

Recognition, Enforcement and Reciprocity

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Abstract:

This article analyses the concept of reciprocity in the recent developments in recognition and enforcement of foreign judgements in the realm of Private International Law. In the process, the paper attempts to respond to a claim made in the article titled ‘Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite’ by Bélich Elbalti which analyses the recent developments in the recognition and enforcement of foreign judgements and the implications of the same. Here, it is argued that although the requirements of reciprocity have been relaxed in various jurisdiction, it will not lead to the complete abolishment of the reciprocity as it will be sustained through positive requirements and with the incentive to maintain territorial sovereignty.

Keywords: Private International Law, Recognition, Enforcement, Reciprocity, Response Paper

INTRODUCTION

This article analyses the concept of reciprocity in the recent developments in recognition and enforcement of foreign judgements in the realm of Private International Law. In the process, the paper attempts to respond to a claim made in the article titled ‘Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite’ by Bélich Elbalti which analyses the recent developments in the recognition and enforcement of foreign judgements and the implications of the same.¹ Here, it is argued that although the requirements of reciprocity have been relaxed in various jurisdiction, it will not lead to the complete abolishment of the reciprocity as it will be sustained through positive requirements and with the incentive to maintain territorial sovereignty.

A LOT OF BARK BUT NOT MUCH BITE?

The article by Bélich Elbalti makes an attempt to assess the role of reciprocity in recognition and enforcement of foreign judgements in the contemporary world. Subsequently, it contrasts the ‘theoretical foundations’ and ‘justification’ of the concept of reciprocity with recent developmental implications on the practice of recognizing and enforcing foreign judgmental.

The author analyses the practice and form of various jurisdictions and records the proof of diminishing requirement of reciprocity. Furthermore, the author makes a comparative analysis between states to establish that the requirement of reciprocity has been watered down and has now taken the form of mere formality instead of proving to be a serious hurdle for uniform practice.

The author argues the ‘toothless principle’ of reciprocity does pose a serious concern in jurisdictions other than those which consider reciprocity of recognition and enforcement of foreign judgements as an additional legal ground which ought to be proved or any other restrictive approach. Discussing in twofold,

¹ Bélich Elbalti, ‘Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite’ (2017) 13 Journal of Private International Law 184

the article regards developments in the recent times to seeks to either abolish the practice of reciprocity or mitigate the rigor of its application. In other sections of the article, the author considers the dark sides of some judgements which act impediments and bar the recognition of foreign cases and their enforceability.

The author concludes by stating that although the requirement of reciprocity may not have been abolished entirely, it no more plays a significant role in the practice of recognition and enforcement of foreign judgements. Therefore, it plays a harmful role only in limited situations, where courts manifest strict adherence to the principle of reciprocity and the non-satisfaction of which makes the foreign judgement unenforceable.

RECIPROCITY OF RECOGNITION AND ENFORCEABILITY

I. The relation between Reciprocity and Sovereignty of a State –

Reciprocity as a requirement can be traced backed to its traditional association of with sovereignty of a state. Such an association seemed to protect equality between sovereign states. Reciprocity is used as a device to dilute the fact that a foreign state may exercise its power over another through accepting their judgement's enforceability. A compromise made then would be the reciprocal acceptance of the effect from a foreign sovereign authority. This, therefore, protect each states prerogatives and interests over the sovereign territory. As a result of this practice, reciprocity would ideally guarantee an efficiency and respect for the sovereignty of states among each other.² A liberal application of reciprocity in practice would result in recognition and enforceability of foreign judgements by a sovereign state.

A sovereign state can, thus, have either of the two approaches - unilateral or multilateral application of reciprocity, i.e., the state can either accept or reject the foreign judgements; or formalize methods of application of reciprocity.

II. Reciprocity as positive and negative requirement –

There can be two ways to look at foreign judgements – (1) Foreign judgements are given over private disputes and therefore, are an act of exercise of 'state authority' or (2) A mere adjudication and resolution of an international dispute which can be binding if the same was just and fair. In response, states can choose to either – (1) deem such judgements to be encroaching a state's sovereignty or; (2) ensure acceptance and application of the judgment.

The positive principle of Reciprocity can be seen from the lens of 'Doctrine of Comity' when considering unilateral applications of reciprocity.³ The Doctrine of Comity or *Comitas Gentinum*, as suggested by scholars allows for both – respect for territorial sovereignty of a state as well as successful recognition and enforcement of a foreign judgement.⁴ As a consequence of such application, reciprocity can be practiced for inducement and as an incentive for foreign states, thereby leading to a harmonized standards among all states.

