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Two Appellate Courts Address Enforcement in U.S.

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BODY:
WHILE THE Full Faith and Credit Clause applies to the recognition and enforcement of judgments among sister states, it does not apply to judgments rendered in foreign countries. Unlike the enforcement of arbitral awards, there is no federal statute applicable to the enforcement of foreign court money judgments in U.S. courts, nor any applicable treaty. n1 Instead, the recognition and enforcement of foreign judgments is governed by state law. n1 The United States is presently involved in the negotiations of a multilateral agreement, the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. An analysis of the proposed Convention is beyond the scope of this article. For a recent commentary on the proposed Convention see Michael Traynor, "A Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments Financial and Commercial Matters: US and European Perspectives," 6 Ann. Surv. Int'l and Comp. L. 1 (2000); Newman and Burrows, "Proposed Hague Convention on Judgments," New York Law Journal, Dec. 30, 1998, at 3.
Since the Supreme Court's seminal decision in Hilton v. Guyot, more than a century ago, however, the practice of U.S. courts has been to grant recognition to civil judgments for money damages rendered by foreign courts on the basis of international comity. n2 As discussed below, there are several requirements to enforce a foreign money judgment, perhaps the most important of which is to establish that the foreign court entered the judgment under a system that provides for impartial tribunals and procedures compatible with the requirements of due process of law.
n2 159 U.S. 113 (1985). Cases regarding the enforcement of foreign money judgments are collected in "Construction and Application of Uniform Foreign-Money Judgments Recognition Act," 100 A.L.R. 3d 792 (1980). The law of the United States regarding the enforcement of foreign judgments is also summarized in the Restatement (Third) of the Foreign Relations Law of the United States @@ 481-82 (1987).
The due process requirement was recently reviewed in two decisions involving the venerable British institution, the Society of Lloyd's, one by the Seventh Circuit in Society of Lloyd's v. Ashenden n3 and the other by the Appellate Division, First Department, in Society of Lloyd's v. Grace, n4 each applying the Uniform Foreign Money Judgments Recognition Act (Act). In each case, American investors, "Names" in the Lloyd's insurance network, opposed the enforcement of money judgments obtained by Lloyd's in England.
n3 1999 WL 284775 (N.D. Ill. Apr. 23, 1999), 233 F.3d 473 (7th Cir. 2000).
n4 2000 WL 1880625 (1st Dept Dec. 28, 2000).
They did so on the somewhat surprising ground that the English judicial system had denied them due process in enforcing Lloyd's contracts with the Names, which included so-called "pay now, sue later" clauses and which barred Names, like the Ashendens and the Graces, from claiming any set-offs, including for fraud, to premiums ascribed to them by Lloyds, and a clause that provided that Lloyd's calculation of the premium owed would constitute "conclusive evidence of the premium due in the absence of manifest error." The English courts upheld the enforcement of these clauses and other aspects of Lloyd's restructuring plan and granted Lloyd's summary judgment for the amounts Lloyd's said were owed by the Ashendens and the Graces.
Lloyd's then sought to enforce these judgments in the U.S., and the Ashendens and Graces sought to oppose them on the ground that in enforcing onerous contractual provisions the English courts had deprived them of an opportunity to be heard and therefore of due process, and on the further ground that these provisions and their enforcement violated New York and Illinois public policy.
This article focuses on the Seventh Circuit decision in Ashenden authored by Chief Judge Richard Posner, which, among other things, develops the notion of "international due process," in contrast to the more complex American concepts of due process, and which interpreted the Act to limit the requirement of international due process to procedural, as opposed to substantive, due process.

The Act

The law applicable to the enforcement of foreign money judgments based on the principles of Hilton has been codified in the Act, which approximately half the states, including New York, have adopted. The remaining states recognize foreign money judgments on the basis of similar principles.

