The Impact of Nahar v. Nahar on Comity in Florida: It's Just Not Funny Anymore

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I. INTRODUCTION

The principle of comity, although less well-known and understood than the related concept of full faith and credit, plays a vital role in the field of international law. In the United States, comity is an established principle that essentially regulates the validity and enforcement of the judgments of foreign nation courts in U.S. courts. Recently, Florida's Third District Court of Appeal issued a ruling that greatly impacts the effect of comity in Florida courts. The ramifications of this decision will be felt in the private sector, Florida's banking industry, and throughout the Florida economy as a whole.

II. FACTS

On May 15, 1984, Roebi Nahar, a citizen of Surinam, passed away in Miami, Florida. He left behind his second wife Glenda, their three minor children, his six adult children by a previous marriage, an aggregate sum of $657,000 deposited in six Florida bank accounts, and certain other assets located on the island of Aruba. Three of the bank accounts were joint accounts with right of survivorship between Roebi and Glenda; two were trust accounts established for the minor children, with Roebi and Glenda named as joint trustees; the last was a Totten trust account opened by Roebi for Glenda and the minor children, naming Roebi as trustee. Soon after Roebi's death, Glenda emptied all but the Totten trust and took control of the

1. Comity is defined, in general, as a willingness on the part of the courts of one state or jurisdiction to give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. BLACK'S LAW DICTIONARY 139 (5th abr. ed. 1983).
2. "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state . . . ." U.S. CONST. art. IV, § 1.
3. Surinam, a nation located in the northeastern corner of South America, was at one time a possession of The Netherlands and became independent in 1976.
5. A Totten trust is a revocable trust created at the opening of a bank account and used to pass property outside of the probate process upon the death of the depositor. BLACK'S LAW DICTIONARY 1513 (6th ed. 1990). See infra text accompanying notes 104-107.
6. Nahar, 656 So. 2d at 227, n.4.
The decedent's adult children, residents of Aruba, petitioned the Aruban Court of First Instance to administer the disposition of the Florida bank accounts according to the law of The Netherlands. They argued that Roebi was domiciled in Aruba and that he was only a temporary resident of Florida. Importantly, the Aruban court obtained personal jurisdiction over Glenda when she appeared in Aruba to contest the action. The Aruban proceeding, later affirmed by the Court of Cassation of The Netherlands, determined that the decedent was a domiciliary of Aruba and ordered his estate administered under Dutch law. The court issued an order commanding Glenda to transfer the funds to Aruba.

The adult children then filed an ancillary administration in Florida requesting that the Florida court order a transfer of the proceeds of the bank accounts to Aruba, under the premise that the court had authority to enforce the Aruban court order via the principle of comity. Glenda Nahar, acting individually and as guardian of her minor children, filed a petition seeking revocation of probate, asserting that the bank accounts had passed to her and to her children by operation of Florida law. Both sides moved for summary judgment.

The Florida trial court found the issue res judicata, entered summary judgment for the adult children, and ordered the bank holding the proceeds of the original accounts to transfer them to Aruba for probate. Glenda Nahar appealed. The Court of Appeal for the Third District of Florida affirmed in large part the trial court's ruling. It found that the trial court was correct in enforcing the Aruban decree because a foreign order should be

7. Id. at 227.
8. Id.
9. Id.
10. Id.
11. The Netherlands Court of Cassation, more commonly known as "The Hague," is the highest court of The Netherlands and its territorial possessions.
12. Nahar, 656 So. 2d at 227.
13. Id.
14. Id.
15. Id. at 227-28.
16. Id. at 228.
17. Id.
18. Id.
extended comity where the parties have been given notice and an opportunity to be heard, the foreign court has original jurisdiction, and the order does not offend the public policy of the State of Florida.\footnote{Id. at 229.}

The Third District's opinion in \textit{Nahar} significantly transformed Florida's approach to comity. In so doing, the \textit{Nahar} court failed to apply a controlling Florida statute and ignored Florida case law and its own carefully crafted precedent. The decision has serious ramifications for future cases involving parties who seek to enforce the judgments of foreign country courts.

This Note examines and criticizes the \textit{Nahar} decision and its treatment of the involved issues. Part III explores the use of comity in Florida. Part IV discusses the decision's majority reasoning and the rationales underlying the vociferous dissents. Part V analyzes the decision and its consequences for the future of suits involving comity.

