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I. INTRODUCTION

On July 27, 2010, Her Majesty's High Court of Justice in England ruled that a Saudi Arabian conglomerate had defaulted on certain loans borrowed from an Emirati commercial bank.[1] To remedy this breach of contract, the English court awarded the bank costs and damages that ultimately exceeded forty million dollars.[2] In August 2011, the bank moved to "domesticate"[3] the English judgment in New York — a state in which the Saudi company did no business. Over the Saudi company's objections, a trial court recognized the English judgment and an appellate panel affirmed the decision unanimously.[4] At this point, civil procedure enthusiasts should be scratching their heads: How could a judge in Lower Manhattan have any power over a Middle Eastern entity that had no meaningful connection to the Empire State?

To curtail overextension by state tribunals, the Due Process Clause of the Fourteenth Amendment limits a court's exercise of power over

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1. Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co., 986 N.Y.S.2d 454, 454 (App. Div. 2014).

2. *Id.*

3. Domestication (or "recognition") is the process of "turn[ing] a judgment from a U.S. federal court, a judgment from a court in another state, or a judgment from another country into an enforceable [forum] state judgment." MIKE ENGLEHART, PROCEDURE FOR ENFORCING FOREIGN STATE, FEDERAL, AND FOREIGN COUNTRY JUDGMENTS IN TEXAS, RENEWAL OF TEXAS JUDGMENTS, AND REVIVAL OF DORMANT TEXAS JUDGMENTS: FOUNDATIONS AND RECENT CASE LAW 2 (2009), *available at* http://www.jdsupra.com/legalnews/procedure-for-enforcing-foreign-state-f-69507/.

4. *Abu Dhabi Commercial Bank*, 986 N.Y.S.2d at 457–58.

nonresident defendants.[5] To satisfy personal jurisdiction, defendants must have sufficient contacts, ties, or relations with the forum state[6] such that it would be fair and reasonable to compel them to participate in and respond to the action against them.[7] Furthermore, in *Shaffer v. Heitner*,[8] the Supreme Court declared that the mere presence of a defendant's property in a given state is an insufficient basis for personal jurisdiction if the property is unrelated to the underlying claim.[9] Nevertheless, the Court suggested in dicta that in a state where a defendant holds assets, a court may enforce a valid out-of-state judgment regardless of the court's jurisdiction as to the original claim.[10] The process of satisfying an out-of-state money judgment, however, involves two distinct and independent steps: recognition and enforcement.[11] Furthermore, parties may seek recognition for purposes other than enforcement in the recognizing jurisdiction.[12] But the Court in *Shaffer* did not address whether courts must have personal jurisdiction over judgment debtors if creditors merely seek to domesticate a judgment separately from an enforcement action.[13]

The Note proceeds in three parts. Part II begins by discussing state mechanisms of recognition and enforcement. Part III then surveys state court interpretations of *Shaffer*'s Footnote 36 and resolves the apparent discrepancy in recent cases concerning the absence of assets. Finally, in Part IV, this Note evaluates the American Law Institute's ("ALI") tentative language on this issue and explores why it is a necessary piece of reform in U.S. foreign relations law. If a state court does not otherwise have personal jurisdiction over a debtor, the court should decline to recognize foreign-country money judgments in the absence of the debtor's assets. Given the complexity of the foreign-country judgment recognition process and its subsequent effect on a debtor's rights, a judgment debtor should not have to appear and dispute recognition in any jurisdiction in which they have neither property nor meaningful contacts.

5. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980).

6. *Id.* at 294 (citing Int'l Shoe Co. v. State of Wash., 326 U.S. 310, 319 (1945)).

7. *Id.* at 292 (citing *Int'l Shoe*, 326 U.S. at 316).

8. Shaffer v. Heitner, 433 U.S. 186 (1977).

9. *Id.* at 209.

10. *See id.* at 210 n. 36. The Court reasoned that applying strict *International Shoe* requirements to the enforcing jurisdiction would allow a judgment debtor to easily skirt their obligations by transferring their assets to a state with which they had insufficient minimum contacts. *See id.* at 210.

11. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: JURISDICTION & JUDGMENTS § 481 cmt. b (1987) ("Recognition and enforcement distinguished."). Out-of-state judgments addressed in this Note are limited to decisions where the remedy is money (hence "money judgments") as opposed to equitable relief. A successful claimant seeking to domesticate the out-of-state decision is therefore the "judgment creditor" and accordingly the unsuccessful party is the "judgment debtor."

12. *Id.*

13. *See generally Shaffer*, 433 U.S. at 186.

II. MECHANISMS OF RECOGNIZING OUT-OF-STATE JUDGMENTS.

In addition to adjudicating domestic disputes, courts in the United States may recognize and enforce out-of-state judgments. For example, state courts routinely recognize money judgments rendered in other states[14] ("sister-state" judgments) or nations[15] ("foreign-country" judgments). As discussed below, courts often conflate recognition with enforcement. Furthermore, courts sometimes treat foreign-country judgments in the same manner as sister-state decisions. Unfortunately, courts' failure to distinguish these distinct and meaningful categories has led to unnecessary discord, confusion, and unfairness.

A. THE INDEPENDENT PROCESSES OF RECOGNITION AND ENFORCEMENT

Recognition is the domestication of an out-of-state judgment such that it has the same effect as any local judgment.[16] Enforcement, on the other hand, is the satisfaction of a judgment debt.[17] Although procedures and collection mechanisms may vary from state to state, the process of enforcement typically involves serving "information" subpoenas to locate and identify property,[18] liens to secure an interest in the property,[19] restraining notices to "freeze" bank accounts,[20] and writs of execution to seize and transfer assets.[21]

14. *See* U.S. CONST. art. IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."). Common examples include "deadbeat parent" cases where state courts recognize out-of-state divorce decrees. Once the divorce is domesticated, the out-of-state parent can take enforcement actions to collect money to satisfy unpaid alimony and child support payments.

