

## Memorandum 2015-38

**Recognition of Tribal and Foreign Court Money Judgments  
(Judicial Discretion)**

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In this study, the Commission<sup>1</sup> was tasked with reviewing “the standards of recognition of a tribal court or foreign court judgment” under the relevant California statutes<sup>2</sup> and reporting “its findings, along with any recommendations for improvement of those standards.”<sup>3</sup> In California, the standards of recognition for both foreign and tribal judgments are derived from the 2005 Uniform Foreign-Country Money Judgments Recognition Act (hereafter, “Uniform Act”).<sup>4</sup>

This memorandum examines the degrees of judicial discretion that are afforded to the courts in deciding whether to recognize certain foreign judgments. Concern about the appropriateness of the degrees of judicial discretion in the Uniform Act appears to have been a significant issue motivating the assignment of this study to the Commission.<sup>5</sup>

## DEGREES OF JUDICIAL DISCRETION IN UNIFORM ACT, GENERALLY

Under the Uniform Act, foreign money judgments are entitled to recognition unless an exception applies.<sup>6</sup> Some of the Uniform Act’s exceptions to

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Namely, California’s enactment of the 2005 Uniform Foreign Money-Judgments Recognition Act (Code Civ. Proc. §§ 1713-1724) and the Tribal Court Civil Money Judgment Act (Code Civ. Proc. §§ 1730-1742).

3. 2014 Cal. Stat. ch. 243, § 1 (SB 406 (Evans)).

4. The 2005 Uniform Act is a revision of the earlier 1962 Uniform Foreign Money-Judgments Recognition Act (hereafter, 1962 Uniform Act). Many of the provisions of the 2005 and 1962 Acts are quite similar. Although this memorandum focuses on the 2005 Act, many of the citations refer to the relevant provisions of both the 2005 and 1962 Acts for ease of reference.

5. See, e.g., Assembly Committee on Judiciary Analysis of SB 406 (June 13, 2014), pp. 6-8 (hereafter, SB 406 Analysis).

6. See 2005 Uniform Act, § 4(a); 1962 Uniform Act, § 3.

recognition are mandatory (i.e., the judgment *shall* not be recognized). Others are permissive (i.e., the judgment *need* not be recognized).

For the most part, the justification for denying recognition is clear on the face of the individual exceptions, regardless of whether the exception is mandatory or permissive. Thus, the difference between the mandatory and permissive exceptions does not appear to be about whether the exception would support nonrecognition, but instead whether, in spite of the exception, recognition may be appropriate.

The Uniform Act does not, however, indicate *why* recognition could be appropriate for the permissive exceptions. This memorandum seeks to identify countervailing factors that could support recognition of a judgment once a permissive exception is established.

In addition, this memorandum seeks to provide the Commission with the background information needed to determine whether the Uniform Act's degrees of judicial discretion should be adjusted.

The exceptions in the Uniform Act fall into the following categories:

- Lack of Jurisdiction
- Systemic Defect
- Unfairness in the Foreign Proceeding
- Violation of the Recognizing Jurisdiction's Public Policy
- Conflicting Judgments

Each category of exceptions and the corresponding degree of judicial discretion for judgment recognition is discussed in turn below.

#### LACK OF JURISDICTION

The Uniform Act prohibits recognition of a foreign judgment where the court that rendered the judgment did not have jurisdiction (either personal or subject matter).

A court of this state **may not recognize** a foreign-country judgment if:

- ...
- (2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.<sup>7</sup>

If a court lacks jurisdiction, then it has no authority to render judgment and the judgment itself is invalid.<sup>8</sup> It makes sense to not recognize an invalid judgment.<sup>9</sup>

One state, New York, made the lack of subject matter jurisdiction a permissive exception. The staff is unsure why New York made this change. In the United States, the rule is that a lack of subject matter jurisdiction cannot be resolved through party consent or waiver.<sup>10</sup> It is possible that other judicial systems operate differently (i.e., parties may be permitted to waive subject matter jurisdiction). Regardless, if a foreign judgment is made in excess of the rendering court's authority, it seems sound not to recognize the judgment.

