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Comity: An Effective Bar to Collateral Attack of a Foreign Court's Jurisdiction After Judgment

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sensitivity to consumer protection, the Supreme Court of Florida has taken a giant step backwards and has issued "an invitation to the unfair lender . . ."[47] to take unconscionable advantage of the unwary borrower.

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Defendant, Philadelphia Chewing Gum Corp., an American concern, planned to introduce "Tarzan chewing gum" into England in conjunction with the English plaintiff, Somportex, Ltd. The plans never reached fruition. Alleging the existence and breach of a contract, the English firm sought damages in the English courts. Extraterritorial service was had on the American defendant under an English long-arm statute.[1] The American firm responded by making a conditional appearance, permitted under English procedure,[2] to contest jurisdiction. The American defendant then attempted to withdraw its appearance, but the court refused. Its jurisdictional objections were overruled,[3] which had the effect, under English law, of converting the conditional appearance into an unconditional one.[4] On the basis of a second motion, the American company was given permission to withdraw from the proceedings.[5] The English Court of Appeal, however, reversed the lower court ruling which had allowed the American firm to withdraw; this placed Philadelphia Chewing Gum in the position of having entered an unconditional appearance.[6] The defendant made no further appearance in the English proceedings, even though the jurisdictional finding was apparently still open to appeal.[7] A default judgment was, thereafter, entered.[8] Enforcement of the English judgment was then sought in the federal district court in Philadelphia, where the English plaintiff was granted a summary judgment.[9] On appeal,

47. *Id.*

1. The English company obtained leave of court, under R. S. C. 1965, Ord. 12, r. 7, to serve notice of its suit extraterritorially.

2. R. S. C. 1965, Ord. 12, r. 7. A conditional appearance has an effect similar to that of a special appearance under FED. R. CIV. P. 12(b)(2).

3. Somportex, Ltd. v. Philadelphia Chewing Gum Corp., [1968] 3 All E.R. 26.

4. R. S. C. 1965, Ord. 12, r. 7.

5. Somportex, Ltd. v. Philadelphia Chewing Gum Corp., [1968] 3 All E.R. 26.

6. *Id.* at 29.

7. *Id.*

8. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161 (E.D. Pa. 1970).

9. *Id.*

the United States Court of Appeals for the Third Circuit, *held*, affirmed: the English judgment should be recognized on the basis of comity; the American defendant could not, under these circumstances, choose the forum in which it would litigate the basis of the English court's jurisdiction. Since the English procedures were in accord with American notions of due process, the defendant, having waived the opportunity to contest the jurisdictional question in the English courts, was conclusively bound by the foreign judgment. *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971).

The English judgment was recognized on the basis of comity, a concept much abused of late by the commentators because of its imprecise and misunderstood meaning.[10] With few exceptions, however, the reported cases reveal a pattern of recognition and enforcement of international judgments.[11] The concept's classic formulation is this:

> "Comity," in its legal sense, is neither a matter of absolute obligation, on the one hand, nor of 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 the rights of its own citizens or of other persons who are under the protection of its laws.[12]

Comity receives its interpretation from the law of the forum in which recognition is sought; it is the basis on which the forum will recognize a judgment of a foreign court.[13] On a more elevated plane, comity can be said to be "a statement of the conflict of laws rules of the forum" with regard to international judgments.[14] Because of the relative infrequency[15] of cases involving international judgments, the conceptual content of comity and the defenses which can be raised under it are as yet

10. Comity has been labeled by the commentators as "a word of loose and uncertain meaning," Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 784 (1950); "chameleonic as its legal uses are varied," Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. REV. 44, 53 (1962); and as an "undefined and virtually undefinable principle," Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291, 293 (1963).

11. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950); Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 MICH. L. REV. 1129 (1935); Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291 (1963).

12. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

13. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 45 at 163 (1962).

14. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 784 (1950).

15. Nussbaum, *Jurisdiction and Foreign Judgments*, 41 COLUM. L. REV. 221, 237 (1941); Peterson, *Res Judicata and Foreign Country Judgments*, 24 OHIO ST. L.J. 291, 295-96 (1963). Professor Nussbaum's research, which uncovered 63 reported cases dealing with foreign country judgments in the period from 1896 to 1936, lead him to conclude such judgments are "extremely rare in this country." However, Professor Peterson disputes this conclusion, claiming to have uncovered an additional 130 reported cases in the same 40-year period.

imprecisely defined. However, with the continued growth of international trade, cases involving international judgments will be more frequent. These cases will establish the boundaries of "comity," and will mark out the forum's conflicts rules with respect to foreign judgments. These decisions, spelling out the terms on which foreign judgments will be recognized, will be stare decisis within the forum.