15. *See* RESTATEMENT, *supra* note 11, at § 481(1) ("[A] final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.").

16. RESTATEMENT, *supra* note 11, at § 481 cmt. b ("Effect of foreign judgment.").

17. RESTATEMENT, *supra* note 11, at § 481 cmt. g ("Proceedings to enforce foreign judgments in the United States.").

18. *See* JAMES J. BROWN, JUDGMENT ENFORCEMENT § 3.01 ("The objective of postjudgment discovery is to determine whether the debtor has assets or whether there may be methods for collecting assets from third parties as a result of their relationship with the debtor.").

19. *See id.* at § 12.07 ("The judgment creditor may place a lien on the judgment debtor's real or personal property in order to secure the judgment.").

20. *See id.* at § 15.05 ("Most commonly, restraining notices are served upon local banking branches or financial institutions in an effort to restrain the funds in the bank account, so that the funds can be executed upon.").

21. *See id.* ("[A]ll property that is subject to enforcement of a money judgment is subject to levy under a writ of execution to satisfy a money judgment.").

Judgment creditors primarily seek recognition to enforce a money judgment where the judgment debtors' assets are beyond the reach of the court rendering the original judgment. Specifically, a creditor will seek recognition to satisfy a debt where the assets are present in the recognizing state. Alternatively, a creditor can pursue domestication in a given state and then leverage the newly recognized judgment to seek enforcement in yet another state[22] or country.[23] Enforcement, however, is not the only reason to seek recognition.[24] Either party, for example, may seek recognition for *res judicata* or collateral estoppel purposes to preclude relitigation of claims and issues resolved in the original out-of-state judgment.[25]

B. STATUTORY FRAMEWORKS FOR RECOGNITION AND CORRESPONDING SCRUTINY OF COURTS RENDERING ORIGINAL JUDGMENT

Although courts may recognize both sister-state and foreign-country judgments, states apply more rigorous procedures to the latter. The respective mechanisms of domestication reflect the fundamental differences between the two types of out-of-state judgments.

1. Sister-State Judgments

Courts afford sister-state judgments considerable deference on constitutional, practical, and cultural grounds. First, and most importantly, the Full Faith and Credit Clause requires states to respect the "judicial proceedings of every other state."[26] Second, given the ease of mobility within the United States, skeptical treatment of sister-state judgments

22. *See* ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD 29 (2007) ("If circumstances in the state where you are ultimately seeking conversion do not favor recognition, an alternative strategy . . . is to seek a judgment in another state under that state's foreign country judgments recognition procedures, and then establish the recognized judgment in your state as a sister-state judgment."). State courts, however, are split on whether foreign judgments recognized by other states are entitled to full faith and credit. *Compare* Standard Chartered Bank v. Ahmad Hamad Al Gosaibi, 99 A.3d 936 (Pa. Super. Ct. Aug. 20, 2014) (affording full faith and credit to Bahraini judgment domesticated in New York) *with* Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank, No. 13-CV-1415, 2014 WL 4356135 (D.C. Ct. App. Sept. 4, 2014) (declining to afford full faith and credit to the same domesticated judgment). The ALI's tentative draft Restatement takes the position that U.S. judgments recognizing foreign judgments are not entitled to full faith and credit. *See* RESTATEMENT (FOURTH) § 401 cmt g.

23. *See, e.g.*, Electrolines, Inc. v. Prudential Assurance Co., Ltd., 260 Mich. App. 144, 148 (2003) (seeking recognition of Liberian judgment in Michigan to ultimately enforce against defendant's assets in England).

24. *See* RESTATEMENT, *supra* note 11, at § 481 cmt. b ("Effect of foreign judgment.").

25. *See id.*

26. U.S. CONST. art. IV, § 1.

would frustrate the enforcement of judgments.[27] Third, state courts are generally rooted in the same legal customs and traditions and thus a judge is less likely to second-guess the propriety of a sister-state judgment.

Nearly all U.S. states and territories have adopted a straightforward administrative process to domesticate sister-state judgments without having to bring a new common law action.[28] The Enforcement Act enables recognition by simply having the party seeking enforcement of the judgment file the judgment with the court[29] and provide notice to the judgment debtor.[30] Under the Enforcement Act, a debtor may request a stay in recognition proceedings upon a showing of appeal.[31] A debtor may also challenge the personal jurisdiction of the court rendering the original judgment, but may not relitigate the underlying claim. In the sister-state context, however, the burden is on the debtor to raise and demonstrate lack of personal jurisdiction.[32] In other words, the original court's power over the judgment debtor is a rebuttable presumption. In sum, courts seem to recognize sister-state judgments without much scrutiny.

2. Foreign Country Judgments

Unlike sister-state judgments, state courts examine foreign-country judgments more closely. This is due in part to the fact that state judges are less familiar with legal systems outside of the United States and that the Full Faith and Credit Clause applies to other states in the union, not other countries. In *Hilton v. Guyot*, the Supreme Court identified several grounds for declining to recognize foreign judgments, including the foreign court's lack of jurisdiction, inadequate process, and fraud.[33] Following *Hilton*, most state courts recognized and enforced foreign country

27. *C.f.* UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT eds. notes (1948) (revised 1964) ("The mobility, today, of both persons and property is such that existing procedure for the enforcement of judgments in those cases where the judgment debtor has removed himself and his property from the state in which the judgment was rendered, is inadequate.").

28. *See generally* REVISED UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT (1964) ("Enforcement Act"). Although the Enforcement Act discusses the "enforcement" of "foreign judgments," the statute in fact speaks to the recognition of sister-state judgments rather than the satisfaction of foreign-country judgments. *See id*.