**Mandatory nonrecognition of a foreign judgment seems proper when the foreign court lacked jurisdiction.**

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7. 2005 Uniform Act, § 4(b) (emphasis added); see also 1962 Uniform Act, § 4(a).

8. See generally 46 Am. Jur. 2d. Judgments § 22 ("In order for a judgment to be valid and enforceable, the court which renders it must have jurisdiction of the parties, as well as jurisdiction of the subject matter. A judgment rendered without jurisdiction may be attacked and vacated at any time, either directly or collaterally.") (citations omitted); see also Carr v. Kamins, 151 Cal. App. 4th 929, 933, 60 Cal. Rptr. 3d 196 (2007) ("A judgment is void on its face if the court which rendered the judgment lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief which the court had no power to grant.' An order after judgment that gives effect to a judgment that is void on its face is itself void and subject to appeal even if the judgment itself is not appealed.") (citations omitted); but see Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd., 181 Cal. App. 4th 752, 767, 104 Cal. Rptr. 3d 641 (2010) ("However, a court does not necessarily act without subject matter jurisdiction merely by issuing a judgment going beyond the sphere of action prescribed by law. Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction ... . The distinction is critical, because action in excess of jurisdiction by a court that has jurisdiction in the fundamental sense (i.e., jurisdiction over the subject matter and the parties) is not void, but only voidable. Errors of substantive law are within the jurisdiction of a court and are not typically acts beyond the court's fundamental authority to act. For example, a failure to state a cause of action, insufficiency of evidence, abuse of discretion, and mistake of law, have been held nonjurisdictional errors for which collateral attack will not lie.") (citations, emphasis, and quotation marks omitted).

9. This is analogous to limitations on the constitutional doctrine of Full Faith and Credit. Lack of jurisdiction is a sufficient reason for a state to refuse to be bound by a sister state's judgment. See generally Pennoyer v. Neff, 95 U.S. 714, 729-736 (1878).

10. See, e.g., 46 Am. Jur. 2d. Judgments § 27 ("A judgment rendered in a case in which the court does not have subject-matter jurisdiction is not validated by the consent of the parties purporting to give the court jurisdiction. Subject-matter jurisdiction is a power that exists by operation of law only and cannot be conferred upon any court by consent or waiver.") (citations omitted).

## SYSTEMIC DEFECTS IN FOREIGN JURISDICTION

The Uniform Act prohibits recognition of any judgment rendered by a foreign judicial system where the quality of justice offered by the system *as a whole* cannot be trusted.<sup>11</sup>

A court of this state **may not recognize** a foreign-country judgment if:

(1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

....<sup>12</sup>

In this case, the systemic problems are so extensive that they taint *all* judgments rendered in that judicial system.

Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course.<sup>13</sup>

**It seems proper to mandate nonrecognition in these circumstances.**<sup>14</sup>

## UNFAIRNESS IN THE FOREIGN PROCEEDING

The Uniform Act includes six permissive exceptions to recognition that involve unfairness in the foreign proceeding.

A court of this state **need not recognize** a foreign-country judgment if:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

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11. This exception is derived from the 1895 U.S. Supreme Court opinion in *Hilton v. Guyot* (requiring, in part, that the judgment be issued “under a system of jurisprudence likely to secure an impartial administration of justice....”). See 2005 Uniform Act, § 4, cmt.; see also *Hilton v. Guyot*, 159 U.S. 113, 202 (1895).

12. 2005 Uniform Act, § 4(b) (emphasis added); see also 1962 Uniform Act, § 4(a).

13. 2005 Uniform Act, § 4, cmt.

