Memorandum 2017-22

2017 Legislative Program (Status Report)

The attached table summarizes the current status of the Commission's[1] 2017 legislative program.

Issues relating to two of the pending bills are discussed below.

AB 1034 (CHAU) — GOVERNMENT INTERRUPTION OF COMMUNICATION SERVICE

AB 1034 would repeal and restate, with minor improvements, existing Public Utilities Code Section 7908. Section 7908 requires court approval before a state or local agency can interrupt communication service to prevent crime or protect public safety. It provides a statutory procedure for obtaining court approval.

Under that procedure, once a government entity has obtained written authority to interrupt communications, that authority must be served on a specified entity.

If the interruption "falls within the federal Emergency Wireless Protocol" ("EWP") the Governor's Office of Emergency Services ("OES") must be served.[2] Any interruption that does not fall within the EWP must be served directly on the relevant communication service provider.

The purpose of serving OES is to ensure compliance with the EWP. That federal policy requires that a specified federal entity make the decision on whether an area interruption of wireless communications will occur. When OES is served with written authority to effect such an interruption, OES will pass the matter along to the federal entity, which will then decide whether to proceed.

The proposed law expressly provides that OES has discretion on whether to proceed when served with written authority to interrupt communications:

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. Pub. Util. Code § 7908(d).

> The Governor's Office of Emergency Services shall have policy discretion on whether to proceed with the proposed interruption.[3]

Assembly Member Chau was contacted by a major wireless communication service provider, who expressed concern with the language granting OES discretion on "whether to proceed with the proposed interruption." The service provider was worried that the language might be read to give OES the final word on whether the proposed interruption would occur, thereby superseding the federal government's authority to make that decision.

That was not the Commission's intention. The language was only intended to grant OES discretion on whether to "proceed" by referring the matter to the federal authorities. Those federal authorities would then make the decision on whether the interruption would occur.

After discussions between Commission staff, Mr. Chau's staff, and counsel for the service provider, the following clarifying amendment was proposed:

> The Governor's Office of Emergency Services shall have policy discretion on whether to ~~proceed with the proposed interruption~~ request that the federal government authorize and effect the proposed interruption.

The staff discussed that language with OES, to make sure that it would not cause any problems for them. OES was not able to take an official position on the amendment, but neither did they express any informal concerns.

The staff then discussed the proposed amendment with the Commission's Chairperson.[4] She had no objection to the change, which she saw as an improvement.

The bill was amended to make the proposed amendment on May 17, 2017.

The Commission now needs to decide whether to accept the amendment as compatible with the Commission's recommendation. **The staff recommends that the Commission do so.** The amendment is merely a clarification of the Commission's intention.

If the Commission accepts the amendment, it could revise its recommendation to use the amended language. This is possible because the

3. Proposed Penal Code § 11476(b).

4. For a discussion of the Commission's practices when an author proposes to amend a Commission-recommended bill, see Memorandum 2017-11, pp. 2-3. See also CLRC Handbook of Practices and Procedures 3.3.

recommendation is still in "pre-print" form, not yet having been printed in a hardbound volume.

The amendment would not require any change to the Commission's Comments.

Does the Commission accept the amendments as consistent with its recommendation? If so, does it wish to revise its recommendation accordingly?

AB 905 (MAIENSCHEIN) — RECOGNITION OF TRIBAL AND FOREIGN COURT MONEY JUDGMENTS

At its April 2017 meeting, the Commission considered an amendment that had been made to AB 905. The amendment, which made changes to Code of Civil Procedure Section 1716, was intended to clarify how courts are to decide whether to recognize a foreign money judgment, where existing law provides discretion on the matter:

> 1716. (a) Except as otherwise provided in subdivisions (b), (c), (d), and ~~(e)~~ (f), a court of this state shall recognize a foreign-country judgment to which this chapter applies.
>
> (b) A court of this state shall not recognize a foreign-country judgment if any of the following apply:
>
> (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.
>
> (3) The foreign court did not have jurisdiction over the subject matter.
>
> (c) (1) A court of this state ~~is not required to~~ shall not recognize a foreign-country judgment if any of the following apply:
>
> ~~(1)~~ (A) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend.
>
> ~~(2)~~ (B) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.
>
> ~~(3)~~ (C) The judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States.
>
> ~~(4) The judgment conflicts with another final and conclusive judgment.~~
>
> ~~(5)~~ (D) The proceeding in the foreign court 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.

