NEW YORK CITY BAR

REPORT ON LEGISLATION BY THE COMMERCIAL LAW AND UNIFORM STATE LAWS COMMITTEE

A.4580-A	**M. of A. Lavine**
S.523-A	**Sen. Hoylman**

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

Uniform Foreign-Country Money Judgments Recognition Act

THIS BILL IS APPROVED

I. THE BILL

The above legislation (the "Bill") has been introduced in the New York State Legislature to update New York's foreign-country money judgements recognition act, Article 53 of the Civil Practice Law and Rules ("CPLR"), consistent with the revised Uniform Foreign-Country Money Judgments Recognition Act promulgated by the Uniform Law Commission ("ULC") in 2005 (the "2005 Uniform Act"). CPLR Article 53 itself is based on the ULC's original 1962 Uniform Foreign Money Judgments Recognition Act (the "1962 Uniform Act"), which has now been updated and clarified by the 2005 Uniform Act.

II. SUMMARY OF EFFECTS OF THE BILL ON NEW YORK LAW

If enacted, the Bill would improve current Article 53 in five material respects. In particular, the Bill would:

1. Make clear that Article 53 applies only to money judgments issued by the courts of foreign countries and has no application to judgments entered in sister states, which are

entitled to full faith and credit under the U.S. Constitution;[1]

2. Codify common law burdens of proof by providing that a party seeking recognition of a foreign judgment bears the burden to prove that the judgment is subject to Article 53, while a party seeking non-recognition bears the burden to prove a specific ground for non-recognition;

3. Clarify the different procedures required for seeking foreign judgment recognition as an original matter or as a counterclaim, cross-claim or affirmative defense in a pending action;

4. Clarify and expand grounds for non-recognition of a foreign-country judgment by: (a) mandating non-recognition in cases where the foreign court did not have subject matter jurisdiction, (b) codifying the common law discretion of New York courts to refuse recognition of a foreign-country judgment where circumstances of the case raise substantial doubt about the integrity of the court rendering the judgment, and (c) permitting discretionary non-recognition where the particular proceedings in which the judgment was entered by the foreign court did not afford the objector due process of law; and

5. Establish that the statute of limitations on enforcement of a foreign-country judgment is the earlier of the limitations period for enforcement of the judgment in the country that entered it or New York's current limitation period of twenty years from when the judgment became effective in the foreign country. CPLR § 211 (b).

By bringing New York law into almost full conformity[2] with the 2005 Uniform Act, the proposed changes to Article 53 would cure defects in the language of the current law and better assure fair and consistent treatment in New York of foreign-country money judgment creditors and their judgment debtors.

Among other things, these amendments would eliminate possible confusion about the scope and application of Article 53 by making it clear that a foreign-country money judgment, unlike a sister-state judgment, must first be recognized pursuant to Article 53 before it can be registered and enforced under the enforcement provisions of CPLR Article 54 or otherwise. The amendments also provide needed codification for issues on which the current statute is silent and the case law may be unclear, including burden of proof and the applicable statute of limitations. Perhaps most important, the amendments would require courts to deny recognition where the foreign-country court rendering the judgment lacked subject matter jurisdiction and codify the

[1] The ULC has also promulgated a model law dealing with the enforcement of sister state judgments, entitled the Uniform Enforcement of Judgments Act (1964), which New York adopted as CPLR Article 54 in 1970. That law is not affected by the Bill.

[2] As discussed below, the Bill would preserve certain provisions of current Article 53 that differ from the text of both the original 1962 Uniform Act and the 2005 Uniform Act, including the availability of summary judgment in lieu of complaint as a means to recognize a foreign-country money judgment and limitations on the enforcement of foreign-country money judgments based on defamation claims. CPLR §§ 5303 and 5304 (b) (8).

traditional equitable discretion of the New York courts to deny recognition where a judgment was obtained by fraud or corruption in a foreign court or where the foreign proceedings did not comply with due process.

Taken together, these amendments would provide greater clarity in the application of Article 53 and better protect New York residents and commercial interests from the unjust enforcement of a money judgment entered without jurisdiction, corruptly or in deprivation of fundamental due process by foreign-country courts. They strike a careful balance between New York's policies in favor of granting comity and recognition to foreign-country judgments while at the same time protecting New York litigants from injustice in those extraordinary cases where the objector to recognition can show that the foreign court lacked subject matter jurisdiction or the foreign proceedings lacked integrity. In particular, the amendments impose on the person objecting to recognition the heavy burden of proving the grounds for non-recognition and would preserve the New York courts' discretion to reject claims that a foreign-country judgment was unfair or obtained by corruption.

