note 209, at 362.

[228] It is not clear that U.S. courts are even properly applying the Hague Service Convention. In *Daguerre, S.A.R.L. v. Rabizadeh* for instance, the court stated that:

> [T]he plaintiff failed to make a prima facie showing that the Superior Court of Paris had personal jurisdiction over the defendant. Pursuant to the Hague Convention, service in a signatory country may be made, inter alia, "by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory." In the United States, the methods prescribed for service under the Hague Convention are set forth in in Rule 4(e)(1) and (2) of the Federal Rules of Civil Procedure.

Daguerre, S.A.R.L. v. Rabizadeh, 978 N.Y.S.2d 80, 82 (N.Y. App. Div. 2013) (citations omitted). The *Daguerre* court then determined that Rule 4 was not satisfied and that the judgment would not be recognized. *Id.* The court seemed to suggest that only proper service under Rule 4 would comply with the Hague Service Convention. *Id.* However, the Convention provides that using a method prescribed by internal law, such as Rule 4, is only one of several methods of effecting service. *See* Hague Service Convention, *supra* note 209, at 364.

[229] 930 N.E.2d 756 (N.Y. 2010).

[230] *Id.* at 759.

in France."[231] The court saw its inquiry as "more circumscribed" in that it needed "only [to] determine at this stage whether the recognition requirements of [the New York Uniform Act] have been met."[232]

Syncrude Canada Ltd. v. The Highland Consulting Group, Inc.[233] illustrates the undue complexity that some U.S. courts introduce into the notice analysis.[234] *Syncrude* involved an action by a Canadian plaintiff to enforce an Alberta judgment for approximately $1.3 million in a Maryland federal court. The defendants, both Maryland corporations, claimed that the judgment was not enforceable in Maryland because Alberta lacked personal jurisdiction over them due to the plaintiff's ineffective service of process. The defendants argued that notice was insufficient under the Hague Service Convention, Alberta law, and U.S. law. Accordingly, the Maryland court, rather than actually deciding what body of law applied to the notice question, proceeded to analyze notice under all three.[235]

With respect to the Hague Service Convention, the court indicated that the provision at issue was Article 10(a), which states that "[p]rovided the State of destination does not object, the present Convention shall not interfere with—(a) the freedom to send judicial documents, by postal channels, directly to persons abroad . . . ."[236] The court noted that there was a split of authority in the U.S. courts over the meaning of the word "send" and whether this

[231] *Id.* The court explained:

> Significantly for our purposes in applying article 53 in this case, before it could properly issue a judgment against Stallion in Stallion's absence, article 15 of the Hague Convention required the Paris Commercial Court to consider whether service on Stallion was properly made or whether "the document was actually delivered to the defendant or to his residence by another method provided for by" the treaty (for example, service "voluntarily" accepted as contemplated by the second paragraph of article 5) (Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 UST 361, TIAS No. 6638 [1969]). Moreover, in whatever form service takes, article 15 further requires that it be "established"—again, before judgment may be entered in a foreign defendant's absence—that the service abroad was made "in sufficient time to enable the defendant to defend" itself in the proceeding (*id.* [notably, language that is identical to that used by our Legislature in CPLR 5304(b)(2)]). Given that the Paris Commercial Court entered a judgment in Galliano's favor in Stallion's absence, it would seem clear that it was "established" to that court's satisfaction that article 15's requirements were met.

Id.

[232] *Id.* The court proceeded to state, "[o]n this record, we are satisfied that Stallion had notice of the proceeding in France 'in sufficient time to enable [it] to defend' itself in that action, and the Paris Commercial Court's exercise of personal jurisdiction over Stallion under these circumstances was not unfair." *Id.* at 759 (citation omitted).

[233] 916 F. Supp. 2d 620 (D. Md. 2013).

[234] *Id.* at 624-28.

[235] Perhaps implicit in this analysis is that the court believed notice must be adequate under all three bodies of law.

