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THE DOCTRINE OF COMITY IN PRIVATE INTERNATIONAL LAW

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The doctrine of comity is the legal principle which dictates that a jurisdiction recognize and give effect to judicial decrees and decisions rendered in other jurisdictions¹ unless to do so would offend its public policy.² Although rooted in the Middle Ages,³ comity continues to be a viable doctrine, because it facilitates the achievement of a primary objective of law—the orderly, consistent and final resolution of disputes.

Comity has received rather scant attention in American jurisprudence due to the constitutional requirement that each state accord full faith and credit to judgments rendered in the courts of sister states. Historically, the American legal system has depended more heavily on interstate questions

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¹ *Brown v. Babbitt Ford, Inc.*, 117 Ariz. App. 192, 571 P.2d 689 (Ct. App. 1977); *Kellogg-Citizens Nat'l Bank v. Felton*, 145 Fla. 68, 199 So. 50 (1940); *Jackson v. Shuttleworth*, 42 Ill. App. 2d 257, 192 N.E.2d 217 (App. Ct. 1963). In the leading American case on the comity of nations, the Supreme Court of the United States defined the doctrine as follows:

"Comity," in the legal sense, is neither 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 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.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). The idea that "comity" connotes mere courtesy has led some commentators to criticize the doctrine as the underlying basis for the recognition and enforcement of foreign judgments. See DICEY'S *CONFLICT OF LAWS* 6-7 (6th ed. J. Morris 1949); H. GOODRICH, *CONFLICT OF LAWS* 11 (3d ed. 1949). This criticism rests solely on definitional grounds. *Russian Socialist Fed. Soviet Republic v. Cibrario*, 235 N.Y. 255, 258, 139 N.E. 259, 260 (1923). Joseph Story, one of early America's great legal scholars, was aware of this criticism as early as 1834. Nevertheless, he defended the use of the term "comity" as the "most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another." J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* § 38, at 37 (1834) (footnote omitted).

² *Bostrom v. Seguros Tepeyac, S.A.*, 225 F. Supp. 222 (N.D. Tex. 1963), *modified*, 347 F.2d 168 (5th Cir. 1965); *Helton v. Crawley*, 241 Iowa 296, 41 N.W.2d 60, 79 (1950); *Anderson v. N.V. Transandine Handelsmaatschappij*, 289 N.Y. 9, 19, 43 N.E.2d 502, 506 (1942); STORY, *supra* note 1, § 38; see note 16 *infra*.

³ See STORY, *supra* note 1, §§ 19-38; Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 305-08 (1953). See also Huber's *De Conflictu Legum*, 13 ILL. L. REV. 375 (1919), reprinted in E. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 136 (1947).

of conflict of laws than on international questions,⁴ and the concept of full faith and credit, therefore, has achieved greater prominence than the doctrine of comity.⁵

Since the United States Constitution does not impose the doctrine of comity upon American courts,⁶ recognition of the judgments of foreign tribunals is left to the discretion of individual courts. Yet, foreign country judgments should be given the same effect as is required to be given sister state decrees by the full faith and credit clause of the Constitution.⁷ As a matter of judicial self-preservation, the doctrine of comity must be implemented universally in order to ensure that judicial decisions are truly effective and enforceable.

The principle of full faith and credit has played an inestimable role in the economic and social development of the United States as a strong and well-integrated unit,⁸ and the effective application of comity similarly may contribute to the development of an economically rationalized international community. Indeed, there is nothing more important to the success of international commerce than that settlements of court disputes be final. Such reasoning underlies the universally accepted principle of res

⁴ One commentator has traced the number of American cases involving foreign country judgments decided between 1896 and 1962. See Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291, 295-96 (1963). Peterson's statistics reveal 130 such cases during the 40 years prior to 1936 (an average of more than three per year) and an additional 288 cases during the following 25 year period (an average of more than 11 per year). *Id.* These numbers clearly are minute in comparison to the number of domestic judgments rendered in the United States each year.

⁵ *Broderick v. Rosner*, 294 U.S. 629, 643 (1935). It would appear that the force given sister state court decrees has not been accidental. The framers of the Constitution drafted the full faith and credit clause partially out of fear that the rules of private international law would continually be subordinated to the overriding local policy of the *lex fori* if based exclusively on principles of comity. THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION 794 (rev. ed. 1972); see note 16 *infra*.