For all these reasons and as discussed below, the Committee endorses and supports enactment of the Bill.[3]

III. BACKGROUND

Current CPLR Article 53 is based on the 1962 Uniform Act. The ULC promulgated the 1962 Uniform Act to promote international trade and business in adopting states by codifying the better common law rules on the recognition of money judgments rendered in other countries. The expressed purpose was to satisfy reciprocity concerns of foreign courts—making it more likely that U.S. money judgments, in turn, would be recognized by other countries. The 2005 Uniform Law seeks to continue this approach while also making improvements based on over fifty years of experience with the original version of the Act.

The 1962 Uniform Act delineated specific conditions which, if satisfied, would make recognition of a foreign-country money judgment mandatory by an adopting state, while leaving the state courts discretion to recognize other foreign-country judgments that failed to satisfy the 1962 Uniform Act, under common law principles of comity or otherwise.[4]

Thirty-three states enacted the original 1962 law, and, of these, 18 states have updated their law to the 2005 Uniform Act. A total of 26 states, including the important commercial jurisdictions of California, Illinois and Texas, have enacted the 2005 Uniform Act and it has been introduced in the legislatures of Nebraska, New York and Rhode Island. In total, 37 states currently have either the original version or the updated law, making it one of the more successful projects of the ULC.

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[3] The text of the Bill is available at https://nyassembly.gov/leg/?bn=A4580.

[4] Thus, provisions of the 1962 Uniform Act, enacted in New York as CPLR § 5301 (b), excluded from the statute's coverage foreign-country money judgments for taxes, fines or penalties, or judgments for support in matrimonial or family matters. These New York exceptions are retained by the Bill.

In New York, the 1962 Uniform Act was advanced by the Judicial Conference of New York and enacted by the State in 1970 as Article 53 of the CPLR. With the exception of a few ministerial changes and the addition of the 2008 "Libel Terrorism Protection Act" (currently CPLR §5304 (b) (8)) as a discretionary basis for non-recognition, the law has remained essentially unchanged in New York for half a century.

IV. PROPOSED REVISIONS OF ARTICLE 53

As stated in the ULC Commentary, the 2005 Uniform Act continues the basic approach of the 1962 Uniform Act, but makes certain changes believed desirable to clarify provisions and resolve issues created by the interpretation of certain courts over more than fifty years.

This report discusses each of the Bill's most significant proposed changes to Article 53 below.

a. Definition of "Foreign country"

Amended § 5301 would replace the current definition of "Foreign state" with a new defined term "Foreign country" to make it clear that a judgment of a foreign country does not include any judgment of a sister state or other judgment subject to the Full Faith and Credit Clause of the U.S. Constitution (U.S. Const., Art. IV., Sec. 1). This change avoids possible confusion arising from the use of "foreign state" and "foreign judgment" as those terms currently appear in CPLR Article 53 and Article 54 ("Enforcement of Judgments Entitled to Full Faith and Credit"). The ULC cited this concern as the reason for the definitional changes in its Official Comment 1 to Section 2 of the 2005 Uniform Act:

> The defined terms "foreign state" and "foreign judgment" in the 1962 Act have been changed to "foreign country" and "foreign-country judgment" in order to make it clear that the Act does not apply to recognition of sister-state judgments. Some courts have noted that the "foreign state" and "foreign judgment" definitions of the 1962 Act have caused confusion as to whether the Act should apply to sister-state judgments because "foreign state" and "foreign judgment" are terms of art generally used in connection with recognition and enforcement of sister-state judgments.[5]

The amendment of § 5301 to define the term "Foreign country" and remove references to "foreign state" from CPLR Article 53 is a necessary change. It clarifies the intent of the New York Legislature that Article 53 only authorizes recognition of money judgments of other foreign nations and not those of courts within the United States and its territories, which are governed by

[5] ULC Cmt 1 on Section 2 of 2005 Uniform Act, citing *Eagle Leasing d/b/a Budget Rent-A-Car of Marietta/Parkersburg, et al. v. Amandus*, 476 N.W.2d 35, 38) (Iowa 1991) ("By its terms, [the Iowa statute's] application to 'foreign' judgments is limited to judgments obtained in the courts of foreign countries, not those obtained in other states. The mix-up is not surprising, given the fact that 'foreign judgment' is a term of art that commonly refers to judgments of neighboring states. Moreover, the titles of the two statutes are deceptively similar.") (footnote and citation omitted).

