New York State Bar Association

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Memorandum in Opposition

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

CPLR #1	February 23, 2021
S. 523	By: Senator Hoylman
A. 4580	By: M. of A. Lavine
	Senate Committee: Judiciary
	Assembly Committee: Codes
	Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to revising and clarifying the uniform foreign country money-judgments recognition act.

LAW AND SECTIONS REFERRED TO: CPLR §§ 5301, 5302, 5303, 5304, 5305, 5306, 5307 and 5309

THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES OPPOSES THIS LEGISLATION

The measure would amend CPLR Article 53, Recognition of Foreign Country Money Judgments, which was enacted in 1970 to adopt the Uniform Foreign Country Money Judgments Recognition Act of 1962, now to adopt the updated Uniform Foreign-Country Money Judgments Recognition Act of 2005. According to the Uniform Law Commission, 25 states have adopted the 2005 Uniform Act.

A. Summary and Comments on Proposed Amendments

The new Act would:

1. Amend § 5301 to refer to a "foreign country" instead of a "foreign state," and add a new subsection (a)(3), to make clear, if it is not clear already, that the Act does not apply to judgments entitled to full faith and credit under Article 1, § 4 of the United States Constitution. (The enforcement of full faith and credit judgments is governed by CPLR Article 54);

2. Amend § 5302 to provide (subsection (c)) that the party seeking recognition of a foreign judgment has the burden of proving that the Act applies to such judgment. This issue is not addressed under existing law.

3. Amend § 5303 to state explicitly that when recognition is sought as an original matter, the party seeking recognition must file an action on the judgment or a motion for summary judgment in lieu of a complaint, and that when recognition

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

is sought in a pending matter, the issue of recognition may be raised by counterclaim, cross-claim or affirmative defense. (While not spelled out, these procedural avenues are already clear under the existing legislation.) The bill would also add a statute of limitations, absent from the present legislation, in a new subsection (d): “An action to recognize a foreign country judgment must be commenced within the earlier of the time during which the foreign country judgment is effective in the foreign country or twenty years from the date that the foreign country judgment became effective in the foreign country.” It is not clear how this statute of limitations would apply in a pending action where “the issue of recognition [is] raised by counterclaim, cross-claim or affirmative defense” as permitted by subsection (b). Nor is it clear which party would bear the burden of proof on the statute of limitations.

4. Amend § 5304 to make lack of subject matter jurisdiction of the foreign court a mandatory ground for non-recognition (subsection (a)(3)) rather than a discretionary ground as under the present law, and add two new discretionary grounds for non-recognition: subsection (b)(7) where “the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering courts with respect to the judgment,” and subsection (b)(8) where the “specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.” Taken together, these two new grounds for non-recognition might encompass virtually any claim of error in the foreign proceeding and could turn a recognition proceeding into an appeal or a retrial. Perhaps to temper this risk, new subsection (c) provides that “A party resisting recognition of a foreign country judgment has the burden of establishing that a ground for nonrecognition stated in subdivision (a) or (b) exists.”

   Reading §§ 5302(c) and 5304(c) together, it appears that the party seeking to enforce the foreign judgment has the initial burden of proving that the judgment is a “foreign country judgment” within the meaning of §§ 5301 and 5302, *viz.* a judgment rendered by the court of a foreign country that grants or denies recovery of a sum of money; that is final, conclusive and enforceable under the law of the rendering country; and that is not a judgment for taxes, a fine or penalty, or a judgment for divorce, support or maintenance, or other judgment rendered in connection with domestic relations. Once these elements have been proven the burden of proof shifts to the party opposing recognition to prove any of the mandatory or discretionary grounds for non-recognition under § 5303(a) and (b), although the bill itself does not speak of burden-shifting.

5. Amend CPLR § 5305, Personal Jurisdiction, to provide that “A foreign country judgment [~~shall~~] may not be refused recognition for lack of personal jurisdiction if” various listed bases of personal jurisdiction over the defendant in the underlying proceeding are satisfied. It is not clear what change in meaning was

intended by the change from "*shall not be refused* recognition" to "*may not be refused* recognition." Nor does the bill address the issue of personal jurisdiction over the defendant/judgment debtor in the recognition proceeding. In *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.,* 160 A.D.3d 93, 94 (2018), the First Department held that "there must be either an in personam or an in rem jurisdictional basis for maintaining the recognition and enforcement proceeding against defendants in New York."

6. Amend CPLR § 5306 to make what appear to be technical and stylistic changes to the existing statute, concerning a stay of the New York proceeding pending an appeal of the foreign country judgment.

7. Amend CPLR § 5307 to add a new subsection (a) on the effect of recognition: "If the court, in a proceeding under § 5305 of this article finds that the judgment is entitled to recognition under this article, then, to the extent that the foreign country judgment grants or denies recovery of a sum of money, the foreign country judgment is:

    1. conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive; and

    2. enforceable in the same manner and to the same extent as a judgment rendered in this state."

It is not clear whether or how this provision changes existing law. The reference to "a proceeding under section 5305 of this article" appears to be an error since § 5303, "Recognition enforcement, and proceedings," actually sets forth the procedure for recognition of a foreign country judgment. Section 5303 also provides that "a court of this state shall recognize a foreign country judgment to which this article applies as conclusive between the parties to the extent that it grants or denies recovery of a sum of money," making § 5307 at least partially redundant.