29. *See id.* at § 2.

30. *See id. at* § 3.

31. *See id. at* § 4.

32. *See* Law Firm of Paul L. Erickson, P.A. v. Boykin, 681 S.E.2d 575, 579 (S.C. 2009) (holding South Carolina Enforcement Act provision unconstitutional for placing burden on creditor).

33. Hilton v. Guyot, 159 U.S. 113 (1895); *see also* Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 150 (2001) (noting how courts in common law jurisdictions have followed *Hilton* criteria except for the Court's "reciprocity" requirement).

judgments based on the common law principle of the "comity of nations."[34] A clear majority of states, however, have now standardized the process of recognition (and grounds for nonrecognition) by adopting one of two uniform acts that codified the common law of recognizing foreign-country judgments.[35]

The Recognition Act allows a state court to recognize foreign judgments once they are final and conclusive.[36] Furthermore, the Recognition Act forbids recognition where the foreign country's judiciary system does not provide impartial tribunals.[37] The Recognition Act also prohibits state courts from recognizing foreign debt judgments where the foreign court lacked personal[38] or subject-matter jurisdiction.[39] The Recognition Act then provides several grounds for the court to refuse recognition at the court's discretion.[40] In contrast to Enforcement Act plaintiffs, judgment creditors under the Recognition Act have the burden of demonstrating the foreign country judgment is entitled to recognition.[41] This includes demonstrating that the foreign court had personal jurisdiction over the debtor.[42] In testing the personal jurisdiction of the original court, U.S. courts have generally applied *International Shoe* standards rather than the foreign judiciary's own procedural requirements.[43] Given the purposes and criteria of the Recognition Act, state courts do not (or rather should not) treat the recognition of foreign country judgments as readily — and with as little scrutiny — as they do for sister-state judgments under the Enforcement Act.

34. *Hilton*, 159 U.S. at 113; Comity of nations "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Id.* at 164.

35. *See* UNIF. FOREIGN-COUNTRY MONEY-JUDGMENTS RECOGNITION ACT (2005) [herinafter "Recognition Act"].

36. *Id.* at § 2 ("Applicability).

37. *Id.* at § 4(a)(1).

38. *Id.* at § 4(a)(2).

39. *Id.* at § 4(a)(3).

40. *Id.* at § 4(b). These grounds include circumstances where the debtor did not receive adequate notice of the foreign court proceedings, the judgment was obtained by fraud, the underlying claim is repugnant to state public policy, the judgment conflicts with another final and conclusive judgment, the foreign court proceedings were contrary to an agreement between parties, or the foreign court was a "seriously inconvenient forum." *Id.*

41. *See*, *e.g.*, *Abu Dhabi Commercial Bank*, 986 N.Y.S.2d at 457–58 ("[T]he legislature reasonably placed the burden on the proponent of a foreign judgment of showing that the foreign court was impartial and followed basic principles of due process.").

42. *See* Recognition Act §§ 4(a)(2), 5.

43. *See*, *e.g.*, de la Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1383–84 (D. Del. 1991) *aff'd*, 961 F.2d 208 (3d Cir. 1992); Koster v. Automark Indus., Inc., 640 F.2d 77, 79 (7th Cir. 1981).

III. PERSONAL JURISDICTION OF COURTS RECOGNIZING JUDGMENT

Shaffer v. Heitner foreclosed the exercise of quasi in rem jurisdiction in cases where the defendant's in-state property was unrelated to the out-of-state claim.[44] The *Shaffer* Court, however, suggested in Footnote 36 that a state court need not have jurisdiction over a judgment debtor when enforcing a sister-state money judgment against the debtor's assets:

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.[45]

The Court explained that a debtor should not be able to "avoid paying his obligations by removing his property to a state in which his creditor cannot obtain personal jurisdiction over him."[46] The Court further noted that "[t]he Full Faith and Credit Clause . . . makes the valid in personam judgment of one State enforceable in all other States."[47]

Shaffer's Footnote 36 was the Supreme Court's last word on whether courts recognizing or enforcing out-of-state money judgments require personal jurisdiction over debtors.[48] Furthermore, state-based Recognition Acts are silent on this issue.[49] Finally, Congress has not passed any statutes that could address the question by federalizing the recognition process. As a result, state court opinions best indicate the state of the law and its trajectory.[50]

Over the past thirty-nine years since *Shaffer*, state courts across the country have cited to and interpreted Footnote 36 to determine personal jurisdiction requirements over non-resident judgment debtors. Indeed, courts have discussed Footnote 36 in recognition and enforcement

44. *See Shaffer*, 433 U.S. at 209.

45. *Shaffer*, 433. U.S. at 210, n.36 ("Footnote 36").

46. *See id*. at 210.

47. *Id*.

48. *See, e.g.*, *Abu Dhabi Commercial Bank*, 986 N.Y.S.2d at 458–59 (referring to *Shaffer* alone for guidance from the U.S. Supreme Court).

49. *See generally supra* note 35.

50. Federal courts sometimes recognize and enforce foreign country judgments, but typically when sitting in diversity and thus applying state domestication laws. Despite calls to nationalize the treatment of foreign country judgments, no federal laws preempt state recognition and enforcement procedures. On the other hand, district courts have exclusive jurisdiction to evaluate and domesticate international arbitral awards under the Federal Arbitration Act. *See* 22 U.S.C.A. § 290k-11(2) (West).

proceedings concerning both sister-state and foreign-country judgments.

