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Waiving Goodbye to Personal Jurisdiction Defenses: Why United State Courts Should Maintain a Rebuttable Presumption of Preclusion and Waiver within the Context of International Litigation

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WAIVING GOODBYE TO PERSONAL JURISDICTION DEFENSES: WHY UNITED STATES COURTS SHOULD MAINTAIN A REBUTTABLE PRESUMPTION OF PRECLUSION AND WAIVER WITHIN THE CONTEXT OF INTERNATIONAL LITIGATION

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A British citizen wins a judgment in Great Britain against a U.S. citizen. The British citizen then seeks to collect on the judgment. To do so, he must bring a claim in the United States for recognition and enforcement of his judgment—but this is more complicated than it appears.

The foreign plaintiff must make a strategic decision regarding the state in which to bring his claim. New York, for example, will seek to give his judgment full recognition and enforcement. Another state, however, might

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1. See Robert C. Casad, Issue Preclusion and Foreign Country Judgments: Whose Law?, 70 IOWA L. REV. 53, 58 (1984) (“As an act of government[, a judgment’s] effects are limited to the territory of the sovereign whose court rendered the judgment, unless some other state is bound by treaty to give the judgment effect in its territory, or unless some other state is willing, for reasons of its own, to give the judgment effect.”). Thus, for a foreign judgment to be enforceable, a defendant’s home court must be willing to recognize and enforce the judgment. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1009–10 (4th ed. 2007).

Recognition of a judgment and enforcement of a judgment are different concepts. Recognition occurs “when [a judgment] is given the same effect that it has in the state where it was rendered with respect to the parties, the subject matter of the action and the issues involved.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92 (1971). Enforcement occurs “when, in addition to being recognized, a party is given the affirmative relief to which the judgment entitles him.” Id. Thus, “recognition of a judgment is a condition precedent to its enforcement.” Id. (emphasis added).


3. See Johnston v. Compagnie Generale Transatlantique, 152 N.E. 121, 122 (N.Y. 1926) (“It is the settled law of this state that a foreign judgment is conclusive upon the merits. It can be impeached only by proof that the court in which it was rendered had not jurisdiction of the subject matter of the action or of the person of the defendant, or that it was procured by means of fraud . . . . The presumption is that the rights and liability of the defendant have been determined according to the law and procedure of the country where the judgment was rendered.” (quoting Dunstan v. Higgins, 33 N.E. 729, 730 (N.Y. 1893))).
decide that before recognizing and enforcing the plaintiff's judgment, it will first inquire into the procedures that the foreign court used in rendering its decision.\footnote{See, e.g., Agnitsch v. Process Specialists, Inc., 318 F. Supp. 2d 812, 818 (S.D. Iowa 2004) (examining the sufficiency of the foreign court's procedure in a case originating in Malaysia).} The state court may even allow the defendant to rechallenge the foreign court's initial jurisdiction over him rather than preclude the defendant from disputing the conclusive foreign judgment.\footnote{See, e.g., id.} Therefore, depending on the state in which the foreign citizen brings his claim for recognition and enforcement, he may not be entitled to his award despite the fact that he has won in a court of competent jurisdiction.\footnote{Compare Johnston, 152 N.E. at 123 (holding that a French judgment should be recognized and enforced because "[t]he principles of comity should give conclusiveness to such a judgment"), with Agnitsch, 318 F. Supp. 2d at 814, 821 (inquiring into a foreign court's basis for personal jurisdiction, despite the fact that the United States defendant submitted to the jurisdiction of the foreign appellate court when the defendant filed an appeal based on the merits rather than merely appealing the jurisdictional question).} This is the predicament of preclusion in foreign litigation.

Guiding the recognition and enforcement of foreign judgments is the principle of federalism requiring that any area not specifically preempted by congressional legislation is left to the states' control.\footnote{See U.S. CONST. amend. X; see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 326–27 (1819); THE FEDERALIST NO. 45 (James Madison). Although federalism helps define the boundaries between state and federal power, it can create problems when states are left to govern areas of the law that affect national interests. Cf. Donald H. Regan, How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez, 94 MICH. L. REV. 554, 571 (1995) (The article asserts that federal intervention is justified in cases involving "an interest belonging to the nation as a whole, as a nation. Obvious examples, drawn from the sphere of foreign affairs, would be national security and access to international trading opportunities on favorable terms."). Another example would be the recognition and enforcement of foreign judgments. See BORN & RUTLEDGE, supra note 1, at 1012.} Because foreign judgments are not governed by congressional legislation, they have been recognized and enforced by the states through the principle of international comity, which involves the mutual recognition of judgments between nations.\footnote{BLACK'S LAW DICTIONARY 284 (8th ed. 2004) (defining "comity" as "[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving . . . mutual recognition of legislative, executive, and judicial acts"); see also Hilton v. Guyot, 159 U.S. 113, 163–64 (1895); BORN & RUTLEDGE, supra note 1, at 1013. Comity is often intertwined with the idea of reciprocity, although reciprocity is rarely a precondition to the United States grant of comity. See Hunt v. BP Exploration Co., 492 F. Supp. 885, 899 (N.D. Tex. 1980) ("There is little justification for judicial imposition of a reciprocity requirement. . . . [R]equiring reciprocity would arbitrarily penalize 'private individuals for positions taken by foreign governments and . . . such a rule has little if any constructive effect, but tends instead to a general breakdown of recognition practice.'" (quoting Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 HARV. L. REV. 1601, 1661 (1968)); see also Bank of Montreal v. Kough, 612 F.2d 467, 471–72 (9th Cir. 1980) ("The difficulty with appellant's argument is that the section of the Uniform
Waiving Goodbye to Personal Jurisdiction Defenses

One exception, however, to recognition and enforcement through the principle of comity occurs in the context of the personal jurisdiction defense.9

[Foreign Money-Judgments Recognition] Act specifically dealing with the circumstances where recognition should or may be denied... makes no mention of reciprocity, and we find nothing in the Act which authorizes us to read such a prerequisite into the statutory scheme by implication." (citation omitted)). But see Hilton, 159 U.S. at 228 ("In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.").

Compare the recognition and enforcement of foreign judgments with that of domestic judgments. The recognition and enforcement of judgments of one state, by its sister states in the Union, is governed by the Full Faith and Credit Clause of the United States Constitution. U.S. CONST. art. IV, § 1; see also BORN & RUTLEDGE, supra note 1, at 1010. The Full Faith and Credit Clause has been implemented by statute. 28 U.S.C. § 1738 (2000).

Conversely, the Full Faith and Credit Clause does not apply to the recognition and enforcement of foreign judgments. See Van Den Biggelaar v. Wagner, 978 F. Supp. 848, 857 & n.9 (N.D. Ind. 1997) (distinguishing the recognition of foreign judgments through the principle of comity from the recognition of sister state judgments through the Full Faith and Credit Clause). Therefore, mechanisms such as comity are necessary to ensure the recognition and enforcement of foreign judgments. See id. at 857.

9. See infra note 41 for an example of the personal jurisdiction exception to the recognition and enforcement of foreign judgments. Personal jurisdiction is also known as "in personam" jurisdiction. See Tracy O. Appleton, Note, The Line Between Liberty and Union: Exercising Personal Jurisdiction over Officials from Other States, 107 COLUM. L. REV. 1944, 1948 (2007). The concept of personal jurisdiction refers to "[a] court's power to bring a person into its adjudicative process..." BLACK'S LAW DICTIONARY, supra note 8, at 870. Personal jurisdiction can be obtained through the defendant's: (1) consent to the jurisdiction; (2) presence in the jurisdiction; or (3) "minimum contacts" with the jurisdiction. See ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS: TERRITORIAL BASIS AND PROCESS LIMITATIONS ON JURISDICTION OF STATE AND FEDERAL COURTS §§ 1-5 (3d ed. 1998); see also Burnham v. Superior Court of Cal., 495 U.S. 604, 619 (1990) (holding that "jurisdiction based on physical presence alone constitutes due process"); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (establishing the rule that "minimum contacts" with a state are sufficient to establish a presence for purposes of service of process provided that jurisdiction would "not offend 'traditional notions of fair play and substantial justice'"); see also Pennoyer v. Neff, 95 U.S. 714, 733 (1877) ("[T]here must be a tribunal competent by its constitution... to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance." (emphasis added)).

The personal jurisdiction requirement is not only a prerequisite for a domestic court's jurisdiction, but is also a requirement for a foreign court's jurisdiction. See UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(2), 13 U.L.A. 58-59 (2000) [hereinafter UFMJRA]; see also S.C. Nat'l Bank v. Westpac Banking Corp., 678 F. Supp. 596, 598 (D.S.C. 1987) ("Following these principles, courts will generally recognize and enforce the judgments of foreign courts if (1) the foreign court had personal and subject matter jurisdiction; (2) the defendant in the foreign action had adequate notice and opportunity to be heard; (3) the judgment was not obtained by fraud; and (4) enforcement will not contravene important public policy.")
Within the framework of the personal jurisdiction defense, the doctrine of waiver plays an important role. In both foreign and domestic adjudication, a defense of personal jurisdiction must be raised at the outset of a claim. If a defendant fails to raise this defense, then it is deemed waived. A judgment may then be rendered against him, despite a court's lack of personal jurisdiction.

