

U.S. RECOGNITION AND ENFORCEMENT OF FOREIGN COUNTRY INJUNCTIVE AND SPECIFIC PERFORMANCE DECREES*

INTRODUCTION

While there is abundant literature and precedent regarding United States recognition and enforcement of foreign country monetary judgments,¹ very little of substance has been said regarding U.S. recognition and enforcement of foreign country equitable decrees.² This is due to the fact that parties rarely seek recognition and enforcement in this country of an injunction or specific performance decree rendered by a foreign country court.

Common sense dictates that if one wants to enjoin activity occurring in the United States or to compel activity to be performed in the United States, one should bring suit in the United States and not abroad.³ Thus the *Restatement (Second) of Conflict of Laws*

* © D. Buzard, 1989. A draft of this article was submitted in completion of the course requirements for TRANSNATIONAL LITIGATION, Tulane Law School, Fall 1988, under the direction of George A. Bermann, visiting (from Columbia Law School) Eason-Weinmann Professor of Law.

1. See, e.g., NANDA & PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN UNITED STATES COURTS, ch. 11 (1988); 2 DELAUME, TRANSNATIONAL CONTRACTS, ch. IX (Booklets 11 and 11.1, 1985); Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW. 425 (1982); von Mehren, *United States Practice Concerning the Recognition of Foreign Judgments*, 17 VA. J. INT'L L. 401 (1977); von Mehren & Patterson, *Recognition and Enforcement of Foreign Country Judgments in the United States*, 6 LAW & POL. INT'L BUS. 37 (1974); Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220 (1972); Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 UCLA L. REV. 44 (1962).

For general information on foreign country recognition and enforcement of U.S. judgments, see generally, NANDA & PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN UNITED STATES COURTS, ch. 12 (1988); 2 DELAUME, TRANSNATIONAL CONTRACTS, ch. X (Booklets 12 and 12.1, 1986); ROMAN, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN VARIOUS FOREIGN COUNTRIES (1984).

2. Excluding matters of personal status, matrimonial law, child custody and support, etc. which have been extensively addressed and are generally well-settled in favor of U.S. recognition and enforcement. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 484, 485, 486 and their Official Comments, Reporter's Notes, and authorities cited therein, at 616 (1987); JACOBSSON & JACOB (ED.), TRENDS IN THE ENFORCEMENT OF NON-MONEY JUDGMENTS AND ORDERS: THE FIRST INTERNATIONAL COLLOQUIUM ON THE LAW OF CIVIL PROCEDURE (1988). See also Uniform Child Custody Jurisdiction Act, § 9B U.L.A. 381 (1987), both adopted in all 50 states and the District of Columbia, and applicable to foreign country decrees.

3. Unless one is bound by a contractual choice of forum clause to bring suit abroad. See, e.g., Pilkington Bros. v. AFG Indus., 581 F. Supp. 1039 (D. Del. 1984), *infra* § II(A);

posited in 1971 that “[e]xisting authority does not warrant the making of any definite statements as to the enforcement of [foreign country] decrees that order the doing of . . . acts [other than the payment of money] or that enjoin the doing of an act.”⁴

However, due to the American⁵ experience of federalism, with its concomitant full faith and credit to sister states mandate, the same *Restatement* assumed:

[A] decree rendered in a foreign nation which orders or enjoins the doing of an act will be enforced in this country provided that such enforcement is necessary to effectuate the decree and will not impose an undue burden upon the American court and provided further that in the view of the American court the decree is consistent with fundamental principles of justice and of good morals.⁶

Still, since granting equitable remedies is discretionary—enforcement requires judicial supervision which the court may perceive as “onerous”⁷—recognition and enforcement of foreign country equitable decrees is subject to closer scrutiny than monetary judgments.⁸

After first enumerating the necessary general principles, this paper will examine issues specific to U.S. recognition and enforcement of foreign⁹ equitable decrees.¹⁰ It will examine the few cases that have arisen wherein a party to a contractual dispute has sought to import an injunction or specific performance decree rendered by a foreign court.

Abadou v. Trad, 624 P.2d 287 (Alaska 1981), *infra* § III(B)(2).

4. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102, comment g, at 310 (1971).

5. Hereinafter, the term, “American” will signify an adjective of the proper noun, “United States of America,” as opposed to the conglomerate of nation-states on the American continents.

6. *See supra* note 4.

7. *Id.* comment e, at 308.

8. *See* NANDA & PANSIUS, *supra* note 1, § 11.03[2] at 11-11.

9. Hereinafter, the term “foreign” will be synonymous with “foreign country,” as opposed to one state of the United states vis à vis another, unless otherwise specified.

10. This paper will not address the issues mentioned *supra* note 2. Nor will it address foreign bankruptcy decrees and foreign decrees based upon foreign securities laws, which both are generally recognized and enforced. *See, e.g.*, Clarkson v. Shaheen, 544 F.2d 624 (2d Cir. 1976) (bankruptcy); Kohn v. American Metal Climax, Inc., 458 F.2d 255 (3d Cir. 1972) (securities). Nor will this paper discuss recognition of foreign probate and inheritance decrees, except for the limited purpose of providing needed examples in subtopics lacking case law from contract. *See infra* notes 105 & 149. This paper will focus on the more speculative area of equitable relief in the contractual setting.

I. THRESHOLD CONSIDERATIONS

A foreign injunction or specific performance decree is susceptible to the same general considerations and/or affirmative defenses as monetary judgments. One commentator neatly delineated the four "basic facts"¹¹ concerning U.S. recognition of foreign judgements:

(a) Generally, the law governing . . . is state rather than federal law.¹²

(b) A judgment must be recognized before it can be enforced.

(c) A foreign-country judgment generally is not directly enforceable in the United States. Usually, it must first be reduced to a judgment of the enforcing U.S. court and then may be enforced by any means available under the local law.

(d) The applicable [law] . . . is primarily judge-made common law rather than statutory law.¹³

With these basics in mind, there are other general matters one must consider regarding foreign judgments. The following is a brief overview of these threshold considerations.

A. Finality

The first consideration is whether the foreign judgment is final. Finality is a requirement for recognition and enforcement in the United States.¹⁴ A "final judgment" is generally viewed as "one that is not subject to additional proceedings in the rendering court other than execution."¹⁵ Moreover, "[t]hat a judgment is subject to appeal or to modification in light of changed circumstances does not deprive it of its character as a final judgment."¹⁶

B. Reciprocity¹⁷

Another threshold consideration and possible defense is the doctrine of reciprocity. The Official Comment to Section 481, *Restatement (Third) of the Foreign Relations Law of the United States*,

11. von Mehren, *supra* note 1.

12. See 28 U.S.C. § 1652, state laws as rules of decision; *Eric R.R. v. Tompkins*, 304 U.S. 64 (1938). *But see infra* note 24 and accompanying text.