New York, for example, has adopted the Act in CPLR Article 53. Following the provisions of the Act, Article 53 provides that "a foreign country judgment is conclusive between the parties to the extent that it grants or denies recovery of a sum of money."n5 It applies to "any foreign country judgment which is final, conclusive and enforceable where rendered, even though an appeal therefrom is pending or it is subject to appeal." n6 A foreign country judgment is "not conclusive," however, if: (1) "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;" or (2) "the foreign court did not have personal jurisdiction over the defendant." n7 These bases of non-recognition preclude courts from recognizing the foreign judgment as a matter of law. n8

n5 CPLR @ 5303.

n6 CPLR @ 5302.

n7 CPLR @ 5304(a).

n8 Siegel Commentaries at 543-49; 11 Jack B. Weinstein, Harold L. Korn, Arthur R. Miller, New York Civil Practice P5304.01 (1998).

A foreign country judgment "need not be recognized" if: (1) the foreign court did not have subject matter jurisdiction; (2) the defendant in the foreign court proceedings did not receive notice of the proceedings in time to enable a defense; (3) the judgment was obtained by fraud; (4) the cause of action violates public policy; (5) the judgment conflicts with another final and conclusive judgment; (6) the proceeding in the foreign country was contrary to an agreement between the parties under which the dispute was to be settled otherwise than by proceedings in that court; or (7) the foreign court was a seriously inconvenient forum for the trial. n9 These bases of non-recognition are discretionary.

n9 CPLR @ 5304(b). For a recent summary of the provisions of the Act and CPLR Article 53 see Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276 (S.D.N.Y. 1999); S. C. Chimexim S.A. v. Velco Enter., Ltd., 36 F. Supp. 2d 209 (S.D.N.Y. 1999).

The burden of proof in establishing the conclusive effect is on the party advocating conclusiveness, and once a plaintiff establishes a prima facie case of enforceability, a defendant may raise defenses such as fraud and public policy. n10

n10 Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 285 (S.D.N.Y. 1999).

The same provisions of the Act apply in Illinois and were reviewed in Ashenden as well as Grace, which was decided under New York law.

Due Process, Public Policy

To properly understand the issues in Ashenden, Grace and other similar Lloyd's decisions, it is first necessary to understand some background concerning Lloyd's, the agreements it sought to enforce and the financial and commercial context surrounding the somewhat unusual provisions in those agreements. n11

n11 The facts described here are based on the fact statements in the lower court and appellate decisions in Ashenden and Grace cited above, and in the recent article by Courtland H. Peterson, "Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases," 60 La. L. Rev. 1259 (2000), written and published before the appellate decisions in Ashenden and Grace. Readers may also want to review additional materials on the Web site established by American Names. See www.truthaboutlloyd's.com

Lloyd's is the "overseer" of the London insurance market composed of numerous underwriting syndicates. Lloyd's function is to regulate the insurance market which takes place in the association of the individual insurers. To invest in underwriting activities in the Lloyd's market, an investor has to become a "Name" by entering into agreements with a "Member Agent" who invests in one or more syndicates on the Name's behalf. The insurance is written by syndicates of Names who provide capital for such underwriting. The Names' personal assets are at risk should an insured obtain a judgment greater than the assets of the syndicate.

In the late 1980s and early 1990s the Lloyd's syndicates incurred large losses stemming from asbestos and pollution claims and from catastrophes, including Hurricane Hugo and the bombing of Pan Am Flight 103. Starting in the 1980s Lloyd's took protective measures by recruiting new Names to provide additional capital and by obtaining a "Private Act" of British Parliament (the Lloyd's Act of 1982) allowing Lloyd's governing body, the Council of Lloyd's, to unilaterally amend bylaws.

In the 1990s the mounting losses led to lawsuits by recently recruited American Names in the U.S. In response, Lloyd's developed a restructuring plan (the Plan) to settle the litigations by having Lloyd's and the Names who

voluntarily accepted the Plan grant each other mutual releases. The settling Names agreed to pay all outstanding obligations after 1992 and would obtain reinsurance of pre-1993 underwriting obligations by a new company, Equitas Reinsurance Ltd. (Equitas), funded in part by premium payments assessed on the Names. Lloyd's sent all Names a statement stating the premium they had to pay to receive reinsurance from Equitas.

