RECOGNITION AND ENFORCEMENT OF FOREIGN MONEY JUDGMENTS DESPITE THE LACK OF ASSETS

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Over the last decade, two states within the United States – New York and Texas – have opened the doors to the opportunity to recognize foreign money judgments despite the absence of the judgment debtor's assets in the recognizing forum. The U.S. Supreme Court, in the famous footnote 36 of the Shaffer case, had already dispensed the enforcing courts with the need to obtain personal jurisdiction over the judgment debtor. The case law developed by the New York and Texas courts, however, goes further than the Shaffer decision, considering superfluous any kind of jurisdictional requirement in the post-judgment phase. This comment analyzes the main legal and economic reasons that justify the recognition of foreign money judgments despite the lack of assets. Special consideration has been given to the due process objection that has been raised against the new trend inaugurated by the Lenchyshyn decision. This comment aims at demonstrating that there is no due process obstacle arising out of the Shaffer *footnote 36, and that granting recognition to foreign decisions despite the lack of assets in the recognizing forum would strongly facilitate recovery from judgment debtors who do not voluntarily comply with their obligations.*

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I.
INTRODUCTION

Recognition and enforcement generally constitute the last steps in the litigation process. These steps become necessary when the judgment debtor does not willingly comply with the obligations set forth in the decision.[1] Although recognizing and enforcing a judgment may not be indispensable, these phases are crucial to the litigation,[2] as the ultimate purpose of civil proceedings is providing the judgment creditor with a concrete tool to recover from the losing party.[3] In fact, it would be rather surprising if a judicial system allowed the par-

1. *See* Elisabetta Silvestri, *Enforcement of Civil Judgments and Orders in Italy: An Overview*, 12 BOND L. REV. 183, 183-84 (2000).

2. *See* Ronald A. Brand, *Recognition and Enforcement of Foreign Money Judgments*, FED. JUD. CTR. (Apr. 2012), http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf.

3. *See, e.g.*, Melinda Luthin, *U.S. Enforcement of Foreign Money Judgments and the Need for Reform*, 14 U.C. DAVIS J. INT'L L. & POL'Y 111, 112 (2007) ("Creating an effective government requires the establishment of methods for resolving disputes . . . and systems for payment of restitution."). The same is also true with respect to international arbitral proceedings, where one of the main tasks of arbitrators is rendering an award that will most likely be recognized and enforced in various jurisdictions. *See, e.g.*, NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 11.11 (5th ed. 2009). This general duty is also included in the arbitration rules of the major arbitral institutions. *See, e.g.*, ICC Rules (2012), Art. 41; LCIA Rules, Art. 32.2. *Contra* JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 12-14 (2003).

ties to litigate a certain issue but would not permit the prevailing party to recover from the judgment debtor when she refuses to comply voluntarily with a court decision. This internal coherence is generally typical of most national judicial systems. However, the scenario becomes more complex when the judgment creditor needs to recognize or enforce the decision abroad because she was unable to collect the amounts due where the judgment was rendered.[4]

Contrary to foreign arbitral awards, which are widely recognized and enforced according to the international standards set forth in the New York Convention,[5] and in some important regional treaties,[6] the vast majority of foreign money judgments are recognized and enforced according to the national law of the enforcing forum.[7] The only attempt to create a multilateral convention on the recognition and enforcement of foreign money judgments on a global scale that is worth mentioning is the 2005 Hague Convention on the Choice of

4. *See* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 472 (3d ed. 2006).

5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, implemented by the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (2006) [hereinafter New York Convention]. The New York Convention, being in force in 149 countries as of early 2013, is clearly one of the most successful conventions. The status of the New York Convention is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

6. The two most important regional conventions on the recognition and enforcement of international arbitral awards are: (i) the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245, implemented by the Federal Arbitration Act, 9 U.S.C. §§ 301-307 (2006) [hereinafter Inter-American Convention]; and (ii) the European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349 [hereinafter European Convention].

7. In the United States, in particular, the absence of a widely ratified international convention on the recognition and enforcement of foreign money judgments has even created an internal fragmentation, since the confirmation of foreign judgments is a matter of state law (and not federal law). *See, e.g.*, John A. Spanogle, *The Enforcement of Foreign Judgments in the U.S. – A Matter of State Law in Federal Courts*, 13 U.S.-MEX. L.J. 85, 85 (2005) ("Even though most of the decisions on enforcement of foreign judgments are being made in federal courts, the applicable law concerning whether or not to enforce the foreign judgment is almost always state law . . . ."). *See infra* text accompanying notes 129-31.

Court Agreements.[8] However, not only has the 2005 Hague Convention failed to attract the required executions and ratifications to enter into force,[9] but its scope of application is also quite limited compared to that of the New York Convention.[10]

Due to the absence of both a widely ratified multilateral convention and of a large number of bilateral treaties,[11] legal scholars have generally focused their attention on issues regarding the national – or regional – practice, sometimes engaging in a comparative analysis,[12] or sponsoring the adoption of international instruments in this field.[13] In the United States, the debate has focused on whether the enforcing court needs jurisdiction – either personal or *quasi-in-rem* jurisdiction – in order to grant recognition and enforcement to a foreign

8. Hague Convention on the Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 [hereinafter 2005 Hague Convention].

9. *See* Stephen B. Burbank, *A Tea Party at The Hague?*, 18 SW. J. INT'L LAW 629, 639 (2012). As of early 2013, only Mexico has ratified the 2005 Hague Convention, while the United States and the European Union are the only signatories. The status of the 2005 Hague Convention is available at http://www.hcch.net/index_en.php?act=conventions.status&cid=98.

10. Although Article 8(1) of the 2005 Hague Convention imposes on the contracting States an obligation to recognize and enforce foreign judgments unless one of the grounds for refusal – exhaustively listed in Article 9 – applies, the scope of the Convention is limited in three important ways (art. 1(1)). First, the Convention applies only to "international" cases (art. 1(2)-(3)). Second, the Convention applies only to "agreements concluded in civil or commercial matters" (art. 1(1)). Third, and more importantly, the obligation to recognize and enforce foreign judgments arises only with respect to decisions rendered by a foreign court as a result of an "exclusive choice of court agreement" (art. 8). *See* Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. PA. J. INT'L L. 1013, 1033-34 (2010).

11. As of early 2013, the United States – for instance – is not party to any bilateral treaty on the recognition and enforcement of foreign money judgments.

12. *See e.g.*, JOSEPH LOOKOFSKY & KETILBJØRN HERTZ, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION: AN ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW 715-812 (3d ed. 2011).

13. *See, e.g.*, Caroline Edsall, *Implementing the Hague Convention on Choice of Courts Agreements in the United States: An Opportunity To Clarify Recognition and Enforcement Practice*, 120 YALE L.J. 397, 406 (2010); Matthew B. Berlin, *The Hague Convention on Choice of Court Agreements: Creating an International Framework for Recognizing Foreign Judgments*, 3 BYU INT'L L. & MGMT. REV. 43, 73-76 (2006).

money judgment.[14] One of the most significant decisions in this debate is the *Lenchyshyn* case,[15] in which the New York Appellate Division recognized and enforced a Canadian money judgment even though the court had no personal jurisdiction over the judgment debtor.[16] Despite the great importance of the holding in the instant case, the New York court in *Lenchyshyn* went even further. Indeed, in *obiter dictum*, the court argued that a foreign money judgment should be recognized notwithstanding the lack of property in the enforcing forum.[17]

Since only a marginal role has been given to the *Lenchyshyn dictum* in the American debate, this comment aims to demonstrate the importance of the recognition and enforcement of foreign money judgments,[18] even in the absence of defendants' assets in the enforcing forum. Part II provides an overview of the relevant U.S. case law. After a brief analysis

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14. *E.g.*, Linda Silberman, *Enforcement and Recognition of Foreign Judgments in the United States*, [Sep.] 1 TRANSNATIONAL JOINT VENTURES, at 5-1, 5-3 (2013). The same issue has been the center of the discussion with respect to the recognition of foreign arbitral awards. *E.g.*, Int'l Commercial Disputes Comm. of the Ass'n of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 AM. REV. INT'L ARB. 407, 411-427 (2004) [hereinafter New York City Bar Report].

15. Lenchyshyn v. Pelko Elec., Inc., 723 N.Y.S.2d 285 (N.Y. App. Div. 2001).

16. *See* Ronald R. Darbee, *Personal Jurisdiction as a Defense to the Enforcement of Foreign Arbitral Awards*, 41 MCGEORGE L. REV. 345, 348 (2010).