13. von Mehren, *supra* note 1, at 402 (author's citations omitted).

14. See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]; 2 DE LAUME, TRANSNATIONAL CONTRACTS, § 9.08 at 20 (Booklet 11, 1985).

15. RESTATEMENT OF FOREIGN RELATIONS § 481, comment e, at 596 (1987).

16. *Id.*

17. This discussion, and especially that of comity, *infra* 1(D), is to be read solely within the present context, and not that of public international law.

states that “[a] judgment otherwise entitled to recognition will not be denied recognition or enforcement because courts in the rendering [nation-] state might not enforce a judgment of a court in the United States if the circumstances were reversed.”¹⁸ A finding of reciprocity no longer is requisite to recognition and enforcement of a foreign judgment, nor is a finding that reciprocity does not exist any longer a valid ground for denial.¹⁹

Addressing the issue may be a mere formality in the majority of U.S. jurisdictions. This is because the holding of *Hilton v. Guyot*,²⁰ which required reciprocity for recognition, has been neither formally overruled nor preempted by federal legislation. Courts may feel compelled to deal with *Hilton* since it is the only Supreme Court pronouncement on the subject.

Federal courts have circumvented the *Hilton* rule due to the subsequent holding in *Erie R.R. v. Tompkins*,²¹ which steered U.S. district courts away from ‘federal common law’ and urged them to apply state law in the absence of federal legislation, constitutional mandate or treaty obligation. Hence, dispositive authority for or against applying the reciprocity doctrine in cases since *Erie* has been derived from state law. Most states have either explicitly repudiated reciprocity or simply do not consider the doctrine as controlling.²² A few states, on the other hand, explicitly authorize or require its application by statute.²³ Thus, the several states have no single, identifiable rule on the (in)applicability of the reciprocity doctrine vis-à-vis foreign courts.

The *Erie* doctrine may now be coming to a demise.²⁴ If so, courts will have to grapple head-on with *Hilton*’s reciprocity test. However, the United States would clearly fulfill their interest in having a single rule by enacting “a clear federal rule pronouncing the de-

18. RESTATEMENT OF FOREIGN RELATIONS § 481, comment d, at 596 (1987).

19. *Id.* reporter’s note 1, at 598-99.

20. 159 U.S. 113 (1895).

21. 304 U.S. 64 (1938).

22. See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 18.

23. *E.g.*, Texas (discretionary), Massachusetts (mandatory), New Hampshire (mandatory as to Canadian judgments). See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 18, at 599; 2 DELAUME, TRANSNATIONAL CONTRACTS, § 9.11 n.16 at 18 (Booklet 11.1, 1985). The federal constitutionality of these statutes is questionable, especially in light of *Zschernig v. Miller*, 389 U.S. 429 (1968) (state statutes denying inheritance rights to non-resident aliens whose countries do not grant reciprocal rights to U.S. citizens [i.e., eastern-block and communist nations] held unconstitutional as invading Congress’ and the Executive’s exclusive province of foreign affairs).

24. “[T]he federal courts are simply ignoring *Erie* either overtly, by failing to recognize an obvious vertical choice of law issue, or by stacking the deck against the application of state law.” Freer, *Erie’s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1090 (1989).

mise of reciprocity in the jurisdictional field.”²⁵

C. Other Affirmative Defenses

Other possible affirmative defenses to recognition were neatly condensed by one recent commentator into the following:

if (1) there is insufficient authentication or proof of the foreign judgment; (2) the foreign tribunal lacked personal or subject matter jurisdiction; (3) the defendant was denied adequate notice or opportunity to be heard; (4) extrinsic fraud was committed in connection with the foreign proceedings; or (5) the foreign judgment contravenes public policy.²⁶

The Restatement (Third) Foreign Relations Law of the U.S. cites from the above lack of personal (but not subject matter) jurisdiction as *mandating* nonrecognition.²⁷ Nonrecognition is also mandatory “if . . . the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law.”²⁸ The *Restatement* embraces all the other listed defenses as *discretionary* grounds for denial of recognition²⁹ and adds two more: if “the judgment conflicts with another final judgment entitled to recognition,”³⁰ and if “the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.”³¹

D. Comity³²

The chief threshold consideration is “international comity,” or “comity.” Comity is theoretically akin to the intra-U.S. full faith and credit requirement.³³ Yet, it is so nebulous a concept that Professor Smit once described it as being “as chameleonic as its legal uses are varied.”³⁴ Chief Justice Marshall saw international comity

25. 2 DELAUME, *TRANSNATIONAL CONTRACTS*, § 9.11 at 29 (Booklet 11, 1985).

26. Note, *Denying Enforcement of a Foreign Country Injunction—Solution or Symptom?*: *Pilkington Bros. v. AFG Industries, Inc.*, 17 CONN. L. REV. 703, 705-06 (1985) (citations omitted).

27. RESTATEMENT OF FOREIGN RELATIONS § 482(1)(b) (1987).

28. *Id.* at § 482(1)(a).

29. *Id.* at § 482(2)(a), (b), (c), (d).

30. *Id.* at § 482(2)(e).

31. *Id.* at § 482(2)(f).

32. *See supra* note 17.

33. Chief Justice Marshall spoke of sister-state relations in terms of “comity.” *See, e.g., Lessor of Fisher v. Cockerell*, 30 U.S. (5 Pet.) 248 (1831).

34. Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9

as the doctrine “by which the different States of the civilized world, receive the laws of others, as governing in certain cases of contract, or questions of a civil nature.”³⁵ The doctrine was later explained by the Supreme Court as being

[N]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regards 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.³⁶

Thus, while reciprocity looks at what the foreign court *would* do with a like U.S. judgment, recognition *vel non* in terms of comity can be a signal sent by the American court as to what the foreign court *should* do if the tables were turned.³⁷

Though nebulous, international comity is the key consideration upon which U.S. courts rely in current recognition and enforcement practice.³⁸ One court went so far as to describe it as “serv[ing] our international system like the mortar which cements together a brick house.”³⁹ Yet, as can be seen on its face, the doctrine—if indeed it can be labeled as such—does not explain how to dispose of the question whether or not to recognize, and if so, enforce a given foreign judgment. In practice, it provides a vocabulary which a court can employ in justifying its ultimate decision, though the basis for that decision may truly lie elsewhere.⁴⁰

II. INJUNCTION

The *Restatement (Second) Conflict of Laws*’ proclaimed in 1971, that no “definite statements” could be made regarding foreign injunctive decrees because “[e]xisting authority [did] not warrant” it.⁴¹ That was actually an understatement: as of that date *no* case

UCLA L. REV. 44, 53 (1962).

35. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 295 (1821).

