Chapter Four Recognition and Enforcement of Foreign Judgments and Arbitral Awards

Introduction

- The third and the last division of conflict of laws is Recognition and Enforcement of Foreign Judgments and arbitral awards.
- The powers of a court are territorially limited; their judgments have no effect beyond the jurisdiction in which they are given unless other countries agree to accept them.

Introduction contd…

- For a case decided in domestic courts, normally, no conditions are expected of such judgment to full fill or to pass for its execution.
- On the contrary, no country will simply welcome a judgment rendered abroad and execute without any condition. That, definitely, has to be checked for, for example, its due process and whether it affects any national value or not.
- *Certain types of judgment, by their nature, only require recognition. These include foreign divorce and nullity decrees.* Other judgments may need both recognition and enforcement .But the court may be asked to enforce a foreign judgment, such as a maintenance order, or any judgment for damages.

Introduction contd…

- Unlike those of choice of juridical jurisdiction and choice of law rules, Ethiopia has got some rules of execution of foreign judgments and arbitral awards.
- Note that there is no single provision dealing with the recognition of judgments under Ethiopian law.

The Rationale Behind Recognition and Execution of Foreign Judgments

- The world today we have **diverse states,** the **interactions** of which in different spheres of life often results in conflicting international legal situations.
- Such interactions may give rise to court decisions that requires to be enforced out side its territory.
- As states are sovereign they will not readily enforce judgments by foreign courts. Therefore unless certain mechanisms are created to allow recognition and enforcement of foreign judgments in a certain country:
  - legitimate rights and status obtained under a foreign law may be lost,
  - Parties to the dispute will be subject to additional costs and trouble as they may be required to bring a new suit or claim in this court

The Rationale Behind Recognition contd…

- To avoid the prejudice that may arise up on parties and to facilitate business transactions countries allow recognition and enforcement of foreign judgments and arbitral awards in their territory.
- Countries have entered to agreements between themselves to recognize and enforce judgments of each other.
- In the absence of treaties, however, as some foreign judgments may not be in line with our understanding of justice, morality, and public policy certain pre-requisites are provided before allowing recognition and enforcement.

Theoretical Basis for Recognition and Enforcement

- **Why should a court of one country recognize and enforce a judgment of another?**
- In general terms, two theoretical justifications have been advanced for the recognition of foreign judgments:
  - Based on the idea of comity and Reciprocity
  - Based on the doctrine of obligation
- comity is a rather vague concept and is more appropriate to the relations between sovereigns
- the doctrine of reciprocity holds that the courts of country A should recognize and enforce the judgments of country B if country B is prepared to offer like treatment.

The doctrine of Obligation

- The doctrine held that, if the courts of country A have properly assumed jurisdiction, then the resulting judgment should be regarded as creating an obligation between the parties which a court ought to recognize. Thus, if a foreign court orders X to pay damages to Y, then it is argued that this creates a legal obligation that may be enforced by Y as an action for debt.

Modes of Execution of Foreign Judgments

- Under international law there are two widely accepted modes concerning the execution of foreign judgments.
- The first is exemplified by the laws of the Continental Europe and Latin American countries. According to the laws of these countries, foreign judgments are accorded enforcement only after the satisfaction of prescribed conditions and after an *exequatur* (a form of proceeding which means a retrial of the foreign judgment) is written and authorized recognition has been granted. In the laws of these countries, or foreign judgment, until supported by a formal decision of enforcement passed by a tribunal of the country in which it is desired to be enforced, will have no effect in that country. In the laws of such country, a foreign judgment is, therefore, not regarded as conclusive.
- The other mode is characteristic of the laws of the Anglo-American countries. Pursuant to the laws of these countries

Conditions for recognition and enforcement

- There are about seven conditions the US stipulated for the purpose of recognition and execution of foreign judgments .These are the results of judge-made law. (Hilton V. Guyot, 159 U.S. 113 (1895)) The (US) forum court should check whether:

1. There was a full and fair trial conducted by the foreign court;
2. The foreign court was of a competent jurisdiction;
3. The foreign court had conducted the trial upon regular proceedings;
4. The defendant has been given due service or voluntary appeared before the court;
5. There is a system in the country of the foreign courts likely to secure an impartial administration of justice between the citizens of its own country and those of other countries;
6. There is nothing to show either a prejudice in the court, in the system of the laws under which it was sitting or fraud in procuring the judgment, or any other special reason why the comity of the United State should not allow its full effect ,and
7. The requirement of reciprocity is met.