~~(6)~~ (E) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

~~(7)~~ (F) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.

~~(8)~~ (G) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(2) Notwithstanding an applicable ground for nonrecognition under paragraph (1), the court may nonetheless recognize a foreign-country judgment if the party seeking recognition of the judgment demonstrates good reason to recognize the judgment that outweighs the ground for nonrecognition.

(d) A court of this state is not required to recognize a foreign-country judgment if the judgment conflicts with another final and conclusive judgment.

~~(d)~~ (e) If the party seeking recognition of a foreign-country judgment has met its burden of establishing recognition of the foreign-country judgment pursuant to subdivision (c) of Section 1715, a party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subdivision ~~(b) or (c)~~ (b), (c), or (d) exists.

~~(e)~~ (f) A court of this state shall not recognize a foreign-country judgment for defamation if that judgment is not recognizable under Section 4102 of Title 28 of the United States Code.

Similar changes were made to Section 1737, which governs the recognition of tribal court money judgments.

The Commission accepted the amendments but decided against revising its recommendation to use the amended language. Instead, the Commission directed the staff to prepare a draft of revised Comments, for Commission review at a future meeting.[5]

A draft of a report setting out revised Comments is attached for the Commission's review. Revised language is shown in ***bold italics***. Where language has been deleted without any replacement, bracketed ellipses have been inserted ("***[…]***")

If the report is approved, with or without changes, it will be printed as an appendix to the Commission's next Annual Report. Pursuant to our usual practice, that appendix will not include any signals to show changes, instead setting out the revised Comments in their final form.

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5. Commissioner Boyer-Vine abstained from this decision and Commissioner Miller-O'Brien voted against it. Minutes (April 2017), p. 3.

Does the Commission approve the report for eventual publication?

Respectfully submitted,

Brian Hebert
Executive Director

Status of 2017 Commission Legislative Program

As of May 31, 2017

		AB 534	AB 905	AB 1034							
	Introduced	2/13/17	2/16/17	2/16/17							
	Last Amended	4/19/17	3/13/17	5/17/17							
First House	Policy Committee	4/5/17	3/21/17	4/5/17							
	Second Committee	4/18/17	4/5/17	4/18/17							
	Passed House	4/27/17	4/20/17	5/30/17							
Second House	Policy Committee	*6/13/17*	*6/13/17*								
	Second Committee										
	Passed House										
Concurrence											
Governor	Received										
	Approved										
Secretary of State	Date										
	Chapter #										

Bill List:
AB 534 (Gallagher): Mechanics Lien in Common Interest Development
AB 905 (Maienschein): Recognition of Tribal and Foreign Court Money Judgments
AB 1034 (Chau): Government Interruption of Communication

KEY

Italics: Future or speculative

"—": Not applicable

DRAFT REPORT OF THE
CALIFORNIA LAW REVISION COMMISSION
ON CHAPTER ___ OF THE STATUTES OF 2017
(ASSEMBLY BILL 905)

Recognition of Tribal and Foreign Court Money Judgments

Chapter ___ of the Statutes of 2017 was introduced as Assembly Bill 905, authored by Assembly Member Brian Maienschein. The measure implements the Commission's recommendation on *Recognition of Tribal and Foreign Court Money Judgments*, __ Cal. L. Revision Comm'n Reports __ (2016). The revised Comments set out below supersede the comparable Comments in the recommendation. The revisions reflect amendments made to Assembly Bill 905 in the legislative process.

Code Civ. Proc. § 1716. Standards for recognition [UFCMJRA § 4]

Comment. Section 1716 is similar to Section 4 of the Uniform Foreign-Country Money Judgments Recognition Act (2005) ("2005 Uniform Act").

Paragraph (b)(1) and subparagraph (c)(1)(G) state exceptions to recognition of a foreign-country judgment related to the due process offered in the foreign proceeding. Under both ***paragraph (b)(1) and subparagraph (c)(1)(G)***, the focus of the inquiry "is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure." See Background from the 2005 Uniform Act *infra*. Unlike the Tribal Court Civil Money Judgment Act, this Act does not attempt to define "due process." *Compare* Code Civ. Proc. § 1732(c) *with* Code Civ. Proc. § 1714.

