TWO MODES OF COMITY

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The Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) *requires* a U.S. court to refuse recognition to a foreign country judgment if the foreign judicial system "does not provide impartial tribunals or procedures compatible with the requirements of due process of law"—if, that is, the foreign judiciary is what we may call systematically inadequate.[1] The UFCMJRA *permits* a U.S. court to refuse recognition to a foreign country judgment if the judgment was "obtained by fraud," if the judgment "was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment," or if "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[2]

In light of the rule forbidding recognition of foreign judgments where the foreign judicial system is systematically inadequate, should U.S. law permit U.S. courts to deny recognition to foreign judgments in cases where the foreign judicial system *overall* is impartial and provides due process, but where the defendant claims a fraud or a failure of due process in the particular foreign proceeding? A simple and attractive answer to this question is: 'No.' If the foreign judiciary as a whole is systematically adequate, then we should trust it to correct errors that occur in particular proceedings. If the foreign judiciary is systematically inadequate, then the judgment is not entitled to recognition in any case. This approach to recognition of foreign judgments is appealing It is simple. At first glance, it seems to accord full respect to foreign

* Shareholder, Murphy & King, P.C., Boston, Mass. This paper is based on remarks I gave at the University of Pennsylvania Journal of International Law's 2012 Fall Symposium in Philadelphia. I benefitted from on-line discussions at Letters Blogatory with Doug Cassel, Chris Whytock, Ronald Brand, Cassandra Burke Robertson, and Aaron Marr Page.

1 UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4, 13 U.L.A. pt. 2, 26 (Supp. 2012).

2 *Id.*

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judiciaries, and it seems likely to decrease ancillary litigation in the United States at the recognition and enforcement phase.

But others have criticized this rule. Professor Doug Cassel argues that the world's judiciaries fall on a spectrum from very good to very bad, and that while there are countries at the ends of the spectrum where it would be sensible to apply a bright-line rule, there are countries in the middle where we want to be able to say, "[Y]our courts are good enough that we will not reject individual judgments sight unseen, but not good enough that we trust them to correct frauds and denials of due process in particular proceedings."[3] He writes that the United Kingdom and Zimbabwe as at the two ends of the spectrum today.[4] American lawyers, myself included, would reflexively agree, probably for historical reasons, with Professor Cassel's off-the-cuff view that the UK courts belong at the end of the spectrum where a bright-line rule might well be appropriate. Michael Traynor and Professor Geoffrey Hazard go further, arguing in an *amicus* brief in *Tropp v. Lloyd's,* a case then on petition for certiorari in the Supreme Court, that under due process principles, even an English judgment should not be recognized when the English court denied due process to the defendant.[5] "'System fairness'," they write, "is not enough."[6]

We can try to evaluate the simple and attractive answer suggested above by looking at two common situations in which American courts accord *one another* comity. The first is in recognition and enforcement of sister state judgments under the Full Faith and Credit Clause[7] and the Uniform Enforcement of Foreign Judgments Act. The second is an apparently far-removed context: federal court review of state court due process in habeas corpus cases. The two point in different directions.

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[3] *See* Douglass Cassel, *Response to Ted Folkman*, LETTERS BLOGATORY (June 4, 2012), http://lettersblogatory.com/2012/06/04/response-to-ted-folkman ("[W]e need not only systemic, but also case-specific, exceptions to enforcement of foreign judgments.").

[4] *Id*.

[5] Brief of Geoffrey Hazard, Jr. & Michael Traynor as Amici Curiae Supporting Petitioner at 12, Tropp v. Corp. of Lloyd's, 131 S.Ct. 3064 (2011) (No. 10-1249), 2011 WL 1881809.

[6] *Id.* at 13.

[7] U.S. CONST. art. IV, § 1.

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How do American courts treat claims of fraud occurring in proceedings in the courts of sister states? Under the Restatement (Second) of Conflict of Laws, "[a] judgment will not be recognized or enforced in other states if upon the facts shown to the court equitable relief could be obtained against the judgment in the state of rendition."[8] So if A sues B in Philadelphia and wins a money judgment, and then brings an action on the judgment in Boston, and B could show that A obtained the judgment only by perjury or some other fraud, *and* if the courts of Pennsylvania would grant relief if B asked for it, then B can get relief in the courts of Massachusetts.

