

First Supplement to Memorandum 2016-22

Recognition of Tribal and Foreign Court Money Judgments (Comments on Draft Tentative Recommendation)

Memorandum 2016-22¹ presents a draft tentative recommendation addressing the recognition of tribal and foreign court money judgments.

Since the draft tentative recommendation was circulated, the Commission received comments from Prof. Kathy Patchel and Prof. William Dodge. Those comments are discussed, in turn, below.

COMMENTS OF PROFESSOR PATCHEL

Prof. Kathy Patchel was the Reporter for the 2005 Uniform Foreign-Country Money Judgments Recognition Act (hereafter, “2005 Uniform Act”). She reviewed the proposed legislation and concluded that the proposed changes are consistent with the Uniform Act and her previous comments.²

COMMENTS OF PROFESSOR DODGE

Prof. Dodge’s comments are attached as an exhibit to this supplement and discussed briefly below.

Uniform Law Commission Comments

Prof. Dodge is concerned about possible confusion arising from the reproduction of only selected portions of the Uniform Law Commission (hereafter, “ULC”) commentary.³ In particular, Prof. Dodge suggests that the partial reproduction of comments could be read to imply that the remaining ULC

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. See Email from Kathy Patchel to Kristin Burford (May 31, 2016) (on file with Commission).

3. See Exhibit, pp. 1-2.

commentary is being disapproved. To avoid this implication, Prof. Dodge suggests omitting the ULC's commentary entirely, but referring to the ULC's commentary in the Commission's comment.⁴

As an alternative to omitting the ULC's commentary, the Commission could expressly disclaim the implication that Prof. Dodge is concerned about. For instance, the following language could be appended to the end of the Commission Comment to Code of Civil Procedure Section 1716 (just before the ULC's commentary):

The Commission's recommendation does not reproduce all parts of the Uniform Law Commission's commentary. The omission of any part of the Uniform Law Commission commentary does not imply disapproval of the omitted commentary.⁵

Definition of "Due Process"

Prof. Dodge is concerned that the definition of "due process" contained in the Tribal Court Civil Money Judgment Act (hereafter, "Tribal Court Judgment Act")⁶ might be applied to the judgments of foreign courts. This could be problematic because, in some instances, the foreign judicial systems may differ in dramatic ways from American judicial proceedings, rendering inapt a listed due process right.

For example, Prof. Dodge notes that, as defined, "due process" includes the right "to call and cross-examine witnesses."⁷ "Many civil law jurisdictions do not permit cross-examination as we do."⁸ Thus, "[p]ermitting lack of cross-examination to become a basis for non-recognition on due process grounds could significantly undercut the enforceability of civil law judgments in California."⁹

By its terms, the application of the Tribal Court Judgment Act's definition of "due process" is limited to that Act.¹⁰ However, given the similarities in the "due process" exceptions to recognition in the Tribal Court Judgment Act and California's Uniform Act, it might be worthwhile to emphasize that the Tribal

4. *Id.* at 2.

5. Similar language could also be added to the reproduced ULC comment in the Tribal Court Judgment Act. See proposed addition of Heading of Chapter 3 (commencing with Code Civ. Proc. § 1730) in draft tentative recommendation.

6. Code Civ. Proc. §§ 1730-1742.

7. See Code Civ. Proc. § 1732(c).

8. Exhibit, p. 2.

9. *Id.*

10. See Code Civ. Proc. § 1732.

Court Judgment Act's definition of "due process" does *not* apply to judgments governed by California's Uniform Act.

If the Commission elects to add such emphasis, the staff would recommend adding language to the Comment to Code of Civil Procedure Section 1716 as follows:

Paragraphs (b)(1) and (c)(8) state exceptions to recognition of a foreign-country judgment related to the due process offered in the foreign proceeding. Under both paragraphs (b)(1) and (c)(8), the focus of the inquiry "is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure." See Background from the 2005 Uniform Act *infra*. Unlike the Tribal Court Civil Money Judgments Act, this Act does not attempt to define "due process." Compare Code Civ. Proc. § 1732(c) *with* Code Civ. Proc. § 1714.

This proposed language, while similar to that suggested by Prof. Dodge, does not refer specifically to the issue of cross-examination. The staff is concerned that identifying a particular example in commentary could have unforeseen implications with respect to the operation of the Tribal Court Judgment Act or California's Uniform Act.

Does the Commission want to add language to the Comment to Code of Civil Procedure Section 1716 to this effect?