[236] Hague Service Convention, *supra* note 209, at 363.

expression also included "service."[237] The court sided with the line of cases that interpreted the phrase expansively as applying to service of process. To bolster its conclusion, the court also pointed to guidance in a Handbook of the Permanent Bureau of the Hague Conference, and to an opinion issued by the Department of State.[238] Notably, however, the court never addressed whether the notice in *Syncrude* itself was properly served under the Convention. While the court seemed to accept the general proposition that process could be served by registered mail under the Convention, it never explained whether the service in question (on someone who was not a registered agent) was acceptable under the Convention.

After concluding that service by registered mail was proper under the Convention, the court indicated that it needed to determine whether service was proper under the law of Alberta. The court undertook this inquiry because it believed that the parties' choice of Alberta law as governing the underlying contract dispute also meant that the parties intended for Alberta law to govern service of process.[239] The court then cited Rule 11.26 of the Alberta Rules of Court, which prescribes three ways that a document may be served (in accordance with local Alberta rules, in accordance with the Hague Service Convention, or in accordance with the law of the jurisdiction in which the person to be served is located). The court seemed at one point to suggest that under Alberta law, since the plaintiff "necessarily had to transmit documents abroad to effect service," this "trigger[ed] application of the Hague Service Convention" as a matter of Alberta law.[240] However, the court did not engage in any actual analysis of the issue. It simply concluded its discussion of Alberta law with the statement that "[u]nder Alberta law[,] service of process on a corporation may be sent 'by recorded mail, addressed to the corporation, to the principal place of business or activity.' 'Service is effected . . . on the date of the acknowledgement of receipt is signed.'"[241] The court's analysis of Alberta law leaves much to be desired. First, its reason for looking to Alberta law in the first place is fallacious. The court looked to Alberta law because the parties had an Alberta choice of law clause in their underlying contract. Yet the parties themselves cannot choose the law under which the validity of service of process will be assessed. For instance, if the litigation took place in Alberta but the parties had agreed that English law would apply, a U.S. court would not look to English law to determine the sufficiency of notice. If Alberta law is

[237] *Syncrude*, 916 F. Supp. 2d at 625-26.

[238] *See id.* at 626.

[239] *See id.* at 626-27.

[240] *Id.* at 627. In other words, the Maryland Federal District Court did not look at internal Alberta rules for service of process, but rather looked to the Hague Service Convention because this appeared to be what the Alberta rules prescribed. *See id.* The Maryland court seemed to be engaging in a *renvoi*-type analysis, applying the Hague Service Convention because that is what it believed an Alberta court would have done. *See id.*

[241] *Id.* at 627 (citation omitted).

relevant (which I do not believe it is), then it is only relevant because it is the law of the forum that issued the foreign judgment. It is not relevant because it is the law chosen by the parties to govern their underlying contract dispute. Second, the court engaged in a very perfunctory examination of Alberta law, essentially citing two provisions (Rules 11.9 and 11.26) and then concluding its discussion. It did not actually attempt to determine whether service was proper under the Alberta Rules of Court.

Finally, the court looked to U.S. law to assess the sufficiency of notice in the foreign proceedings. It cited both federal[242] and state[243] law on the issue and concluded that the plaintiff did not technically comply with the rules. However, it proceeded to state:

> In this case, the Maryland Defendants make much of the fact that Syncrude's service of process was not addressed to a specific person at the corporations and that it was received by an "unauthorized" person under Maryland Rule 2–124(d), namely Corporate Comptroller Todd Bittner ("Mr. Bittner"). However, the record reflects that Mr. Bittner was one of the signatories to the Contract between the parties. He was also Syncrude's main point of contact to the Maryland Defendants throughout the business relationship. Because he acknowledged receipt of Syncrude's service of process, *the Maryland Defendants had actual notice of the pendency of an action against them in the Alberta Court. Moreover, nowhere in the pleadings have the Maryland Defendants denied having received actual notice*. Accordingly, service of process in the Canadian Litigation was proper and authorized under federal and state law.[244]

In short, although service was not proper under either federal or state law, due process was nonetheless satisfied because the defendant had actual notice of the proceedings.

