Study D-1200 April 6, 2016

Memorandum 2016-13

Recognition of Tribal and Foreign Court Money Judgments (Recognition Standards)

In this study, the Commission[1] was tasked with reviewing "the standards of recognition of a tribal court or foreign court judgment" under California's enactment of the 2005 Uniform Foreign-Country Money Judgments Recognition Act (hereafter, "California's Uniform Act")[2] and the Tribal Court Civil Money Judgment Act (hereafter, "Tribal Act")[3] and reporting "its findings, along with any recommendations for improvement of those standards."[4]

In California, the standards of recognition for both foreign and tribal court judgments are derived from the 2005 Uniform Foreign-Country Money Judgments Recognition Act (hereafter, "Uniform Act" or "2005 Uniform Act").[5]

Under the Uniform Act, foreign court money judgments are entitled to recognition unless an exception applies.[6] Some of the Uniform Act's exceptions to recognition are mandatory (i.e., the judgment *shall* not be recognized).[7] Others are permissive (i.e., the judgment *need* not be recognized).[8]

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). 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. Code Civ. Proc. §§ 1713-1724.
3. Code Civ. Proc. §§ 1730-1742.
4. 2014 Cal. Stat. ch. 243, § 1 (SB 406 (Evans)).
5. The 2005 Uniform Act is a revision of the earlier 1962 Uniform Foreign Money-Judgments Recognition Act (hereafter, "1962 Uniform Act"). For the purposes of this memorandum, except as noted, the relevant provisions of the 2005 and 1962 Acts are quite similar. Therefore, this memorandum includes citations to case law under both the 2005 and 1962 Acts, without noting the particular version of the Act in operation at the time the case was decided. The text of the Acts and the associated commentary is available on the Uniform Law Commission's website: http://uniformlaws.org/.
6. See 2005 Uniform Act § 4(a).
7. *Id.* § 4(b).
8. *Id.* § 4(c).

This memorandum is the third in a series of memoranda discussing the individual standards of recognition for foreign and tribal court judgments in California law. **This memorandum discusses all the remaining standards of recognition that were not addressed in prior memoranda.**

Generally, for the exceptions discussed in this memorandum, California's Uniform Act and the Tribal Act are substantively identical and uniform. For the most part, this memorandum focuses on California's Uniform Act enactment, as much of the commentary and case law relates to the Uniform Act. However, the staff anticipates that the analysis presented will apply to the recognition of either foreign or tribal court judgments, except as noted.

DUE PROCESS

California's Uniform Act and the Tribal Act both contain three exceptions to judgment recognition related to due process, one of which is mandatory and the other two permissive. The mandatory and permissive exceptions are discussed in turn below.

Before addressing those provisions, the staff would like to raise one general issue regarding due process in tribal courts. The federal Indian Civil Rights Act[9] (hereafter, "ICRA") prohibits tribes from denying "to any person within its jurisdiction the equal protection of its laws or depriv[ing] any person of liberty or property without due process of law."[10] As noted in a prior memorandum, the case law indicates that tribal courts are the arbiters of issues arising under ICRA.[11] The staff did not find any authority that addressed how ICRA might bear on the due process analysis with respect to recognition of a tribal court judgment. **The staff invites comment on that issue.**

Mandatory Nonrecognition for Systemic Due Process or Impartiality Failures

California's Uniform Act and Tribal Act both require nonrecognition of a judgment rendered in a foreign judicial system that has *systemic* defects in the quality of justice it provides. The relevant provision from California's Uniform Act is reproduced below.

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9. 25 U.S.C. § 1301 et seq.
10. *Id*. § 1302(a)(8); see also Cohen's Handbook of Federal Indian Law § 14.04[2] (Nell Jessup Newton Editor-in-Chief, Lexis Nexis 2012) (hereafter, "Cohen's Handbook").
11. See First Supplement to Memorandum 2016-6, p. 8.

Code Civ. Proc. § 1716 (Uniform Act § 4)[12]

1716. …

(b) A court of this state shall not recognize a foreign-country judgment if any of the following apply:

(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.

…

By its terms, this standard applies in situations where the judicial system *as a whole* fails to provide impartial tribunals or afford litigants due process.

The commentary of the Uniform Act indicates that the inquiry under this exception focuses on "the basic fairness of the foreign-country procedure,"[13] as opposed to requiring the full panoply of American constitutional due process protections. In particular, "[p]rocedural differences … are not sufficient to justify denying recognition under [this exception], so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding."[14]

The staff found only a few cases where a court denied recognition to a foreign country judgment based on this exception. In one case, the Ninth Circuit Court of Appeals, applying California law, denied recognition to an Iranian judgment against the former shah's sister on the grounds that she "could not expect fair treatment from the courts of Iran, could not personally appear before those courts, could not obtain proper legal representation in Iran, and could not even obtain local witnesses on her behalf."[15] In another case, a federal court in New York denied recognition to a Liberian judgment, which was issued during a civil war while the Liberian Constitution was suspended.[16]

