July 13, 2011 volume 10 issue 28

This Week's Feature

Forum Non Conveniens and Foreign-Judgment Recognition: Different Sides of Different Coins

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When a U.S. company is faced with tort or other claims emanating from abroad, there is no fundamental contradiction between successfully moving for dismissal from a U.S. court on forum non conveniens (FNC) grounds, and then subsequently challenging the enforceability of a particular judgment emanating from the foreign court. While sharing some superficial similarities, the standards applicable to these two different inquiries are, as a matter of legal doctrine and public policy, in important respects, very distinct. And on a practical level as well, they address circumstances that often vary substantially, and that, at a minimum, cannot simply be assumed to be materially identical. As a consequence, the notion that U.S. courts should apply an "estoppel" principle is fundamentally misplaced, as is the proposition that a U.S. court should require a defendant, as a precondition to dismissing a case for FNC, to stipulate to satisfy any foreign country judgment. Rather, courts must apply the appropriate respective criteria to the particular issue before them, with sensitivity to the different circumstances, legal principles, and policies addressed by each doctrine.

The interplay between FNC and subsequent recognition of foreign judgments is not a mere theoretical problem, but one that potentially faces a significant and growing number of defendants, as transnational litigation increases and the international operations of U.S. companies, in particular, become more attractive targets for the U.S. plaintiffs' bar and their overseas cohorts and supportive foreign regimes. This problem has been exacerbated by the recent influx of dubious or even fraudulent foreign claims, where plaintiffs' lawyers manufacture and control the evidence they put before U.S. courts, but American defendants are hindered in their ability to test the reliability of the evidence or compel evidence to the contrary. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Think Globally Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases* (June 2010).

Moving for a dismissal based on FNC is a traditional and perfectly appropriate response to being sued in the United States for large-scale tort actions based on alleged wrongdoing that took place in a foreign country. Such cases often involve personal injury or property damage claims that necessarily implicate witnesses and other evidence located in the plaintiffs' country of origin, as well as foreign legal principles and knowledge of local conditions that may be difficult to convey adequately to finders of fact located in the United States. In response, foreign plaintiffs have sought to increase the cost for FNC dismissal by urging courts to require—as a precondition to FNC dismissal—that defendants stipulate to satisfy any foreign judgment eventually produced in the defendants' "requested" forum. *See, e.g., Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1368 (S.D. Tex. 1995), ***aff'd***, 231 F.3d 165 (5th Cir. 2000); *Cariajano v. Occidental Petroleum Corp.*, 626 F.3d 1137, 1152 (9th Cir. 2010), ***superseded on reh'g***, Nos 08-56187, 08-56270, 2011 WL 2138209 (June 1, 2011). Plaintiffs have also started to argue that—stipulation or not—defendants who obtain dismissal based on FNC should be "estopped" from subsequently opposing efforts to recognize and enforce any subsequent foreign judgment, regardless of later changes in the foreign judicial system or any evidence of fraud, corruption, or lack of due process. In short, plaintiffs

argue that a defendant that "asks" to be tried in a foreign forum cannot later complain about the judgment entered against it in that forum. *See, e.g*., DBCP Plaintiffs' Response to Defendants' Judicial Estoppel Arguments, *Osoriov. Dole Food Co*., No. 07-22693, 2008 WL 6971777 (S.D. Fla. Aug. 12, 2008); *Osorio v. Dole Food Co*., 665 F. Supp. 2d 1307, 1343 (S.D. Fla. 2009), aff'd 635 F.3d 1277 (11th Cir. 2011).

