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Foreign Judiciaries Through the Eyes of U.S. Courts

August 08, 2014

American courts are frequently asked by litigants to render decisions concerning the adequacy and integrity of other countries' judicial systems. These questions come up as a rule in one of two situations: first, when a party who has obtained a money judgment in his favor from a foreign court seeks to have that judgment recognized and enforced in a U.S. court (usually because the judgment debtor's assets are located in the United States); second, and more common, when a defendant seeks a dismissal of a newly filed action on forum non conveniens grounds, arguing that another — foreign — court is a more appropriate venue. In both of these situations, courts are required — often reluctantly — to wade into the precarious waters of passing judgment on another country's judiciary.

Recognition of Judgments

Recognition of foreign court money judgments is governed by state law. The law of each state provides several grounds on which its courts, as well as federal courts sitting in diversity, can refuse to recognize a foreign judgment. Some of these grounds are mandatory; others are discretionary. Among the mandatory grounds for non-recognition is if 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." (*See e.g.*, CPLR 5304 [a][1]). That is, the question is whether the judicial system of the foreign state en gross suffers from a systemic failure either (a) to provide impartial tribunals, or (b) to provide procedures compatible with due process. Proving either of these elements is no easy matter. They raise deeply factual questions and are decided by courts based on expert and other testimony, as well as on documentary evidence. The fact that a given foreign legal system may provide for due process on paper (e.g., in the 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*, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 134 (2d Cir. 2000), 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. On the other hand, courts make clear that due process in this context is not synonymous with American procedure. Rather, due process refers to a "procedure simple and basic enough to describe the judicial processes of civilized nations, and which is fundamentally fair." *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476-77 (7th Cir. 2000).

Courts refer to this as the "international concept of due process," distinguishing it from "the complex concept that has emerged from American case law." *Id.* Thus, for example, that a foreign judicial system does not provide for pretrial discovery, third-party subpoenas, jury trials, or other staples of American procedure will not by itself invalidate the foreign judgment. Because courts are hesitant to make broad-stroke findings about another country's legal system and judiciary, findings of systemic lack of due process or wholesale absence of impartiality are rare. Notable court decisions in which courts denied recognition on the grounds of partiality or absence of due process, in addition to *Bridgeway*, *supra*, are: *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995), where the court found that the judicial system of post-1979 Iran lacked procedural due process; and most recently, *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 610-17 (S.D.N.Y. 2014), where one of the reasons for the court's denial of recognition of an Ecuadorian judgment was that the Ecuadorian legal system was in a state of constitutional crisis and did not provide impartial tribunals (although the Chevron decision arose not in the context of a recognition proceeding commenced by the judgment creditor but as a preemptive challenge by the judgment debtor). The district and appellate decisions in *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd in part*, *Osorio v. Dow Chemical Co.*, 635 F.3d 1277 (11th Cir. 2011), attest to how sensitive courts are to impugning another nation's legal system. In *Osorio*, the district court refused to recognize a Nicaraguan court's judgment on several grounds, including that the Nicaraguan judicial system did not provide impartial tribunals. 665 F. Supp. 2d at 1348-51. The court's conclusion was based on what it found to be vast evidence of judicial corruption and partiality. *Id.* The court of appeals, while affirming the district court's rejection of the Nicaraguan judgment on other grounds, nevertheless felt compelled to disavow, without directly addressing, the conclusion concerning the Nicaraguan legal system. The court stated: "we do not address the broader issue of whether Nicaragua as a whole 'does not provide impartial tribunals' and decline to adopt the district court's holding on that question." 635 F.3d at 1279. **Forum Non Conveniens**

The common law doctrine of forum non conveniens is a discretionary device permitting a court in rare instances to dismiss a claim even when the court is an otherwise appropriate venue with jurisdiction over the claim. Invariably it is the defendant who seeks such a dismissal, arguing that some other jurisdiction — often a foreign one — is more appropriate. Aside from the desire, common to all defendants, to have the claims against him dismissed, the defendant may be motivated by a number of factors. The claims against him may be governed by foreign law, which the defendant may deem to be more appropriately interpreted by that country's courts. The witnesses and evidence needed for his defense may be located in the foreign jurisdiction. The defendant himself may be a citizen of the foreign country, which naturally affects him logistically and impacts his costs. Indeed, forum non conveniens motions often involve a U.S. plaintiff and a foreign defendant, each one wishing to be on their "home" turf. Also, from a strategic perspective, the defendant may regard it unlikely that the plaintiff, having been dismissed out of the U.S. action, would actually pursue his claims in the foreign court, as this would entail retaining foreign counsel, incurring additional costs, and, if the plaintiff is a U.S. person, venturing into unfamiliar legal terrain. In such case, as happens not infrequently, a forum non conveniens dismissal serves as a complete victory to the defendant.