17. *Lenchyshyn*, 723 N.Y.S.2d at 291 ("[E]ven if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment . . . 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 . . . .").

18. The scope of this note is limited to foreign money judgments. With this expression it is usually made reference, in the United States, to "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." Uniform Foreign Money-Judgments Recognition Act of 1962 § 1, 13 U.L.A. 263 (1986 and 2010 Supp.) [hereinafter 1962 Uniform Recognition Act]. Similarly, *see also* Uniform Foreign-Country Money Judgments Recognition Act of 2005 § 3, 13 U.L.A. 7 (2010 Supp.) [hereinafter 2005 Uniform Recognition Act]. Foreign arbitral awards do not fall under this definition. *See* Andreas F. Lowenfeld & Linda Silberman, *United States of America*, *in* ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 123, 125 (Charles Platto & William G. Horton eds., 2d ed. 1993).

of the landscape prior to the *Lenchyshyn* decision, Part II focuses on the *Lenchyshyn* case and subsequent New York case law, as well as on Texas case law. Three cases have particular relevance: the *Koehler* case,[19]the *Abu Dhabi Commercial Bank* case,[20] and the *Haaksman* case.[21] Part III then examines the reasons why other judicial systems both within the United States and abroad should follow the New York model. Emphasis will be given to the important commercial implications that a worldwide trend in favor of the recognition and enforcement of foreign money judgments, despite the lack of assets, would have on transnational business relationships. Part IV, in turn, analyzes the criticisms of the new trend in the New York and Texas courts and the possible judicial and political reasons that could justify opposition to the recognition and enforcement of foreign money judgments when no assets exist in the enforcing jurisdiction.

II.

THE AMERICAN ATTITUDE TOWARDS RECOGNITION AND ENFORCEMENT OF FOREIGN MONEY JUDGMENTS: FROM *SHAFFER* TO *ABU DHABI COMMERCIAL BANK*, THROUGH *LENCHYSHYN*

In the United States, Article IV, Section 1 of the Constitution guarantees the "Full Faith and Credit" to all judgments rendered by the courts of the fifty sister-states.[22] Accordingly, the Constitution imposes on every state an obligation that, although not absolute,[23] virtually always requires the full recognition and enforcement of all judgments rendered by any court in the United States.[24] This obligation, however, does not apply when the judgment creditor seeks to recognize or

19. Koehler v. Bank of Bermuda Ltd., 911 N.E.2d 825 (N.Y. 2009).

20. Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Services Co., 948 N.Y.S.2d 533 (Sup. Ct. 2012).

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

22. U.S. CONST. art. IV, § 1.

23. *See* William L. Reynolds, *The Iron Law of the Full Faith and Credit*, 53 MD. L. REV. 412 (1994).

24. *E.g.*, GEORGE A. BERMANN, TRANSNATIONAL LITIGATION IN A NUTSHELL 330 (2003).

enforce a foreign judgment.[25] Hence, an analysis of the due process requirements to enforce a foreign decision is needed.

A. *Is Personal or* Quasi-in-Rem *Jurisdiction Necessary to Recognize or Enforce a Foreign Money Judgment? The* Shaffer *Case and Its Subsequent Interpretations*

In *Shaffer v. Heitner*,[26] the U.S. Supreme Court held that the minimum contacts test set forth in *International Shoe*,[27] which until that time had been applied only to *in personam* jurisdiction cases, is also applicable to *quasi-in-rem* proceedings.[28] Accordingly, the sole existence of the defendant's property in the territory of a state did not suffice anymore as a basis to support jurisdiction.[29]

However, the minimum contacts test applies in its entirety solely to the pre-judgment stage when the court has to determine whether or not it has jurisdiction to decide the merits of the dispute.[30] Conversely, a "greatly relaxed" minimum contacts standard applies to the recognition and enforcement phases.[31] As a matter of fact, the judgment creditor – contrary

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25. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 227 (1895) ("[J]udgments rendered in France, or in any other foreign country . . . are not entitled to full credit and conclusive effect when sued upon in this country . . . ."). *See also* Lookofsky & Hertz, *supra* note 12, at 782; Patricia Youngblood Reyhan, *Conflict of Laws: 2008-2009 Survey of the New York Law*, 60 SYRACUSE L. REV. 769, 771-772 (2010).

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

27. Int'l Shoe Co. v. Wash. Office of Unemployment Comp. & Placement, 326 U.S. 310, 316 (1945) ("[D]ue process requires . . . that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'") (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

28. *Shaffer*, 433 U.S. at 212.

29. *Id.* at 209.

30. *See* Arístides Díaz-Pedrosa, Shaffer*'s Footnote 36*, 109 W. VA. L. REV. 17, 27 (2006) ("[T]he [Supreme] Court in *Shaffer* understood that the difference between pre-judgment and post-judgment proceedings calls for different applications of [the minimum contacts] test.").

31. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 309 n. 14 (1980) (Brennan, J., dissenting) ("[T]he [Supreme] Court indicated that the requirement of contacts may be greatly relaxed (if indeed any personal contacts would be required) where a plaintiff is suing a nonresident defen-

to the plaintiff – is not looking for new or additional relief, but rather simply asking the enforcing judge to recover the amount of money already awarded in the rendering forum.[32] This difference between the pre-judgment and post-judgment stages had already been made clear by the *Shaffer* case, where the Supreme Court, albeit in *dictum*, stated that:

> 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.[33]

Footnote 36 of the *Shaffer* case, therefore, seems to permit the recognition or enforcement of domestic judgments even though the only tie with the enforcing forum is the presence of the judgment debtor's assets. Although the court is silent on the possibility of applying this principle when the confirmation of a foreign money judgment is sought, it is from the *Shaffer* decision that the *Lenchyshyn* court concluded that no jurisdictional basis whatsoever is required to confirm a Canadian money judgment.[34] Necessarily, before getting to the *Lenchyshyn* decision, it is essential to describe two more logical steps occurred during the case law evolution.

First, the *Shaffer* footnote 36 refers to the enforceability of U.S. domestic judgments according to the Full Faith and Credit Clause. Hence, doubts have been cast on the applica-

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dant to enforce a judgment procured in another State.") (citing *Shaffer*, 433 U.S. at 210-11 nn. 36-37); Electrolines, Inc. v. Prudential Assurance Co., 677 N.W.2d 874, 884 (Mich. Ct. App. 2003). *See also* 1 HON. WILLIAM HOUSTON BROWN, THE LAW OF DEBTORS AND CREDITORS § 6:55 (2d ed. 2002); Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of* In Personam *Jurisdiction*, 43 CASE W. RES. L. REV. 97, 115 (1992).

32. *See Lenchyshyn*, 723 N.Y.S.2d at 291 ("In proceeding under [the Uniform Foreign Money-Judgments Recognition Act], the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment."). *See also* Pure Fishing, Inc. v. Silver Star Co., Ltd., 202 F. Supp. 2d 905, 909-10 (N.D. Iowa 2002) (finding the rationale of *Lenchyshyn* persuasive). *But see Electrolines*, 677 N.W.2d at 885 (disagreeing with *Lenchyshyn*).

33. *Shaffer*, 433 U.S. at 210 n.36.

34. *See Lenchyshyn*, 723 N.Y.S.2d at 289-90.

tion of this *dictum* to foreign money judgments.[35] However, several courts have broadened the *Shaffer dictum* to money judgments rendered outside the United States,[36] thus reducing the judgment creditors' burden to obtain the recognition or execution of their foreign decisions.[37] In fact, applying the *Shaffer* outcome to foreign judgments has drastically reduced the jurisdictional requirements that the judgment creditor ought to demonstrate to obtain the recognition. Instead of the more restrictive standards to establish *in personam* jurisdiction over the defendant, the judgment creditor has to prove the sole existence of the losing party's assets in the recognizing forum.

Second, the *Shaffer dictum* has given rise to conflicting case law in those sister-states that still require the presence of the judgment debtor's property in order to confirm a foreign money judgment. For instance, the Fourth and the Ninth Circuits disagree on whether the judgment debtor's property in the enforcing forum should be related to the parties' dispute.[38] In the *Glencore Grain* case,[39] the Ninth Circuit reasoned that a foreign arbitral award is enforceable "even if [the] property has *no relationship* to the underlying controversy between the parties."[40] By contrast, in *Base Metal*,[41] the Fourth Circuit

35. *See, e.g.*, Luthin, *supra* note 3, at 126-27 ("[It] is less clear . . . whether the term 'court of competent jurisdiction' applies only to U.S. Courts or if it includes foreign courts as well.").