A main goal of the Plan was to allow Lloyd's market to function without being impeded by litigation. The Plan contained a "pay now, sue later" clause that barred Names from claiming any set-offs to the Equitas premium, including for fraud. It also contained a "conclusive evidence" clause providing that Lloyd's calculation of the premium owed would constitute "conclusive evidence as between the Name and Equitas in the absence of manifest error." Lloyd's also enacted a new bylaw pursuant to the Lloyd's Act authorizing a substitute agent to enter into the Plan on the non-accepting Names' behalf, and ordered the agent to sign the Equitas contract on behalf of the non-accepting Names. Lloyd's then paid Equitas the premiums based on Lloyd's calculation and took assignments from Equitas of its claims against the non-accepting Names.

Many American Names, including the Ashendens and the Graces, started lawsuits in the U.S. under the U.S. securities laws accusing Lloyd's managing agents and members' agents of fraudulently inducing them to join syndicates without advising them that they could be exposed to massive liability for "longtail" claims such as asbestos and pollution claims. The central issue initially was the enforcement of the forum and choice of law clauses in the Names' contract requiring them to litigate their claims in England, subject to English law. The courts rejected the Names' defense that enforcement of these clauses would violate public policy because they conflicted with the anti-waiver provisions of the U.S. securities laws. n12 They concluded that England provided the Names with a forum to bring their claims and that English law provided a sufficient remedy for their claims. n13

n12 See, e.g., Stamm v. Barclays Bank of New York, 153 F.3d 30 (2d Cir. 1998); Roby v. Corporation of Lloyds's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945 (1993); Richards v. Lloyd's of London, 135 F.3d 1289 (9th Cir.), cert. denied, 525 U.S. 943, (1998); Haynsworth v. The Corporation, 121 F.3d 956, 969 (5th Cir. 1997), cert. denied, 523 U.S. 1072 (1998); Allen v. Lloyd's of London, 94 F.3d 923, 929-30 (4th Cir. 1996); Shell v. R.W. Sturge Ltd., 55 F.3d 1227, 1230-31 (6th Cir. 1995); Bonny v. Society of Lloyd's, 3 F.3d 156, 160-62 (7th Cir. 1993), cert. denied, 510 U.S. 1113 (1994); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir.), cert. denied, 506 U.S. 1021 (1992).

n13 The decisions have prompted much commentary. See, e.g., Courtland H. Peterson, "Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgment Revisited Through the Lloyd's of London Cases," 60 LA. L. Rev. 1259 (2000); "Extra Territorial Jurisdiction of U.S. Securities Law: Application to Lloyd's of London Membership Agreements," 5 U.C. Davis J. Int'l L. Pol'y 1 (1999).

Lloyd's then brought a series of test cases in England which: (1) upheld Lloyd's authority to create Equitas and the substitute agent's authority to bind the Names who did not accept the Plan; (2) upheld the validity of the "pay now, sue later" clause; and (3) upheld the "conclusive evidence" clause. The English courts gave these clauses precisely the effect Lloyd's intended, recognizing Lloyd's ability to negotiate a "confessed" judgment against the non-accepting Names without allowing them to raise any pre-hearing defenses or to engage in discovery.

Lloyd's sued the Ashendens and Graces in England, was awarded summary judgment in each case, and then sought recognition of the judgment in the United States pursuant to the Act.