While some courts have found this argument superficially appealing, *see, e.g., In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 851, 866 (S.D.N.Y. 1986), *modified*,809 F.2d 195 (2d Cir. 1987) [hereinafter *Union Carbide*]; *Cariajano*, 626 F.3d at1156, ***superseded on reh'g***, 2011 WL 2138209, if actually embraced, it would create a fundamentally unfair "Catch-22" in which defendants must choose between two unsatisfactory options: (1) litigating in a seriously inconvenient forum, perhaps under circumstances where they may never be able to enjoy a trial consistent with due process because of the limits on U.S. courts' access to essential witnesses and documentary evidence, *or* (2) obtaining an opportunity to litigate in a foreign court where they may have greater access to evidence necessary to a defense, but securing this opportunity at a steep price: signing a blank check to satisfy any foreign judgment entered by the foreign court. If it were understood to require a court to recognize a foreign judgment despite evidence that the judgment was, in fact, procured through fraud or in a system that, before judgment is entered, falls victim to corruption, a breakdown in the rule of law, or by the plaintiffs' wrongful exploitation of the foreign forums' weaknesses, then it would pose especially grave fairness problems. Indeed, the DBCP claims tried in U.S. courts, where it later came to light that the litigation was tainted by fabricated claims, plaintiff coaching and threats to third-party witnesses, are a stark example of what can happen when the court and the defendant lack access to necessary evidence and witnesses. *See* Steve Stecklow, *Fraud by Trial Lawyers Taints Wave of Pesticide Lawsuits*, Wall St. J., at A1 (Aug. 19, 2009); David Hechler, *Judge Throws Out Toxic Tort Judgment Against Dole*, Corporate Counsel (July 16, 2010). And there are numerous reported decisions showing instances where foreign countries have suffered a breakdown in the rule of law or fell prone to corruption prior to U.S. courts being called to recognize the country's judgment. *See, e.g., Osorio*, 665 F. Supp. 2d at 1347-51 (noting breakdown of rule of law in Nicaragua due to a "pact between the country's two strongmen, Daniel Ortega and Arnoldo Alemán"); *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 287-88.

Plaintiffs' argument is also fundamentally untenable because it conflates two distinct legal concepts: that of FNC, a doctrine concerned about which forum is most convenient to the parties and which court offers the easiest and most effective access to evidence, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248-49 (1981), and that of recognition and enforcement of foreign-country judgments, which concerns the standards that must be satisfied before any U.S. court can take a foreign-country judgment with no force or effect in this country and convert it into a U.S. judgment entitled to full faith and credit. *See* Uniform Foreign Money-Judgments Recognition Act § 3 (1963) [hereinafter UFMJRA]; *Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895). In contrast to the limited policy undergirding FNC, the recognition standard serves, crucially, not only to protect the constitutional rights of all U.S. citizens, but to preserve bedrock principles of U.S. jurisprudence and the orderly and fair administration of justice throughout the United States. *Compare id.* ("[N]o nation will suffer the laws of another to interfere with her own to the injury of her citizens... whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions . . . [e]very nation must be the final judge for itself") with *Piper*, 454 U.S. at 256 (the "central purpose of any *forum non conveniens* inquiry" is simply "to ensure that the trial is convenient . . . .").

Forum Non Conveniens

As the Supreme Court has explained, the "central focus of the forum non conveniens inquiry is convenience." *Id.* at 249. Thus, in deciding whether to dismiss a case based on FNC, a court need only determine "(1) that an adequate alternative forum is available and (2) that . . . private and public interest factors weigh in favor of dismissal." *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 951 (11th Cir. 1997); *see also Piper*, 454 U.S. at 255 n.22, 257. The private factors typically considered include "'ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining atten-dance of willing witnesses; . . . and all other practical problems that make trial of a case easy, expeditious, and inexpensive.'" *Id.* at 241 n.6 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). The public factors that courts consider are "the administrative

difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Id.* (quoting *Gilbert*, 330 U.S. at 509).

The FNC "adequacy" inquiry is what foreign plaintiffs have typically relied on to argue that a defendant should be required to stipulate to satisfying a foreign judgment as a condition of FNC dismissal. For instance, in a portion of the *Union Carbide* decision the Second Circuit later reversed, the district court initially agreed with the plaintiffs' argument that it should require the defendant, as a precondition to FNC dismissal, to agree to pay any eventual Indian judgment. *Union Carbide*, 634 F. Supp. at 852, *modified*, 809 F.2d at 204-06. When Union Carbide argued for the adequacy of Indian courts to address the type of claims at issue, the district court noted "it is defendant Union Carbide which, perhaps ironically, argues for the sophistication of the Indian legal system in seeking dismissal." *Id.* To assuage the plaintiffs' concerns that a judgment from India would not be enforceable, the court conditioned dismissal "on Union Carbide's agreement to be bound by the judgment of its preferred tribunal, located in India, and to satisfy any judgment rendered by the Indian court." *Id*.

