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Recognition of Foreign Country Judgments in the United States: A Primer

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Transnational litigation is an expanding field, fueled by globalization, cross-border transactions and the pervasive movement of assets across national borders. As a consequence, the issue of recognition and enforcement of foreign country judgments in the United States is one with which lawyers and their clients are forced to grapple with an ever-increasing frequency. This article provides an overview of this area of law.

I. Legal Framework

United States is not a party to any international treaty that governs recognition of foreign court judgments. Likewise, although long advocated, there is no federal statute, akin to the Federal Arbitration Act, which applies to court judgments issued abroad. Recognition of foreign court judgments is thus almost entirely a matter of state law. Each state has its own statute or a set of common law principles govern recognition of foreign court judgments. These statutes and principles are applied by state courts and also by federal courts in actions where jurisdiction is based on diversity of citizenship. (There is no direct authority as to what law is to be applied by federal courts exercising federal question jurisdiction, although jurisprudence suggests that it should be federal common law).

Three basic legal frameworks exist for recognition of foreign judgments in the U.S.:

- The 1962 Uniform Foreign Money-Judgments Recognition Act;
- The 2005 Uniform Foreign-Country Money Judgments Recognition Act; and
- The Restatement (Third) of Foreign Relations Law's provisions on foreign judgment recognition.

As of this writing, sixteen states have adopted the 1962 Act. Among these are New York, Florida, Pennsylvania and Texas. Eighteen states have adopted the 2005 Act. These include Delaware, California, Illinois and Colorado. The remaining sixteen states follow the Restatement. Among these are Arizona, Louisiana, New Hampshire and Wisconsin.

Importantly, courts are far from uniform in their interpretation of the various elements of the two Recognition Acts and the Restatement principles. Care must be taken to analyze the applicable case law in the particular state where recognition is sought or opposed.

II. Threshold Requirements

The primary requirement for recognition in all states is that the foreign judgment be "final." The two Recognition Acts go further, requiring that the judgment be "final,

conclusive and enforceable where rendered." The finality of the judgment is determined by whether no further proceedings remain before the foreign court and the judgment is ready to be executed upon in the issuing jurisdiction. If an appeal is pending in the foreign country, U.S. courts have the discretion to – but need not – stay recognition until the appeal is resolved.

Both of the Recognition Acts apply solely to judgments "granting or denying a sum of money," *i.e.*, to money judgments only. Judgments for injunctive, declaratory or other equitable relief are not covered by the Recognition Acts. However, the Restatement does permit recognition of foreign judgments "declaring personal status or determining property interests." States that follow the Restatement thus recognize a broader range of foreign judgments.

Under the so-called "revenue rule," judgments for taxes, fines or other penalties are excluded from recognition by the Recognition Acts. Likewise, domestic relations judgments, such as those "for divorce, support or maintenance," are not within the scope of the Recognition Acts. Such judgments are not, however, barred from recognition *per se*, and may be recognized under common law and the principles of comity, or a separate statute or treaty.

III. Reciprocity

Reciprocity in the context of foreign judgments is a quid pro quo-like concept that considers whether the foreign state in question extends similar recognition to U.S. judgments. Neither the Restatement nor the two Recognition Acts require proof of reciprocity by the courts of the rendering state as a condition for – or even a factor in – the recognition of that state's judgments. However, several U.S. states have added reciprocity as a condition for recognition. Of these, six states (including Florida and Ohio) make the absence of reciprocity a discretionary basis for a denial of recognition. Two states – Georgia and Massachusetts – make the absence of reciprocity by the foreign state a mandatory ground for a denial of recognition. So, for example, a court judgment from Sweden or the Netherlands (which do not recognize U.S. court judgments) would not be recognized in Massachusetts or Georgia for lack of reciprocity.

IV. Grounds for Non-Recognition

The Restatement and the Recognition Acts set out several grounds for non-recognition of foreign judgments. These are divided, broadly, into mandatory grounds (*i.e.*, those which, once established, require the court to deny recognition) and discretionary grounds (*i.e.*, those whose presence may, but need not, disqualify the foreign judgment from recognition). Importantly, the various state statutes by which the Recognition Acts have been enacted sometimes contain subtle differences in language and should be considered individually when seeking or opposing recognition in the particular state.

