

NOTES

THE VALUE OF A NEW JUDGMENTS CONVENTION FOR U.S. LITIGANTS

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A new Judgments Convention creates common, binding rules for the recognition and enforcement of foreign judgments among countries that are party to the Convention. This Note considers what such a Convention would have to offer U.S. litigants. It starts by examining a common scholarly view—that U.S. judgments are unreasonably difficult to enforce abroad, in comparison to the relative ease of recognizing and enforcing foreign judgments in the United States. It argues that this view is out of date, due to improvements in three areas that have traditionally prevented the recognition of U.S. judgments—jurisdiction, public policy concerns about punitive damages, and reciprocity. It then considers the Convention in light of the knowledge that U.S. judgments have become easier to enforce abroad and argues that the Convention would still offer important benefits to U.S. litigants, both by making the rules for recognition and enforcement more predictable and transparent, and by “locking in” existing improvements in foreign law. It concludes by arguing that U.S. litigants would benefit if the United States joined the Convention.

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INTRODUCTION

In 1985, a terrible accident occurred on a quiet Alabama road. Fifteen-year-old Kurt Parrott was thrown from his motorcycle and hit his head on the pavement. The defective buckle on his helmet broke, and he died instantly. His mother, who bought him the helmet, sued the manufacturer of the buckle in state court and won a one million dollar judgment.¹

In 2012, another accident occurred, this time at a Philadelphia minor league baseball game. The culprit was a defective firework, which was meant to celebrate the end of the game. Instead, it exploded prematurely. According to the complaint of the later-filed case, the firework blew Herbert Truhe thirty feet into the air, destroying most of his right hand and shooting shrapnel into his body. Joseph Mascaro, who was standing next to the firework, lost his foot to shrapnel and suffered a traumatic brain injury.² Both men and their families sued in state court. Truhe was awarded \$4.6 million, and Mascaro received \$10.4 million.³

What do these two seemingly unrelated accidents have to do with each other? In both cases, the defendants were foreign companies that lacked assets in the United States. And when the plaintiffs tried to enforce their U.S. judgments overseas, foreign courts denied recognition. In *Parrott*, the company that manufactured Parrott's helmet buckle was Italian.⁴ When Parrott's mother sought to have her judgment enforced against the company in Italy, the Italian Supreme Court refused to recognize the Alabama judgment because it included

¹ The facts in this example were taken from *Parrott v. Fimez S.p.A.*, Cass., sez. tre, 19 gennaio 2007, n. 1183, Foro it. I 2007, I, 1460 (It.), translated in Francesco Quarta, *Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto*, 31 HASTINGS INT'L & COMP. L. REV. 753, 780–82 (2008). For further discussion of this case, see *infra* notes 99–103 and accompanying text.

² The facts in this example were taken from Complaint at 2–6, *Truhe v. Jianxi* [sic] Province Lidu Fireworks Co., No. 120701333 (Pa. Cty. Ct. C.P. Law Div. July 10, 2012), 2012 WL 2795983. For further discussion of this case, see *infra* note 152 and accompanying text.

³ See Qisheng He, *Chronology of Practice: Chinese Practice in Private International Law in 2017*, 17 CHINESE J. INT'L L. 1101, 1143 (2018) (discussing the awards and the Chinese judgment from 2017 denying recognition to the awards).

⁴ Quarta, *supra* note 1, at 755.

punitive damages.⁵ In *Truhe*, the firework was manufactured by a Chinese company.⁶ When *Truhe* brought his U.S. judgment to a court in China, the Chinese court refused to recognize the judgment because it said that there was no proof that an American court would recognize a Chinese judgment under similar circumstances.⁷

As these examples show, obtaining a favorable U.S. judgment does not guarantee that a plaintiff will be able to collect compensation from a foreign defendant. Worse, the plaintiff may be unable to predict whether or not their judgment will be enforceable in a foreign country before entering into litigation. Each country sets its own rules for the recognition and enforcement of foreign court judgments. These rules depend on many individual factors, which may change over time and be difficult to research in advance. U.S. plaintiffs may go through the expense and difficulty of litigation before realizing they have won a judgment that is unenforceable in the only country where the defendant holds assets. Although it is difficult to assess the scope of the problem of non-recognition, a survey by the American Bar Association found that litigants seeking to get U.S. judgments recognized abroad face “a myriad of substantive, procedural, and practical hurdles.”⁸

The uncertainty of getting judgments recognized and enforced abroad stands in sharp contrast to arbitral awards, which are generally enforceable in any of the 160 countries that have signed on to the New York Convention, an international agreement guaranteeing the mutual recognition and enforcement of arbitral awards.⁹ This ease of enforcement is a major reason that arbitration has gained such popularity in international business agreements.¹⁰ But for small businesses, who rarely do business overseas and may not think to put an arbitration clause in their contract, or for tort plaintiffs like those in *Parrott* and *Truhe*, who cannot use arbitration and often lack the assets or expertise necessary to sue overseas, the enforceability of their U.S. judgment abroad is a significant obstacle.

⁵ *Id.* at 753.

⁶ Complaint at 1, 9, *Truhe*, No. 120701333.

⁷ See He, *supra* note 3, at 1144.

⁸ Comm. on Foreign & Comparative Law, *Survey on Foreign Recognition of U.S. Money Judgments*, 56 REC. ASS'N B. CITY N.Y. 378, 410 (2001).

⁹ See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]; Status of Treaty: New York Convention, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=_en (last updated July 21, 2019).

¹⁰ See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS 21 (2d ed. 2001).

A new Convention on the recognition and enforcement of foreign judgments seeks to provide the same certainty for court judgments that the New York Convention has provided for the recognition of arbitral awards. The Judgments Convention, which was finalized in July 2019 after several years of negotiations, attempts to set predictable, enforceable rules for the recognition and enforcement of court judgments in civil and commercial cases among member countries.¹¹ The United States participated in negotiations on the new Convention but has not yet given a clear indication of whether it intends to join the Convention.¹² This Note considers the value of the Convention for U.S. litigants and makes two major contributions.

First, it identifies a common view in the literature—that U.S. judgments are unreasonably hard to enforce abroad in comparison to the relative ease of enforcing foreign judgments in the United States—and explains why this view may be outdated. Although there are still obstacles to recognition in some countries, as the recent *Truhe* case shows, this Note argues that the situation has improved since Parrott’s mother was denied compensation over a decade ago. There are three common reasons for non-recognition of U.S. judgments recognized in the literature: jurisdiction, public policy concerns about punitive damages, and reciprocity. Because of changes in the past several years in the laws of the United States and of other countries in each of these areas, they are less likely now to be reasons for non-recognition, leading to somewhat greater recognition and enforcement of U.S. judgments.

The second contribution of this Note is to assess the value of the new Judgments Convention for U.S. litigants. It argues that even though U.S. judgments are now more likely to be recognized abroad in some countries, the new Convention would still offer important gains. First, although recognition is more likely today, it is still true that not all U.S. judgments will be recognized abroad, and the Convention would expand the pool of judgments that would be recognized. The Convention would also make it clear from the start of a proceeding whether the judgment is likely to be recognized abroad, allowing litigants to better plan their litigation strategy. Finally, the

¹¹ See Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, *opened for signature* July 2, 2019 [hereinafter Judgments Convention] (not yet in force), <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf>; *Overview of the Judgments Project*, HAGUE CONF. ON PRIV. INT’L L., <https://assets.hcch.net/docs/905df382-c6e0-427b-a5e9-b8cfc471b575.pdf> (last visited July 8, 2019) (describing the goals of the Judgments Convention).

¹² See *infra* note 166 and accompanying text.

Convention would “lock in” existing improvements in the recognition of U.S. judgments by requiring member countries to recognize judgments that fall under the Convention even if those countries later change their domestic recognition law in a way that would make recognition more difficult. The Note concludes that the United States should join the new Judgments Convention, despite the improved situation for recognition of U.S. judgments, because it will make international judgments recognition more frequent, more predictable, and more efficient for U.S. litigants.

This Note proceeds in three parts. Part I offers a brief primer on the law of recognition and enforcement in the United States and compares U.S. law to the approaches of foreign countries.¹³ It describes the long-held scholarly view that it is difficult for U.S. litigants to get their judgments recognized abroad. Part II examines this common view, arguing that it is outdated and that it has now become somewhat easier to get U.S. judgments recognized and enforced abroad. This Part focuses on the three most common reasons for non-recognition of U.S. judgments and shows that recent changes in U.S. and foreign law in each of these areas have made it easier to get U.S. judgments recognized abroad. Finally, Part III shows that, although it is now easier to get U.S. judgments recognized abroad, the Convention could still offer important gains to U.S. litigants, by making recognition more predictable.

I

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD

This Part offers a brief primer on the law of recognition and enforcement in the United States and abroad.¹⁴ It emphasizes that in

¹³ It is impossible for this Note to survey the law in all countries. Therefore, the focus throughout the Note is on countries that are major trade partners of the United States, on the assumption that these are the countries where U.S. litigants are most likely to need to enforce U.S. judgments. Specifically, the Note focuses on law in China, Japan, South Korea, Australia, Mexico, Canada, and European Union countries. *See Top Trading Partners: May 2019*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/statistics/highlights/top/top1905yr.html> (last visited July 21, 2019) (listing top U.S. trade partners).

¹⁴ A brief note about terminology: Recognition and enforcement, though often analyzed together, are two distinct concepts. Recognition of a foreign judgment means that the judgment will have preclusive effect as though it were a judgment of the recognizing court. Enforcement speaks to the power of the enforcing court to compel the defendant to satisfy a money judgment. In many countries, recognition of a foreign judgment is required before there can be enforcement, but there may be recognition without enforcement, meaning that the judgment would have preclusive effect, but the court may choose not to compel the defendant to pay the judgment using assets in the country. *See* PETER HAY, *ADVANCED INTRODUCTION TO PRIVATE INTERNATIONAL LAW AND PROCEDURE* 5.6, 5.7

the United States, in both federal and state law, there is a presumption in favor of recognition and enforcement of foreign judgments. Next, this part compares U.S. federal and state law to statutory and common law abroad. It notes that although there are many commonalities in the tests that countries apply to recognition and enforcement, there has long been a perception that it is harder to get U.S. judgments recognized abroad than it is for foreign judgments to be recognized in the United States.

A. *Historical Developments in the United States*

The modern U.S. approach to recognition and enforcement is based on an 1895 Supreme Court case, *Hilton v. Guyot*, in which the Court began to establish a liberal regime of recognition.¹⁵ At issue was whether the United States would recognize a French judgment in favor of a French citizen against two U.S. citizens doing business in France.¹⁶ The Court's decision relied on the concept of international comity to establish a federal common law rule for the recognition and enforcement of foreign judgments in the United States: There is a presumption that judgments that are final and conclusive in the country in which they are rendered will be recognized, unless there are specific grounds for non-recognition.¹⁷ In this case, the Court ultimately declined to recognize the judgment based on reciprocity; it found that France would not recognize a U.S. judgment under the same circumstances.¹⁸ However, this element of the decision was not applied in future cases, whereas the comity principle announced in the decision continues to serve as the basis of federal and state law on recognition and enforcement.¹⁹

Shortly after *Hilton*, state courts deciding the issue of recognition found that *Hilton* was not binding on them because recognition

(2018) (ebook) (describing recognition and enforcement). Where this Note uses "recognition," it refers to both recognition and enforcement.