36. In New York, *see, e.g.*, *Lenchyshyn*, 723 N.Y.S.2d at 290 ("While we recognize that the . . . *Shaffer* footnote concern[s] the recognition and enforcement of sister state judgments, we conclude that the same principle applies to recognition and enforcement of foreign country money judgments."); *Abu Dhabi Commercial Bank*, 948 N.Y.S.2d at 535. *Contra* Biel v. Boehm, 406 N.Y.S.2d 231, 233 (N.Y. Sup. Ct. 1978). In Iowa, *see Pure Fishing*, F. Supp. 2d at 910. In Texas, *see Haaksman*, 260 S.W.3d at 479-80; Beluga Chartering B.V. v. Timber S.A., 294 S.W.3d 300, 305 (Tex. App. 2009).

37. The New York City Bar shares the same opinion. *See* New York City Bar Report, *supra* note 14, at 418.

38. *See* Edsall, *supra* note 13, at 400.

39. Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114 (9th Cir. 2002).

40. *Id.* at 1127 (emphasis added).

41. Base Metal Trading, Ltd. v. Ojsc "Novokuznetsky Aluminum Factory", 283 F.3d 208, 213 (4th Cir. 2002) ("[W]hen the property which serves as the basis for jurisdiction is completely unrelated to the plaintiff's cause of action, the presence of property alone will not support jurisdiction.") (citing *Shaffer*, 433 U.S. 186).

held that a foreign arbitral award could be enforced in the U.S. only when the award debtor's property in the enforcing forum is related to the dispute decided by the arbitral tribunal. The *Shaffer dictum* did not expressly take a position on this specific aspect. However, requiring the relatedness of the property located in the enforcing forum might be excessively burdensome for the judgment creditor for the following reasons.[42] First of all, even admitting that *Base Metal*'s approach should prevail, this conclusion ought to be limited to the enforcement of foreign arbitral awards.[43] In fact, even the *Electrolines* case, which strongly criticized *Lenchyshyn*'s outcome,[44] admitted that "an action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum."[45] Moreover, generally speaking, a creditor does not expect to recover from her debtor only those assets that are related to a certain business or cause of action.[46] Apart from usually being impossible to determine which assets are linked with a certain business,[47] this task is unquestionably much more difficult for the judgment creditor than for the debtor, who has full control over her properties. Requiring a connection between the cause of action and the property serving as the basis for the jurisdiction to recognize would render the recovery of money

42. *See* New York City Bar Report, *supra* note 14, at 417 (considering "the Ninth Circuit decision as better reasoned and more consistent with the Supreme Court's decision in *Shaffer* . . . .").

43. *See* Edsall, *supra* note 13, at 401 ("In the foreign judgments context, the case law on jurisdictional requirements for enforcement seems more clearly not to require a connection between property in dispute and the underlying cause of action.").

44. *See* Electrolines, *supra* note 31, at 885.

45. *Id.* at 884 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. h (1987)).

46. *See* Díaz-Pedrosa, *supra* note 30, at 43 ("To both parties, the importance of these assets is not defined in terms of relatedness . . . . [T]hat is also the only thing that matters to a winning party [and] should be the only thing that matters to a court.").

47. *Id.* at 44. The relatedness would be even harder to determine when the underlying cause of action deals with intangible property. *See, e.g.*, Robert Laurence, *The Off-Reservation Garnishment of an On-Reservation Debt and Related Issues in the Cross-Boundary Enforcement of Money Judgments*, 22 AM. INDIAN L. REV. 355, 383 (1998) ("Garnishments of wages, bank accounts, accounts receivable and other intangible debts may comprise the 'unusual' cases.").

more costly not only for judgment creditors, but also for the American judicial system as a whole, since the winning party will have to start several enforcing proceedings in various sister-states, thus increasing the workload of the national judicial system. Eventually, such an approach would excessively protect the judgment debtor, permitting her to hide property related to the cause of action in sister-states where the winning party has not tried to enforce the foreign money judgment.[48]

In sum, as a result of the case law evolution derived from *Shaffer*, foreign money judgments can be recognized or enforced in certain jurisdictions in the United States even if the only contact with the enforcing forum is the presence of the judgment debtor's assets, without the need to establish *in personam* jurisdiction over the debtor. Moreover, as demonstrated above, it is clearly more convincing that the judgment debtor's property located in the recognizing forum does not need to be related to the underlying dispute between the parties. Starting from this point, some sister-states have gone much further. The most outstanding example is the State of New York, followed by Texas.

B. *New York Case Law*

The process of reduction of the jurisdictional requirements necessary to enforce foreign money judgments quickly sped up in New York at the beginning of the 2000s. If the *Shaffer* footnote simply required the enforcing forum to have *quasi-in-rem* jurisdiction, the *Lenchyshyn* case dispensed even with this last requirement.[49] The New York Appellate Court has thus departed from the previous case law requiring the presence of assets in New York in order to recognize a foreign judgment,[50]

48. *See* Díaz-Pedrosa, *supra* note 30, at 44 (classifying this result as a form of forum shopping). In the international arbitration context, this approach would likely result in the violation of the *pacta sunt servanda* principle, as the sole presence of the award debtor's unrelated property in the enforcing forum is not a ground for refusing recognition or enforcement under Article V of the New York Convention. *See* William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 281-82 (2006).

49. *See* New York City Bar Report, *supra* note 14, at 423.

50. *E.g.*, *Biel*, 406 N.Y.S.2d at 233; Jimenez v. Mobil Oil Co. de Venezuela, *S.A.*, No. 90 CIV. 5938 (SWK), 1991 U.S. Dist. LEXIS 4996, at *3-4 (S.D.N.Y. Apr. 18, 1991).

thereby opening the doors to judgment creditors seeking relief in the United States without knowing where the judgment debtor has located her assets.[51] The *Lenchyshyn* decision had a revolutionary impact, as it undermined one of the pillars of the American standards for obtaining the recognition and enforcement of a foreign money judgment: the presence of the losing party's property in the enforcing forum.[52] As a result, from this decision on, the holder of a foreign money judgment is entitled to obtain a confirmation of the decision in New York even if, at the time of commencing the enforcing proceeding, the judgment debtor does not have assets in the state. Besides crystallizing the decision rendered in the foreign forum as an effect of the *res judicata* doctrine,[53] this new approach gives the judgment creditor the chance to recover from the losing party as soon as the debtor brings assets to New York.[54]

Another important innovation has been introduced in the *Koehler* case, decided by the New York Court of Appeals in 2009.[55] In 1995, the New York Appellate Division affirmed for

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51. *See* CIBC Mellon Trust Co. v. Mora Hotel Corp., 100 N.Y.2d 215, 221 (N.Y. 2003) (defining New York as a "generous forum in which to enforce judgments for money damages rendered by foreign courts . . . ."). The existence of a forum within the United States where to easily obtain the recognition of foreign money judgments is crucial for judgment creditors. In fact, after the recognition of a foreign money judgment in one of the sister-states, the judgment could freely circulate in the United States according to the Full Faith and Credit Clause. *See* Díaz-Pedrosa, *supra* note 30, at 36 n.100.

52. *See Lenchyshyn*, *supra* note 17.

53. *See* BLACKABY, *supra* note 3, ¶ 11.14 n.15 ("The successful party may sometimes seek recognition and enforcement of an award in a country where the losing party may have no assets in order (so to speak) to obtain the *imprimatur* of a respected court upon the award."). *See infra* Part III.A.

54. *See* Marc J. Goldstein & Andrea K. Bjorklund, *International Commercial Dispute Resolution*, 36 INT'L LAW. 401, 407 (2002) ("[T]he [judgment] creditor may be inclined to seek enforcement in a pro-enforcement jurisdiction where, it has reason to believe, the [judgment] debtor may at some point have assets subject to attachment (if only, perhaps, because funds in transit might flow through a bank account 'situated' in that jurisdiction)."). *See infra* Part III.B.