Rather than engaging in a protracted discussion of notice under the Hague Service Convention, Alberta law, and U.S. law (federal and state), the court should have gotten to the heart of the matter: the foreign court had jurisdiction because the defendant in the action had *actual notice* of the proceedings under broad standards of American due process. This is the crux of the analysis, and any additional inquiry into notice under foreign law or the Hague Service Convention only has the potential to complicate and confuse the analysis.[245] Unfortunately, there are many cases like *Syncrude* where courts analyze whether notice complied with the intricacies of foreign procedural law or with

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[242] *See id.* (discussing Rule 4 of the Federal Rules of Civil Procedure).

[243] *See id.* (discussing Maryland Rule 2-124(d)).

[244] *Id.* at 627-28 (emphasis added) (citations omitted).

[245] Additionally, it requires the parties to now introduce evidence of foreign law and of Hague Service Convention law, which may in turn necessitate the hiring of experts. *See, e.g.*, Baker & McKenzie Zurich v. Frisone, 18 N.Y.S.3d 577, at *1 (N.Y. Sup. Ct. 2015).

the Hague Service Convention,[246] all while losing sight of the ultimate issue: Under U.S. law, did the defendant have sufficient knowledge of the suit such that he could have defended the action?[247]

There are, however, examples of U.S. cases that have adeptly dealt with the notice issue in the context of recognition proceedings. For instance, in the recent case of *Baker & McKenzie Zurich v. Frisone*, a state court in New York described what a U.S. court should consider in assessing the adequacy of notice in the foreign proceedings:

> "The ultimate question, therefore, is whether a reasonable method of notification [was] employed and reasonable opportunity to be heard [was] afforded to the person affected." Thus, "[w]hen the challenge to personal jurisdiction in the foreign country is based on improper service of process (or equivalent initiatory papers), the Court's inquiry fuses subsections (a)(2) and (b)(2) of CPLR § 5304: the proponent of the foreign judgment need not show that service of process was in strict compliance with the relevant foreign laws, but must instead establish meaningful notice' 'under the circumstances, reasonably calculated to afford defendant an opportunity "in sufficient time to enable [it] to defend", itself in that action.'" "The Court's inquiry centers on whether the procedure used [for service of process] [was not] fundamentally-unfair,' with the issue of propriety of service under the relevant law left to the discretion of the foreign forum issuing the judgment."[248]

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[246] *See, e.g.*, Bank of Montreal v. Kough, 612 F.2d 467, 470 n.4 (9th Cir. 1980); Gardner v. Letcher, No. 2:12-cv-00488-KJD-NJK, 2014 WL 3611587, at *1 (D. Nev. July 18, 2014); K & R Robinson Enters. Ltd. v. Asian Exp. Material Supply Co., 178 F.R.D. 332, 337-38 (D. Mass. 1998); Daguerre, S.A.R.L. v. Rabizadeh, 978 N.Y.S.2d 80, 81-82 (N.Y. App. Div. 2013).

[247] *See* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION §404 (AM. LAW INST., Tentative Draft No. 1, 2014). Comment c. to Section 404, covering discretionary grounds for nonrecognition, provides:

> A court may have a sufficient basis to exercise jurisdiction over a party, based on that party's contacts with the forum, but still fail to give adequate notice of the existence of the proceeding. In the United States, such notice normally comes in the form of service of process. Where a foreign court's failure to give adequate notice prejudices a party, as when that party does not receive enough time to prepare its defense, a U.S. court will refuse to recognize the resulting judgment. A U.S. court assesses the adequacy of the notice based on a general standard of reasonableness. The question does not turn on whether there existed technical or irrelevant noncompliance with the issuing forum's law on the serving of notice of a suit.

Id. § 404 cmt. c. However, the Fourth Restatement continues to conceive of notice as a discretionary ground for nonrecognition. *Id.* § 404 cmt. b.

[248] *Frisone*, 18 N.Y.S.3d, at *8 (quoting Gondre v. Silberstein, 744 F. Supp. 429, 434 (E.D.N.Y. 1990); then quoting Shipcraft v. Arms Corp. of the Phil., No. 150651/2012. 2013 WL 649415, at *4 (N.Y. Sup. Ct. Feb. 19, 2013)).