- Under English Common Law, three main grounds need to be established. In broad terms, these are:
- (a) that the foreign court must have been a competent court of jurisdiction;
- (b) that the judgment must be final and conclusive; and
- (c) that the judgment must be for a fixed sum not itself a tax or penalty.

Defenses to recognition and enforcement

- **Judgment given in a way contrary to natural justice**
- **Judgment obtained by Fraud**
- **Recognition contrary to public policy**
- **Conflicting judgments**
- **A foreign judgment given in breach of an arbitration or jurisdiction clause**

Execution of foreign judgments in Ethiopia

- We have two methods:
  - On the basis of International treaty(agreement)
  - On the basis of on fulfillment of conditions under civil procedure code provisions (456-461 civ.pro.co)
- If there is any treaty that was entered between Ethiopia and other country for recognition and enforcement of judgments of each other based on that treaty Ethiopian courts will recognize and enforce judgments obtained in that country. (Art.456)
- E.g. Treaty between Ethiopia and Djibouti. The only treaty that Ethiopia concludes.

- In the absence of treaty, then the conditions under Art.458 must be full filled. These are:
- *a) the execution of Ethiopian judgments is allowed in the country in which the judgment to be executed was given(**Reciprocity**);*
- *b) The judgment was given by a court duly established and constituted;*
- *c) The judgment-debtor was given the opportunity to appear and present his defense;*
- *d) The judgment to be executed is final and enforceable; and*
- *e) Execution is not contrary to public order or morals."*

1. Reciprocity

- In upholding this principle Ethiopia to ensure, inter alia, that the foreign state recognizes the judgments rendered by their courts.
- Defendant needs to show that Ethiopian judgment would not be enforced in that foreign country.
- The doctrine of reciprocity which has relation against a state as its basis, but which may simultaneously victimize innocent individuals,
- Interestingly, many states do not include reciprocity as a prerequisite for the execution of foreign judgment. Eg. Argentina and Brazil, in USA New York and California states rejected reciprocity as condition.

2.A Court Duly Established and Constituted

- Should such matters be determined on the basis of Ethiopian law? Or the foreign law? Or international law? No guidance is given by the Code, thus rendering the application of the criteria very difficult.
- A certain type of tribunal established in one state may be known in other state. In view of this fact, it would, therefore, be absurd to test the status of a court of one state by the law of another state which may not have an identical or even a similar court in its territory.
- In the opinion of this Ibrahim Indris, it suffice for the Ethiopian court to resort to the law of foreign country concerned to determine whether or not the tribunal rendering the judgment sought to be executed is on duly established.

- In determining whether the court giving judgment has jurisdiction or not: Two methods
- In In the Anglo-American legal systems and also in the laws of many Latin American countries, jurisdiction is defined by the law of the rendition forum. I.e. the law of the country whose court has pronounced the judgment.
- In the legal system of such continental law countries as Greece, Turkey and Austria, on the other hand, the jurisdiction of a court is ascertained on the basis of the law of the recognition forum, i.e. the law of the country in which execution of foreign judgment is sought.
- Each method has its own weaknesses.

- **Recommendation**
- In so far as the Ethiopian choice is concerned, it would be advisable to adhere to a method of definition of jurisdiction in which a compromise solution is attained:
- Ethiopian law may accept the law of rendition forum in appropriate circumstances. Consequently, care must be taken so that Ethiopian courts in matters pertaining for instance, to land situated in Ethiopia or to a patent recognized and registered by the government of Ethiopia are not outside of the jurisdiction they acquire under Ethiopian law.
- The assumption of jurisdiction by a foreign court must also not be incompatible with the general principles of international law.
- In cases where the jurisdiction assumed by the foreign court rendering the judgment is found to be repugnant to the Ethiopian interests, or that the jurisdiction is considered to be of Ethiopian courts exclusively the foreign judgments should not be executed in Ethiopia.

3. **Opportunity by the Judgment-Debtor to Present and Defend his Case**

- The judgment-debtor must have been served with a summons in due time, so that he could avail himself of the opportunity to defend the case.
- If the debtor of a foreign judgment has not received a legally sufficient notice, because ineffective means were used when effective means were readily available, so that in consequence the debtor failed to appear in court, the foreign judgment cannot be executed.

4. **Finality and Enforceability of a Foreign Judgment**

- What do finality and enforceability mean?
- What sort of foreign judgments are deemed to be final and enforceable?
- Which country's law should be consulted to determine the finality and enforceability of a foreign judgment?
- Ethiopian law does not include provisions which could help find solutions to these questions
- The concept of finality and enforceability implies that the foreign judgment sought to be executed is not liable to review, modification or to be set aside by another judgment. It implies that the judgments pronounced is conclusive, final and for ever established the existence of rights of which it is made to be conclusive evidence in a country.
- A judgment deemed final and enforceable is said to obtain a status of res judicata, and is, therefore, binding upon the parties to the suit.