CPLR Article 54.6 Consequently, both American and foreign courts will be more readily able to distinguish the different functions of CPLR Articles 53 and 54. This revision of Article 53 will thus enable New York to remain competitive internationally as well as maintain uniformity within the domestic sphere.

b. Codification of Burdens of Proof

Current Article 53 does not expressly provide which party bears the burden of (i) proving that a given foreign country judgment is subject to recognition under § 5302 and (ii) establishing any of the grounds for non-recognition under § 5304. The proposed amendments to Article 53 would change that by expressly allocating these burdens of proof between the party seeking and the party resisting enforcement of a foreign country money judgment.

Specifically, under proposed new § 5302 (c), "[a] party seeking recognition of a foreign country judgment [would have] the burden of establishing that this article applies to the foreign country judgment." In contrast, under proposed new § 5304 (c), (subject to an exception for judgments based on defamation) "[a] party resisting recognition of a foreign country judgment [would have] the burden of establishing that a ground for non-recognition stated in subdivision (a) [which sets forth mandatory grounds for non-recognition] or (b) [which sets forth discretionary grounds for non-recognition] of this section exists."

As set forth below, the Committee recommends adoption of these amendments, but acknowledges that it would moot the decisions of some New York courts which have allocated to the party seeking recognition an initial burden of proving that none of the *mandatory* grounds for non-recognition exists. The proposed amendments would eliminate any requirement that the party seeking recognition attempt to prove a negative, by making a *prima facie* showing of the absence of grounds for denying recognition. Subject to an exception for defamation-based judgments, it would simply shift the entire burden of proving the existence of grounds to deny recognition to the party resisting recognition. The Committee believes this will enhance the efficiency of the recognition process.

i. *Burden of Proving that the Foreign-Country Judgment Is Subject to Article 53*

Current Article 53, by its terms, "applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." CPLR § 5302. As noted above, however, current Article 53 is silent as to which party bears the burden of proving that these applicability requirements are met.

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[6] This definitional change does not affect the treatment of arbitration awards rendered in foreign countries which, if subject to the New York or Panama Conventions for the recognition and enforcement of foreign arbitral awards, are recognized and enforceable under the Federal Arbitration Act. *See* 9 U.S.C. §§ 202, 302. The judgment of a foreign court confirming a foreign arbitral award, however, would be subject to recognition under Article 53. *See, e.g., Commissions Import Export S.A. v. Republic of the Congo*, 757 F.3d 321, 330 (D.C. Cir. 2014) (foreign court judgment confirming arbitral award is distinct from arbitration award itself and will be subject to state law for foreign-country judgment recognition).

The new rule codifies, rather than changes, New York common law. Federal and state courts in New York have consistently imposed this burden of proof on the party seeking recognition of the foreign country judgment. *See, e.g., Ackermann v. Levine*, 788 F.2d 830, 842 n.12 (2d Cir. 1986) (under Article 53, "a plaintiff seeking enforcement of a foreign country judgment granting or denying recovery of a sum of money must establish [the applicability requirements] prima facie"); *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 286 (S.D.N.Y. 1999) ("The burden of proof in 'establishing the conclusive effect of a foreign judgment is on the party asserting conclusiveness.'") (quoting 11 Jack B. Weinstein et al., *New York Civil Practice* ¶ 5302.01 (1998)), *aff'd*, 201 F.3d 134 (2d Cir.2000); *accord Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 275 (1970) ("The burden of proof in establishing the conclusive effect in the rendering jurisdiction of a prior judgment is upon the party asserting it").