It is true that comity is not a rule of international law.[16] But once adopted by the forum, comity is a part of its conflicts of laws rules. It is submitted then that it cannot be said without some qualification, that comity "is not a rule of law, but one of practice, convenience and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation."[17] As perceived by the Third Circuit in *Somportex*, comity is little more than a halfway house between duty and courtesy. This is correct, but only so far as international obligations, duties, and laws are concerned. Once it is embedded in the decisional law of the forum, it is as much a part of the forum's law as a principle of contract or tort law. And, as the cases dealing with comity increase in number, its conceptual content will be more precisely defined and predictability will increase. The stare decisis effect of comity was tacitly conceded by the Third Circuit when it acknowledged comity to be its "governing standard" under applicable Pennsylvania precedents.[18] The same effect would bind a Pennsylvania court.[19] Once proclaimed as the law of the forum, comity and the defenses available under it remain the law until overturned by the appropriate court within the forum.

Despite some authority to the contrary,[20] the reported cases are not in agreement on whether the doctrine of res judicata applies to foreign judgments. And where the cases do employ res judicata terminology, in deciding what effect is to be given an extranational judgment, res judicata comes into play only after the foreign judgment is recognized on the basis of comity. In New York, where there are several leading decisions on the res judicata effects of foreign judgments, recent decisions have made clear that comity remains the underpinning of whatever res judicata effect is granted an internationally foreign judgment. In *Rosenbaum v. Rosenbaum*,[21] the New York Court of Appeals noted that "under

16. Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. REV. 44, 53 (1962).

17. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

18. *Id.*, *citing* Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and Svenska Handelsbanken v. Carlson, 258 F. Supp. 448 (D. Mass. 1966).

19. *In re* Christoff's Estate, 411 Pa. 419, 192 A.2d 737 (1963), *cert. denied*, 375 U.S. 965 (1964).

20. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 789 (1950).

21. 309 N.Y. 371, 130 N.E.2d 902 (1955).

comity—as contrasted with full faith and credit—our courts have power to deny even prima facie validity to the judgments of foreign countries for policy reasons."[22]

The scope of the res judicata effect granted in New York to an international judgment was dealt with in *Watts v. Swiss Bank Corp.*[23] There the Court of Appeals, after again making clear that comity was the basis of its recognition of a French judgment, held that French res judicata rules would properly have governed the case, had French law been pleaded and proven. The same approach, that of examining the res judicata rules of the rendering court to determine what scope should be given to an international judgment, was utilized in *Bata v. Hill*,[24] an internationally celebrated case which refused collateral estoppel effect to a Dutch judgment. "[C]ollateral estoppel," the Delaware court held, "only applies where . . . the court rendering the first determination will itself thereafter give conclusive effect to its own determination."[25] English cases have reached the same result.[26]

Enforcement of an international judgment on the basis of the res judicata rules of the forum, without reference to comity or to the res judicata rules of the forum which rendered the judgment, has, however, been advocated.

> Once a foreign judgment is recognized, it will be given the same effect . . . that it would have in subsequent proceedings in the foreign forum. This procedure is perhaps reconcilable with the doctrines that base the recognition of foreign judgments on comity or on a presumed legal obligation created by the foreign judgment, but it is indefensible under a res judicata rationale. . . . A contrary rule, making the extent of the local effect of foreign judgments dependent directly on domestic principles, would seem to find strong support in both logic and application.[27]

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22. *Id.* at 375, 130 N.E.2d at 903.

23. 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970).

24. 37 Del. Ch. 96, 139 A.2d 159 (1958), *modified sub nom.*, Bata v. Bata, 39 Del. Ch. 258, 163 A.2d 493 (1960), *reh. denied*, 39 Del. Ch. 548, 170 A.2d 711, *cert. denied*, 366 U.S. 964 (1961).

25. *Id.* at 127, 139 A.2d at 176.

26. *E.g.*, Carl-Zeiss-Stiftung v. Rayner & Keller, Ltd., [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536.

27. Smit, *International Res Judicata and Collateral Estoppel in the United States*, 9 U.C.L.A.L. REV. 44, 63 (1962).

Professor Leflar may be staking out yet another position when he writes: "Common law principles of res judicata are as applicable in American courts to judgments rendered in foreign countries as to those rendered in the United States." B. LEFLAR, AMERICAN CONFLICTS LAW § 74 at 171 (1968). Ignoring as it does the differences between the res judicata effects accorded judgments in common law and in civil law jurisdictions, Leflar's statement finds little, if any, support in the cases. *Cf.*, *e.g.*, Palmarito de Cauto Sugar Co. v. Warner, 225 App. Div. 261, 232 N.Y.S. 569 (1929), wherein res judicata effect was denied a Cuban bankruptcy decree because under Cuban law the bankruptcy decree would not preclude the action at hand. Also, see note 24 and accompanying text.