⁶ See *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912).

⁷ The full faith and credit clause is contained in article 4, § 1 of the United States Constitution, which provides as follows:

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.

U.S. CONST. art. IV, § 1; see 28 U.S.C. § 1738 (1976). This clause has been construed to require that a judgment of a state court be given the same effect in a sister state as in the state of its rendition. *Hanley v. Donoghue*, 116 U.S. 1, 3 (1885); *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234 (1818).

⁸ See *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943). In *Magnolia Petroleum*, the Court stated:

The full faith and credit clause . . . thus became a nationally unifying force. It altered the status of the several states as independent foreign sovereignties, each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation

Id.

judicata.⁹ Just as a dispute may not be relitigated in the jurisdiction in which it was settled, so also must that dispute be treated as finally resolved by all other jurisdictions. The concept of *res judicata*, otherwise, is hopelessly undermined. To permit a party to relitigate a case in any jurisdiction having contact with the dispute would enable that party to flout the authority of the forum in which the suit first was litigated.¹⁰

The practical good sense in recognizing foreign judgments is particularly evident in the area of international commerce. If multinational corporations are to be bound transnationally by judgments in actions to which they are parties, they will reap the benefits of such judgments in addition to shouldering the burdens. In this age of burgeoning tourism and internationally mobile manpower, the doctrine of comity is as important to private individuals as it is to multinational corporations.¹¹ Examples of judgments upon which every person must be able to rely include determinations of marital status, decrees of adoption and findings of negligence.

While the doctrine of comity requires that foreign judgments be recognized, it also requires that they be given effect. This requirement may mandate more than enforcing a foreign money judgment. For example, if the applicable foreign law dictates that a bilateral divorce decree terminates a spouse's financial responsibilities to the other, such a decree may not form the basis of an award of alimony in another forum.¹² Alternatively,

⁹ See generally *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952). In essence, the doctrine of *res judicata* provides that an existing final judgment is conclusive as to the parties and those in privity with them of all rights, questions and facts in controversy. A settled dispute, therefore, is not open to relitigation in the same court or in any other court of concurrent jurisdiction, provided the judgment was rendered on the merits by a competent court, without fraud or collusion. *E.g.*, *Schroeder v. 171.74 Acres of Land*, 318 F.2d 311, 314 (8th Cir. 1963); *In re Spinosa's Estate*, 117 Cal. App. 2d 364, 255 P.2d 843, 845 (Ct. App. 1953); *Israel v. Wood Dolson Co.*, 1 N.Y. 2d 116, 118, 134 N.E.2d 97, 98, 151 N.Y.S.2d 1, 3 (1956).

¹⁰ Some authors favor recognizing foreign judgments on a theory of international *res judicata*. See Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States*, 4 INT'L LAW. 720 (1970); Peterson, *supra* note 4; Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950); Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A. L. REV. 44 (1962). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98, Comment b (1971).

Although an "international *res judicata*" approach would place foreign and domestic judgments on an equal footing, such a theory is not problem-free. See Smit, *supra*, at 61-62.

¹¹ See generally Peterson, *supra* note 4, at 305-06.

¹² *Cf.* *Nowell v. Nowell*, 157 Conn. 470, 254 A.2d 889, *cert. denied*, 396 U.S. 844 (1969); *Gosselin v. Gosselin*, 1 Mass App. Ct. 146, 294 N.E.2d 555 (1973) (divorce judgment in one state cannot be basis for alimony award in another).

¹³ At present, reciprocity is an element affecting the recognition of foreign judgments. See *Hilton v. Guyot*, 159 U.S. 113, 228 (1895). In *Hilton*, the Supreme Court held that a valid *in rem* or quasi-*in rem* judgment rendered abroad is entitled to conclusive effect in this country. *Id.* at 166-67. The *Hilton* decision also would give conclusive effect to an *in personam* judgment rendered abroad. Such a decree would be considered only *prima facie* evidence, however, if rendered by a foreign tribunal not giving conclusive effect to similar judgments

a suit dismissed on a finding of contributory negligence in a jurisdiction where such negligence defeats a plaintiff's claim may not be relitigated in a jurisdiction which follows the comparative negligence doctrine. Giving effect to a foreign judgment based on comity means giving it the same effect that it would have in the forum in which it was rendered.