A. FOOTNOTE 36 IN ENFORCEMENT PROCEEDINGS

Consistent with Footnote 36, courts agree that they need not have personal jurisdiction over debtors to enforce judgments against out-of-state judgment debtors.[51] The debtor, however, must still possess property in-state to satisfy Due Process. In the few cases where the presence of the debtor's domestic assets were contested, courts have understandably disfavored enforcement where the creditor has failed to identify said assets.[52] Courts have held this position in cases involving not only sister-state decisions, but also foreign country judgments.[53] Moreover, no court has held that a creditor may initiate enforcement proceedings in the absence of property. Intuitively, permitting enforcement would be impractical, unfair, and illogical where there is simply no debtor property to identify, seize, and transfer. The consensus with respect to enforcement, however, stands in contrast to the apparent discord among state courts regarding the need for personal jurisdiction in recognition proceedings.

B. FOOTNOTE 36 IN RECOGNITION PROCEEDINGS

Given that most creditors seek recognition to quickly enforce against debtor's identifiable assets in the same jurisdiction, few Footnote 36 cases have specifically addressed recognition independently of enforcement.[54] Furthermore, only New York,[55] Texas,[56] and Michigan[57] courts have

51. *See, e.g.*, Arbor Farms, LLC v. GeoStar Corp., 314911, 2014 WL 2197846, at *3–5 (Mich. Ct. App. May 27, 2014); Koh v. Inno-Pac. Holdings, Ltd., 54 P.3d 1270, 1272–73 (Wash. App. 2002); Kingsland Holding, Inc. v. Bracco, No. CIV. A. 14817, 1996 WL 104257 (Del. Ch. Mar. 5, 1996); UMS Partners, Ltd. v. Jackson, 94J-12-159H-17-076, 1995 WL 413395 (Del. Sup. Ct. June 15, 1995); Tabet v. Tabet, 644 So. 2d 557, 559 (Fla. Dist. Ct. App. 1994); Gwinnett Prop., N.V. v. GH Montage GmbH, 215 Ga. App. 889, 895 (1994); Sagona v. Doty, 25 Va. Cir. 529 (1991); First v. State, Dep't of Soc. & Rehab. Servs. ex rel. LaRoche, 247 Mont. 465, 474–75 (1991); Ruiz v. Lloses, 559 A.2d 866, 867–68 (N.J. App. Div. 1989); Fraser v. Littlejohn, 96 N.C. App. 377, 379–81 (1989); *see also* Joseph E. Neuhaus, *Current Issues in the Enforcement of International Arbitration Awards*, 36 U. MIAMI INTER-AM. L. REV. 23, 29 (2004) (collecting cases to support proposition that "[a]fter Shaffer, state courts throughout the country have regularly applied 'quasi in rem' jurisdiction in cases seeking to enforce foreign-state judgments, without imposing any requirement that the property be related to the subject matter of the dispute").

52. *See, e.g.*, Williamson v. Williamson, 275 S.E.2d 42, 43 (1981) (federal courts have also applied this rationale when declining to enforce international arbitral awards). *See, e.g.*, Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1127–28 (9th Cir. 2002); *accord* Cargnani v. Pewag Austria G.m.b.H., No. CIV. S-05-0133 WBSJF, 2007 WL 415992 (E.D. Cal. Feb. 5, 2007).

53. *See generally supra* note 52.

54. *See, e.g.*, Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 910 (N.D. Iowa 2002).

55. Lenchyshyn v. Pelko Elec., Inc., 281 A.D.2d 42, 47–50 (N.Y. App. Div. 2001).

56. Haaksman v. Diamond Offshore (Bermuda), Ltd., 260 S.W.3d 476, 480 (Tex. App. 2008).

addressed their own personal jurisdiction in the context of recognizing foreign-country judgments. New York and Texas have taken the position that in-state assets are not required for pure recognition purposes. On the other hand, the ALI's draft Restatement (Fourth) on Foreign Relations Law interprets Michigan's position in *Electrolines, Inc. v. Prudential Assurance Co.* as requiring such assets for recognition, and is therefore in conflict with New York's decision in *Lenchyshyn v. Pelko Electric* and its progeny. Upon closer review, however, the court's holding in *Electrolines* concerned enforcement rather than recognition alone and thus does not stand for anything more than the uncontroversial position that in-state assets are a prerequisite to enforcement.

1. Lenchyshyn *and* Abu Dhabi.

New York courts have held that personal jurisdiction over a debtor is not required to recognize a foreign-country judgment.[58] In *Lenchyshyn* — the first case in the United States addressing this issue — Michael Lenchyshyn sought both recognition and enforcement of a Canadian money judgment resulting from his intellectual property claims against Pelko Electric, Inc.[59] Upon service of process, Pelko unsuccessfully moved to dismiss for lack of personal jurisdiction, claiming that the company had no presence or business in New York.[60] Lenchyshyn, on the other hand, argued Pelko had a "jurisdictional nexus" with New York based on allegations of hidden funds and significant commercial activity.[61]

Affirming on appeal, the *Lenchyshyn* court held that neither the U.S. Constitution nor New York law required a "jurisdictional basis" for recognizing foreign-country judgments.[62] First, the court determined that while New York's version of the Recognition Act had several enumerated bases for non-recognition, the personal jurisdiction of the New York court recognizing the judgment is not one of them and its absence was a "telling omission."[63] Second, citing Footnote 36, the court concluded that personal jurisdiction was not required by the Due Process clause for recognition purposes.[64] Third, the court did not believe the procedural differences between the Recognition and Enforcement Acts implied "additional jurisdictional requirements to be satisfied in proceedings to obtain