55. Note that, although the *Koehler* case concerns the enforcement of a Maryland decision, the outcome of the decision has been considered applicable also to money judgments rendered by courts outside the United States. *See* George F. Hritz & Amy A. Lehman, Koehler v. Bank of Bermuda *Three Years Later: Fewer Places to Hide*, 20 BUS. TORT LITIG. 11, 13 (Oct. 22, 2012), *available at* http://apps.americanbar.org/litigation/committees/business

the first time that judgment debtors could be ordered to turn over out-of-state property once the court had established personal jurisdiction over them.[56] The *Koehler* court not only endorsed this principle, but it also extended its application to garnishees.[57] Although the *Koehler* court does not go as far as the *Lenchyshyn* court, which holds that neither personal nor *quasi-in-rem* jurisdiction are necessary to enforce a foreign money judgment, the *Koehler* decision has three significant implications.

First of all, the last instance court of the state confirmed that there is no need of "jurisdiction over property" to entertain post-judgments proceedings in New York.[58] In fact, requiring that either personal or *quasi-in-rem* jurisdiction can be alternatively established, once the personal jurisdiction requirement has been met, it is irrelevant whether the judgment debtor has assets in the enforcing forum.[59] Thus, albeit implicitly, this decision confirms the *Lenchyshyn dictum* since the judgment creditor is not necessarily required to demonstrate the presence of the debtor's assets in the state.[60] Secondly, the *Koehler* case has notably increased the chance to recover from a judgment debtor.[61] Not only can New York courts oblige the debtor to turnover out-of-state property, but they also can extend their authority to third parties – garnishees – that hold money belonging to the judgment debtor. This power may have far-reaching consequences since it can be exercised based solely on the existence of personal jurisdiction over the

torts/articles/fall2012-1012-koehler-v-bank-bermuda-three-years-later-fewer-places-hide.html.

56. Starbare II Partners, L.P. v. Sloan, 216 A.D.2d 238, 239 (N.Y. App. Div. 1995). *See also* Miller v. Doniger, 814 N.Y.S.2d 141, 141 (App. Div. 2006); Gryphon Dom. VI, LLC v. APP Int'l Fin. Co., 836 N.Y.S.2d 4, 9 (App. Div. 2007) (finding that this rule is not limited to situations where a judgment debtor removed property from New York).

57. *Koehler*, 911 N.E.2d at 830.

58. *Id.* at 828, 831.

59. *Id.*at 828.

60. *See* James E. Berger, *New York Court of Appeals Permits Extraterritorial Seizure of Assets in Aid of Judgments*, PRATT'S J. BANKR. L., Sept.-Oct. 2009, at 433, 438 ("The Court of Appeals' decision in *Koehler* is extremely significant. Judgment creditors seeking to enforce a judgment in New York will no longer be required to prove that executable assets are located in the state.").

61. *See* Damien H. Weinstein, *New York: The Next Mecca for Judgment Creditors? An Analysis of* Koehler v. Bank of Bermuda Ltd., 78 FORDHAM L. REV. 3161, 3195 (2010).

third-party garnishee, "regardless of whether the court has personal jurisdiction over the judgment debtor or the judgment creditor."[62] Finally, and most importantly, the combination of the *Lenchyshyn* and *Koehler* cases creates an ideal environment for judgment creditors, as a New York court would most likely recognize a foreign money judgment regardless of the lack of property in the state (*Lenchyshyn*) and, at the same time, it will be empowered to oblige a judgment debtor's garnishee to bring assets into New York for execution (*Koehler*), when personal jurisdiction can be obtained over the garnishee.

A recent confirmation of the New York relaxed approach regarding the jurisdictional post-judgment requirements is embodied in *Abu Dhabi Commercial Bank*, where the court, endorsing the *Lenchyshyn* interpretation of the *Shaffer* footnote 36, held that neither personal nor *quasi-in-rem* jurisdiction is required to recognize or enforce foreign money judgments.[63]

However, a similar result has been upheld in Texas. Here, the *Haaksman* court, relying on the *Lenchyshyn* case, concluded that two Dutch money judgments had to be recognized even if the Texas courts lacked personal jurisdiction over the judgment debtor, and the judgment debtor did not have property in the state.[64]

III.
THE REASONS TO RECOGNIZE AND ENFORCE FOREIGN MONEY JUDGMENTS DESPITE THE LACK OF ASSETS AND COMMERCIAL EFFECTS

Every judicial system has an interest in providing the judgment creditor with a valid and enforceable judgment.[65] However, with the growing globalization of the second half of the twentieth century, the enforcement process is less and less

62. *See* Daniel L. Brown & Elizabeth M. Rotenberg-Schwartz, *Judgment Secured: Now What?* 'Koehler' *Provides Greater New York State Access to Banks for Collection*, N.Y. L.J., July 20, 2009, at S8.

63. *Abu Dhabi Commercial Bank*, 948 N.Y.S.2d at 535.

64. *See Haaksman*, 260 S.W.3d at 481 ("We agree with the [*Lenchyshyn*] case and conclude 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.").

65. *E.g.*, Weinstein, *supra* note 61, at 3197.

confined to the same jurisdiction. In addition to this geographical complexity, the dematerialization of financial instruments has increased the risk of not obtaining relief when the losing party does not voluntarily comply with the decision. Granting the opportunity to recognize foreign money judgments despite the absence of the judgment debtor's assets in the enforcing forum is an extremely powerful tool to reduce the losing party's chances to hide her property from creditors.[66] This note will analyze three important reasons why the New York approach should be followed by other jurisdictions.

A. *Recognition Without Enforcement*

As a general principle, the presence of assets in the territory of the enforcing forum is necessary to *enforce* foreign money judgments. However, in the absence of property, the judgment creditor might be interested in obtaining a mere *recognition* of the foreign decision, hoping to recover her outstanding judgment later. Moreover, regardless of a subsequent enforcement, in some instances the prevailing party might be exclusively interested in recognizing a favorable decision to prevent the re-litigation of the claims – or issues – already disputed in the rendering forum. This occurs in two hypotheses.

In the first case, the defendant in the first proceeding, having prevailed, wants to prevent the unsuccessful plaintiff from obtaining a relief in a second forum.[67] Supposing that the defendant has not stated any cross-claim or counter-claim in the first proceeding, the prevailing defendant cannot even aspire to enforce the foreign judgment,[68] but she will simply look for a decision granting *res judicata* that avoids any re-litigation of the merits of the dispute.[69] In such a case, it is obvious

66. *See* David H. Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of* Shaffer v. Heitner, 63 IOWA L. REV. 997, 1008 (1978) ("The exemption of proceedings to realize on judgments from the minimum contacts standard of *International Shoe* is pragmatically necessary if judgment debtors are to be prevented from shielding their assets from judgment creditors by shipping the assets to a state with which the underlying litigation had no prior connection.").

67. *See* BERMANN, *supra* note 24, at 328-29.

68. *See* Park & Yanos, *supra* note 48, at 260 ("*Enforcement* would normally be sought by the winning *claimant* . . . .") (emphasis added).

69. *Id.* at 297 ("When the prevailing party is the respondent in the [first proceeding], the need for . . . recognition takes on a different significance.

that no logical reason can prevent the prevailing defendant from obtaining the recognition of the foreign judgment regardless of the lack of the losing plaintiff's assets in the recognizing forum.[70] A different conclusion would bring the bizarre result that a party, notwithstanding the unfavorable outcome of the first proceeding, could be allowed to re-litigate the dispute on the merits in another forum if she does not have any property there. This, combined with the ease of moving properties from a state to another as a result of the aforesaid dematerialization of financial instruments, would basically allow the losing party to re-litigate a dispute in a great number of jurisdictions until a favorable decision is obtained. The absurd result of this scenario speaks for itself, and the rationale of justice and fairness requires that the foreign judgment be recognized.

In the second hypothesis, the winning plaintiff could be interested in barring the losing defendant's attempts to obtain a relief, in a different forum, on matters already litigated.[71] Indeed, if the second forum rendered a decision – in favor of the judgment debtor – contrary to the first judgment, recovery in this forum would not be possible anymore. The non-recognition of the first judgment and the subsequent re-litigation of the merits of the dispute is a possible scenario. However, this outcome is acceptable only when the grounds for non-recognition are internationally accepted. Despite the absence of a widely ratified international instrument in this field, it is still possible to infer these grounds from the text of the 2005 Hague Convention,[72] the few existing regional conventions,[73]

Notwithstanding the absence of property in the jurisdiction, confirmation should be available to ensure that the [judgment] will be clothed with clear *res judicata* effect . . . .").