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12. See corresponding provision in the Tribal Act, Code Civ. Proc. § 1737(b)(3).
13. See 2005 Uniform Act § 4 Comment 5.
14. *Id.*
15. Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (9th Cir. 1995). It is worth noting that some view this case as taking a broad reading of the exception. See, e.g., Restatement (Fourth) of Foreign Relations Law of the U.S.: Jurisdiction § 404 Reporters' Note 9 (Tentative Draft No. 1, 2014), *available at* https://www.ali.org/projects/show/foreign-relations-law-united-states/ (hereafter, "Draft Fourth Restatement") (citing *Bank Melli* as example of case where concern about integrity of rendering court was specific to individual proceeding); but see American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 5 Reporters' Note 2 (2006) (hereafter, "ALI Model Statute") (citing *Bank Melli* as example of situation where "the judiciary of the state where the foreign judgment was rendered is dominated by the political branches of government or by a special interest").
16. Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 286-88 (S.D.N.Y. 1999), *aff'd* 201 F.3d 134 (2d Cir. 2000).

Where the judicial system as a whole is fundamentally compromised, it seems appropriate to simply deny recognition to judgments arising from that judicial system as a matter of course.

> 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.[17]

In the staff's view, this exception is appropriate and sufficiently clear as drafted. Thus, the staff recommends no changes to this provision.

Permissive Nonrecognition for Failure of Due Process or Impartiality in the Individual Proceeding

In the earlier 1962 Uniform Act, the mandatory exception for systemic failures was the only exception that expressly addressed due process and the impartiality of the courts. However, in certain judgment recognition proceedings, courts were faced with due process problems that were not systemic, but were instead limited to the individual proceeding. In those instances, courts reached different conclusions on whether the judgment must be recognized (i.e., the mandatory exception did not apply) or not recognized (i.e., the mandatory exception applied) under the Uniform Act.[18]

When revising the Uniform Act, the Uniform Law Commission (hereafter, "ULC") addressed that issue by adding two permissive exceptions that address due process problems or court integrity in an individual proceeding. The relevant provisions from California's Uniform Act are reproduced below.

> **Code Civ. Proc. § 1716 (Uniform Act § 4)** [19]
>
> 1716. …
>
> (c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:
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> …

17. See 2005 Uniform Act § 4 Comment 12.

18. See *id.* § 4 Comments 11, 12; see also Draft Fourth Restatement, *supra* note 15, § 404 Reporters' Note 10 (noting "a few courts drew the inference that under [the 1962 Act] a court asked to recognize a foreign judgment could not consider the deficiencies of the particular proceeding in question").

In some instances, courts took a broad view of the mandatory exception and did not recognize a foreign court judgment where the failure was arguably less than a systemic problem. See *supra* note 15 .

19. See corresponding provisions in the Tribal Act, Code Civ. Proc. § 1737(c)(7)-(8).

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

(8) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

…

These exceptions complement the mandatory exception for systemic due process failures, authorizing nonrecognition of a foreign court judgment where the failure was limited to the individual proceeding.[20]

As with the mandatory nonrecognition provision, the phrase "due process" is intended to mean fundamental fairness, as opposed to the American constitutional concept of due process specifically.[21] One state, North Carolina, modified its enactment accordingly (referring to a foreign proceeding that is "fundamentally unfair" rather than "not compatible with the requirements of due process of law").[22]

The staff did not find any cases applying the exceptions to recognition discussed here. Since these provisions are relatively new, this is unsurprising.

As the Commission concluded earlier in this study,[23] these exceptions are appropriately permissive, rather than mandatory. Where there were problems in the individual proceeding (as opposed to the judicial system as a whole), there may be factors in the individual case that would weigh in favor of recognition in spite of the problem. For example, the Uniform Act commentary discusses a situation where a court might decide to recognize a judgment 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."[24]

In the staff's view, these exceptions are appropriate and sufficiently clear as drafted. The staff recommends no changes to these provisions.

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20. See 2005 Uniform Act § 4 Comments 11, 12.
21. See *id*. § 4 Comment 12 ("[This provision] allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness.").
22. See Unif. Foreign-Country Money Judgments Recognition Act (2005), 13, pt. II U.L.A. 2015 Cumulative Pocket Part p. 33.
23. See Minutes (October 2015), p. 3; see also Memorandum 2015-38, pp. 4-8.
24. 2005 Uniform Act § 4 Comment 12.

NOTICE

Both California's Uniform Act and the Tribal Act permit nonrecognition where the defendant in the foreign or tribal proceeding did not receive notice of that proceeding. The relevant provision from California's Uniform Act is reproduced below.

> **Code Civ. Proc. § 1716 (Uniform Act § 4)[25]**
>
> 1716. …
>
> (c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:
>
> (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.
>
> …

By its terms, this provision seems to focus on the *timing* of the notice and whether that timing impeded defendant's ability to defend the case.