A. Mandatory Grounds for Non-Recognition

1. ***System-Wide Absence of Impartiality and Due Process***. Under the Restatement and the Recognition Acts, foreign judgments will not be recognized if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law." This mandatory basis for non-recognition does not deal with the lack of impartiality or due process in the *particular case* in which the foreign judgment was rendered. Rather, the test is whether the judicial system of the rendering foreign state *as a whole* suffers from a systemic failure either to (a) provide impartial tribunals, or (b) provide procedures compatible with due process.

   The foreign judicial system need not be identical to the U.S. system, but its procedures must be "compatible with the requirements of due process of law," applied by U.S. courts. The burden is on the party opposing recognition to demonstrate a systemic absence of impartiality and due process. The United States Supreme Court in *Hilton v. Guyot* set forth the essential elements of a fair legal process as follows:

   > 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 citations 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 special reason why the comity of this nation should not allow it full effect.

Needless to say, proving a systemic failure of due process, or, more serious still, failure of a country's entire judicial system to provide impartial tribunals is no simple matter. These are deeply factual questions and are generally decided by the courts based on expert and other testimony, as well as on documentary evidence. The fact that the given foreign legal system may provide for due process "on paper" (*e.g.*, in its constitution) does not necessarily mean that it will be deemed to comport with due process principles in practice. Such, for example, was the case in *Bridgeway Corp. v. Citibank*, where the court found that the Liberian legal system contained formal constitutional protections, including an independent judiciary, but nevertheless concluded that "throughout the period of civil war, Liberia's judicial system was in a state of disarray and the provisions of the Constitution concerning the judiciary were no longer followed."

U.S. courts are generally reluctant to make broad-stroke findings about another country's legal system and judiciary. The result is that cases where systemic lack of due process or wholesale absence of impartiality have been found are few and far in between. Notable decisions in this area are: *Bank Melli Iran v. Pahlavi*, where the court found that the judicial system of post-1979 Iran lacked procedural due process; *HSBC USA, Inc. v. Prosegur Paraguay, S.A.*, in which the court refused to recognize a Paraguay judgment based on evidence of mass corruption and lack of adequate procedural protections and independence of national judiciary; and *Sanchez Osorio v. Dole Food Co.*, where the district court refused to recognize a Nicaraguan court's judgment based, in part, on vast evidence of judicial corruption and partiality. In the latter case, the Eleventh Circuit Court of Appeals, while accepting the district court's conclusion that the Nicaraguan court system failed to provide procedural due process, nevertheless "decline[d] to adopt" the district court's finding that Nicaragua as a whole did "not provide impartial tribunals."

2. ***Lack of Personal Jurisdiction***. Lack of jurisdiction over the defendant is a mandatory ground for non-recognition of a foreign judgment under the Restatement and the Recognition Acts. In deciding this issue, U.S. courts will apply their own standards for personal jurisdiction – not those of the rendering court. Thus, even if the foreign court finds jurisdiction over the defendant to be proper, U.S. courts will not as a rule defer to that finding, but will analyze the issue independently under the due process principles applicable to domestic actions.

   The Recognition Acts provide several instances under which recognition may not be refused for lack of personal jurisdiction. These include (a) personal service on the defendant in the foreign county; (b) defendant's voluntary appearance in the foreign litigation for purposes other than to contest jurisdiction; (c) defendant's prior agreement to submit to the jurisdiction of the foreign court; (d) defendant's domicile in the foreign country; (e) defendant's business office in the foreign country, provided the underlying claim arose out of the business conducted from that office; and (e) defendant's operation of motor vehicle or plane in the foreign county, provided that the claim arose out of that operation.

3. ***Lack of Subject Matter Jurisdiction***. This is a mandatory ground for non-recognition under the Recognition Acts. It is, however, a discretionary ground under the Restatement. Challenges to recognition based on a lack of subject matter jurisdiction are rare, and, unlike personal jurisdiction, which is analyzed by U.S. courts under domestic due process principles, subject matter jurisdiction is analyzed by reference to the foreign court's own standards. Consequently, U.S. courts will not normally question a foreign court's decision concerning its own subject matter jurisdiction. The exception is that in cases decided under the Restatement standard (which permits recognition of judgments determining interest in property), courts will not defer to the decisions of the foreign courts if rights to land in the U.S. or rights in a U.S. patent, trademark or copyright are affected.