\section*{III. Comity in Florida}


The application of comity basically entails that courts of one jurisdiction will give effect to judicial decisions of another jurisdiction, not as a matter of obligation but out of deference and mutual respect.\footnote{Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972); Hilton, 159 U.S. at 163-64.}
Extensions of comity, however, are not without limitation. Courts have refused to extend comity when there is a lack of personal or subject matter jurisdiction over the defendant;\textsuperscript{22} the order is based on fraud;\textsuperscript{23} there is a lack of notice to the defendant;\textsuperscript{24} the order is not final;\textsuperscript{25} or the order is contrary to the public policy of the forum where the party seeks enforcement.\textsuperscript{26}

Like most states, Florida has employed the doctrine of comity on a limited basis to recognize and enforce foreign nation judgments.\textsuperscript{27} Initially, Florida courts extended comity only to final judgments and not to interlocutory\textsuperscript{28} orders.\textsuperscript{29} The policy underlying this limitation was that "it would be an undue burden for American courts to become entangled in the... intricacies of foreign court practice by recognizing or enforcing the temporary court orders of another country."\textsuperscript{30} Florida courts have preferred to wait until a foreign court issued a final order before deciding on the applicability of comity.\textsuperscript{31} In this respect, Florida law has been in accord with the practices of most United States jurisdictions.\textsuperscript{32}

\begin{enumerate}
\item 22. \textit{Restatement} § 104.
\item 23. \textit{Id.} § 98 cmt. g; § 115.
\item 25. Ogden v. Ogden, 33 So. 2d 870 (Fla. 1947). \textit{See also} \textit{Restatement} § 107.
\item 26. \textit{Restatement} § 98 cmt. g; § 117 cmt. c.
\item 27. \textit{See} Beverly Beach Properties, Inc. v. Nelson, 68 So. 2d 604, 609 (Fla. 1953); Willson v. Willson, 55 So. 2d 905 (Fla. 1951); Pawley v. Pawley, 46 So. 2d 464, 469 (Fla. 1950); Ogden v. Ogden, 33 So. 2d 870 (1947). \textit{Following} the U.S. Supreme Court's reasoning in \textit{Aetna Life}, 223 U.S. at 185, the Florida Supreme Court has held that the Full Faith and Credit clause of the United States Constitution does not require Florida courts to enforce the judgments of foreign nations. \textit{Parker}, 21 So. 2d at 142; \textit{Pawley}, 46 So. 2d at 468. \textit{See also} U.S. \textit{Const.} art IV, § 1.
\item 28. An interlocutory order is one that decides some preliminary point or matter, but is not a final decision on the entire controversy. \textit{Black's Law Dictionary} 417 (5th abr. ed. 1983).
\item 31. \textit{Id.}
\item 32. Bishop & Burnette, \textit{supra} note 20, at 430-31; Zaphiriou, \textit{supra} note 29, at 747; \textit{Restatement} § 107.
\end{enumerate}
Over the past decade Florida's Third District Court of Appeal has gradually expanded the categories of foreign orders to which it will extend comity. This movement began in 1984 when the Third District granted comity to a temporary injunction issued in St. Vincent and the Grenadines. The trend took on greater shape in 1990 when the court rejected a per se rule against recognition of interim foreign orders and instituted a case-by-case analysis. The court specifically included those cases involving domestic relations support payments and protection of the rights of creditors as categories where public policy strongly encouraged extension of comity to non-final foreign orders. In 1991, the Third District extended comity to a temporary injunction issued by an English court in a receivership action. In its most recent ruling on comity prior to Nahar, the Third District advanced the view expressed in Cardenas that comity may be extended to interlocutory orders under certain circumstances. The court has failed, however, to set strict guidelines delineating those situations where non-final judgments of foreign nations will be extended comity.

IV. Nahar v. Nahar

A. The Majority Decision

In June 1995, the Third District Court of Appeal, sitting en banc, held that a Dade County probate judge was correct in enforcing the decree of an Aruban court and ordering the proceeds of the bank account transferred to Aruba. In reaching that conclusion, the court found a Florida statute concerning choice of law and bank accounts inapplicable. The court then

34. Cardenas v. Solis, 570 So. 2d at 999. See infra text accompanying notes 38-42.
35. Cardenas, 570 So. 2d at 998.
38. Nahar v. Nahar, 656 So. 2d at 229.
39. Id. at 228, n.8. The court clearly erred by failing to apply Florida statute § 655.55. If the court had properly interpreted the requirements of the statute and applied it in this case, it never would have reached the comity issue, and Florida law would have controlled the disposition of the bank accounts. See infra text ac-
changed the test for determining when a foreign nation’s interlocutory order would be extended comity.\textsuperscript{40}

The court acknowledged that originally only the final judgments of foreign courts were entitled to comity, but proceeded to trace the recent expansion of comity in the Third District.\textsuperscript{41} It then stated that the case-by-case rule announced in Cardenas would be discarded in favor of the approach contained in the Restatement (Second) Conflict of Laws.\textsuperscript{42} Virtually all foreign decrees, final or interlocutory, would be extended comity as long as they met requirements of notice and jurisdiction, and did not conflict with the public policy of Florida.\textsuperscript{43} The court concluded that the Aruban court had met the requirements of the Restatement, and therefore its order was entitled to comity in Florida.