Paragraph (b)(2) provides that a foreign-country judgment shall not be recognized if the foreign court did not have personal jurisdiction over the defendant. Section 1717 makes clear that a foreign court lacks personal jurisdiction if either of the following applies:

(1) The foreign court lacks a basis for exercising personal jurisdiction that would be sufficient according to the standards governing personal jurisdiction in this state.
(2) The foreign court lacks personal jurisdiction under its own law.

Paragraph (c)(1) lists grounds ***for nonrecognition of*** a foreign-country judgment. ***[…]*** When the ***[…]*** grounds ***for nonrecognition in paragraph (c)(1)*** apply, the court ***may nonetheless*** recognize the foreign-country judgment***, under paragraph (c)(2),*** in the unusual case where countervailing considerations outweigh the seriousness of the defect underlying the applicable ground for nonrecognition.

Such countervailing considerations could include, for instance, situations in which the opponent failed to raise an objection in the foreign court or the opponent's own misconduct was the primary cause of the harm suffered.

Subparagraph (c)(1)(A) provides ***for nonrecognition of*** a foreign-country judgment if the defendant did not receive notice of the foreign proceeding in sufficient time to enable the defendant to defend. Under this ***subparagraph***, a defect in either the timing or the content of the notice could be grounds for nonrecognition if that defect precluded the defendant from defending in the foreign court proceeding.

Subparagraph (c)(1)(B) provides ***for nonrecognition of*** a foreign-country judgment if fraud deprived the losing party of an adequate opportunity to present its case. The Uniform Law Commission's commentary on this provision indicates that the type of fraud that can serve as grounds for nonrecognition is limited to "extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case." See Background from the 2005 Uniform Act *infra*. The reference to "extrinsic fraud" suggests that the test established by the exception is categorical, permitting nonrecognition in cases of extrinsic, but not intrinsic, fraud. However, the language of the exception establishes a functional test, whether the fraud deprived the party of an adequate opportunity to present its case. Recent judgment recognition case law evaluates fraud by assessing "whether the injured party had any opportunity to address the alleged misconduct during the original proceeding." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 404 Reporters' Note 3 (Tentative Draft No. 1, April 1, 2014). This case law suggests that a key consideration for a court deciding whether alleged fraud could be a ground for nonrecognition is whether there was "a reasonable opportunity for the person victimized by fraud to uncover the misconduct and bring it to the [rendering] court's attention." *Id*.

[…]

Former paragraph (c)(9) is not continued. Federal law includes specific standards governing the recognition of foreign-country defamation judgments. See subdivision ~~(e)~~ (f) (referring to the federal SPEECH Act standards for recognition of defamation judgments).

Subdivision (d) provides that a court may decline to recognize a foreign-country judgment if it conflicts with another final and conclusive judgment. Some commentators suggest that, where the foreign court rendering the later judgment fairly considered the earlier judgment and declined to recognize it under standards similar to those set forth in this Uniform Act, a court should ordinarily recognize the later foreign-country judgment. However, in some situations, other law may require the recognition of one of the conflicting judgments (e.g., where one of the conflicting

judgments is entitled to full faith and credit). See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 404 Comment f, Reporters' Note 6 (Tentative Draft No. 1, April 1, 2014).

Subdivision (f) is added to make clear that judgments that are not eligible for recognition under the federal SPEECH Act (codified at 28 U.S.C. §§ 4101-4105) shall not be recognized under this chapter.

The commentary for Section 4 of the 2005 Uniform Act is set out, in relevant part, below. The Law Revision Commission's recommendation (*Recognition of Tribal and Foreign Court Money Judgments*, __ Cal. L. Revision Comm'n Reports __ (2016)) does not reproduce all parts of the Uniform Law Commission's commentary. The omission of any part of the Uniform Law Commission commentary does not necessarily imply disapproval of the omitted commentary.

The legislation implementing the Commission's recommendation made changes to the court's discretion to recognize a judgment when certain grounds for nonrecognition apply. See AB 905 (Maienschein), as amended March 13, 2017. The Uniform Law Commission commentary may not be consistent with these changes.