It is not entirely clear from the language of this provision whether it permits objections based on a defect in the *content* of the notice.[26] The Commission may want to consider clarifying whether the notice exception can encompass defects in the content of the notice. For instance, the Draft Fourth Restatement's notice exception also requires that the notice be "adequate" (i.e., "the party resisting recognition did not receive *adequate* notice of the proceeding in the foreign court in sufficient time to enable it to defend").[27]

Even if the notice provision does not apply to a defect in the content of notice, such a defect might be grounds for nonrecognition under other provisions of the Uniform Act.[28]

The Uniform Act's commentary does not address the notice exception and, thus, does not speak to this issue. **The Commission should consider whether any uncertainty on this point would warrant a clarifying revision.**

That issue aside, the notice provision seems reasonable. Absent countervailing considerations, it seems unfair to hold a defendant responsible for

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25. See corresponding provision in the Tribal Act, Code Civ. Proc. § 1737(c)(1).

26. See Draft Fourth Restatement, *supra* note 15, § 404 Reporters' Note 2 (entitled "Adequacy of Notice" and noting that Uniform Act provides for "nonrecognition of a foreign judgment in instances of *inadequate notice* by the court of origin") (emphasis added).

27. *Id*. § 404(a) (emphasis added).

28. See, e.g., Code Civ. Proc. §§ 1716(c)(8), 1737(c)(8) (exceptions to recognition for failure of due process in individual proceeding).

a foreign court judgment where the defendant was precluded from putting on a defense due to a failure to receive timely notice. The permissive character of this exception would allow a California court to consider whether such countervailing considerations exist as it decides whether nonrecognition is warranted.

Notice vs. Service of Process

Among other things, Memorandum 2016-6 discussed the provisions for nonrecognition of a foreign court judgment where that court lacked personal jurisdiction. The memorandum briefly discussed whether the Uniform and Tribal Act's exceptions to recognition for a lack of personal jurisdiction could apply to situations in which the court lacked personal jurisdiction due to a defect in the service of process.[29] In that discussion, the memorandum identified Uniform Act cases in which the courts analyzed service of process in assessing whether the foreign court lacked personal jurisdiction.[30]

The memorandum then noted that the Uniform Act's language appears to preclude treating a defect in service of process as a jurisdictional defect in some situations.[31] The discussion concluded by asking whether the jurisdictional provisions should be revised to "make clear that, under the Act, a foreign court can lack personal jurisdiction as a result of improper or inadequate service of process."[32] In other words, if the service defect rises to the level of defeating the foreign court's personal jurisdiction, should the Act permit a finding that the foreign court lacked jurisdiction on the basis of that service defect?

At the February meeting, the Commission decided to postpone answering that question, in part because the application of this notice exception to service defects had not yet been analyzed. The following section analyzes whether the notice provision would be sufficient to address defects in service that could defeat a foreign court's jurisdiction. If so, then service defects could simply be addressed under the notice provision, presumably without requiring adjustment to the personal jurisdiction provisions.

29. Memorandum 2016-6, pp. 16-17.
30. See *id*. at 17, n. 61.
31. Code of Civil Procedure Section 1717(a) *requires* recognition of a judgment if specified grounds for personal jurisdiction exist, without any exception for defects in service of process.
32. Memorandum 2016-6, p. 17.

Service of Process and the Notice Provision

Assuming, for now, that certain defects in service of process could defeat personal jurisdiction,[33] would the notice provision necessarily permit nonrecognition of a judgment in all such cases? The answer appears to be no. The application of the notice provision to service defects is discussed below.

The Uniform Act's notice exception establishes a functional standard focused on whether the defendant had sufficient notice of the proceeding. Service of process is a formal requirement that, while performed with the goal of transmitting notice, does not necessarily provide the defendant with actual knowledge of the proceeding (e.g., service by publication).[34]

Often, the defendant will receive notice of a lawsuit through the service of process. In these cases, the formal requirement of service and the functional requirement of notice are both achieved by a single act. And, when that single act does not occur, the defendant will neither receive service, nor have notice of the lawsuit. In this instance, the Uniform Act's notice provision would apply and would permit nonrecognition.

However, it is possible for the defendant to receive notice of the lawsuit, absent compliance with the law governing service of process. In this situation, the Uniform Act's functional test for notice may be satisfied, but the formal

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33. The staff found California and other American case law supporting the proposition that deficient service may, in some instances, be a jurisdictional deficiency, *regardless of whether the defendant had actual notice of the proceeding*. See, e.g., American Express Centurion Bank v. Zara, 199 Cal. App. 4th 383, 131 Cal. Rptr. 3d 99 (2011); Mashud Parves Rana v. Islam, 305 F.R.D. 53 (S.D.N.Y. 2015).

34. Service and notice are distinct issues under American law. There may be situations where the defendant has actual notice of the lawsuit absent the service of process and vice versa — there may be situations where service was proper, but the defendant did not actually receive notice (e.g., service by publication).