- With regard to the appropriate law of country by which the issue of finality and enforceability of a foreign judgment might be tested, two practices are recognized world wide.[73]
- According to the first practice, to determine whether or not a certain judgment is final and enforceable, it is necessary to refer to the law of the country whose court pronounces the judgment or the rendition forum.
- The second practice argues in favor of the law of the court to whose jurisdiction the judgment has been referred for execution or the recognition forum.
- Though no express provision is available to this effect in Ethiopian law, the requirement embodied in the Civil Procedure Code that the foreign judgment must be accompanied by a certificate signed by the president or the registrar of the rendition forum to the effect that such judgment is final and enforceable, may imply that Ethiopian law has favored the former practice.

5.Public Order and Morality

- Public order is a doctrine which serves as a safety valve for a country to enable its courts to deny effect to foreign [laws and] judgments which, for one reason or another, should not be enforced.
- The concept of morality also refers to the fact that those foreign judgments appearing repugnant to the conduct, customs or accepted practices of the society of the recognition forum would not be carried out.
- A foreign judgment contrary to the morals of a society also implies violation of the public order.
- *Ethiopian courts to deny execution of foreign judgments for 'public order' reasons. These include:*
- *First, a foreign judgment obtained by fraudulent means, public order may be invoked when foreign judgment is proved to have been procured by false evidence.*
- *Second, a foreign judgment rendered by a court of a state the government of which Ethiopia opposes, for instance, a judgment from a state whose government is outlawed by the International Community for its grave violations of fundamental rights and human freedoms, is unlikely to be executed in Ethiopia*

Examples in which public order may be invoked to deny execution of judgment

- First, a foreign judgment obtained **by fraudulent means**, public order may be invoked when foreign judgment is proved to have been procured by false evidence.
- Second, a foreign judgment rendered by a court of a state the government of **which Ethiopia opposes**, for instance, a judgment from a state whose government is outlawed by the International Community for its grave violations of fundamental rights and human freedoms, is unlikely to be executed in Ethiopia
- Third, a foreign judgment which **precludes an opposing judgment of an Ethiopian court** rendered on the same cause of action, even if the Ethiopian judgment is given later is not executed. As is expressly provided in its Civil Procedure Code, Ethiopia never attributes effect to a foreign judgment contradicting an Ethiopian judgment, even if the later is not yet finalized.
- fourth, foreign judgments which are of a public nature, such as administrative, tax and criminal judgments are denied execution.

Procedures for the Execution of Foreign Judgment

- Under Ethiopian law, no foreign judgment may be executed with out the filing of an application to a court to that effect. The appropriate court to which an application should be made is the Federal High Court of Ethiopia.
- Any application for the execution of a foreign judgment must be made in writing and accompanied by certified copy the judgment to be executed and a certificate signed by the president of the registrar of the foreign court rendering the judgment which states that judgment is final and enforceable.
- Regarding the copy of the judgment, two questions may be asked. Should the copy of the foreign judgment be translated into Amharic which is the working language of the federal High Court from whatever language it was pronounced in?
- When turning our attention towards Ethiopian law, we find that no express provision in the code requires the translation of foreign judgment desired to be executed in Ethiopia into Amharic, nor is there one requiring an authentication of that judgment by the appropriate Ethiopian consulate. (Art457)
- But, one cannot ignore the judicial practice that has started to develop over the years, and according to which a foreign judgment submitted to an Ethiopian court for execution is required to be translated into Amharic and be authenticated by the Ethiopian consulate in the country in which the judgment was pronounced.

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- An Ethiopian court to which an application for execution of a foreign judgment is filed is required to enable the party against whom the judgment is liable to be executed to present his observation within such time as the court shall fix.
- The court is empowered to decide whether or not pleadings may be submitted. Where it believes that there are doubts as to certain points, the court may suspend its decision, pending the certification of the doubtful points. In principle, the court decided on the basis of the application submitted to it.
- However, in case of special reasons which the court records, as, for example, when a judgment debtor objects to the execution of foreign judgments in Ethiopia, the court may order that a hearing attended by both parties be held.
- Where the application is allowed and the application to have it executed is granted, the foreign judgment is executed as though it were given by the Ethiopian court, and a decision on costs in Ethiopia may also be rendered.