One response, then, to the simple and attractive answer is that it would be counterintuitive and anomalous if a U.S. defendant could challenge the judgment of the courts of a sister state on grounds of fraud but could not challenge the judgment of the courts of a foreign country on the same grounds, assuming in both cases that the judiciaries in question were systematically adequate. If anything, the judgment of the courts of a sister state should be entitled to more deference, not less, than the judgment of a foreign court. Comity should not require that a U.S. court give foreign judgments *more* effect than it gives domestic sister state judgments. This reasoning leads to a kind of comity in which U.S. courts say, in effect, "we respect your decisions so much that we will treat them precisely as we treat domestic decisions, and we respect your decisions so much that we will try to carry out your laws and to refuse recognition to judgments that we think you also would refuse to affirm, under your own law, if asked."

The kind of comity present in habeas corpus cases leads in a different direction. In a typical case, the prisoner claims that he was denied due process at his trial (e.g., by having ineffective assistance of counsel, or by a serious constitutional error in the admission of evidence), and seeks relief in the federal district court. The statute requires a prisoner to exhaust his remedies in state court before turning to federal court. That is, the prisoner must give the state court the first chance to rule on the issue, unless the state has no process for correcting it or the process would be ineffective in the circumstances. There is a second relevant feature of the habeas corpus statute: the federal court will only hold that the state court's criminal sentence is unconstitutional if it is

8 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 115 (1971).

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contrary to *clearly established* federal law as determined by the Supreme Court. This is a different kind of comity. It says: "We respect your courts so much that we will defer to you in the first instance, and even if you get it wrong, we will not correct your mistake unless you got it *really* wrong."

These two models of comity lead to two different prescriptions when applied to the field of recognition and enforcement of foreign country money judgments. The first says that the highest mark of respect for a foreign court is to treat its judgments just as we treat sister state judgments and to apply the foreign court's own law as we think the foreign court itself would apply it. This model leads, more or less, to the case-specific exceptions for fraud and the like that exist today in the UFCMJRA. Let us assume that we are considering only foreign judiciaries that would agree in principle that they should not enforce their own judgments if procured by fraud. The second says that the highest mark of respect for a foreign court is to defer to it in the first instance if it is willing to decide the issue, and then only to reject its decision if the decision is not merely wrong, but manifestly wrong. This model leads, more or less, to the simple, attractive rule we were considering at the outset—a rule that rejects case-specific challenges in favor of systematic challenges and that tends to defer to foreign decisions even when they do not accord with the letter of our own law of due process.

One could try to judge which of these two modes of comity—recognition of sister state judgments or habeas corpus review—seems better suited to recognition and enforcement of foreign country judgments by considering the policies that animate courts when they speak of the need for comity in the recognition of foreign judgments. On the one hand, two key concerns that face U.S. courts when they speak of comity are the fear of being seen to sit in judgment on the courts of other nations and the fear of causing diplomatic problems for the United States. If these fears are the predominant concerns, then the increased deference that federal courts show to state courts may be the better model. On the other hand, the UFCMJRA itself makes full faith and credit for sister state judgments the model of comity we give to foreign judgments: a foreign court money judgment that is entitled to recognition is "conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this

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state would be conclusive."[9] We may want to give foreign courts the same kind of respect we give to sister state courts, treating our courts and foreign courts as coordinate bodies that act as each others' agents or helpers in the enforcement of judgments that are entitled to recognition. If this is the predominant concern, then full faith and credit may be the better model. Both alternatives are plausible.

