Title

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Author

Whytock, Christopher A

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CHRISTOPHER A WHYTOCK

ENFORCEMENT—ALONG WITH rulemaking and rule application—is a basic function of any system of governance.[1] The effectiveness of a governance system depends significantly on compliance with the rules it produces.[2] Compliance, in turn, depends in the first instance on ex ante background factors that influence a person's understanding of the legitimacy of a governance system and its rules and the expected costs and benefits of non-compliance.[3] Enforcement is the process of obtaining a person's compliance or punishing a person's non-compliance when ex ante background factors fail to elicit compliance.[4]

In a governance system with courts, one basic type of enforcement is the enforcement of court judgments. For example, if background factors do not lead a judgment debtor to comply with a money judgment in the first instance, enforcement measures may then be taken to compel payment to the

[1] See AM Kjaer, *Governance* (Cambridge, Polity Press, 2004) 10 (defining governance as 'the setting of rules, the application of rules, and the enforcement of rules').

[2] See K Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387, 388 ('Compliance … is typically an important aspect of the production of institutional effectiveness, but not the only aspect').

[3] See JG March and JP Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organization* 943 (distinguishing the logic of appropriateness and the logic of consequences in decision-making); TR Tyler, *Why People Obey the Law* (Princeton, Princeton University Press, 1990) (analysing the role of legitimacy in compliance).

[4] Two clarifications are in order. First, enforcement is not necessarily a precondition for compliance. A well-designed governance system that attends to background factors will tend to elicit compliance without enforcement. Second, there can, of course, be a relationship between background factors and enforcement. eg, punishment at the enforcement stage may feed back into the background cost–benefit analysis, thus enhancing future compliance by other persons without enforcement.

judgment creditor. A standard enforcement measure is execution, whereby a court issues an order directing an enforcement agent (such as a sheriff or *huissier de justice*) to seize property of the judgment debtor, sell it, and deliver the proceeds to the judgment creditor in satisfaction of the judgment. The enforcement of court judgments is an important governance function because courts themselves perform important governance functions.[5] They offer dispute resolution services in the form of litigation, and in the process they authoritatively interpret rules and apply them to particular situations. From the perspective of political science, courts not only resolve discrete disputes, but also contribute to the authoritative allocation of resources within a society, thus answering a basic question of governance: Who gets what?[6]

When national courts decide cases involving parties of different nationalities or activities that occur or have effects in the territory of more than one nation, they engage in what I call *transnational judicial governance*.[7] In addition to determining the rights and obligations of transnational actors, they regulate extraterritorial activity and they allocate governance authority among nations, between national and international institutions, and between private and public actors. For example, in transnational regulatory litigation, national courts apply national regulatory norms to determine rights and obligations of transnational actors.[8] In transnational public law litigation, '[p]rivate individuals, government officials, and nations sue one another directly, and are sued directly, in a variety of judicial fora, most prominently, domestic courts',[9] based on rights derived from both national

[5] See M Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, The University of Chicago Press, 1981); M Shapiro and AS Sweet, *On Law, Politics, And Judicialization* (Oxford, Oxford University Press, 2002); CN Tate and T Vallinder (eds), *The Global Expansion of Judicial Power* (New York, NYU Press, 1995); RA Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 *Journal of Public Law* 279; CA Whytock, 'Domestic Courts and Global Governance' (2009) 84 *Tulane Law Review* 67.

[6] The 'who gets what' question has long preoccupied scholars of domestic systems of governance. See, eg HD Lasswell, *Politics: Who Gets What, When, How* (New York, Whittseley House, 1936). *cf* RM Cover, 'Dispute Resolution: A Foreword' (1979) 88 *Yale Law Journal* 910, 911 (noting that courts both solve disputes and distribute resources); M Shapiro, 'From Public Law to Public Policy, or the "Public" in "Public Law"' (1972) 5 *Political Science & Politics* 410, 413 (discussing 'judicial allocation of values').

[7] For an in-depth analysis of transnational judicial governance, see Whytock (n 5) and CA Whytock, 'Transnational Judicial Governance' (2012) 2 *St John's Journal of International & Comparative Law* 55. *cf* TL Putnam, 'Courts Without Borders: Domestic Sources of US Extraterritoriality in the Regulatory Sphere' (2009) 63 *International Organization* 459 (exploring how domestic courts have come to regulate persons and conduct outside their states' borders by claiming jurisdiction over transactions with local and extraterritorial elements).

[8] See generally HL Buxbaum, 'Transnational Regulatory Litigation' (2006) 46 *Virginia Journal of International Law* 251, 253–54 (examining the rise in cases brought in US courts under the Alien Tort Claims Act, applying international law norms to secure remedies for violation of those norms that would not otherwise be available).

[9] HH Koh, 'Transnational Public Law Litigation' (1991) 100 *Yale Law Journal* 2347, 2348 (discussing how traditional domestic litigation and traditional international law litigation have merged to form a blended body of 'transnational' public law).

and international law. And in transnational private litigation, national courts resolve transnational disputes under different nations' private law rules (for example rules governing torts, contracts and property)—rules that reflect these nations' respective distributive and regulatory policies.[10]

The same multinational connections that enable transnational judicial governance can also create special enforcement challenges. If a court in one nation (N1) issues a money judgment but the judgment debtor has no assets in N1, enforcement may be impossible there. The judgment creditor may then seek enforcement in another nation (N2) where the judgment debtor does have assets. From N2's perspective, the N1 judgment is a foreign judgment. The problem is that sovereignty principles and related customary international law principles on jurisdiction generally prohibit nations from taking enforcement measures in the territory of other nations. Moreover, there is no general rule of international law requiring nations to enforce foreign judgments. Therefore, the ability to enforce the N1 judgment in N2 depends on the willingness of an N2 court to order enforcement against the judgment debtor's N2 assets, which in turn depends on N2's private international law (conflict of laws) rules.