57. Electrolines, Inc. v. Prudential Assurance Co., 677 N.W.2d 874, 883–85 (Mich. App. 2003).
58. *Abu Dhabi Commercial Bank*, 986 N.Y.S.2d at 454; *Lenchyshyn*, 281 A.D.2d at 47–50.
59. *Lenchyshyn*, 281 A.D.2d at 43.
60. *Id.* at 44.
61. *Id.* at 44–45.
62. *Id.* at 47.
63. *Id.* at 48–49.
64. *Id.* at 47–48.

recognition."[65] While acknowledging the formality and complexity of domesticating foreign-country judgments, the court decided that Recognition Act requirements "should not be viewed as allowing the judgment debtor to raise nonstatutory obstacles to recognition of the foreign-country money judgment."[66]

Fourth, characterizing the recognition process as a "ministerial function," the court surmised that imposing additional personal jurisdiction requirements would be unfair and impractical for creditors because "[m]ost devices for the enforcement of money judgments operate *in rem* against the real or personal property of the judgment debtor, or *in personam* against third parties, such as banks, investment firms, employers, or other third-party garnishees, obligors or debtors of the judgment debtor."[67] Fifth, the court deemed Lenchyshyn had sufficiently alleged Pelko's New York assets and that "[s]uch assets and/or debts would have a New York situs, which is all that is required to subject them to levy or restraint here as a means of enforcing the domesticated Ontario judgment."[68] Finally, the *Lenchyshyn* court opined that even in the absence of assets, courts should recognize judgments to allow creditors to enforce against later-acquired property;

> [m]oreover, even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment pursuant to CPLR article 53, and thereby should have the opportunity to pursue all such enforcement steps in futuro, whenever it might appear that defendants are maintaining assets in New York, including at any time during the initial life of the domesticated Ontario money judgment or any subsequent renewal period.[69]

Lenchyshyn therefore required domestic assets for enforcement of foreign-country judgments, but opened the door to the possibility of recognition in absence of such assets.

In 2014, a New York court applied *Lenchyshyn* to affirm recognition of a forty-million dollar English judgment, despite debtor's lack of in-state property.[70] As in *Lenchyshyn*, the court in *Abu Dhabi Commercial Bank*

65. *Lenchyshyn*, 281 A.D.2d at 49.
66. *Id.*
67. *Id.* at 49–50.
68. *Id.* at 50.
69. *Id.*
70. *Abu Dhabi Commercial Bank*, 986 N.Y.S.2d at 454–55.

PJSC v. Saad Trading, Contr. & Fin. Servs. Co expressly rejected debtor's contention that the stricter requirements of foreign-country recognition implied jurisdictional requirements beyond those specified in the Recognition Act.[71] The court further stated that because "[New York's rules of civil procedure] and the English court are already protecting the defendant's due process rights, including personal jurisdiction, the court charged with recognition and enforcement should not be required to grant further protection during a ministerial enforcement action."[72] Lastly, in a reference to Footnote 36, the *Abu Dhabi* court believed "[t]here is no unfairness to the defendant if the plaintiff obtains an order in New York recognizing the foreign judgment, which can then be enforced if the defendant is found to have, or later brings, property into the State."[73] New York has therefore established itself as a permissive arena for judgment creditors strategically seeking recognition without the prospect of immediate enforcement.[74]

2. The Electrolines-Haaksman *"Disagreement"*

Declining to follow *Abu Dhabi*, Michigan courts require jurisdiction over debtors or their property to domesticate foreign country judgments.[75] In *Electrolines*, Electrolines, Inc. sought recognition of a Liberian judgment against several European insurance companies, with the ulterior motive of ultimately seizing defendants' assets in the United Kingdom.[76] Among other reasons, the trial court found in summary disposition that the court's personal jurisdiction over the insurance companies was irrelevant to Recognition Act proceedings.[77]

Reversing on appeal, the *Electrolines* court held creditors must demonstrate personal jurisdiction because the entry of judgment is governed by the Enforcement Act and therefore constitutes an enforcement action.[78] Furthermore, by examining the language of the creditor's complaint and other filings, the court believed Electrolines sought not just

71. *Abu Dhabi Commercial Bank*, 986 N.Y.S.2d at 455.

72. *Id.* at 458.

73. *Id.* (citation omitted).

74. *C.f.* CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 100 N.Y.2d 215, 221 (2003) ("New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts"). New York becomes an even more attractive venue for judgment creditors when considering that a New York court may compel a bank within their jurisdiction to deliver the judgment debtor's *out-of-state* assets. Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533, 536 (2009).

75. *Electrolines*, 677 N.W.2d at 880.

76. *Id.* at 877–78. This lawsuit arose from an insurance claim filed by Electrolines, Inc., for property damage resulting from a fire at its store and factory in Monrovia, Liberia. *See id.*

77. *Id.* at 877.

78. *Id.* at 882.

recognition, but also enforcement.[79] The *Electrolines* court also reasoned that in "establish[ing] that personal jurisdiction is not a prerequisite to its recognition and enforcement action," the "holding of *Lenchyshyn* is helpful only where a party demonstrates that property of the judgment debtor is located within the jurisdiction of the court."[80] The court also stated:

> However, plaintiff overlooks that the judgment debtors in *Lenchyshyn* had assets in the enforcing state, to wit, bank accounts in Buffalo, New York, and a New York corporation where one of the defendants was a principal. Although the *Lenchyshyn* court concluded that personal jurisdiction was not required, the *Lenchyshyn* court acquired jurisdiction because the defendants had property in New York. Indeed, the *Lenchyshyn* court concluded that "[a]t bottom, defendants take the illogical and inequitable position that a judgment debtor's New York assets should be immune from execution or restraint so long as the judgment debtor absents himself from New York . . . ." Thus, the holding of Lenchyshyn is helpful only where a party demonstrates that property of the judgment debtor is located within the jurisdiction of the court.[81]