This discrepancy occurs because the waiver doctrine is not as consistently applied in the foreign judgment context as it is in the domestic judgment context. When presented with a request to recognize and enforce a foreign judgment, most U.S. courts hold that if a defendant loses a personal jurisdiction challenge and proceeds to litigate on the merits, he has waived his personal jurisdiction defense. Other U.S. courts hold that a defendant is not (citing Robert B. von Mehren, Enforcement of Foreign Judgments in the United States, 17 VA. J. INT'L L. 401, 403 (1977)).

10. See, e.g., Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) ("Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived."). Waiver is defined as "an intentional relinquishment of a known right and may be implied from circumstances indicating an intent to waive. Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Bonnette v. South Carolina, 282 S.E.2d 597, 598 (S.C. 1981) (citations omitted).

11. FED. R. Civ. P. 12(b), (g)-(h); see also Dart v. Balsam, 953 S.W.2d 478, 480 (Tex. App. 1997) (stating that under the UFMJRA, "[g]rounds for nonrecognition may be waived if a party had the right to assert that ground as an objection or defense in the foreign country court but failed to do so").

12. FED. R. Civ. P. 12(h)(1); see also Ins. Corp. of Ir., 456 U.S. at 704 ("[U]nlike subject-matter jurisdiction, which even an appellate court may review sua sponte, under Rule 12(h), Federal Rules of Civil Procedure, '[a] defense of lack of jurisdiction over the person . . . is waived' if not timely raised in the answer or a responsive pleading.").

13. See Ins. Corp. of Ir., 456 U.S. at 704-05.

14. See BORN & RUTLEDGE, supra note 1, at 1044 ("In [some] cases, U.S. courts will not enforce a foreign judgment, even though they might enforce a comparable state judgment.").

15. See, e.g., In re Verit Indus., 7 F. App'x 743, 744 (9th Cir. 2001) ("It is true that when a defendant submits to the jurisdiction of the court 'for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that court's determination on the issue of jurisdiction: That decision will be res judicata on that issue in any further proceedings.'" (citing Ins. Corp. of Ir., 456 U.S. at 706)); Covington Indus. v. Resintex A.G., 629 F.2d 730, 732 (2d Cir. 1980) (holding that when personal jurisdiction is questioned, the enforcing court may render the judgment void, unless "inquiry into the matter [of personal jurisdiction] is barred by the principles of res judicata"); Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Caf6, 566 F.2d 861, 863 (2d Cir. 1977) (holding that if the lower court finds, upon remand, that the defendant made a special appearance in the court, then he has no right to contest jurisdiction of the foreign court); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 441 (3d Cir. 1971) (holding that a defendant was precluded from raising the jurisdictional issue because he failed to raise it initially); Fairchild, Arabatzis & Smith, Inc. v. Prometco Co., 470 F. Supp. 610, 615 (S.D.N.Y. 1979) (holding that a defendant who voluntarily submits to a court's jurisdiction is precluded from later raising a jurisdictional challenge); Domingo v. States Marine Lines, 340 F. Supp. 811, 815 (S.D.N.Y. 1972) ("New York gives conclusive effect to judgments of foreign countries based on personal jurisdiction . . . .").
precluded from relitigating the jurisdictional issue, thereby implicitly holding that waiver of a jurisdictional defense has not occurred.\(^6\)

This variance in method occurs, in large part, because there is no uniform federal rule governing the recognition and enforcement of foreign judgments.\(^7\)

Rather, this area of the law is primarily left to the states, which determine how to enforce foreign judgments within their own sovereign territories.\(^8\)


17. Restatement (Third) of Foreign Relations Law § 481 cmt. a (1987); Born & Rutledge, supra note 1, at 1011–12; see UFMJRA § 1, 13 U.L.A. 43 (2002) (governing the recognition and enforcement of foreign judgments in a majority of states because there is no applicable uniform federal law).

18. See, e.g., Ronald A. Brand, Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance, 67 Notre Dame L. Rev. 253, 265 (1991) (noting that because a majority of states have not yet adopted the Recognition Act, the recognition and enforcement of foreign judgments is largely governed by common law). Arguably, enforcement of foreign judgments is governed by federal common law. See id. Although general federal law is nonexistent, substantive federal common law exists in a few specific areas involving “uniquely federal interest[s],” such as the enforcement of foreign judgments. Born & Rutledge, supra note 1, at 11–12. Even where it exists, however, federal common law only slightly improves uniformity because federal common law “will be Fairchildsioned only to prevent 'significant conflict' between state laws and federal policies.” Id. at 12. Further, even if a conflict does exist between state and federal law, federal common law “will be Fairchildsioned only to the extent necessary to eliminate the conflict.” Id.

Thus, in areas that are traditionally federal, such as enforcement of foreign judgments, the Court has acted to preempt state law only where there is a significant conflict. Id. For examples of judicial preemption through federal common law, see Boyle v. United Technologies Corp., 487 U.S. 500, 505–07 (1988), which discusses the preemption of state law in the area of procurement of military equipment; United States v. Little Lake Misere Land Co., 412 U.S. 580, 595–96 (1973), which holds that state law is an inappropriate standard to apply in the area of contracts entered into by the United States; and Zschernig v. Miller, 389 U.S. 429, 440–41 (1968), which determines that federal common law trumps state law in the area of United States foreign relations.

Additionally, in the area of recognition and enforcement of foreign judgments, the Court has specifically said that states should apply their individual laws through the Erie doctrine, which requires federal courts sitting in diversity to apply state law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); see also Success Motivation Inst. of Japan Ltd. v. Success Motivation Inst. Inc., 966 F.2d 1007, 1010 (5th Cir. 1992) (holding that state law should have been applied to determine the preclusive effect of a foreign judgment). As a result of legislative and judicial reluctance to fashion federal common law for the recognition and enforcement of foreign judgments, federal law largely, though not necessarily, heeds to state law. See Born & Rutledge, supra note 1, at 12 (noting that federal common law is only created to the “extent necessary to eliminate the conflict”). Thus, although enforcement of foreign judgments is
The absence of a federal law or treaty governing recognition and enforcement allows individual states to interpret the law differently from one another. Consequently, there is no uniformity to the recognition and enforcement of foreign judgments. Lack of uniformity creates unpredictability in the law. It is this unpredictability that is problematic, both to U.S. citizens and to foreign citizens who try to enforce judgments within the United States, because it may frustrate the reasonable expectations of litigants and lead to disparate results across the states.

This Comment will examine the implications of a system whereby the personal jurisdiction defense to recognition and enforcement of foreign judgments is governed by state law. In Part I, this Comment will explore the practice of recognizing and enforcing foreign judgments. Next, it will compare how the defense of personal jurisdiction in the area of international judgments differs from its domestic counterpart. In Part II, this Comment will examine the four different conclusions courts have reached when analyzing personal jurisdiction waivers in international litigation. It will consider the merits and disadvantages of each conclusion through the perspective of the various interests these court decisions affect.

In Part III, this Comment will address the dilemma stemming from a lack of uniformity regarding the preclusive effect of foreign judgments. It will assert that when courts hold that preclusion has not occurred, they are impliedly holding that waiver has also not occurred. This Comment will argue that non-preclusion is the wrong approach to recognition and enforcement of foreign judgments, both because it breaks with the great weight of case law and because it allows a defendant to reassert the jurisdictional challenges that he has previously waived. This Comment will contend instead that a rebuttable presumption of preclusion should uniformly be adopted. This presumption would aid standardization of the application of waiver decisions, thereby promoting stability in the law of recognition and enforcement of foreign judgments.

perhaps governed by federal common law, in all practicality, federal common law more often than not defers to state law. See id.; see also Brand, supra, at 262–63.


22. See infra Part II.C for an analysis of the problems associated with unpredictability.
I. THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: A
HISTORIC TRADITION AND A MODERN PERSPECTIVE

A. Authority to Recognize and Enforce Foreign Judgments

The authority to recognize and enforce sister-state judgments comes from
the U.S. Constitution’s Full Faith and Credit Clause.\(^{23}\) This clause requires
recognition and enforcement of domestic judgments.\(^{24}\) Because this clause
only governs the recognition and enforcement of judgments between states, the
recognition and enforcement of foreign judgments must come from other
authority.\(^{25}\)

The first source of guidance on the recognition and enforcement of foreign
judgments is the principle of international comity.\(^{26}\) The Supreme Court first
acknowledged this principle in the case of *Hilton v. Guyot*.\(^{27}\) There, the Court
recognized that:

> after due citation or voluntary appearance of the defendant, and
> under a system of jurisprudence likely to secure an impartial
> administration of justice between the citizens of its own country and
> those of other countries, [when] there is nothing to show either
> prejudice in the court, or in the system of laws under which it was
> sitting, or fraud in procuring the judgment, or any other special
> reason why the comity of this nation should not allow it full effect,
> the merits of the case should not, in an action brought in this country
> upon the judgment, be tried afresh . . . .\(^{28}\)

After this case was decided, the lower federal courts followed the Court’s lead
in looking to principles of comity for determinations of whether to enforce
foreign judgments.\(^{29}\)

The second source of law governing recognition and enforcement of foreign
judgments is the Uniform Foreign Money-Judgments Recognition Act

\(^{23}\) U.S. CONST. art. IV, § 1.