Yet, far from being a wholesale endorsement of the foreign judicial system, this inquiry into the adequacy of the foreign forum is actually relatively narrow. In the FNC context, U.S. courts must determine whether the courts of a foreign country are adequate before the foreign litigation has commenced and without the clarity of hindsight or a record of the actual foreign proceedings. Indeed, FNC is an *ex ante* decision made early in the litigation so that the parties can avoid the expense and delay associated with merits discovery and pretrial proceedings. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp*., 549 U.S. 422, 434-36 (2007). And, at this threshold level, courts often decline to label a foreign forum "inadequate" unless the foreign court's substantive or procedural law is "so clearly inadequate or unsatisfactory" that it affords "no remedy at all." *Piper*, 454 U.S. at 254 & n.22.

More fundamentally, the adequacy inquiry is not meant to exhaustively determine whether the relevant foreign judicial system is prone to fraud or a lack of due process or impartial tribunals. Indeed, because FNC dismissal simply results in trial in the plaintiffs' country of origin, U.S. courts frequently prefer to avoid deeming foreign tribunals "inadequate" when ruling on FNC. Most often citing comity concerns, courts stress the need to refrain from criticizing unnecessarily the foreign judicial system, especially at the threshold consideration represented by a motion for FNC. *See, e.g., P.T. United Can Co. v. Crown Cork & Seal Co*., 138 F.3d 65, 73 (2d Cir. 1998).

Recognition and Enforcement of Foreign-Country Judgments

Determining whether a foreign-country judgment can be recognized and enforced in the United States is a fundamentally different inquiry from asking which forum is the most convenient for a prospective trial. "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived." *Hilton*,159 U.S. at 163. Through a recognition and enforcement action, however, a judgment creditor seeks to have the foreign judgment elevated from a judgment with no force or effect—rendered without any U.S. Constitutional guarantees—to a judgment that enjoys the same status as a U.S. judgment, backed by commensurate enforcement powers and "entitled to full faith and credit" under the U.S. Constitution. *See* UFMJRA § 3. Because of the significance of foreign-judgment recognition, U.S. courts are obligated to ensure that foreign judgments satisfy essential minimum requirements before they can be recognized or enforced. As the Supreme Court noted more than 100 years ago, "no nation will suffer the laws of another to interfere with her own to the injury of her citizens . . . . Every nation must be the final judge for itself" of the force and effect—if any—to be afforded to a foreign judgment. *Hilton*,159 U.S. at 163 at 165. Far from being a question of convenience, in order to determine whether a foreign country judgment can be embraced by a U.S. court and converted into a U.S. judgment, U.S. courts must carefully balance the interests of the recognition forum, its policies, and the rights of the defendants, among other things.

In order to do this, the majority of U.S. states have enacted statutes expressly delineating what foreign-

country judgments they will recognize and enforce, and the grounds that must be satisfied before such judgments can be brought to the level of a U.S. judgment. U.S. courts typically limit recognition and enforcement to civil judgments for a sum of money (not criminal judgments or judgments awarding a tax, penalty, or fine). *See, e.g*., UFMJRA § 1(2); Restatement (Third) of Foreign Relations Law of the United States §§ 481(1), 485. And while U.S. jurisdictions have often taken fairly liberal approaches to recognizing foreign-country civil money judgments, in hopes that their own civil judgments will be recognized abroad, all state laws (and federal common law) expressly prohibit recognizing judgments from foreign systems that do not provide impartial tribunals or procedures compatible with due process of law. *E.g. id*. § 4(a)(1). They likewise empower courts to refuse to recognize judgments obtained by fraud or that are repugnant to the state's own public policy, among other things. *E.g. id*. § 4(b)(1)-(2).