Background from the 2005 Uniform Act

Source: This section is based on Section 4 of the 1962 [Uniform Foreign Money Judgments Recognition] Act [hereafter, "1962 Act"].

1. This Section provides the standards for recognition of a foreign-country money judgment. Section [1719] sets out the effect of recognition of a foreign-country money judgment under this Act.

2. Recognition of a judgment means that the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country. *See, e.g.* Restatement (Second) of Conflicts of Laws, Ch. 5, Topic 3, Introductory Note (recognition of foreign judgment occurs to the extent the forum court gives the judgment "the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the state where it was rendered.") Recognition of a foreign-country judgment must be distinguished from enforcement of that judgment. Enforcement of the foreign-country judgment involves the application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign-country judgment. Recognition of a foreign-country money judgment often is associated with enforcement of the judgment, as the judgment creditor usually seeks recognition of the foreign-country judgment primarily for the purpose of invoking the enforcement procedures of the forum state to assist the judgment creditor's collection of the judgment from the judgment debtor. Because the forum court cannot enforce the foreign-country judgment until it has determined that the judgment will be given effect, recognition is a prerequisite to enforcement of

the foreign-country judgment. Recognition, however, also has significance outside the enforcement context because a foreign-country judgment also must be recognized before it can be given preclusive effect under res judicata and collateral estoppel principles. The issue of whether a foreign-country judgment will be recognized is distinct from both the issue of whether the judgment will be enforced, and the issue of the extent to which it will be given preclusive effect.

3. [Subdivision (a) of Section 1716] places an affirmative duty on the forum court to recognize a foreign-country money judgment unless one of the grounds for nonrecognition stated in [subdivision ***(b), (c), (d), or (f)***] applies. [Subdivision] (b) states three mandatory grounds for denying recognition to a foreign-country money judgment. If the forum court finds that one of the grounds listed in [subdivision] (b) exists, then it must deny recognition to the foreign-country money judgment. ***[Subdivisions (c) and (d)] state*** eight nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. ***[Subdivision (e)]*** places the burden of proof on the party resisting recognition of the foreign-country judgment to establish that one of the grounds for nonrecognition [stated in subdivision ***(b), (c), or (d)***] exists.

4. The mandatory grounds for nonrecognition stated in [subdivision (b) of Section 1716] are identical to the mandatory grounds stated in Section 4 of the 1962 Act. The discretionary grounds stated in ***[subparagraphs (c)(1)(A) through (c)(1)(E) and subdivision (d)]*** are based on subsection 4(b)(1) through (6) of the 1962 Act. The discretionary grounds stated in ***[subparagraphs (c)(1)(F) and (c)(1)(G)]*** are new [to the 2005 Uniform Act].

5. Under [paragraph (b)(1) of Section 1716], the forum court must deny recognition to the foreign-country money judgment if that judgment was "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The standard for this ground for nonrecognition "has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved." Cmt §4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the foreign-country procedure. Kam-Tech Systems, Ltd. v. Yardeni, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord*, Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962

Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under [paragraph] (b)(1), so long as the essential elements of impartial administration and basic procedural fairness have been provided in the foreign proceeding. As the U.S. Supreme Court stated in *Hilton*:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, 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, and 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 then a foreign-country judgment should be recognized. *Hilton*, 159 U.S. at 202.

6. [Omitted]

7. ***[Subparagraph (c)(1)(B) of Section 1716]*** limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case — is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the foreign-country judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the foreign proceeding. Intrinsic fraud does not provide a basis for denying recognition under ***[subparagraph (c)(1)(B)]***, as the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in ***[subparagraph (c)(1)(C) of Section 1716]*** is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether "the [cause of action] [claim for relief] on which the judgment is based" is repugnant to public policy. Based on this "cause of action" language, some courts interpreting the 1962 Act have

refused to find that a public policy challenge based on something other than repugnancy of the foreign cause of action comes within this exception. *E.g.*, Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy); Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); The Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *cf.* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). ***[Subparagraph (c)(1)(C)]*** rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although ***[subparagraph (c)(1)(C)]*** of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the foreign law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the foreign-country judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language "or of the United States" in ***[subparagraph (c)(1)(C)]***, which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.*, Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. ***[Subparagraph (c)(1)(D) of Section 1716]*** allows the forum court to refuse recognition of a foreign-country judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the forum issuing

the foreign-country judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the foreign litigation resulting in the foreign-country judgment.