> Actual notice is neither necessary nor sufficient for due process. Rather due process requires compliance with an officially prescribed method of invoking the court's jurisdiction, which, when followed according to its own terms, is reasonably calculated to provide actual notice. The Supreme Court made this point clearly in *Wuchter v. Pizzutti* [276 U.S. 13 (1928)], a case involving service under the New Jersey nonresident motorist statute. The statute provided that operation of a motor vehicle in the state constituted an appointment of the Secretary of State to be the operator's agent to receive service in the state for a claim arising out of the operation of the vehicle. The statute did not require the Secretary of State to notify the defendant when such service was made, although the Secretary of State in fact did forward such notice to nonresident motorists generally, and did so in the *Wuchter* case. Although actually notified, the defendant did not appear but appealed the resulting default judgment on the ground that the service of process was unconstitutional.

Robert C. Casad & William B. Richmond, Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts, v. 1, § 2.7[2][a], p. 193 (3d. ed., 1998) (citations omitted).

service defect could be so consequential as to defeat the foreign court's exercise of personal jurisdiction.

This situation, where the defendant has notice of the proceeding, but the court lacks jurisdiction due to a service defect, is not purely hypothetical. Such a result can occur under California law.[35] In particular, California case law indicates that "[n]o California appellate court has gone so far as to uphold a service of process solely on the ground the defendant received actual notice when there has been a complete failure to comply with the statutory requirements for service."[36] While there is a general rule in favor of liberal construction of service requirements, substantial compliance with the rules for service of process is still required for jurisdictional purposes.[37]

Where a foreign country's law requires compliance with service of process rules as a precedent to the court exercising jurisdiction over a person, it is possible that a formal defect in service of process would be sufficient to defeat the personal jurisdiction of a foreign court, *regardless of whether the defendant had notice of the foreign proceeding*. In this situation, the Uniform Act's functional notice provision does not appear to permit nonrecognition (i.e., the defect is related to service, *not* notice).

Where a service defect is indeed a jurisdictional problem, it seems that it should be treated as such. In the staff's view, it would be problematic if a court were required to recognize a foreign court judgment where the service of process was so defective that the foreign court lacked personal jurisdiction over the defendant.

At the previous meeting, the Commission decided that the Uniform Act's personal jurisdiction provisions should permit objections to a foreign court's exercise of personal jurisdiction where there are no grounds for personal jurisdiction under foreign law.[38] The staff is unsure why jurisdictional defects

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35. See *supra* note 33.

36. See *American Express*, 199 Cal. App. 4th at 392 (citing Summers v. McClanahan, 140 Cal. App. 4th 403, 414, 44 Cal. Rptr. 3d 338 (2006)); see also *id*. at 387 (quoting Dill v. Berquist Construction Co., 24 Cal. App. 4th 1426, 1444, 29 Cal. Rptr. 2d 746 (1994)) ("Compliance with the statutory procedures for service of process is essential to establish personal jurisdiction. Thus, a default judgment entered against a defendant who was not served with a summons in the manner prescribed by statute is void." (internal citations and quotations omitted)).

37. See generally Summers v. McClanahan, 140 Cal. App. 4th 403, 407-11, 44 Cal. Rptr. 3d 338 (2006) (discussing the "liberal, practical approach to service of process issues" in effect in California and other jurisdictions); see also *supra* note 36.

38. Minutes (February 2016), p. 3.

under foreign law arising from defective service, rather than adequate grounds should be treated differently.

As with the objections to grounds for personal jurisdiction under foreign law, the staff expects that cases requiring a court to assess objections to service of process under foreign law would be rare. Such objections arising from foreign law would likely have been addressed or effectively waived in the foreign court proceeding.[39]

Fortunately, the staff believes that there is a fairly simple and unproblematic way to address this issue. The Uniform Act's provisions on personal jurisdiction could be drafted to remove any obstacle to treating a defect in service of process as jurisdictional. In other words, the Act could simply be agnostic on how a foreign court could lack personal jurisdiction under its own laws. This would allow a court to consider defective service of process in appropriate situations (i.e., where the defect is a jurisdictional issue under foreign law).

If the Commission is comfortable with that general approach, the staff will bring implementing language back for consideration when it presents a staff draft of proposed legislation.

Conclusion

The staff believes that the notice provision is generally sound. **However, there are two possible changes to the Uniform Act that the Commission should consider:**

- Revise the notice provision to make clear that it applies to a defect in the *content* of a notice, and not just the timing of the notice.
- Draft the provisions on personal jurisdiction to avoid precluding a court from finding that the foreign court lacked personal jurisdiction over a defendant because of a defect in service of process.

FRAUD

Both California's Uniform Act and the Tribal Act permit nonrecognition where the foreign or tribal court judgment was procured by fraud. The relevant provision from California's Uniform Act is reproduced below.

39. See Memorandum 2016-6, pp. 12-13.

Code Civ. Proc. § 1716 (Uniform Act § 4)[40]

1716. …

(c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:

…

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

…

The Uniform Act commentary provides helpful detail as to the intended scope of this exception:

> [This provision] limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the [fraud] provision in … the 1962 Act by the courts, which 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 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the foreign-country judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding. Intrinsic fraud does not provide a basis for denying recognition under [this provision], as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.[41]

The staff found few cases discussing the fraud exception. In none of those did the court conclude that the fraud exception applied.[42] In some instances, the allegations of fraud pertain to issues of intrinsic fraud; in those cases, the courts

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40. See corresponding provision in the Tribal Act, Code Civ. Proc. § 1737(c)(2).