\(^{24}\) Id.; see also BORN & RUTLEDGE, supra note 1, at 1010.

\(^{25}\) See BORN & RUTLEDGE, supra note 1, at 1011–12. The clause does not apply to foreign
judgments, but only to judgments between sister states. Id.

\(^{26}\) See UFMJRA § 2, 13 U.L.A. 46 (2002) (stating that the Act should apply to “any
foreign judgment that is final and conclusive”); see also BORN & RUTLEDGE, supra note 1, at
1014–15 (explaining that the principle of comity provides a basis for enforcing foreign
judgments).

\(^{27}\) 159 U.S. 113, 202–03 (1895).

\(^{28}\) Id.

(“Comity should be withheld only when its acceptance would be contrary or prejudicial to the
interest of the nation called upon to give it effect.”); Hunt v. BP Exploration Co., 492 F. Supp.
885, 900 (N.D. Tex. 1980) (using comity as the means to enforce the judgment, rather than
1973) (refusing to “impose reciprocity as a condition to giving conclusive effect to a foreign
judgment”).
To date, thirty-one states have adopted this Act. In states that have adopted the UFMJRA, the statute provides a mechanism for the recognition of foreign money judgments. As for the states that have not adopted the UFMJRA, a third source of law governs recognition and enforcement of foreign judgments: state common law.

The UFMJRA is not mandatory. See id. § 8, at 80; see also id. Table of Jurisdictions, at 21. It was “enacted to protect interests of local citizens in foreign states by encouraging reciprocal accommodation in enforcing judgments.” Id. § 1 n.2, at 46. The UFMJRA only applies to monetary judgments; it is inapplicable to penalties or other non-monetary judgments. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483, cmts. a–e (1987).

Regarding defenses to recognition and enforcement, the UFMJRA states that:

(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;

(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 [cause of action] or [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.


Thus, the UFMJRA provides that not all foreign judgments are conclusive or deserve recognition because some legal systems are incompatible with the United States Constitution’s Due Process requirements. Therefore, it may be necessary for courts to examine the foreign court’s processes even after a final judgment has been rendered against a United States defendant. See id. Although this leeway is necessary to assure that due process is met, it is this same leeway that creates the loophole through which courts may reexamine a conclusive foreign determination, even in cases where such examination is unnecessary.


32. See generally UFMJRA, 13 U.L.A. 43 (providing a statutory scheme for the recognition of foreign money-judgments).

This latter source of authority derives from the case of *Klaxon Co. v. Stentor Electric Manufacturing Co.* 34 There, the Supreme Court held that the individual laws of the several states, rather than federal laws, apply in conflicts-of-law cases. 35 This case was pivotal because it meant that when resolving foreign judgment conflicts, the personal jurisdiction defense would be applied based on the varying laws of each particular state, rather than through a uniform federal law. 36 Thus, even though the Full Faith and Credit Clause does not provide for recognition and enforcement of foreign judgments, 37 various other sources supply this authority.

**B. Similarities and Worlds of Difference in Applications of the Personal Jurisdiction Defense to Domestic and Foreign Judgments**

The defenses to recognition and enforcement of foreign judgments are similar to their domestic counterparts. 38 In either forum, there are a few prerequisites in order to raise these defenses. In the context of domestic judgments, defendants must not be precluded from challenging recognition and enforcement of a judgment as a result of prior litigation. 39 Similarly, in order

34. 313 U.S. 487 (1941).
35. Id. at 496. This holding was based on the decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), which required a federal court, sitting in diversity, to apply the laws of the forum state.
36. See, e.g., *Success Motivation Inst. of Japan Ltd. v. Success Motivation Inst. Inc.*, 966 F.2d 1007, 1010 (5th Cir. 1992) (holding that state law should have been applied to determine the preclusive effect of a foreign judgment); *McCord v. Jet Spray Int'l Corp.*, 874 F. Supp. 436, 438 (D. Mass. 1994) (holding that the effect of the foreign court's judgment upon a defendant will be determined by applying state law); *Hunt v. BP Exploration Co.*, 492 F. Supp. 885, 892 (N.D. Tex. 1980) (holding that Texas state law applied when determining jurisdiction in a suit brought to enforce a foreign judgment); see also supra note 19 and accompanying text.
37. U.S. CONST. art. IV, § 1.
39. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); see also NLRB v. Thalbo Corp., 171 F.3d 102, 109 (2d Cir. 1999) (“[A] judgment in a prior proceeding bars a party . . . from relitigating an issue if . . . (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.”). This concept of preclusion is known as res judicata.

Res judicata, in its broadest sense, encompasses both claim and issue preclusion. Cornell University Law School, Legal Information Institute, Res Judicata, http://topics.law.cornell.edu/wex/Res_judicata (last visited Aug. 28, 2008). Res judicata is defined as “[a]n issue that has been definitively settled by a judicial decision.” BLACK'S LAW DICTIONARY, supra note 8, at 1336-37. Res judicata can also be used in its narrower sense, which refers to claim preclusion. Lawyers.com, Res Judicata, http://research.lawyers.com/glossary/res-judicata.html (last visited Aug. 26, 2008). In this context, res judicata can be:
to preserve their ability to contest recognition and enforcement of a foreign judgment, defendants to a foreign proceeding must not be precluded by prior litigation.\(^4\)

A second prerequisite to asserting defenses in either the domestic or foreign context is timing. In order to later contest enforcement, a defendant must have raised his defense at the outset of the litigation.\(^41\) If defenses are not raised initially, they are deemed waived.\(^42\)

After ensuring these prerequisites are met, a court determining recognition and enforcement may then consider the asserted defenses. In both the domestic and foreign arenas, the rendering court's lack of personal jurisdiction over the defendant is one available defense.\(^43\) Although the personal jurisdiction defense is available in both the domestic and foreign contexts, a substantial variance arises with respect to how it is applied, because the preclusion principle is not uniformly recognized in cases of foreign judgments.\(^44\)

Within the context of foreign litigation, lower courts addressing subsequent litigation's effect on the personal jurisdiction defense have adopted four main approaches. Some U.S. courts hold that subsequent litigation of a claim on the merits, after a defendant loses the personal jurisdiction argument, precludes the

[a]n affirmative defense barring the same parties from litigating the second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

BLACK'S LAW DICTIONARY, supra note 8, at 1337; see also RESTATEMENT (SECOND) OF JUDGMENTS §§ 17, 24 (1982). Throughout this Comment, res judicata will be used in the narrower sense.

40. See UFMJRA § 5, 13 U.L.A. 73; see also, e.g., Fairchild, Arabatzis & Smith, Inc. v. Prometco Co., 470 F. Supp. 610, 615 (S.D.N.Y. 1979) (“[Defendant's] actions in the British court preclude it from the collateral attack on that court's judgment on jurisdictional grounds.”).

41. FED. R. CIV. P. 12(b), (g)-(h) (stating the domestic law requirement that a defendant must raise certain defenses at the outset of litigation or else waive those defenses); see also Dart v. Balaam, 953 S.W.2d 478, 480 (Tex. App. 1997) (stating that under the UFMJRA, “[g]rounds for nonrecognition may be waived if a party had the right to assert that ground as an objection or defense in the foreign country court but failed to do so”).

42. See UFMJRA § 5, 13 U.L.A. 73.


44. Compare Johnston v. Compagnie Generale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926) (holding that a French judgment should be recognized and enforced because “[t]he principles of comity should give conclusiveness to such a judgment . . . .”), with Agnitsch v. Process Specialists, Inc., 318 F. Supp. 2d 812, 821 (S.D. Iowa 2004) (inquiring into a foreign court's basis for personal jurisdiction despite the fact that the United States defendant impliedly submitted to the jurisdiction of the foreign court by appealing the decision on the merits rather than merely appealing that court's assertion of personal jurisdiction).
defendant from challenging recognition. Some courts go further, holding that subsequent litigation on the merits amounts to a waiver of defenses during the enforcement stage. By contrast, other courts hold that subsequent litigation on the merits of a claim does not preclude a defendant from challenging recognition. Although it is rare to hold that a defendant has not waived his jurisdictional challenge upon subsequent litigation, in holding that a defendant is not precluded from challenging recognition, these courts are implicitly permitting a defendant to raise a defense to enforcement that would otherwise be waived. These differing approaches create a lack of uniformity in the law, consequently causing unpredictability.

II. FOUR APPROACHES TO THE EFFECT OF SUBSEQUENT LITIGATION ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

A. Subsequent Litigation Amounts to Preclusion from Relitigation and Waiver of the Personal Jurisdiction Defense

Numerous courts have held that if a defendant loses a personal jurisdiction defense in a foreign court and then proceeds to litigate the claim on the merits, he is both precluded from relitigating during the recognition stage of the claim and has waived his personal jurisdiction defense for purposes of challenging enforcement.