14. The wording of this standard, in particular the term “due process,” has caused some concern. See SB 406 Analysis, *supra* note 5, at 7 (quoting the Habematolel Pomo of Upper Lake). For the purposes of this memorandum, it is sufficient to note that the Uniform Act commentary makes clear that the due process inquiry under the Uniform Act should focus on fundamental fairness, not on whether the foreign system provides all the same procedures and protections as U.S. courts. See 2005 Uniform Act, § 4, cmt. The concerns about the term “due process” and the operation of this standard will be addressed in more detail in a subsequent memorandum.

(2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;

...

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.<sup>15</sup>

While these exceptions are similar in type, the staff acknowledges that the apparent degree of unfairness under the individual exceptions differs considerably (i.e., deprivation of an adequate opportunity to present a case vs. required to litigate in a different forum than the parties had initially agreed to).

### **Reason for Nonrecognition**

For most of these exceptions, the language of the exception itself (or a clear implication of the language) indicates both that something unfair happened in the foreign proceeding and that the unfairness was prejudicial (e.g., the defendant did not receive notice “in sufficient time to enable the defendant to defend” or the proceeding “was not compatible with the requirements of due process of law”). It is this prejudice that seems to justify nonrecognition.

In fact, the prejudice justifying nonrecognition is so obvious and compelling that the appropriateness of permitting recognition at all seems questionable. The Uniform Act offers no indication of what circumstances could offset the apparently prejudicial deficiencies described in the exceptions. From the language of the Act, a reader is left to wonder why a court would *ever* recognize a judgment if one party did not have an adequate opportunity to present its case or the judgment was rendered under procedures that were not compatible with due process.

The silence of the Uniform Act on this point has led to significant concern that the Act does not sufficiently disavow procedural unfairness. For example, in

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15. 2005 Uniform Act, § 4(c) (emphasis added); see also 1962 Uniform Act, § 4(b).

analyzing the bill that assigned the Commission this study, the Assembly Committee on Judiciary wrote:

Even a cursory review of the grounds for discretionary nonrecognition raise legitimate questions as to the fairness and due process provided in the underlying action and what should the appropriate standard be for recognition in state court. For example, the bill (and the [Uniform Act]) allows a court, in its discretion, to recognize and enforce a tribal court money judgment even when the specific proceedings in the tribal court leading to the judgment were not compatible with due process of law. Currently the bill – and the [Uniform Act] – require mandatory nonrecognition of a tribal order if it was rendered under a judicial system that does not provide procedures compatible with the requirements of due process. However, if the system provides procedures that, at least on paper, provide due process of law, but the actual procedures used in a particular case do not, the defendant has not been afforded due process of the law and thus, the proceeding would not, under the Ninth Circuit decision in *Wilson v. Marchington*, be entitled to recognition in federal court. Is it reasonable policy – under both this bill and the [Uniform Act] – to permit such an order to be enforced by a California court? This is obviously a very important question calling for further study.<sup>16</sup>

### **Possible Reasons for Recognition**

Although the Uniform Act itself does not indicate why, in spite of unfairness in the foreign proceeding, recognition might be appropriate, the Uniform Act's commentary suggests, for two of the exceptions (7 and 8, above), a possible situation where recognition may be appropriate:

[I]f the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.<sup>17</sup>

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16. See SB 406 Analysis, *supra* note 5, at 7.

17. See 2005 Uniform Act, § 4, cmt.

While helpful, the commentary does not answer the more fundamental question of *why* recognition is appropriate in this specific situation. In the staff's assessment, the failure to appeal could weigh in favor of recognition for a few reasons:

- *Casts doubt on the source of the prejudice.* If a party failed to take advantage of an opportunity to resolve the alleged deficiency in the foreign court system, the prejudice may be attributed, in part, to the party's own inaction.
- *Unfairness to the party seeking recognition.* Where the opposing party did not challenge the alleged deficiency in the foreign court system, the party seeking recognition may not have had an opportunity to get the issue resolved prior to the judgment.
- *Impedes judicial economy.* In situations when the foreign court fully litigated the merits of the case, that court would presumably be in the best position to resolve an alleged procedural deficiency. In such situations, California courts may be reluctant to permit a party to attack a foreign judgment on grounds that should have been resolved in the foreign court system.