41. 2005 Uniform Act § 4 Comment 7; but see ALI Model Statute, *supra* note 15, § 5 Reporters' Note 6 (suggesting that the Uniform Act's exception, which "refers merely to 'fraud,'" encompasses both extrinsic and intrinsic fraud).

42. See, e.g., Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610, 615 (S.D.N.Y. 1979) ("Plaintiffs' 'fraud' challenge is easily disposed of because it rests upon a basic misapprehension of the scope of the statutory exception. Whether or not the defendants engaged in a fraud with respect to the commodity transactions about which plaintiff complains is entirely irrelevant to the recognition of the British judgment. 'The fraud must relate to matters other than issues that could have been litigated and must be a fraud on the court.' No such contention is raised here." (citations omitted)).

indicate the fraud should have been (and, in some cases, was) raised before and addressed by the foreign court.[43]

The Draft Fourth Restatement suggests that the extrinsic/intrinsic fraud distinction described by the Uniform Act commentary has not necessarily been controlling in recent case law on judgment recognition.[44] In particular, a Reporters' Note from the Restatement suggests that modern judgment recognition cases applying the fraud exception focus more on "the existence of a reasonable opportunity for the person victimized by fraud to uncover the misconduct and bring it to the court's attention."[45] The Restatement also notes that "[t]he possibility that the rendering forum might not be open to a challenge based on fraud in the prior proceeding would not preclude nonrecognition on some other ground, such as circumstances indicating a lack of integrity of the rendering court…."[46] As the Restatement suggests, other exceptions to recognition may apply in situations where the foreign court system did not permit a party to raise concerns about intrinsic fraud (e.g., the party was denied due process).

With regard to the statutory language, the staff concludes that the fraud exception is generally appropriate. The staff does not see a need to modify the language of the provision itself. However, the Commission may want to provide commentary regarding the scope of the exception. In particular, the Commission may want to reproduce the Uniform Act commentary and possibly supplement that commentary with information derived from the Restatement. **Should the staff do so when preparing a draft Comment for this provision?**

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43. See, e.g., Soc'y of Lloyd's v. Hamilton, 501 F. Supp. 2d 248, 252-253 (D. Mass. 2007), *adopted*, 501 F. Supp. 2d 248 (D. Mass. 2007) ("Mr. Hamilton's third and fifth affirmative defenses fail because the 'fraud' alleged in these affirmative defenses does not meet the requirements of 'fraud' as contemplated by the Recognition Act. While the Recognition Act provides a defense if the foreign judgment is 'obtain[ed] by fraud,' the fraud 'must relate to matters other than issues that could have been litigated and must be fraud on the court.' Mr. Hamilton's allegations of fraud specifically stem from his contention that he was fraudulently induced to become [an insurance underwriter in the Lloyd's of London insurance market]. Not only should these defenses of fraud have been raised in England, they were." (citations omitted) (emphasis in original)).

44. Draft Fourth Restatement, *supra* note 15, § 404 Reporters' Note 3 (discussing recognition of foreign and domestic judgments); see also Restatement (Third) of Foreign Relations Law of the U.S. § 482 Comment e (1987) (hereafter, "Third Restatement") ("The distinction between extrinsic and intrinsic fraud for purposes of recognition of foreign judgments is based on the view that a challenge on grounds of intrinsic fraud should be addressed to the rendering court.").

45. Draft Fourth Restatement, *supra* note 15, § 404 Reporters' Note 3.

46. *Id.*

REPUGNANCY TO PUBLIC POLICY

Both California's Uniform Act and the Tribal Act permit nonrecognition in situations where recognition of the foreign or tribal court judgment would be repugnant to state or federal public policy. The relevant provision from California's Uniform Act is reproduced below.

> **Code Civ. Proc. § 1716 (Uniform Act § 4)[47]**
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> 1716. …
>
> (c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:
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> …
>
> (3) The judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States.
>
> …

The Uniform Act's commentary provides further explanation:

> [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."[48]

While that general description of the public policy standard is helpful, the cases provide concrete examples of foreign court judgments that are repugnant to public policy. Many cases applying this exception addressed situations where the foreign court judgment was in tension with U.S. constitutional protections for freedom of speech or the press.[49] These cases arose prior to the enactment of the federal SPEECH Act, which prohibits the recognition of foreign defamation judgments unless specified conditions are met.[50] Aside from the free speech and

47. See corresponding provision in the Tribal Act, Code Civ. Proc. § 1737(c)(3).

48. See 2005 Uniform Act § 4 Comment 8 (citation omitted).

49. See Draft Fourth Restatement, *supra* note 15, § 404 Comment e; see also, e.g., Telnikoff v. Matusevitch, 702 A.2d 230 (Md. Ct. App. 1997); Ohno v. Yasuma, 723 F.3d 984, 1003-1005 (9th Cir. 2013) (discussing cases where foreign court judgments were declined recognition on grounds of repuganance to policies embodied in First Amendment).