1. Preclusion from Relitigation

If a defendant fails to challenge a jurisdictional issue, then the defendant can later be precluded from raising it. In Somportex Ltd. v. Philadelphia Chewing Gum Corp., the parties had an agreement that Somportex would market Philadelphia Chewing Gum's product in Great Britain. The agreement deteriorated, and, as a result, Somportex filed an action for breach

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45. See infra Part II.A.1.
46. See infra Part II.A.2.
47. See infra Part II.B.1.
48. See infra Part II.B.2.
49. See infra Part III.
50. See infra Part III.
51. See Marathon Oil Co. v. Ruhrgas, 145 F.3d 211, 217 (5th Cir. 1998) ("Although the personal jurisdiction requirement is a 'fundamental principl[e] of jurisprudence,' without which a court cannot adjudicate, the requirement of personal jurisdiction, unlike that of subject-matter jurisdiction, 'may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue.'" (citation omitted)); RAR, Inc. v. Turner Diesel, Ltd., 107 F.3d 1272, 1280 (7th Cir. 1997) (holding that "personal jurisdiction is waiveable"). Cf Franklin Nat'l Bank v. Krakow, 295 F. Supp. 910, 917 (D.D.C. 1969) ("[A] defendant's right to contest jurisdiction is not waived where he neither appears nor objects to jurisdiction prior to the entry of a default judgment against him.").
52. See supra note 15.
of contract against Philadelphia Chewing Gum in Great Britain. 54 Philadelphia Chewing Gum entered a conditional appearance to set aside the summons, but later decided to forego both its jurisdictional challenge and its motion to dismiss the summons. 55 The English Court of Appeal held that the appearance was unconditional, and therefore Philadelphia Chewing Gum had submitted to the court's jurisdiction. 56 Somportex proceeded to obtain a default judgment against Philadelphia Chewing Gum. 57

Thereafter, Somportex filed an action in the United States seeking to enforce its judgment against Philadelphia Chewing Gum. 58 On appeal, the pertinent issue was whether the English court had properly examined the basis for jurisdiction over Philadelphia Chewing Gum. 59 The United States Court of Appeals for the Third Circuit held that the English court properly determined that it had jurisdiction over Philadelphia Chewing Gum, and that, because Philadelphia Chewing Gum was given the opportunity to contest the factual basis for jurisdiction but failed to do so, the issue was waived. 60 Therefore, the Third Circuit held that Philadelphia Chewing Gum was precluded from arguing the issue during the recognition stage, and its motion for summary judgment was denied. 61 As this case demonstrates, one way a defendant can be precluded from challenging the jurisdictional issue is by a failure to raise the jurisdictional defense in the initial forum. 62

Another way a defendant can be precluded from raising a jurisdictional defense is by voluntarily submitting to the court's jurisdiction. This type of preclusion occurred in Fairchild, Arabatzis & Smith, Inc. v. Prometco Co. 63 There, the plaintiff, Fairchild, Arabatzis and Smith (Fairchild), operated as a

54. Id. at 437.
55. Id. at 437-38. The solicitors informed the court that instead of pursuing its earlier course of action, Philadelphia Chewing Gum wished to withdraw its counsel's appearance. Id. at 438. The lower English court granted the motion and Somportex appealed. Id.
56. Id. One judge originally upheld the lower court's decision, but was then reversed by the Court of Appeal in a later proceeding. Id. Philadelphia Chewing Gum did not appeal the court's decision dismissing its application to set aside the summons. Id. at 438-39. Thus, the court's order became final. Id. at 439.

An unconditional appearance occurs when a defendant enters a court without placing any contingencies on his presence before it. See, e.g., id. at 437 n.2. In the United States, this is known as a "general appearance," which results in the waiver of "a party's ability later to dispute the court's authority to enter a binding judgment against him or her." BLACK'S LAW DICTIONARY, supra note 8, at 107.

58. Id. The district court granted Somportex's motion for summary judgment. Id. The district court also dismissed a third-party complaint against a middle-man supplier. Id. at 436, 439.
59. Id. at 441.
60. Id.
61. Id.
62. Id.
commodity futures commission merchant. Prometco, operating as a middle man for the defendant Charbit, agreed to sell commodity options for futures contracts to be performed in the United Kingdom. Various commodity options were purchased, and Fairchild subsequently defaulted on its payments to Prometco. Prometco then instituted an action in the United Kingdom and provided notice of the action to Fairchild at its New York offices.

Fairchild initially filed a memorandum with the British court stating that, unless Fairchild applied for and obtained an order setting aside the summons, its appearance would be unconditional. Thus, it was necessary for Fairchild to obtain a dismissal of its summons, or Fairchild would be deemed to have submitted to the court's jurisdiction. Fairchild then sought an order to set aside the summons, claiming insufficiency of service and lack of personal jurisdiction. The English court denied Fairchild's motions, finding that the court had personal jurisdiction and that Fairchild was properly served. When Fairchild failed to appear before the court for a summary judgment proceeding, the court entered a judgment against it.

Fairchild then filed suit in New York against Prometco and Charbit, alleging securities fraud and common law fraud. The relevant issue before the United States District Court for the Southern District of New York was what preclusive effect to give to the British judgment rendered against Fairchild. The district court held that Fairchild was precluded from relitigating matters decided by the British court based on two grounds. First, the court concluded that because Fairchild had voluntarily appeared for a purpose other than contesting jurisdiction, Fairchild was precluded from rechallenging the jurisdiction.

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64. Id. at 612.
65. Id.
66. Id.
67. Id.
68. Id.
69. See id.
70. Id.
71. Id. at 613. Although the English court determined that it had jurisdiction, that finding did not foreclose the matter. Under English law, if a plaintiff makes a prima facie showing of jurisdiction, then the claim can proceed. Id. The defendants are permitted to raise the jurisdictional issue again at trial or at proceedings for summary judgment. Id. In this case, Prometco moved for summary judgment, and Fairchild chose not to appear at the summary judgment proceeding. Id. Default judgment was entered against Fairchild. Id. Further, because Fairchild did not appear at the summary judgment proceeding, it forfeited its right to rechallenge the jurisdictional issue under English law. See id.
72. Id.
73. Id. at 613–14.
74. Id. at 614–15.
75. Id. at 615.
judgment. Second, because Fairchild raised and lost the jurisdictional defense, and then subsequently litigated on the merits, it was precluded from contesting jurisdiction in the district court. Thus, a voluntary submission to a court's jurisdiction precludes one from subsequently raising a jurisdictional defense.

These two cases illustrate how many courts give preclusive effect to foreign judgments. Because waiver frequently goes hand-in-hand with preclusion, courts that give preclusive effect to foreign judgments often take the view that the party challenging the foreign judgment has also waived his personal jurisdiction defense.

2. Waiver of the Personal Jurisdiction Defense

In addition to preclusion rulings, courts have often held that when a defendant raises and loses a jurisdictional challenge, but proceeds to litigate on the merits, he has waived his jurisdictional defense for purposes of challenging enforcement. Waiver can be unintentional, through one's missteps in litigation, or it can be intentional, through one's conscious participation in adjudication.

The issue of unintentional waiver was addressed in *S.C. Chimexim S.A. v. Velco Enterprises Ltd.*, when Chimexim, a Romanian corporation, sued Velco, an American corporation, seeking to have a judgment, originally rendered

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76. *Id.* Fairchild voluntarily appeared for a purpose other than contesting jurisdiction when it failed to obtain an order dismissing the summons against it; therefore, Fairchild had entered an unconditional appearance, which is a voluntary submission for jurisdictional purposes. *Id.*

77. *Id.*

78. *Id.*

79. See supra notes 45, 51 and accompanying text.

80. See, e.g., *Fairchild, Arabatzis & Smith, Inc.*, 470 F. Supp. at 615 (discussing the court's second reason for its holding that the defendant was precluded from challenging enforcement: the defendant raised and lost a jurisdictional challenge, and then proceeded to litigate the merits of the claim); see also discussion supra Part II.A.1.

81. See, e.g., *S.C. Chimexim S.A. v. Velco Enters.*, 36 F. Supp. 2d 206, 215 (S.D.N.Y. 1999) (challenging a ruling on the merits amounts to a waiver of any available personal jurisdiction defense); *Yihye v. Blumenberg*, 687 N.Y.S.2d 703, 704 (N.Y. App. Div. 1999) ("The defendant did not move to dismiss the action or interpose any relevant jurisdictional defense based upon improper service. Thus, the defendant waived any objections to personal jurisdiction he might have otherwise asserted . . . .") (citation omitted)).

82. See, e.g., *S.C. Chimexim S.A.*, 36 F. Supp. 2d at 215 (noting the defendant's implicit, unintentional waiver); *S.C. Nat'l Bank v. Westpac Banking Corp.*, 678 F. Supp. 596, 598 (D.S.C. 1987) (noting the defendant's implicit, deliberate waiver where the "party . . . objects to a court's jurisdiction, but takes action inconsistent with that objection"). Both of these cases deal with types of implicit waiver. Although explicit waiver is not the subject of this paper, it is certainly an additional means whereby a defendant may waive his defense. See *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998) ("The requirement that a court have personal jurisdiction is a due process right that may be waived either explicitly or implicitly.").
Waiving Goodbye to Personal Jurisdiction Defenses against Velco in Romania, enforced in the United States. The underlying lawsuit arose when Velco failed to meet its financial contractual burden and Chimexim filed suit in Romania. Velco failed to appear for the proceeding before the Romanian court, and the court entered a default judgment against Velco. On Velco’s appeal, the court of appeal affirmed the tribunal.