¹⁵ *Hilton v. Guyot*, 159 U.S. 113 (1895); see Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 COLUM. J. TRANSNAT'L. L. 277, 282 (2017) (describing the legacy of *Hilton* as a U.S. regime that is "very receptive" to recognizing foreign judgments).

¹⁶ *Hilton*, 159 U.S. at 114.

¹⁷ *Id.* at 202–03. International comity is a slippery concept, applied differently in different areas of legal analysis. In a classic and frequently-quoted formulation, the *Hilton* Court found that "'[c]omity' . . . is neither a matter of absolute obligation . . . nor of mere courtesy and good will 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" *Id.* at 163–64.

¹⁸ *Id.* at 228.

¹⁹ See Brand, *supra* note 15, at 285 (noting that state courts rejected *Hilton*'s reciprocity requirement while retaining the presumption of recognition based on comity).

was a matter of state law.²⁰ *Johnston v. Compagnie Générale Transatlantique* is an early example of this approach.²¹ There, the New York Court of Appeals rejected the idea that *Hilton* explicitly governed recognition by state courts and found instead that recognition and enforcement was a matter of state law.²² However, *Johnston* still applied the same presumption of recognition based on comity emphasized in *Hilton*.²³ When *Erie Railroad Co. v. Tompkins* was decided shortly after *Johnston*, the federal common law approach used in *Hilton* atrophied, and the law on recognition and enforcement developed mainly as state common, and later statutory, law.²⁴ However, both state common and statutory law continued to reflect the presumption in favor of recognition, based on comity, that *Hilton* set forth.²⁵

B. Contemporary U.S. Law on Recognition and Enforcement

Today, recognition and enforcement of a foreign judgment is governed in most states by state statute.²⁶ In 1962, the Uniform Law Commission (ULC) first developed a model statute, the Uniform Foreign Money-Judgments Recognition Act (UFMJRA), which sought to codify state common law on the recognition and enforcement of foreign money judgments.²⁷ The Act covers “any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.”²⁸ Like the common law

²⁰ See *id.* at 286.

²¹ 152 N.E. 121 (N.Y. 1926) (recognizing a French judgment and holding that the New York courts are not bound by the outcome in *Hilton*).

²² See *id.* at 123 (describing the issue as one of private rights under state law, not an issue of international relations under federal law).

²³ See *id.* (finding that although “this court is not bound to follow [*Hilton*],” comity should still form the basis of the decision of whether to recognize a foreign judgment).

²⁴ See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that federal courts sitting in diversity must apply the common law of the state in which they sit); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (AM. LAW INST. 1988) (describing a “consensus” among state and federal courts that, apart from federal question cases where federal common law would apply, recognition is now governed by state law).

²⁵ See Brand, *supra* note 15, at 286–87 (explaining that even after *Erie*, the comity analysis in *Hilton* continued to form the basis of U.S. law on recognition and enforcement).

²⁶ See *id.* at 295 (noting that thirty-four states have enacted at least one of the Recognition Acts).

²⁷ UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM’N 1962).

²⁸ *Id.* § 1(2). Under the revenue rule, countries generally decline to enforce the tax judgments of foreign countries on grounds of international comity. Countries also generally do not enforce punitive judgments of other countries (e.g., fines). Family law matters are excepted because they are covered by a series of international treaties. Although the UFMJRA deals only with judgments awarding a sum of money, it does not forbid recognition of non-money judgments, and courts routinely recognize such

that came before it, the Act is based on a presumption of recognition if judgments are “final and conclusive and enforceable where rendered” and do not meet one of the “Grounds for Non-Recognition” set out in section 4.²⁹ Section 4(a) lists three mandatory grounds for non-recognition: 1) if the judgment was rendered under a system that does not provide basic due process protections, 2) if the foreign court did not have personal jurisdiction over the defendant, or 3) if the foreign court did not have subject matter jurisdiction.³⁰ In addition, Section 4(b) lists optional grounds for non-recognition and enforcement, including defective notice; fraud; conflict with another final and conclusive judgment; violation of a choice of forum agreement; if personal jurisdiction was based only on service and the trial court was seriously inconvenient to the defendant; and if the judgment violates the public policy of the recognizing state.³¹

In 2005, the ULC released a revised Act, the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA), which is in the same vein as the original Act but seeks to correct interpretive problems that arose after the 1962 Act was adopted by states.³² More than thirty states have enacted the 1962 or 2005 Act.³³ Some states have made modifications to the Acts, reflecting different approaches to the issue of recognition and enforcement.³⁴

judgments as a matter of comity. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 reporters’ note 4 (AM. LAW INST. 2018) (describing this distinction).

²⁹ UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT §§ 2, 4.

³⁰ *Id.* § 4(a).

³¹ *Id.* § 4(b).

³² See UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT prefatory note (UNIF. LAW COMM’N 2005) (explaining that the new Act was drafted because of interpretive problems that had arisen since the old Act was drafted in 1962); see also *The Uniform Foreign-Country Money Judgments Recognition Act: A Summary*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=E34db215-4834-ad24-7b1b-52d1f9c730c6&forceDialog=0> (last visited July 9, 2019). For example, the 2005 Act clarifies the burden of proof at various stages of the litigation and adds a statute of limitations. *Id.*

³³ See *Foreign Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=9c11b007-83b2-4bf2-a08e-74f642c840bc> (last visited July 22, 2019) (showing which states have adopted the 1962 Act); *Foreign-Country Money Judgments Recognition Act*, UNIFORM L. COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=AE280c30-094a-4d8f-b722-8dcd614a8f3e> (last visited July 22, 2019) (showing which states have adopted the 2005 Act).

³⁴ For example, Florida, Idaho, Maine, North Carolina, Ohio, and Texas have added reciprocity as a discretionary ground for non-recognition, and Georgia and Massachusetts have reciprocity as a mandatory ground. RONALD A. BRAND, FED. JUDICIAL CTR., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 11 (2012), <https://www.fjc.gov/sites/default/files/2012/BrandEnforce.pdf>.

In states that have not enacted either Act, recognition and enforcement of foreign judgments is governed by common law.³⁵ Under the Restatement (Third) of Foreign Relations Law, a “final judgment of a court of a foreign state” is “entitled” to recognition and enforcement.³⁶ However, a U.S. court must not recognize a judgment that was rendered without an impartial tribunal, due process, or personal jurisdiction over the defendant.³⁷ It may not recognize a judgment that was rendered without subject matter jurisdiction or notice, if it was obtained by fraud or violates the public policy of the United States, or if it conflicts with another judgment entitled to recognition or violates a dispute settlement agreement.³⁸

Finally, in 2006, the American Law Institute (ALI) released a proposed federal statute on the recognition and enforcement of foreign judgments.³⁹ The project was begun in anticipation of a successful treaty on the recognition and enforcement of foreign judgments, which would require federal implementing legislation.⁴⁰ Though the treaty negotiations ultimately floundered, and no federal law has been adopted, the ALI proposed statute has contributed significantly to the debate on recognition of foreign judgments in the United States, and many commentators believe a federal law is still necessary.⁴¹

In sum, although recognition and enforcement in the United States now is a matter of state law and differs from state to state, the presumption in favor of recognition first established in *Hilton* still holds.⁴² Additionally, the states share some common bases for non-recognition. As the next Section will demonstrate, the presumption in favor of recognition may set the United States apart from other countries. There is a perception that other countries have often established greater barriers to recognition and enforcement of foreign judgments, either through statutory law or in practice.

³⁵ Brand, *supra* note 15, at 288, 295.

³⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1) (AM. LAW INST. 1987).

³⁷ *Id.* § 482(1).

³⁸ *Id.* § 482(2). The Restatement (Fourth) of Foreign Relations Law largely tracks this approach, although there have been minor adjustments; for example, lack of subject matter jurisdiction in the rendering court is now a mandatory ground for non-recognition, and lack of reciprocity is now a discretionary ground for non-recognition. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 483(b), 484(i) (AM. LAW INST. 2018).

³⁹ RECOGNITION AND ENF'T OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE (AM. LAW INST. 2006).

⁴⁰ *Id.* at xiii.

⁴¹ See Brand, *supra* note 15, at 277 (describing the “opportunities for forum shopping and litigation strategies that result in both inequity of result and inefficiency of judicial process” that stem from the current state law regime).

⁴² See *id.* at 286–87.

C. Foreign Law on Recognition and Enforcement

This Section examines the law of major U.S. trade partners on the recognition and enforcement of foreign judgments.⁴³ The main considerations taken into account by these countries when deciding whether to recognize a foreign judgment are similar to those that feature in U.S. law, although the outcomes may differ.⁴⁴ For example, all of these countries require that the judgment be final and conclusive in the court in which it was rendered.⁴⁵ Similarly, most of these countries will look at whether the defendant has been granted basic due process in the foreign proceedings.⁴⁶ All of these countries also consider whether the rendering court had jurisdiction, although the requirements for jurisdiction vary.⁴⁷ Most of these countries also consider whether the judgment would violate the public policy of the country,

⁴³ See *supra* note 13.

⁴⁴ See Linda J. Silberman, *Some Judgements on Judgments: A View from America*, 19 KING'S L.J. 235, 238 (2008) (“[O]ne finds a basic similarity of frameworks adopted in various countries even though the particular solutions turn out to be different.”). *But see* GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 1084 (5th ed. 2011) (“There is no uniform practice among foreign states regarding the recognition of foreign judgments.”).

⁴⁵ See ASIAN BUS. LAW INST., *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN ASIA* 4 (Adeline Chong ed., 2017) (noting that all of the Asian countries surveyed have a finality requirement); HAY, *supra* note 14, at 5.2.1 (“For reasons of judicial economy, most legal systems traditionally required that the foreign decree be *final* before a request for local recognition and enforcement would be entertained.”); Silberman, *supra* note 44, at 239 (noting that recognition “is generally thought to be limited to final money judgments”).

⁴⁶ See ASIAN BUS. LAW INST., *supra* note 45, at 15 (noting that “a denial of procedural fairness” is a reason for non-recognition under Australian common law); *id.* at 56 (noting that a judgment must not be “in breach of due process” to be recognized under Chinese law); *id.* at 112 (noting that a foreign judgment will be denied recognition under Japanese law if it violates public policy, which includes an element of procedural fairness); *id.* at 199 (noting that a judgment will be denied recognition under South Korean law if it violates the procedural public policy of Korea, which includes an element of due process); Matthew H. Adler, *Enforcement in a New Age: Judgments in the United States and Mexico*, 5 U.S.-MEX. L.J. 149, 151–52 (1997) (noting that Mexico requires the defendant to be “personally served notice of the proceeding . . . [and] have a fair opportunity to defend”); Silberman, *supra* note 44, at 241–42 (describing the approach to due process in England, Canada, and Germany).