10. ***[Subparagraph (c)(1)(E) of Section 1716]*** authorizes the forum court to refuse recognition of a foreign-country judgment that was rendered in the foreign country solely on the basis of personal service when the forum court believes the original action should have been dismissed by the court in the foreign country on grounds of *forum non conveniens*.

11. ***[Subparagraph (c)(1)(F) of Section 1716]*** is new. Under this ***[subparagraph]***, the forum court may deny recognition to a foreign-country judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with [paragraph] (b)(1), which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, [paragraph] (b)(1) focuses on the judicial system of the foreign country as a whole, rather than on whether the particular judicial proceeding leading to the foreign-country judgment was impartial and fair. *See, e.g.*, The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962 Act); CIBC Mellon Trust Co. v. Mora Hotel Corp,. N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, ***[subparagraph (c)(1)(F)]*** allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the foreign-country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. ***[Subparagraph (c)(1)(G) of Section 1716]*** also is new. It allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness. Like ***[subparagraph (c)(1)(F)]***, it can be contrasted with [paragraph] (b)(1), which requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not

provide procedures compatible with the requirements of fundamental fairness. While the focus of [paragraph] (b)(1) is on the foreign country's judicial system as a whole, the focus of ***[subparagraph (c)(1)(G)]*** is on the particular proceeding that resulted in the specific foreign-country judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment.

[Subparagraphs (c)(1)(F) and (c)(1)(G) of Section 1716] both are discretionary grounds for denying recognition, while [paragraph] (b)(1) is mandatory. Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the foreign-country judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the foreign-country judgment in the foreign country, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. Under [***subdivision (e)*** of Section 1716], the party opposing recognition of the foreign-country judgment has the burden of establishing that one of the grounds for nonrecognition set out in ***[subdivisions (b), (c), or (d)]*** applies. The 1962 Act was silent as to who had the burden of proof to establish a ground for nonrecognition and courts applying the 1962 Act took different positions on the issue. *Compare* Bridgeway Corp. v. Citibank, 45 F.Supp. 2d 276, 285 (S.D.N.Y. 1999) (plaintiff has burden to show no mandatory basis under 4(a) for nonrecognition exists; defendant has burden regarding discretionary bases) *with* The Courage Co. LLC v. The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition). Because the grounds for nonrecognition in Section [1716] are in the nature of defenses to recognition, the burden of proof is most appropriately allocated to the party opposing recognition of the foreign-country judgment.

[Adapted from the Uniform Law Commission's Comment to the 2005 Uniform Act § 4.]

Heading of Chapter 3 (commencing with Section 1730) (added).

Comment. The heading of Chapter 3 (commencing with Section 1730) is added to locate the Tribal Court Civil Money Judgment Act within Title 11.

[…]

Code Civ. Proc. § 1737. Standards for recognition for tribal court money judgment [similar to UFCMJRA § 4]

Comment. ***Section 1737 is similar to Section 4 of the Uniform Foreign-Country Money Judgments Recognition Act (2005) ("2005 Uniform Act"), but relates to the recognition for tribal court civil money judgments. See also Section 1716 (for recognition of foreign-country money judgments).***

Paragraph (b)(1) provides that a tribal court money judgment shall not be recognized if the tribal court did not have personal jurisdiction over the respondent. Under this paragraph, a tribal court can lack personal jurisdiction if either of the following applies:

(1) The tribal court lacks a basis for exercising personal jurisdiction that would be sufficient according to the standards governing personal jurisdiction in this state.
(2) The tribal court lacks personal jurisdiction under its own law.

The need to evaluate personal jurisdiction under the tribal court's own law should be rare. In most cases, objections to personal jurisdiction will have been litigated or waived in the tribal court proceeding. "There is authority … for the proposition that a U.S. court generally will not look behind a foreign court's finding of personal jurisdiction under its own law." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 403 Reporters' Note 7 (Tentative Draft No. 1, April 1, 2014). Generally, the mere fact that a judgment was rendered by a tribal court suggests that personal jurisdiction was proper under tribal law. However, a California court may need to evaluate personal jurisdiction under tribal law when the issue of personal jurisdiction was neither litigated nor waived in the tribal court proceeding (e.g., the defendant never appeared and a default judgment was entered).