36. *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). *See also*, *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

37. *See* BURGENTHAL & MAIER, *PUBLIC INTERNATIONAL LAW IN A NUTSHELL* §§ 7-12, 7-13, at 174-79 (1985).

38. *Bishop & Burnette, United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT’L LAW 425, 426 (1982).

39. *Laker Airways v. Sabena Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

40. *See, e.g. infra* notes 65-67 and accompanying text.

41. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 4.

had arisen wherein a party to a contractual dispute sought to enforce in the United States an injunction rendered by a foreign court.

A. *Pilkington v. AFG*

Since the writing of the *Restatement (Second) Conflict of Laws*, however, one case relative to the issue has been reported: *Pilkington Brothers, Ltd. v. AFG Industries Inc.*⁴²

1. *The Case*

Pilkington, a British corporation, had licensed an interest in revolutionary float glass technology to AFG, a Delaware corporation.⁴³ The agreement provided that disputes would be arbitrated in London under British arbitration law.⁴⁴ The contract disputes arose when AFG formed a subsidiary by which Pilkington believed AFG would export their technology world-wide. Additionally, AFG allowed representatives of a Portuguese company to tour AFG's float glass plant.⁴⁵ Pilkington submitted its grievances to arbitration as per the parties' agreement. Fearing an exposure of their technology, they requested and received an "interim injunction" from the High Court of Justice pursuant to British arbitration law.⁴⁶ The interim injunction barred AFG from diffusing any information about the technology or allowing any observation thereof, to or by third parties and/or persons within AFG's own organization who were not explicitly authorized to handle the technology and who had not sworn to confidentiality, pending the outcome of the arbitration.⁴⁷

However, because neither AFG nor its officers had property in Britain and because AFG's officers were not themselves present in the U.K., Pilkington feared the British courts would not be able to enforce its interim injunction if a violation occurred.⁴⁸ Therefore, Pilkington sought to duplicate the interim injunction on AFG's own territory in the U.S. District Court for the District of Delaware.⁴⁹

42. 581 F. Supp. 1039 (1984).

43. 581 F. Supp. at 1040-41. Actually, the technology was licensed to AFG's predecessor, ASG Industries, Inc. *Id.* at 1041.

44. *Id.* at 1041.

45. *Id.*

46. *Id.* at 1041-42.

47. For text of interim injunction, see *id.* at 1041-42.

48. *Id.* at 1046.

49. *Id.* at 1042. Pilkington first sought a temporary restraining order which was denied, since "[t]he Court was not convinced that AFG would violate the 'foreign interim injunction' and therefore held Pilkington failed to demonstrate irreparable injury." *Id.* See

Pilkington's stateside claim sought a prompt declaration of its rights under the British Order, and an order of the district court which would carry the British Order into effect in the United States.⁵⁰ However, the district court concluded:

[P]rinciples of international comity do not require, and in fact militate against, the issuance of a duplicative order that would interject this Court into the arbitration dispute now before the English courts⁵¹ . . . by assaying its own interpretation of the [British] order. It is thus inappropriate to issue any declaration of Pilkington's rights under the [British] injunction.⁵²

2. *The Court's Reasoning*

To arrive at its negative conclusion couched in terms of international comity,⁵³ the *Pilkington* court engaged in a tripartite analysis of reciprocity, finality and comity. It then cursorily dismissed plaintiff's fears of inadequate enforcement in his own forum.

a. Reciprocity—The court first considered the doctrine of reciprocity and systematically disposed of it as not controlling.⁵⁴ Launching into the discussion via *Hilton*,⁵⁵ the court embraced the *Erie* doctrine⁵⁶ and looked to Delaware for the controlling law. On the basis of the Delaware Supreme Court's criticism of reciprocity in *Bata v. Bata*,⁵⁷ the *Pilkington* court concluded that Delaware law "would reject application of the reciprocity doctrine in this case."⁵⁸

b. Finality—The court next addressed the finality of the British decree, concluding that the issue was not dispositive.⁵⁹ While noting the general rule, that a foreign judgment must be final in order to be recognized and enforced here,⁶⁰ the court again looked to Dela-

28 U.S.C. FED. R. CIV. P. 65.

50. *Id.* at 1046.

51. *Id.* at 1043.

52. *Id.* at 1046.

53. *See infra* notes 65 & 67 and accompanying text.

54. 581 F. Supp. at 1043-44.

55. *See supra* note 20 and accompanying text.

56. *Id.*

57. 39 Del. Ch. 258, 163 A.2d 493, 505 (1960).

58. 581 F. Supp. at 1044.

59. 581 F. Supp. at 1045; *but see, infra* note 65 and accompanying text.

60. *See supra* § 1(A). The court actually categorized "finality" as a "rule of international comity," possibly in anticipation of its disposition of the issue; *see infra* notes 65 & 67 and accompanying text.

ware's stance on the question. It found⁶¹ that a Delaware court would enforce a per se modifiable decree of a foreign nation court.⁶²

However, the Delaware cases which enforced modifiable sister-state injunctions all involved child custody and divorce decrees entered after a full adjudication of the merits; they were only "modifiable" upon a material change in circumstances.⁶³ Since the British injunction—an *interim* injunction—was granted to aid ongoing arbitration and was not based upon an adjudication of the merits, the court deemed Delaware case law inapplicable to the issue of finality.⁶⁴

The court was then left with the general rule dictating non-recognition due to non-finality which, as the court inferred, could have disposed of the case then and there.⁶⁵ Yet the court realized that "[t]here may be a case . . . in which a foreign nation 'interim' injunction could be recognized" and wisely refused to "create a per se rule against recognition and enforcement of foreign interim injunctions."⁶⁶ Thus, the court apparently decided the case according to the finality rule but chose to phrase its decision "under general principles of international comity."⁶⁷

c. Comity—By issuing its own duplicative, preliminary injunction, the court feared it would unleash a new, indescribable beast in the Pilkington/AFG controversy which could wreak havoc on the orderly arbitration proceedings underway, and thus contradict the "principles of international comity."⁶⁸ To support its fears, the court proffered three illustrative hypothetical situations.

First, if there were a violation of the U.S. injunction and the aggrieved party applied to the U.S. court for sanctions, the U.S. court would have to interpret and apply an order originally "drafted by the English High Court in furtherance of the High Court's special role under the English Arbitration Act."⁶⁹ This

61. On the basis of *McElroy v. McElroy*, 256 A.2d 763, 766-67 (Del. Ch. 1969) (Delaware court has discretion to enforce a sister-state decree), the Uniform Child Custody Jurisdiction Act, Del. Code Ann. tit. 13, §§ 601-639 (1981).

62. 581 F. Supp. at 1045.

63. *Id.*

64. *Id.*

65. "The High Court order could thus be distinguished as merely an interim order, entered into in aid of arbitration, and not based on a full consideration of the merits of the underlying dispute." *Id.*

66. *Id.*

67. *Id.* See also *supra* notes 36, 38-39 and accompanying text.