The court did note that comity would not extend to Aruba’s order concerning the Totten trust account as it was not at issue in the Aruban action and, under the rules governing Totten trusts, had vested at Roebi’s death in Glenda and the minor children, the beneficiaries of the account.\textsuperscript{44}

\begin{itemize}
  \item \textsuperscript{40} Nahar, 656 So. 2d at 229.
  \item \textsuperscript{41} Id. at 228.
  \item \textsuperscript{42} Id. at 228-29. As noted in Nahar, the Restatement’s doctrine of recognition of the judgments of foreign courts is contained primarily in §§ 98 and 92. Those sections read in pertinent part:

  \begin{itemize}
    \item § 98
      A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.
      \begin{itemize}
        \item[a.] The rule of the Section is limited to valid judgments, that is, to judgments which meet the requirements of section 92.
      \end{itemize}

    \item § 92
      A judgment is valid if
      \begin{itemize}
        \item[a.] the state in which it is rendered has jurisdiction to act judicially in the case; and
        \item[b.] a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and
        \item[c.] the judgment is rendered by a competent court; and
        \item[d.] there is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.
      \end{itemize}

  \end{itemize}

  \item \textsuperscript{43} Nahar, 656 So. 2d at 229.
  \item \textsuperscript{44} Id. at 230. The court failed, however, to note that the other accounts at issue had vested simultaneously with the Totten trust. See infra text accompanying notes 97-103.
\end{itemize}
Finally, in two minor yet related holdings, the court ruled that the trial court erred in failing to determine the disposition of Roebi’s Miami real estate but was correct in deducting the costs of the action to recover the contents of the bank accounts from the proceeds of the accounts.

B. The Dissents

Writing for the three concurring/dissenting justices, Judge Hubbart agreed with the majority’s rulings concerning the Totten trust, the decedent’s real estate, and the charging of the costs of the action, but strongly disagreed with the rulings regarding the remaining five bank accounts. Judge Hubbart maintained that the use of comity was inappropriate in this instance, because of the controlling Florida conflict-of-laws rule governing joint bank accounts and Totten trusts. Without the principle of comity available, Judge Hubbart noted that Florida law controlled the disposition of these bank accounts and that under Florida law the account proceeds passed to Glenda and her minor children. He also disagreed with the majority’s expansion of the use of comity and its failure to apply Florida Statute Section 655.55.

In a separate dissent, Judge Jorgenson added that the public policy considerations involved in this case overrode the court’s power to extend comity because individuals who open Florida accounts should be protected under Florida law from intrusions by foreign courts. Judge Jorgenson argued that this situation should be an exception to the application of comity.

45. Nahar, 656 So. 2d at 225.
46. Id.
47. Id. at 231.
48. Id.
49. Id. at 236 n.5 (Hubbart, J., dissenting). Judge Hubbart stated that the new comity doctrine embraced by the majority was both an inappropriate extension of the Third District’s precedents and based on a misreading of the Restatement.
50. Id. at 234 n.3 (Hubbart, J., dissenting). Judge Hubbart disagreed with the majority’s reading of the statute’s retroactivity clause as well as the clauses providing exceptions to the statute’s application.
51. Id. at 239 (Jorgenson, J., dissenting).
52. Id.
V. ANALYSIS

*Nahar* is a significant departure from Florida's use of comity, but the court should never have addressed the issue. Having done so, however, *Nahar* represents a bold extension of comity, and its results are, at best, problematic. The court's decision to disregard precedent and create a new standard for the extension of comity is questionable. Even assuming the validity of the new approach, the *Nahar* court failed to apply important elements of the newly-created standard.

A. Comity Should Never Have Been At Issue

The *Nahar* court reached the comity issue only because of its failure to apply the controlling Florida statute.53 Had the court applied the statute, disposition of the bank accounts would have followed according to Florida law and the result would have been completely different.54

In this respect, the court's first error was to misapply the statute's retroactivity clause. The court held that the statute did

53. Florida Statute § 655.55 reads in pertinent part:

(1) The law of this state, excluding its law regarding comity and conflict of laws, governs all aspects . . . of any deposit account in a branch or office in this state of a deposit or lending institution . . . regardless of the citizenship, residence, location, or domicile of any other party to the contract or agreement governing such deposit account, and regardless of any provision of any law of the jurisdiction of the residence, location, or domicile of such other party, whether or not such deposit account bears any other relation to this state . . . .

(3) As used in this section, the term:

(a) "Deposit or lending institution" means any of the following:

(1) A bank trust company, credit union, or association organized and existing under the laws of this or any other state.

(b) "Deposit account" means any deposit or account in one or more names including, without limitation, any . . . joint account . . . trust account, custodial account, fiduciary account, deposit in trust, or Totten trust account . . . .