The 'Grace' Decision

In Grace, Justice Herman Cahn, relying in great part on the earlier district court decision by Judge Harry Daniel Leinenweber in the Ashenden case in Illinois, observed that the Graces were notified of, and participated in, the English proceedings before the judgment was entered against them, and knowingly and willingly agreed in their initial undertaking with Lloyd's to litigate claims in the English courts, under English law. n14 He further noted that the English courts had upheld the "pay now, sue later" and "conclusive evidence" clauses, and found that Lloyd's had a valid reason for enacting such clauses, and that the English courts had sufficient reason to uphold them: to ensure that the Lloyd's Plan would be immediately implemented and that Lloyd's could continue to function. n15 Justice Cahn also concluded that viable remedies existed in the English courts.

n14 Society of Lloyd's v. Grace, 11/30/99 N.Y.L.J. 27 (col 1) (Sup. Ct. N.Y. Cty. 1999).

n15 Id.

He also rejected the Graces' public policy argument based on the New York Court of Appeals' decision in Greschler v. Greschler. n16 In that case the Court of Appeals noted that the public policy exception to the doctrine of comity is usually invoked in the rare instance "where the original claim is repugnant to fundamental notions of what is decent and just," and that recognition is usually granted unless it is demonstrated that the decree violates "some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal" so that the enforcement would result in recognition of a transaction which is "inherently vicious, wicked or immoral,

and shocking to the prevailing moral sense." n17 Applying the Greschler standard, Justice Cahn held that the contract provisions and their enforcement by the English Court did not violate New York public policy.
n16 Id.
n17 Greschler v. Greschler, 51 N.Y.2d 368 (1980).
The First Department affirmed, finding that the Graces were "afforded notice and an opportunity to be heard in the underlying English action" and that the basic requirements of due process were met. n18 In dictum, the panel repeated the findings of the earlier forum and choice of law cases, finding that the Graces, like other Names, "have effective and viable remedies in the English courts, to vindicate their substantive rights and therefore [the judgment] did not violate any public policy of New York, therefore entitling the judgment to comity." n19
n18 U.S. v. Jones Daniel Good Real Prop., 510 U.S. 43 (1993).
n19 Greschler v. Greschler, 51 N.Y.2d 368 (1980).

Seventh Circuit Case
From the outset, Chief Judge Posner's opinion focused on the specific language in the Act requiring the party challenging the judgment to show that it was rendered under a system which does not provide impartial tribunals or procedures compatible with due process. n20 He dismissed any suggestion that the English judicial system failed "to provide impartial tribunals or procedures," describing such claim as "risible" and concluding that "the courts of England are fair and neutral forums." n21 This was perhaps not surprising given that " 'United States courts which have inherited major portions of their judicial traditions and procedure from the United Kingdom are hardly in a position to call the Queen's Bench a kangaroo court.' " n22
n20 233 F.3d at 476.
n21 Id.
n22 Id., quoting British Midland Airways Ltd. v. International Travel, Inc., 497 F.2d 869 (9th Cir. 1974).
The Chief Judge then focused on the Ashendens' due process argument. Following earlier case law, he observed that while the English concept of fair procedure is not identical to ours, the Act was not "intended to bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of our courts." n23 He interpreted "due process" under the Act to refer to "a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers," meaning that they do not offend concepts of "basic fairness." n24 He called this the "international concept of due process" to distinguish it from the more complex American case law concepts, and observed that international due process is even less demanding than the test to determine whether to enforce a foreign arbitral award under the New York Convention, which had been interpreted to mean applying a minimalist version of the enforcing jurisdiction's concept of due process. n25
n23 Id. at 476.
n24 Id. at 477.
n25 Id. at 478.
Chief Judge Posner rejected the Ashendens' argument that the statute required American courts to determine whether the particular English judgment conformed to the requirements of American due process, finding that the statute did not support such a "retail approach," which would also be inconsistent with providing an expeditious method for collection. n26
n26 Id. at 479.
Applying these principles, the panel found that while both the "pay first, sue later" and "conclusive evidence" clauses narrowed the Ashendens' procedural rights considerably, due process is not a "fixed menu of procedural rights," and the amount of process due depends on the circumstances. n27 Here, Lloyd's was faced with "looming disaster," and the court found that the only potential source for funding to avert such a disaster was the Names themselves. The panel allowed that it was reasonable to postpone the adjudication of the Names' fraud claims under the "pay now, sue later clause," and found that by enforcing this clause the English courts had not deprived the Ashendens of either international or American due process. n28 Similar due process challenges had been rejected under federal law when a firm withdrew from a multi-employer pension plan, in which case a similar "pay now, sue later" solution was invoked. n29
n27 Id.
n28 Id.
n29 Id.
But the Seventh Circuit concluded that, in any event, all the English court had really done was to interpret a one-sided contract that allowed the Names to waive their procedural rights in advance. The panel found such a waiver to be analogous to a "cognovit note," in which a debtor consents in advance to the creditor's obtaining a judgment