Chimexim later filed suit in the United States District Court for the Southern District of New York, seeking to have its judgment against Velco enforced. On the issue of enforcement, which Velco contested on personal jurisdiction grounds, the district court determined that Velco had waived its jurisdictional defense. Specifically, the court found that Velco had voluntarily surrendered to the Romanian court’s jurisdiction by challenging the ruling on the merits concurrent with raising its jurisdictional defenses during the appeal. Thus, personal jurisdiction challenges can be waived unintentionally, even when a defendant raises his defense but does so while simultaneously challenging an additional claim.

Further, a jurisdictional defense may be waived through conscious participation in a trial on the merits. For example, in South Carolina National Bank v. Westpac Banking Corp., the court held that subsequent litigation on the merits amounts to a waiver of jurisdictional defenses that were

83. S.C. Chimexim S.A., 36 F. Supp. 2d at 207, 209–10. Chimexim, the Romanian corporation, and Velco, the United States corporation, were both in the business of distributing chemicals and plastics. Id. at 209. Chimexim had upheld its end of the contract, but Velco had not finished paying on its contract. Id. As a result, the companies entered into an agreement setting up a payment schedule that would allow Velco to settle its outstanding account. Id.
84. Id. at 209.
85. Id. at 210. Velco was served with process at its representative office in Romania; however, Velco denied that its representative office ever received the summons, which was why Velco failed to appear at the proceeding. Id.
86. Id.

At the court of appeal, Velco initially asserted lack of personal jurisdiction, claiming that its representative office was the incorrect office to represent the company in court. S.C. Chimexim S.A., 36 F. Supp. 2d at 210. Velco also argued that the initial pleading was "insufficiently 'stamped,'" that there was insufficient service of process, and that the tribunal settled the case without addressing the merits. Id. After the court of appeal’s decision, Velco appealed to the Supreme Court of Romania, but because the New York court was unaware of the Romanian appellate court’s disposition, it did not address the Romanian Supreme Court proceeding. Id.
89. Id. at 215.
90. Id.
91. Id.
92. See, e.g., S.C. Nat’l Bank v. Westpac Banking Corp., 678 F. Supp. 596, 599 (D.S.C. 1987). When a jurisdictional defense is implicitly waived, waiver can be through either an intentional submission to a court’s jurisdiction, or an unintended submission. Id.
otherwise available to the defendant. South Carolina National Bank (SCNB) had issued a letter of credit and bills of lading to Commonwealth Steel Company. Through a series of transactions, the letter and bills became the property of Westpac Banking Corporation (Westpac). Upon presentment of the letter and bills to SCNB, however, SCNB rejected the demand for payment, asserting that the bills of lading did not satisfy the specified requirements.

Westpac demanded payment of the letter of credit and filed suit against Commonwealth Steel in Australia to recover its investment. SCNB was joined as a defendant, and made a special appearance "to contest the Australian court's jurisdiction." The Australian court ruled that jurisdiction was proper over SCNB. Following the court's jurisdictional ruling, SCNB participated in the full trial on the merits, to which it came out the losing party.

SCNB then filed an action in the United States District Court for the District of South Carolina seeking a declaratory judgment that the Australian judgment

93. Id.
94. Id. at 596–97. SCNB provided a letter of credit to Commonwealth Steel Company (an Australian corporation) on behalf of National Railroad Utilization Corporation in exchange for products that Commonwealth agreed to ship to National. Id. In order to receive payment, Commonwealth Steel Company was required to present a set of bills of lading to SCNB. Id.

A bill of lading is "[a] document that establishes the terms of a contract between a shipper and a transportation company. It serves as a document of title, a contract of carriage and a receipt for goods." U.S. Dep't of Transp., Glossary of Shipping Terms, http://www.marad.dot.gov/Publications/glossary/B.html (last visited Aug. 22, 2008); see also WHARTON POOR, POOR ON CHARTER PARTIES AND OCEAN BILLS OF LADING 134 (5th ed. 1968).

Commonwealth Steel Company subsequently negotiated the letter and the bills of lading to Westpac Banking Corp., who in turn, presented the documents to SCNB. S.C. Nat'l Bank, 678 F. Supp. at 597.

96. Id. at 597. The bills of lading were subject to requirements set forth in the Uniform Customs and Practices for Documentary Credit. Id. at 596–97. Subject to these requirements, the bills of lading had to be "clean 'on board' ocean bills of lading," and meet the requirements thereof. Id. at 597.

An "ocean bill" is simply a bill that prescribes that the method of shipping should be by sea. RICHARD SCHAEFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT 152, 160–62 (6th ed. 2005). "Clean" bills of lading refer to bills that "contain[] no notations by the carrier that indicate any visible damage to the goods, packages, drums, or other containers being loaded." Id. at 160. An "on board" bill of lading "states that the goods have actually been loaded aboard a certain vessel." Id.

98. Id.
99. Id.
100. Id. The Australian court held that the bills of lading conformed with the requirements in the letter of credit, and awarded judgment to Westpac. Id. SCNB subsequently appealed the Australian judgment to the New South Wales Court of Appeal where it contested only the trial court's decision on the merits, but not the jurisdictional issue that it had initially raised at trial. Id. The court of appeal reversed, and Westpac filed an appeal to the Judicial Committee of the Privy Council. Id. The Privy Council reversed the court of appeal, rendering judgment in favor of Westpac. Id.
was unenforceable. Westpac counterclaimed to enforce the judgment. The district court found in favor of Westpac, holding that the Australian courts had personal jurisdiction over SCNB. The court determined that “SCN[B]’s subsequent conduct [of participating in the trial on the merits] was inconsistent with the continued assertion of its right to personal jurisdiction. . . . Instead SCN[B] appeared to voluntarily submit to the Australian courts’ jurisdiction throughout the litigation process.” Thus, because SCNB participated in litigation on the merits, it waived its right to assert a subsequent personal jurisdiction challenge.

The above cases demonstrate the position advanced by the majority of U.S. courts. Namely, when a defendant either fails to raise a jurisdictional issue or raises, but loses, a jurisdictional challenge and then participates in the trial on the merits, the defendant is not only precluded from challenging the foreign court’s jurisdiction during recognition, but he has also waived the defense for purposes of contesting enforcement.

B. Subsequent Litigation Does Not Require Preclusion from Relitigation or Amount to Waiver of a Personal Jurisdiction Defense

As discussed below, some courts have held that when a party loses a jurisdictional challenge and then litigates on the merits, he is neither precluded from relitigating the issue during recognition of the judgment, nor is he deemed to have waived his jurisdictional defenses for purposes of challenging enforcement of the judgment.

1. No Preclusion from Relitigation

In Agnitsch v. Process Specialists, Inc., a creditor brought an action to enforce a Malaysian judgment against a U.S. debtor. The creditor, Agnitsch, filed an action in Malaysia for breach of contract against defendant, Process Specialists, Inc. (PSI). PSI, which was served process in its home state of Texas, contended that the Malaysian court lacked personal jurisdiction over it.

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101. Id.
102. Id. Westpac also counterclaimed in the alternative for a new judgment on the merits.
103. Id.
104. Id. at 600.
105. Id. at 599.
106. Id. at 599–600.
108. Id. at 814.
109. Id. Both parties then filed affidavits with the Malaysian court in support of their positions on the contested issue of personal jurisdiction. Id.
The Malaysian court then ordered PSI to file a defense to Agnitsch’s breach of contract claim.\textsuperscript{110} PSI appealed the order, but the appeal was denied.\textsuperscript{111} PSI then failed to file its defense, and the court entered a default judgment against it.\textsuperscript{112} Agnitsch proceeded to file suit in the United States District Court for the Southern District of Iowa seeking to enforce the judgment against PSI.\textsuperscript{113} The district court determined that there were genuine issues of material fact regarding whether the defendant had sufficient minimum contacts with Malaysia to uphold a finding of personal jurisdiction.\textsuperscript{114} As a result, the district court denied both motions for summary judgment.\textsuperscript{115} It is significant that, in denying the motions, the court overlooked the critical fact that PSI submitted to the foreign court’s jurisdiction by appealing matters unrelated to the jurisdictional question.\textsuperscript{116} The district court thereby implicitly held that the defendant was not precluded from challenging personal jurisdiction.\textsuperscript{117} Thus, although the court was properly concerned with guaranteeing PSI’s due process rights,\textsuperscript{118} it unnecessarily retried the issue by failing to recognize PSI’s voluntary submission to the Malaysian court.\textsuperscript{119}