(6) This section applies to deposit accounts . . . entered into before, on, or after July 1, 1988. However, this section does not apply to any deposit accounts existing on July 1, 1988, if either party to the contract or agreement governing the deposit account provides the other party with a written objection to the application of this section within 6 months of July 1, 1988.

*Id.*

54. For a discussion of the disposition of the accounts under Florida law, see *infra* text accompanying notes 93-107.
not apply to bank accounts opened and closed before July 1, 1988, the statute's effective date. The statute, however, clearly provides that it is to apply to all accounts "entered into before, on, or after July 1, 1988." No exception is made for accounts closed before that date. The court further stated that the statute was not applicable since Roebi Nahar died four years before the effective date; this despite the lack of any statutory provision for such contingencies. This interpretation is in clear defiance of the express statutory command.

When the Florida Legislature enacted Section 655.55, it merely codified, and did not change, Florida's common law. The Legislature was thus within its constitutional authority when it chose to make the statute apply retroactively to all bank accounts. Indeed, the Third District Court of Appeal, per Judge Hubbart in Sanchez v. Sanchez de Davila ruled the retroactivity clause valid precisely because it did not alter but merely codified the common law. In Sanchez several Totten trust accounts were opened in 1979 and then closed by the account beneficiaries in 1983 after the depositor's death. As in Nahar, the accounts were both opened and closed before the Florida Legislature enacted Section 655.55. Nevertheless, the Sanchez court ruled the statute applicable because of the retroactivity clause. The court should have done the same in Nahar and was clearly in error by neglecting to do so.

The court's second error involved the interpretation of the exception contained in Section 655.55(6). The court decided that even if the statute applied, the accounts in question qualified for the exception and thus fell outside the statute's purview.

55. Fla. Stat. § 655.55(6) (1988). In Nahar, Judge Hubbart notes that the statute clearly applies to all accounts opened before July 1, 1988, without exception for accounts closed before that date. Nahar, 656 So. 2d at 234 n.3 (Hubbart, J., dissenting).
56. Nahar, 656 So. 2d at 228 n.8.
57. Id. at 234 n.3 (Hubbart, J., dissenting). Judge Hubbart points out that there is no provision in the statute that exempts an account because an account depositor died before the statute's enactment. He notes that the statute is clear in mandating application to all accounts opened before July 1, 1998, regardless of whether any depositor was living or dead on that date. Id.
58. 547 So. 2d 943 (Fla. 3d Dist. Ct. App. 1989).
59. Id. at 944.
60. Id. at 945 n.2.
61. Nahar, 656 So. 2d at 228 n.8.
The exception provides that "if either party to the contract or agreement governing the deposit account provides the other party with a written objection to the application of this section within six months" of the statute's effective date, the statutory provisions shall not apply. The court determined that Roebi, through his successor, had provided such an objection by being involved in litigation of the accounts on July 1, 1988.

The crucial error in this regard is that the statute expressly provides that the exception only applies to accounts in existence on July 1, 1988. The court failed to acknowledge this language when contemplating the use of the exception. Because the accounts, as the Nahar court itself admitted, were closed in 1984, it was impossible for them to qualify for the exception contained in Section 655.55(6). Therefore, the court clearly erred by even considering it in this case.

Going beyond this oversight, the court's conclusion that the notice required to invoke the exception had been given is also suspect. The court equated the existence of litigation with the requirement of written notice and disregarded explicit statutory language. Section 655.55(6) expressly limits those individuals entitled to object to the statute's application to "either party to the contract or agreement governing the deposit account." The Nahar court ignored this express legislative command and carelessly broadened the category of persons entitled to invoke the exception. According to the court's interpretation, the words "either party" may now encompass both agents and successors of the parties.

B. Florida Precedent

Having sidestepped the controlling statute, the Nahar court reached the comity issue. It then radically modified its own prior approach to deciding which foreign nation orders will be extend-
ed comity. As Judge Hubbart notes, this unrestrained extension will require Florida courts to extend comity to virtually every foreign decree so long as valid personal jurisdiction is obtained by the foreign court. The court thus expanded comity far beyond the boundaries previously established by Florida case law.

As previously noted, Florida courts have a strong interest in setting limits on comity. When necessary, they have reluctantly expanded its application, but have tread cautiously in so doing. In contrast, the Nahar court ignored that prudent history and instituted a rule providing little guidance as to exactly which foreign decrees warrant comity's deference.