Respectfully submitted,

Kristin Burford
Staff Counsel

May 31, 2016

To: California Law Revision Commission

From: Professor William S. Dodge, UC Davis School of Law

Re: Comments on Memorandum 2016-22, Recognition of Tribal and Foreign Court Money Judgments

This memo provides comments on Memorandum 2016-22 concerning the Recognition of Tribal and Foreign Court Money Judgments. I am Martin Luther King, Jr. Professor of Law at UC Davis School of Law and a reporter for the American Law Institute's *Fourth Restatement of Foreign Relations Law—Jurisdiction*, which covers (among other topics) the enforcement of foreign judgments in the United States. I have had the opportunity to consult with the Commission's staff as this project has progressed and I have attended two of the Commission's prior meetings.

I would begin by noting that the Commission's staff has done outstanding work on this project and that I largely agree with its analysis and Tentative Recommendation. The Tentative Recommendation would largely follow the 2005 Uniform Act but it has also identified a few issues that may be helpfully clarified. I would note that in the one place where the Tentative Recommendation would depart from the text of the Uniform Act, it does so in order to follow the actual practice of other states of examining personal jurisdiction under both foreign law and U.S. standards. In other words, this change would, in fact, promote the substantive uniformity in the recognition and enforcement of foreign judgments that is the aim of the 2005 Act.

I offer comments in two areas for the Commission's consideration.

ULC Commentary

One of the questions that Memorandum 2016-22 raises for the Commission's consideration is the extent to which the ULC's commentary on the 2005 Uniform Act should be reproduced in the Commission's comments. At present, the Tentative Recommendation would reproduce most but not all of the ULC's commentary to Section 4 of the Uniform Act in the Commission's comments to Section 1716 and the same commentary (with a few additional redactions) in the Commission's comments to the Tribal Court Civil Money Judgment Act. The Tentative Recommendation would not reproduce the ULC's commentary to Section 5 of the Uniform Act, which would also be amended, nor the ULC's commentary to other sections of the Uniform Act, which would not be amended.

When the Legislature adopted the 2005 Uniform Act in 2007, it did not adopt the ULC's commentary. While I find that the ULC's commentary is often helpful in explaining the statutory text, I fear it may be confusing to reproduce selected

portions of that commentary. Doing so may send a message that the ULC's commentary to other sections is being disapproved. In some cases, the Tentative Recommendation would omit the ULC's commentary because the commentary would not make sense in light of the proposed changes to the statutory text or because the commentary does not translate well to the context of tribal judgments. But in other cases, the tentative recommendation would omit the ULC's commentary only because it is recommending no changes to those sections of the Act. I fear that it may be difficult for courts to distinguish these different situations.

My preferred solution would be for the Commission's comments to omit the ULC's commentary entirely but to add a sentence informing the reader that the ULC's commentary exists and may be useful in understanding the background of California's Act. This would avoid the implicit disapproval of those parts of the ULC commentary not reproduced. This would leave the reader to determine for herself when parts of the ULC commentary are not relevant because of differences in California's provisions. Omitting the ULC's commentary entirely would also be consistent with what the Legislature did in 2007.

Such a sentence could be drafted in many ways, but just by way of example, the sentence on page 31, line 1, might be replaced with something like the following:

California's Uniform Foreign-Country Money Judgments Recognition Act is based on the 2005 Uniform Act, and the Uniform Law Commission's commentary, where relevant, may be helpful in understanding California's Uniform Act.

A similar sentence might replace the sentence on page 39, line 42.

Definition of Due Process

Under the Tentative Recommendation, the Tribal Court Judgment Act would define "due process" in Section 1732(c), while California's Uniform Act would leave "due process" undefined. I support this basic decision. To avoid confusion, however, I believe it would be useful to note in the Commission's comments that what constitutes "due process" under the Uniform Act may not be identical to the definition found in Section 1732(c).

In particular, I am concerned that Section 1732(c)'s definition of "due process" requires the right "to call and cross-examine witnesses." Many civil law jurisdictions do not permit cross-examination as we do. In *Hilton v. Guyot*, the United States Supreme Court specifically rejected an argument that a French judgment should be denied recognition and enforcement on due process grounds because the judgment debtor had not been allowed to cross-examine witnesses. Permitting lack of cross-examination to become a basis for non-recognition on due process grounds could significantly undercut the enforceability of civil law judgments in California.

Again, there would be many ways to make this point in the comments. By way of example, a paragraph along the lines of the following might be inserted on page 30, beginning at line 6:

Paragraph (b)(1) provides that a foreign-country judgment shall not be recognized if the foreign country does not provide impartial tribunals or procedures compatible with the requirements of due process. Paragraph (c)(8) provides that a court may decline to recognize a foreign-country judgment if the specific proceeding leading to the judgment was not compatible with the requirements of due process of law. Unlike Section 1732(c), California's Uniform Act does not attempt to define "due process." Some of the requirements listed under Section 1732(c) for tribal judgments, like cross-examination, may not be required for the recognition of foreign-country judgments. Under both paragraph (b)(1) and paragraph (c)(8), the focus of the inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign country procedure.