² Bélig Elbalti , The Traditional Role through Unilateral Application of Reciprocity in *The role of the reciprocity requirement in the harmonization of standards for the recognition and enforcement of foreign judgments* (Memoire 2008)

³ Bélig Elbalti , The Traditional Role through Unilateral Application of Reciprocity in *The role of the reciprocity requirement in the harmonization of standards for the recognition and enforcement of foreign judgments* (Memoire 2008)

⁴ Bélig Elbalti , The Traditional Role through Unilateral Application of Reciprocity in *The role of the reciprocity requirement in the harmonization of standards for the recognition and enforcement of foreign judgments* (Memoire 2008)

However, such a positive notion of reciprocity can be seen to have developed beyond mere recognition and enforcement within a foreign, to an issue of the judgements having an extraterritorial effect outside the jurisdiction they were issued in. Under the Roman legal system, foreign judgements were seen as a simple resolution of private dispute instead of a ‘product of a foreign legal system’ and thus, favored recognition and enforceability of foreign judgements.⁵ The issue of extraterritoriality emanates with emergence of numerous independent states. This promoted the widespread acceptance of the idea of supreme domination, rule and authority over sovereign territory. For example, English Jurisprudence led to transformation of the ‘Doctrine of Comity’ into the ‘Doctrine of Obligation’ which imposed the legal obligation over the party to conform with the judgement. This, however, shadows the importance of recognition and enforcement of foreign judgements.⁶

The focus of harmonization of standards of recognition and enforceability comes from policy decisions and liberal practice of individual states. A state’s unilateral recognition and enforcement of a foreign judgement is dependent on the belief that other foreign countries would have a reciprocal obligation to recognize and enforce judgements given by other states as well. Thus, states impose liberal standards, with the expectation that although these standards will be imitated by other states, they will adopt a liberal attitude towards judgements of other foreign states.

Consider the example of the liberal attitude of American Courts which grant recognition to foreign judgments on the basis of Doctrine of Comity. This led to change in states’ policies regarding judgments; what was earlier refused from gaining recognition in the absence of any formal agreement or on the basis of a precondition is not considered as an obligation of the court to render just decisions and uphold such foreign decisions. It has often been stated that the German Courts has not denied recognition to American Courts’ decision on the basis of reciprocity.⁷

On the other hand, Reciprocity as a negative requirement varies from state to state and cannot be enclosed within a particular scope. The states subject the application of reciprocity to a system of laws and therefore, require such preconditions stated as laws to be fulfilled in order for reciprocity to apply. The legal framework then imposes obligation on the courts to recognize and enforce judgements which conform with the system of laws as laid down although they may have been deemed that the rendering foreign court would recognize and enforce the same, under similar circumstances. Such negative requirements of reciprocity are universally embedded in the civil legal systems across the globe.⁸ For example, consider the Tunisian state’s Private International Law Code 1988 which was enacted by the government as a safeguard against various foreign legal jurisdictions. Such a safety valve particularly aimed at reciprocity and not harmonization.

⁵ Susan L. Stevens, ‘Commanding International Judicial Respect : Reciprocity and the Recognition and Enforcement of Foreign Judgments’ (2002) 26 *Hastings International & Comparative Law Review* 115; See also, Joel R. Paul, ‘Comity in International Law (1991) 32 *Harvard International Law Journal* 1

⁶ Bélig Elbalti, The Traditional Role through Unilateral Application of Reciprocity in *The role of the reciprocity requirement in the harmonization of standards for the recognition and enforcement of foreign judgments* (Memoire 2008)

⁷ Bélig Elbalti, ‘Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite’ (2017) 13 *Journal of Private International Law* 184

⁸ Bélig Elbalti, Reciprocity as a Negative Requirement or Prerequisite to the Recognition and Enforcement of Foreign Judgments in *The role of the reciprocity requirement in the harmonization of standards for the recognition and enforcement of foreign judgments* (Memoire 2008)

Reciprocity has often been used as a negative tool to retaliate against states which do not recognize judgements decided foreign courts. State which have a liberal approach to the recognition of foreign judgements often resort to retaliate against states which continue to hold their restrictive practices and refuse to practice recognition and enforcement of foreign judgements. The American case of *Hilton v. Guyot* is illustrative of negative reciprocity used a tool for retaliation. In this case, although the Supreme Court had declared the recognition of the foreign judgement and had decided to give effect to it on the basis of Doctrine of Comity, it Supreme Court, later, refused to recognize the judgement rendered by French Court on the basis that French Courts do not reciprocate such recognition and enforcement but instead consider certain conditions to give effect to comity. The Apex Court stated that, “there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to judgments of the court of France; and that ground is the want of reciprocity. Consequently, the doctrine of reciprocity as prerequisite for the recognition can be described as follows: courts are required to do, not as justice and reason require, but as they are done by.”