without notice or a hearing, upon the appearance of an attorney designated by the creditor. n30 Faced with similar due process challenges, such notes had survived scrutiny by the U.S. Supreme Court. n31

n30 Id.

n31 Id., discussing D.H. Overmeyer Co., v. Fric, Co., 405 U.S. 174 (1972).

Chief Judge Posner recognized that, unlike the "pay now, sue later" clause, the "conclusive evidence" clause not only postponed the Names' claims, but extinguished them by barring any challenge to Lloyd's calculation before the judgment. n32 Nevertheless, the court found that while such a claim might raise a question of substantive international due process, due process under the Act means only procedural due process. n33 The only substantive basis the Act recognizes for non-enforcement, the panel concluded, is a violation of public policy, a claim the Ashendens pressed on the district court but abandoned on appeal, because the district court rejected these claims based on the many holdings in the forum and choice of law cases. n34

n32 Id. at 480.

n33 Id.

n34 1999 WL 284775, at *5.

The Seventh Circuit found that the enforcement of a one-sided contract involved a substantive offense, not a procedural one, and while the manifest error standard required by the contract was difficult to meet, the Names would have an opportunity to raise the issue in England as part of their contractually delayed post-judgment fraud challenge. n35 Consistent with earlier case law, the circuit court held that the right to pretrial discovery is not a part of either the domestic or international concepts of due process.

n35 233 F.3d at 480.

The decision concluded that, in any event, "the key question is not the fairness of Lloyd's measures but the fairness of the English court in holding that Lloyd's was authorized by its contract with the Names to appoint agents to negotiate a contract that would bind the Names without the Names' consent," and that the English court's "interpretation of the original contract, like the interpretation authorizing Lloyd's to adopt the pay now sue later clause, is not so unreasonable that it could be thought a denial of international due process." n36

n36 Id.

The Cases in Perspective

There were several factors at play in Ashenden and Grace that militated in favor of enforcement of Lloyd's judgments.

First, it would be difficult for any American court to find that the English judicial system, "the very fount from which our system developed; a system which has procedures and goals which closely parallel our own," to be one that did not provide impartial tribunals or due process. n37 This said, American courts have not hesitated to review the adequacy of procedures in nations whose commitment to due process is open to real question, including Iran, Congo, Liberia, Ecuador and others, n38 and some commentators suggest that there has been a trend, on the part of courts in the Second Circuit at least, to pass judgment on the adequacy of foreign courts' performance and the fairness of their judicial systems. n39

n37 Id. at 476, quoting In re Hashim, 213 F.3d 1169, 1172 (9th Cir. 2000).

n38 Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995); Choi v. Kim, 50.F.3d 244 (3d Cir. 1995); Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276 (S.D.N.Y. 1999).

n39 Lawrence Newman, "Passing Judgment on Other Countries' Courts," N.Y.L.J., May 3, 2000, at 3, reviewing the decisions in Bridgeway Corp. v. Citibank, 201 F. 3d 134 (2d Cir. 2000) (finding that Liberia did not provide a judicial system affording impartial tribunals or due process even though the party opposing enforcement in the Liberian judgment had participated in the lawsuit and had previously taken part in a dozen lawsuits in Liberia, many as plaintiff) and Aguinda v. Texaco, Inc., 2000 WL 122143 (S.D.N.Y. Jan 31, 2000) (requiring further briefing on the adequacy of the courts of Ecuador in the context of a forum non conveniens determination); see also S.C. Chimexim S.A. v. Velco Enter. Ltd., 36 F. Supp. 2d 206 (S.D.N.Y. 1999) (court enforced Romanian judgment but only after detailed review of the Romanian judicial system.)