⁴⁷ See ASIAN BUS. LAW INST., *supra* note 45, at 4 (noting that all of the Asian countries surveyed, including civil law countries and common law countries, consider jurisdiction of the rendering court in deciding whether to recognize a judgment); Adler, *supra* note 46, at 151 (noting that jurisdiction is required by Mexican courts); Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 191 (2008) (describing the general judgments recognition requirements for European countries, including jurisdiction); Frank Walwyn & Kayla Theeuwen, WeirFoulds LLP, *Enforcement of Judgments and Arbitral Awards in Canada: Overview*, THOMSON REUTERS PRACTICAL LAW (Apr. 1, 2018), <https://1.next.westlaw.com/Document/I202727df6e6f11e598dc8b09b4f043e0/View/FullText.html> (noting that Canadian courts are required to consider whether the rendering court had jurisdiction).

although, again, what type of judgment violates public policy will vary by country.⁴⁸ Finally, some of these countries also have a reciprocity requirement.⁴⁹

Although the general considerations for recognition and enforcement are similar in the United States and most of its major trade partners, there are several key differences. First, some countries have enacted bilateral or multilateral agreements guaranteeing mutual recognition and enforcement of foreign judgments as long as certain criteria are met.⁵⁰ For countries involved in the agreement, common treaty rules apply, but when there is no international agreement, courts in those countries apply domestic statutory or common law, which may be less permissive of recognition and enforcement.⁵¹ Because the United States has never joined an international treaty on recognition and enforcement, U.S. litigants are unable to take advantage of treaty regimes, and U.S. judgments are subject to the country's domestic law on recognition and enforcement.⁵²

Second, irrespective of the specific domestic law applied, many scholars have taken the view that foreign countries are often unwilling to enforce U.S. judgments. As one author put it in 2008, “[f]or quite some time, the perception in the United States has been that U.S. judgments do not fare very well when the time comes to recognize or enforce them abroad.”⁵³ Another described U.S. judgments as “sub-

⁴⁸ See ASIAN BUS. LAW INST., *supra* note 45, at 16 (noting that a judgment will be denied recognition in Australia if it violates public policy); *id.* at 51, 55 (noting that a judgment will be denied recognition in China if it violates public policy); *id.* at 106 (noting that a judgment will be denied recognition in Japan if it violates public policy); *id.* at 180 (noting that a judgment will be denied recognition in South Korea if it violates public policy); Adler, *supra* note 46, at 152 (noting that a judgment in Mexico will be denied recognition if it is contrary to public policy); Baumgartner, *supra* note 47, at 191 (describing public policy as a “general” requirement for European countries); Walywn & Theeuwen, *supra* note 47 (noting that a judgment can be denied recognition under Canadian law if it violates public policy).

⁴⁹ See ASIAN BUS. LAW INST., *supra* note 45, at 55–56 (describing China's reciprocity requirement); Wolfgang Wurmest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 186–87 (2005) (describing a softening in Germany's reciprocity requirement).

⁵⁰ See HAY, *supra* note 14, at 5.3.1, 5.3.2 (describing the European practice of entering into treaties to guarantee mutual recognition and enforcement and noting that the United States has not taken part in this practice); Baumgartner, *supra* note 47, at 181 (making a similar point).

⁵¹ See Baumgartner, *supra* note 47, at 181.

⁵² See HAY, *supra* note 14, at 5.3.2 (noting that the United States has never joined an international treaty on recognition and enforcement, which puts U.S. litigants at a disadvantage).

⁵³ Baumgartner, *supra* note 47, at 175 (citing Matthew H. Adler, *If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 LAW & POL'Y INT'L BUS. 79, 94 (1994) (“U.S. courts are

ject to a certain level of international discrimination, despite more than fair treatment of foreign money judgments in American courts.”⁵⁴ Many other scholars have expressed similar sentiments.⁵⁵

Several specific areas of U.S. domestic law are commonly cited as reasons for the non-recognition of U.S. judgments, including jurisdiction, public policy concerns about punitive damages, and reciprocity. U.S. negotiators working on a previous iteration of the Judgments Convention noted these issues as particular stumbling blocks.⁵⁶ In testimony to Congress in 2000, a U.S. State Department negotiator argued that “[e]ven in those countries that will, in principle, enforce foreign judgments in the absence of a treaty, the reach of U.S. long-arm jurisdiction, what they perceive to be ‘excessive’ jury awards, and punitive damages are sometimes considered reasons not to enforce U.S. judgments.”⁵⁷ Today, the State Department Legal Resources website on recognition and enforcement comments on the lack of a treaty regime, noting that “[a]lthough there are many reasons for the absence of such agreements, a principal stumbling block appears to be the perception of many foreign states that U.S. money judgments are excessive Moreover, foreign countries have objected to the extra-

quite liberal in their approach to the recognition and enforcement of judgments . . . whereas the reverse is not true.”)).

⁵⁴ Eric Porterfield, *A Domestic Proposal to Revive the Hague Judgments Convention: How to Stop Worrying About Streams, Trickle, Asymmetry, and a Lack of Reciprocity*, 25 DUKE J. COMP. & INT’L L. 81, 83 (2014).

⁵⁵ See LINDA J. SILBERMAN & FRANCO FERRARI, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, at xvi (2017) (“Several articles in the research collection discuss the particular difficulties that U.S. judgments encounter when recognition and enforcement is sought abroad.”); Kevin M. Clermont, *A Global Law of Jurisdiction and Judgments: Views from the United States and Japan*, 37 CORNELL INT’L L.J. 1, 13–14 (2004) (“Americans are being whipsawed by the European approach. Not only are they still subject (in theory) to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but also U.S. judgments tend (in practice) to receive short shrift in European courts.”); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 548 (“[T]he United States currently recognizes incoming judgments much more readily than American judgments are enforced elsewhere. Ultimately . . . the success of enforcing U.S. judgments abroad must be balanced against the American willingness to enforce incoming judgments. With regard to many countries in the world, that balance is currently very uneven.”).

⁵⁶ See *Negotiation of Convention on Jurisdiction and Enforcement of Judgments*, 95 AM. J. INT’L L. 418, 418, 420 (2001).

⁵⁷ *Id.* at 419 (quoting *Internet and Federal Courts: Issues and Obstacles: Hearing Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Jeffrey D. Kovar, Assistant Legal Adviser, U.S. Dep’t of State)).

territorial jurisdiction asserted by courts in the United States.”⁵⁸ Similarly, many scholars have recognized jurisdiction, punitive damages, and reciprocity as the main challenges preventing the recognition and enforcement of U.S. judgments abroad.⁵⁹ A survey conducted by the New York City Bar Association in 2001 also identified jurisdiction, public policy concerns related to punitive damages, and reciprocity (among others) as key reasons for non-recognition of U.S. judgments.⁶⁰

In Part II, this Note examines these three areas. Continuing the focus on countries that are major U.S. trade partners, it argues that the idea that U.S. judgments are particularly hard to enforce abroad, based on these three issues, may be outdated. Although the foreign countries considered in this Note still do not have the same presumption of recognition based on comity that exists in U.S. law, and there may still be some issues with non-recognition, recent changes in U.S. and domestic law have made it easier for U.S. judgments to be recognized in these countries.

II

WHY ARE U.S. JUDGMENTS NOW MORE LIKELY TO BE RECOGNIZED ABROAD?

This Part examines jurisdiction, public policy concerns about punitive damages, and reciprocity in turn. It explains why each basis for non-recognition has traditionally prevented U.S. judgments from being recognized abroad. In the first two areas, U.S. law differed substantially from that in the other countries considered in this Note, making recognition of U.S. judgments more difficult. Developments in the past several years in U.S. and foreign law in these areas have made

⁵⁸ Bureau of Consular Affairs, U.S. Dep’t of State, *Enforcement of Judgments*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/international-judicial-assist/Enforcement-of-Judges.html> (last visited July 14, 2019).

⁵⁹ See BORN & RUTLEDGE, *supra* note 44, at 1084 (“This difficulty [of getting a judgment recognized and enforced] can be particularly acute with regard to U.S. judgments, because of . . . the size of damage awards, and the nature of U.S. jurisdictional claims.”); Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529, 531 (2010) (“The chances of getting a substantial punitive damages judgment from a U.S. court recognized by any court outside the U.S. are virtually nil.”); John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT’L L. 507, 513 (2007) (“[T]he Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters . . . was never concluded, with punitive damages being a major source of disagreement.”); Porterfield, *supra* note 54, at 84 (“Four reasons are commonly given for this disparate treatment of American judgments: (1) exorbitant bases of personal jurisdiction (for example, long arm ‘doing business’ jurisdiction, or physical presence, also known as ‘tag’ jurisdiction), (2) ‘excessive’ jury awards, (3) the public policy of the forum, and (4) punitive damages.”).

⁶⁰ See Comm. on Foreign & Comparative Law, *supra* note 8, at 378–79.

them more similar, in turn making U.S. judgments more likely to be recognized. In the final area, reciprocity, several countries considered in this Note have, in the past several years, loosened their reciprocity requirements, leading to greater recognition. Ultimately, this Part argues that these developments show that the common scholarly view—that U.S. judgments are exceptionally hard to enforce abroad—is no longer fully accurate.⁶¹

A. Jurisdiction

In all of the countries considered in this Note, the court being asked to recognize the judgment will only do so if it finds that the rendering court had jurisdiction over the parties.⁶² The standard for judging whether the rendering court had jurisdiction varies by country, although many countries have rules that favor local plaintiffs.⁶³ For example, some countries lay out specific bases or tests for jurisdiction in their statutory requirements for recognition and enforcement.⁶⁴ Other countries determine whether the rendering court had jurisdiction according to the laws of the country of the rendering court.⁶⁵ However, some countries require the rendering court to have had jurisdiction according to the rules of the country of the requested court.⁶⁶ This approach is referred to as the “mirror-image rule.”⁶⁷

⁶¹ At least one scholar has made a similar point about the harmonization of judgments regimes globally. See Béligh Elbalti, *Spontaneous Harmonization and the Liberalization of the Recognition and Enforcement of Foreign Judgments*, 16 JAPANESE Y.B. PRIV. INT’L L. 264 (2014) (arguing that judgments recognition regimes globally have liberalized and are now spontaneously converging). The argument of this Note is different in that it focuses exclusively on issues that have prevented recognition of U.S. judgments, and changes to U.S. law that make recognition more likely.

⁶² See *supra* note 47 and accompanying text.