When faced with such an application, the court will conduct a weighing analysis of several prescribed factors. Before doing so, however, the court must answer the threshold question of whether the alternative foreign forum proposed by defendant is "adequate" to adjudicate the parties' dispute. *DiRienzo v. Philip Services Corp.*, 232 F.3d 49, 56 (2d Cir. 2000). For his part the plaintiff, wishing to keep the case where he brought it, will often argue that the proposed foreign forum is in some aspect problematic. The problems urged by plaintiff may include at the more serious end, corruption, politicization, lack of impartiality and due process, and at the less serious one, backlog, judicial inexperience, difficulty in obtaining evidence, lack of compulsory process, etc. In *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981), the Supreme Court set a high bar for forum inadequacy: A foreign forum will be found inadequate only "in rare circumstances," and only when the remedy available abroad will be "so clearly inadequate or unsatisfactory that it is no remedy at all." Since *Piper*, not many countries have lived up (or down) to its stringent standard. Among the foreign fora which have been held to be inadequate are: Ghana (*Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189 (S.D.N.Y. 1996)); Sudan (*Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 189 (S.D.N.Y. 2003)); Iran (*Rasoulzadeh v. Associated Press*, 574 F.Supp. 854 (S.D.N.Y. 1983)); Croatia (*Sablic v. Armada Shipping APS*, 973 F.Supp. 745 (S.D. Tex. 1997)); Bolivia (*Eastman Kodak Co. v. Kavlin*, 978 F.Supp. 1078 (S.D. Fla. 1997)); Egypt (*Tradimpex Egypt Co. v. Biomune Co.*, 777 F. Supp. 2d 802 (D. Del. 2011)) and Paraguay (*HSBC USA, Inc. v. Prosegur Paraguay, S.A.*, 2004 WL 2210283 (S.D.N.Y. Sept. 30, 2004)). Perhaps the most common challenge to a foreign forum is that the country's judicial system is corrupt. Courts have shown little tolerance for this argument. As noted by the *Eastman Kodak* court, "'the alternative forum is too corrupt to be adequate' argument does not enjoy a particularly impressive track record." 978 F.Supp. at 1084. Thus, countries like Bulgaria, Venezuela, Russia, Turkey, Honduras, Jordan, Indonesia, Nigeria, Ukraine and others have all been found to provide adequate fora despite plaintiffs' claims of varying degrees of judicial corruption. Courts emphasize that "bare denunciations and sweeping generalizations" (*In re Arbitration between Monegasque de Reassurances S.A.M. v. Nak Neftogaz of Ukr.*, 311 F.3d 488, 499 (2d Cir. 2002)), as well as "anecdotal complaints of corruption" (*Stroitelstvo Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 589 F.3d 417, 421 (7th Cir. 2009)), will not be sufficient to establish inadequacy of a foreign forum. A party claiming inadequacy based on corruption "must make a powerful showing." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006). Sometimes courts diverge on the issue of adequacy even with respect to the same country. Egypt, for example, has been ruled both adequate and inadequate largely on the same facts. In 2011, the *Tradimpex* court took "judicial notice of the recent revolutionary events ... including the dissolution of Egypt's constitution and parliament," and concluded that Egypt did not constitute an adequate forum. 777 F. Supp. 2d at 807. Only a year later, a different district court in *Miralda v. Tidewater*, 2012 WL 3637845, at *5, (E.D. La. Aug. 23, 2012), found that while it was "undisputed that Egypt is in the wake of a political revolution and in a state of political strife and unrest," there was insufficient proof that the political situation had affected the judicial system, and concluded that Egypt offered an adequate forum. Almost identical set of facts — different results. China is another case in point. While most courts find China to be an adequate forum notwithstanding the governing

party's control over the judiciary, at least one court has found it to be inadequate. (*BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 429 F. Supp. 2d 1179 (E.D.Mo. 2006)). **Different Issues**

Because the inquiry is necessarily time-specific, that a given country was deemed an inadequate forum yesterday does not mean it will be found so today. For example, in a Pinochet-era decision in *Canadian Overseas Ores Ltd. v. Compania De Acero Del Pacifico, S.A.*, 528 F.Supp. 1337, 1342-43 (S.D.N.Y. 1982), Chile was held to be an inadequate forum due to the "serious questions about the independence of Chilean judiciary vis-a-vis the military junta currently in power." Today, no court would seriously entertain a challenge to the independence of the Chilean judiciary. Similarly, Croatia was found in 1997 to be an inadequate forum, as a "war-torn country" in a region of "political and military instability" (*Sablic*, 973 F.Supp. at 748). By 2008, however, Croatia was deemed adequate (though not without reservations) because by this time it was no longer "mired in…a disastrous armed conflict." (*Cortec Corp. v. Erste Bank ber Oesterreichischen Sparkassen AG*, 535 F. Supp. 2d 403, 410 (S.D.N.Y. 2008)). Determinations of adequacy often hinge on the nature of the claim. In *In re Air Crash Disaster Over Makassar Strait, Sulawesi*, 2011 WL 91037 (N.D. Ill. Jan. 11, 2011), for example, the court concluded over plaintiffs' objection that Indonesia was an adequate forum for product liability claims arising out of an airplane crash. The court distinguished its decision from *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005) — a case in which Indonesia was held to be an inadequate forum. *Doe* dealt with claims that U.S. oil companies aided and abetted the Indonesian army in committing various torts and human rights abuses by paying the army to protect a natural gas pipeline in the country. In finding Indonesia to be inadequate, the *Doe* court accepted plaintiffs' argument that suing in Indonesia would subject them to "genuine risk of reprisals." 393 F. Supp. 2d at 29. Since no similar risk was present in *Air Crash*, Indonesia was deemed an adequate forum in that case. Courts are generally more receptive to the inadequacy argument if plaintiff can demonstrate convincingly that his physical safety would be imperiled were he to proceed in the foreign court. Such was the case in *Presbyterian Church*, *supra*, (Sudan), *Cabiri*, *supra*, (Ghana), and *Rasoulzadeh*, *supra* (Iran). In the latter, the court minced no words: If the plaintiffs returned to Iran to sue they "would probably be shot." 574 F.Supp. at 861. To sum up, lawyers and litigants who find themselves on either side of the argument — whether in foreign judgment recognition proceedings or forum non conveniens applications — should be aware that the disinclination of U.S. courts to make value judgments about foreign judiciaries can be overcome only with specific and convincing evidence, well documented and expertly presented, and only in circumstances that clearly warrant it. The presumption that a foreign judicial system is no less impartial or adequate than its American counterpart is not easily rebutted.

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