It is submitted, however, that such a rule would vary res judicata as presently employed in both domestic and international situations.[28] Moreover, enforcement of the res judicata rules of the forum where recognition is sought could give the internationally foreign judgment a scope and effect beyond that accorded the judgment in the country where it originated.[29] Under the approach advanced by Professor Smit,[30] the res judicata effect given the foreign judgment in the recognizing forum would have no necessary correlation to its res judicata effects in the court which rendered the judgment. The rights, obligations, and duties of the litigants would expand or contract depending, fortuitously, on the res judicata rules of the country where a judgment creditor seeks enforcement.

Without employing res judicata terminology, the Third Circuit, in *Somportex*, refused to review the English jurisdictional finding, holding that the English courts had jurisdiction to decide the question of local jurisdiction.[31] The result was in conformity with Chief Justice Marshall's holding in *Rose v. Himley*,[32] where the difference between local jurisdiction and jurisdiction in the international sense became embedded in American conflicts law. Marshall established this rule for the recognition of foreign judgments in the United States:

> Of its own jurisdiction, so far as depends on municipal rules, the courts of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. The distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.[33]

The *Somportex* decision on the local jurisdiction question was reached without reliance on *Rose v. Himley* or other cases involving recognition of foreign judgments. Instead, the Third Circuit relied on *Baldwin v. Iowa State Traveling Men's Association*,[34] a case which dealt with the enforcement in one federal district of a default judgment rendered by another federal district court. Constitutional full faith and credit[35] was

28. "The effect of a valid judgment upon the rights or other interests of the parties and persons in privity with them is determined by the law of the state where the judgment was rendered." RESTATEMENT, CONFLICT OF LAWS § 450, at 533 (1934).

29. *Cf.*, Bata v. Hill, 37 Del. Ch. 96, 139 A.2d 159 (1958), *modified sub nom.*, Bata v. Bata, 39 Del. Ch. 258, 163 A.2d 493 (1960), *reh. denied*, 39 Del. Ch. 548, 170 A.2d 711, *cert. denied*, 366 U.S. 964 (1961).

30. See note 27 *supra* and accompanying text.

31. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971).

32. 8 U.S. (4 Cranch) 240 (1808).

33. *Id.* at 275-76.

34. 283 U.S. 522 (1931).

35. U.S. CONST. art. IV, § 1.

held not to apply to such situations. The defendant in *Baldwin* entered a special appearance, but received an adverse ruling on the jurisdictional question. A default judgment was later entered. The Supreme Court, relying on the policy of favoring an end to litigation, held that the defendant was not entitled to another opportunity to relitigate the jurisdictional issue. The Third Circuit found this same policy applicable to the international judgment at issue in *Somportex*, holding that "defendant cannot choose its forum to test the factual basis of jurisdiction. It was given, and it waived, the opportunity of making the adequate presentation in the English court."[36] The American firm's objection to the conversion of its conditional appearance to contest jurisdiction into a general one was rejected.[37] The court pointed out that the corresponding Federal[38] and Pennsylvania[39] procedural rules have the same effect. The court in *Somportex* also pointed out[40] that, in *York v. Texas*,[41] due process was held not to require that a state court permit special appearances for the limited purpose of contesting jurisdiction.

The notion of jurisdiction in the international sense, *i.e.*, whether the requirements of basic due process were satisfied, was tacitly recognized and applied by the Third Circuit in *Somportex*. Well-established in American conflicts law, the distinction is also recognized by the English courts. However the English cases have added little clarity to the notion. The English test for determining whether a foreign court properly had jurisdiction in the international sense was set out on one occasion[42] as conformity with "natural justice" and on another occasion as the "normally recognized limits of territorial jurisdiction."[43] What the English cases, as well as their American counterparts, seem to mean is that a foreign judgment will be recognized if the foreign court claimed jurisdiction under its rules and if the foreign court's jurisdictional procedures comport with those of the forum in which recognition is sought. There is some American authority for the proposition that a foreign judgment, if it is to be recognized in this country, must conform to the constitutional requirements of due process. In *Griffin v. Griffin*,[44] the Supreme Court said, in dictum, that no American court will "give effect, even as a matter of comity, to a judgment elsewhere acquired without due process."[45]

36. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 441 (3d Cir. 1971).

37. *Id.*

38. FED. R. CIV. P. 12(b)(2).

39. PA. R. CIV. P. 1451(a)(7).

40. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 442 n.11 (1971).

41. 137 U.S. 15 (1890).

42. Pemberton v. Hughes [1899] 1 Ch. 781, 796.

43. British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd. [1954] 1 Ch. 37, rejecting an injunction under the Sherman Anti-trust Act in United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951).