If the benefits of granting recognition to foreign judgments based on comity are to be realized, recognition must not be made to depend upon reciprocity.¹³ A party seeking recognition of a foreign decree should not be compelled to establish that, under similar circumstances, the jurisdiction in which the decree was rendered would recognize a court decision of the jurisdiction in which recognition is sought. For jurisdictions to make reciprocity a prerequisite to comity would be highly counterproductive, because it would interpose a logically unwarranted obstacle to the liberal recognition of foreign judicial decrees. If the decision of a court of one country were not recognized by a court of another country for any reason, each nation thereafter would refuse to recognize judgments of the other's courts.¹⁴ The judicious administration of justice would not be well served by the retaliation of judicial systems against each other for nonrecognition. The final settlement of a legal dispute is a boon to all legal systems, and, therefore, recognition of foreign judgments should not be withheld solely due to an absence of reciprocity.

The sole justification for a forum's refusal to recognize a foreign judicial decree would be if its own public policy were offended by granting recognition.¹⁵ Moreover, this "escape clause" should be reserved for the

rendered by American courts, and, even then, only where the judgment had been rendered against an alien of the foreign tribunal. *Id.* at 228.

The reciprocity requirement set forth in *Hilton* has been criticized for punishing the individual for the policies of his country, placing a burden on domestic courts to determine if the rendering tribunal would have enforced a similar judgment rendered by a domestic court, encouraging retaliation and failing to ensure recognition of American judgments abroad. See Kulzer, *Some Aspects of Enforceability of Foreign Judgments: A Comparative Summary*, 16 BUFFALO L. REV. 84, 90-91 (1966); Reese, *supra* note 10, at 793. It appears that the reciprocity requirement imposed by *Hilton* is in general disrepute among the commentators. See, e.g., R. LEFLAR, AMERICAN CONFLICTS LAW § 74, at 173 (rev. ed. 1968); Golomb, *Recognition of Foreign Money Judgments: A Goal-Oriented Approach*, 43 ST. JOHN'S L. REV. 604, 615-17 (1969); Smit, *supra* note 10, at 49-50.

Despite the criticism of *Hilton*, the Supreme Court has chosen not to overrule it. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 411 (1964). The case has been followed by the federal courts, see, e.g., *Kessler v. Armstrong Cork Co.*, 158 F. 744, 748 (2d Cir. 1907); *Venezuelan Meat Export Co. v. United States*, 12 F. Supp. 379, 385 (D. Md. 1935), and has been cited with approval by many state courts. See, e.g., *Northern Aluminum Co. v. Law*, 157 Md. 641, 646, 147 A. 715, 717 (1929); *Traders' Trust Co. v. Davidson*, 146 Minn. 224, 227, 178 N.W. 735, 736-37 (1920). New York courts have taken the position that the rule of *Hilton* is not binding upon them. See *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121, 122-23 (1926); *Cowans v. Ticonderoga Pulp & Paper Co.*, 219 App. Div. 120, 219 N.Y.S. 284 (3d Dep't), *aff'd*, 246 N.Y. 603, 159 N.E. 669 (1927).

¹⁴ The threat of retaliation resulting from a reciprocity requirement may well be real. See Nadelmann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184 (1952).

¹⁵ Courts have refused to grant a foreign judgment recognition on public policy grounds where

most compelling circumstances.¹⁶ Frequent refusal to grant comity for public policy reasons would defeat the purpose of the doctrine and encourage the development of anarchy in international affairs.