50. For more information, see the discussion of federal SPEECH Act in Memorandum 2015-50.

free press cases, courts have rarely denied recognition to a foreign court judgment on public policy grounds.[51]

The ULC modified this exception in 2005 to expressly include situations where the *judgment* is repugnant to public policy (as distinguished from the claim or cause of action underlying the judgment). Under the 1962 Uniform Act, the relevant inquiry had been "whether 'the [cause of action] [claim for relief] on which the judgment is based' is repugnant to public policy."[52] Some courts had read that language very narrowly, declining to apply the public policy exception unless public policy was offended by the underlying cause of action or claim for relief.[53] For example, in *Southwest Livestock & Trucking Co. v. Ramon*,[54] the Fifth Circuit Court of Appeals considered a Mexican judgment on a promissory note with an interest rate of 48%. Recognition of the judgment was opposed on the grounds that the interest rate amounted to usury, which is against Texas public policy.[55] Nonetheless, the court refused to deny recognition on public policy grounds because the underlying cause of action — enforcement of a promissory note — does not offend public policy.[56] The ULC's amendment seems to have been intended to prevent such a narrow reading of the public policy exception.

With the ULC's 2005 amendments to this provision, the exception seems appropriate and sufficiently clear as drafted. Thus, the staff recommends no changes to this provision.

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51. See Draft Fourth Restatement, *supra* note 15, § 404 Reporters' Note 4 ("Aside from foreign defamation and libel judgments, … instances where a court has refused to recognize a foreign judgment on this ground are rare."). See also *id.* (listing cases where public policy exception was applied to decline recognition to foreign court judgment, including cases where foreign court refused to recognize priority of Internal Revenue Service claims for unpaid taxes, decided ownership of U.S. trademark, refused to defer to foreign bankruptcy proceeding, and treated foreign court's voluntary discontinuance as dismissal with prejudice).

52. See 2005 Uniform Act § 4 Comment 8.

53. See cases cited in *id.*; see also 723 F.3d at 1005-1013 (applying 2005 Uniform Act and separately analyzing whether judgment and cause of action or claims were repugnant to public policy).

54. 169 F.3d 317 (1999).

55. *Id*. at 320-321.

56. *Id.* at 321 ("This subsection of the Texas Recognition Act does not refer to the judgment itself, but specifically to the 'cause of action on which the judgment is based.' Thus, the fact that a judgment offends Texas public policy does not, in and of itself, permit the district court to refuse recognition of that judgment.

In this case, the Mexican judgment was based on an action for collection of a promissory note. This cause of action is not repugnant to Texas public policy.") (citations omitted).

Both California's Uniform Act and the Tribal Act permit nonrecognition where the foreign or tribal court judgment conflicts with another final and conclusive judgment. The relevant provision from California's Uniform Act is reproduced below.

> **Code Civ. Proc. § 1716 (Uniform Act § 4)[57]**
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> 1716. …
>
> (c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:
>
> …
>
> (4) The judgment conflicts with another final and conclusive judgment.
>
> …

By its terms, this provision would apply when a foreign court judgment conflicts with *any* other judgment, regardless of whether that judgment was rendered by a foreign court, a tribal court, a sister-state court, a federal court, or even a California court. In some instances, it may be that the court's discretion to recognize the foreign court judgment is limited by other doctrines (i.e., a court may be required to decline recognition of a foreign court judgment that conflicts with a sister-state judgment that is entitled to full faith and credit).[58]

While the Uniform Act provides no commentary on this provision, a comment in the Draft Fourth Restatement provides some explanation of how courts should address situations of conflicting judgments:

> If the court rendering the later judgment fairly considered the earlier judgment and declined to recognize the earlier judgment under standards comparable to those set forth in this Restatement, a U.S. court should ordinarily recognize the later judgment.[59]

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57. See corresponding provision in the Tribal Act, Code Civ. Proc. § 1737(c)(4).

58. There is some authority for the proposition that certain bilateral treaties to which the United States is a party accord full faith and credit treatment to judgments from particular foreign countries. See In Sik Choi v. Hyung Soo Kim, 50 F.3d 244, 248 (3d Cir. 1995); Vagenas v. Cont'l Gin Co., 988 F.2d 104, 106 (11th Cir. 1993); but see John F. Coyle, Friendship Treaties ≠ Judgments Treaties, 112 Mich. L. Rev. First Impressions 49 (Dec. 2013) (positing that Third and Eleventh Circuits incorrectly interpreted friendship treaties between (1) U.S. and Korea and (2) U.S. and Greece, respectively, as judgment treaties).

59. Draft Fourth Restatement, *supra* note 15, § 404 Comment f. The standards in the Restatement are largely the same as those in the Uniform Act. *Compare* 2005 Uniform Act § 4 *with* Draft Fourth Restatement § 404. See also ALI Model Statute, *supra* note 15, § 5 Comment j.