The stakes are high both for nations, because the enforcement of foreign judgments is one factor that determines the quality of transnational judicial governance, and for individual litigants, because the enforcement of foreign judgments affects their legal rights. In this chapter, I analyse the rules of foreign judgment enforcement from both perspectives. I do so comparatively, with a focus on the private international law rules of the European Union (EU) and United States (US) applicable to foreign judgments in civil and commercial matters, in order to highlight how different approaches strike different balances between two sets of enforcement values: governance values and rights values. Part I provides an overview of governance values and rights values. Part II examines a spectrum of ideal-type and real-world approaches to foreign judgment enforcement—ranging from always enforce, to the US and EU approaches to their respective internal judgments (full faith and credit and the Brussels I Regulation), to national treatment of external judgments, to never enforce—and explains how they score on different governance values and rights values. Part III is more conjectural. It proposes lessons of this chapter's analysis for the design of private international law rules governing foreign judgments, and speculates about the causes and consequences of the evolution of the law of foreign judgments in the transatlantic area—including implications for the transnational market for dispute resolution services.

[10] See generally R Wai, 'Transnational Private Litigation and Transnational Governance' in M Lederer and PS Müller (eds), *Criticizing Global Governance* (New York, Palgrave Macmillan, 2005) 243 (analysing transnational private litigation).

I. ENFORCEMENT VALUES

Although enforcement is a basic governance function, it would be a mistake to understand enforcement in purely functional terms, because enforcement—like private international law generally—implicates important societal values. In the context of foreign judgment enforcement, enforcement values can be placed roughly into two categories: governance values and rights values.[11]

A. Governance Values

Governance values focus on policies facilitating, guiding or restraining collective activity.[12] These values have implications that extend beyond the parties to particular disputes.[13] Governance values include *efficiency*, which is concerned with avoiding the expenditure of societal resources to re-litigate issues that have already been litigated, and with reducing transaction costs in transnational business.[14] If N2 declines to enforce an N1 judgment, duplicative public resources of N2's legal system and private resources of the litigants will be expended if the claimant subsequently pursues the same claim in N2. These costs can be avoided—and efficiency thus increased—if N2 renders duplicative litigation unnecessary by enforcing the N1 judgment.

Closely related to efficiency is the principle of *repose*, which emphasises 'the need to put to rest quarrels and disputes that have arisen so that the energies of individuals and the resources of society can be devoted to more constructive tasks'.[15] One way of understanding repose is in terms of public and private opportunity costs. If N2 declines to enforce the N1 judgment

[11] For a preliminary sketch of these two types of values and their application to EU and US private international law, see CA Whytock, 'Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments' (2014) 7 *Erasmus Law Review* 113.

[12] See RO Keohane, *Power and Governance in a Partially Globalized World* (London, Routledge, 2002) 245–46 (defining governance as 'the processes and institutions, both formal and informal, that guide and restrain … collective activit[y]').

[13] See Whytock (n 5) 31.

[14] See R Michaels, 'Recognition and Enforcement of Foreign Judgments' in *Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com (noting that 'the general public has an interest in avoiding resources spent on re-litigation and in international decisional harmonies'); AT von Mehren and DT Trautman, 'Recognition of Foreign Adjudications: A Survey and a Suggested Approach' (1968) 81 *Harvard Law Review* 1601, 1603–04 (noting 'desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated'). See also J Lookofsky and K Hertz, *EU-PIL: European Union Private International Law in Contract and Tort* (New York, JurisNet, 2009) 135 (noting importance of foreign judgment enforcement to 'promote efficiency and economy in international business').

[15] AT Von Mehren, 'Recognition and Enforcement of Foreign Judgments—General Theory and the Role of Jurisdictional Requirements' (1981) 167 *Recueil des Cours* 20–22.

and the plaintiff files the same claim against the defendant in N2, then N2 will spend public resources for its courts to adjudicate the claim that it could otherwise spend on other judicial matters, and the parties will spend private resources on litigation that they could otherwise spend on more beneficial endeavours. N2's enforcement of the N1 judgment would bring the dispute to an end and avoid these public and private opportunity costs.

Another governance value is *certainty*, which helps 'establish the security of contracts, promote commercial dealings, and generally further the rule of law among states that are interdependent as well as independent'.[16] Among the uncertainties of transnational litigation is uncertainty about whether an N1 judgment will be enforced in other nations. This uncertainty can lead to financial and contractual uncertainty, because it is unclear whether a judgment that otherwise would establish the parties' financial and contractual responsibilities will ultimately be given effect. This uncertainty can be avoided, and the parties' planning for the future facilitated, if N2 enforces—and is expected to enforce—N1 judgments.

A somewhat different governance value is *comity*. Comity is the respect that one nation gives to another nation as a legally equal sovereign. Comity may 'foster … stability and unity in an international order' by avoiding conflict among nations and by promoting reciprocity in the respect that nations give to each other.[17] N2 may owe no international legal obligation to N1 to enforce an N1 judgment, but by nevertheless enforcing it N2 furthers the value of comity, thus avoiding the offence to (and perhaps conflict with) N1 that could be caused by N2's refusal to respect the judgment, and encouraging N1 to reciprocate by enforcing N2 judgments.

B. Rights Values

Foreign judgment enforcement also implicates rights values. These values focus on justice for particular litigants in particular cases. One rights value is *correctness*, including both substantive and procedural correctness. As Arthur von Mehren puts it, the 'principle of correctness … expresses the

[16] AF Lowenfeld, 'International Litigation and the Quest for Reasonableness: General Court on Private International Law' (1994) 245 *Recueil des Cours* 109. See also Von Mehren and Trautman (n 14) 1603–04 (noting 'interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction …'); Michaels (n 14) 2 (referring to 'transnational legal certainty' as a value underlying the enforcement of foreign judgments).