Holding that the creditor had failed to demonstrate the Michigan trial court's personal jurisdiction over the debtors, *Electrolines* reversed the lower court's order.[82]

Texas courts, on the other hand, have followed *Lenchyshyn* to recognize foreign-country money judgments despite the absence of debtor assets.[83] In *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, creditors sought recognition of a Dutch judgment against their former employer, Diamond Offshore (Bermuda), Ltd. ("Diamond Bermuda").[84] In response, Diamond Bermuda contested the trial court's personal jurisdiction by filing for a special appearance and moving for nonrecognition.[85] Although creditors asserted Diamond Bermuda was subject to general jurisdiction due to their contacts with the state, the trial court nevertheless granted special appearance.[86] Reversing on appeal, the *Haaksman* court rejected

79. *Electrolines*, 677 N.W.2d at 883–84.
80. *Id.* at 885.
81. *Electrolines*, 677 N.W.2d at 877.
82. *Id.* at 889.
83. *Haaksman*, 260 S.W.3d at 480.
84. *Id.* at 478.
85. *Id.*
86. *Id.*

Diamond Bermuda's contention that the trial court "lacked a valid basis for the exercise of personal jurisdiction over appellee, [and] therefore, the foreign judgment should not be recognized in Texas."[87] While acknowledging that Texas' Recognition Act permitted challenges to the personal jurisdiction of the foreign court, the *Haaksman* court noted the Recognition Act did not require the recognizing court to have such jurisdiction over the debtor.[88] In their appeal, Diamond Bermuda relied on *Electrolines* to support their proposition that a court considering recognition must determine personal jurisdiction if the debtor has no in-state property.[89]

Rejecting this argument, the *Haaksman* court pointed out that *Lenchyshyn* permitted recognition in the absence of debtor assets to "have the opportunity to pursue all such enforcement steps in [the] future."[90] The *Haaksman* court concluded that "even if a judgment debtor does not currently have property in Texas, a judgment creditor should be allowed the opportunity to obtain recognition of his foreign-money judgment and later pursue enforcement if or when the judgment debtor appears to be maintaining assets in Texas."[91]

Haaksman was right to note that *Electrolines* ignored *Lenchyshyn*'s language regarding recognition in the absence of assets. *Electrolines*, however, was correct as a matter of law in requiring personal jurisdiction; the Michigan court's error was in misinterpreting the creditor's pleadings as a demand for both recognition *and* enforcement of the Liberian judgment. In line with the consensus position discussed above, the court then ruled against Electrolines because *enforcement* requires presence of assets. As a result, the court's mistake was not in their statement of law concerning enforcement, but rather in their strained interpretation of the relief sought. Given their express desire to leverage the anticipated Michigan judgment to pursue debtor's assets in England, creditors were not seeking ultimate enforcement in Michigan.[92] Furthermore, even if the creditor sought enforcement in Michigan post-recognition, Electrolines could not proceed if they failed to identify the debtor's in-state assets for seizure.[93] Finally, remembering that the Enforcement Act is a mechanism to recognize sister-state judgments, the *Electrolines* court assumed actions falling under the Enforcement Act necessarily constitute enforcement

87. *Haaksman*, 260 S.W.3d at 479.
88. *Id.* at 479–80.
89. *Id.* at 480.
90. *Id.* at 481.
91. *Id.*
92. *Electrolines*, 677 N.W.2d at 878.
93. *Id.*

proceedings.[94] On the contrary, as noted in the court's opinion, judgments filed under Michigan's Enforcement Act are recognized, but not yet enforced because they have "the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of the circuit court, the district court, or a municipal court of this state and *may be enforced* or satisfied in like manner."[95] By failing to distinguish recognition and enforcement proceedings, and their respective functions and requirements, the *Electrolines* court erred by adamantly characterizing the creditor's action for recognition as the pursuit of enforcement.

Despite the court's mischaracterization of the creditor's pleadings and misconstruction of the Enforcement Act, *Electrolines* does not conflict with *Lenchyshyn* or its progeny. As a matter of law, *Electrolines* is limited to the consensus position that in-state assets are a necessary prerequisite to enforcement, not recognition alone. In fact, at the outset of their analysis, the *Electrolines* court stated "[t]he facts of this case do not require us to decide the jurisdictional requirements of a complaint brought solely under the [Recognition Act]."[96] As a result, *Lenchyshyn* remains unchallenged by state courts outside of New York: To recognize foreign-country money judgments, courts need not have jurisdiction over debtors or their property. Due process concerns, however, militate against this position.

IV. IS RECOGNITION FAIR IN JURISDICTIONS ALIEN TO DEBTORS?

Taken together, Footnote 36 and *Lenchyshyn* are appealing propositions for international judgment creditors. The ALI, however, asserts that the *Lenchyshyn* court and its adherents have misread Footnote 36 in dispensing with the personal jurisdiction requirement.[97]

The ALI–a national organization of distinguished legal professionals — guides judges and practitioners by publishing scholarly work that organizes black letter law, addresses uncertainties, and recommends areas of reform.[98] One of the ALI's projects, the Restatement of The Foreign Relations Law of the United States, was last revised in 1987 and the ALI is now in the process of updating it for the fourth edition.[99] On May 19,

94. *Electrolines*, 677 N.W.2d at 883.

95. *Id.* (emphasis added)

96. *Id.*

97. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION & JUDGMENTS § 402 Reporter's Note 3. (2014) (Tentative Draft No. 1).

98. *About ALI*, AMERICAN LAW INSTITUTE (Jan. 8, 2016, 6:55 PM), https://www.ali.org/about-ali/.

99. *The Foreign Relations Law of the United States*, AMERICAN LAW INSTITUTE (Jan. 8, 2016, 6:57 PM), https://www.ali.org/projects/show/foreign-relations-law-united-states/.