⁶³ See HAY, *supra* note 14, at 6.2 (noting that the laws in many countries allow courts to exercise jurisdiction more easily over cases where the plaintiff is a citizen of the country).

⁶⁴ See, e.g., ASIAN BUS. LAW INST., *supra* note 45, at 12 (describing the statutory test for jurisdiction in Australia, which takes this approach).

⁶⁵ For example, this is the rule in China. See *id.* at 61 (“[T]he court of origin must have jurisdiction in accordance with its own law.”).

⁶⁶ This is the rule, for example, in Germany, South Korea, and Mexico, among other countries. See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 328, para. 1, sentence 1, translation at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.) (“The courts of the state to which the foreign court belongs do not have jurisdiction according to German law”); ASIAN BUS. LAW INST., *supra* note 45, at 183 (“The South Korean courts determine the jurisdiction of the foreign court according to the rules of South Korea.”); Adler, *supra* note 46, at 152 (“Mexico requires that the judgment be rendered according to rules of jurisdiction compatible with Mexican law”).

⁶⁷ See Wurmnest, *supra* note 49, at 189 (describing the “mirror-image rule” in Germany).

In the past, jurisdiction created significant problems for U.S. judgments because the jurisdictional analysis of the United States has historically departed from the approach to jurisdiction used in other countries. Traditionally, U.S. courts exercised general jurisdiction, which allowed the defendant to be sued for any act, if the defendant had “continuous commercial contacts with the forum.”⁶⁸ Many other countries found this exercise of jurisdiction excessive because it allowed U.S. courts to exercise jurisdiction over foreign defendants in situations in which the plaintiff’s claim had little connection to the United States.⁶⁹ The U.S. approach to general jurisdiction created significant problems for the recognition and enforcement abroad of U.S. judgments.⁷⁰

However, in *Goodyear*⁷¹ and *Daimler*,⁷² the U.S. Supreme Court narrowed the grounds for general jurisdiction.⁷³ Since *Daimler* was decided in 2014, general jurisdiction has been found only when the defendant’s contacts with the forum are so continuous and systematic that it is “essentially at home in the forum state.”⁷⁴ By narrowing the grounds for general jurisdiction, the Court brought U.S. jurisdictional analysis more in line with that of other countries.⁷⁵ Indeed, since 2014, U.S. grounds for general jurisdiction are now similar to those in the EU.⁷⁶ In *Daimler*, the majority acknowledges the frequent tension between the U.S. approach to general jurisdiction and that of other

⁶⁸ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 424 (1984) (Brennan, J., dissenting) (criticizing the majority’s departure from this approach to general jurisdiction).

⁶⁹ See OSCAR G. CHASE ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* 664 (2d ed. 2017) (arguing that jurisdiction in the United States continues “to be perceived as excessive” by many countries).

⁷⁰ Speaking about efforts to negotiate a treaty on recognition and enforcement in the early 1990s, one commentator noted: “The difficulties with the larger project have been, at least on the surface, primarily due to disagreements over personal jurisdiction between the United States and continental Europe, although other major issues emerged later in the process.” Baumgartner, *supra* note 47, at 176 (footnotes omitted).

⁷¹ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

⁷² *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

⁷³ See Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. 344, 344–47, 346 n.6, 347 n.7 (2016) (describing the more stringent requirements for general jurisdiction articulated in *Goodyear* and *Daimler*).

⁷⁴ *Daimler*, 134 S. Ct. at 751 (quoting *Goodyear*, 564 U.S. at 919).

⁷⁵ See Silberman & Simowitz, *supra* note 73, at 344 (describing the U.S. approach to general jurisdiction after *Daimler* as “closer to the rest of the world”).

⁷⁶ Linda J. Silberman, *The Continuing Relevance of Private International Law and Its Challenges: Judicial Jurisdiction and Forum Access—The Search for Predictable Rules* 15 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 19-02, 2019).

countries, including the EU.⁷⁷ The majority argues that an “expansive view of general jurisdiction” is a “risk[] to international comity.”⁷⁸ The majority even goes so far as to note that the United States’ expansive view of general jurisdiction had created problems in the recognition of foreign judgments: “The Solicitor General informs us . . . that ‘foreign governments’ objections to some domestic courts’ expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments.”⁷⁹

This change in U.S. jurisdiction rules since 2014 may make it easier for U.S. judgments to be recognized abroad in some jurisdictions.⁸⁰ Countries that require mirror-image jurisdiction or apply specific bases of jurisdiction in order to recognize a judgment would be more likely to find jurisdiction under the new U.S. general jurisdiction standard than the old standard. There are examples of U.S. judgments being refused recognition in the past due to the perception that U.S. jurisdiction was excessive.⁸¹ These judgments might not be denied recognition and enforcement today, now that U.S. jurisdiction rules are closer to those of other countries.

⁷⁷ *Daimler*, 134 S. Ct. at 763.

⁷⁸ *Id.*

⁷⁹ *Id.* (quoting Brief for the United States as Amicus Curiae Supporting Petitioner, *Daimler*, 134 S. Ct. 746 (No. 11-965)). The Court is referring to earlier efforts by the Hague Conference to negotiate a treaty on the recognition and enforcement of foreign judgments. These efforts ultimately failed, and the Conference eventually narrowed its focus to produce the Choice of Court Agreement. See *infra* notes 159–62 and accompanying text.

⁸⁰ Several other scholars have noted this possibility already. See Ronald A. Brand, *Understanding Judgments Recognition*, 40 N.C. J. INT’L L. & COM. REG. 877, 878 (2015) (arguing that changes to U.S. jurisdiction rules may make it easier for U.S. judgments to be recognized abroad); Louise Ellen Teitz, *Another Hague Judgments Convention? Bucking the Past to Provide for the Future*, 29 DUKE J. COMP. & INT’L L. 491, 509 (2019) (arguing that a new judgments convention may be less important now that the United States has narrowed the grounds for general jurisdiction); see also HAY, *supra* note 14, at 6.2.3 (making a similar point). Note, however, that although narrowing U.S. jurisdiction may make it easier to get judgments recognized abroad, it also has the effect of making it more difficult for plaintiffs to sue in the United States in the first place.

⁸¹ *Cf.* Comm. on Foreign & Comparative Law, *supra* note 8, at 384–88 (noting countries that do not recognize judgments based on “U.S.-style long-arm jurisdiction” because it is broader than the narrow grounds for jurisdiction recognized by these countries). The expansive U.S. conception of general jurisdiction was also a major stumbling block that prevented the success of earlier efforts to negotiate a Hague Treaty on judgments. See Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 642 (2000) (noting that in order for the United States to join an earlier treaty, it would have had to abandon general jurisdiction over foreign defendants).

B. Public Policy Concerns About Punitive Damages

In addition to denying recognition of foreign judgments based on failure to meet certain personal jurisdiction standards, courts in the countries considered in this Note generally will deny recognition if a foreign judgment violates the public policy of the country where recognition is sought.⁸² U.S. law also includes public policy as grounds for non-recognition of foreign judgments.⁸³ In the 1962 and 2005 Uniform Acts, public policy is a discretionary basis for non-recognition.⁸⁴ In the ALI proposed federal statute, public policy would be a mandatory ground for non-recognition.⁸⁵ However, under U.S. law, public policy as a ground for non-enforcement is interpreted narrowly.⁸⁶ It is not sufficient that the cause of action could not be asserted in the state where recognition and enforcement is sought.⁸⁷ Rather, the judgment must “violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”⁸⁸

Other countries interpret public policy as a ground for non-recognition in varying ways. In Australia, a judgment can be refused recognition on public policy grounds if it is based on a law that would violate the public policy of the forum (for example, if it was a judgment for wages to be paid to a sex worker because sex work is illegal) or if it was “obtained in a manner obnoxious to the law of the forum” (for example, a judgment obtained under duress).⁸⁹ In China, by contrast, “public policy refers to matters relating to state sovereignty and

⁸² See *supra* note 48 and accompanying text (describing this requirement for the countries considered in this Note).

⁸³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(d) (AM. LAW INST. 1987).

⁸⁴ UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(3) (UNIF. LAW COMM’N 2005); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3) (UNIF. LAW COMM’N 1962).

⁸⁵ RECOGNITION AND ENF’T OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE § 5(a)(vi) (AM. LAW INST. 2006).

⁸⁶ See S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 114 (2014) (describing the test for public policy under U.S. law).

⁸⁷ See *id.*

⁸⁸ *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918). Although *Loucks* was interpreting public policy as grounds for non-recognition in the context of recognition of a sister state judgment, the interpretation of public policy with regard to foreign country judgments is similar.

⁸⁹ See ASIAN BUS. LAW INST., *supra* note 45, at 16 & n.36 (describing the interpretation of public policy in Australia).

security, basic principles of law and public social interests,” but it is rarely invoked as a defense to recognition.⁹⁰

One interpretation of public policy that has been particularly challenging for the recognition and enforcement of U.S. judgments in the past is the idea that punitive damages are a violation of the public policy of the country of the requested court. Common law countries, though they often recognize punitive damages, may restrict the award of punitive damages to certain classes of cases and may deny recognition and enforcement of awards for punitive damages outside those classes.⁹¹ Many civil law countries do not permit the award of non-compensatory damages, and may refuse to recognize and enforce awards for such damages.⁹² Italy and Germany have previously taken this approach.⁹³

In 1992 the German Supreme Court faced the issue of recognition of a California judgment including a substantial award for punitive damages and pain and suffering.⁹⁴ The defendant was a German-American citizen who was found liable in a civil action for sexual abuse of a 14-year-old American citizen.⁹⁵ The California court awarded the plaintiff \$750,260, including \$400,000 as punitive damages.⁹⁶ The defendant had no assets to satisfy the judgment in California, so the plaintiff sought to enforce the judgment in Germany.⁹⁷ The German court ruled that the damages for pain and suffering were enforceable (though they were far higher than what would have been awarded in Germany) but that the punitive damages

⁹⁰ See *id.* at 68 (footnote omitted) (describing the interpretation of public policy in China).

⁹¹ See, e.g., Gotanda, *supra* note 59, at 510–11 (noting that England awards punitive damages but limits them to suits against government servants, suits where the defendant’s profit from the wrongful conduct is greater than the compensation paid to the plaintiff, and suits where punitive damages are authorized by statute).

⁹² See *id.* at 510 (explaining that most civil law countries limit recovery to compensatory damages). In some cases, if a foreign judgment contains punitive damages, the court will refuse to recognize the entire judgment. This was previously the case in Italy. See *infra* notes 99–103 and accompanying text (describing a 1995 decision by the Italian Supreme Court). In other countries, the court will recognize the compensatory portion of the award but not the punitive portion. This was the case in Germany. See *infra* notes 94–98 and accompanying text (describing a 1992 decision by the German Supreme Court).

⁹³ See *infra* notes 94–103 and accompanying text.

⁹⁴ For an extensive discussion of this case, see Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729 (1992).