But one could also look at what U.S. courts do in practice. I know of no decisions that expressly frame issues of recognition or enforcement as a matter of which model of comity to adopt, and I know of no empirical study of U.S. cases on point. However, two recent cases do suggest, at least anecdotally, that courts are drawn to the habeas corpus model of comity—that is, they are drawn to give greater deference to foreign judgments than they would give to domestic judgments. The first is *Cagan v. Gadman*.[10] Cagan sued Gadman for fraud and civil conspiracy, and also sought recognition and enforcement of an English court judgment against Gadman for more than £282,000. The English claim was that, due to Gadman's alleged fraud, Cagan had incurred significant UK tax liability. Gadman opposed recognition and enforcement on the grounds that the UK authorities had deemed Cagan's tax liability to be satisfied by restitution that Gadman had made to the British government after his criminal conviction for fraud. It seems that if Gadman had sought to enforce the judgment in England, Cagan would have been able to raise satisfaction of the judgment as a defense. The existence of a sister state judgment does not bar the judgment debtor, "under any notion of *res judicata*, collateral estoppel, or finality of judgment from challenging the judgment's enforceability by reason of a post-judgment act that would have the effect of discharging or satisfying the judgment."[11] On a full faith and credit model of comity, the U.S. court should have permitted Cagan to raise satisfaction of the judgment as a defense in the United States. But the judge rejected this view, holding that

[9] UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT *supra* note 1, § 7.

[10] Cagan v. Gadman, No. 08-CV-3710 (SJF)(ARL), 2012 U.S. Dist. LEXIS 162053 (E.D.N.Y. Oct. 31, 2012). I discussed Cagan in these terms on an online forum. *See* Ted Folkman, *Case of the Day: Cagan v. Gadman*, LETTERS BLOGATORY (Jan. 3, 2013), http://lettersblogatory.com/2013/01/03/case-of-the-day-cagan-v-gadman/.

[11] R&D 2001, LLC v. Rice, 938 A.2d 839, 848 (Md. 2008).

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that the proper step was to seek a declaration from the English court that the judgment had been satisfied. The court gave greater deference to the English court than it would have given to the court of a sister state.

The second recent case is *United States v. Barry Fischer Law Firm, LLC*.[12] The U.S. government had seized millions of dollars in a U.S. bank account belonging to Kesten Development Corp. and brought a forfeiture action. The U.S. government lost and the court ordered the funds returned. Before they could be returned, the Brazilian government brought criminal proceedings against Kesten's principals in Brazil and issued an order seizing the assets in the bank accounts. Ultimately, the principals were criminally convicted and, on appeal, the Brazilian court found that the funds in the U.S. account were the proceeds of a crime, that Kesten was merely a shell that should be disregarded, and that the funds were subject to forfeiture to Brazil. The U.S. government, aware that there were conflicting claims to the funds, brought an interpleader action. The key issue was whether the U.S. court should recognize the Brazilian judgment so as to give preclusive effect to the Brazilian court's finding that Kesten should be disregarded. The judgment was not entitled to preclusive effect in Brazil because, under Brazilian law, a judgment is not final until appeals are decided, and the case was still on appeal in Brazil. In a full faith and credit case, the law requires the court to give the judgment as much effect as it has in the rendering state, but the U.S. judge gave the Brazilian judgment preclusive effect anyway. In effect, the judge gave the Brazilian judgment *greater* preclusive effect than it would have had if it had been a sister state judgment; he noted that full faith and credit principles are "peculiar to our legal system and do not apply when the judgment of a foreign nation's court is at issue."[13]

We are not now in a position to decide whether this possible tendency to afford greater deference to foreign judgments than to domestic judgments in some cases is wise or not. But if it exists, then its existence may be evidence that U.S. courts recognize that

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[12] No. 10 Civ. 7997, 2012 U.S. Dist. LEXIS 152921 (S.D.N.Y. Oct. 24, 2012). I discussed *Fischer* in an online forum. *See* Theodore J. Folkman, *Case of the Day: United States v. Barry Fischer Law Firm*, LETTERS BLOGATORY (Nov. 12, 2012), http://lettersblogatory.com/2012/11/12/case-of-the-day-united-states-v-barry-fischer-law-firm/.

[13] *Barry Fischer Law Firm*, 2012 U.S. Dist. LEXIS 152921 at *13.

the comity they should accord to foreign courts is more deferential than the comity they accord to one another. If this is so, then we may predict that when faced with challenges to the fairness of a particular foreign proceeding, U.S. courts will tend to defer to the foreign court, as long as the foreign court "provide[s] impartial tribunals [and] procedures compatible with the requirements of due process of law."[14]

[14] UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, *supra* note 1, § 5304(a)(1).

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