Restrictive application of reciprocity could include a selective recognition and enforcement of judgements relating to particular matters or just a simple denial of the judgements which are not in favor of the state against nationals of which it has been rendered. Reciprocity has not only been used as precondition to check the regularity of recognition of judgements by foreign states but also as a postcondition to phase enforcement of foreign judgements. Therefore, although a foreign judgement may have been recognized, it's substantial enforcement cannot be ensured. Owing to the different practices and standards of negative requirement of reciprocity by states across the globe, there exists no uniform understanding of the scope of negative applicability of reciprocity as a concept.

III. Treaty based Reciprocity

Conciliation of the reciprocity as a standard practice can also be seen to be done through multilateral applications. Multilateral application is introduced between states by concluded treaties and arrangements. Such formal reciprocal agreements embedded in the treaties ensure protection to litigants and the sovereign state from drastic consequences of international commerce and differences in states' reciprocal practices. Countries are able to vindicate their sovereignty over the territory while at the same time secure international transactions. Reciprocity through treaties further the interests of both the states and parties and lead harmonization, but not uniformity, of practice between states and their standards for recognition and enforcement.⁹ The Japanese Courts, according the Civil Procedure Code 1890, require reciprocity to be guaranteed under International Treaties in order for the foreign judgments to be recognized in Japan. In 1983, the Supreme Court of Japan changed the test to a more liberal one by deeming it sufficient for the rendering state to adopt and accept Japanese judgement under the substantially similar circumstances, which is not very different from those required in the Japanese legal system.

Conventions on Recognition and Enforcement can be broadly categorized into three – Simple, Double and Mixed Conventions. The discretion available with the states and their courts differ in each of these

⁹ Béligh Elbalti, Multilateral Application of Reciprocity in *The role of the reciprocity requirement in the harmonization of standards for the recognition and enforcement of foreign judgments* (Memoire 2008)

conventions, with Mixed Conventions allowing enforcing courts to exercise jurisdiction as well as the discretion of implementing recognition and enforcement.¹⁰

WHY RECIPROCITY?

Recognition of a Foreign Judgement would refer to the applicability of Res-Judicata status and bind the parties while enforcement would subsequently denote authorized-affirmative relief given to the party on basis of the foreign judgements. A state having exclusive jurisdiction over its territory exercises complete control on recognition and enforcement of judgements. Recognition attempts to dilute the rigor of such exclusivity while prioritizing remedy for private parties through recognition and enforcement.

In the article, ‘Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite’, the author considers twofold development – (1) abolition of reciprocity and; (2) tempering the significance of reciprocity requirements. Although there is sufficient evidence regarding the change in reciprocal practices of various countries, it can be said that international recognition and enforcement of foreign judgements will predominantly be accepted on more terms than just fulfillment of domestic requirements, arrangements or agreements. It may seem as though watering down of reciprocity requirements would eventually lead to the abolition of the idea of reciprocity as a whole. However, what is really seen is the removal or dilution of negative requirements of reciprocity and expectation of reciprocity as a whole.

While in agreement with the viewpoint expressed in the abovementioned article, it cannot be said that states will be in favor of ‘abolition of reciprocity’. The idea or implicit incentive of reciprocity cannot be taken away from the practice of recognition and enforcement. With the growing international trade and investment market, states prepare themselves to be more adaptable to the likelihood disputes that may arise between parties. This is does not necessarily infringe or shadow the idea of state sovereignty.

There are states which have always been open to positive requirement of reciprocity and implemented the same through doctrine of comity and international obligations in the form of Conventions, Treaties and agreements. While some others have begun to broaden the horizons recognition and enforcement of foreign judgements.

Among the United States, recognition and enforcement of judgements are dependent on ‘full-faith-and-credit’ clause of the Constitution. However, the same does not apply internationally.¹¹ The case of *Hilton v. Guyot* lays down the disparaged test of reciprocity as in the occasion of recognition and enforcement of a French Judgement.¹² It can be argued that the element of reciprocity with respect to recognition and enforcement of foreign judgments was endangered by the Supreme Court. Further, scholars highlight the issue of the foreign judgements failing to pass the ‘jurisdictional test’. On the contrary, subsequent practices of the American courts emanate the idea of comity as described by the Supreme Court as–

¹⁰ Béligh Elbalti, Multilateral Application of Reciprocity in *The role of the reciprocity requirement in the harmonization of standards for the recognition and enforcement of foreign judgments* (Memoire 2008)

¹¹ Ruth Badger Ginsburg, ‘Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States’ (1970) 4 *The International Lawyer* 720, 722

¹² *Hilton v. Guyot* 159 U.S. 113 (1895)

“Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to rights of its own citizens or of other persons who are under the protection of its laws.”¹³

Apart from upholding a positive requirement for reciprocity, USA has rarely used its treaty making power for regulating recognition and enforcement of foreign judgements. However, it supports its practice with some prominent international conventions (such as the Conventions by Hague Conference on Private International Law, United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, etc.) which provide for comprehensive sources of law in order to regulate on matters.