Where a defect in the service of process would defeat personal jurisdiction under tribal law, a court may find that the tribal court lacked personal jurisdiction under tribal law on the basis of that service defect. However, where the service defect is not

jurisdictional, the service defect could still lead to nonrecognition under other provisions. ***E.g., Section 1737(c)(1)(A).***

Paragraph (c)(1) lists grounds ***for nonrecognition of*** a tribal court money judgment. ***[…]*** When the ***[…]*** grounds ***for nonrecognition in paragraph (c)(1)*** apply, the court ***may nonetheless*** recognize the foreign-country judgment***, under paragraph (c)(2),*** in the unusual case where countervailing considerations outweigh the seriousness of the defect underlying the applicable ground for nonrecognition. Such countervailing considerations could include, for instance, situations in which the opponent failed to raise an objection in the tribal court or the opponent's own misconduct was the primary cause of the harm suffered.

Subparagraph (c)(1)(A) provides ***for nonrecognition of*** a tribal court money judgment if the defendant did not receive notice of the tribal court proceeding in sufficient time to enable the defendant to defend. Under this ***subparagraph***, a defect in either the timing or the content of the notice could be grounds for nonrecognition if that defect precluded the defendant from defending in the tribal court proceeding.

Subparagraph (c)(1)(B) provides ***for nonrecognition of*** a tribal court money judgment if fraud deprived the losing party of an adequate opportunity to present its case. The Uniform Law Commission's commentary on this provision indicates that the type of fraud that can serve as grounds for nonrecognition is limited to "extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case." See Background from the 2005 Uniform Act *infra*. The reference to "extrinsic fraud" suggests that the test established by the exception is categorical, permitting nonrecognition in cases of extrinsic, but not intrinsic, fraud. However, the language of the exception establishes a functional test, whether the fraud deprived the party of an adequate opportunity to present its case. Recent judgment recognition case law evaluates fraud by assessing "whether the injured party had any opportunity to address the alleged misconduct during the original proceeding." See Restatement of the Law Fourth: The Foreign Relations Law of the United States: Jurisdiction § 404 Reporters' Note 3 (Tentative Draft No. 1, April 1, 2014). This case law suggests that a key consideration for a court deciding whether alleged fraud could be a ground for nonrecognition is whether there was "a reasonable opportunity for the person victimized by fraud to uncover the misconduct and bring it to the [rendering] court's attention." *Id*.

Subdivision (d) provides that a court may decline to recognize a tribal court money judgment if it conflicts with another final and conclusive judgment. Some commentators suggest that, where the tribal court rendering the later judgment fairly considered the earlier judgment and declined to recognize it under standards similar to those set forth in this Act, a court should ordinarily

recognize the later tribal court money judgment. However, in some situations, other law may require the recognition of one of the conflicting judgments (e.g., where one of the conflicting judgments is entitled to full faith and credit). See *id.* § 404 Comment f, Reporters' Note 6.

The commentary for Section 4 of the 2005 Uniform Act is set out, in relevant part, below. The Law Revision Commission's recommendation (*Recognition of Tribal and Foreign Court Money Judgments*, __ Cal. L. Revision Comm'n Reports __ (2016)) does not reproduce all parts of the Uniform Law Commission's commentary. The omission of any part of the Uniform Law Commission commentary does not necessarily imply disapproval of the omitted commentary.

The legislation implementing the Commission's recommendation made changes to the court's discretion to recognize a judgment when certain grounds for nonrecognition apply. See AB 905 (Maienschein), as amended March 13, 2017. The Uniform Law Commission commentary may not be consistent with these changes.

Background from the 2005 Uniform Act

Source: [Section 1737] is based on Section 4 of the 1962 [Uniform Foreign Money Judgments Recognition] Act [hereafter, "1962 Act"].