In *Landauer Ltd. v. Joe Manani Fish Co.*,[249] the New York Court of Appeals applied an equally common-sense view of notice.[250] In that case, the defendant argued that service was not properly effected in an English proceeding because the party on whom service was effected was not an appropriate corporate agent.[251] The court, rather than engaging with the subtleties of whether service was appropriate under a given set of rules, stated "it is apparent from the record that, through its counsel—who was engaged in ongoing negotiations with [plaintiff's] attorney in an effort to settle the dispute—[defendant] had ample notice of the English lawsuit before the default judgment was entered (counsel ultimately acknowledged that [defendant's] president also knew about the litigation)."[252] Thus, the court was focused on *actual* notice and did not allow the defendant to avoid an otherwise enforceable foreign judgment on the basis of what some might consider a technicality.[253] *Landauer* is a prime example of how U.S. courts should conduct the notice inquiry: by focusing on the fundamental question of whether the defendant received actual (and adequate) notice of the proceedings, rather than by focusing on technical requirements of foreign law or the Hague Service Convention.

V. AMENDING THE UNIFORM ACT

Ideally, states would amend their version of the Uniform Act to address the two particular gaps identified in this Article: (1) the lack of guidance on what law applies to the personal jurisdiction inquiry; and (2) the incoherence of the notice provision. Such an amendment need not be overly complicated. For instance, Subsection 4(b) of the 2005 Act[254] could be amended as follows:

> 4(b) A court of this state may not recognize a foreign-country judgment if:
>
> (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
>
> (2) the foreign court did not have personal jurisdiction over the defendant <u>under the laws of this country</u>; or
>
> (3) the foreign court did not have jurisdiction over the subject matter.

[249] 8 N.E.3d 839 (N.Y. 2014).

[250] *Id.* at 840-41.

[251] *See id.* at 840.

[252] *Id.* at 841.

[253] *See also* Israel v. Flick Mortg. Inv'rs, Inc., 23 So. 3d 1196, 1198 (Fla. Dist. Ct. App. 2008) ("Given that the record indisputably shows that Flick actually received notice of the Israeli action and that Flick was able to timely defend itself therein, its 'defense' to recognition in the lower court, centered as it is on the manner of notice, appears to be insufficient under the Act.").

[254] All the modifications proposed herein could similarly be applied to the 1962 Act.

This would make clear that U.S. courts are not to assess jurisdiction by reference to the laws of F1, or even a combination of the laws of F1 and F2. Rather, the law of F2 would apply to the question of whether the foreign court properly asserted jurisdiction over the defendant. Official comments to the Uniform Act could further clarify that the "laws of this country" do not refer to state-specific standards, but rather to general standards of federal due process. The comments could also explain that in assessing whether the foreign court had personal jurisdiction (both an adequate basis and adequate notice), U.S. courts must bear in mind that foreign courts will necessarily have different procedural rules and that American constructs cannot be transplanted wholesale into the international context.

The issue of how to amend the Uniform Act to better deal with the issue of notice is slightly more complicated. As discussed, nothing in the Uniform Act itself suggests that notice is a component of personal jurisdiction. Rather, the Uniform Act treats a lack of notice as a discretionary ground for nonrecognition. Moreover, the Uniform Act focuses solely on the timing of notice, stating that a foreign judgment need not be recognized where the defendant did not receive the notice in sufficient time to enable him to defend. The Act does not speak to the adequacy of notice more broadly (i.e., content, manner, and timing of notice). To address these issues, the 2005 Act could be amended, first, by eliminating reference to notice in Subsection 4(c) and renumbering the remaining provisions as follows:

> 4(c) A court of this state need not recognize a foreign-country judgment if:
>
> ~~(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;~~
>
> (1) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;
>
> (2) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;
>
> (3) the judgment conflicts with another final and conclusive judgment;
>
> (4) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;
>
> (5) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;
>
> (6) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
>
> (7) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

Next, Section 5 could be amended to explicitly state that adequate notice is a component of personal jurisdiction. This, in turn, would make a lack of adequate notice a mandatory ground for nonrecognition. For instance, Section 5 of the 2005 Act could be amended as follows:

> 5(a) A foreign-country judgment may not be refused recognition for lack of personal jurisdiction if the defendant received adequate notice of the proceeding and:
>
> (1) the defendant was served with process personally in the foreign country;
>
> (2) the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;
>
> (3) the defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
>
> (4) the defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;
>
> (5) the defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign country; or
>
> (6) the defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action] [claim for relief] arising out of that operation.
>
> (b) The list of bases for personal jurisdiction in subsection (a) is not exclusive. The courts of this state may recognize bases of personal jurisdiction other than those listed in subsection (a) as sufficient to support a foreign-country judgment.