68. 581 F. Supp. at 1045-46.

69. *Id.* at 1046.

could "lead to inconsistent interpretations and inconsistent enforcement," and thus "any interpretation of the High Court's order should be made by that court, not a U.S. district court."⁷⁰

Second, "the existence of two identical outstanding injunctions could lead to a race to that courthouse which is perceived by each party as the more favorable forum."⁷¹

Third, "modifications of an injunction in one jurisdiction could lead to confusion and procedural tangles in the other jurisdiction. It is far simpler to have one court receive all applications for modifications."⁷²

d. Adequate Enforcement Mechanisms—Finally, the court belittled the plaintiff's fears of not being able to enforce the British injunction in the U.K.,⁷³ although these fears motivated plaintiff to seek the duplicative injunction in the first place.⁷⁴ The British court could still fine the defendant, and the *Pilkington* court saw that as an adequate deterrent. The district court also did not overlook the fact that the parties had contracted to proceed in the British forum.⁷⁵ Yet, again not wishing to create per se rules, the court expressly left open the question of "whether insufficient enforcement mechanisms in a foreign jurisdiction of a litigant's choice would ever constitute grounds for issuing a duplicative interim injunction at the behest of the same litigant."⁷⁶

B. Criticism of *Pilkington*

Though *Pilkington* provides the only true grist for our grindstone, the parties' pleadings and the court's opinion did not render the case completely on-target. If the court's interpretation of the plaintiff's pleadings is correct, *Pilkington* did not seek *recognition* of its foreign-decreed injunction; rather, they urged the court to declare its *own* injunction which would "exactly track the wording" of the foreign one.⁷⁷ This may be criticized as a distinction without a difference, yet the court viewed the distinction as critical: a separate American injunction would be "redundant" since the foreign

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. See *supra* note 48 and accompanying text.

75. 581 F. Supp. at 1046.

76. *Id.*

77. 581 F. Supp. at 1042.

injunction “restrict[s] conduct by AFG within the territorial limits of the United States as well as in England.”⁷⁸

Thus, it seems the only relief available under the *Pilkington* scenario would be *after* an actual violation has occurred. After a violation, *Pilkington* could petition the U.S. court to recognize the U.K. decree as having been violated and then to enforce it. Yet it is doubtful if the *Pilkington* court would grant relief under this ‘classic’ paradigm, for it is no different than the first hypothetical illustration drawn during the court’s discussion of comity.⁷⁹ Apparently, the *Pilkington* court would prefer that the British court first determine that a violation of its order has occurred, a task too onerous for the American court,⁸⁰ before granting any relief. This logic would dictate, on the other hand, that it would be much more burdensome—on both the foreign court and the parties—to make such a factually-dependent determination while sitting an ocean away from the site of the disputed activity.

Logical as that may be, parties do assume risks and burdens when they enter freely into a contract. The court was quick to point out that *Pilkington* had contracted to process its disputes in its own home forum. Yet such a tenacious position can act as a disincentive to furthering transnational ventures if a party, on the other side of the globe, cannot count on the judiciary of his counterpart’s country to *aid* in the resolution of a dispute when manifestly feasible.

What would have been ideal for *Pilkington* (and probably what they really wanted) would be to put their British interim injunction ‘on file’ in the United States, ready to be enforced immediately upon a violation. This would save precious time in the event of action, by knocking off the ‘recognition’ stage of the proceeding and going straight to ‘enforcement.’ Given that court dockets do not advance with lightning speed, such a gain in time could make the difference between losing an invaluable trade secret or not.

Thus *Pilkington* highlights the need for an expedited registration scheme. Similar provisions are provided by the Uniform Foreign Money-Judgment Recognition Act⁸¹ and the Uniform Enforcement of Foreign Judgments Acts⁸²—whereby a foreign party can put their injunction ‘on file’ before harm occurs. The rendering court

78. *Id.* at 1046 n.10.

79. *See supra* notes 69-70 and accompanying text.

80. *See supra* note 7 and accompanying text.

81. 13 U.L.A. 261 (1986).

82. 13 U.L.A. 149 and 181 (1986) (wherein “foreign” connotes “sister-state”).

would remain the sole court empowered to modify an injunction,⁸³ and a party would simply update its 'file' in the recognizing forum with any subsequent modifications to the injunction.

Meanwhile, *Pilkington* serves as another lesson to contract draftspersons not to be too quick to choose their client's home forum as the sole forum for dispute resolution. If it is clear that the site of a contract's performance or of the activity licensed will be confined to or principally within the territory of Forum Y, then the choice of Forum X may be inapt. If the law of Forum X is perceived as preferable, then choice of Forum Y with application of Forum X's law *mutatis mutandis*⁸⁴ may be in order.

C. *Pilkington's Impact*

1. *Obstacle to Recognition*

In deciding this case of first impression, the *Pilkington* court was careful not to pronounce premature per se rules against either recognition and enforcement of modifiable foreign injunctions⁸⁵ or issuance of a "duplicative interim injunction" rendered by the proponent's express forum of choice.⁸⁶ However, the court's reasoning in this case may lend itself to cursory denial of similar, future requests.⁸⁷

Indeed, the negative resolution of the issue presented—which the court phrased as "whether an American court must duplicate a foreign interim injunction, without reference to the underlying dispute, *where there are ongoing and continuous violations* of that foreign injunction"⁸⁸—would, on its face, militate against recognition of a foreign interim injunction in cases even more factually compelling than *Pilkington*.

Though AFG was not in violation of the interim injunction, they specially stipulated that they would cause *Pilkington* "irreparable harm" in order to avoid discovery and to present a discrete legal issue.⁸⁹ Furthermore, the plaintiff's claim was for a "declaration of [its] rights under the High Court Order"⁹⁰ and not simply recogni-

83. Compare, *supra* note 72 and accompanying text.

84. Replacing "High Court of Justice" with "United States District Court," for example.

85. See *supra* note 66 and accompanying text.

86. See *supra* note 76 and accompanying text.

87. See *supra* notes 69 & 78 and accompanying text.

88. 581 F. Supp. at 1042 (emphasis added).

89. *Id.* n.5.

90. *Id.* at 1046.

tion of that Order. Thus, a subsequent court, in order to circumvent *Pilkington*, will have to limit *Pilkington* to its facts and its specific prayer for relief.