1. [Section 1737] provides the standards for recognition of a [tribal court] money judgment. …

2. [Omitted]

3. … [Subdivision (b) of Section 1737] states three mandatory grounds for denying recognition to a [tribal court] money judgment. If the forum court finds that one of the grounds listed in [subdivision (b) **…**] exists, then it must deny recognition to the [tribal court] money judgment. ***[Subdivisions (c) and (d) state*** nine] nonmandatory grounds for denying recognition. The forum court has discretion to decide whether or not to refuse recognition based on one of these grounds. ***[Subdivision (e)]*** places the burden of proof on the party resisting recognition of the [tribal court] judgment to establish that one of the grounds for nonrecognition exists.

4. [Omitted]

5. Under [paragraph (b)(3) of Section 1737], the forum court must deny recognition to the [tribal court] money judgment if that judgment was "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The standard for this ground for nonrecognition "has been stated authoritatively by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113, 205 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for nonrecognition. A case of serious injustice must be involved." Cmt §4, Uniform Foreign Money-Judgment Recognition Act (1962). The focus of

inquiry is not whether the procedure … is similar to U.S. procedure, but rather on the basic fairness of the [tribal court] procedure. Kam-Tech Systems, Ltd. v. Yardeni, 74 A.2d 644, 649 (N.J. App. 2001) (interpreting the comparable provision in the 1962 Act); *accord*, Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (procedures need not meet all the intricacies of the complex concept of due process that has emerged from U.S. case law, but rather must be fair in the broader international sense) (interpreting comparable provision in the 1962 Act). Procedural differences, such as absence of jury trial or different evidentiary rules are not sufficient to justify denying recognition under [paragraph (b)(3) …], so long as the essential elements of impartial administration and basic procedural fairness have been provided in the [tribal court] proceeding. As the U.S. Supreme Court stated in *Hilton*:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, 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, and 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 then a foreign-country judgment should be recognized. *Hilton*, 159 U.S. at 202.

6. [Omitted]

7. ***[Subparagraph (c)(1)(B) of Section 1737]*** limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud. This provision is consistent with the interpretation of the comparable provision in subsection 4(b)(2) of the 1962 Act by the courts, which have found that only extrinsic fraud — conduct of the prevailing party that deprived the losing party of an adequate opportunity to present its case — is sufficient under the 1962 Act. Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment. When this type of fraudulent action by the plaintiff deprives the defendant of an adequate opportunity to present its case, then it provides grounds for denying recognition of the [tribal court] judgment. Extrinsic fraud should be distinguished from intrinsic fraud, such as false testimony of a witness or admission of a forged document into evidence during the [tribal court] proceeding. Intrinsic fraud does not provide a basis for denying recognition under ***[subparagraph (c)(1)(B)]***, as the

assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court.

8. The public policy exception in ***[subparagraph (c)(1)(C) of Section 1737]*** is based on the public policy exception in subsection 4(b)(3) of the 1962 Act, with one difference. The public policy exception in the 1962 Act states that the relevant inquiry is whether "the [cause of action] [claim for relief] on which the judgment is based" is repugnant to public policy. Based on this "cause of action" language, some courts interpreting the 1962 Act have refused to find that a public policy challenge based on something other than repugnancy of the … cause of action comes within this exception. *E.g.*, Southwest Livestock & Trucking Co., Inc. v. Ramon, 169 F.3d 317 (5th Cir. 1999) (refusing to deny recognition to Mexican judgment on promissory note with interest rate of 48% because cause of action to collect on promissory note does not violate public policy); Guinness PLC v. Ward, 955 F.2d 875 (4th Cir. 1992) (challenge to recognition based on post-judgment settlement could not be asserted under public policy exception); The Society of Lloyd's v. Turner, 303 F.3d 325 (5th Cir. 2002) (rejecting argument legal standards applied to establish elements of breach of contract violated public policy because cause of action for breach of contract itself is not contrary to state public policy); *cf.* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (judgment creditor argued British libel judgment should be recognized despite argument it violated First Amendment because New York recognizes a cause of action for libel). ***[Subparagraph (c)(1)(C)]*** rejects this narrow focus by providing that the forum court may deny recognition if either the cause of action or the judgment itself violates public policy. *Cf.* Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(d) (1986) (containing a similarly-worded public policy exception to recognition).