⁹⁵ *Id.* at 730.

⁹⁶ *Id.* at 731.

⁹⁷ *Id.* at 729–31.

were unenforceable as a matter of public policy because their purpose was “punishment and deterrence.”⁹⁸

A similar approach to judgments containing punitive damages prevailed in Italy. As mentioned briefly in the Introduction to this Note, in 2007 the Italian Supreme Court was faced with the decision of whether to enforce an award against an Italian manufacturer of motorcycle helmet buckles.⁹⁹ The mother of a 15-year-old U.S. citizen, who was thrown from his motorcycle and killed when the buckle on his helmet broke, brought a case in Alabama state court.¹⁰⁰ She was awarded one million dollars in compensation.¹⁰¹ The manufacturer of the helmet buckle lacked assets in the United States, so she sought to enforce the judgment in Italy.¹⁰² The Italian court found that the judgment was unenforceable because punitive damages violated Italy’s public policy.¹⁰³ Similar cases have occurred in other jurisdictions.¹⁰⁴

As these cases demonstrate, judgments including punitive damages have proven difficult to enforce in the past, raising a justifiable concern about the recognition and enforcement of U.S. judgments abroad.¹⁰⁵ However, there are two recent developments that have made it easier to seek enforcement of U.S. judgments that include punitive damages. First, starting with a decision in 1996, the United States has begun to circumscribe the use of punitive damages, bringing U.S. practice more in line with that of other countries.¹⁰⁶ Second, starting in the early 2000s and continuing today, several countries that previously rejected judgments including punitive damages have begun to recognize a role for them.¹⁰⁷

In the United States, the Supreme Court has used the Due Process Clause to limit the amount of punitive damages that can be

⁹⁸ *Id.* at 745–46.

⁹⁹ *Parrott v. Fimez S.p.A.*, Cass., sez. tre, 19 gennaio 2007, n. 1183, *Foro it.* I 2007, I, 1460 (It.), *translated in* Quarta, *supra* note 1, at 780–82; *see also* Quarta, *supra* note 1 *passim* (discussing the case at length); Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, *N.Y. TIMES* (Mar. 26, 2008), <http://www.nytimes.com/2008/03/26/us/26punitive.html> (reporting on the case).

¹⁰⁰ Quarta, *supra* note 1, at 753, 755–56.

¹⁰¹ *Id.* at 756.

¹⁰² *Id.* at 776.

¹⁰³ *Id.* at 753.

¹⁰⁴ *See, e.g.*, Martin Bernet & Nicolas C. Ulmer, *Recognition and Enforcement in Switzerland of US Judgments Containing an Award of Punitive Damages*, 22 *INT’L BUS. LAW.* 272, 273 (1994) (discussing a Swiss case).

¹⁰⁵ *See, e.g.*, Jessica J. Berch, *The Need for Enforcement of U.S. Punitive Damages Awards by the European Union*, 19 *MINN. J. INT’L L.* 55, 55 (2010) (arguing that it is “vitaly important” to find ways to recognize U.S. punitive damages awards in foreign countries).

¹⁰⁶ *See infra* notes 108–12 and accompanying text (describing two seminal U.S. cases).

¹⁰⁷ *See infra* notes 113–26 and accompanying text (describing cases in France and Italy).

awarded. First, in *BMW of North America, Inc. v. Gore*, the Court established a “guidepost” analysis to limit punitive damages.¹⁰⁸ The plaintiff in *Gore* purchased a BMW, and the company failed to disclose that the car had suffered acid rain damage and had been repainted prior to sale.¹⁰⁹ The cost of repainting the car was about \$600, but a jury awarded \$4 million in punitive damages.¹¹⁰ The Court overturned the award, establishing “guideposts” for determining whether punitive damages were grossly excessive to the point of violating the 14th Amendment.¹¹¹ In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court expanded on the guidepost analysis, explaining that “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process.”¹¹²

As U.S. law limiting the use of punitive damages awards has developed, several countries that previously were skeptical of punitive damages have also begun to recognize a limited role for punitive damages. One such country is France. In a recent case, an American couple bought a boat from a French manufacturer that was damaged prior to the sale.¹¹³ The couple won an award in a California court for over \$3 million, including \$1.46 million in punitive damages.¹¹⁴ The American couple took the judgment to France to enforce it against the French manufacturer’s assets. In a 2010 decision, the French Supreme Court ultimately refused to recognize the judgment, finding that “the amount awarded [was] disproportionate to damages actually suffered and breach of the debtor’s contractual obligations.”¹¹⁵ However, strikingly, the court asserted for the first time that punitive damages might be recognized in limited cases. The court found that “a punitive damage award is not, by itself, contrary to public policy.”¹¹⁶

¹⁰⁸ 517 U.S. 559, 574–85 (1996).

¹⁰⁹ *Id.* at 563 & n.1.

¹¹⁰ *Id.* at 564–65.

¹¹¹ *Id.* at 562, 585–86. These “guideposts” are the degree of reprehensibility, the ratio between the punitive award and the plaintiff’s actual harm, and the legislative sanctions provided for comparable misconduct. *Id.* at 574–85.

¹¹² 538 U.S. 408, 425 (2003).

¹¹³ See Benjamin West Janke & François-Xavier Licari, *Enforcing Punitive Damage Awards in France After Fountaine Pajot*, 60 AM. J. COMP. L. 775, 781 (2012) (describing the facts of the French case).

¹¹⁴ *Id.* at 782.

¹¹⁵ *Id.* at 794 (quoting Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Dec. 1, 2010, Bull. civ. I, No. 1090 (Fr.)).

¹¹⁶ *Id.* at 796.

This decision may open the door to the recognition of punitive damages in France.¹¹⁷

A recent decision in Italy also suggests that punitive damages will no longer be considered categorically unrecognizable as a matter of public policy.¹¹⁸ In 2001, an American motocross racer suffered brain injuries after a crash while wearing a helmet manufactured by an Italian company.¹¹⁹ The racer brought an action against Nosa, the helmet's retailer, Helmet House, the helmet's U.S. distributor, and AXO, the helmet's Italian manufacturer.¹²⁰ Nosa settled with the injured plaintiff and won a judgment for indemnification against AXO in a Florida court.¹²¹ Nosa then took the judgment to Italy, seeking enforcement. Although Nosa was ultimately unsuccessful, the Italian court took the opportunity in dicta to reverse its previous position on punitive damages.¹²² Speaking of Italy's previous refusal to recognize punitive damages, Italy's highest court declared: "A punitive function associated to a damages award is no longer 'incompatible with the general principles of our legal system, as it was in the past . . .'"¹²³ Importantly, the court, citing *BMW*, noted that in U.S. law, "a rapid evolution has taken place, reducing the risk of the so-called grossly excessive damages."¹²⁴ This case indicates a clear change in the Italian tradition of using public policy as a basis for the non-recognition of U.S. punitive damages awards.¹²⁵ Taken together, the French and Italian cases suggest that U.S. limits on punitive damages, along with other countries' increasing acceptance of a limited role for punitive damages, have opened the door for the recognition of some punitive

¹¹⁷ *But see id.* at 802 (offering a pessimistic view on whether this case will have a significant effect on the French approach to recognition and enforcement). The authors ask: "Are U.S. punitive damage awards per se unenforceable in France? We cannot go that far in our interpretation of the *Fountaine Pajot* case. Nevertheless, it is clear that only small awards will be enforceable, if at all." *Id.*

¹¹⁸ *Axo Sport v. Nosa Inc.*, Cass., sez. un., 5 luglio 2017, n. 16601, Foro. it. I 2017, I, 2613 (It.), translated in Letizia Coppo, *The Grand Chamber's Stand on the Punitive Damages Dilemma*, 3 ITALIAN L.J. 593, 593–604 (2017).

¹¹⁹ See Brief of Appellee at 1, *Axo Sport, S.p.A. v. Nosa, Inc.*, 41 So. 3d 910 (Fla. Dist. Ct. App. 2010) (unpublished table decision) (No. 4D08-4364), 2009 WL 7111098, at *1 (describing the facts in the original U.S. litigation).

¹²⁰ *Id.*

¹²¹ See Coppo, *supra* note 118, at 594 ("With these judgments, the US courts granted NOSA's request to be indemnified by AXO for the payment of one million euros resulting from a settlement reached with the plaintiff . . .").

¹²² See *id.* at 597 ("[E]ven if the appeal is to be rejected in its entirety, the Supreme Court may nonetheless express the relevant principle of law governing the matter, provided that it is one of particular importance.").

¹²³ *Id.* at 598.

¹²⁴ *Id.* at 603.

¹²⁵ See *id.* at 601 ("Surely, the notion of 'public policy', representing a limit to the application of a foreign law, has undergone substantial changes.").

damages abroad. A similar trend has been noted in several other jurisdictions.¹²⁶

C. Reciprocity

The final key area cited by scholars as a stumbling block for U.S. judgments—reciprocity—has also undergone recent changes which may make it less difficult to enforce U.S. judgments. As discussed in Part I, the U.S. approach to reciprocity has changed over time. Reciprocity was the initial grounds for non-recognition in *Hilton*.¹²⁷ However, the Uniform Acts, adopted by a majority of states, do not include a reciprocity requirement, and reciprocity has been abandoned in most states that still apply the common law.¹²⁸ Indeed, the ALI Proposed Federal Statute stimulated controversy by including a mandatory reciprocity requirement.¹²⁹ The reporters explained that the purpose of this requirement was to create an incentive for foreign countries to commit to recognizing U.S. judgments.¹³⁰ The ALI

¹²⁶ See Gotanda, *supra* note 59, at 525–27 (arguing that changes in French, German, EU, Canadian, and Australian law may lead to greater enforcement of U.S. awards for punitive damages); Coppo, *supra* note 118, at 615 (noting, in commentary on the Italian court’s decision, that “a multi-functional approach to tort liability [that recognizes punitive damages] appears to be in line with the current European trend”).

¹²⁷ See *supra* notes 17–18 and accompanying text (describing the holding in *Hilton*).

¹²⁸ See, e.g., *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 318 F. Supp. 161, 168 (E.D. Pa. 1970) (“Since its beginning in *Hilton*, the concept of reciprocity has not found favor in the United States. . . . The Court finds that the concept of reciprocity is a provincial one”); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. e (AM. LAW INST. 1971) (“[*Hilton*] involved an appeal from a lower federal court, and the opinion did not discuss whether the rule it announced as to reciprocity would be binding on State courts. So far as is known, no federal or State court has ever made such a suggestion.”). *But see* RECOGNITION AND ENF’T OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE § 7 reporters’ note 3 (AM. LAW INST. 2006) (noting that “[t]en states have adopted the Uniform Act with a provision concerning reciprocity” and describing specific state requirements).

¹²⁹ See RECOGNITION AND ENF’T OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FED. STATUTE § 7(a) (“A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.”); see also *id.* at xiii (“The most controversial issue in this effort has been whether to require reciprocity from countries whose judgments come before an American court for enforcement.”).