70. *Id.*

71. *See* BERMANN, *supra* note 24, at 329. *See also* Pelagia Ivanova, Forum Non Conveniens *and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards Under the New York Convention*, 83 B.U. L. REV. 899, 902 (2003).

72. *See* Article 9 of the 2005 Hague Convention, *supra* note 8 (listing seven grounds that may lead to refusal of recognition or enforcement of a foreign judgment).

73. *See* Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 34-35, 2001 O.J. (L12) 1 (EC) [hereinafter Brussels I Regulation]. Identical grounds for non-recognition are listed in the 2007

and the most important conventions regarding the recognition and enforcement of foreign arbitral awards[74] None of these instruments makes reference to the lack of the judgment debtor's property in the enforcing forum. Nor, usually, does national legislation.[75] Moreover, requiring the presence of the judgment debtor's property in the enforcing forum would lead to the undesirable result that a losing party might avoid the recognition of an unfavorable decision by simply transferring her property to a different jurisdiction. Accordingly, as in the first hypothesis, the general principles of justice and fairness lead to the conclusion that foreign money judgments should be recognized despite the lack of assets.[76]

B. *Fairness to the Plaintiff and the Opportunity to Recover* in Futuro

When the *Lenchyshyn* court welcomed the recognition of foreign money judgments even in the absence of the judgment debtor's property in New York, it had in mind a precise goal: facilitating the judgment creditor's relief once the losing party has brought assets into the state.[77] Imposing the same due process requirements at the post-judgment stage and in proceedings concerning the merits of the dispute would be excessively onerous for a judgment creditor.[78]

Lugano Convention, whose signatories are: the European Union, Denmark, Iceland, Norway, and Switzerland. *See* Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 34-35, 2007 O.J. (L339) 3.

74. *See* Article V of the New York Convention. Similarly, *see* Article 5 of the Inter-American Convention; Article XI of the European Convention.

75. For the United States, *see* Uniform Foreign Money-Judgments Recognition Act § 4 (1962); Uniform Foreign-Country Money Judgments Recognition Act § 4 (2005); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987). For Germany, *see* ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Jan. 30, 1877, § 328; for Switzerland, *see* LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ (LDIP) [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, art. 25 and 27 ; for Italy, *see* Art. 64 L. n. 218/1995.

76. *See* Park & Yanos, *supra* note 48, at 260 (arguing that, especially in the international context, the prevailing claimant might have an interest in obtaining the recognition of a foreign judgment "even absent the identification of assets in the forum belonging to the respondent at that time.").

77. *Lenchyshyn*, 723 N.Y.S.2d at 291.

78. *See supra* text accompanying notes 42, 46-48.

Accordingly, the recognizing judge should, as a principle, favor the prevailing party in her attempts to satisfy the outstanding payment.[79] A different approach would result in an unjust advantage for the judgment debtor that, having already lost on the merits, should not be allowed to delay, or even impede, the recognition or enforcement of a foreign money judgment for due process reasons.[80] In fact, requiring high standards of due process in the recognition phase would entail two questionable consequences. The first concerns the administration of justice both on an international and a domestic level, while the second directly affects the judgment creditor.

Engaging in a further due process analysis at the recognizing stage means that the losing party would be substantially allowed to re-litigate the jurisdictional basis of the existing foreign judgment.[81] Quite a few considerations make re-litigation undesirable. Commonly shared is the desire for finality.[82] This obviously depends on the level of trust that the enforcing forum puts in the rendering one.[83] Usually, however, when two countries adopt similar standards of due process, the willingness to recognize the other country's money judgments increases.[84] Another argument against re-litigation can be found in the comity doctrine,[85] according to which foreign money

79. *E.g.*, Fraser v. Littlejohn, 386 S.E.2d 230, 237 (N.C. Ct. App. 1989) ("[Courts] ha[ve] an interest in assisting out-of-state creditors who seek to collect from debtors who come within the reach of our courts. No state benefits when debtors are allowed to escape their financial obligations, and we refuse to assist appellant in his attempt at that effort here.").

80. *See* Weinstein, *supra* note 61, at 3194-95.

81. *See id.* at 3195.

82. *See* Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1603 (1968).

83. *See* LOWENFELD, *supra* note 4, at 474. (arguing that one of the main counter-arguments to the recognition and enforcement of foreign judgments is the "generalized distrust of courts of other states").

84. *See, e.g.*, Spanogle, *supra* note 7, at 95 (concluding that U.S. courts generally enforce all those foreign money judgments that have been rendered in compliance with the minimum standards of due process).

85. The definition of comity generally accepted in the United States reads 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

judgments are generally entitled to recognition and enforcement.[86] Furthermore, apart from the possible international consequences deriving from the lack of confidence in the rendering forum,[87] a re-litigation regarding the existence of due process requirements would turn out to be costly and time-consuming for the recognizing forum.[88]

The second problem of requiring the same – or similar – due process standards in both post-judgment and pre-judgment proceedings pertains to the unfairness towards the judgment creditor.[89] Permitting an objection based on the lack of *quasi-in-rem* jurisdiction in the recognizing court would allow the judgment debtor to shield her assets.[90] Supposing that no personal jurisdiction is required according to the *Shaffer* foot-

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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, 159 U.S. at 163-64.

86. *See* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) ("[T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced – the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations."). *See also* LOOKOFSKY & HERTZ, *supra* note 12, at 784 (defining the comity doctrine as stronger than the national rules on recognition and enforcement). For a distinction between the "doctrine of international comity" and the "comity of courts", see Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, U.C. L. REV. 11, 47-48 (2010).

87. When a bilateral or multilateral convention exists, a denial of recognition or enforcement of a foreign decision on grounds different from those expressly listed in the treaty might plausibly be classified as a violation of the *pacta sunt servanda* principle and a violation of the convention. *See* Park & Yanos, *supra* note 48, at 252 ("According to the rules of international law, . . . neither a Constitutional mandate nor the enactment of a statute provide an excuse for a treaty violation."). *See infra* the text accompanying notes 132-38.

88. *See* Weinstein, *supra* note 61, at 3195.

89. *See* Darbee, *supra* note 16, at 363; Vernon, *supra* note 66, at 1008.

90. *See, e.g.*, Henry E. Rakowski, *Enforcing Judgments*, J. NASSAU COUNTY B. ASS'N, Oct. 2002, at 3, 22 ("It is very unlikely that a debtor will 'hold still' and allow his bank accounts to be restrained. The debtor should be presumed to actively engage in tactics designed to conceal his assets.").

note in the post-judgment stage,[91] it would be extremely simple for the judgment debtor to avoid recognition based on the absence of *quasi-in-rem* jurisdiction. Indeed, by simply transferring assets to another jurisdiction, the debtor would prevent not only the enforcement of the foreign money judgment – *per definitionem* – but also the recognition of the judgment, thus foreclosing the creditor's opportunity to obtain recognition in the hope that a subsequent recovery will be possible. Allowing this practice would compel the judgment creditor to start various enforcement proceedings in order to find a jurisdiction where the losing party has not removed or could not have removed her property. As the *Lenchyshyn* court held, however, "[c]onsiderations of logic, fairness, and practicality" suggest a different solution,[92] since a foreign court has already declared that the judgment creditor is entitled to recover from the counter-party.

Therefore, even if no property whatsoever exists when the recognition is sought, policy considerations indicate that the judgment creditor has a legitimate interest in obtaining the confirmation of the foreign money judgment, if only, because she might believe that the losing party will bring assets into the jurisdiction in the future.[93]

C. *Repercussions on International Commercial Relationships*

If the recognition without enforcement scenario and the chance to recover *in futuro* may be classified as the legal and policy-based justifications, respectively, of the recognition and enforcement of foreign money judgments despite the lack of assets, there is also a fundamental economic explanation that supports the same outcome. This argumentation is especially convincing if we consider the hypothesis where the judgment creditor and the debtor are competitor companies in the same industry. 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

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91. *See supra* text accompanying note 33.

92. *Lenchyshyn*, 723 N.Y.S.2d at 291.

93. *See* Edsall, *supra* note 13, at 404 ("In fora where creditors believe that their debtors will in the future have assets, stand-alone recognition could speed enforcement when assets later arrive in the jurisdiction."); Goldstein & Bjorklund, *supra* note 54, at 207.

the prevailing company a comparative advantage were it to decide to invest in a country where none of the parties is present.