2014, ALI's membership approved a tentative draft of sections concerning jurisdiction,[100] which states that "[a] person seeking *recognition* of a foreign judgment through a civil proceeding must obtain jurisdiction over any person against whom the judgment will operate" such that "the persons whom the judgment will bind have sufficient contacts with the forum to satisfy due process."[101] In "[p]roceeding[s] to *enforce* foreign judgments, however, the presence of assets belonging to any person against whom enforcement is sought will satisfy due process."[102]

But under *Lenchysyn*, creditors may seek recognition for any reason, and three broad purposes come to mind: to "lie in wait" for future assets, to seek enforcement in yet another state or country, and to preclude relitigation of settled issues or claims. To understand why the *Lenchyshyn* standard violates a judgment debtor's due process rights, we must examine all three of these recognition scenarios as they each present a different balance of interests between parties.

A. RECOGNITION IN ANTICIPATION OF FUTURE ASSETS

For judgment creditors, one benefit of the *Lenchyshyn* rule is that non-compliant debtors are essentially "locked out" of the jurisdiction until they satisfy their judgment debt.[103] But even if we accepted these effects as desirable, *Lenchyshyn* still underestimates the burden of disputing the recognition of foreign-country judgments, particularly when compared to the domestication of sister-state decisions. In other words, *Lenchysyn* is insensitive to the "burden that the judgment debtor would suffer had she to defend herself in various enforcing *fora*, even where she has no tie whatsoever with the jurisdiction."[104] To satisfy due process, courts and practitioners should consider the Restatement's position: "A person seeking recognition of a foreign judgment through a civil proceeding must obtain jurisdiction over any person against whom the judgment will operate."[105]

A debtor with several statutory grounds to dispute recognition should not have the burden to appear in any state of the creditor's choosing.[106] To

100. *Actions Taken at the 91st Annual Meeting*, AMERICAN LAW INSTITUTE (Jan. 8, 2016, 6:59 PM), http://2014annualmeeting.org/actions-taken/.

101. *Supra* note 98, § 402 cmt. b (Tentative Draft No. 1).

102. *Id.*

103. *See* Emilio Bettoni, *Recognition and Enforcement of Foreign Money Judgments Despite the Lack of Assets*, 10 N.Y.U. J.L. & BUS. 155, 174–75 (2013) ("A favorable decision rendered in any jurisdiction, coupled with the opportunity to recognize a foreign judgment elsewhere regardless of the presence of assets would grant to the prevailing company a comparative advantage were it to decide to invest in a country where none of the parties is present.").

104. *Id.* at 184 (dismissing this concern).

105. *Supra* note 98, at § 402 cmt. b (Tentative Draft No. 1).

106. *See* Linda J. Silberman and Aaron D. Simowitz, *Recognition and Enforcement of Foreign*

illustrate this in a hypothetical scenario, consider a small Japanese business, Arigato, LLC ("Arigato"), that is sued by one of their competitors, a larger Chinese company, Nihao Corporation ("Nihao"). Upon securing a sizeable money judgment in proceedings in a court in China, Nihao seeks recognition in New York. Arigato currently has no dealings with, or assets in, the United States, let alone the Empire State. Moreover, Arigato considers the foreign court proceedings as unfair and believes the Chinese tribunal was not impartial.

Under *Lenchyshyn*, despite Arigato's lack of ties to the state, the New York court initiates recognition proceedings. Although given notice, Arigato is caught off-guard because it has no connection to the state and thus had no expectation of being "haled into court" to dispute recognition in that jurisdiction. Arigato, however, will feel obligated to retain local counsel, dispatch representatives, and generally expend resources due to the risk of recognition, which would prevent Arigato from ever doing business or holding assets in New York. This example demonstrates how, by disposing of personal jurisdiction altogether, the *Lenchyshyn* standard can be unfair for debtors in foreign-country judgments and violate their Due Process rights.

This scenario stands in stark contrast to the sister-state context. While the Recognition Act requires separate proceedings and an examination of several bases for mandatory and discretionary nonrecognition, the Enforcement Act is little more than a formality, with the presumption that sister-state judgments are constitutionally entitled to recognition. As a result, courts have concluded that personal jurisdiction is not required to recognize a sister-state judgment.[107] In *Gingold v. Gingold*, for example, the plaintiff sought recognition of a New York divorce decree in California against her ex-husband.[108] Holding that it was "not necessary for a California court to have jurisdiction over the person or property of an obligor in order to validly register a foreign support order," the California Court of Appeal characterized the recognition process as a "ministerial duty of the clerk" which "does not prejudice any rights of the obligor."[109] As discussed, debtors may collaterally attack the judgment but they have very limited grounds to dispute its presumed legitimacy. The process of recognizing a sister-state judgment thus does not require full-fledged

Judgments and Awards: What Hath Daimler Wrought?, 90 N.Y.U. L. REV. 1609 (forthcoming 2016) ("A judgment debtor has a number of defenses available to challenge the original judgment, but a judgment debtor should not be forced to raise those defenses in any forum that the judgment-creditor might choose to bring an enforcement action.").

107. Gingold v. Gingold, 161 Cal. App. 3d 1177, 1182–84 (1984).

108. *Id.* at 1180.

109. *Id.* at 1184.

personal jurisdiction to satisfy a debtor's due process rights.

B. RECOGNITION FOR OUT-OF-STATE ENFORCEMENT

In the hypothetical above, Arigato's dilemma is worsened by the possibility that Nihao would take the newly recognized New York judgment and seek enforcement in another state or country.[110] But to what end? Nihao could benefit in one of two ways by "converting" the judgment in one jurisdiction with the ultimate aim of enforcement elsewhere.