This proposed rewording of Section 5 conveys that there is both a notice component to personal jurisdiction, as well as a basis component. Moreover, the proposal eschews the prior formulation of the notice provision—"the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend"[255]—in favor of an "adequate notice" standard. The expression "adequate notice" is broad enough to encompass issues related to the content of notice, the manner of notice, and the timing of notice.

[255] 2005 UNIFORM ACT, *supra* note 9, at § 5.

CONCLUSION

The question of whether a foreign court had personal jurisdiction over the defendant is a central one in the judgment recognition and enforcement inquiry. Unfortunately, courts in the United States are not all on the same page when it comes to whose law should govern the question of personal jurisdiction: foreign law, U.S. law, or some combination of both. The more reasoned and workable approach is to assess whether a foreign court had personal jurisdiction under American standards of jurisdiction. By "American" standards, courts should refrain from using state-specific personal jurisdiction law, but rather should turn to broad principles of due process. By analyzing whether the judgment court had personal jurisdiction strictly under U.S. law, American courts can avoid difficult questions of foreign law and the potential affront to international comity that can result when a U.S. court second-guesses a foreign court's assessment of its own jurisdiction.

Two aspects of the personal jurisdiction inquiry—submission and notice—have caused particular concern for U.S. courts. With respect to submission, U.S. courts often defer to a foreign court's interpretation of whether a defendant submitted to the jurisdiction of the foreign court. I have argued that submission should not be treated different than any other basis for jurisdiction. That is, submission should be assessed according to broad U.S. standards, bearing in mind that foreign processes will necessarily differ. U.S. courts should find that a foreign court had personal jurisdiction over the defendant when the defendant did more than simply preserve a jurisdictional objection in the foreign court.

The issue of notice has also been problematic for U.S. courts analyzing whether a foreign country properly asserted jurisdiction over a defendant. The confusion is the product of two things: first, the lack of clarity on whose law applies to the question of notice, and second, the inadequate treatment of notice in the Uniform Act. On this latter point, the Uniform Act does not make it clear that notice is actually a component of the personal jurisdiction analysis; instead, the Uniform Act seems to suggest that notice is a discretionary basis for nonrecognition, and is relevant only to the extent that the defendant does not receive notice in time to enable him to defend. On the former point, courts are unclear on whether notice should be assessed using foreign law, domestic law, or the Hague Service Convention. I maintain that notice should be assessed by broad U.S. standards, such that fundamentally the question that a recognizing forum should ask is whether the defendant in the foreign proceedings received "adequate" notice.

Recent trends indicate that an increasing number of judgments will be brought to the U.S. for recognition and enforcement—and many (if not most) of these will involve challenges to the rendering court's jurisdiction. In a number of these cases, large sums of money are at stake.[256] Consequently, it is

[256] *See, e.g.*, Chevron Corp. v. Naranjo, 667 F.3d 232, 236 (2d Cir. 2012) (concerning a

important that litigants and judges alike understand and appreciate the baseline principles that should guide the judgment recognition analysis. Applying the law of the enforcing state (i.e., U.S. federal law) to the question of personal jurisdiction represents the most sensible solution to the choice of law problem in the recognition of foreign judgments, and the one least likely to violate international comity.

\$17.2 billion judgment, later reduced to \$9 billion); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1408, 1413 (9th Cir. 1995) (denying enforcement of \$32 million judgment); Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1352 (S.D. Fla. 2009) (denying enforcement of \$97 million judgment); Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2005 WL 6184247, at *1 (C.D. Cal. 2005) (denying enforcement of \$489.4 million judgment).