Suppose, for example, that the prevailing party decides to invest in a foreign country – say, Country X – which is particularly appealing for the companies operating in a certain sector. Assume, also, that neither the judgment creditor nor the debtor/competitor is present in Country X. If the judgment creditor obtained the recognition of the foreign money judgment in Country X, two potential situations might be envisaged. On the one hand, if the debtor/competitor desired to invest there, she would have no other option but to honor the obligations contained in the decision. On the other hand, the debtor/competitor might persist in the attempt to shield her assets from the judgment creditor, but, in this hypothesis, she could not take advantage of investing in Country X, thus leaving a considerable economic advantage in that market to the creditor.

The same principles apply when the prevailing party wants to prevent her debtor/competitor from investing in a country, Country X again, where the judgment creditor is present at the time of the rendering of the decision. If the judgment creditor obtains the recognition of a foreign money judgment in Country X, the debtor/competitor will be called once again to break the impasse, by either avoiding investing in Country X or resigning herself to comply with her obligations.

In conclusion, even if the debtor/competitor decided to continue hiding her assets from the judgment creditor, the prevailing company would at least benefit from the recognition of foreign judgments despite the lack of assets because this would ensure her a comparative advantage in terms of access to the market in certain unexplored areas.

IV.

CRITICISMS TO THE NEW YORK AND TEXAS APPROACH, AND OBJECTIONS TO THE RECOGNITION AND ENFORCEMENT OF FOREIGN MONEY JUDGMENTS IN THE ABSENCE OF PROPERTY

American commentators split on the new approach adopted by the New York and Texas courts. Some welcome the revolutionary innovation as a powerful means to grant just and

fair,[94] as well as prompt,[95] relief to judgment creditors, enabling them to reach assets shielded through evasive maneuvers.[96] Some others, on the contrary, criticize the new trend.[97] The major criticism, which deserves a separate analysis, is the alleged violation of the Due Process Clause of the Constitution.

A. *The Due Process Concern*

The Due Process Clause of the U.S. Constitution limits the circumstances in which a person may be subject to the jurisdictional power of American courts. Due process, in fact, requires that sufficient links exist between the defendant and the forum for a person to be subject to the forum's jurisdiction. The first case in which the Supreme Court considered questions of jurisdictional power was the *Pennoyer* case.[98] *Pennoyer* limited state courts' jurisdiction "over persons and property within [their] territor[ies]".[99] Requiring that jurisdiction to adjudicate be based on the power over either persons or property, the Supreme Court created three different categories of jurisdiction: *in personam*, *in rem*, and *quasi-in rem*.[100] Starting from the *International Shoe* case, the due process standard applicable to *in personam* proceedings has evolved from the sovereign theory of jurisdiction adopted in *Pennoyer* to a two-fold test that takes into account: the "minimum contacts" between the defendant and the forum; and whether the exercise of jurisdictional power "offend[s] the traditional notion of fair play and substantial justice".[101] Following *International Shoe*, the Supreme Court has adopted several variants of this

94. *See* Darbee, *supra* note 16, at 363.

95. *See* Edsall, *supra* note 13, at 404.

96. *See* Weinstein, *supra* note 61, at 3198.

97. *E.g.*, Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT'L ARB. 439, 444 (2013).

98. Pennoyer v. Neff, 95 U.S. 714 (1877).

99. *Id.* at 722.

100. *See* LINDA J. SILBERMAN ET AL., CIVIL PROCEDURE - THEORY AND PRACTICE 67-68 (3d ed. 2009).

101. *Int'l Shoe*, 326 U.S. at 316. *See supra* note 27.

test,[102] and its evolution is still ongoing as evidenced by the recent decision in *Nicastro*.[103]

Much slower transformation, by contrast, has occurred with respect to proceedings *in rem*. For the first time, the Supreme Court had to decide the due process standard applicable to this type of actions in the *Shaffer* case, concluding that the *International Shoe* test ought to be applied to all claims, regardless whether *in personam*, *in rem* or *quasi-in-rem*.[104]

In light of this case law, legal scholars who adopt a conservative view have reproached the New York and Texas courts for having excessively departed from the minimum contact standards set by the Supreme Court.[105] However, it is necessary to distinguish between the due process requirements applicable to the pre-judgment phase, and those applicable when recognizing a (foreign) decision. This dichotomy between jurisdiction to adjudicate and jurisdiction to recognize, was recognized by the *Shaffer* footnote 36, when the court considered satisfactory a more relaxed approach for the post-judgment phase.[106] As a consequence, in analyzing the *Lenchyshyn* decision, all the due process tests applicable to jurisdiction to adjudicate should be left aside. Thus, the sole due process factor to be taken into account when dealing with the recognition of foreign money judgments despite the lack of assets is the *Shaffer* footnote.

The *Shaffer* footnote does not permit the recognizing judge to dispense completely with the due process analysis. However, it does diminish the standards, considering the presence of assets in the enforcing forum as a sufficient ground to exercise jurisdiction over the judgment debtor, without requiring the personal jurisdiction test to be met.[107] With this pre-

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102. For a complete overview of the Supreme Court case law on jurisdictional power after *International Shoe*, see SAMUEL ISSACHAROFF, CIVIL PROCEDURE 101-23 (3d ed. 2012).

103. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011) (holding that the stream of commerce theory alone is insufficient to justify the jurisdiction of a court unless the defendant has specifically targeted a single sister-state, and not the Unites States as a whole).

104. *Shaffer*, 433 U.S. at 212.

105. *See* Luthin, *supra* note 3, at 129 ("Oddly absent from the [*Lenchyshyn*] decision is any discussion of the Constitutional constraints of due process . . . .").

106. *See supra* the text accompanying notes 31-33.

107. *See* Díaz-Pedrosa, *supra* note 30, at 36 n.100.

mise in mind, some authors question whether the evolution of the due process requirements under the *Lenchyshyn* case – and the subsequent New York and Texas decisions – complies with requirement imposed by the Supreme Court in the *Shaffer* footnote.

It is unquestionable that the *Lenchyshyn* court went further than what emerges from the mere wording of the *dictum* of the *Shaffer* case. However, the famous footnote 36 should be contextualized. As mentioned above, the Supreme Court in *Shaffer* was asked for the first time to determine whether the presence of assets in a state was sufficient to give rise to the jurisdictional power of state courts – as held in *Pennoyer* – or the minimum standard test set forth in *International Shoe* should have applied to *quasi-in-rem* proceedings. In order to uphold the latter alternative, the Supreme Court engaged in the analysis of the reasons that could be opposed to the application of the *International Shoe* test.[108] For the purpose of this comment, we will focus only on the first issue analyzed in the decision.[109]

The Supreme Court believed the main reason for treating the presence of the defendant's assets in the forum as necessary and sufficient to adjudicate a claim is the risk that the defendant could otherwise avoid jurisdiction by moving her property to a state where she is not subject to personal jurisdiction.[110] Apart from considering this risk unlikely,[111] the Supreme Court sought to overcome this obstacle, holding that the Full Faith and Credit Clause prevents any attempt to shield the assets in a sister-state where the defendant is not subject to personal jurisdiction. In fact, the automatic enforcement of decisions rendered in states where the plaintiff can obtain personal jurisdiction over the defendant, permits the creditor to

108. *Shaffer*, 433 U.S. at 209-12.

109. *Id.* at 210.

110. *Id.* ("The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not have jurisdiction if *International Shoe* applied is that a wrongdoer 'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit.'") (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. a (1971)).

111. *Id.* ("[W]e know of nothing to justify the assumption that a debtor can avoid paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him.").

recover in those sister-states where the assets are hidden.[112]. Since the Supreme Court justified the need of *in personam* jurisdiction for the pre-judgment phase by arguing that the Full Faith and Credit Clause permits to recover in all other sister-states where the defendant has hidden her assets, it is clear why the *Lenchyshyn* court, dealing with the recognition of a *foreign* money judgment, felt itself unrestricted by *Shaffer*'s footnote 36.