¹³⁰ *Id.* § 7 cmt. b (“The purpose of the reciprocity provision in this act is . . . to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States.”). Though the proposed statute has not been adopted as legislation, the proposal to include a reciprocity requirement has generated much academic debate. See, e.g., Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT’L L. 239 (2004) (arguing that a reciprocity provision is unnecessary).

Proposal has not been adopted, and the trend in the United States is still against a requirement of reciprocity.¹³¹

Some other countries do have a reciprocity requirement.¹³² Historically, this has prejudiced the recognition of U.S. judgments in those countries, first, because the United States is not party to any treaties requiring mutual recognition (the clearest case for reciprocity), and second, because recognition and enforcement is governed by state law in the United States,¹³³ which may make it difficult for foreign courts to determine whether the individual state that made the judgment meets the reciprocity requirement.¹³⁴

Reciprocity requirements take several forms. There are some countries that refuse to recognize and enforce any judgments in the absence of a bilateral treaty guaranteeing mutual recognition.¹³⁵ Other countries, like China, require *de facto* reciprocity, meaning that the court that rendered the judgment had once recognized a Chinese judgment.¹³⁶ If there was no previous effort to recognize a Chinese judgment in the rendering court, then reciprocity would be denied.¹³⁷ A less strict approach to reciprocity adopted by some countries requires only that a judgment of the requested court *could* be enforced under the law of the rendering court.¹³⁸

¹³¹ See Miller, *supra* note 130, at 296 (explaining that a “great majority” of U.S. jurisdictions have rejected a reciprocity requirement).

¹³² See *supra* note 49 and accompanying text (referencing reciprocity requirements in China and Germany).

¹³³ See *supra* Section I.B (describing how state statutory law and common law govern recognition and enforcement in the United States).

¹³⁴ Interestingly, the ULC first proposed a model act in 1962 *not* to address perceived disunity problems among state common law but rather to increase the chances the U.S. judgments would be recognized abroad in countries with reciprocity requirements because statutory law would make it easier for the courts of foreign countries to access U.S. law. See Stephen B. Burbank, *Whose Regulatory Interests? Outsourcing the Treaty Function*, 45 N.Y.U. J. INT’L L. & POL. 1037, 1041 (2013) (noting that the primary reason for the Uniform Act was to promote foreign recognition of U.S. judgments); see also *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 792 N.E.2d 155, 159 (N.Y. 2003) (“[New York’s adoption of the Uniform Foreign Money-Judgments Recognition Act] was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad . . .”).

¹³⁵ See Bélich Elbalti, *Reciprocity and the Recognition and Enforcement of Foreign Judgments: A Lot of Bark but Not Much Bite*, 13 J. PRIV. INT’L L. 184, 197 (2017) (noting that Russia takes this approach).

¹³⁶ See ASIAN BUS. LAW INST., *supra* note 45, at 57 (quoting Articles 281–82 of the Civil Procedure Law of China, which outline this approach); cf. Elbalti, *supra* note 135, at 203–04 (noting that even in the presence of *de facto* reciprocity Chinese courts have refused to recognize some Korean judgments).

¹³⁷ See ASIAN BUS. LAW INST., *supra* note 45, at 57.

¹³⁸ See, e.g., Elbalti, *supra* note 135, at 191 (noting Germany, Korea, and Japan as examples of this approach).

However, there is some recent indication that reciprocity requirements are fading globally.¹³⁹ For example, one commentator notes that in the past several years, some countries have been doing away with their reciprocity requirements and that in countries where the requirement remains, limits have been imposed on reciprocity as a ground for non-recognition.¹⁴⁰ In some cases, reciprocity is required only for judgments rendered against nationals of the country in which the requested court sits.¹⁴¹ Reciprocity might be required only for enforcement and not recognition.¹⁴² Finally, reciprocity might be required but presumed, unless the defendant can prove that there would not be reciprocity.¹⁴³

The most significant example of change comes from China, where a court in 2017 recognized a U.S. judgment for the first time after a long history of refusing recognition of U.S. judgments on reciprocity grounds.¹⁴⁴ The plaintiff in the case brought a claim in a California court against a Chinese couple.¹⁴⁵ The plaintiff alleged that the couple entered into a fraudulent equity transfer agreement; the plaintiff paid the couple \$125,000 for a fifty percent stake in a management company, and the couple fled with the money to China.¹⁴⁶ The California court rendered a default judgment when the defendants failed to appear, and the plaintiff sought recognition and enforcement of the judgment in China.¹⁴⁷ The Chinese court recognized the judgment, finding that because there was no treaty between the United States and China, recognition was on the basis of reciprocity.¹⁴⁸ The court took note of the fact that the plaintiff had introduced evidence of a Chinese judgment that had been recognized by a California court several years earlier and concluded that this was enough to establish reci-

¹³⁹ *See id.* at 185 (arguing that reciprocity requirements have become less prevalent, and less strict, globally).

¹⁴⁰ *Id.* at 187–89 (listing examples of countries that have adopted these approaches).

¹⁴¹ *Id.* at 189.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See* Suni Gong, *The Chinese Court's Enforcement of a U.S. Civil Judgment*, CTR FOR TRANSNAT'L LITIG. & COM. L.: TRANSNAT'L NOTES (Apr. 17, 2018), <https://blogs.law.nyu.edu/transnational/2018/04/the-chinese-courts-enforcement-of-a-u-s-civil-judgement> (describing the case, and China's previous history of denying recognition to U.S. judgments).

¹⁴⁵ Liu Li Yu Tao Li Deng Shenqing Chengren he Zhixing Waiguo Fayuan Minshi Panjue Jiufen An (刘利与陶莉等申请承认和执行外国法院民事判决纠纷案) [Liu Li v. Tao Li et al. for Recognition and Enforcement of a Civil Judgment of a Foreign Court] PKU Law CLI.C.9347048(EN) (Wuhan Interm. People's Ct. June 30, 2017) (China) (recognizing a judgment by the Los Angeles County Superior Court in *Liu Li v. Tao Li & Tong Wu*).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

procuity.¹⁴⁹ This case was important because it marked the first time that a Chinese court had ever recognized a U.S. judgment.¹⁵⁰

Though this decision represents a significant departure from China's previous refusal to recognize and enforce U.S. judgments, there are several reasons to think this decision's effects might be limited. First, the decision appears to be a continuation of China's policy of de facto reciprocity—the California court's judgment was recognized because another court in California had recently recognized a Chinese judgment.¹⁵¹ A different Chinese court, only two months before, had refused to recognize another U.S. judgment even though the plaintiff introduced the same evidence of a U.S. court recognizing a Chinese judgment; there, the problem was that the judgment the plaintiff was trying to have recognized in that case was from a court in Pennsylvania, not a court in California.¹⁵² This suggests that judgments rendered by courts in states where no court has been faced with a Chinese judgment may not be recognized and enforced in China. Some commentators have also suggested that the *Liu Li* judgment was recognized because the Chinese court it was submitted to was a particularly “open-minded” court.¹⁵³ The Chinese court that recognized the judgment in *Liu Li* was also the first court to recognize any foreign judgment in China, recognizing a German judgment in 2013.¹⁵⁴

Despite these reasons for pessimism, there is some indication that China is joining the trend away from a formal requirement of reciprocity. Chinese legal scholars have criticized the existing regime as rigid and restrictive, and a barrier to international trade.¹⁵⁵ The Supreme People's Court is drafting a new judicial interpretation on the recognition and enforcement of foreign judgments that may

¹⁴⁹ *Id.*

¹⁵⁰ See Gong, *supra* note 144 (describing the “sensation” the case caused in China and the United States because it was the first time a Chinese court recognized a U.S. judgment).

¹⁵¹ *Id.*

¹⁵² See He, *supra* note 3, at 1143–44 (discussing the previous case, *Truhe v. Jiangxi Lidu Fireworks Group Co.*, in which the U.S. plaintiff was asking a Chinese court to recognize a judgment issued by a Philadelphia court, using the same California recognition of a Chinese judgment as evidence of reciprocity). This is the case referenced in the Introduction to this Note.

¹⁵³ Gong, *supra* note 144.

¹⁵⁴ *Id.*

¹⁵⁵ See Lei Zhu, *The Kolmar v. Sutex Case on Reciprocity in Foreign Judgments Enforcement in China: A Welcome Development or Still on the Wrong Track?*, 13 FRONTIERS L. CHINA 202, 213 (2018) (describing criticisms of de facto reciprocity by Chinese scholars).

include a less stringent policy on reciprocity.¹⁵⁶ In a recent article, a judge of the Supreme People's Court of China noted that "the circumstances may be ripe" for a more expansive interpretation of the reciprocity requirement that allows Chinese courts to find reciprocity based on anticipated "future judicial assistance."¹⁵⁷ This would make it significantly more likely that U.S. judgments would be recognized in China.

As this Part has shown, although there are still obstacles to the recognition of U.S. judgments, changes in U.S. and foreign law on jurisdiction and punitive damages and a trend away from strict reciprocity requirements have all improved the likelihood that U.S. judgments will be recognized abroad. The next Part will consider, in light of these changes, what the new Judgments Convention has to offer U.S. litigants.

III

WHAT DOES THE NEW JUDGMENTS CONVENTION OFFER THE UNITED STATES?

This Part compares the existing improvements in the recognition of U.S. judgments abroad with the gains that would be realized by the newly negotiated Judgments Convention. Section III.A begins with a brief description of the history and goals of the Convention. Sections III.B, III.C, and III.D then examine the three areas described above: jurisdiction, public policy, and reciprocity—the typical stumbling blocks for U.S. judgments. In each of these areas, the sections highlight the improvements offered by the Convention. Finally, Section III.E concludes with a discussion of what U.S. litigants stand to gain if the United States joins the Convention.

A. The Convention Negotiations

The new Judgments Convention was adopted on July 2, 2019 by the member countries of the Hague Conference on Private International Law.¹⁵⁸ The negotiations that led to the Convention were based on an earlier, Hague Conference–led effort to negotiate a

¹⁵⁶ See ASIAN BUS. LAW INST., *supra* note 45, at 58 ("The situation [referring to the strict reciprocity requirement] is expected to change in the near future.").

¹⁵⁷ Jianli Song, *Recognition and Enforcement of Foreign Judgments in China: Challenges and Developments*, CHINA INT'L COM. CT. (Aug. 30, 2018), <http://cicc.court.gov.cn/html/1/219/199/203/1048.html>.