44. 327 U.S. 220 (1946).

45. *Id.* at 229.

However, some commentators[46] and some cases[47] have suggested that something less than complete due process will sustain recognition of a foreign judgment, provided there is notice and hearing in accordance with foreign law. More authoritative, perhaps, is the treatment in *Hilton v. Guyot*[48] of the defendant's objections to enforcement of a French judgment on due process grounds. The court held:

> It is next objected that in those (French) courts one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross examination by the opposite party, and that the defendants were, therefore, deprived of safeguards that are by our law considered essential to secure honesty and to detect fraud in a witness; and also that documents and papers were admitted in evidence, with which the defendants had no connection, and which would not be admissible under our own system of jurisprudence. . . .[Since] the practice followed and the method of examining witnesses were according to the laws of France, we are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment.[49]

In *Somportex*, the Third Circuit found the English jurisdictional procedures employed there to be in conformity with constitutional due process.[50] Hence the court was not required to decide if something else than complete due process in securing jurisdiction would sustain recognition of a foreign judgment in this country.

The judicial economy exhibited by the Third Circuit in deciding whether the English court hand "jurisdiction in the international sense" typifies the decision as a whole, a very restrained and correct one. The court gave binding effect to the English court's holding that local jurisdiction was proper under English law. Thus *Somportex* is blended into a line of well reasoned cases dating from the early days of the Republic.

46. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 59 at 213 (1962), where the author says that foreign procedures must "conform, at least substantially, to the requirements of constitutional due process;" B. LEFLAR, AMERICAN CONFLICTS LAW § 73 at 167 (1968), where the author states that conformity with "basic concepts of due process" is sufficient to warrant recognition and enforcement of an internationally foreign judgment. *See*, Von Mehren and Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601 (1968) for a policy-oriented analysis suggesting that recognition practice with regard to internationally foreign judgments could be more permissive than that dealing with interestate judgments.

47. *E.g.*, Henderson v. Drake, 138 Cal. App. 2d 621, 292 P.2d 254 (1956); Dunstan v. Higgins, 138 N.Y. 70, 33 N.E. 729 (1893). Such decisions are in a numerical minority, even in their home states, with the majority view represented by Boivin v. Talcott, 102 F. Supp. 979 (N.D. Ohio 1951).

48. 159 U.S. 113 (1895).

49. *Id.* at 204-05.

50. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 443 (3d Cir. 1971).

The court accomplished this without becoming embroiled in the academic controversy over the res judicata effects to be accorded internationally foreign judgments, a controversy which seems destined to confuse, rather than clarify an already difficult concept.

JOSEPH P. AVERILL

RESCISSION OF AN AUTO SALE UNDER THE UNIFORM COMMERCIAL CODE—HOW TO GET RID OF A FOUR-WHEELED LEMON

Plaintiff purchased a new 1970 Jaguar automobile from defendant dealer. Express warranties were made in the sales contract and the warranty booklet, both of which were given to plaintiff upon delivery of the vehicle. The booklet additionally disclaimed any warranty not specifically mentioned and limited plaintiff's remedies to the repair or replacement of defects. Both the disclaimer and limitation clauses were in the same size, style, color, and print as the remaining portions of the booklet. Problems in the steering, air conditioning, and doors developed almost immediately. The vehicle also developed a tendency to stop for no apparent reason. After three months, during which defendant had possession for repair purposes for approximately fifty percent of the time, plaintiff sued for rescission, or alternatively, for damages for breach of the implied warranty of merchantability. The trial court ordered defendant to transfer to plaintiff a new 1970 Jaguar with equipment comparable to that of the non-conforming vehicle. When compliance with this order was found to be impossible,[1] an amended final judgment was then entered, awarding damages of $6,500.00, the market value of the car on that date. Since the original price of the vehicle was $7,676.00, plaintiff was forced to bear the depreciation loss of $1,176.00. Defendant appealed, and plaintiff cross-appealed on the depreciation assessment. The District Court of Appeal, Third District, *held*, affirmed: The limitations and disclaimers were ineffective, rescission was proper, but plaintiff must bear the depreciation. *Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc.*, 258 So.2d 319 (Fla. 3d Dist. 1972).

The decision in the instant case turned substantially on interpretations of various sections of the Uniform Commercial Code,[2] which has been adopted in all jurisdictions except Louisiana.[3] *Dade County Dairies* presented a case of first impression for Florida in dealing with

1. The action did not come to trial until the latter part of 1971, and vehicles which could comply with the court's order were unavailable.

2. Hereinafter referred to as the "Code."

3. Florida was one of the last states to do so, adopting the Code on Jan. 1, 1967. *See* FLA. STAT. § 680.101 (1971).