Although ***[subparagraph (c)(1)(C)***] of this Act rejects the narrow focus on the cause of action under the 1962 Act, it retains the stringent test for finding a public policy violation applied by courts interpreting the 1962 Act. Under that test, a difference in law, even a marked one, is not sufficient to raise a public policy issue. Nor is it relevant that the [tribe's] law allows a recovery that the forum state would not allow. Public policy is violated only if recognition or enforcement of the [tribal court] judgment would tend clearly to injure the public health, the public morals, or the public confidence in the administration of law, or would undermine "that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel." Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 901 (N.D. Tex. 1980).

The language "or of the United States" in ***[subparagraph (c)(1)(C)]***, which does not appear in the 1962 Act provision, makes it clear that the relevant public policy is that of both the State in which recognition is sought and that of the United States. This is

the position taken by the vast majority of cases interpreting the 1962 public policy provision. *E.g.*, Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup.Ct. N.Y. 1992) (British libel judgment denied recognition because it violates First Amendment).

9. ***[Subparagraph (c)(1)(D) of Section 1737]*** allows the forum court to refuse recognition of a [tribal court] judgment when the parties had a valid agreement, such as a valid forum selection clause or agreement to arbitrate, providing that the relevant dispute would be resolved in a forum other than the [tribal court] issuing the … judgment. Under this provision, the forum court must find both the existence of a valid agreement and that the agreement covered the subject matter involved in the … litigation resulting in the [tribal court] judgment.

10. ***[Subparagraph (c)(1)(E) of Section 1737]*** authorizes the forum court to refuse recognition of a [tribal court] judgment that was rendered … solely on the basis of personal service when the forum court believes the original action should have been dismissed by the [tribal] court … on grounds of *forum non conveniens*.

11. … Under ***[subparagraph (c)(1)(F) of Section 1737]***, the forum court may deny recognition to a [tribal court] judgment if there are circumstances that raise substantial doubt about the integrity of the rendering court with respect to that judgment. It requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with [paragraph (b)(3) **…**], which requires that the forum court refuse recognition to the [tribal court] judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, [paragraph (b)(3) **…**] focuses on the [tribe's] judicial system … as a whole, rather than on whether the particular judicial proceeding leading to the [tribal court] judgment was impartial and fair. *See, e.g.*, The Society of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (interpreting the 1962 Act); CIBC Mellon Trust Co. v. Mora Hotel Corp,. N.V., 743 N.Y.S.2d 408, 415 (N.Y. App. 2002) (interpreting the 1962 Act); Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (interpreting the 1962 Act). On the other hand, ***[subparagraph (c)(1)(F)]*** allows the court to deny recognition to the [tribal court] judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the [tribal court] judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the [tribe's] judicial system … as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular [tribal court] judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.

12. ***[Subparagraph (c)(1)(G) of Section 1737]*** … allows the forum court to deny recognition to the [tribal court] judgment if the court finds that the specific proceeding in the [tribal] court was not compatible with the requirements of fundamental fairness. Like ***[subparagraph (c)(1)(F)]***, it can be contrasted with [paragraph (b)(3) **…**], which requires the forum court to deny recognition to the [tribal court] judgment if the forum court finds that the entire judicial system … where the [tribal court] judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of [paragraph (b)(3) **…**] is on the [tribal] judicial system as a whole, the focus of ***[subparagraph (c)(1)(G)]*** is on the particular proceeding that resulted in the specific [tribal court] judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular [tribe] that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the [tribal court] judgment was entered was denied fundamental fairness in the particular proceedings leading to the [tribal court] judgment.

[Subparagraphs (c)(1)(F) and (c)(1)(G)] both are discretionary grounds for denying recognition, while [paragraph (b)(3) **…**] is mandatory. Obviously, if the [tribe's] entire judicial system … fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that [judicial system] would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the [tribal court] judgment, then there may or may not be other factors in the particular case that would cause the forum court to decide to recognize the [tribal court] judgment. For example, a forum court might decide not to exercise its discretion to deny recognition despite evidence of corruption or procedural unfairness in a particular case because the party resisting recognition failed to raise the issue on appeal from the [tribal court] judgment …, and the evidence establishes that, if the party had done so, appeal would have been an adequate mechanism for correcting the transgressions of the lower court.

13. [Omitted]

[Adapted from the Uniform Law Commission's Comment to the 2005 Uniform Act § 4.]