2. *Int'l Shipping v. Hydra Offshore*

Pilkington may already be dissuading courts from issuing duplicative, interim injunctive relief. In *International Shipping Co. v. Hydra Offshore, Inc.*,⁹¹ plaintiff commenced arbitration in the U.K. and obtained an order from a British court temporarily enjoining defendant from transferring possession of the ship.⁹² Immediately thereafter, plaintiff sought identical equitable relief in the U.S. District Court for the Southern District of New York.⁹³ Viewing such relief and the means by which plaintiff sought it as "drastic and extraordinary,"⁹⁴ the court signed the order but deleted the proposed injunction's operative paragraph.⁹⁵

Unfortunately, the *Hydra* opinion does not address this 'denial' of the injunction per se because the issue was whether or not to sanction plaintiff's counsel⁹⁶ for failure to ascertain diligently that the court lacked jurisdiction.⁹⁷ Though the injunction question was rendered moot by the court's finding that it lacked jurisdiction, it would be helpful to know what prompted the court to 'deny' the 'pre'- preliminary injunction by deleting it from the draft Order which instigated defendant's Motion to Dismiss.

The court considered *Pilkington* and found it "most apposite."⁹⁸ Yet whether the court relied on *Pilkington* in striking the injunction or in finding that plaintiff did not act in bad faith⁹⁹ or both, cannot be discerned from the *Hydra* opinion alone. Apparently, plaintiff cited *Pilkington* in an "argument for the extension of existing law."¹⁰⁰ Did plaintiff invoke the *Pilkington* court's refusal to formulate per se rules against the issuance of duplicate interim injunctions and argue that their situation was one in which such rem-

91. 675 F. Supp. 146 (S.D.N.Y. 1987). Apparently, *Hydra* is the only judicial opinion to have cited (at 153 n.8) *Pilkington* since its publication (signoff date, June 23, 1989).

92. *Id.* at 148. The opinion does not indicate whether the arbitration was pursuant to the contract or any other agreement between the parties.

93. *Id.*

94. *Id.* at 154.

95. *Id.* at 148.

96. Pursuant to FED. R. CIV. P. 11.

97. 675 F. Supp. at 150-54.

98. *Id.* at 153 n.8.

99. *Id.* The court imposed much lower sanctions than urged because it found that plaintiff did not act in bad faith.

100. *Id.*

edy was appropriate?¹⁰¹ Did defendant also cite *Pilkington* in an argument on the merits against the duplicative, interim injunction? Did the court, presented with the opinion by either party, read *Pilkington* as running against issuance of the injunction? Or did the court, regardless of *Pilkington*, cursorily strike the injunction in its discretion not to burden itself?¹⁰²

To begin to answer these questions, one would have to examine the pleadings and memoranda submitted to the court. However, "an action is now pending in state court relating to the same issues"¹⁰³ and some further exposition of *Pilkington's* effects may be forthcoming.

III. SPECIFIC PERFORMANCE

As with injunctions, there is a paucity of cases in which a party to a contractual dispute has sought to import a specific performance decree for recognition and enforcement in the United States. Moreover, the underlying disputes in those few reported cases falling within this paradigm involve conveyance of real property, and not performance of services. As to the latter, there truly is a void of case authority.¹⁰⁴ As to the former, even though there are few reported cases, the underlying doctrines involved are established well enough to provide solid guidance.

This section describes the doctrines and cases relative to recognition of foreign specific performance decrees affecting rights in real property¹⁰⁵ and draws conclusions as to when a foreign specific per-

101. See *supra* note 66 and accompanying text.

102. See *supra* note 7 and accompanying text.

103. 675 F. Supp. at 154. A search of the state databases in Westlaw reveals no published ruling on this controversy to date (signoff, June 23, 1989).

104. Again, logic dictates that to compel judicially the rendering of a service in the United States, one would bring action on the contract in the United States (unless otherwise dictated by the contract's choice of forum clause), where the court of equity is in a realistic position to monitor the activity ordered.

This observation does not encompass performance ordered by an arbitral panel, which may be located abroad, and sought to be performed in the U.S. Submission of a private contractual dispute to arbitration is inherently by agreement (albeit perhaps enforced by a court) among the parties; it is not unilateral recourse to a court of law. Conceptually, an order emanating from the arbitration emanates from the parties' contract itself. Therefore, a U.S. court asked to recognize an arbitral order engages in an action on the contract, not an action on a foreign judgment subject to the considerations and defenses enumerated *supra* § 1.

105. No cases (involving recognition of foreign specific performance decrees) are found in which the underlying controversy was a contractual dispute over rights in moveable property. Such controversies, apparently, usually involve claims for damages (money) or are submitted to arbitration. However, as the several subsections *infra* will illuminate, a foreign specific performance decree operative upon personal property should encounter no obstacles (apart from the considerations and defenses *supra* § 1 - 1(D)) to recognition and enforcement

formance decree should be recognized and enforced.

A. Sovereignty

Nowhere is a foreign decree more susceptible to scrutiny than when it involves rights in land. This is because the sovereign has supreme and unquestioned control over its territory. The territorial supremacy of the sovereign is "a postulate that has been characterized as the touchstone of private and public international law."¹⁰⁶ It follows that a "territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain."¹⁰⁷

This is due to political as well as practical reasons. As to the former:

A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil.¹⁰⁸

As to the latter, "courts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation."¹⁰⁹

Thus, a foreign court cannot legally try title to land located in the United States, and vice versa. Such an action by the rendering forum would be a flagrant violation of the receiving forum's sovereignty, and any decree emanating therefrom would summarily be denied recognition. The rule is so universal that it also applies between states of the United States: "[t]he courts of one state cannot

in the U.S. This is because movables, wherever located, are "incidental to their owner's person and so to be governed as to title by the laws of his domicile." *Wyatt v. Fulrath*, 16 N.Y.2d 169, 211 N.E.2d 637, 640 (1965) (Desmond, C.J., dissenting).

Thus, a French judgment, pursuant to the civil law's community property and forced heirship rules, declaring a New York joint-tenancy bank account to be part of decedent's estate and that the surviving spouse had no right in that account upon decedent's death (spouse would have automatic sole ownership under New York law) was given full effect in New York. *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 265 N.E.2d 739 (1970) (unanimous decision). Compare, *Wyatt v. Fulrath*, *supra*, in which New York law was held to govern a bank account held in joint-tenancy by Spanish domiciliaries but where the plaintiff did not seek a Spanish judgment, and thus the New York court was the only court of adjudication.

106. *Banco Nat'l de Cuba v. Sabbatino*, 376 U.S. 398, 445-46 (1964) (White, J., dissenting) (citing KAPLAN & KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 135-72 (1961); HERZ, *INTERNATIONAL POLITICS IN THE ATOMIC AGE* 58-62 (1959)).

107. *Association de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, Cir. J.).

108. *Id.* (quoting, 1 F. WHARTON, *CONFLICT OF LAWS* § 278 at 636 (3d ed. 1905)).