\textsuperscript{110} \textit{id.}
\textsuperscript{111} \textit{id.}
\textsuperscript{112} \textit{id.}
\textsuperscript{113} \textit{id.} at 813. In response, PSI filed a motion to dismiss. \textit{id.} The district court determined that it would treat PSI’s motion as one for summary judgment, because both parties had submitted motions addressing matters outside the scope of the pleadings. \textit{id.}
\textsuperscript{114} \textit{id.} at 821.
\textsuperscript{115} \textit{id.}
\textsuperscript{116} \textit{See id.} at 817–18 (listing various exceptions to the general rule that foreign judgments are given full faith and credit, but failing to discuss the possibility that a defendant may waive the personal jurisdiction defense by submitting to the court).
\textsuperscript{117} \textit{See id.} Ordinarily, a court would be within its bounds in determining whether to enforce a judgment of a foreign court by looking to whether the foreign court’s proceedings comported with the U.S. due process guarantees of “fair play and substantial justice.” \textit{id.} at 818 (citing Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 914 (N.D. Iowa 2002)). Arguably, however, PSI submitted to the jurisdiction of the foreign court because PSI appealed the Malaysian order requiring it to file a defense on the merits. Had PSI simply appealed on jurisdictional grounds, the court’s holding would have been entirely correct because the foreign court would not have reached the merits. Instead, PSI’s actions amounted to a submission to the Malaysian court’s jurisdiction and effectively extinguished any due process concerns. \textit{Compare id.} at 821 (suggesting no waiver based on defendant’s challenging on the merits), \textit{with S.C. Chimexim S.A. v. Velco Enterprises Ltd.}, 36 F. Supp. 2d 206, 215 (S.D.N.Y. 1999) (holding that a challenge on the merits that is raised coextensively with a jurisdictional challenge amounts to a jurisdictional waiver).
\textsuperscript{118} \textit{See CIBC Mellon Trust Co. v. Mora Hotel Corp.}, 743 N.Y.S.2d 408, 418 (N.Y. App. Div. 2002), \textit{aff’d}, 792 N.E.2d 155 (N.Y. 2003) (“Since a foreign court’s determination that it has personal jurisdiction does not necessarily comport with the prerequisites of this country’s Constitution for such a finding, an assertion of jurisdiction by a foreign court should not preclude a challenge here. Such a challenge is not, in fact, a second bite of the apple on the jurisdiction issue.”).
\textsuperscript{119} \textit{Agnitsch}, 318 F. Supp. 2d at 818–21.
2. No Waiver of the Personal Jurisdiction Defense

Occasionally, a court will hold that subsequent litigation on the merits neither amounts to preclusion nor waiver of the jurisdictional defense; one such example is *Hunt v. BP Exploration Co.* The *Hunt* case dealt with an American citizen, named Nelson Bunker Hunt, who was part of a cooperative venture with BP to develop an oil concession in Libya. Hunt had entered into an agreement with BP which provided that Hunt would convey to BP a one-half interest in his concession of a Libyan oil field in exchange for BP’s agreement to provide initial payments, costs of exploration, and costs of development.

When the Libyan government nationalized the concession, BP filed a suit in England alleging that because its contract had been frustrated, Hunt had unfairly obtained a benefit. Hunt declined to accept service of the writ of summons, and later filed a motion to dismiss, alleging that the British court lacked jurisdiction. Hunt’s objection was overruled and he filed an appeal, which he then neglected to pursue. Instead, he filed suit in the United States District Court for the Northern District of Texas seeking a declaratory judgment that the judgment rendered against him in England was unenforceable.

Trial began on the merits in England, while Hunt’s suit was pending in the United States. Judgment was entered against Hunt in the English

120. 492 F. Supp. 885, 895 (N.D. Tex. 1980). This case has since been distinguished on the ground that:
[b]y maintaining this second action in an American court, Hunt made it clear he did not submit to the English court’s jurisdiction or acquiesce in its judgment. In addition, at the time of the American decision in *Hunt*, appeal of the English judgment was still pending. . . . Hunt had not pursued . . . appeals on the merits without raising an objection to the foreign court’s jurisdiction.
122. *Id.* at 888–89.
123. *Id.* at 889. The contractual frustration claim arose when, during the course of the venture, the Libyan government nationalized BP’s interest in the concession. *Id.* BP later entered into a settlement agreement with the Libyan government purporting to settle all claims between BP and Libya arising from Libya’s expropriation of BP’s oil interests. *Id.*

After Libya nationalized BP’s interest, the Libyan government informed Hunt that no further oil would be delivered to his account. *Id.* Hunt subsequently entered into a settlement agreement with Libya, in part, providing that Libya would agree to a final settlement and release of any claims it may have had against Hunt as BP’s successor to the concession. *Id.*

BP’s suit against Hunt alleged “that its contract with Hunt was frustrated when BP’s interest in the concession was expropriated [by the Libyan government], and that, because of BP’s contractual performance before expropriation, Hunt obtained a valuable benefit.” *Id.*

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 890.
proceeding. In the United States, the issue before the district court was whether the English court had jurisdiction over Hunt, as measured by U.S. jurisdictional standards.

The court stated that "trying the merits of the British suit after losing the jurisdictional argument is not a consent to the jurisdiction of the English court and a waiver of his due process rights to an appropriate forum." The court based this assertion on the idea that if a foreign court's jurisdictional determination does not satisfy U.S. due process standards, than a due process defense cannot be precluded during enforcement. Therefore, although the court ultimately found that the English court did have personal jurisdiction over Hunt, Hunt was not precluded from relitigating, nor was he deemed to have waived his jurisdictional challenges.

Thus, the four approaches to determining recognition and enforcement of foreign judgments advanced by United States courts result in significantly different outcomes. Because these outcomes have a substantial effect on the litigants, their interests must be the central focus in developing the correct standard with which to promote uniformity.

C. The Various Interests Affected by Preclusion and Waiver Decisions

Perhaps the best way to assess the benefits and burdens of each judicial approach is to examine them through the perspective of the interests affected. This interest-balancing is logical because the structure of the mechanism used to recognize and enforce foreign judgments, comity, is a judicial tool inherently based on balancing.

The recognition and enforcement of foreign judgments is based on a system that encompasses the importance of assuring comity to international judgments, while conditioning that comity on a defendant's opportunity to be afforded due process rights in a foreign forum. The recognition and

128. Id. Both Hunt and BP appealed the English judgment, but the appeal had not been decided at the time of the United States proceeding. Id.

129. Id. at 895.

130. Id.

131. See id.; see also BORN & RUTLEDGE, supra note 1, at 1058.


133. See, e.g., 30 AM. JUR. 2D Executions and Enforcement of Judgments § 673 (2005) ("If a judgment rendered by a court of another state does not fall within the protection of the full faith and credit provision of the Federal Constitution, recognition may be accorded such judgment under the doctrine of comity, unless such judgment was obtained in the absence of due process.” (footnotes omitted)).

134. See UFMJRA § 4, 13 U.L.A. 58–59 (2002); see also Litvaitis v. Litvaitis, 295 A.2d 519, 522 (Conn. 1972) ("[J]udgments of courts of foreign countries are recognized in the United States because of the comity due to the courts and judgments of one nation from another. Such recognition is granted to foreign judgments with due regard to international duty and convenience, on the one hand, and to rights of citizens of the United States and others under the protection of its laws, on the other hand.").
enforcement of foreign judgments therefore innately involves interest-balancing. Consequently, it is logical to apply an interest-balancing formula in determining the mechanism that should be used to remedy the preclusion problem.

1. The Common Interests of Both the Parties and the System

The first class of rights at stake involves the rights of individual parties to a lawsuit. Plaintiffs and defendants have an interest in the finality of judgments, whether those judgments are rendered domestically or internationally. The Supreme Court recognized in *Montana v. United States* that “[a]pplication of [res judicata] is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.”

Finality is important because it allows both the parties and the judicial system to proceed, rather than maintaining suits indefinitely, disputing facts decided by an “infallible” judge.

Further, the parties have an interest in finality because it will, to some degree, protect the parties from “the cost and vexation of multiple lawsuits.” Because lawsuits can be financially burdensome, it is beneficial for all parties that the process is as short in duration as possible. This is especially true where parties may face suit abroad. The increased costs of defending a lawsuit in a foreign country, coupled with the costs of a subsequent suit in the United States during the recognition and enforcement stages, often make international suits more expensive than domestic suits.

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135. See, e.g., Livaitis, 295 A.2d at 522.
138. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final.”); see also RESTATEMENT OF JUDGMENTS, ch. 1, Introduction 10–11 (1982).
In addition, the judicial system has an interest in finality, apart from avoiding an indefinite continuation of the process. The less often that parties dispute issues that have been resolved, the more judicial resources are conserved.\textsuperscript{142}

Because finality is an important value of our system,\textsuperscript{143} mechanisms like preclusion that help to promote this value should be favored. Preclusion reinforces the goals of finality by estopping parties from relitigating their claims.\textsuperscript{144} Alternatively, denying preclusion to foreign judgments frustrates the goal of finality by extending the cost, uncertainty, and burden on the parties and the judicial system.

2. The Individual Interests of Both the Parties and the System

Although defendants, plaintiffs, and the judicial system may share a common interest in the finality of judgments, the parties and the judicial system have divergent, and sometimes competing, interests as a result of their positions in the litigation. Defendants, for example, have an interest in being afforded the same, or comparable, due process rights in a foreign suit to which they would be entitled in a domestic suit.\textsuperscript{145} This is the very reason several courts refuse to provide preclusive value to foreign judgments—not all foreign

\textsuperscript{142} Allen, 449 U.S. at 94; see also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) ("Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." (footnote omitted) (emphasis added)).

\textsuperscript{143} See Allen, 449 U.S. at 94.

\textsuperscript{144} See id. (discussing the benefits of finality in the judicial system).