[17] Von Mehren and Trautman (n 14) 1603–04. See also Michaels (n 14) 2 ('Dutch authors, in particular Voet and Huber, developed [the principle of] comity, defined much later by the United States Supreme Court in [*Hilton v Guyot*] a decision denying recognition to a French judgment as "neither a matter of absolute obligation on the one hand nor of mere courtesy and good will … it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another …"').

concern that legal justice, as understood by the society in both substantive and procedural terms, be done'.[18] Simply put, there is value in reaching an outcome that is just and legally correct—both substantively and procedurally. N2's enforcement of an incorrect N1 judgment would be at odds with the value of correctness. For this reason, the judgment debtor may want the N2 court to subject the N1 judgment to some degree of procedural or substantive scrutiny before it is enforced, or it may wish to have the N2 court review the judgment in its entirety (*révision au fond*) to ensure a correct outcome.

Closely related to the value of correctness are *property rights*. At least in the case of money judgments, the standard enforcement measure is execution, a process whereby the judgment debtor's property is seized and sold to satisfy the judgment. If the judgment is not legally correct, then the taking of the judgment debtor's property to satisfy the judgment would not be legally justified, leading to a violation of the judgment debtor's property rights. For this reason, the judgment debtor may want the N2 court to scrutinise the N1 judgment to serve not only the intrinsically important value of correctness, but also the value of protecting the judgment debtor's property rights.

Another rights value implicated by foreign judgment enforcement is *access to justice*. Access to justice requires not only court access, but also a remedy when a person is legally entitled to one.[19] A plaintiff may be able to obtain court access in N1 to pursue a claim against a defendant. But if the N1 court issues a judgment in the plaintiff's favour, the defendant refuses to satisfy the judgment and only has assets in N2, and N2 refuses to enforce the judgment, then the plaintiff may lack a remedy altogether and thus be denied meaningful access to justice. Moreover, in some cases a plaintiff—for either legal or practical reasons—may lack access to an N2 court where the prospective judgment debtor has assets. If N2 both fails to provide court access and refuses to enforce an N1 judgment, the result may be a transnational access-to-justice gap.[20] When N2 enforces an N1 judgment, N2 helps complete the plaintiff's access to justice rights by providing a legal remedy.[21]

Governance values and rights values are not mutually exclusive. Protecting rights in particular cases can advance broader governance values, and governance values like efficiency and certainty can benefit individual

[18] Von Mehren (n 15) 20–22.

[19] CA Whytock, 'Foreign State Immunity and the Right to Court Access' (2013) 93 *Boston University Law Review* 2033; CA Whytock and CB Robertson, 'Forum Non Conveniens and the Enforcement of Foreign Judgments' (2011) 111 *Columbia Law Review* 1444, 1472.

[20] Whytock and Robertson (n 19) 1472.

[21] See XE Kramer, 'Cross-Border Enforcement and the Brussels I-Bis Reg: Towards a New Balance Between Mutual Trust and National Control Over Fundamental Rights' (2013) 60 *Netherlands International Law Review* 343, 367 ('The abolition of exequatur has … been justified by the desire to enhance access to justice and the right to an effective remedy, as guaranteed by Art 47 of the EU Charter and Arts 6 and 13 of the ECHR. … From the perspective of the judgment creditor, the interests are evidently to enforce his rights as a result of a judgment in an efficient way'.).

litigants. On the other hand, no approach to foreign judgment enforcement can simultaneously maximise all of these values.[22] Value trade-offs are therefore inevitable, and different approaches to foreign judgment enforcement will entail different trade-offs.

II. A SPECTRUM OF APPROACHES TO FOREIGN JUDGMENT ENFORCEMENT

In the absence of a global treaty on foreign judgment enforcement, there are diverse private international law approaches to foreign judgments. One way to arrange these approaches is along a spectrum indicating the extent to which they tend to favour enforcement, from a categorical always-enforce approach, to the usually-enforce approach that the US and the EU take to their respective internal judgments, to the sometimes-enforce approach that nations tend to take to external judgments, to a categorical never-enforce approach. These approaches strike different trade-offs among various governance values and rights values.

A. Always Enforce

One approach to foreign judgments is *always enforce*. This approach scores high on governance values. By enforcing the N1 judgment, N2 makes duplicative litigation unnecessary, brings the parties' dispute to a close, and gives respect to N1's legal system, thus furthering the values of efficiency, repose, certainty and comity. The always-enforce approach has mixed scores on rights values. On the one hand, it promotes access to justice by ensuring that a plaintiff can obtain a remedy based on a foreign judgment. On the other hand, it does so without regard to correctness and property rights, and therefore scores low on those values.

B. Usually Enforce: Full Faith and Credit and Internal US Judgments

A more nuanced approach is to *usually enforce* foreign judgments. An example is the US full-faith-and-credit approach. The full-faith-and-

[22] See Von Mehren (n 15) 22 ('Embracing one [principle] to the complete exclusion of the other would be intolerable. Assigning an absolute value to correctness would create an enormous social and economic burden, unduly reward the disputatious, and undermine the security of transactions and relations that is essential if economic and social life are to go forward. On the other hand, giving full scope to the principle of repose would require that full and absolute finality be given to every determination made by an adjudicator of first instance. But … a system of justice that, in the name of repose, denied in every case a second chance would be perceived as fundamentally unjust. … [A] tension persists between the two principles and no solution can ever be entirely stable nor demonstrably correct'.).

credit clause—contained in Article IV, Section 1 of the US Constitution—provides that

> [f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

A federal statute—28 USC § 1738—implements the full-faith-and-credit clause by requiring that all courts in the United States, including both state and federal courts, give full faith and credit to the judicial proceedings of US states.[23]

Full faith and credit is sometimes called an 'iron law' because it can require one state (S2) to enforce another state's (S1) judgment even if the judgment is based on a mistake of fact or law.[24] If the judgment debtor wishes to challenge the S1 judgment on the merits, it must do so in S1's courts—for example, by appealing to an S1 appellate court—but it cannot do so in S2.[25] There are narrow exceptions to the general rule. Full faith and credit does not require S2 to enforce an S1 judgment if the S1 judgment was obtained by fraud or if the S1 court did not have jurisdiction. However, if the S1 court heard the issue of fraud or jurisdiction and decided against the judgment debtor, the S2 court must give full faith and credit to that decision.[26]

The US Supreme Court has stated that there is no 'roving public policy exception' to full faith and credit.[27] According to the Court, '[t]he full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation … [W]e are aware of [no] considerations of local policy or law which could rightly be deemed to impair the force and effect which the full faith and credit clause … require[s] to be given to [a money] judgment outside the state of its rendition'.[28] But 'the issue will not stay buried; like the mythical Phoenix, the notion that there is a "public policy" exception to the Iron Law of Full Faith and Credit keeps trying to rise from the ashes'.[29] As one expert opines, however, 'the Supreme Court

[23] See 28 USC 1738 ('The … judicial proceedings of any court of any … State, Territory or Possession … shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken'.).