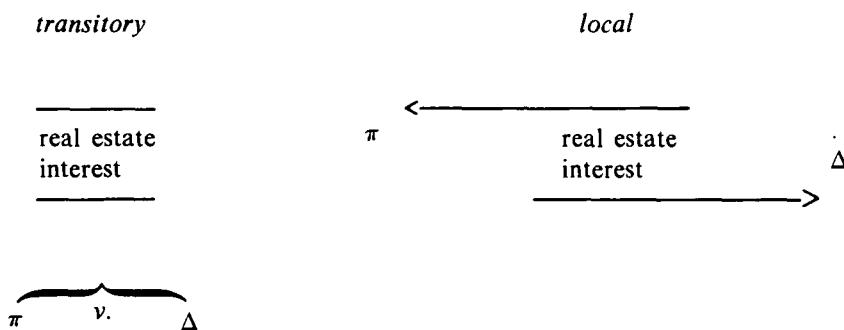
109. 735 F.2d at 1521.

create an interest in real estate situated in another state, nor can they adjudicate the title or control the devolution of real estate situated in a foreign state.¹¹⁰

B. Local v. Transitory Action and Jurisdiction in Personam

The mere fact that a dispute involves rights in real property does not necessarily remove it from the purview of a foreign court. What a foreign court cannot do is define or allocate real property rights. That is the unique province of the territory's sovereign. What a foreign court can do is examine the relationship among the parties and, on the basis of the relationship, determine if one owes title to the other; if so, the court may compel conveyance of the property between the parties.¹¹¹

This distinction is often referred to as 'local action' versus 'transitory action,' or the 'local action rule.' A local action involves the actual creation or redefinition of an interest in real estate wherein each party seeks the definition most favorable to him/herself. Only the sovereign over the territory concerned has jurisdiction of a local action, hence the 'local action rule.' A transitory action does not touch the property interest per se but focuses on the parties' dispute over a fixed interest in real estate. The distinction is depicted graphically in Figure 1:



110. 1 THOMPSON, REAL PROPERTY § 4 at 24 (Supp. 1980) (citations omitted).

111. "[T]he decree is more than a mere order to the person; it is a final determination of that person's obligation and the obligation can scarcely be extinguished by non-performance." W. Barbour, *The Extra-Territorial Effect of the Equitable Decree*, 16 MICH. L. REV. 527, 532 (1919).

In a transitory action, the dispute can be severed from the real estate interest and the property right is given, whereas a local action inextricably involves the real estate interest and the property right is variable.

Chief Justice Marshall explained this distinction and its relation to *in personam* jurisdiction early in the last century:

[T]here is much reason for considering [a dispute over title] as a local action, and for confining it to the court sitting within the state in which the lands lie. . . . But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as a trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.¹¹²

Marshall's views were derived from the English courts' experience regarding contractual claims to or fraudulent uses of lands in North America and Ireland. In those cases, the plaintiffs would follow their defendants to England and seek redress there. Though a court in England could not "enforce its decree *in rem*," for the lands lay abroad, "[t]he strict primary decree of a court of equity is *in personam*, and may be enforced [against the defendant personally] in all cases where the person is within its jurisdiction."¹¹³

The conceptual framework of local/transitory action is by no means outdated. As the Fifth Circuit recently noted, "[t]he rationale for the [local action] rule is as forceful today as it was in Chief Justice Marshall's time."¹¹⁴ In *Hayes v. Gulf Oil Corporation*,¹¹⁵ the tribunal swept away any cobwebs surrounding the local action doctrine, reviewing it¹¹⁶ from *Massie* to *Shaffer v. Heitner*¹¹⁷ via *Pennoyer*¹¹⁸ and *International Shoe*.¹¹⁹ The court found that the

112. *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 158 (1810). See also, *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8411).

113. 10 U.S. at 158-59 (citing, *Penn v. Lord Baltimore*, 1 Ves. 444 (1750) ("Chancellor of England decreed a specific performance of a contract respecting lands laying in North America.")).

114. *Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 290 (5th Cir. 1987).

115. 821 F.2d 285 (5th Cir. 1987).

116. *Id.* at 287-90.

117. 433 U.S. 186 (1977). The appellant in *Hayes* argued that *Shaffer* "overruled" the local action rule. 821 F.2d at 288.

118. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1878).

119. *International Shoe Co., Inc. v. Washington*, 326 U.S. 310 (1945).

doctrine "is so fundamental that state courts are not obligated to give full faith and credit to judgments from either federal or state courts sitting outside the local state's territorial boundaries."¹²⁰

Moreover, modern policy reasons compel adherence to the doctrine:

The local action rule prevents courts unfamiliar with local property rights and laws from interfering with title to real property which must be recorded under a unitary set of rules to keep it free of conflicting encumbrances. These local rules ensure that real property actions will be tried in a convenient forum and that orderly notice to all interested parties—through [local] land records—will be facilitated.¹²¹

Though *Hayes* was a purely intra-U.S. dispute, it does teach an important transnational lesson. The issue in *Hayes* "really involved . . . a contract dispute . . . which just happen[ed] to involve the title to real property."

However, instead of bringing an action on the contract, plaintiff brought suit to try title.¹²² The case was remanded for dismissal or transfer to the district court in whose territory the action lay.¹²³ If this were an action to recognize a foreign decree based on a trial of title, the suit would likewise be dismissed and the party seeking recognition would have to completely retry the case in the local forum. Thus, when trying a dispute involving American property interests, one should double check one's pleadings to be sure the action is brought explicitly in contract. Likewise, it behooves a party-opponent to scrutinize the original pleadings for any hint that the foreign proceedings actually tried title.

1. *Roblin v. Long*

The only foreign-rendered specific performance decree brought to this country for enforcement occurred a century ago, in the New York case *Roblin v. Long*.¹²⁴ The plaintiff sought to enforce a decree rendered by a Canadian court of chancery. The underlying dispute involved title to a tract in Ontario. The Canadian court found for the plaintiff and ordered the defendant to deliver the land patent to plaintiff. The defendant then fled to New York, where

120. *Id.* at 287.

121. *Id.* at 290.

122. *Id.* at 288.

123. *Id.* at 291.

124. 60 How. Pr. 200 (N.Y. Sup. Ct. 1880).

plaintiff followed him and brought suit on the Canadian decree. Along the same lines as the English cases cited by Chief Justice Marshall eighty years before,¹²⁵ the court stated that since it had

[A]cquired jurisdiction of the person of the defendant, it possesse[d] full power to enforce the judgment and decree of the chancery court of Canada, to the extent of compelling defendant to convey the lands mentioned in the complaint though the same are situated in the Province of Canada and without the jurisdiction of this court.¹²⁶

Moreover, the court enforced the Canadian decree out of comity where by such enforcement it would not violate its own laws or inflict injury upon some one of its own citizens.¹²⁷

The *Roblin* court did not enforce a foreign decree relative to a dispute over New York real estate but, rather, over property located in the rendering forum's own territory. Thus, the one concrete case of a foreign specific performance decree being recognized and enforced by a U.S. court highlights only the foreign (in this case the American) court of equity's limited powers *in personam*, as well as the general consideration of comity.