\textsuperscript{145} See Montré D. Carodine, Political Judging: When Due Process Goes International, 48 WM. & MARY L. REV. 1159, 1182–84 (2007) (discussing Judge Posner’s statements in Society of Lloyd’s v. Ashenden, regarding the “international concept of due process” (quoting Society of Lloyd’s v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000))); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 482(1)(a) (1987) ("A court in the United States may not recognize a judgment of the court of a foreign state if: (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law . . . ."); Michael Wallace Gordon, Forum Non Conveniens Misconstrued: A Response To Henry Saint Dahl, 38 U. MIAMI INTER-AM. L. REV. 141, 166 (2006) ("if a foreign judgment is rendered in a fair process that provided due process, the judgment will be enforced in the United States.").
judicial systems afford defendants the constitutional protections United States citizens are guaranteed in domestic suits.146

Another interest at stake is the defendants' interest in predictability of the system. If defendants cannot predict how a particular court will resolve an issue, then it may be hard (if not impossible) to tell when certain conduct may result in judgments against them.147

In the context of international judgments, defendants have an interest in knowing what conduct amounts to preclusion and waiver of jurisdictional defenses.148 If defendants cannot tell what conduct is going "beyond objecting to jurisdiction,"149 then defendants may either unintentionally waive their jurisdictional objections, or in the alternative, not raise them at all.150 In other words, unpredictability could have a "chilling effect" by deterring a defendant from raising a defense, even if his defense is valid, because of the unknown consequences that would arise from such action.151 Further, it may not be obvious to a defendant when his chance to assert a constitutional right actually occurs. Does it occur at the time of action in a foreign court, or does it occur at the time of action in a U.S. court?152 Under the current system, the defendant is faced with an untenable choice—raise the right in the foreign court and risk submitting to its jurisdiction, or raise the right in a domestic court and risk being precluded from litigating that right.153

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146. See UFMJRA § 4, 13 U.L.A. 58–59 (2002) (providing that a court may deny the preclusive effect if the foreign tribunal did not have "procedures compatible with the requirements of due process of law").

147. See Symeon C. Symeonides, The Need for a Third Conflicts Restatement (And a Proposal for Torts Conflicts), 75 IND. L.J. 437, 447 (2000) (noting widespread unpredictability in the field of conflicts law); see also Eugène F. Scoles et al., Conflict of Laws § 2.26 (3d ed. 2000) (noting that the consequences of unpredictability in American conflicts law are "[c]ontradictory results in the case law, confusion, and . . . [a] 'homeward trend'").


149. Born & Rutledge, supra note 1, at 1058.

150. See supra note 80 for examples of cases in which litigants effectively waived their jurisdictional objections.

151. See Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (discussing that uncertain rules regarding what conduct violates the law will result in a "chilling effect" in the context of the First Amendment's free speech guarantees). This "chilling effect" often occurs in the free speech context, in which the Court is concerned with a defendant who does not speak about a certain issue, regardless of the truth of his speech, for fear of the repercussions. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).


153. Cf Born & Rutledge, supra note 1, at 1058 ("This approach requires defendants to choose between having a U.S. court resolve jurisdictional challenges and having an opportunity to defend against the plaintiff's claims on the merits.").
Furthermore, in either the domestic or the international context, plaintiffs have an interest in enforcing all judgments that might be awarded.⑩⁴ Because plaintiffs would presumably like to collect their judgments in an expedient and efficient manner, prolonging litigation by relitigating conclusive issues only delays this relief.⑩⁵

Additionally, the judicial system has its own interest in predictability. Where two different theories on preclusion and waiver persist, the predictability of the judicial system declines. The judicial system benefits from predictability, because predictability helps determine the precedent to which a court should adhere,⑩⁶ and it “encourage[s] reliance on


155. See Walter W. Heiser, Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions, 51 WAYNE L. REV. 1161, 1192 (2005) (noting that one advantage to litigating in the United States, as opposed to other nations, is the “efficient enforcement of judgments”). The longer litigation is prolonged, the longer a plaintiff’s compensation is delayed. Compare Chesley v. Union Carbide Corp., 927 F.2d 60, 61 (2d Cir. 1991) (noting that litigation in the case of In re Union Carbide Corp., 634 F. Supp. 842 (S.D.N.Y. 1986), ultimately resulted in a judgment of $470 million for plaintiffs), with Indians Remember Industrial Disaster, L.A. TIMES, Dec. 4, 2004, at A8 (reporting that bureaucratic delays have denied fund disbursement to Indian victims for almost twenty years), and Alex Perry, Bhopal: 20 Years After, TIME, Nov. 29, 2004, available at http://www.time.com/time/printout/0,8816,832302,00.html (outlining the struggle it has been for victims to receive more than minimal compensation, or compensation at all), and David Rohde, Compensation for Bhopal Victims, N.Y. TIMES, July 20, 2004, at A6 (discussing an Indian Supreme Court ruling that held that “compensation should be distributed directly to the victims and no longer held by the government”).

156. See, e.g., Thompson v. Keohane, 516 U.S. 99, 121 n.2 (1995) (Thomas, J., dissenting) (“The interests in finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent . . . .” (quoting Stringer v. Black, 503 U.S. 222, 228 (1992))). For example, circuit splits occur when the Supreme Court has not yet spoken on an issue; therefore, the individual circuits have no mandatory precedent (at least, not from a higher court), to which to adhere. Thus, the circuit courts may determine the resolution of an issue by their own accord. These individual determinations create circuit splits. Once the Supreme Court does resolve a split, however, the circuits are then bound to follow Supreme Court precedent, eliminating confusion as to which law to apply in their resolution of an issue. See Environmental Law Institute, Glossary of General Legal and Constitutional Terms, http://www.endangeredlaws.org/resourcguideglossary.htm (last visited Aug. 21, 2008).
Thus, when an area of law is unpredictable, the judicial system suffers.157 Last, the United States as a whole, and the states individually, have interests in consistent resolutions of the preclusion and waiver issues.159 The UFMJRA was initially proposed because:

[j]udgments rendered in the United States have in many instances been refused recognition abroad either because the foreign court was not satisfied that local judgments would be recognized in the American jurisdiction involved or because no certification of existence of reciprocity could be obtained from the foreign government in countries where existence of reciprocity must be certified to the courts by the government. Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad.160 Thus, by enforcing the judgments rendered in foreign jurisdictions, the federal government and the states stand to benefit because it is more likely that foreign countries will enforce the judgments rendered in the United States against foreign citizens.161

III. THE BENEFITS FLOWING FROM PRECLUSION AND WAIVER ARE FRUSTRATED BY COURTS THAT DO NOT ADHERE TO THE PRINCIPLE OF PRECLUSION

As the case law demonstrates, although many courts maintain a presumption of preclusion,162 others do not.163 When the law lacks uniformity, it also lacks

158. Cf. id. If reliance on adjudication is encouraged by promoting consistent decisions, then, logically, the converse is true. Arguably then, the Estabrook case could be understood to stand for the proposition that reducing consistency between decisions effectively discourages reliance on adjudication by litigants. Cf. id.
160. Id.
161. See, e.g., Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 911 (N.D. Iowa 2002) ("Codification by a state of its rules on the recognition of money-judgments rendered in a foreign court will make it more likely that judgments rendered in the state will be recognized abroad." (quoting UFMJRA Prefatory Note, 13 U.L.A. 40 (1962))). The theory advanced by the UFMJRA is thus one of reciprocity; however, reciprocity by a foreign state is not a prerequisite to the recognition and enforcement of judgments in the UFMJRA. In fact, the drafters of the UFMJRA "consciously rejected reciprocity as a factor to be considered in recognition of foreign money judgments." Bank of Montreal v. Kough, 612 F.2d 467, 471 (9th Cir. 1980).
162. See supra Part II.A.
163. See supra Part II.B.
predictability.\textsuperscript{164} Lack of predictability is, in turn, detrimental to citizens of foreign countries,\textsuperscript{165} citizens of the United States,\textsuperscript{166} and to the United States as a country.\textsuperscript{167}

\textsuperscript{164} See Sadler v. State Farm Mut. Auto. Ins. Co., No. C07-995Z, 2007 WL 2778257, at *7 (W.D. Wash. Sept. 20, 2007) (noting the forum state's interest in protecting its citizens from both a lack of predictability and a lack of uniformity in results); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c (1971) (discussing the rationale behind conflicts law, and placing emphasis on the "policy favoring uniformity of result"); Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that the rules of law are important for the promotion of both uniformity and predictability of law); Héctor G. Bladuell, Note, \textit{Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test}, 105 MICH. L. REV. 837, 846 (2007) ("The lack of uniformity does not promote predictability in judgments and allows judicial fishing expeditions for factors or criteria that support a particular result.").

\textsuperscript{165} See, e.g., Michael Traynor, \textit{Conflict of Laws, Comparative Law, and The American Law Institute}, 49 AM. J. COMP. L. 391, 393 (2001) ("Recognition and enforcement of foreign country judgments has been governed by a relatively stable principle of finality accompanied by comity, particularly as applied to money judgments."). Therefore, it follows that finality will often be thwarted when the principle of comity is not realized. This is detrimental to the countries involved, as needless litigation wastes valuable judicial resources, and also to the foreign plaintiff, because any judgment to which he is entitled is delayed. \textit{See, e.g., Mast, Foos & Co. v. Stover Mfg. Co.}, 177 U.S. 485, 488 (1900) ("Comity is not a rule of law, but one of practice, convenience and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question.").