European Countries have often held international conventions as important sources of law on recognition and enforcement. Bilateral Treaties have been in place since the 1930s, not only in common law countries but also in the civil law countries.¹⁴ Multilateral Conventions (e.g.- Brussels Convention) also form a part of the recognized regulators of reciprocity in the European Countries. Treaty and Convention dependent developments have created a uniform European regime in terms of recognition and enforcement of foreign judgements.

The Chinese Legal System is known to have been dependent on negative reciprocity, i.e., recognition and enforcement of a foreign judgment is dependent on the successful enforcement of Chinese judgements in other rendering countries.¹⁵ Recognition and Enforcement in China is governed by its Civil Procedure Law, wherein recognition is the prerequisite for enforceability. Considering the high reciprocity standards held by the Chinese state, the 2016 Judgement of Kolmar Group AG v. Sutex Group is a progressive step towards possibly lowering the reciprocity requirement and expansion of the recognition and enforcement regime. In this case, the Court enforced the Singaporean commercial judgement in China.¹⁶ Apart from the developments in acceptance of foreign judgements, China is also a part of more than 30 bilateral treaties and arrangements with countries across the world. Foreign Judgements which fall within the scope of these treaties will generally be enforced, unless contrary to public policy, lack effectiveness or any other ground listed in the treaty.

In Russia, it is well established that recognition and enforcement is dependent on existence of Treaty obligations. However, several observations contrary to such a requirement have been made. For example, a 2002 case of the Supreme Court where an English judgement was recognized and enforced even in the absence of a treaty between UK and Russia.; the 2006 Judgement by a Russian Federal Court construed the requirement of reciprocity to be inclusive of considerations on other international instruments.¹⁷

¹³ Hilton v. Guyot 159 U.S. 113 (1895)

¹⁴ Arthur T. Von Mehren, ‘Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?’ (1994) 57 The Hague Conference on Private International Law 271, 274

¹⁵ King Fung Tsang, ‘Enforcement of foreign commercial judgments in China’ (2018) 14 Journal of Private International Law 262, 264

¹⁶ Kolmar Group AG v. Sutex Group Civil Case No 3, Nanjing Intermediate People’s Court (9 December 2016).

¹⁷ Bélig Elbalti, ‘Reciprocity and the recognition and enforcement of foreign judgments: a lot of bark but not much bite’ (2017) 13 Journal of Private International Law 184, 198

Subsequently, 2009 judgement acknowledged that the absence of treaty obligation does that prevent the courts from recognizing foreign judgement on basis of comity and other general principles of international law.¹⁸ Hence, a gradual divergence from sole dependency on stringent standards is seen while at the same time widening the scope of acceptance of foreign judgements.

CONCLUSION

Sovereignty of a state holds paramount important in the international community. With international developments in trade and commerce, and the opening of state boundaries to foreign goods, states have adapted to the new forms of reciprocity which does not solely depend on particulars acts of reciprocity or hinder reciprocity through stringent requirements. Varied conventions, treaties and agreements along with an underlined understanding of comity among states allows for both, harboring respect for territorial sovereignty of each state and recognition and enforcement of a foreign judgements.

The developments in recognition and enforcement of foreign judgements has not lost the element of reciprocity but instead drifted away from negative requirements stipulated by each and their sole dependency on the same. Apart from terms of reciprocity stipulated in agreements and arrangements amongst states, broader terms of rejecting or nullifying foreign judgements such as public policy and inherently unjust decisions (e.g.- absence of fair chance and trial) are some of the widely accepted terms which replace the negative requirements as earlier used by the states.

Some states continue to inhibit recognition and enforcement of foreign judgements in certain matters. For example, the Chinese system of recognition and enforcement of foreign judgement and vice-versa in states rendering the foreign judgement, especially if these foreign states are trade partners with China.¹⁹ However, this does not disturb the overall movement of the international community towards a more homogeneous practice of recognition and enforcement, if not uniformity. The introduction of new national statues in various countries (such as in Vietnam, Ukraine, etc.) provides substantial evidence to be considered for the same. This is also promotes international relations between states rendering and recognizing judgements with a foreign element.

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¹⁸ *Rentpool B.V. v Podjemnye Tekhnologii*, Decision of the Commercial Court of Moscow, Region No. A41-9613/09 (5 June 2009)

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