Second, a recurrent theme in these cases is that the Names were sophisticated investors who voluntarily subjected themselves to English law and courts, so that enforcement did no more than make them live up to their contracts. Moreover, these Names' activities in the Lloyd's market involved not only international transactions, but indirectly the exercise of regulatory authority by the Council of Lloyd's, pursuant to the delegation of British Parliament, over an insurance market with participants and policyholders from all over the world. In the end, though, the "pay now, sue later" and "conclusive evidence" clauses were merely interpreted and enforced by the English courts as a valid waiver, and involved no procedural irregularities in the English court system itself.

Third, while the judgments of the English courts appear to be virtually immune from the challenge in the U.S. on due process or partiality grounds, they have been challenged on jurisdictional and substantive public policy grounds, as demonstrated in several recent cases refusing to enforce British libel judgments on First Amendment and state constitutional grounds. n40 The public policy exception will continue to be interpreted narrowly, however, for "few judgments fall into the category of judgments that need not be recognized because they violate the public policy of the forum." n41 The narrowness of the public policy exception reflects a compromise between two axioms, res judicata and fairness to the litigants, that underlie the recognition of foreign money judgments. n42

n40 See, e.g., Telnikoff v. Matusevich, 347 Md. 561 (Ma. 1996) (British libel judgment contrary to public policy was denied recognition); Bachnan v. India Abroad Publications, 154 Misc. 2d 228 (Sup. Ct. 1992) (English libel judgment against New York news service operation could not be recognized as it was opposed without safeguards for freedom of speech and of the press provided by the First Amendment and the New York Constitution.) See generally, Eric P. Enson, "A Roadblock on the Detour Around the First Amendment: Is the Enforcement of English Libel Judgments in the United States Unconstitutional?", 21 Loy L.A. Int'l & Comp. L. Rev. 159 (March 1999).

n41 In re Hashim, 213 F.3d 1169, 1171 (9th Circ. 2000) (English court's judgment according fees and costs was enforceable.)

n42 See Southwest Livestock and Trucking, Co., Inc. v. Ramon, 169 F. 3d 317 (5th Cir. 1999) (reversing lower court ruling that refused to recognize a Mexican judgment.)

Fourth, the trial courts in the Lloyd's cases weighed heavily the unique importance of Lloyd's to the international insurance system and to the British economy. n43 The notion of international due process notwithstanding, the courts of first instance found that the potential disaster hovering over Lloyd's (and therefore the international insurance and reinsurance market) met the conditions of "exigent circumstances," justifying a deprivation of the Names' pre-judgment rights to challenge Lloyd's, even under American due process standards.

n43 Ashenden, 1999 WL 284775, at *8 (N.D. Ill. Apr. 23, 1999).

While the Seventh Circuit developed the notion of "international due process" to emphasize that foreign judgments should not be subjected to more complicated American concepts of due process, both the lower and appellate courts in Ashenden and Grace found that the procedures followed here would pass muster under American principles of due process, which also recognize that there are "extraordinary situations" that justify "postponing an opportunity for a hearing." n44 As a practical matter, then, practitioners who are challenging the enforcement of a foreign money judgment are advised to make their arguments not only on international due process grounds but on American notions of due process as well.

n44 See Ashenden, 1999 WL 284775, at *7-8 citing Fuentes v. Shevin, 92 S. Ct. 775 (1972); Matthews v. Eldridge, 96 S. Ct. 893 (1976); Phillips v. Commissioner, 283 U.S. 589 (1931).

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