Although the United States is not a party to any judgment enforcement treaty, courts in this country regularly enforce foreign judgments. Indeed, if jurisdiction in the foreign court is proper and service of process was accomplished appropriately, the expectation should be that the foreign judgment will be enforced. In the past few months, however, there have been two noteworthy cases in which enforcement of foreign judgments was refused.

The State of the Law

The common law basis for enforcing foreign judgments in the United States is typically traced to the Supreme Court's decision in *Hilton v. Guyot*, 159 U.S. 113 (1895). Ironically, in that case, the Supreme Court refused to enforce a French judgment on the grounds of lack of reciprocity. Nevertheless, the Supreme Court's treatment of the enforceability of non-U.S. judgments as a matter of "comity of nations" was a seminal moment that ushered in a regime favorable to enforcing foreign judgments. The Supreme Court described comity as follows:
The recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. Id. at 164.

On the statutory side, in 1962, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the Uniform Foreign Country Money-Judgments Recognition Act. See 13 U.L.A. 39. The act codified the common law applied in the majority of U.S. states. More than half the states have adopted the act, and the number continues to grow.

Under the act, there are three mandatory bases for denying enforcement of foreign judgments: (1) the judgment was rendered under a judicial system that 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. There are also a number of discretionary grounds. One is the situation in which the foreign proceeding was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court. Other discretionary grounds include a judgment obtained by fraud that deprived the losing party of an adequate opportunity to present its case and a judgment that is repugnant to public policy.

The DeJoria Decision

_DeJoria v. Maghreb Petroleum Exploration_, No. 13-cv-654 (W.D. Tex. Aug. 13, 2014) was a lawsuit by American billionaire and philanthropist John Paul DeJoria, best known as a co-founder of the Paul Mitchell line of hair products and the Patron Spirits Company. (The authors' firm, including co-author David Zaslowsky, represented DeJoria.) Between 1998 and 2001, DeJoria invested in an oil exploration project in Morocco. DeJoria's pleadings described how the Moroccan royal family later obtained a stake in the venture through a cash infusion from a Liechtenstein entity controlled by a cousin of King Mohammed VI.

In connection with work done by DeJoria's company, on Aug. 20, 2000, King Mohammed VI gave a nationally televised speech during which he announced the discovery in Morocco of what he described as "copious and high quality oil." The king's announcement was significant news in Morocco, which, while sitting next to some of Africa's largest oil and gas producing nations, had not discovered its own reliable domestic source of oil and gas. The king's remarks seemed to presage the end of Morocco's longstanding energy insecurity, a prospect that so excited Moroccan traders that the Moroccan stock market jumped 5 percent following the king's announcement. In the end, however, the amount of oil proved to be much less plentiful than first anticipated, a reality that adversely affected both the king's credibility and the long-term business prospects of DeJoria's company in Morocco.

Disappointing results from the venture's first well led the Moroccan interests to expel DeJoria from the venture and sue him and another American investor, alleging fraudulent representation of the venture's value and mismanagement of the venture. DeJoria did not appear in the
Moroccan case, and a Moroccan court ultimately entered judgment against him and the other American investor for approximately $123 million.

DeJoria sued the Moroccan judgment creditors in the U.S. District Court for the Western District of Texas, seeking a declaration that the Moroccan judgment was unenforceable on several due process and procedural grounds. The Moroccan creditors counterclaimed for recognition of the judgment. The court held that the Texas Uniform Foreign Country Money Judgments Recognition Act precluded enforcement of the Moroccan judgment because it was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law. This ground for challenging a foreign award has rarely succeeded in the past.

The court pointed to various evidence to support its conclusion. There was a USAID report which stated that "the judiciary still suffers from persistent complaints that it is plagued with corruption, is not independent or accountable, does not have effective mechanisms for enforcement, and is encumbered by delays." Additionally, under Article 24 of the Moroccan Constitution, the king appoints the Minister of Justice (MOJ), which, given the fact that the MOJ sits on the High Judicial Council, gives the king considerable indirect influence over the makeup of the judiciary.

The court also noted that Morocco's very own foreign minister all but confirmed the veracity of the USAID report's findings pertaining to judicial independence. Speaking to an audience at the Brookings Institute in Washington D.C., in March 2011, Foreign Minister Taieb Fassi-Fihri, described Morocco's continuing problem with "phone call justice." Judicial independence, he explained, "is not the reality today, because [there are] some calls from time to time, from the Justice Department to some judge."

In the eyes of the district court, the most powerful piece of evidence that all was not well in the Moroccan judicial system came from the Moroccan judges themselves. On Oct. 6, 2012, roughly 1,000 Moroccan judges staged a sit-in in front of the Moroccan Supreme Court demanding more independence for the judiciary. The protesting judges carried a petition signed by 2,200 Moroccan judges, roughly two-thirds of the country's total judges, demanding structural reforms to guarantee their independence from the king.