When the Third District first began its expansion of comity in Cardenas v. Solis and other cases, it restricted itself to very limited instances compelled by strong public policy considerations. In Cardenas, the court extended comity to a temporary injunction issued in Guatemala as part of a divorce action. The injunction prevented the husband from accessing half of the funds in Florida bank accounts while the divorce proceeded in Guatemala. The court noted that two types of foreign, non-final decrees should be extended comity on grounds of public policy: (1) domestic relations suits involving support payments to spouses and minor children; and (2) suits where creditors seek to collect on a valid debt. Although the court

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69. Id. at 236-37 n.5 (Hubbart, J., dissenting) (Florida courts will now be required to enforce "any . . . foreign court order which satisfies certain basic jurisdictional . . . prerequisites.").
70. See supra text accompanying notes 27-32.
71. See supra text accompanying notes 33-37.
72. 570 So. 2d 996 (Fla. 3d Dist. Ct. App. 1990).
73. Id. at 999.
74. Id. at 997.
75. In Cardenas, the court ruled that Fla. Stat. § 655.55(1) did not prevent the application of the rules of comity to Florida bank accounts. This holding has no bearing on Nahar, however, because of the type of bank accounts involved. In Cardenas, the account was merely a checking account, and Florida law gives no answer to the question of ultimate ownership. Florida law only provides a presumption of ownership in these types of accounts and the question of true ownership is left to the courts. In Nahar, however, Florida law is conclusive about ownership of the accounts in question and there is no issue for the courts to decide. Therefore, in Nahar, the issue of ownership is decided before comity can even be considered. In Cardenas, the court distinguished Sanchez v. Sanchez de Davila, 547 So. 2d 943 (Fla. 3d Dist. Ct. App. 1989), on the same grounds.
76. Cardenas, 570 So. 2d at 999. The court found that there was "obviously a strong public policy" involved in enforcing decrees in these types of cases because "spouses and debtors abroad ought not to be able to walk away from their foreign
had introduced comity into the realm of non-final decrees, it specifically explained which areas the expansion would reach. Neither support payments nor valid debt collections were at issue in *Nahar*.

In *Pacanins v. Pacanins*, the court reaffirmed the *Cardenas* ruling on almost identical facts. In a domestic relations suit where a wife sought a half-interest in Florida funds, comity was extended to a Venezuelan injunction. Quoting *Cardenas* on the policy concerns indicating an extension of comity in such instances, the court noted that "[t]his is clearly the type of situation where public policy would favor the enforcement of a foreign interlocutory order."

After *Cardenas* and *Pacanins*, it was clear that where public policy reasons dictated, comity could be extended to the interlocutory orders of foreign courts. The court, however, had not as clearly explained that all interlocutory orders might be extended comity regardless of strong forum public policy concerns. A mere five months later, the *Nahar* court disregarded public policy in reaching its decision.

By concluding that *Cardenas* established the power to expand comity to its limits, the *Nahar* court hastily overstated *Cardenas* without considering the consequences. What the *Nahar* court set forth is a doctrine of comity based only on the Restatement (Second) Conflict of Laws, which has very few limits and demolishes the careful, cautious approach the Third District had previously taken in expanding comity's application. Surely, the *Cardenas* court had not anticipated the expansive methodology employed in *Nahar*.

The consequences of this expansion will be far-reaching. Florida has now ceded a great deal of control over its citizens to the courts of foreign nations. So long as foreign courts can acquire the threshold standards of jurisdiction and notice, they may issue orders, final or interlocutory, that will have substantial effect on the property and legal relationships of thousands of Floridians. The *Nahar* court might have been more

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77. 650 So. 2d 1028 (Fla. 3d Dist. Ct. App. 1995).
78. *Id.* at 1028-29.
79. *Id.* at 1030.
prudent, and certainly more protective of Florida citizens, than to chart a future course through a non-binding volume such as the Restatement.\footnote{While Florida courts have sought guidance from the Restatement in the past, Continental Mortg. Inv. v. Sailboat Key, Inc., 395 So. 2d 507 (Fla. 1981), allowing the Restatement — a national compilation of the state of the law that is not necessarily attuned to the specific public policy issues facing individual states — to dictate the law's parameters is somewhat akin to allowing the tail to wag the dog. The Restatement should report on what the law is rather than act to set the law. Even if consulted by the courts of a foreign state, a court must take into account the specific situation faced by that state and adapt the rulings found in the Restatement accordingly.}

Assuming,\textit{ arguendo}, that the Third District was correct in implementing the Restatement requirements for comity, it nevertheless failed to acknowledge that even the Restatement places limits on the doctrine. These limits should have prevented the\textit{ Nahar} court from approving its new version of comity in this case.