2. *Abadou v. Trad*

The 1981 Alaskan case *Abadou v. Trad*¹²⁸ illuminates the primary importance of the local/transitory distinction. Though there was no foreign decree involved, the court sent the plaintiff to procure one and then hypothesized as to how it would treat a decree once plaintiff brought one back. A Frenchman (plaintiff), contracted with a Lebanese national (defendant), to joint ownership of lands purchased in Alaska.¹²⁹ The contract included the parties' respective duties to make payments on the purchase, and provided that the Beirut courts would be the sole forum to resolve disputes.¹³⁰ A dispute arose over defendant's alleged failure to pay. Plaintiff brought suit "for contribution from and foreclosure of equitable lien," but in an Alaskan superior court.¹³¹ Defendant moved to dismiss, relying on the choice of forum clause.¹³²

125. Plaintiff's brief cited *Massie* as well as the English cases cited therein. *Id.* at 202.

126. *Id.* at 205.

127. *Id.*

128. 624 P.2d 287 (Alaska 1981).

129. *Id.* at 289.

130. *Id.*

131. *Id.*

132. *Id.*

Plaintiff rebutted on two grounds. First, he claimed that the Lebanese judicial system was in a "state of disarray" and that he would be denied due process therein.¹³³ Plaintiff failed to provide substantive proof of this, and the Alaskan courts refused to take judicial notice of the condition of Lebanon's courts.¹³⁴

Second, plaintiff argued that the Alaskan statute mandated that "certain actions concerning real property" be brought in that state.¹³⁵ Despite the imperative language of the statute, the court noted the absence of the exclusive language "and not elsewhere."¹³⁶ Moreover, absent evidence of some other factor (e.g., unequal bargaining power) which would render an inequitable result, "the contractual choice of forum clause . . . will prevail over the statutory venue provision."¹³⁷ This was especially so in light of "the extreme complexity of the dealings between the parties that necessarily would be involved in any suit *on the contract*."¹³⁸ The court thus implicitly viewed this action as primarily transitory in nature and not local. Therefore, it held that

[T]he fact that the dispute in this case concerns land in Alaska does not make it improper to give effect to the contractual choice-of-forum clause and to hold, as a matter of venue, that Abadou should first bring his claim before the courts of Lebanon, and that only if he cannot obtain relief in that forum should he be able to re-file his action in an Alaskan court.¹³⁹

Plaintiff maintained that any Lebanese decree affecting Alaskan land would be void.¹⁴⁰ The court, therefore, addressed the type of decree the Lebanese court could validly render. It suggested ave-

133. *Id.* n.3. Plaintiff's reply was in 1979. Plaintiff asserted "that the legal system in Lebanon is in a state of disarray and given the difference in the religious persuasions of the parties, a fair trial could not be had . . . because of the political and legal climate there." *Id.*

134. *Id.* at 290. In his attempt at bypassing the choice-of-forum clause, plaintiff failed to meet his burden "of showing that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court, or that enforcement of the clause would contravene a strong public policy of the forum in which suit is originally brought." *Id.* (citing, Volkswagenwerk A.G. v. Klippan, GmbH, 611 P.2d 498, 503-04 (Alaska 1980); M/S. Bremen v. Zapata Off-shore Co., 407 U.S. 1 (1972)).

135. The statute in question, Alaska Stat. § 22.10.030(a), reads:

All actions in ejectment or for the recovery of the possession of, quieting title to, for the partition of, or the *enforcement of liens upon, real property* shall be commenced in the superior court in the judicial district in which the real property, or any part of it affected by the action, is situated.

As quoted in 624 P.2d at 290, n. 4 (emphasis added).

136. 624 P.2d at 290.

137. *Id.* at 290-91.

138. *Id.* at 290 (emphasis added).

139. *Id.* at 292-93.

140. *Id.* at 290.

nues of analysis which it would follow should either party bring back a Lebanese decree for recognition and enforcement in Alaska. The court stated that the only valid decree would be to compel conveyance among the parties themselves, pursuant to the court's *in personam* jurisdiction; a decree purporting actually to convey the land would be void for excess of jurisdiction.¹⁴¹

If the decree passed this first test, the court would then look to "the common law applicable to foreign judgments," which would include "possible treaties[,] federal common law . . . [or d]ifferences in strong public policy [evidenced by a judgment not] rendered under circumstances which satisfy our own basic concepts of due process of law.'" ¹⁴² The court would also seek guidance from the grounds for non-recognition listed in the Uniform Foreign Money-Judgments Recognition Act, as adopted by the Alaskan legislature.¹⁴³

All in all, the court was "sufficiently persuaded that since 'the only state which by the action of its courts can change the title of a particular land is that of the *situs*,' the courts of Alaska will ultimately have to decide the enforceability of foreign judgments affecting Alaskan land."¹⁴⁴ Thus, even if between themselves the parties executed deeds to the land pursuant to a valid foreign decree, the successful party will still have to bring an action to recognize the decree.

3. *Law of the Situs*

The *Abadou* opinion also invoked the possibility that, irrespective of the underlying contract, the rendering forum may have to apply the target forum's local law in cases involving title to land.¹⁴⁵ This is commonly referred to as the law of the *situs* doctrine or *lex loci rei sitae*—"the law of the place where a thing or subject matter is situated."¹⁴⁶ The Alaska Supreme Court was ambivalent to the doctrine. However, the local action doctrine, in tandem with the rendering court's limited *in personam* jurisdiction, bars a foreign court from adjudicating disputes over land ownership in which local law is *necessarily* dispositive.

141. *Id.* at 291.

142. *Id.* at 292 (quoting, R. LEFLAR, AMERICAN CONFLICTS OF LAW § 84 at 170-71 (3d ed. 1977)). See also, *supra* § I.

143. 624 P.2d at 292 (citing, Alaska Stat. § 09.30.120). See generally, *supra* § I(C).

144. 624 P.2d at 292 (quoting, R. LEFLAR, *supra* note 143, § 165.

145. 624 P.2d at 292.

146. BLACK'S LAW DICTIONARY 1056 (4th ed. 1957).

The Alaskan court, unwittingly or not, may have built a safety valve for future recognition practice. What if, for instance, the Lebanese court made a full finding of fact regarding the parties' contract and, based on its findings, came to a judgment somehow grossly contrary to Alaskan law but not rising to the level of a due process violation? The Alaskan court could still deny recognition based on a blind application of the *situs* doctrine, disregarding the contractual choice-of-law clause.