This principle seems compatible with two Uniform Act cases where conflicting judgments were at issue.[60]

In the staff's view, this exception is appropriate as drafted. Thus, the staff recommends no changes to this provision. However, the Commission may want to provide Comment language to guide a court's exercise of discretion. In particular, the staff notes that the conflicting judgments exception is somewhat different than the other permissive exceptions in that there appears to be single, primary consideration — whether the later court accorded the appropriate res judicata effect to an earlier judgment. Although the language of the Uniform Act is flexible and would allow a court to do whatever it thinks is appropriate, identifying this key consideration in the commentary would probably be helpful. **Should the staff address that issue when preparing a draft Comment for this exception?**

PROCEEDING CONTRARY TO PARTIES' AGREEMENT ON DISPUTE RESOLUTION

Both California's Uniform Act and the Tribal Act permit nonrecognition in situations where the foreign or tribal court proceeding was contrary to the parties' agreement on dispute resolution. The relevant provision from California's Uniform Act is reproduced below.

> **Code Civ. Proc. § 1716 (Uniform Act § 4)[61]**
>
> 1716. …
>
> (c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:
>
> …
>
> (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.
>
> …

By its terms, this provision applies to a dispute resolution agreement that identifies a particular forum for litigation or alternative dispute resolution (i.e., arbitration or mediation).[62]

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60. Draft Fourth Restatement, *supra* note 15, § 404 Reporters' Note 6 (citing Byblos Bank Europe, S.A. v. Sekerbank Turk Anonym Syrketi, 10 N.Y.3d 243 (N.Y. 2008) and Ackerman v. Ackerman, 517 F. Supp. 614 (S.D.N.Y. 1981), *aff'd*, 676 F.2d 898 (2d Cir. 1982)).

61. See corresponding provision in the Tribal Act, Code Civ. Proc. § 1737(c)(5).

62. See 2005 Uniform Act § 4 Comment 9 (This provision "allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a

The Draft Fourth Restatement summarizes the case law on this issue by stating "[w]here a valid choice-of-forum agreement governs a dispute, a U.S. court will refuse to recognize a foreign judgment resulting from a breach of that agreement in the absence of a waiver of rights under that agreement."[63] The staff's review of the case law largely confirms that principle.[64]

As the Restatement language suggests, this exception applies to choice of forum agreements. The case law indicates that this exception does not apply in situations when the foreign court judgment is contrary to a *choice of law* agreement.[65]

In the staff's view, this exception is appropriate and sufficiently clear as drafted. Thus, the staff recommends no changes to this provision.

INCONVENIENT FORUM

Both California's Uniform Act and the Tribal Act permit nonrecognition in situations where the foreign or tribal court was a seriously inconvenient forum, if the court's personal jurisdiction is based solely on personal service. The relevant provision from California's Uniform Act is reproduced below.

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valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing the foreign-country judgment.").

63. Draft Fourth Restatement, *supra* note 15, § 404 Reporters' Note 7; see also ALI Model Statute, *supra* note 15, § 5 Comment f.

64. Courts have declined to recognize foreign court judgments on the basis of this provision. See, e.g., Diamond Offshore (Bermuda), Ltd. v. Haaksman, 355 S.W.3d 842 (Tex. Ct. App. 2011); Montebueno Mktg. v. Del Monte Foods Corp.-USA, 2012 U.S. Dist. LEXIS 39372 (N.D. Cal. 2012), *aff'd* 570 Fed. Appx. 675 (9th Cir. 2014).

In some instances, however, the courts applying this provision have recognized the foreign court judgment, concluding that the person raising the objection effectively waived the objection by participating in the foreign court proceedings. See, e.g., Dart v. Balaam, 953 S.W.2d 478, 482 (Tex. Ct. App. 1997) ("While the contract between Appellant and Appellee specified that disputes would be submitted to the courts of Vanuatu, neither party sought to enforce that right. Appellee waived his right by filing suit in Australia. Appellant in turn elected to waive his right by making an unconditional appearance and by filing a counter-claim seeking affirmative relief in the Australian court. Having failed to contest the issue in the Australian court, Appellant cannot now assert it as a basis for nonrecognition."); Van Den Biggelaar v. Wagner, 978 F. Supp. 848, 861 (N.D. Ind. 1997).

65. See Ingersoll Milling Machine Co. v. Granger, 833 F.2d 680, 689 (7th Cir. 1987) ("Ingersoll argues that the Belgian judgment contravenes the parties' agreement to be bound by the law of Illinois. We agree with the district court that [this exception] is a choice of forum, rather than a choice of law, provision. The fact that the parties chose to subject the relationship to Illinois law would not prevent the enforcement of a judgment of a Belgian court in litigation involving that relationship. … Thus, for Ingersoll's arguments to have any merit, the agreement between Mr. Granger and Ingersoll would have had to provide that any suit regarding the employment relationship be brought in the courts of Illinois. However, the contract has no such provision.").

Code Civ. Proc. § 1716 (Uniform Act § 4)[66]

1716. …

(c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:

…

(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.

…

As the language of the exception indicates, this exception is limited to circumstances where personal jurisdiction is premised solely on personal service.