\textbf{C. The Non-Final Exception}

The\textit{ Nahar} court crafted a new test for extending comity based exclusively on the Restatement (Second) Conflict of Laws.\footnote{\textit{Nahar}, 656 So. 2d at 235-36.} Under this test, the only impediments are related to jurisdiction, notice, and public policy. As Judge Hubbart indicates, however, the court failed to note additional restrictions on comity mandated by Restatement Section 92 and set forth in subsequent sections of the Restatement.\footnote{\textit{Id.} at 236 n.5 (Hubbart, J., dissenting). Judge Hubbart points out that Restatement § 92 cmt. c, upon which the majority relies heavily in setting its new test, qualifies its broad approach to comity by noting that judgments are entitled to comity "except as stated in §§ 103, 107-121."}

Restatement Section 107 declares that judgments will not be recognized or enforced if the judgment is not a final determination under the law of the state issuing the order.\footnote{Restatement § 107. See also \textit{Nahar}, 656 So. 2d at 236 n.5 (Hubbart, J., dissenting); Ogden v. Ogden, 33 So. 2d at 870.} Therefore, even under the Restatement view of comity the modifiable judgments of foreign courts should not be extended comity by a Florida jurisdiction. As declared by the\textit{ Cardenas} court, the policy behind this rule is that courts should not transfer jurisdiction to a foreign court which could later vacate or modify its original
order. \textsuperscript{84} This is precisely the type of order enforced in \textit{Nahar}.

The Aruban order only requires the account proceeds to be transferred to Aruba for the probate process. \textsuperscript{85} No final judgment was made concerning how those proceeds should be divided under Dutch probate law. \textsuperscript{86} Once the funds are transferred to Aruba, Florida courts will have no power to ensure that the rights of Glenda and her minor children are protected. Had a judgment in Aruba already been made as to the allocation of funds, the Florida court could divide them and transfer only those funds that would be distributed to Aruban heirs, thereby retaining control over those funds to which Glenda and her children are entitled. To transfer all of the funds based on an interlocutory order subject to future modification is premature and prohibited under the Restatement. \textsuperscript{87}

Consideration of the rights of Glenda and her children leads to a second exception included in the Restatement — that of a conflict with the public policy of the jurisdiction where enforcement is sought.

\textbf{D. The Public Policy Exception}

While the \textit{Nahar} court stated that contravening forum public policy is a reason to refuse an extension of comity, it failed to indicate the source or limits of this concept. The public policy exception is fully discussed in the Restatement.

Restatement Section 117 declares that judgments should be enforced in United States jurisdictions even if contrary to the public policy of the enforcing jurisdiction. \textsuperscript{88} A comment to that section, however, provides an exception to this rule for all foreign nation judgments. \textsuperscript{89} Under that comment, courts are free to refuse enforcement of foreign judgments if enforcement would

\textsuperscript{84} 570 So. 2d at 998.
\textsuperscript{85} \textit{Nahar}, 656 So. 2d at 236-37 (Hubbart, J., dissenting).
\textsuperscript{86} \textit{Id.} at 236. Aruba, a civil code nation, follows a probate process termed forced heirship, under which Glenda and all nine of Roebi's children will share equally. For a general discussion of this form of probate law, see Deborah A. Batts, \textit{I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance}, 41 HASTINGS L.J. 1197, 1211-16 (1990).
\textsuperscript{87} \textit{Nahar}, 656 So. 2d at 236 (Hubbart, J., dissenting).
\textsuperscript{88} \textit{RESTATEMENT} § 117.
\textsuperscript{89} \textit{Id.} § 117 cmt. c.
be contrary to the forum's public policy. 90

Two public policy concerns arise in Nahar which caution against extension of comity to the Aruban order. The first is the strong interest of the forum in protecting widows and minor children; the second is in protecting Florida financial depositors and the banking industry itself.

After her husband's death, Glenda was left alone to care for herself and her three minor children. Subsequently, the six adult children from Roebi's prior marriage appeared and demanded that Glenda move all of the funds intended for her to Aruba where a court could determine their distribution. Florida certainly has an interest in protecting its residents in such situations from being deprived of their property. This alone should have been a sufficient ground for denial of comity. Instead, the Third District placed a resident widow and her three minor children at the mercy of a foreign court.

Furthermore, as noted by Judge Jorgenson, Florida has an interest in protecting Florida bank depositors, as well as the banks themselves. 91 While he was alive, Roebi Nahar was in the best position to determine how his money should be allocated at his death. He did so by establishing the six bank accounts. Upon his death, however, his adult children appeared, claiming to represent his interests. Subsequently, they prevented their deceased father's wishes from being carried out. If a decedent has taken advantage of perfectly legal mechanisms under Florida law to determine the disposition of his property, 92 Florida's public policy interest should not aid a foreign nation's courts in defeating those mechanisms.