Such an application of the *situs* doctrine should be discouraged. A Contract is a contract and one is bound by the obligations into which one enters freely. Moreover, the "thing" or "subject matter" in dispute is not the land but the contract itself.¹⁴⁷ If nothing else, comity should militate against rejection of foreign law due to a blind application of the *situs* doctrine.¹⁴⁸

This discussion is not intended to belittle the law of the *situs* doctrine.¹⁴⁹ In a local action not only does the law of the *situs* gov-

147. See *supra* § III(B) Figure 1 and accompanying text.

148. See *supra* note 37 and accompanying text. For instance, a U.S. court would not want its equitable decrees denied Lebanese recognition due to failure to apply Islamic law.

149. "It is a principle firmly established that to the law of the State in which the land is situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances." *DeVaughn v. Hutchinson*, 165 U.S. 566 (1897).

Nowhere is the *situs* rule more rigidly applied, and apt to produce inequitable results, than in probate. For example, civil law provisions for a 'secret will' or 'mystic testament' (see, e.g., French Civil Code Art. 976) are completely anomalous to Anglo-American will statutes. Such wills purporting to devolve American property, executed by residents and/or nationals of a civil law country and found valid under that country's law by a court of that country, nevertheless were found void by American courts and denied effect even though no public policy would be violated by the property devolving as the wills directed. See *In Re Panovsersis' Will*, 151 A.2d 518 (Del. Orphans' Ct. 1959); *In Re DiPersia's Estate*, 9 N.J. Super. 576, 75 A.2d 833 (1950); *Vogel v. Lehritter*, 34 N.E. 914 (N.Y. 1893).

Fortunately, the recurrence of this situation has now been stifled by adoption of Uniform Probate Code § 2-506 in Delaware (Del. Code tit. 12, § 1306) and New Jersey (N.J. Stat. § 3-9). The uniform provision reads:

A written will is valid if . . . its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

Uniform Probate Code § 2-506, 8 U.L.A. 116 (1983). New York remedied the situation much earlier through *In Re Harwood*, 104 Misc. 653, 172 N.Y.S. 296 (Sur. Ct. 1918), *aff'd sub nom* *Matter of Gay*, 188 A.D. 918, 176 N.Y.S. 900 (1st Dep't), *aff'd sub nom* *In Re Gay's Will*, 125 N.E. 918 (N.Y. 1919). In *Harwood*, Surrogate Fowler demonstrated that denial of ancillary probate to a will validly executed under the law of the testator's domicile actually was a departure from practice established early on in England, and construed existing New York statute to allow ancillary probate.

This note is intended simply to point up the real problems posed by the law of the *situs* doctrine, especially in transnational trusts and estates law. Fortunately, much international cooperative work is being done to iron out those problems. The United States has signed the 1984 Convention on the Law Applicable to Trusts and Their Recognition and also the 1973 Washington Convention Providing a Uniform Law in the Form of an International Will,

ern, but only the forum of the *situs* may adjudicate.¹⁵⁰ In a transitory action, a foreign court of equity may only exercise its jurisdiction *in personam* to compel a conveyance;¹⁵¹ the resulting conveyance between the parties ultimately must be approved by the local forum.¹⁵² Thus, the law of the *situs* doctrine is inherently satisfied with regard to foreign specific performance decrees rendered upon a contractual dispute involving an interest in American real estate.

CONCLUSION

It is hoped that this article has provided useful insights and practical suggestions to those concerned with American foreign equitable decree recognition. Though there has been little activity in this field as limited to contract, if the United States' commercial renaissance in the global community is successful, it will engender innumerable private, transnational ventures confiding technology, skills and knowledge. These ventures will give rise to disputes demanding real relief—where money alone will not do. Fortunately, we can anticipate many of the difficulties which may be encountered and are in a position to plan accordingly.

The overriding difficulty is the burden involved in recognizing and enforcing the foreign decree, which American courts may perceive as onerous.¹⁵³ One possible means to ease this burden is a foreign equitable decree registration scheme.¹⁵⁴ Another improvement would be federal clarification¹⁵⁵ of finality, reciprocity and perhaps comity, thereby providing a uniform, national standard by which to evaluate a given decree. Foreign parties could thereby form clear expectations as to the remedies available throughout the United States.

Discussion has been given to promulgating treaties with our trading partners, smoothing the way for recognition and enforcement of judgements between signatory nations. The first effort in this area was the proposed *U.S.-U.K. Reciprocal Recognition and Enforce-*

both which the State Department will ask the Senate to take up in 1989; also, the latest Hague Conference quadrennial session is considering the final text of the proposed Convention on the Law Applicable to Decedents Estates. *International Law News*, Vol. 17, No. 4, Fall 1988, at 11, col. 2.

150. See *supra* notes 132-40 and accompanying text.

151. See *supra* notes 114-15, 142 and accompanying text.

152. See *supra* note 144 and accompanying text.

153. See *supra* note 7 and accompanying text, and § II(A)(2)(c).

154. See *supra* notes 81-83 and accompanying text.

155. See *supra* note 25 and accompanying text.

ment of Civil Judgments Treaty.¹⁵⁶ It was "to be the first in a network of treaties designed to regularize recognition practice in the United States and increase the recognition of U.S. judgments abroad."¹⁵⁷ Agreement, however, was not reached and negotiations were terminated.¹⁵⁸ Before embarking on another like endeavor, the United States should put its own fifty-odd member household in order and adhere to one national stance on the doctrines of finality, reciprocity, international comity, and the law of the *situs*.

In the meantime, however, prudent contract draftspersons should give due regard to *where* the contract is to be performed and should be careful not to lock themselves out of that territory's fora in the event equitable relief is called for.¹⁵⁹ Litigators must also be very careful to bring original suits under validly adjudicable legal theories (*vis-à-vis* the anticipated recognizing forum)¹⁶⁰ and to phrase their prayers for relief in the least 'burdensome' terms possible¹⁶¹ when it comes to recognition.

*David Buzard***

156. Comment, *The Effect of the Proposed U.S.-U.K. Reciprocal Recognition and Enforcement of Civil Judgments Treaty on Current Recognition Practice in the United States*, 18 COLUM. J. TRANSNAT'L L. 119 (1979).

157. Smit, *The Proposed U.S.-U.K. Convention on Recognition and Enforcement of Judgments: A Prototype for the Future?*, 17 VA. J. INT'L L. 443 (1977).

158. RESTATEMENT OF FOREIGN RELATIONS ch. 8, Introductory Note, at 592 n.1 (1987).

159. See *supra* note 84 and accompanying text.

160. See *supra* notes 122-23 and accompanying text; accord, B. Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 672-76 (1954).

161. See *supra* notes 77-78, 90, 94-95 and accompanying text.

** J.D. (candidate) Tulane Law School, 1990; B.A. (Linguistics) Northwestern University, 1984.