The staff found no cases where this exception was found to apply. This may be because "[j]urisdiction based on service of process on one only transitorily present in a state is no longer acceptable under international law if that is the only basis for jurisdiction and the action in question is unrelated to that state."[67] The staff reviewed a number of cases where courts considered the applicability of this exception. In each, the court concluded that personal jurisdiction could be premised on something other than personal service and, thus, the exception did not apply.[68]

Although the exception may have little practical application, the staff finds it to be appropriate and sufficiently clear as drafted. Thus, the staff recommends no changes to this provision.

66. See corresponding provision in the Tribal Act, Code Civ. Proc. § 1737(c)(6).

67. See Third Restatement, *supra* note 44, § 421 Reporter's Note 5. With regard to tribal courts, it is unclear under what circumstances personal jurisdiction premised solely on service of process would be acceptable. See First Supplement to Memorandum 2016-6, pp. 8-9 (suggesting that, with regard to nonmembers, inquiry into tribal court's personal jurisdiction may largely be subsumed within subject matter jurisdiction inquiry, which generally requires nonmember to have specific types of contact with tribe or its members); Cohen's Handbook, *supra* note 10, § 7.02 (indicating uncertainty as to whether tribal citizenship is itself sufficient contact to support tribal court's personal jurisdiction over tribe member).

68. See, e.g., Bank of Nova Scotia v. Tschabold Equip., 754 P.2d 1290, 1295 (Wash. Ct. App. 1988) ("The Canadian court's jurisdiction over Pacific Western was based upon its long-arm rule, a court order, and Pacific Western's voluntary appearance, as well as upon personal service. Refusing recognition of ScotiaBank's Canadian judgment is therefore not warranted on [the inconvenient forum] basis.").

RECIPROCITY

In *Hilton v. Guyot*,[69] the seminal Supreme Court case on comity, the Court declined to recognize a French judgment on the basis that France did not recognize judgments from U.S. courts.[70]

Although the 1962 Uniform Act did not include a reciprocity requirement for recognition of foreign court judgments, the ULC explained that one of the goals of the Uniform Act was to encourage reciprocity by foreign courts. Ensuring that foreign court judgments are extended comity in state courts would make it more likely that foreign courts would do the same for our judgments.[71]

When the ULC revised the Act in 2005, it again considered whether to include a provision on reciprocity and, again, declined to do so.[72]

As noted in a prior memorandum, a small number of states have deviated from the Uniform Act on this point, providing that a lack of reciprocity is grounds for nonrecognition of a foreign court judgment.[73] Five states currently have a reciprocity provision; all these states are operating under enactments of the 1962 Uniform Act.[74] Four states that previously had a reciprocity provision did not include such a provision when they enacted the 2005 Uniform Act.[75]

The Draft Fourth Restatement includes a reciprocity requirement, but it acknowledges that this is a minority view.[76]

Most of the states that do include a reciprocity provision in their enactments of the Uniform Act have made the provision permissive.[77] The staff is unsure

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69. 159 U.S. 113 (1895).
70. See *id*. at 210-229.
71. 1962 Uniform Act Prefatory Note ("Judgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.").
72. See 2005 Uniform Act Prefatory Note.
73. See generally discussion of "Reciprocity" in Memorandum 2015-28, pp. 7-8.
74. See *id*. at n. 33 (Florida, Maine, Massachusetts, Ohio, and Texas).
75. See *id*. at n. 33 (Enactments of 1962 Uniform Act in Colorado, Georgia, Idaho, and North Carolina all included reciprocity provisions. All of those states enacted 2005 Uniform Act without including reciprocity provision).
76. Draft Fourth Restatement, *supra* note 15, § 404(i); see also *id*. § 404 Reporters' Note 11. Georgia, which is noted as having a mandatory nonrecognition provision for a lack of reciprocity, has adopted the 2005 Uniform Act without including a reciprocity provision. See 2015 Ga. Act No. 167 (enacted May 6, 2015).
77. See Draft Fourth Restatement, *supra* note 15, § 404 Reporters' Note 11. Massachusetts is the only state that currently has a mandatory reciprocity provision.

what considerations would guide a court in deciding how to exercise its discretion when a lack of reciprocity is the only ground for nonrecognition.

Reciprocity seems fundamentally different from the other exceptions to recognition. Rather than addressing concerns about the quality of justice offered by the judgment at issue, the apparent purpose of a reciprocity provision is to encourage foreign and tribal jurisdictions to change their policies on judgment recognition.

An evaluation of the merits of a reciprocity provision is probably beyond the scope of this study because the question of whether to add such a provision seems fundamentally political (rather than legal).

The staff sees no legal deficiency in the lack of a reciprocity requirement in California law and recommends against deviating from uniformity on this issue.

CONCLUSION

This memorandum completes the staff's initial analysis of all of the exceptions to recognition in the Uniform Act and the Tribal Act. For the next meeting, the staff will prepare draft language implementing the Commission's cumulative decisions and discussing any further issues that may be identified by the staff.

Respectfully submitted,

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