First, the *Shaffer* footnote does not explicitly exclude the possibility to recognize a judgment where the judgment debtor has no property. Second and more importantly, the *dictum* contained in the footnote 36 has a clear domestic preference. In fact, if the Full Faith and Credit Clause permits automatic recognition and enforcement of judgments within the United States, the same solution is not available in the international context where the Full Faith and Credit Clause does not apply. Accordingly, where recognition of *foreign* money judgments is at issue, the risk that the judgment debtor might shield her assets in order to avoid her obligations ought to be taken into serious account. Thus, although admitting that the *Shaffer* footnote is applicable to the recognition of foreign money judgments,[113] this analogy should be considered valid only with respect to the dispensation with the personal jurisdiction requirement. On the contrary, requiring the presence of the judgment debtor's property in the recognizing forum when dealing with foreign decisions would go too far, because the Full Faith and Credit Clause cannot obviate to the risk of a debtor shielding her assets when the decision has been rendered outside the United States. The domestic context of footnote 36 makes clear that it does not apply in the international context; the Supreme Court did not intend to require the presence of property in the recognizing forum as an indispensible element to obtain recognition of foreign money judgments.

As of today, the Supreme Court has not yet had the opportunity to pronounce on the due process requirements necessary to obtain recognition or enforcement of *foreign* money judgments. Thus, nothing prevents the Court from upholding the *Lenchyshyn* decision. Not only would this be desirable, but

112. *Id.*

113. *See supra* text accompanying notes 35-37.

appears far from implausible. Especially in light of the global trend of negotiating and adopting international treaties aimed at facilitating the confirmation of foreign decisions – in both the arbitration and state court litigation contexts – there appears to be no reason that the Supreme Court would take a step back from the position already adopted. On the contrary, a further relaxation of the due process requirements appears foreseeable and in line with the recent shift away from the traditional understanding of jurisdictional requirements.[114] Such a conclusion would be welcome also in light of the potential risks that a new due process analysis at the recognizing stage entails: opportunity to re-litigate, and unfairness towards the judgment creditor.[115]

B. *Other Criticisms to the Recognition and Enforcement of Foreign Money Judgments Despite the Lack of Assets*

Apart from the due process concern, two other critical observations have been raised against the new trend of the New York and Texas courts.

The first objection is systemic: recognizing foreign money judgments regardless of the absence of property in the enforcing forum would create inconsistency between the treatment granted to foreign money judgments, on the one hand, and foreign arbitral awards, on the other.[116] This assertion is based on the premise that a jurisdictional requirement is necessary to obtain the confirmation of a foreign arbitral award.[117] In fact, all the federal courts that have decided this issue have imposed some jurisdictional requirement.[118] Both the Ninth and the Fourth Circuits, although diverging on the relatedness requirement of the judgment debtor's property located in the enforcing forum,[119] have held that it is necessary to establish either *in personam* or *quasi-in-rem* jurisdiction when confirming

114. *See* Weinstein, *supra* note 61, at 3195.

115. *See supra* Part III.B.

116. *See* New York City Bar Report, *supra* note 14, at 426.

117. *Id.*

118. It is worth underlining that, contrary to the recognition and enforcement of foreign judgments, which is a matter of state law, the confirmation of foreign arbitral awards is subject to federal law. *See, e.g.*, Lowenfeld & Silberman, *supra* note 18, at 125.

119. *See supra* notes 39-41 and accompanying text.

a foreign award.[120] The Third Circuit has reached an analogous conclusion.[121] Slightly more complex is the case law in the Second Circuit. Here, the District Court for the Southern District of New York originally held that the presence of property in New York was enough to grant enforcement of a foreign award, even though no effect could have been given beyond the assets on which *quasi-in-rem* jurisdiction was based[122] The Court of Appeals avoided taking a position in the 2003 *Dardana* case, where, with the court describing the issue as "difficult", the matter was remanded to the district court and the case was settled before a decision was made.[123] More recently, however, the Court of Appeals clarified its position, arguing that compliance with the *Shaffer* footnote imposes to establish jurisdiction over either the award debtor or her property in order to confirm a foreign arbitral award.[124]

Therefore, federal courts, even when expressly admitting that *in personam* jurisdiction might not be necessary,[125] still require *quasi-in-rem* jurisdiction to recognize or enforce foreign awards. Consequently, instead of seeking recognition or enforcement under the New York Convention – or under the applicable domestic law –, the holder of a foreign arbitral award

120. *See*, respectively, *Glencore Grain*, 284 F.3d at 1121 ("[I]t is not significant in the least that the legislation implementing the [New York] Convention lacks language requiring personal jurisdiction over the litigants. We hold that neither the [New York] Convention nor its implementing legislation removed the district courts' [constitutional] obligation to find jurisdiction over the defendant in suits to confirm arbitration awards.") and *Base Metal*, 283 F.3d at 212-16 (where the court engages in a long inquiry on the existence of the jurisdictional requirement over the judgment debtor).

121. *See* Telcordia Tech Inc. v. Telkom SA Ltd., 458 F.3d 172, 178-79 (3d Cir. 2006).

122. *See* CME Media Enters. B.V. v. Zelezny, No. 01 Civ. 1733 (DC), 2001 U.S. Dist. LEXIS 13888, at *10 (S.D.N.Y. Sept. 10, 2001).

123. *See* Dardana Ltd. v. A.O. Yuganskneftegaz, 317 F.3d 202, 208 (2d Cir. 2003).

124. *See* Frontera Res. Azer. Corp. v. State Oil Co., 582 F.3d 393, 396-98 (2d Cir. 2009).

125. *See Zelezny*, 2001 U.S. Dist. LEXIS 13888, at *9-10 ("Here, the Court has *quasi in rem* jurisdiction because respondent maintains property . . . in this District. Minimum contacts are not required because an arbitration panel with personal jurisdiction over Zelezny has already adjudicated CME's claims against Zelezny and determined that he is a debtor of CME; the purpose of the instant proceeding is to collect on that debt." (citations omitted)).

might be tempted to convert the foreign *arbitral award* into a foreign *judgment* before requesting its recognition in New York or Texas.[126] By using this alternative, the winning party could obtain the recognition of the foreign money *judgment* (confirming the foreign *award*) regardless of the absence of assets in New York or Texas, thanks to the recent case law developed in these jurisdictions. It is hard to believe that the *Lenchyshyn*, the *Haaksman*, and the *Abu Dhabi Commercial Bank* courts had this scenario in mind. However, there are neither logical nor legal reasons that prevent a winning party from adopting this strategy. A prevailing party has already obtained a favorable decision – either in the form of a judgment or an arbitral award – rendered by competent judicial body that had jurisdiction over the losing party.[127] As a result, an enforcing court should not create obstacles to the recognition of foreign decisions, but, on the contrary, it should favor the circulation of foreign judgments as much as possible in order to grant effective relief to the prevailing party.

Even if it is true that the recent trend adopted by the New York courts creates a more favorable regime for the recognition of foreign money judgments than foreign awards, this inconsistency does not seem an overwhelming issue. There are other inconsistencies in the American system that create greater concern. The most evident is the lack of uniformity among the sister-states' legislation, which is an obvious consequence of the fact that the area of recognition and enforcement of foreign money judgments is nowadays considered a matter of state law (and not federal law).[128] Although many sister-states have adopted either the 1962 or the 2005 version of the Uniform Recognition Act and the 1964 Revised Uniform Enforcement of Foreign Judgment Act,[129] other states

126. *See* New York City Bar Report, *supra* note 14, at 418. This is indeed what occurred in *Dardana* where the judgment creditor sought to overcome the difficulties related to the absence of personal jurisdiction over the losing party by pleading in the alternative the enforcement of both the foreign *judgment* confirming the arbitral award and of the foreign *arbitral award*. *Dardana*, 317 F.3d at 208-09. *See also* Lawrence W. Newman & David Zaslowsky, *Jurisdiction to Enforce Arbitral Awards*, N.Y. L.J., Apr. 30, 2003, at 4.

127. *See Zelezny*, 2001 U.S. Dist. LEXIS 13888, at *9-10; *supra* note 125.

128. *See supra* note 7.

129. Revised Uniform Enforcement of Foreign Judgment Act of 1964, 13 U.L.A. 155 (2002).

continue to apply the common law principles generally reflected in the Restatement (Third) of Foreign Relations Law.[130] Moreover, many states that have adopted the uniform acts have done so creating several variances.[131] The American system, thus, implicitly permits judgment creditors to forum shop among the various sister-states in order to find the most favorable enforcing forum. It would be rather bizarre if a state court considered as a systemic inconsistency the opportunity to forum shop between the New York Convention and the domestic law on the recognition and enforcement of foreign judgment, when the U.S. legal system, lacking in a uniform federal regime, permits a judgment holder to choose the most favorable sister-state where to recognize or enforce a foreign decision.