¹⁵⁸ See *It's Done: The 2019 HCCH Judgments Convention Has Been Adopted!*, HAGUE CONF. ON PRIV. INT'L L. (July 8, 2019), <https://www.hcch.net/en/news-archive/details/?varevent=687> (announcing the adoption of the Convention).

new Judgments Convention, which began in 1992.¹⁵⁹ These earlier negotiations eventually floundered, resulting in the narrower Choice of Court Convention in 2005.¹⁶⁰ The earlier effort at a broad Judgments Convention proved challenging because the draft included direct rules on jurisdiction, which meant that countries would have to change their domestic law on jurisdiction in order to join the treaty.¹⁶¹ The negotiating countries were unable to come to agreement on rules of direct jurisdiction.¹⁶²

In 2011, the negotiating countries agreed to again attempt a Judgments Convention.¹⁶³ They agreed that the new Convention would be less ambitious than the previous attempt; rather than agreeing upon bases of jurisdiction that would govern in each country's domestic law, the participants decided to generate a list of bases of jurisdiction that were universally acceptable for recognition and enforcement.¹⁶⁴ A judgment made under one of these bases of jurisdiction that meets the other requirements in the Convention must be recognized.¹⁶⁵

It is yet to be seen which countries will sign on to the new Convention. The United States was an active participant in the renewed negotiations, but it is difficult to predict whether the United States ultimately will join the Convention. For example, the United States also actively participated in the negotiations for the Choice of Court Agreement and signed it in 2009, but the agreement never came into force in the United States because it could not be ratified by the Senate.¹⁶⁶ The goal of this Part is to consider how joining the

¹⁵⁹ See FRANCISCO GARCIMARTÍN & GENEVIÈVE SAUMIER, *JUDGMENTS CONVENTION: REVISED DRAFT EXPLANATORY REPORT* para. 2 (2018) (explaining the history of the project). The Hague Conference also negotiated a previous Judgments Convention in 1971 but only five countries have ratified it. See *Status Table of 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=78> (last updated Nov. 10, 2010).

¹⁶⁰ See MASATO DOGAUCHI & TREVOR C. HARTLEY, *PRELIMINARY DRAFT CONVENTION ON EXCLUSIVE CHOICE OF COURT AGREEMENTS: EXPLANATORY REPORT 6* (2004) (explaining that the negotiations on the Choice of Court Convention grew out of the abandoned Judgments Project).

¹⁶¹ GARCIMARTÍN & SAUMIER, *supra* note 159, para. 2.

¹⁶² *Id.*

¹⁶³ *The Judgments Project*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/projects/legislative-projects/judgments> (last visited July 21, 2019).

¹⁶⁴ See *id.*

¹⁶⁵ See *infra* Section III.B (discussing the effects of the Convention on foreign recognition and enforcement of U.S. judgments).

¹⁶⁶ See *Status Table of 2005 Convention on Choice of Court Agreements*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (last updated Aug. 23, 2018). As other scholars have explained, the Choice of Court Agreement failed to be ratified by the U.S. Senate, not because anyone disagreed with the

Convention would improve the recognition of U.S. judgments abroad. The next three Sections use the text of the Convention to examine the improvements the treaty would offer in the key areas that have prevented recognition of U.S. judgments in the past—jurisdiction, public policy, and reciprocity.

B. Jurisdiction

As discussed in Section II.A, countries apply different requirements when determining whether the foreign court rendering a judgment had jurisdiction over the parties.¹⁶⁷ In the past, U.S. judgments were often denied recognition because U.S. jurisdiction rules were out of sync with much of the rest of the world.¹⁶⁸ However, this situation has improved after the Supreme Court circumscribed general jurisdiction in *Goodyear* and *Daimler*.¹⁶⁹

The Convention would decrease further the likelihood that U.S. judgments will be denied recognition and enforcement based on jurisdiction. Article 5, titled “Bases for Recognition and Enforcement,”¹⁷⁰ provides bases of jurisdiction that make a judgment eligible for recognition and enforcement under the treaty.¹⁷¹ The goal of this article is to sidestep the complex jurisdictional rules laid out in each country’s domestic law for the recognition and enforcement of a foreign judgment.¹⁷² Rather than parsing those rules, litigants can assume that if their judgment was made under one of the bases of jurisdiction laid out in the article, it will not be denied recognition on jurisdictional grounds.¹⁷³ The jurisdictional bases in this article are non-exhaustive, meaning that a party to the treaty could still recognize the judgment of another party, even if the party rendering the judgment exercised

content, but because of a political disagreement about whether the Agreement should be implemented through state or federal law. Ronald A. Brand, *New Challenges in the Recognition and Enforcement of Judgments*, in *THE CONTINUING RELEVANCE OF PRIVATE INTERNATIONAL LAW AND ITS CHALLENGES* (Franco Ferrari & Diego P. Fernandez Arroyo eds.) (forthcoming 2019) (manuscript at 41). Similar political disagreements may make it difficult for the United States to ratify the new Judgments Convention. *Id.* at 42. This Note does not take up this question.

¹⁶⁷ See *supra* Section II.A.

¹⁶⁸ See *supra* notes 68–70 and accompanying text (discussing how the U.S. approach to general jurisdiction presented obstacles for the foreign recognition and enforcement of U.S. judgments).

¹⁶⁹ See *supra* notes 71–75 and accompanying text (detailing how *Goodyear* and *Daimler* brought U.S. jurisdictional analysis more in line with that of other countries).

¹⁷⁰ Judgments Convention, *supra* note 11, art. 5.

¹⁷¹ *Id.*

¹⁷² See *supra* Section II.A (describing these rules and their effects on the recognition and enforcement of foreign judgments).

¹⁷³ GARCIMARTÍN & SAUMIER, *supra* note 159, para. 143.

jurisdiction on a basis not included in Article 5.¹⁷⁴ However, such recognition and enforcement would not be automatic under the treaty and would be at the discretion of the domestic law of the recognizing court.¹⁷⁵ Additionally, courts in each country can continue to exercise jurisdiction on grounds not recognized in the treaty; however, judgments made on bases of jurisdiction not included in Article 5 will not be guaranteed recognition and enforcement.¹⁷⁶

In looking at how the treaty would affect the recognition and enforcement of U.S. judgments abroad, the question is whether the United States exercises jurisdiction on grounds that are not currently recognized by other countries but are included in the treaty. The treaty divides the jurisdictional bases into three categories: jurisdiction based on connections with the defendant; jurisdiction based on consent; and jurisdiction based on connections between the claim and the country of the rendering court.¹⁷⁷

Whether this system offers improvements for U.S. judgments depends on where a litigant is seeking to enforce the judgment. The Convention likely would not improve the recognition of U.S. judgments in some countries on the basis of jurisdiction, including Germany, Spain, Italy, and France, because the bases for jurisdiction recognized under the Convention are similar to those already recognized by these countries.¹⁷⁸ However, the Convention might improve the recognition of U.S. judgments in England, Australia, India, and other countries whose law developed from English law.¹⁷⁹ The domestic law of these countries is stricter than the bases of jurisdiction laid out in the Convention.¹⁸⁰

For example, English courts find that the defendant was subject to jurisdiction in the foreign court if the person against whom the judgment was given was present in the foreign country at the time of the proceeding; the person was a claimant or made a counterclaim in

¹⁷⁴ *Id.*

¹⁷⁵ Judgments Convention, *supra* note 11, art. 16.

¹⁷⁶ GARCIMARTÍN & SAUMIER, *supra* note 159, para. 143.

¹⁷⁷ *Id.* para. 146.

¹⁷⁸ See POLICY DEP'T FOR CITIZENS' RIGHTS & CONSTITUTIONAL AFFAIRS, THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW "JUDGMENTS CONVENTION" 7 (2018) (describing the effect the Convention would have on these countries). Although Brussels requires EU member states to adopt uniform standards for recognizing and enforcing the judgments of other member states, the recognition and enforcement of judgments from non-EU member states is left to the domestic law of each individual country. Therefore, U.S. judgments can be subject to different recognition requirements in different EU countries. *Id.* at 6–7.

¹⁷⁹ See *id.* (noting that the Convention will lead to these three countries recognizing judgments that they do not currently recognize).

¹⁸⁰ *Id.*

the foreign court; the person voluntarily appeared in the proceedings; or the person consented, before the proceedings began, to jurisdiction.¹⁸¹ Imagine a classic contract dispute. A small business owner in the United States signs a sales contract to buy a shipment of electronics from a manufacturer in another country. When the electronics are delivered, the business owner notices that they are defective and attempts to return them. The manufacturer refuses, and a contract dispute ensues. The small business owner, lacking assets or expertise to sue in the manufacturer's home country, sues instead in her local state court and wins a favorable judgment. If the manufacturer was English, such a judgment probably would not be recognizable in England, unless the manufacturer was present in the United States, voluntarily appeared in the proceedings, or consented to jurisdiction. However, if both countries were party to the Convention, a judgment rendered in the United States *would* be enforceable (at least from a jurisdictional perspective) as long as the place of performance of the contract was understood to be the United States and the defendant had a "purposeful and substantial connection" to the United States.¹⁸² Of course, the "purposeful and substantial connection," which is similar to U.S. jurisdictional analysis under the Due Process Clause, might create a lack of predictability if the manufacturer does not do much business with the country where the judgment was rendered.¹⁸³ But in general, the Convention rule is more predictable and allows for recognition in more countries, compared to existing foreign law.

If we consider a torts case, the situation is even clearer. Imagine that a visitor from another country is negligently driving while intoxicated while in the United States and injures a pedestrian. The pedestrian's family, lacking the expertise or assets necessary to sue overseas, obtains a tort judgment in state court against the foreign driver. Again, under the existing English rule, the judgment would be denied recognition because the U.S. court did not have jurisdiction under the bases of jurisdiction for foreign judgments recognized by the English system, unless the driver consented to jurisdiction or was

¹⁸¹ 2 LAWRENCE COLLINS, DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 588–95 (14th ed. 2006) (Rule 36).

¹⁸² Judgments Convention, *supra* note 11, art. 5(1)(g). According to the Convention, the place of performance of the contract should be determined either by the agreement of the parties, or by the law applicable to the contract. *Id.*

¹⁸³ The effect of some clauses will depend on uniform interpretation by national courts. As at least one scholar has noted, the Convention will only result in greater predictability if the uniform interpretation rule in Article 21 is given real effect. *See* Judgments Convention, *supra* note 11, art. 5(1)(g), 21; *see also* Brand, *supra* note 166, at 34.

present in the United States at the time of the proceedings.¹⁸⁴ By contrast, under the Convention, if both countries were parties to the Convention, such a judgment *would* be recognized under Art. 5(1)(j) of the treaty as long as the act causing the injury (the negligent driving) occurred in the United States.¹⁸⁵

More importantly, under the Convention, litigants in both of these cases would be able to predict more easily whether their judgments would be recognized prior to bringing a case, even if they did not know the country in which they would seek to enforce their judgment. In the contract dispute, the litigants would know that a judgment rendered in the place of performance designated in the contract was likely to be enforceable, as long as the defendant had some connection to the place of performance. Similarly, in the torts case, litigants would know that any country that had signed on to the Convention could not deny recognition based on jurisdiction for a judgment from the country where the injury occurred.