For a forum to refuse to enforce a foreign judgment based on an offense to its public policy, more must be demonstrated than that the foreign law merely differs from its own.¹⁷ Otherwise, comity would be an illusion, since no two legal systems are identical. Public policy is offended only if a foreign judgment does violence to a jurisdiction's fundamental moral notions of what is decent and just.¹⁸ Only where recognition would shock the conscience of the forum in which enforcement is sought and shake the underlying basis of its public order can nonrecognition be justified on public policy grounds. It is clear, for example, that no forum need give effect to a foreign decree which it considers to be cruel and physically painful. Enforcement of a foreign judgment also may be denied for public policy reasons where no jurisdictional nexus exists between the parties to a judgment, or the cause of action itself, and the forum in which it was rendered, but only if the jurisdictional insufficiency is so great as to shock the conscience of the forum in which the enforcement is sought. Thus, for example, a jurisdiction might withhold recognition to a mail order divorce decree¹⁹ or a judgment procured without giving the defendant notice and opportunity to be heard.²⁰

The burden of proving that a foreign judgment is offensive to public policy should fall heavily on the party arguing it.²¹ The clearest, most

a defendant was given inadequate notice and no reasonable opportunity to defend. See, e.g., *Boivin v. Talcott*, 102 F. Supp. 979 (N.D. Ohio 1951); *In re Estate of Paramythiotis*, 15 Misc. 2d 133, 181 N.Y.S.2d 590 (Sur. Ct. N.Y. County 1958); *Banco Minero v. Ross*, 106 Tex. 522, 172 S.W. 711 (1915). Lack of jurisdiction also has served as a basis for denying recognition. See, e.g., *Ryder v. Ryder*, 2 Cal. App. 2d 426, 37 P.2d 1069 (Ct. App. 1934); *Davidson & Co. v. Allen*, 89 Nev. 126, 508 P.2d 6 (1973). Finally, judgments have been denied recognition when procured by fraud. See, e.g., *Tamimi v. Tamimi*, 38 App. Div. 2d 197, 328 N.Y.S.2d 477 (2d Dep't 1972). See generally von Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37, 61 (1974).

¹⁶ See Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969, 1015-16 (1956). Where public policy is utilized as a choice of law principle, it often serves to exclude foreign law and not to protect the forum or its citizens. See Holder, *Public Policy and National Preferences: The Exclusion of Foreign Law in English Private International Law*, 17 INT'L & COMP. L.Q. 926, 949-51 (1968).

¹⁷ See generally *Compania Mexicana Redio di fusora Franteriza v. Spann*, 41 F. Supp. 907, 909 (N.D. Tex. 1941), *aff'd*, 131 F.2d 609 (5th Cir. 1942); *Neporany v. Kir*, 5 App. Div. 2d 438, 439, 173 N.Y.S.2d 146, 147-48 (1st Dep't 1958); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117, Comment c (1971).

¹⁸ See *SNR Holdings, Inc. v. Ataka America, Inc.*, 54 App. Div. 2d 406, 408, 388 N.Y.S.2d 909, 911 (1st Dep't 1976); von Mehren & Patterson, *supra* note 15, at 61.

¹⁹ See, e.g., *In re Chong Jah Alix*, 252 F. Supp. 313 (D. Hawaii 1965); *Ryder v. Ryder*, 2 Cal. App. 2d 426, 37 P.2d 1069 (Ct. App. 1934); *Bergeron v. Bergeron*, 287 Mass. 524, 192 N.E. 86 (1934). See also note 17 *supra*.

²⁰ See note 16 *supra*.

²¹ *In re Malaschenko*, 204 F. Supp. 744 (D.N.J. 1962); 164 East Seventy-Second St. Corp. v. Ismay, 65 Cal. App. 2d 574, 151 P.2d 29 (Ct. App. 1944).

convincing evidence of the alleged offense should be required before recognition is denied. With greater international contact between judicial systems and wider study of comparative law internationally, jurisprudential concepts of fairness and justice should become more alike, and the occasions upon which public policy grounds will be employed to deny recognition of foreign decrees will be encountered ever more infrequently.

The implementation of comity imposes a two-fold burden on all jurisdictions. Initially, courts must refrain from reexamining the merits of foreign judgments. A second burden falls upon each court in its capacity as an original forum: cognizant that a decree may require enforcement in another forum, every lawmaker and judge should endeavor not to take actions which will offend other legal systems' basic public policies.

In an intimately interconnected international community, the doctrine of comity is linked closely with the effective and efficient administration of justice. Only when comity is granted liberally, a task to which every judicial system must be dedicated, can contempt for judicial order be extinguished. While international political differences always will serve as a potential source of division, a universal respect for judicial decisions and the rule of law can bring people together.