Thus, whereas the FNC doctrine generally counsels a court to avoid commenting on the integrity of a foreign judicial system in order to further principles of comity, recognition law *expressly requires it*. If a foreign judicial system or its procedures are not "fundamentally fair," or "offend against 'basic fairness'" or otherwise manifest "serious injustice," the country's judgment is not recognizable as a matter of law. *Society of Lloyds v. Ashenden*, 223 F.3d 473, 477 (7th Cir. 2000); UFMJRA § 4 & cmt. In making the determination if a judgment from the foreign forum possesses the requisite safeguards necessary for recognition by a U.S. court, courts rely on a variety of sources depending on the case: expert testimony surveying the available material bearing on the foreign judiciary, analyses by international organizations focusing on transparency and corruption, and neutral sources such as Country Reports issued by the U.S. State Department. *See, e.g., Bridgeway*, 201 F.3d at 142-43; *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1411-12 (9th Cir. 1995); *Osorio*, 665 F. Supp. 2d at 1347-51. That inquiry—an express requirement under state law for the court to examine the integrity and fairness of a foreign legal system—stands in marked contrast to FNC's "adequacy" inquiry, where courts so often avoid commenting on such matters during the course of exercising their "sound discretion" to decide dismissal. *Piper*, 454 U.S at 266; *accordOsorio*, 665 F. Supp. 2d at 1347 ("The Court admits that it is not entirely comfortable sitting in judgment of another nation's judicial system, but does so in deference to the Florida Recognition Act, which includes the absence of impartial tribunals as a mandatory basis for non-recognition.").

Moreover, unlike FNC, the decision of whether to recognize a foreign judgment is made with the benefit of hindsight. Indeed, certain aspects of the foreign proceedings may be particularly relevant to whether the judgment is recognizable, such as whether there is evidence that the judgment was procured by fraud or that the defendant was denied procedures compatible with due process of law. *See, e.g*., UMJFRA §§4(b)(2); Uniform Foreign-Country Money Judgments Recognition Act § 4(c)(8) (2005). Whereas FNC's adequacy inquiry is necessarily *ex ante* and made early in the litigation, a court ruling on foreign-judgment recognition has the benefit of the full record of the actual foreign litigation to determine whether the foreign judicial system had adequate safeguards to protect the defendant's interests and whether any irregularities in the foreign proceedings give rise to a defense against recognition. Requiring such a detailed analysis of the integrity of a foreign judicial system is unnecessary and typically avoided by courts at the FNC stage, but it is required as a matter of law before a foreign-country judgment can be recognized.

The Fundamental Problem of Requiring Judgment Recognition as a Precondition to FNC Dismissal

Consistent with the fundamental distinctions between FNC and recognition and enforcement, those courts that have wrestled most directly with the relation between FNC and subsequent foreign judgment recognition have, on the whole, suggested that requiring a defendant at the FNC stage to stipulate to satisfying a foreign judgment is legally improper, and have rejected "estoppel" claims during a later recognition action.

For example, in *Union Carbide*, discussed above, the Second Circuit ultimately found that the district court's precondition constituted reversible error. It noted that even though the foreign legal system constituted an "adequate" forum for purposes of FNC, judgments from systems lacking impartial tribunals or procedures compatible with due process were unrecognizable under the relevant state law and,

therefore, "[a]ny denial by the Indian courts of due process can be raised by [Union Carbide] as a defense to the plaintiffs' later attempt to enforce a resulting judgment against [Union Carbide] in this country." *Union Carbide*, 809 F.2d at 204. And importantly, the court noted that although there were not presently facts suggesting a judgment might be obtained by fraud, such a situation "conceivably could occur in the future." *Id.*

In a similar vein, in *Bank Melli of Iran v. Palavi*. the court addressed the related issue of whether a defendant's previous argument in favor of FNC dismissal judicially estopped her from attacking the procedures employed by the Iranian courts. In ruling that the defendant could still contest enforcement of the judgment despite previously having argued for FNC dismissal, the court noted the differences between the arguments on the FNC motion and in the enforcement action and held that arguing for FNC dismissal "is not truly inconsistent" with resisting enforcement of the resulting judgment. *Pahvali*, 58 F.3d at 1413. Other courts have reached similar conclusions. *Shell Oil Co. v. Franco*, 2005 WL 6184247, at *5 (C.D. Cal. 2005); *Delgado*, 231 F.3d at 175 n.21.

In addition to being wrong under the law, it is also undesirable from a practical and policy perspective for a U.S. court to tie its hands by committing itself to enforcing a foreign judgment—at the FNC stage—before the foreign proceeding even has begun. Although foreign plaintiffs attempt to portray a defendant who contests recognition and enforcement after having won FNC dismissal as engaging in unfair gamesmanship, there are very good reasons why a defendant might win FNC dismissal but that a U.S. court nonetheless must refuse to recognize a judgment that eventually is entered by the foreign court: circumstances within a foreign country might change, the plaintiffs may have actively exploited the weaknesses of the foreign judiciary for their own improper ends, and it allows U.S. courts to show respect for foreign legal systems at the FNC stage without forfeiting the interests of the U.S. judicial system and its federal and state constitutional guarantees.