Similar reasons may support judgment recognition in other factual scenarios. For example, the court could conclude that recognition was appropriate if the party opposing recognition was somehow responsible for bringing about the problem in the foreign court (i.e., had unclean hands). Recognition may be appropriate where, for instance, the defendant failed to receive notice because the defendant was willfully evading notice. Or, the court might find that the defendant had effectively waived the right that is the basis for the objection. Recognition may be appropriate where, for instance, the defendant waived the right to a jury trial in the foreign court, but now claims that the lack of a jury trial was a due process violation.

The staff could offer a number of scenarios where, on balance, it seems more fair and reasonable to recognize a judgment despite the fact that the grounds establishing an exception are present. However, there are likely other situations, which the staff does not anticipate, where judgment recognition would also be appropriate, given the totality of the circumstances.

Generally, treating this class of exceptions as permissive allows a court to evaluate the level of harm, the parties' conduct in the foreign court system, and any other factors the court deems relevant in determining whether recognition of an individual foreign judgment is appropriate.

## **Appropriateness of Discretion**

The initial question for the Commission to consider is whether any judicial discretion is appropriate once a court finds that an exception is established. In other words, should the presence of one of these exceptions preclude recognition of the judgment altogether?

Some states have concluded that all of these permissive exceptions should instead be mandatory exceptions. As noted in a prior memorandum, three states made all of these permissive exceptions mandatory.<sup>18</sup>

As discussed above, there do appear to be countervailing factors that could support recognition despite the court finding that the grounds for an exception were established. As such, making all the exceptions mandatory seems too inflexible and, in some cases, would lead to unjust results.

While these exceptions have been evaluated as a class, the Commission may decide that the different exceptions justify different treatment (i.e., not all of the exceptions justify discretion). One state, Maine, made the fraud exception (exception 2, above) mandatory. Granting a court discretion to recognize a judgment arising from a proceeding where fraud was perpetrated may have been seen as especially troubling, particularly if the party who perpetrated the fraud is the one seeking recognition of the judgment.<sup>19</sup> However, even where fraud is an issue, there may be instances where, given the totality of the circumstances, judgment recognition might be better than the alternative.

In the staff's opinion, some level of discretion is appropriate for all of these permissive exceptions. Making these exceptions (or some subset thereof) mandatory would preclude the courts from doing justice in cases where the totality of the circumstances clearly weighs in favor of judgment recognition.

**Does the Commission want to preserve some degree of discretion for judgment recognition when these exceptions apply?**

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18. See Memorandum 2015-28, p. 4 (Georgia, Massachusetts, and Ohio).

19. The language of the exception does not require that the fraud be perpetrated by one of the parties, only that the fraud "deprived the losing party of an adequate opportunity to present its case." 2005 Uniform Act, § 4(c)(2). However, the Uniform Act commentary indicates that courts interpreting this exception have found that "only extrinsic fraud – *conduct of the prevailing party* that deprived the losing party of an adequate opportunity to present its case – is sufficient" under the Act. See 2005 Uniform Act, § 4, cmt. (emphasis added).

## Focus the Court's Exercise of Discretion

If the Commission concludes that some degree of discretion for these exceptions is appropriate, the Commission must consider whether the Uniform Act adequately explains how a court should exercise this discretion.

Currently, the Uniform Act simply says that the court “need not” recognize the foreign judgment.<sup>20</sup> The Act itself does not indicate what factors a court should consider in deciding whether to recognize a judgment once an exception is established; nor does the Act identify nonrecognition as the appropriate outcome, in the absence of any countervailing factors.