B. Discretionary Grounds for Non-Recognition

The discretionary grounds for non-recognition are the following:

1. ***Lack of Notice***. According to the Restatement and the Recognition Acts, a foreign judgment need not be recognized if "the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend." Comments to the Restatement elaborate: "If it were established that the defendant did not have notice of the pendency of the action that resulted in the judgment in question, and that no attempt had been made to give notice by means reasonably calculated to do so, the judgment would not ordinarily qualify for recognition, except in special circumstances …"

   The question of proper notice is a factual one, for which courts have applied two separate standards. The narrower view considers whether service was proper under the procedures of the foreign court. The second view focuses on the broader constitutional concerns – whether notice was deemed adequate under U.S. principles of due process.

2. ***Fraud***. Foreign judgments "obtained by fraud" need not be recognized by U.S. courts. Here courts distinguish between extrinsic and intrinsic fraud. The former consists of some "fraudulent action by the prevailing party that deprived the losing party of adequate opportunity to present its case to the court." The latter is predicated on allegations of improper conduct within the foreign proceeding, such as perjured testimony or falsified documents.

   As a rule, intrinsic fraud will not be sufficient to deny recognition of a foreign judgment. Extrinsic fraud may be sufficient, depending on its seriousness. However, if the foreign court had considered and ruled on the issue of extrinsic or intrinsic fraud, U.S. courts will generally not second-guess the foreign court's findings.

3. ***Foreign Claim Repugnant to U.S. Public Policy***. Under the Restatement and the two Recognition Acts, courts are not required to recognize foreign judgments which are based on a claim that is "repugnant to the public policy" of the recognizing state. Notably, the issue is not whether the result (*i.e.*, the judgment) is repugnant to public policy, but whether the underlying claim is. Comments to the Restatement define repugnancy as something "contrary to fundamental notions of decency and justice."

   U.S. courts infrequently find foreign claims to be "repugnant to public policy." The fact that a particular cause of action may not exist in the state where recognition is sought is not in and of itself sufficient to deny recognition. The public policy in question must raise a substantially serious constitutional issue to warrant denial of recognition.

   Prominent examples in this area are two First Amendment cases, *Buchanan v. India Abroad Publications* and *Telnikoff v. Matusevitch*, in which courts refused to recognize foreign judgments for defamation/libel on the grounds that the underlying claims were repugnant to U.S. principles of free speech and press. These decisions, in turn, served as an impetus for state and federal legislation. In 2008, the New York legislature enacted a rule limiting recognition of foreign defamation judgments to those emanating from jurisdictions which provide "at least as much protection for freedom of speech and press … as would be provided by both the United States and New York constitutions." Following suit, the U.S. Congress in 2010 passed the SPEECH Act ("Securing and Protection of our Enduring and Established Constitutional Heritage Act"), which rendered all foreign libel/defamation judgments unenforceable in the U.S. unless they are compatible with the First Amendment to the Constitution.

4. ***Inconsistent Judgments***. These situations arise when a court is presented with evidence of an earlier judgment, either from a foreign or a U.S. court, which is inconsistent with the judgment whose recognition is sought. U.S. courts will generally recognize the later of the two foreign inconsistent judgments, although, under the Restatement and the Recognition Acts, they have the discretion to recognize the earlier one or neither. As stated by the Court of Appeals of New York in *Byblos Bank Europe v. Sketerbank Turk Anonym Syrketi*,

   > The last-in-time rule applicable in resolving conflicting sister state

> judgment … need not be mechanically applied when inconsistent foreign country judgments exist. Rigid application of the rule would conflict with the plain language of [the 1962 Recognition Act] vesting New York courts with discretion to decide whether a foreign judgment that conflicts with another judgment is entitled to recognition.

By the same token, U.S. courts will not, as a rule, give preference to an earlier inconsistent sister-State judgment and will recognize a later inconsistent foreign judgment if is it otherwise entitled to recognition.