Finally, Florida has a strong interest in protecting its financial industry, the international nature of which is undoubted. If foreign depositors cannot be assured that disposition of their funds deposited in Florida financial institutions will proceed

90. Id.
91. Nahar, 656 So. 2d at 239 (Jorgenson, J., dissenting) ("Individuals who open ... accounts ... in Florida should enjoy the certainty that the disposition of their funds in those accounts will be governed by the laws of Florida, and not by the vagaries of a distant tribunal."). Id.
92. Roebi Nahar had placed his funds in three different types of bank accounts, all legal under Florida law. For a discussion of what ultimately would have happened to the funds if disposed of under Florida law, see infra notes 97-107 and accompanying text.
according to their legitimate wishes, they will discontinue use of those institutions. The effect of the \textit{Nahar} decision is to implant just such uncertainty and insecurity in the minds of foreign depositors. This could prove disastrous for Florida's financial industry.

Individually or collectively, these public policies should have persuaded the \textit{Nahar} court not to extend comity to the Aruban court order. Had the Third District denied comity for any of the three reasons noted above, the resolution of the case would, of course, have been quite different.

\textbf{E. Resolution of \textit{Nahar} Under Florida Law}

If comity had been unavailable in \textit{Nahar}, only a pure conflicts of law question would have remained. Judge Hubbart provides a thorough discussion of how Florida case and statutory law would resolve that conflict and dispose of the six bank accounts.\textsuperscript{93}

Hubbart first notes that in conflicts questions concerning the disposition of bank accounts, Florida courts have consistently endorsed the situs rule: the law of the site of the bank account shall control.\textsuperscript{94} He then points out another Third District ruling, in a case almost identical to \textit{Nahar}, in which the court ruled that the law of Florida applied to the disposition of a Florida bank account regardless of the domicile of any party to the account.\textsuperscript{95}

\textsuperscript{93} \textit{Id.} at 237 (Hubbart, J., dissenting).


\textsuperscript{95} \textit{Nahar}, 656 So. 2d at 233 (Hubbart, J., dissenting) (citing and discussing Sanchez v. Sanchez de Davila, 547 So. 2d 943 (Fla. 3d Dist. Ct. App. 1989). In \textit{Sanchez}, a Venezuelan national opened two Totten trust accounts in Miami, both in trust for two of his sons. Upon his death, twelve children who were not beneficiaries of the trust opened probate proceedings in Venezuela. The children also filed ancillary probate proceedings in Miami seeking control of the Totten trust proceeds. The trial court held that Venezuelan law applied to the accounts but the Third District reversed. In \textit{Nahar}, the majority distinguished \textit{Sanchez} on the basis that the Nahar's had an antenuptial agreement, but the court fails to explain why that agreement has any bearing on the issues.
Judge Hubbart concludes that if the Nahar court had applied Florida law to the six bank accounts, the accounts would have passed at Roebi's death either to Glenda or to her minor children and none of the proceeds would have become part of Roebi's probate estate.96

1. Joint Bank Accounts

Three of the accounts at issue were held by Roebi and Glenda as joint tenants. Judge Hubbart points out that under Florida Statute Section 658.56,97 accounts held in two or more names are presumed to provide rights of survivorship upon the death of one tenant.98 This presumption must be overcome by a party challenging the account.99 Hubbart indicates that no evidence was produced by Roebi's adult children to rebut that presumption.100 Thus, immediately upon Roebi's death Glenda became the sole owner of the contents of the accounts by operation of law.101 Consequently, none of the money became part of Roebi Nahar's probate estate. The Aruban court, therefore, did not have the power to order transfer of those funds to Aruba for Roebi's probate.

2. Joint Trust Accounts

Two of the accounts at issue were trust accounts naming Roebi and Glenda as co-trustees for their minor children. Judge Hubbart correctly points out that since the accounts were in trust for the children and one trustee was still alive, the trust continued to exist after Roebi's death and the proceeds could not become part of his estate.102 Hubbart further notes that under Florida law when one co-trustee dies the other becomes the sole trustee and has the power to revoke the trusts,103 as Glenda

96. Nahar, 656 So. 2d at 233 (Hubbart, J., dissenting).
97. Florida Statute § 658.56 was repealed in 1992. The substance of the statute was simultaneously reenacted in Florida Statute § 655.79.
98. Nahar, 656 So. 2d at 233 (Hubbart, J., dissenting).
99. Id.
100. Id.
101. Id. See also In re Estate of Clement, 568 So. 2d 1297 (Fla. 2d Dist. Ct. App. 1990).
102. Nahar, 656 So. 2d at 238 (Hubbart, J., dissenting).
103. Id. (citing Seymour v. Seymour, 85 So. 2d 726 (Fla. 1956)).
did. At Roebi’s death, therefore, none of the contents of the trust accounts attached to Roebi’s estate. Again, it was not within the power of the Aruban court to issue an order concerning those accounts.

3. Totten Trust Account

The Totten trust account named Roebi as trustee for Glenda and their children. As Judge Hubbart demonstrates, under Florida law the beneficiaries of a Totten trust are entitled to the proceeds of the account upon the death of the depositor. Once Roebi passed away, ownership of the account passed immediately to Glenda and her three children.