C. Public Policy Concerns About Punitive Damages

As discussed in Section II.B, many countries use public policy concerns as a basis for non-recognition of foreign judgments, and this justification is often used to refuse recognition of U.S. judgments which include an award of punitive damages.¹⁸⁶ Although this basis for non-recognition has become less common, to the extent it still creates an obstacle for the recognition of U.S. judgments, the Convention does little to guarantee recognition.

The Convention excludes punitive damages from the definition of public policy as a basis for non-recognition, but punitive damages are included as a separate basis for non-recognition.¹⁸⁷ The Convention includes public policy in Article 7, which lists optional reasons for non-recognition and enforcement of judgments. Article 7(c) states that recognition and enforcement of a judgment may be refused if it “would be manifestly incompatible with the public policy of the requested State.”¹⁸⁸ The explanatory report notes that “manifestly” is intended to set the bar high for the use of public policy as a reason for non-recognition and enforcement.¹⁸⁹ However, Article 10 allows parties to refuse recognition and enforcement of a judgment that awards

¹⁸⁴ See Richard Gwynne, *England and Wales, in* 1 INTERNATIONAL EXECUTION AGAINST JUDGMENT DEBTORS § 24:4 (Dennis Campbell ed., 2013).

¹⁸⁵ Judgments Convention, *supra* note 11, art. 5(1)(j).

¹⁸⁶ See *supra* Section II.B.

¹⁸⁷ See GARCIMARTÍN & SAUMIER, *supra* note 159, para. 295.

¹⁸⁸ Judgments Convention, *supra* note 11, art. 7(c).

¹⁸⁹ GARCIMARTÍN & SAUMIER, *supra* note 159, para. 295.

damages that are not damages for “actual loss or harm suffered.”¹⁹⁰ In other words, Article 10 gives parties explicit permission to refuse recognition and enforcement of punitive damages. The explanatory report notes that this provision has been included in the Convention in part to prevent states from using public policy as a ground for non-recognition and enforcement of awards including punitive damages.¹⁹¹ However, this narrowing of the public policy defense is not particularly helpful from the perspective of getting U.S. judgments with punitive damages recognized, given that Article 10 still gives parties license not to recognize punitive damages.

So, to return to our torts case from the previous Section, if the court awarded punitive damages to the injured pedestrian, the Convention would not make it any more likely that those damages would be enforced abroad.¹⁹² However, it is important to note that the Convention is a floor, not a ceiling, for recognition. If the country in question would recognize a U.S. judgment including punitive damages under domestic law, Article 10 would certainly not prevent it from continuing to do so.

D. Reciprocity

Of the three frequently cited problem areas for foreign recognition of U.S. judgments, the area where the Convention offers the greatest improvement over the existing situation is reciprocity. Even the strictest form of reciprocity is clearly satisfied by a treaty guaranteeing mutual recognition and enforcement. As discussed in Section II.C, many countries are doing away with or interpreting more liberally reciprocity requirements in their domestic law.¹⁹³ However, for those countries that retain reciprocity requirements, the treaty would remove this potential roadblock to recognition and enforcement of U.S. judgments.

For example, China’s law still contains a reciprocity requirement, though Chinese courts may be moving towards a more liberal interpretation of the requirement.¹⁹⁴ Returning to our contracts case, if the

¹⁹⁰ Judgments Convention, *supra* note 11, art. 10.

¹⁹¹ See GARCIMARTÍN & SAUMIER, *supra* note 159, para. 295 (explaining that the public policy defense should not be used to address challenges to the recognition or enforcement of judgments that include punitive damages because punitive damages have been separately addressed in Article 10).

¹⁹² See also Berch, *supra* note 105, at 57 (arguing that the United States made a “strategic mistake” in agreeing to a similar public policy clause in the Choice of Court Agreement negotiations, and that the United States should seek to amend that clause of the Choice of Court Agreement).

¹⁹³ See *supra* Section II.C.

¹⁹⁴ See *supra* notes 148–57 and accompanying text.

buyer sought to enforce a U.S. judgment against the defective electronics manufacturer in China, the outcome under existing Chinese domestic law is somewhat uncertain. Although *Liu Li*, discussed in Part II, was promising as the first time a Chinese court enforced a U.S. judgment, it is unclear if the outcome will be the same in future cases, especially if the parties come before a different Chinese court.¹⁹⁵

Alternatively, under the Convention, the buyer's judgment clearly would be recognized. A separate portion of Chinese law governs recognition and enforcement if there is a treaty in place,¹⁹⁶ and in this scenario there would be no issue of de facto reciprocity; the judgment would be recognized regardless of which court in the United States rendered the judgment and regardless of whether that court had ever been faced with a Chinese judgment. The same would be true in the torts example from the previous Section.

The one important caveat to this is that the effect of the Convention will naturally depend on how many countries elect to join. If those countries that retain reciprocity requirements choose not to join the Convention, then it will have little effect in this area. One potentially promising sign is that China appears to have taken an active role in the negotiations, suggesting that China may be giving serious consideration to joining the final Convention.¹⁹⁷

E. Benefits of the Convention

As the preceding sections show, the Convention offers concrete gains in some, but not all, of the areas that have traditionally plagued the recognition and enforcement of U.S. judgments abroad. First, judgments that were denied recognition in some countries because the rendering court did not have jurisdiction under the laws of the country of the requested court would now be recognized. More significantly, reciprocity would no longer be a concern for all countries that ratify the Convention. On the other hand, judgments that include punitive

¹⁹⁵ See *id.*

¹⁹⁶ See ASIAN BUS. LAW INST., *supra* note 45, at 49 (quoting Articles 281–82 of the Chinese Code of Civil Procedure).

¹⁹⁷ See Hague Conference on Private Int'l Law, *Proposal of the Delegation of the People's Republic of China*, Working Doc. No. 216 E (Nov. 2017), <https://assets.hcch.net/docs/0f73ed23-9898-434c-90e3-c10b44104c49.pdf> (describing a proposal to delete Article 5(1)(p) from the draft); see also Hague Conference on Private Int'l Law, *Proposal of the Delegation of the People's Republic of China*, Working Doc. No. 220 E (Nov. 2017), <https://assets.hcch.net/docs/92e53bf3-028e-4619-baa2-8cd4255d31bf.pdf> (describing a proposal to amend Article 7(1)(h)). China also signed the Choice of Court Agreement in September 2017, which may suggest a willingness to cooperate on related private international law issues. See *Status Table of 2005 Convention on Choice of Court Agreements*, *supra* note 166.

damages would still be denied enforcement (although the part of the judgment that is not punitive may be enforced under the Convention).

In addition to these improvements, the Convention offers two other benefits to U.S. litigants. First, the Convention will “lock in” existing gains. As shown in Part II, U.S. judgments are already more likely to be enforced abroad than they were in the past. However, some of those improvements are the result of changes to foreign law. For example, some countries have made their reciprocity requirements less stringent. But that improvement is based solely on the domestic law in those countries and could change again to the detriment of U.S. litigants. Under the Convention, existing improvements will be “locked in”—the Convention will create a predictable floor, and judgments that come under the Convention will be enforced even if foreign law changes. If countries decide to adopt stricter reciprocity requirements once again, the Convention will prevent this change from having a detrimental effect on U.S. litigants as long as the country is a member of the Convention. This benefit makes U.S. participation in the Convention worthwhile, even if the situation for U.S. judgments has already improved.¹⁹⁸

Of course, the Convention would also require the United States to recognize judgments from all other member countries to the Convention. Some scholars have expressed concerns that U.S. courts might be forced to recognize judgments from legal systems that lack basic procedural fairness.¹⁹⁹ However, U.S. courts could still deny recognition to any foreign judgments that lacked basic procedural fairness under the public policy exception in Article 7.²⁰⁰ Thus, this concern should not prevent U.S. participation, especially given the important gains the Convention would offer to U.S. litigants.²⁰¹

In addition to “locking in” existing improvements, the Convention would also benefit U.S. litigants by making the rules of

¹⁹⁸ Outside the scope of this Note are additional potential reasons that U.S. participation may be worthwhile. For example, the United States might participate in the treaty in order to encourage international cooperation in this area. Some might argue that if the United States joins the treaty, it would also have the additional benefit of bringing uniformity to U.S. state law on recognition and enforcement, though this might depend in part on whether the treaty is implemented through a federal statute.

¹⁹⁹ See Ronald A. Brand, *The Circulation of Judgments Under the Draft Hague Judgments Convention* 33–35 (Univ. of Pittsburgh Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2019-02, 2019) (describing this concern and arguing that it could be overcome through a system of “bilateralization”).

²⁰⁰ Judgments Convention, *supra* note 11, art. 7(c).

²⁰¹ The few scholarly pieces considering the Convention from a U.S. perspective have reached a similar conclusion. See, e.g., Teitz, *supra* note 80 (assessing the Convention and offering reasons that the United States should not only participate in the negotiations but also join the Convention).

recognition and enforcement for countries under the Convention transparent. If the Convention gains wide membership, litigants will be able to look at the rules in the Convention to determine whether a judgment will be enforceable in another country before ever filing a case, and before they are even certain about the country in which they will need to seek enforcement. This is a significant improvement over the existing situation, where litigants are unlikely to know if a judgment will be enforceable before obtaining it, and where litigants may need to hire a local lawyer or do research on the domestic law of the country in which they wish to enforce a judgment to determine whether it will be enforceable. This predictability is particularly important for tort victims and owners of small businesses, who are unlikely to be able to take advantage of the alternative of international arbitration.

CONCLUSION

If the United States joins the new Judgments Convention, it will be the first time the United States has acceded to an international treaty requiring reciprocal recognition and enforcement of judgments. As this Note has argued, foreign recognition of U.S. judgments has already improved in recent years. But despite these improvements, the Convention still has important benefits to offer U.S. litigants. In addition to concrete improvements in the areas of jurisdiction and reciprocity, the Convention will also make the rules for judgments recognition clear and predictable and will lock in existing gains.

Returning to the cases from the Introduction of this Note, it is possible that today, Parrott's mother would be able to enforce her judgment in Italy.²⁰² However, she might still be denied recognition in some countries. The same is true of the plaintiffs in the *Truhe* case.²⁰³ Worse, these plaintiffs would probably be unable to predict, prior to bringing the case, whether a judgment would be enforceable abroad. It is plaintiffs like these that would be served by the new Judgments Convention, which would offer them clear, reliable, and predictable information about where their U.S. judgment will be recognized.

²⁰² See *supra* Section II.B (describing how some countries initially skeptical about recognizing judgments containing punitive damages, like Italy, have now become more willing to consider such awards, while other countries still deny recognition based on punitive damages).

²⁰³ See *supra* Section II.C (discussing how despite some willingness from China to loosen its reciprocity requirement, it is still not entirely clear that a judgment like the one in *Truhe* would be recognized without the Convention).