First, even if the sister-state had a higher standard for domesticating foreign judgments, the sister-state is much more likely to respect and recognize the New York judgment. An appellate court in Pennsylvania took this very position in *Standard Chartered Bank*[111] when affirming a lower court's decision to recognize a Bahraini judgment domesticated in New York. The court stated that:

> [p]ursuant to the U.S. Constitution, the Full Faith and Credit Act, and the Enforcement Act, Standard Chartered's New York judgment is, as a matter of law, entitled to full faith and credit in Pennsylvania as with any other judgment issued by a New York court. That the New York judgment recognized a foreign nation judgment is of no moment. Just as Pennsylvania courts were compelled to recognize [sister-state judgments from New Jersey and West Virginia] pursuant to full faith and credit, we are similarly bound to recognize the instant New York judgment. Accordingly, the trial court did not err in giving full faith and credit to the New York judgment and denying AHAB's plea to disregard full faith and credit and vacate the Pennsylvania judgment.[112]

Second, a foreign country's court may be more receptive to recognizing an American judgment than a Chinese one. Indeed, the creditors in *Electrolines* sought recognition in Michigan for that reason; they believed an English court would more readily domesticate an Americanized judgment compared to the original Liberian ruling. In these situations, creditors can forum shop among the States for courts amenable to recognition and "transfer" the judgment to out-of-state jurisdictions

110. *See generally* Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. 459, 478 (2013) (labelling this type of forum shopping as "judgment arbitrage").

111. *Standard Chartered Bank*, 99 A.3d at 396.

112. *Id.* at *943–44 (citations omitted).

where the creditor's assets are actually located. As a result, a judgment creditor's ability to seek recognition for the purposes of out-of-state enforcement exacerbates the unfairness in *Lenchyshyn*.[113]

On this point, the ALI's position in the Restatement (Fourth) is that the Full Faith and Credit Clause does not "*require* a U.S. Court automatically to regard as conclusive the decision of another U.S. court to recognize, or not to recognize, a foreign judgment."[114] One rationale for this position is that "denying automatic enforcement of a sister-State's recognition of a foreign judgment would discourage forum shopping that could ensue from bifurcation of the recognition and enforcement States."[115] Although the ALI's stance is reasonable and mitigates the unfairness described above, its position is insufficient as trial courts are still more likely to honor foreign judgments domesticated by sister-states even if courts are not obligated to do so under the U.S. Constitution. If additional state courts join New York and Texas in casually dispensing with the personal jurisdiction requirement with respect to recognition proceedings, however, the U.S. Supreme Court may need to clarify Footnote 36 to ensure that state courts are not depriving judgment debtors of their liberty or property without the due process of law.

C. RECOGNITION FOR THE PRECLUSIVE EFFECT OF A FOREIGN JUDGMENT

Finally, parties may seek recognition in absence of assets for *res judicata* or collateral estoppel purposes, rather than for a foreign-money enforcement.[116] For example, a debtor may defensively seek recognition to prevent a creditor's relitigation of a claim or issue settled earlier overseas in the debtor's favor.[117] Alternatively, a creditor may offensively seek recognition in the U.S. to bar relitigation of particular issues of fact or law.

These scenarios, however, would not violate the debtor's Due Process rights. In either case, courts have power over the party because the creditor or debtor seeking recognition is appearing in the state by choice, and thus voluntarily submitting themselves to the recognizing court's jurisdiction. As a result, no parties consenting to a court's authority suffer from Due

113. *See Lenchyshyn*, 281 A.D.2d at 43.

114. *Supra* note 98, at § 401 cmt. g (emphasis added); *see also Standard Chartered Bank*, 98 A.3d at 1004 (The Supreme Court has made clear that "the full faith and credit clause is not an inexorable and unqualified command." (quoting Pink v. A.A.A. Highway Exp., 314 U.S. 201, 210 (1941)).

115. *Id.*

116. *See* Manco Contracting Co. (W.W.L.) v. Bezdikian, 85 Cal. Rptr. 3d 233, 243 (Ct. App. 2008) (citing RESTATEMENT (THIRD) § 481, cm. b, p. 595; Renoir v. Redstar Corp., 20 Cal. Rptr. 3d 603 (2004)) (recognizing that a party may rely on res judicata or collateral estoppel principles unrelated to enforcement of a money judgment).

117. *See generally supra*, note 117 and accompanying text.

Process violations because the question of personal jurisdiction in foreign money-judgment recognition proceedings does not turn on such preclusion scenarios.

IV. CONCLUSION

Claimants who have won their case deserve to be made whole. International judgment creditors should thus have every opportunity to seize debtor assets wherever located. As the Supreme Court noted in *Shaffer*, no debtor should be able to "avoid paying his obligations by removing his property to a state in which his creditor cannot obtain personal jurisdiction over him."[118]

But if state courts do not otherwise have personal jurisdiction over a debtor, the court should not recognize foreign-country money judgments in the absence of the debtor's assets in that forum. Considering the complications inherent to the foreign-country judgment recognition process and the potential impact on rights and liabilities, it is fundamentally unfair to require a judgment debtor to appear and dispute recognition in any jurisdiction in which they have no property and no meaningful contacts.[119]

To that end, state court systems and practitioners of international litigation alike should resist the urge to treat the recognition of foreign-country money judgments as a mere formality and instead take heed of the Due Process concerns expressed in the ALI's position.

118. *Shaffer*, 433 U.S. at 210.

119. Silberman, *supra* note 106 at 14–15. Where creditors anticipate an influx of debtors' assets into the forum state, courts should require a minimal evidentiary showing supporting such a belief while permitting limited discovery to identify the property expected. Upon such a showing, there would seem to be no unfairness in recognizing a foreign money judgment in a state otherwise alien to debtors.