Indeed, with respect to this account, the Nahar court ruled that the proceeds had vested in Glenda and her children and that the trial court had erred in ruling that this account was to be transferred to Aruba.

The Nahar court revealed an overall inconsistency in so ruling. Although it recognized the instant vesting of the Totten trust, the court failed to perceive the same vesting of the joint bank accounts and the joint trust accounts, even though under Florida law they vested at the same moment as the Totten trust.

VI. CONCLUSION

The Nahar court could have reached the correct result by either of two methods: (1) by ruling that Florida Statute Section 655.55 applied in this case and that therefore the use of comity was impermissible; or (2) by ruling the statute inapplicable, rejecting the use of comity due to reasons of non-finality and public policy, and determining the choice of law issue. The conclusion from either process is that under Florida law the proceeds of the six bank accounts passed to Glenda and her minor children and none of the proceeds became part of Roebi Nahar’s probate estate. At this juncture, the court should have declined

104. Nahar, 656 So. 2d at 227 n.4.
105. Id. at 237 (Hubbart, J., dissenting) (citing Seymour, 85 So. 2d 1297; Sanchez, 547 So. 2d 963; In re Solnik’s Estate, 401 So. 2d 896, 897 (Fla. 4th Dist. Ct. App. 1981)).
106. Nahar, 656 So. 2d at 237 (Hubbart, J., dissenting).
107. Id. at 230.
to enforce the Aruban decree and refused to order the transfer of funds.

Instead the Third District completely transformed Florida law with respect to comity. The court permitted a foreign nation's court to exercise power it never had over the property of a Florida resident. Following the court's ruling, Glenda Nahar must transfer the contents of all six bank accounts to Aruba and await the probate of Roebi's estate under Dutch law.¹⁰⁸

The suggested effect of Nahar on all cases involving comity is substantial. The Third District has greatly altered the legal landscape in a state so heavily populated by multi-national citizens. Given the number of Florida residents that are citizens of foreign nations, the issue is sure to appear often in Florida courts. When it does, what will be the consequences? Perhaps the case will merely teach people like Glenda Nahar a simple lesson: never appear in a foreign nation's court to contest a case. By not appearing, she would have prevented the Aruban court from satisfying one of the key components required by the Nahar court, valid personal jurisdiction. But is that the best solution? Is it desirable for parties to avoid the law because they fear their own state courts will not enforce their property rights? Unfortunately, after the decision in Nahar v. Nahar, that is precisely the situation that exists today.

An alternative but equally reprehensible result is that foreign residents of Florida will avoid Florida courts in order to protect their property and prevent what was done to Glenda Nahar. Temporary Florida residents who are citizens of foreign countries have lost the security they once had when depositing funds in Florida financial institutions. At the depositor's death, those funds may be disposed of in a manner never intended by the decedent if family members in a foreign country can get to court quickly and receive a favorable ruling compelling transfer of the funds from Florida. The Nahar court stated that in such a situation it will regard the foreign judgment as a conclusive settlement of the issue and will enforce it regardless of Florida law.

¹⁰⁸ Dutch law includes provisions for "forced heirship" whereby a surviving spouse takes in equal shares with all surviving children. Therefore, in this case the likely outcome in Aruba is that Glenda and each of Roebi's nine children will receive one-tenth of his estate.
Consequently, foreigners will deposit their funds in other American states — states that will guarantee, through legislative and judicial enforcement, the intended disposition of accounts upon a depositor's death. Such a movement would harm the Florida banking industry and the entire state economy.

In November 1995, the Supreme Court of Florida declined review of the Third District's ruling in Nahar.\(^\text{109}\) Although disappointing, this refusal was expected because all Florida law concerning comity has been made by the Third District and thus there is no conflict between this decision and any other Florida court of appeal.\(^\text{110}\)

A suggestion was made in 1979 that the Florida legislature follow the lead of many other states and codify the foreign judgment issue.\(^\text{111}\) No action has been taken on that suggestion, and it is urged again here that this be considered since it would be the most direct and effective manner of putting the issue to rest. The legislature should take the opportunity to clarify the rules governing comity and the enforcement of foreign judgments. Thousands of Floridians and the entire Florida financial industry are depending on it.

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110. This absence of conflict among the Florida District Courts of Appeal, in fact, precluded the Florida Supreme Court from reviewing Nahar. See Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) (reaffirming that the Florida Supreme Court's power to review decisions of the district courts of appeal is limited and strictly prescribed). Under the facts of Nahar, it appears that Fla. Const., art. V, § 3(b)(4) provided the only possible avenue of appeal. Art. V, § 3(b)(4) states that the Florida Supreme Court “[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that it is certified by it to be in direct conflict with a decision of another district court of appeal.” The issue in Nahar was neither in conflict with a decision of another district court of appeal, nor certified to be of great public importance.

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