As *Osorio* aptly demonstrates, a lot can change in the interim between FNC dismissal and judgment recognition. In a case related to *Osorio* that was brought in 1995, a U.S. court found that "[the] plaintiffs will not be treated unfairly or deprived of all remedies in the courts of Nicaragua." *Delgado*, 890 F. Supp. at 1352. By 2009, when plaintiffs sought U.S. enforcement of a Nicaraguan judgment, Nicaraguan law had been significantly altered in ways that directly affected the claim tried, including the enactment of law that "fundamentally altered the legal landscape in Nicaragua" subsequent to the FNC dismissal and that "single[d] out the DBCP defendants for 'Positive Discrimination.'" *Osorio*, 665 F. Supp. 2d at 1343-44. Moreover, due in part to a "pact between the country's two strongmen," Nicaragua's courts had become susceptible to politicization, corruption, and fraud. *Id*. at 1347-51; *see alsoThink Globally Sue Locally, supra*, at 21-33. As the *Osorio* court noted in 2009, when FNC dismissal was entered in 1995, "no one could have predicted" such a breakdown in the rule of law. *Osorio*, 665 F. Supp. 2d at 1344.

Thus, it is a real possibility that, after a defendant successfully wins FNC dismissal, a foreign judicial system may suffer a breakdown in the rule of law. Perhaps worse, as recent cases demonstrate, lawyers and politicians in a country that constitutes an "adequate" forum for the plaintiffs' extant claims at the FNC stage can later give in to an abusive, "anything goes" mentality—and engage in unfair and even fraudulent conduct in an attempt to saddle the FNC movant with unfounded liability. *Think Globally Sue Locally, supra*, at 21-52 (discussing attorney misbehavior in Nicaraguan and Ecuadorian litigation that previously had been the subject of FNC dismissal). But a U.S. court deciding FNC dismissal will not, under the "adequacy" inquiry, have had a basis—or reason—to take into account the possibility that the foreign country's judicial system might change or that plaintiffs' lawyers might engage in unethical conduct to secure a victory abroad. Instead, in a subsequent recognition action, when a U.S. court is met with a foreign-country judgment from a foreign judicial system that has deteriorated, it can—and must—ensure itself of that system's fundamental fairness and independence before enforcing its judgment.

The possibility of a breakdown in the rule of law or of unexpected irregularities in a foreign judicial system's application of its laws to foreign defendant corporations is an increasingly important concern. Especially in the midst of a deep worldwide recession and in an unpredictable global economy, the long-term stability of those foreign governments is difficult to forecast in advance, and the temptations to target U.S. corporate defendants for unfair and exploitative judicial proceedings may prove increasingly

irresistible.

Most fundamentally, the differing standards for FNC and foreign-judgment recognition allow U.S. courts to show due respect for foreign judicial systems, while still adequately protecting U.S. interests and the rights and interests of U.S. citizens. There is value in legal rules that allow a U.S. court to say a case can be tried in a foreign jurisdiction without thereby tying its hands and committing itself to embracing what may turn out to be a fundamentally flawed judgment. Put in simple terms, FNC analysis shows respect for foreign judicial systems by giving them the benefit of the doubt—that the foreign forum where trial is more convenient will satisfactorily try the case. But, if evidence comes to light—either during the course of the defendants' proceeding or otherwise—that the foreign system is materially flawed or fails to satisfy applicable recognition and enforcement standards, then U.S. jurisdictions should not abandon their own interests and principles, nor the legal protections afforded to U.S. citizens at the recognition and enforcement stage. Applying "estoppel" or requiring the parties in advance to stipulate to judgment enforcement would, in many cases, do exactly that.

Conclusion

Courts can and should dismiss foreign litigation filed in the United States that would be inconvenient, expensive and difficult to conduct fairly in a U.S. court. But it is a mistake to require as a precondition to such a dismissal, a defendant's promise to adopt, recognize, and enforce any foreign-country judgment ultimately produced—regardless of subsequent changes in the forum system or other unfairness, fraud, or foreign corruption that subsequently taints the proceedings. Courts and counsel are wise to keep the fundamental differences between FNC and the laws governing recognition and enforcement in mind before requiring defendants to give up their legitimate rights and undermining the interests of U.S. courts.

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