B. Reasons for Opposition

We oppose the proposed legislation primarily because the new discretionary grounds for non-recognition of a foreign judgment set forth in proposed Sections 5304(b)(7) and (8) create a serious risk of re-litigation of foreign proceedings in New York. Under the existing Rule 5304(a), "a foreign country judgment is not conclusive if . . . the judgment was rendered under a *system* which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." Thus, litigants opposing recognition of a foreign judgment are permitted under existing law to attempt to show that the judgment was the product of a legal system that does not afford

litigants due process of law. Current Article 53 does not, however, permit a party opposing the recognition of a foreign judgment to challenge the procedures followed *in a particular case*.[1]

The existing CPLR § 5304(a) provides for non-recognition only upon a showing that the *system* in which the judgment was obtained fails to afford due process, rather than permitting a collateral attack on the proceedings in a particular case, so that the recognition proceeding does not become a re-litigation on the merits. As Judge Posner, writing for the Seventh Circuit federal court of appeals, put it in a decision quoted with approval by the Appellate Division, First Department, such a "retail approach" would "be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions – which would in effect give the judgment creditor [sic] a further appeal on the merits."[2]

While we recognize that there may be benefits to uniformity with the laws of the other states that have adopted the 2005 Uniform Act, we believe that those benefits are outweighed by the risks associated with giving litigants a second bite at the apple and permitting them to relitigate in New York the merits of a dispute that already has been resolved by a foreign court of competent jurisdiction in a system that survives scrutiny under CPLR Section 5304(a).[3] Indeed, because the proposed Subsections 5304(b)(7) and (b)(8) add new defenses to recognition, they can be expected to make recognition more difficult than in states that have adhered to the 1962 version of the Uniform Act, and may

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[1] *See, e.g., CIBC Mellon Trust Co. v. Mora Hotel Corp.,* 296 A.D. 2d 81, 89, 743 N.Y.S.2d 408, 415 (1st Dep't 2002). CPLR 5304(b)(3) provides a discretionary ground for non-recognition if "the judgment was obtained by fraud." This provision, however, "limits the type of fraud that will serve as a ground for denying recognition to extrinsic fraud." National Conference of Commissioners on Uniform State Laws, Uniform Foreign-Country Money Judgments Recognition Act, February 10, 2006, at 11 ("Examples of extrinsic fraud would be when the plaintiff deliberately had the initiating process served on the defendant at the wrong address, deliberately gave the defendant wrong information as to the time and place of the hearing, or obtained a default judgment against the defendant based on a forged confession of judgment."). *See also, e.g., Overmyer v. Eliot Realty,* 83 Misc.3d 694, 705, 371 N.Y.S.2d 246, 258 (Sup. Ct., West. Cty. 1975) (analyzing claim of fraud in obtaining sister-state judgment: "The fraud must relate to matters other than issues that could have been litigated and must be a fraud on the court.").

[2] *Society of Lloyd's v. Ashenden,* 233 F.3d 473, 477 (7th Cir. 2000); *CIBC Mellon Trust,* 296 A.D. 2d at 89, 743 N.Y.S.2d at 415 (2002) (quoting *Ashenden*).

[3] Affording litigants a second bite at the apple may, moreover, incentivize them to withhold arguments that could have been raised in the court of original jurisdiction in the hope that such arguments will receive a more favorable hearing from a New York court at the judgment recognition phase.

incentivize judgment creditors to seek recognition in those states rather than New York.[4] By reducing the deference owed by New York courts to foreign money judgments, the proposed legislation may also cause foreign courts to reexamine the merits of New York money judgments.

It bears noting that the risk of re-litigation is not limited to judgments rendered in foreign nations. Native American tribal court judgments, for instance, would qualify as "foreign judgments" under the proposed act because such judgments are not entitled to full faith and credit under the United States Constitution. The procedure for recognition of tribal judgments is addressed in 22 NYCRR 202.71. Under the proposed amendments to CPLR Article 53, however, tribal court judgments would be subject to re-litigation in New York State courts based upon claims that the procedures in a particular case somehow violated due process. Such re-litigation of a judgment entered by a tribal court of competent jurisdiction would offend traditional notions of comity.

We further note that we are not aware of any instances in which New York courts have criticized existing Article 53 for failing to provide for discretionary challenges based on infirmities in the procedures applied in a particular case, or called for amendement of the statutes in Article 53. To the contrary, the Appellate Division, First Department has recognized the risks of permitting such re-litigation as discussed above.

Finally, in addition to our concerns about proposed Sections 5304(b)(7) and (8), we note that many of the changes in the proposed amended CPLR Artilce 53 are stylistic and of questionable necessity, and a few are ambiguous, as discussed in the Summary and Comments above.

Conclusion

For the above reasons, the Committee on Civil Practice Law and Rules opposes this legislation.

Persons who prepared the report: Robert P. Knapp III, Chair of the Subcommittee, Steven J. Fink, Herbert C. Ross, Harold B. Obstfeld, Thomas Wiegand, and PJ Herne, members.

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[4] This concern may be ameliorated to some extent by the fact that the party opposing recognition would bear the burden of proof to establish one of the discretionary grounds for non-recognition. That assignment of the burden of proof does nothing, however, to reduce the risk of extensive re-litigation of foreign country judgments if the proposed Act is adopted.