As noted above, the Act's failure to require any particular outcome or offsetting considerations in the face of a demonstrated unfairness in the foreign proceeding has raised concerns.<sup>21</sup> Even though, as discussed, discretion may indeed be appropriate or even necessary to avoid unjust results,<sup>22</sup> the Act's apparently unfettered discretion seems at odds with common sense. It simply cannot be that the Act authorizes a court, who found unfairness in the foreign proceeding, to recognize the resulting foreign judgment without first finding *something* that offsets or counterbalances the unfairness (e.g., waiver in the foreign proceeding, unclean hands, harmless error).

If the Commission agrees that the Act's silence on this point is problematic and needs to be addressed, the staff has initially identified three options to better describe how a court should exercise its discretion, after a permissive exception has been established:

- Add clarifying Commission Comments, but do not revise the language of the statute.
- Supplement the language of the Uniform Act with a statutory list of considerations that a court could take into account when exercising its discretion.
- Revise the language of the Uniform Act to make the exceptions presumptive (e.g., the judgment shall *not* be recognized *unless* the court finds good reason to do so).

Each of these options is discussed in turn below. **The Commission will need to provisionally decide whether the staff should further develop any of these options.**

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20. 2005 Uniform Act, § 4(c); see also 1962 Uniform Act, § 4(b).

21. See discussion of “Reason for Nonrecognition,” *supra*.

22. See discussion of “Possible Reasons for Recognition,” *supra*.

### *Commission Comments*

If the Commission wants to minimize changes to the Uniform Act language, it could provide guidance solely through Commission Comments. Commission Comments are reproduced in most annotated codes, thereby providing useful guidance to courts and practitioners. They also serve as evidence of legislative intent.<sup>23</sup>

For example, a Commission Comment could say something along the lines of the following:

In deciding whether to recognize a judgment under this section, a court might consider whether, given the totality of the circumstances, recognition would be more fair and reasonable than nonrecognition.

The staff suggests that, if the Commission pursues this option, the Comments be drafted as advisory and illustrative, rather than mandatory and binding.

The main benefit of this approach is that it would not disrupt the Uniform Act's language. All other things being equal, it is better to preserve the language of a Uniform Act without significant change. With respect to foreign judgment recognition, uniformity provides a particular benefit, as it "creates a stability in this area that facilitates international commercial transactions."<sup>24</sup>

The main detriment of the approach is it does not address the source of potential misunderstanding, the language of the statute itself. Moreover, some disapprove of the practice of "legislating by Comment," rather than addressing an issue directly in statute.

The staff notes that the other options, discussed below, would also involve explanatory Commission Comments.

### *List of Considerations*

The Uniform Act could be supplemented with a list of factors to consider in evaluating whether judgment recognition would be appropriate. Such a list would not dictate the outcome (i.e., recognition or not), but it would give a more concrete sense of the types of issues that might be relevant as the court determines the outcome. The list would also provide some reassurance that countervailing factors that could support judgment recognition do exist.

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23. See generally 2013-2014 Annual Report, 43 Cal. L. Revision Comm'n Reports 253, 267-273 (2013).

24. 2005 Uniform Act, Prefatory Note.

For example, such a list could include the following:

- Whether the opponent attempted to remedy the issue in the foreign court (e.g., whether the opponent took advantage of a procedure for extension of time after having received late notice).
- Whether the opponent waived the right to complain of the issue that underlies the exception (e.g., the opponent claims a violation of due process based on the failure to receive a jury trial, a right which the opponent voluntarily waived in the foreign proceeding).
- Whether the opponent's own misconduct contributed to the problem in the foreign court (e.g., the opponent failed to receive actual notice because the opponent wrongfully evaded notice).

If the Commission is interested in pursuing this option, the staff recommends that the list be expressly illustrative and nonexclusive. The staff anticipates that any list would be both over- and under-inclusive. Not every factor would be important in every case. And, the list would likely omit factors that are nonetheless germane in some cases (i.e., we cannot anticipate all of the relevant considerations).

The main benefit of this approach is that the statute itself would identify certain circumstances that might support recognition, notwithstanding the deficiency in the foreign proceeding. This would presumably lessen the sense that the law permits recognition of manifestly unjust judgments.