[24] WM Richman, WL Reynolds and CA Whytock, *Understanding Conflict of Laws* 4th edn (New Providence, LexisNexis, 2013) 388.

[25] ibid.

[26] ibid, 393–94.

[27] *Baker v General Motors* 522 US 222, 233–34 (1998). See, eg, Restatement (Second) of Conflict of Laws § 103 ('A judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with important interests of the sister State'.); *Reading & Bates v Baker Energy Resources* 976 SW 2d 702 (Tex App 1998); *Blackwell v Haslam*, 2013 WL 3379364 (Tenn App 2013).

[28] *Baker v General Motors* (n 27) 233–34 (citations omitted).

[29] WL Reynolds and WM Richman, *The Full Faith and Credit Clause* (Westport, Praeger, 2005) 102.

has not endorsed [a public policy exception] and its precedents seem to negate it'.[30]

The US full-faith-and-credit approach is not far from the always-enforce ideal type, and thus scores high on governance values, as well as on the rights value of access to justice (albeit not as high as the always-enforce approach). By allowing for the possibility of non-enforcement in S2 on the ground of fraud or lack of S1 jurisdiction, the US full-faith-and-credit approach falls short of maximising the governance values of efficiency, repose and certainty. Because full faith and credit applies to the S1 court's decisions on its own jurisdiction and on claims of fraud, however, the value of comity nevertheless should ordinarily be protected. To a slightly greater extent than the always-enforce approach, the US full-faith-and-credit approach furthers the rights values of correctness and property rights by providing some protection against enforcement when the S1 judgment was a result of fraud or the S1 court lacked jurisdiction. Any trade-off against access to justice due to the fraud exception would seem to be an equitable one in cases where it is the judgment creditor who committed the fraud.

C. Usually Enforce: The Brussels I Regulation and Internal EU Judgments

The private international law rules governing the enforcement of a judgment of a court of one EU member (M1) in another EU member (M2) are contained in the recently recast Brussels I Regulation.[31] These rules lie farther from the always-enforce end of the spectrum than the rules of US full faith and credit, but, as explained below, they are getting closer. Under the Brussels I Regulation, there is a general rule requiring enforcement of an M1 judgment in M2, unless one of the grounds for refusing enforcement listed in Article 45(1) is found to exist:[32]

> On the application of any interested party, the recognition of a judgment shall be refused:
>
> (a) if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed;
> (b) where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to

[30] SC Symeonides, 'Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey' (2014) 62 *American Journal of Comparative Law* 223, 319.

[31] Reg No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1 (hereinafter Brussels I Reg).

[32] See Brussels I Reg, Art 46 ('On the application of the person against whom enforcement is sought, the enforcement of a judgment shall be refused where one of the grounds referred to in Article 45 is found to exist'.).

arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;

(c) if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed;

(d) if the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; or

(e) if the judgment conflicts with: (i) [the special jurisdictional provisions of] Sections 3, 4 or 5 of Chapter II where the policyholder, the insured, a beneficiary of the insurance contract, the injured party, the consumer or the employee was the defendant;[33] or (ii) [the exclusive jurisdiction provisions of] Section 6 of Chapter II.[34]

Overall, the Brussels I Regulation—like the US full-faith-and-credit approach—scores high on the governance values of efficiency, repose, certainty and comity. In one respect, the Brussels I Regulation may score even higher on these values because lack of personal jurisdiction is not a ground for refusing enforcement (except pursuant to Article 45(1)(e), where the judgment conflicts with the Brussels I Regulation's special jurisdictional provisions designed to protect weak parties—but even then, Article 45(2) provides that M2 shall be bound by the findings of fact on which M1 based its jurisdiction).[35] However, this difference should not be overstated because, as noted above, under the US law of full faith and credit, S2 must give full faith and credit to an S1 court's jurisdictional rulings. The most salient difference in terms of governance values is the Brussels I Regulation's public policy exception, which entails a trade-off against the values of efficiency, repose, certainty and comity. However, because the public policy ground is very narrow, this difference, too, should not be overstated.[36]

[33] These provisions are intended to protect parties assumed to be relatively weak. See M Bogdan, *Concise Introduction to EU Private International Law* 2nd edn (Groningen, Europa Law Publishing, 2012) 53 (noting that the equivalent special jurisdictional provisions in the Brussels I Reg are intended 'to protect the weaker party (the person claiming insurance benefits, the consumer, the employee) against being sued in other Member States than his own, while at the same time giving the same weaker party the option to sue in his own country even when the defendant is domiciled in another Member State').

[34] For example, 'in proceedings which have as their object rights *in rem* in immovable property … the courts of the Member State in which the property is situated' has exclusive jurisdiction. Brussels I Reg, Art 24(1).

[35] See P Hay, 'The Development of the Public Policy Barrier to Judgment Recognition Within the European Community' (2007) 6 *The European Legal Forum* 289, 290 (noting that the Brussels I Reg's recognition command is in this respect *stronger* than US full faith and credit 'because it is combined with jurisdictional bases that must be observed by rendering courts').

[36] See P Stone, *EU Private International Law* 2nd edn (Cheltenham, Edward Elgar Publishing, 2010) 239 (noting that the ECJ has 'consistently emphasised' that the public policy exception 'should operate only in exceptional cases').