5. ***Judgment Inconsistent with Parties' Choice of Forum***. If parties to a contract select an exclusive forum for the resolution of their disputes (whether an arbitral tribunal or court), U.S. courts will usually not recognize a judgment issued by another forum. Although this basis for non-recognition is discretionary under the Restatement and the Recognition Acts, the U.S. Supreme Court in *The Bremen v. Zapata Offshore Co.*, made clear that choice of forum clauses should be enforced by the courts absent some "compelling and countervailing reason," such as fraud or undue influence. Consequently, post-*Bremen* jurisprudence makes inconsistency with the parties' choice of forum for all practical purposes a mandatory basis for non-recognition of a foreign judgment.

   Courts will, however, consider arguments that the forum selection clause had been waived by defendant in the foreign proceeding. If waiver is found, the foreign judgment will be recognized, assuming no other basis for denial of recognition exists.

6. ***Forum Non Conveniens***. Under both of the Recognition Acts (but not the Restatement), U.S. courts have the discretion not to recognize a foreign judgment where "in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action." The test normally applied by the courts is whether the foreign court should have dismissed the action on the grounds of *forum non conveniens*, as this doctrine is applied by U.S. courts. In situations where the doctrine of *forum non conveniens* does not exist in the foreign jurisdiction, the court's inquiry is whether, had the foreign court recognized the doctrine, it would have dismissed the action on the grounds of serious inconvenience.

   It is important to note the key limitation of this exception: it applies only to cases where jurisdiction of the foreign court was based *solely* on personal service. If, instead – or in addition – jurisdiction was based on some other grounds (*e.g.*, consent, domicile, incorporation), the exception will not apply.

7. ***Integrity of the Foreign Court with Respect to Judgment***. This is one of the two discretionary grounds for non-recognition added by the 2005 Recognition Act, which do not exist in either the 1962 Recognition Act or the Restatement. Under this exception, courts may refuse recognition in situations where "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment." The exception is distinct from the mandatory grounds for non-recognition based on a general and systemic failure of the foreign judicial system from which the judgment emanated. Rather, the focus here is on the integrity of the rendering court specifically in connection with the judgment sought to be recognized. According to comments to the 2005 Recognition Act, the required showing is of "corruption in a particular case that had an impact on the judgment that was rendered." Bribery of the foreign judge, for example, would likely be sufficient for denial of recognition.

8. ***Lack of Due Process in the Foreign Proceeding***. The second of the discretionary grounds added by the 2005 Recognition Act is when "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirement of due process of law." As in the previous, integrity-of-the-court ground for non-recognition, this is a case-specific exception, focusing not on the overall foreign judicial system but on the conduct of the proceeding which led to the judgment.

   There is to date scant case law involving the last two exceptions and no meaningful judicial analysis of specific situations in which they were invoked

by judgment debtors. At present, attorneys have little to go on other than the plain language of the exceptions.

V. Other Considerations

A. Statute of Limitations

The 2005 Recognition Act provides a specific statute of limitations for commencing an action to recognize a foreign judgment: such an action must be commenced within the earlier of (a) the time during which the foreign judgment is effective in the foreign country or (b) 15 years from the date that the foreign judgment is effective in the foreign country.

Neither the 1962 Recognition Act nor the Restatement provide for a specific statute of limitations. Courts in these jurisdictions have tended to apply the statute of limitations applicable to the enforcement of comparable domestic judgments.

B. Default Judgments

As a general rule, U.S. courts do not give default foreign judgments any less weight than those rendered on the merits. Default judgments are also equally amenable to challenges based on lack of personal jurisdiction or to any other objections available in the given recognizing state.

C. Burden of Proof

Under the 2005 Recognition Act, the burden of proof is initially on the party seeking recognition to establish that the foreign judgment is within the scope of the Act – *i.e.*, that it is final, conclusive and enforceable, granting or denying a sum of money, and is not a judgment for taxes, fine, penalty or rendered in connection with domestic relations. Once this is established, the burden shifts to the party opposing recognition to prove that any of the mandatory or discretionary grounds for non-recognition exist. The 1962 Recognition Act and the Restatement are silent on the burden of proof, but courts applying these have followed largely the same burden-shifting scheme.

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