The main disadvantage of the approach is that it would introduce non-uniform language into the Uniform Act. However, this non-uniform language would likely not disrupt the value of uniformity on the whole, as it is intended simply to clarify considerations that might be relevant to an otherwise discretionary decision under the Act.

#### *Treat the Exceptions as Presumptions*

When a permissive exception has been established, the Uniform Act simply allows the court to decline to recognize the judgment. An alternative approach would be to treat the permissive exceptions as presumptions favoring nonrecognition.

This approach would clearly state that nonrecognition is the default result when an exception applies, while expressly permitting this default to be overridden in appropriate circumstances. The appropriate circumstances for recognition could either be described generally (e.g., where, on balance,

nonrecognition would be unfair) or described in more detail (as in the previous “list of considerations” approach).

There is precedent for this approach. North Carolina’s enactment treats the permissive exceptions as presumptions.<sup>25</sup> Under North Carolina’s enactment, recognition “shall be denied unless ... recognition would nevertheless be reasonable under the circumstances.”<sup>26</sup>

The main benefit of such an approach is that it makes explicit both the default result when an exception applies and the circumstances justifying a departure from that default.

It seems likely that this approach is generally consistent with how the exceptions operate in practice. In other words, a court would likely favor nonrecognition if an exception applies, unless the court found an important countervailing reason to recognize the judgment. However, restating the exceptions as express presumptions might substantively change outcomes, particularly in close cases. With a clear default of nonrecognition, a court may be less inclined to go against that default unless the balance overwhelmingly tips in favor of recognition.

The main detriment of this approach is that, at a minimum, it may be *perceived* as a significant substantive change, making it more difficult for foreign judgments to be recognized. The appearance of a policy change might be problematic, particularly because the Uniform Act has governed the recognition of foreign judgments in California for nearly 50 years without causing any obvious problems. This approach is also a more significant deviation from uniformity.

#### REPUGNANCY TO PUBLIC POLICY

The Uniform Act also includes a permissive exception for situations where the judgment, or some aspect thereof, is repugnant to public policy. Specifically, the Uniform Act provides:

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25. See N.C. Gen. Stat. § 1C-1853(c). North Carolina similarly treats the permissive public policy and conflicting judgments exceptions as presumptive exceptions.

For the conflicting judgments exception, North Carolina crafted two presumptions depending on the relative timing of the judgments. North Carolina favors recognition of the later judgment. See *id.* § 1C-1853(d), (e); see also Memorandum 2015-28, p. 5.

26. N.C. Gen. Stat. § 1C-1853(c).

A court of this state **need not recognize** a foreign-country judgment if:

...

(3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;

...<sup>27</sup>

The Uniform Act's commentary explains that the public policy exception is an exacting standard, requiring much more than a simple difference in law:

[A] difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel."<sup>28</sup>

Given that rationale, which seems sound, it is not clear why the exception is permissive. The values protected by this exception are public values. It is not clear that the private concerns of the parties to the foreign proceeding would justify taking an action that would threaten public values. Once a court effectively concludes that some aspect of the foreign judgment is repugnant to the public policy of this state,<sup>29</sup> the staff is unsure what circumstances could justify overriding state public policy and recognizing the judgment.

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27. 2005 Uniform Act, § 4(c) (emphasis added); see also 1962 Uniform Act, § 4(b)(3).

28. 2005 Uniform Act, § 4, cmt. (citation omitted).

29. See generally Mark Rosen, *Exporting the Constitution*, 53 Emory L.J. 171, 177-179 (2004) (discussing foreign judgment recognition more generally under principles of comity) ("The vast majority of American courts have interpreted the public policy exception very narrowly. Most commonly, enforcement is deemed to violate public policy only if enforcing the judgment is found to be repugnant; a common formulation is that the public policy exception to the doctrine of comity is usually invoked only in the rare instance where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought. Courts refer to the public policy exception as a high standard that is narrow in scope, and as a doctrine that is available only in exceptional cases or the rare instance. As another court has accurately stated:

Courts in the United States normally will not deny recognition merely because the law or practice of the foreign country differs, even if markedly from that of the recognition forum.... As Judge Cardozo observed: We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.