Similar to US full faith and credit, the same features that make the Brussels I Regulation score high on governance values make it score lower on the rights values of correctness and property rights, and relatively high on access to justice.[37] The absence of a fraud ground and a general jurisdictional ground for refusal of enforcement might suggest an even lower score on correctness and property rights (and a higher score on access to justice) than US full faith and credit. The public policy exception, however, may allow non-enforcement in a limited number of exceptional instances of fraud, particularly if the fraud is found to have precluded a fair trial,[38] and in addition to the limited special jurisdictional grounds for refusal noted above, there are protections for the right to adequate notice in Article 45(1)(b) applicable to default judgments. More broadly, the public policy exception can be understood as providing a 'safety net' that furthers the values of correctness and property rights by allowing M2 to refuse enforcement of an M1 judgment where M1 failed to provide procedural rights—including those fair trial rights assured by Article 6(1) of the European Convention on Human Rights[39]—which would go beyond the grounds for refusal expressly available under the US law of full faith and credit. These doctrinal nuances defy measurement. Comparative empirical analysis of actual court decisions in US full-faith-and-credit and EU Brussels I Regulation enforcement cases would ultimately be necessary to evaluate which approach scores higher on various governance values and rights values.

There is, however, a trend in the EU's internal approach to foreign judgments in a direction that reflects a further emphasis on the governance values of efficiency, repose, certainty and comity and the rights value of access

[37] Perhaps the EU emphasis on these governance values at the expense of the rights value of correctness was most clearly expressed in the ECJ's judgment in *Turner*, a jurisdiction case, in which it ruled that a court of one EU member (in this case the United Kingdom) is prohibited from issuing an antisuit injunction barring a party from pursuing proceedings in the same case in a court of another EU member (in this case Spain) 'even where that party is acting in bad faith with a view to frustrating the existing proceedings': Case 159/02 *Turner* [2004] ECR I-3565, para 31. One US commentator argues that the ECJ's approach in *Turner* 'elevates a quest for efficiency over a quest for equity'. R Brand, 'Hague Academy of International Law' (2011) 358 *Recueil des Cours* 9, 177. See also Case C-116/02 *Gasser* [2003] ECR I-14693, para 54 (requiring Austria to dismiss a case under the first-court-seized rule where suit was first filed in Italy, despite the parties' exclusive choice-of-court agreement selecting an Austrian court). Art 31 of the recast Brussels I Reg changes the rule announced in *Gasser* by prioritising courts with exclusive jurisdiction under a choice-of-court agreement.

[38] CMV Clarkson and J Hill, *The Conflict of Laws* 4th edn (Oxford, Oxford University Press, 2011) 197. For an analysis of EU Member Court decisions on the applicability of the Brussels I Reg's public policy exception in cases where fraud is alleged, see Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, *Report on the Application of Reg Brussels I in the Member States* (Sep 2007, Study JLS/C4/2005/03), available at ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf.

[39] XE Kramer, 'Cross-border Enforcement in the EU: Mutual Trust versus Fair Trial? Towards Principles of European Civil Procedure' (2011) 2 *International Journal of Procedural Law* 202, 219 ('A safety net for the violation of fair trial principles is provided [by the Brussels I Reg] at the enforcement level through the ground of refusal relating to public policy'.).

to justice: EU law has made it progressively easier to enforce EU Member judgments in other EU Members. Most notably, one of the highlights of the recast Brussels I Regulation is the elimination of *exequatur*—that is, a declaration of enforceability by M2—as a prerequisite for enforcement of an M1 judgment in M2. In certain specialised areas of EU law, *exequatur* had already been abolished.[40] But implementing this change for judgments in civil and commercial matters more generally is an important step toward facilitating the enforcement of foreign judgments within the EU—albeit arguably at the expense of the values of correctness and property rights. As Peter Stone argues, '[t]he effect of the change—will usually be to reduce from an already low level the protection which a defendant can obtain from the courts of his own country'.[41] Similarly, Andrew Dickinson argues that *exequatur* provides significant protection against fraudulent enforcement proceedings.[42] Moreover, according to a recent study, the jurisprudence of the European Court of Human Rights 'clearly recognizes the value of exequatur or similar proceedings for the protection of human rights of the judgment debtor'.[43] But others note that exequatur rarely resulted in non-enforcement anyway, and argue that in any event the ability of a judgment debtor to apply for refusal of enforcement and appeal a decision to deny that application renders the elimination of exequatur inconsequential from a rights perspective.[44] For example, Peter Hay argues that 'abolition of the exequatur streamlines the recognition process, but … does not change it much substantively'.[45] Similarly, Samuel Baumgartner argues that 'the abolition of the declaration of enforceability sounds like a bolder move than it really is'.[46]

[40] See European Commission, 'Impact assessment accompanying the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)' SEC(2010) 1547 final, 15 (hereinafter Impact Assessment) (noting abolition of *exequatur* in Reg 805/2004 of 21 April 2004 establishing a European enforcement order for uncontested claims [2004] OJ L143/15, Reg 1896/2006 of 12 December 2006 creating a European Order for Payment Procedure [2006] OJ L399/1, Reg 861/2007 of 11 July 2007 creating a European Small Claims Procedure [2007] OJ L199/1, and Reg 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1).

[41] Stone (n 36) 265.

[42] A Dickinson, 'Surveying the Proposed Brussels I bis Reg—Solid Foundations but Renovation Needed' (2010) 12 *Yearbook of Private International Law* 247, 267.

[43] T Schilling, 'The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights' (January 2012) 4, available at works.bepress.com/theodor_schilling/9.

[44] See B Hess, *Note on the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* (Brussels, European Parliament, 2011), available at www.europarl.europa.eu/RegData/etudes/note/join/2011/453201/IPOL-JURI_NT(2011)453201_EN.pdf.

[45] P Hay, 'Notes on the European Union's Brussels-I "Recast" Regulation: An American Perspective, European Legal Forum' (2013) *The European Legal Forum* 1, 6.

[46] SP Baumgartner, 'Changes in the European Union's Regime of Recognizing and Enforcing Foreign Judgments and Transnational Litigation in the United States' (2012) 18 *Southwestern Journal of International Law* 567.