\textsuperscript{166} Cf Nicol v. Tanner, 256 N.W.2d 796, 800–01 (Minn. 1976) ("[J]udgments are enforced to bring an end to litigation so that the rights of parties might finally be determined and judicial energies might be conserved."). Lack of predictability is detrimental to United States citizen-defendants because, depending on the jurisdiction in which recognition and enforcement are being sought, the defendant may or may not be afforded the opportunity to relitigate his claims. \textit{See id.} This poses a forum shopping problem, in which a foreign-plaintiff could theoretically seek to enforce a judgment in a state that strictly follows principles of comity. Conversely, a defendant is almost left with a luck-of-the-draw scenario, whereby his ability to relitigate, rightly or wrongly decided, could depend on the state in which the plaintiff seeks enforcement. \textit{See John A.E. Pottow, The Myth (and Realities) of Forum Shopping in Transnational Insolvency}, 32 BROOK. J. INT'L LAW 785, 815 n.127 (2007) ("[F]orum shopping is defined as the search by a plaintiff for the international jurisdiction most favourable to his claims . . . . However, where forum shopping leads to unjustified inequality between the parties to a dispute with regard to the defence of their respective interests, the practice must be considered and its eradication is a legitimate legislative objective." (quoting Opinion of Advocate General Ruiz-Jarabo Colomer at ¶71–73, Case C-1/04, Susanne Staubitz-Schreiber, 2006 E.C.R. 1-701, http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004C0001:EN:HTML)); see also Brand, \textit{supra} note 18, at 317 ("So long as we have issues of international law being determined in both federal and state courts, we run the risk of application of different interpretations of the rules and a resulting promotion of forum shopping.").

\textsuperscript{167} See Brand, \textit{supra} note 18, at 322 (arguing that a uniform federal rule would "create greater possibility that a United States judgment would be enforced in a foreign court . . . . [I]t would make it easier to prove that a United States federal court would enforce a judgment of the foreign jurisdiction, thus facilitating satisfaction of foreign court reciprocity requirements."); \textit{cf.} Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992) ("The issuance of antisuit injunctions threatens predictability by making cooperation and reciprocity between courts
There are numerous problems inherent in a system that lacks uniformity and predictability of the law.\textsuperscript{168} Unfortunately, courts that do not give preclusive effect to foreign judgments are only promoting this system.\textsuperscript{169}

When courts refuse to give preclusive effect to the recognition of a foreign judgment, they open the case for reexamination.\textsuperscript{170} In so doing, the implication is that a defendant has not waived his right to assert a jurisdictional defense. The conclusion that follows from a court’s decision to reconsider a judgment on a jurisdictional challenge is that the defendant has not waived his defense. If the defendant had waived his defense, then the court would not be empowered to reexamine the jurisdictional challenge.\textsuperscript{171}

A court’s refusal to apply a presumption of preclusion to foreign judgments is tantamount to an implicit refusal to recognize waiver. This is not only contrary to the majority of cases, but also hinders predictability in the judicial system.\textsuperscript{172} To remedy this problem, all U.S. courts, state and federal, should maintain a rebuttable presumption of preclusion when deciding whether to recognize and enforce foreign judgments. If this presumption is uniformly

\textsuperscript{168}See discussion supra Part II.C (discussing the detriments to a system that lacks predictability and uniformity in the law).

\textsuperscript{169}Cf. JEROME FRANK, LAW AND THE MODERN MIND 118–20 (1930) (contending that predictability in law is unattainable because the legal system lacks finality).

\textsuperscript{170}Cf. Cole v. Young, 817 F.2d 412, 431 (7th Cir. 1987) ("We may not reexamine a decision of a state court on the ground that it is inconsistent with some earlier case; forbidding such inquiry is what preclusion is all about. Principles of preclusion apply even after it has been authoritatively established that a decision was wrong.").

\textsuperscript{171}Cf. Gaston v. Ploeger, No. 04-2368, 2008 WL 169814, at *5 n.12 (D. Kan. Jan. 17, 2008) ("This fact [eventually raising an issue as to the court’s jurisdiction], however, fails to revitalize a personal jurisdiction defense that already has been waived. . . . [T]he waiver of the defense of lack of personal jurisdiction . . . is absolute." (emphasis added)).

\textsuperscript{172}See supra notes 20–22 and accompanying text (noting that lack of uniformity creates unpredictability in the law).
adopted, the problems associated with lack of predictability would be greatly alleviated.173

Although one could advocate for an irrebuttable presumption, a rebuttable presumption assures that the interests at stake will be afforded due consideration.174 Because recognition of foreign judgments is conditioned upon the foreign government’s conferral of due process rights to U.S. defendants,175 it would frustrate this condition to require an irrebuttable presumption, by which a defendant would be permanently barred from demonstrating that he was not afforded his due process rights.176 Thus, by providing for a rebuttable presumption, stability can be created while U.S. concerns can be assured.

Moreover, although there are some detriments to adopting this rebuttable presumption, these can be mitigated. For jurisdictions that currently maintain presumptions of preclusion, the confusion experienced by some defendants as to when and how to assert their rights is one detriment to the preclusion
presumption.\textsuperscript{177} This lack of clarity, however, is often easily remedied by the courts’ use of a bright-line rule.\textsuperscript{178} To ensure a bright-line rule, the courts should require that any conduct inconsistent with asserting jurisdictional challenges amounts to waiver of the challenge.\textsuperscript{179}

Another argument against the presumption of preclusion is that the presumption would undermine the government’s interest in ensuring that constitutional due process guarantees are afforded to U.S. litigants defending in foreign courts.\textsuperscript{180} This due process interest is certainly not to be taken lightly; however, this concern can be minimized if the courts apply the preclusion presumption only to those cases arising within legal systems that provide comparable due process rights to litigants.\textsuperscript{181} For systems in which due process or similar rights are not afforded, the courts should have the authority to ensure that due process rights have been protected.\textsuperscript{182} This could be accomplished through the adoption of a rebuttable presumption of preclusion.

Thus, although the due process concerns are valid, they do not counterbalance the interests the same parties have in finality, especially when the due process concerns can be easily remedied while maintaining a rebuttable presumption of preclusion.\textsuperscript{183} Predictability is perhaps the greatest asset of our system.\textsuperscript{184} When strides can be made to assure predictability at little expense

\textsuperscript{177} See supra notes 148–54 and accompanying text (discussing how defendants to foreign litigation experience confusion in asserting their rights because of the timing and methodology requirements under the current system).

\textsuperscript{178} See BORN & RUTLEDGE, supra note 1, at 1057–58 (noting that many courts take the position that litigation on the merits is tantamount to waiver).

\textsuperscript{179} See, e.g., FDIC v. Niblo, 821 F. Supp. 441, 451 (N.D. Tex. 1993) ("[W]aiver is the voluntary, intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right."); CIBC Mellon Trust Co. v. Mora Hotel Corp., 792 N.E.2d 155, 162 (N.Y. 2003) ("When defendants applied to the High Court to set aside the English judgments and to defend on the merits, they did more than they had to do to preserve a jurisdictional objection ... and so they voluntarily appeared in the foreign proceeding ... ").


\textsuperscript{181} See Hunt v. BP Exploration Co., 492 F. Supp. 885, 894–95 (N.D. Tex. 1980) ("Where, as here, the rendering forum’s system of jurisprudence has been a model for other countries in the free world, and whose judges are of unquestioned integrity independent of the political winds of the moment, the judgment rendered is entitled to a more ministerial, less technocratic, recognition decisional process. ... But the elements of the prima facie case are more likely to be met and it is less likely that such prima facie cases would be rebutted for judgments from favored systems.").

\textsuperscript{182} See UFMJRA § 4, 13 U.L.A. 59 cmt. ("As indicated [by the Supreme Court in Hilton], a mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.").

\textsuperscript{183} See Xiao Yang Chen v. Fischer, 843 N.E.2d 723, 725 (N.Y. 2005) ("The primary purposes of res judicata are grounded in public policy concerns and are intended to ensure finality, prevent vexatious litigation and promote judicial economy.").

\textsuperscript{184} See, e.g., Sarah Rudolph Cole, Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution, 51 HASTINGS L.J. 1199, 1202 (2000) ("While a court’s opinion certainly impacts the litigants before it, the opinion also becomes a component of the public good
to the rights and interests of the parties involved, the scales tip in favor of the presumption of preclusion.

IV. CONCLUSION

Courts that refuse to maintain a presumption of preclusion in the process of recognizing and enforcing foreign judgments inherently are ignoring waivers of jurisdictional defenses.185 This implicit disregard for waiver decisions breaks with the great weight of precedent and authority, and frustrates the goal of predictability in the law.186 There exists a pressing need for uniformity of the system because uniformity promotes predictability.187 To enhance uniformity, all U.S. courts, state and federal, should maintain rebuttable presumptions of preclusion that would prohibit relitigation of foreign judgments during the recognition and enforcement stages. This is one way of adding clarity to a vastly complex area of foreign judgments that is only expanding in a world that is becoming ever more globally interconnected.188