Furthermore, the alleged inconsistency is only problematic if the American courts' implementation of the New York Convention is absolutely correct; instead, enforcing foreign arbitral awards should not require local property. The lack of *in personam* or *quasi-in-rem* jurisdiction by the enforcing court is not a ground for refusal of recognition or enforcement of an award under Article V of the New York Convention. Since these grounds are generally accepted as "exhaustive",[132] there is a clear tension between the due process requirements imposed by the U.S. Constitution and the New York Convention.[133] U.S. courts have usually resolved this impasse in favor of the Constitution.[134] However, the *pacta sunt servanda* principle, which is broadly classified as a principle of international customary law,[135] and is embodied in Article 27 of the Vienna

130. *See* Brand, *supra* note 2, at 6. For a chart containing the state-by-state enactment of the uniform acts, *see id.* at 2 app. D.

131. *See, e.g.*, Luthin, *supra* note 3, at 120.

132. *E.g.*, Albert Jan van den Berg, *The New York Convention of 1958: An Overview, in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 39, 56 (Emmanuel Gaillard & Domenico di Pietro eds., 2008) (also pointing out that "[a]s far as the grounds for refusal of enforcement of the award as enumerated in Article V are concerned, . . . they are to be construed narrowly.").

133. *See* Park & Yanos, *supra* note 48, at 296-97.

134. *E.g.*, Reid v. Covert, 354 U.S. 1, 16 (1957).

135. *See, e.g.*, Josef L. Kunz, *The Meaning and the Range of the Norm* Pacta Sunt Servanda, 39 AM. J. INT'L L. 180, 180-81 (1945) ("The norm *pacta sunt servanda*, which has constituted 'since times immemorial the axiom, postulate and categorical imperative of the science of international law' . . . is a

Convention on the Law of Treaties,[136] as well as the pro-enforcement bias of the New York Convention,[137] suggest the opposite conclusion.[138] Bearing this in mind, the preferable solution for the American system would be to dispense with all jurisdictional requirements for recognition and enforcement of foreign *arbitral awards*, and to not impose any additional requirements when confirming foreign money *judgments*. Thus, U.S. courts would not only comply with Article V of the New York Convention, but they would also eliminate the internal disparity of treatment between foreign arbitral awards, whose recognition still require either personal or *quasi-in-rem* jurisdictional basis, and foreign money judgments, that according to the recent case law developed by the New York an Texas courts can be obtained regardless of any jurisdictional tie with the enforcing forum.

The second criticism of the recognition of foreign money judgments despite the lack of assets concerns the alleged 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.[139] Drawing such a conclusion would be a serious mistake, since generally the proceedings started by the judgment creditor are the consequence of the attempts of the losing party to shield her assets.[140] Hence, it is the judgment debtor herself that, having decided not to comply spontaneously with the obligations set forth in the foreign money judgment, accepts the risk of bearing the litigation

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customary norm of general international law, a constitutional norm of a superior rank . . . .") (citation omitted); J. Logan Murphy, *Law Triangle: Arbitrating International Reinsurance Disputes Under the New York Convention, the McCarran-Ferguson Act, and Antagonistic State Law*, 41 VAND. J. TRANSNAT'L L. 1535, 1558 (2008) ("[T]he positive obligation of *pacta sunt servanda* binds the United States as customary international law and a general principle of international law recognized by nations throughout the world.").

136. Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.").

137. *See, e.g.*, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2711-25 (2009); van den Berg, *supra* note 132, at 56.

138. *See* Park & Yanos, *supra* note 48, at 296-97; Darbee, *supra* note 16, at 366.

139. *See* Edsall, *supra* note 13, at 404-05.

140. *See* Rakowski, *supra* note 90, at 3, 22.

costs to defend herself from the confirmation of the decision in various jurisdictions.

C. *Criticism of the* Koehler *Decision*

The New York case law has encountered further criticisms after having ordered a garnishee-bank to turn over properties of the judgment debtor that were located outside New York. First of all, the dissenting judges have expressed a constitutionality concern,[141] which, however, does not seem to create serious problems for the same reasons illustrated above with respect to the *Lenchyshyn* and the *Abu Dhabi Commercial Bank* cases.[142] Another issue raised by the dissenting judges is the opportunity to forum shop that the *Koehler* decision would grant to the judgment creditor.[143] Also in this respect the majority's decision does not appear flawed. As discussed above,[144] in fact, the judgment creditor already benefits from the right to forum shop as a consequence of the differences among the sister-states' legislation.

The most valid argument concerns the economic consequences of empowering a court to force a third party to turn over out-of-state property.[145] Rendering this process extremely easy – as indeed the *Koehler* court does, since no connection whatsoever is required between the judgment debtor and New York – would encourage many unsatisfied judgment creditors to turn to the New York courts. This could potentially seriously affect New York's economy and reduce its attractiveness as a global financial center. Banks might suffer the most from the *Koehler* outcome and reconsider the advantages of retaining their branches in New York.[146] Yet, while this argument has its merits, it is hard to believe that banks and multinational companies will relinquish their operations in New York, given its

141. *Koehler*, 911 N.E.2d at 833 (Smith, J., dissenting) ("The majority's broad view of New York's garnishment remedy may cause it to exceed the limits placed on New York's jurisdiction by the Due Process Clause of the Federal Constitution.").

142. *See supra* Part IV.A. *See also* David D. Siegel, Koehler*: Creating Mecca for Creditors or Anti-Mecca for Garnishees?*, N.Y. L.J., July 28, 2009, at 4.

143. *Koehler*, 911 N.E.2d at 831 (Smith, J., dissenting).

144. *See supra* Part IV.B.

145. *See* Brown & Rotenberg-Schwartz, *supra* note 62 (defining the potential implication of the *Koehler* outcome as "staggering").

146. *Id.*

importance as a crucial business hub. On the contrary, the advantages of doing business in New York are likely to still outweigh the risk of being forced to turn over the out-of-state property belonging to a judgment debtor.[147] Further, and perhaps more importantly, the whole judicial system will benefit from the new power that the *Koehler* case attributed to the New York courts. By preventing a judgment debtor from shielding her assets abroad, the recent New York case law increases a creditor's chances to obtain final relief.[148]

V.
FINAL REMARKS

The preceding analysis shows the far-reaching consequences of the new trend followed by the New York and Texas courts. In particular, New York case law permits judgment creditors to combine two extremely powerful tools: the recognition and enforcement of foreign money judgments despite the lack of assets (*Lenchyshyn* and *Abu Dhabi Commercial Bank*), and the possibility of imposing on a garnishee subject to New York jurisdiction the duty to turn over out-of-state property belonging to the judgment debtor, who might not have contacts with the state (*Koehler*). As a result, judgment creditors are considerably empowered to recover from a losing party who avoids immediate compliance and hides assets abroad.

While these revolutionary changes have been received somewhat skeptically, all the criticisms considered above and, in particular, the due process objection based on the presence of assets in the recognizing forum imposed by the *Shaffer* footnote, have proved to be unconvincing. The recognition of foreign money judgments despite the lack of assets is justified by three considerations. First, the prevailing party might have an interest in obtaining the simple recognition of the foreign money judgment, without caring about its enforcement – at least in the first instance. Second, the rationale of fairness indicates that holders of a foreign money judgment have a legitimate interest in obtaining the confirmation of foreign decisions, if only, because they might believe that the losing party will bring assets in the enforcing forum in the future. Finally,

147. *See* Weinstein, *supra* note 61, at 3198-99.
148. *Id.* at 3198.

obtaining the recognition of a foreign money judgment could represent an important economic advantage in those cases in which the prevailing party and the judgment debtor are competitors in the same industry.

As a general principle, when dealing with the confirmation of foreign decisions, it is critical to keep in mind that the judgment creditor has already been found entitled to a certain relief by a competent judicial authority and that the need to turn to a foreign judge for confirmation can be the sole consequence of two scenarios: either the impossibility to be satisfied in the country where the judgment was rendered, or the necessity to prevent re-litigation on the merits in a second forum. As a consequence, a recognizing judge should approach this issue with a pro-recognition attitude. This is what the New York and Texas courts already did, relaxing the due process requirement of the recognition phase, and it is desirable that more jurisdictions, both within the United States and abroad, follow suit.