But whether or not this move significantly undermines the rights values of correctness and property rights, it indicates a stronger EU emphasis than before on the governance values of efficiency, repose, certainty and comity. In fact, these governance values are expressed in the Brussels I Regulation itself. As its preamble notes, it is essential to eliminate '[c]ertain differences between national rules governing jurisdiction and recognition of judgments [that] hamper the sound operation of the internal market' and to put in place rules 'to ensure rapid and simple recognition and enforcement of judgments',[47] in furtherance of 'the objective of free circulation of judgments in civil and commercial matters'.[48] Regarding *exequatur* specifically, the preamble explains that 'the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed'.[49]

D. Sometimes Enforce: The US Approach to External Judgments

US full-faith-and-credit applies only to judgments from within the US and the Brussels I Regulation applies only to judgments from within the EU. In that sense, they both deal with 'internal' judgments. Private international law regarding 'external' judgments is generally farther from the always-enforce end of the spectrum than private international law regarding internal judgments. Some nations only enforce an external N1 foreign judgment if a treaty with N1 requires them to do so, and some only enforce based on reciprocity—that is, if N1 would enforce an N2 judgment under the same circumstances.[50] In other nations, including the United States, private international law takes a more nuanced *sometimes enforce* approach to external foreign judgments by combining a general rule in favour of enforcement with a list of grounds for refusal.[51]

In the US, state law (not federal law) generally provides the rules governing the enforcement of external foreign judgments. For many years, the most common approach among US states was legislation based on the Uniform Foreign Money-Judgments Recognition Act, which was approved by the National Conference of Commissioners on Uniform State Laws (Uniform Law Commission) in 1962 (1962 Act). The 1962 Act has three mandatory and six discretionary grounds for refusal:

> (a) A foreign judgment is not conclusive if
>
> (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

[47] Preamble 4 of Brussels I Reg.
[48] ibid, preamble 6.
[49] Above n 47, recital 26.
[50] Lookofsky and Hertz (n 14) 137–40.
[51] R Brand, 'Hague Academy of International Law' (2011) 358 *Recueil des Cours* 9, 103.

(2) the foreign court did not have personal jurisdiction over the defendant; or
(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if
(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
(2) the judgment was obtained by fraud;
(3) the … [claim for relief] on which the judgment is based is repugnant to the public policy of this state;
(4) the judgment conflicts with another final and conclusive judgment;
(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.[52]

By including a wide range of grounds for refusing enforcement, the 1962 Act scores lower on the governance values of efficiency, repose, certainty and comity and on the rights value of access to justice than either the US full-faith-and-credit or the EU Brussels I Regulation approaches to internal judgments. In terms of the values of correctness and property, the 1962 Act scores relatively high by requiring or allowing an N2 court in the US to refuse enforcement when it finds one of the enumerated procedural defects or fraud.

In 2005, however, the Uniform Law Commission adopted a new uniform act to replace the 1962 Act: the Uniform Foreign-Country Money Judgments Recognition Act of 2005 (2005 Act). The 2005 Act adds two discretionary grounds for refusal not contained in the 1962 Act, providing that a court need not recognise a foreign-country judgment if:

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.[53]

This change invites US judges to more closely scrutinise the specific foreign proceedings leading to a judgment. Traditionally, the failure of due

[52] See ss 3 and 4 of Uniform Foreign Money-Judgments Recognition Act of 1962 (1962). See ss 481 and 482 of the Restatement (Third) of Foreign Relations Law of the United States attempts to restate the common law of foreign judgment enforcement, and it is for the most part consistent with the 1962 Act.

[53] See s 4(c) of 2005 Act. Moreover, in 2005, the American Law Institute adopted a proposed federal statute on the recognition and enforcement of foreign judgments that included a mandatory version of the 2005 Act's judicial integrity exception. See American Law Institute, 'Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute' s 5(a)(ii) (2006) (barring recognition or enforcement if 'the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question') (hereinafter ALI Proposed Statute).

process in a particular case has not been sufficient to refuse enforcement.[54] Nevertheless, a growing number of US States are enacting legislation based on the 2005 Act, and today there are already more 2005 Act States than 1962 Act States.[55] Thus, the 2005 Act and its new case-specific grounds for refusal are rapidly becoming the norm in US law.

The shift toward new case-specific grounds for non-enforcement is a shift towards a greater emphasis on the rights values of correctness and property. On the other hand, this trend cuts against the governance values of efficiency, repose, certainty and comity. Commentators in the US are not unaware of these costs. For example, the American Law Institute rejected a case-specific due process exception in its proposed federal statute on foreign judgments, explaining that '[s]uch a detailed inquiry into the foreign judgment is inconsistent with the pro-enforcement philosophy of [the 1962] Act'.[56] Similarly, the US Court of Appeals for the Seventh Circuit has expressed the concern that a case-specific approach would be 'inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions' and 'would in effect [allow] a further appeal on the merits … thus converting every successful multinational suit for damages into two suits …'.[57] Concerns from an access to justice perspective have also been raised.[58] But these concerns ultimately have not carried the day, as suggested by the increasingly widespread adoption of the 2005 Act by US States.

[54] See s 4 of 1962 Act (providing systemic but not case-specific due process exception). However, based on a review of US court decisions, one scholar has concluded that even when courts apply the systemic due process standard, they in fact tend to consider case-specific factors. See PB Stephan, 'Unjust Legal Systems and the Enforcement of Foreign Judgments' in PB Stephan (ed), *Foreign Court Judgments and the United States Legal System* (Leiden, Brill, 2014).

[55] The US Virgin Islands and 15 states have legislation based on the 1962 Act: Alaska, Connecticut, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas and Virginia. However, two of these states—Massachusetts and Virginia—have introduced pending legislation based on the 2005 Act. See www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act (last visited 4 March 2014). The District of Columbia and 18 states have adopted legislation based on the 2005 Act: Alabama, California, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Washington. In addition, legislation based on the 2005 Act has been introduced in Massachusetts, Mississippi and Virginia. See www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act (last visited 4 March 2014).