...

One possibility is that recognition might, in some situations, be the lesser of two evils (with respect to state public policy). Assume, for instance, a California court is asked to recognize a foreign breach of contract judgment. Assume, further, that the judgment arose from a lawful contract in the foreign country, but the contract is one that would be prohibited by California public policy. In such a case, the California court may want to consider the underlying values that California seeks to protect by prohibiting the particular contract. California's prohibition could be intended to protect vulnerable parties – and failing to recognize the foreign judgment would unjustly enrich someone who took advantage of a vulnerable party. In some cases, the California court may conclude that nonrecognition is more offensive to California values than recognition.

**Is the Commission satisfied that discretion is appropriate when the foreign judgment itself or the underlying cause of action or claim for relief is repugnant to California's public policy?**

#### CONFLICTING JUDGMENTS

The final permissive exception applies when the foreign judgment conflicts with another judgment. The Uniform Act provides:

(c) A court of this state **need not recognize** a foreign-country judgment if:

...  
(4) the judgment conflicts with another final and conclusive judgment;  
...<sup>30</sup>

In this case, the other judgment is not necessarily one of a foreign court (but it may be), nor is it necessarily a judgment that would otherwise be eligible for recognition.

If there is more than one judgment on the same issue, it may not be clear which (if any) should be recognized. To decide that question, the court may need to consider a wide variety of facts. First, the court may need to determine whether each of the judgments is eligible for recognition. If more than one

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Courts consistently have enforced foreign judgments even if they would have refused to entertain suit on the original claim on grounds of public policy.”) (citations and quotation marks omitted).

30. 2005 Uniform Act, § 4(c) (emphasis added); see also 1962 Uniform Act, § 4(b)(4).

judgment is eligible, then the court could consider whether legal or equitable considerations weigh in favor of recognizing a particular judgment. In some cases, the facts may point strongly toward recognizing one judgment over the others. In other cases, there may be no clear answer and a court might decide to recognize neither.

Treating the conflicting judgments exception as permissive allows a court to consider all of the relevant information and determine the appropriate course of action. **Granting the court discretion to make such a determination seems proper.**

## CONCLUSION

Generally, the Uniform Act appropriately recognizes that certain exceptions should bar recognition of a foreign judgment entirely (i.e., mandatory exceptions), while other exceptions require a more detailed inquiry before the appropriate result can be ascertained (i.e., permissive exceptions). The staff's specific conclusions and concerns about the judicial discretion under the Uniform Act are summarized below:

- The mandatory exceptions seem to describe situations in which a foreign judgment should never be recognized (i.e., lack of jurisdiction and fundamental systemic problems in the foreign justice system).
- The permissive exceptions that involve fairness in the foreign proceeding, while troubling on their face, may occur in situations where judgment recognition is the appropriate result, despite unfairness in the foreign proceeding.

The staff believes additional guidance as to the court's exercise of discretion once a permissive fairness exception is established would be helpful. In particular, the silence of the Uniform Act on this point has led to significant concerns that the statute does not sufficiently disavow recognition of unfair foreign judgments.

Such guidance could be provided in the statute itself or solely in Commission Comments. The staff identified two options for providing guidance in the statute: providing list of relevant considerations that a court should take into account and establishing a presumption in favor of nonrecognition when an exception applies.

- The appropriate treatment of the public policy exception is unclear. The staff has doubts about whether it would ever be proper to recognize a judgment that offends public policy, but

recognizes that there could be situations in which nonrecognition might do a greater injury to public values.

- The existing permissive treatment of the conflicting judgments exception seems proper. The facts that may bear on the proper disposition of such judgments would seem to be so varied as to require judicial discretion.

Respectfully submitted,

Kristin Burford  
Staff Counsel