Pointing also to the king's involvement in the appointment, discipline, and promotion of Moroccan judges, as well as the monarchy's direct intervention in the outcomes of certain civil cases, the court observed that "the Moroccan royal family's commitment to the sort of independent judiciary necessary to uphold the rule of law has and continues to be lacking in ways that raise serious questions about whether any party that finds itself involved in a legal dispute in which the royal family has an apparent interest—be it economic or political—in the outcome of the case could ever receive a fair trial."

Citing other facts as well, the court found "no conceivable set of facts or circumstances in which DeJoria could have prevailed in the underlying case," and concluded that the Moroccan court proceedings were fundamentally unfair and failed to provide DeJoria adequate due process. The decision is on appeal.
The Derr Case

Although Dejoria was decided under the act another recent case, Derr v. Swarek, No. 13-60904 (5th Cir. Sept. 9, 2014), was decided under the common law because the relevant state, Mississippi, has not passed the act. In that case, Thomas L. Swarek and Thomas Anthony Swarek ("the Swareks") sued Herman Derr and Derr Plantation, Inc. in the Chancery Court of Mississippi, alleging that Derr and his corporation breached a contract for the sale of Mississippi farmland. Derr died while the action was pending and, after years of stagnation in the Mississippi Chancery Court, Derr's wife and children sued the Swareks in the German Regional Court in Düsseldorf, Germany, seeking a declaratory judgment that they were not liable for any claims arising from the putative land contract.

Before the German court ruled on the matter, the Swareks voluntarily dismissed all of their claims against Derr with prejudice in the Mississippi case, and withdrew a pending motion to substitute the Derr heirs as defendants in the Mississippi action. The German Regional Court then dismissed the Derr heirs' claim, finding that, because of the Mississippi dismissal, the Derr heirs lacked the required legitimate interest in a declaratory judgment, and lacked the need for legal protection. On appeal, however, the German Higher Regional Court reversed and granted Derr's heirs a declaratory judgment of non-liability, and awarded them $300,000 in court costs as the prevailing party. The heirs then sued in federal district court to enforce the German court's judgment for costs.

The U.S. Court of Appeals for the Fifth Circuit, affirming the district court's judgment, refused to recognize the German court's judgment. Under Mississippi law, a judgment will not be recognized if recognition would "render meaningless substantial rights of the non-moving party" or violate public policy. The court held that, here, the two inquiries merged because res judicata is a doctrine of public policy and such public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of res judicata, would be endless. Under the doctrine of comity, the German court should have given effect to the adjudication in Mississippi, which resulted in the termination of the Swareks' claim, but the German court refused to do that. The Fifth Circuit therefore held that the German Higher Regional Court's failure to respect the Swareks' dismissal with prejudice of their claims against Derr violated Mississippi public policy and rendered meaningless the right of the Swareks to put an end to litigation of their claims.

The Derr heirs also argued that they were not seeking to enforce the German court's substantive judgment of non-liability in the Mississippi district court, but only its attendant order for costs. The court rejected this attempt to separate the cost award from the underlying decision on liability. The cost award does not exist under German law independently of the underlying judgment, but, rather, costs are awarded to the prevailing party. Thus, if the Derr heirs had not improperly obtained a declaratory judgment of non-liability on the identical claims that the Swareks had dismissed with prejudice nearly two years earlier, no order for costs would have issued.

It is interesting to contrast this decision with an earlier public policy case from Germany. Ackerman v. Levine, 788 F.2d 830 (2d Cir. 1986), arose out of a relationship in which the
plaintiff attorney claimed that he performed 20 days worth of work for the defendant but that the defendant refused to pay. The amount of the plaintiff's bill was based on a German statutory billing schedule. After obtaining a default judgment, the plaintiff sought to enforce the judgment in the United States. The district court held that, based on the undisputed fact that the parties never discussed fees, the German judgment was unenforceable as violative of New York's public policy that an attorney must ensure the reasonableness and full comprehension by the client of the compensation agreement.

The U.S. Court of Appeals for the Second Circuit ruled the district court had erred in holding that the failure of the German law regarding attorney fees to meet New York's more rigorous principles of fiduciary duties sufficiently offended local public policy as to justify non-enforcement of the entire judgment. According to the Second Circuit, Germany's choice to regulate attorney fees by statute rather than by fiduciary principles and to vest its courts with jurisdiction to ensure the proper application of the billing statute did not lead to treatment of the defendant that could be considered so "repugnant to fundamental notions of what is decent and just." The Second Circuit noted that a portion of the work allegedly performed by the plaintiff was not authorized by the defendant but that the German judgment should be enforced for that portion which was.

In sum, the United States remains a jurisdiction that is generally friendly to enforcing foreign judgments. As these two recent cases indicate, however, there are circumstances where U.S. courts will refuse to enforce them.

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