[56] See s 5, comment c, of ALI Proposed Statute.

[57] *Society of Lloyd's v Ashenden*, 233 F 3d 473, 477 (7th Cir 2000).

[58] CA Whytock, 'Some Cautionary Notes on the "Chevronization" of Transnational Litigation' (2013) 1 *Stanford Journal of Complex Litigation* 467, 479; Whytock and Robertson (n 19).

E. Never Enforce

Finally, as a point of comparison, it is helpful to consider a categorical *never enforce* approach. By preventing enforcement of an N1 judgment in N2, this approach scores low on the governance values of efficiency, repose, certainty and comity. It has mixed scores on rights values, however. It is agnostic as to the value of correctness in the sense that it refuses enforcement without any inquiry into the judgment's actual substantive or procedural correctness. It scores high on the value of property rights because it categorically protects the judgment debtor's N2 property from being used to satisfy the N1 judgment (albeit in an unprincipled way that is not linked to correctness). And it scores low on the value of access to justice by preventing a successful plaintiff from obtaining a remedy in N2 based on the N1 judgment, even in situations where the judgment debtor's only assets are in N2.

III. BROADER IMPLICATIONS: DESIGN, CAUSES AND CONSEQUENCES

The analysis presented above has implications for the design of private international law rules on foreign judgment enforcement. It also raises questions about the factors that influence how these rules evolve and about the impact of various approaches to foreign judgment enforcement on the market for dispute resolution services.

A. Fundamental Design Principles

As demonstrated above, different approaches to foreign judgment enforcement reflect different trade-offs between different enforcement values. These trade-offs are inevitable because governance values and rights values cannot be simultaneously maximised. For example, as this chapter's analysis shows, scores on the values of efficiency, repose, certainty, comity and access to justice tend to be inversely correlated with scores on the values of correctness and property rights. This means that in any effort to design or reform private international law rules, a single-minded focus on a particular subset of these values is likely to result in rules that have unintended negative consequences for other values. This suggests two fundamental principles of design for rules governing foreign judgments:

— First, the implications of the rules for all governance and rights values should be thoroughly analysed before settling on a given approach.
— Second, the inevitable trade-offs among these values should be made explicitly and transparently by lawmakers.

B. Explaining the Evolution of Foreign Judgment Enforcement

Stepping back from design principles, what factors might explain—as a matter of positive theory—how the law of foreign judgments evolves from the never-enforce end of the spectrum toward the always-enforce end of the spectrum (or vice versa)?

— First, the evolution of private international law rules governing foreign judgments is likely to be strongly influenced by cross-national patterns of procedural and substantive legal convergence. Specifically, other things being equal, as cross-national procedural and substantive convergence increases, procedural and substantive grounds for refusal are likely to decrease. This is because procedural grounds for non-enforcement are less necessary if the nations involved have similar procedural rules, and substantive grounds for non-enforcement—such as public policy—are less important if those nations have similar substantive law and policy.

It would seem that there is more procedural and substantive convergence among US States than among EU members, and more convergence in each of these cases than among nations globally. Therefore, it is not surprising that the US internal full-faith-and-credit approach is closest to the always-enforce approach, with the EU's internal Brussels I Regulation approach slightly farther away from it, and the US approach to external foreign judgments still farther away. This may also help explain the rejection of the European Commission's proposal to eliminate the public policy exception in the recast Brussels I Regulation.[59]

— Second, the evolution of private international law rules governing foreign judgments is likely to be strongly influenced by levels of mutual trust among nations. Specifically, other things being equal, as mutual trust increases, grounds for refusal are likely to decrease.

In the EU, the concept of mutual trust has played an animating role in private international law since at least the early 1990s. In *Sonntag v Waidmann*,

[59] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)' COM(2010) 748 final, (hereinafter Brussels I Recast Proposal). The proposal did add, however, a limited right for a judgment debtor to 'apply for a refusal of recognition or enforcement of a judgment where such recognition or enforcement would not be permitted by the fundamental principles underlying the right to a fair trial' (Art 46) and it preserved the public policy ground for certain specified defamation and collective redress claims (Art 37). See Kramer (n 21) 365 (noting that the proposed removal of the public policy exception was 'extensively debated' and arguing that '[t]he protection of public policy is to be regarded as a matter of the rule of law and has always been regarded as a necessary safety valve in private international law').

a 1993 case before the European Court of Justice, Advocate General Darmon stated in his opinion that

> [t]he principle of the recognition of judgments is based on the Member States' mutual trust in their respective legal systems and judicial institutions. This trust allows the Member States to waive their internal rules on the recognition and enforcement of foreign judgments.[60]

The recast Brussels I Regulation explicitly links the abolition of exequatur to mutual trust:

> Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. … As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed.[61]

Conversely, where there is less mutual trust, more grounds for refusal are likely. In the US, both of the new case-specific exceptions added by the 2005 Act were justified in terms of a lack of 'mutual trust' even though the exact words are not used. As the Study Report for the 2005 Act pointed out regarding its new case-specific due process exception, '[t]here is less expectation that foreign courts will follow procedures comporting with U.S. notions of due process and jurisdiction or that they will apply substantively tolerable laws, and there may be suspicions of unfairness or fraud'.[62] The Reporter's Notes to a draft of the 2005 Act also noted support for the 2005 Act's case-specific judicial integrity exception based on the perception that 'bribery and other forms of judicial misconduct can be a real issue with regard to certain foreign country judgments'.[63] The federal statute

[60] Opinion of Advocate General Darmon in Case C-172/91 *Sonntag v Waidmann* [1993] ECR I-1963, paras 71–72.

[61] Recital 26 of Brussels I Recast. X Kramer, 'Procedure Matters: Construction and Deconstructivism in European Civil Procedure' (2012) 33 *Erasmus Law Lectures* 18 ('Based on this pillar [mutual trust], the European Commission wishes to abolish the permission of courts for the enforcement of judgments rendered in another EU Member State. The idea is that if there is full mutual trust, this permission (called *exequatur*) is no longer required').

[62] K Patchel, Study Report on Possible Amendment of the Uniform Foreign Money-Judgments Recognition Act, 25 June 2003, 26, available at www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufmjra_apr04_studyrpt.pdf.

[63] Discussion Draft of 2005 Act, October 2004, 7. The American Law Institute's commentary on the corruption ground for non-enforcement in its proposed federal statute on foreign judgments also expresses distrust, noting 'concerns about corruption in the judiciaries of certain countries'. The drafters acknowledge that '[t]he defense of possible corruption in the rendering court is one that has not traditionally been an explicit ground for nonrecognition or nonenforcement by courts in the United States'. But they explain that 'concerns about corruption in the judiciaries of certain countries and the effect of corruption in the particular case led to inclusion of this additional defense'.

on the recognition and enforcement of foreign judgments proposed by the American Law Institute in 2005 justified its mandatory judicial integrity exception in similar terms:

> The defense of possible corruption in the rendering court is one that has not traditionally been an explicit ground for nonrecognition or nonenforcement by courts in the United States. However, concerns about corruption in the judiciaries of certain countries and the effect of corruption in the particular case led to inclusion of this additional defense.[64]

It is noteworthy that the European Commission has also used lack of mutual trust as a reason for not extending the Brussels I regime to non-EU members, raising concerns that 'companies might not always get a fair trial and an adequate protection of their rights before the courts of a third State' and that '[s]uch problems can notably arise in countries where the judiciary cannot be considered to be independent or is riven by corruption'.[65] Similarly, in his opinion in *Owusu v NB Jackson*, Advocate General Léger explained that the EU established the simplified Brussels Convention mechanism for recognition and enforcement

> in a specific context characterised by mutual trust between the Member States of the Community regarding their legal systems and their judicial institutions. However, the same situation does not necessarily prevail in relations between Member States and non-Contracting States. That is why this mechanism of the Convention applies only to judgments given by courts of a Member State in the context of their recognition and enforcement in another Member State.[66]

These two conjectures imply that further substantive and procedural convergence between EU members on the one hand and US states on the other hand, accompanied by measures to build an area of transatlantic mutual trust in the administration of justice, could improve prospects for the ratification and implementation of the Hague Convention on Choice of Court Agreements and, perhaps eventually, on a more generally applicable framework for the transatlantic enforcement of foreign judgments.

C. Enforcement of Judgments and the Market for Dispute Resolution Services

Yet another consideration is the effect of different approaches to foreign judgment enforcement on the market for dispute resolution in civil and commercial matters. This market has two dimensions: an international

[64] ALI Proposed Statute (n 53) 60 (comment d on s 5).
[65] Impact Assessment (n 40) 20.
[66] Opinion of Advocate General Léger in Case C-281/02 *Owusu v NB Jackson and others* [2005] ECR I-1383, para 144.

dimension, which involves competition among nations, and a public–private dimension, which involves competition between national courts and arbitration. The law of foreign judgments affects both dimensions of competition.

— First, other things being equal, rules favouring enforcement of judgments among a group of nations is likely to increase competition among the courts of those nations.

Absent such rules, a plaintiff will have a strong incentive to sue in the courts of a nation (N1) where the defendant has assets, even if the courts of another nation (N2) are more efficient or otherwise more appropriate. This is because if the plaintiff sues in N2 and obtains a favourable judgment there, it may not be possible to enforce that judgment in N1. In contrast, with rules favouring the enforcement of N2 judgments in N1 (and vice versa), the plaintiff's choice of court will not depend so heavily on concerns about enforcement, and competition between N1 and N2 courts will instead be based primarily on their other respective advantages and disadvantages as providers of dispute resolution services.

Of course other considerations (especially jurisdictional rules) can also affect this competition. But holding those considerations constant, the implication is that competition among national courts would be greater among US states and among EU members where rules favour enforcement of internal judgments than between courts in the US and courts in the EU. A party may prefer an EU member's courts, but sue in the US because that is where the defendant's assets lie (or vice versa). This distorts the international dimension of competition for dispute resolution services in the transatlantic area. A further implication is that an EU–US judgment enforcement agreement or a multinational agreement with enforcement provisions (such as the Hague Convention on Choice of Court Agreements) could enhance the international dimension of competitiveness of the market for dispute resolution services in the transatlantic area.

— Second, other things being equal, rules favouring enforcement of judgments among a group of nations is likely to increase competition between the courts of those nations and arbitration.

Private international law rules governing the enforcement of foreign judgments has an important impact on this public–private dimension of the market for dispute resolution services. One of the major advantages of arbitration as a method of transnational dispute resolution is that most nations tend to enforce foreign arbitral awards, subject to narrow and exclusive grounds for refusal, in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and similar regional arrangements. This gives parties an incentive to select arbitration even if they otherwise have strong reasons to prefer litigation in

a national court (such as a desire for an appellate review process). The lack of an analogous treaty regime for the enforcement of foreign judgments distorts this dimension of the market for dispute resolution services.

If, for example, the Hague Convention on Choice of Court Agreements enters into effect for a significant number of nations, enforcement issues will no longer tip the scale in favour of arbitration to the extent they do now.[67] And even now, where litigation in an EU member's courts is at least as attractive to a claimant as arbitration, the Brussels I Regulation's rules on enforcement should significantly level the playing field when the respondent has assets in at least one EU member's territory, and the same would seem to be the case internally to the US full-faith-and-credit regime.

None of the foregoing is meant to suggest that unbridled competition for dispute resolution services is necessarily desirable. The point is simply that when designing an approach to foreign judgment enforcement, private international law-makers should be attentive to the implications of their rules for both the international and public–private dimensions of the market for dispute resolution services. Further interdisciplinary study of the implications of different approaches to foreign judgment enforcement for governance values and rights values, and of the causes and consequences of variation across different approaches, promises to provide important foundations for understanding and reforming private international law in the transatlantic area and beyond.

[67] Brand (n 37) 149–51.