The proposed new CPLR § 5302 (c) is consistent with prior New York decisional law regarding the burden of proof for CPLR § 5302's requirements. The Committee supports the codification of this prior case law in new CPLR § 5302 (c).

ii. *Burden of Proving the Grounds for Non-Recognition*

Current Article 53 is similarly silent as to which party bears the burden of proof with respect to the grounds for non-recognition set forth in CPLR § 5304. New York courts have split on this issue. Several New York decisions applying current Article 53 have differentiated, for burden of proof purposes, between the mandatory and discretionary grounds for non-recognition. Those courts determined that the party seeking recognition of the foreign-country judgment bears the initial burden of proving that the mandatory grounds for non-recognition set forth in CPLR § 5304 (a) do *not* exist, while the party resisting recognition of the judgment bears the burden of establishing any of the discretionary grounds for non-recognition set forth in CPLR § 5304(b). *See, e.g., Bridgeway*, 45 F. Supp. 2d at 286 ("[A]s a matter of logic, it would appear that the plaintiff seeking enforcement of the foreign judgment bears the burden of proving that no mandatory basis for non-recognition pursuant to CPLR § 5304(a) exists, and that the defendant opposing enforcement has the burden of proving that a discretionary basis for non-recognition pursuant to CPLR § 5304(b) applies.") (citing *S.C. Chimexim S.A. v. Velco Enters. Ltd.*, 36 F. Supp. 2d 206, 212 (S.D.N.Y. 1999)); *Wimmer Canada, Inc. v. Abele Tractor & Equip. Co.*, 299 A.D.2d 47, 49 (3d Dep't 2002) ("As the proponent, plaintiff bears the burden of making a prima facie showing that the mandatory grounds for non-recognition—i.e., due process and personal jurisdiction—do not exist (see CPLR 5304 [a]) and that CPLR article 53 requirements are satisfied."); *Daguerre, S.A.R.L. v. Rabizadeh*, 112 A.D.3d 876, 878 (2d Dep't 2013) ("A plaintiff seeking enforcement of a foreign country judgment bears the burden of making a prima facie showing that the mandatory grounds for non-recognition do not exist.") (citations omitted).

It appears that at least one New York court has allocated to the defendant (or party resisting recognition) the burden of proving the existence of a mandatory ground for non-recognition under CPLR § 5304(a). In *Downs v. Yuen*, 298 A.D.2d 177 (1st Dep't 2002), the First Department placed "the burden . . . on defendant [a party resisting recognition of a Hong Kong judgment], not plaintiff, initially to offer evidence" as to "whether the Hong Kong judicial system as a whole comports with due process"—that is, whether the mandatory ground for non-recognition under current CPLR § 5304(a)(1) was present. 298 A.D.2d at 178. That decision, however, also provided the

potential for further litigation on this issue. The court explained that the reason why the initial burden was on the party resisting was because there was "ample precedent" that "the Hong Kong judicial system as a whole comports with due process" (*id*. at 178)—leaving open the possibility that, if there were no such precedent, the burden of proof might have indeed been allocated to the plaintiff in the first instance.

The proposed new CPLR § 5304 (c) would moot these New York cases by expressly providing that, with the exception of foreign-country money judgments based on claims of defamation, the burden of proof of grounds for non-recognition—both mandatory and discretionary—is on the party resisting recognition. The Bill, however, preserves the current protections against enforcement of foreign-country defamation judgments (CPLR § 5304 (b) (8)) by requiring the party seeking recognition of such a judgment to prove that the foreign country proceedings provided at least as much protection of freedom of speech and press as is afforded by the United States and New York constitutions.[7] The Committee supports these changes and is persuaded by the ULC's official Comment 3 to Section 4 of the 2005 Act, which reasoned that, "Because the grounds for non-recognition in Section 4 are in the nature of defenses to recognition, the burden of proof is most appropriately allocated to the party opposing recognition of the foreign-country judgment." The new rule would eliminate the need for the party seeking recognition to waste time and resources making a boilerplate showing that every potential ground for non-recognition is absent. While preserving existing protections against enforcement of foreign-country defamation judgments, the new rule would promote efficiency by requiring that the resisting party identify the grounds for non-recognition on which it relies and make the required showing as to those grounds.

c. Clarification of Procedures for Recognition of Foreign-Country Judgments

New § 5303 (b) would provide that "[i]f recognition of a foreign country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action on the judgment or a motion for summary judgment in lieu of complaint seeking recognition of the foreign country judgment."

New § 5303 (c) would provide that "[i]f recognition of a foreign country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim or affirmative defense."

These provisions replace the second sentence of current § 5303 (a), which states that "a foreign judgment is *enforceable* by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, cross-claim or affirmative defense." (Emphasis added.) This sentence's use of the word "enforceable" is incorrect. The proposed

[7] The Bill further protects against recognition of foreign-country money judgments that offend First Amendment standards by expressly providing (at amended CPLR § 5303) that recognition under CPLR Article 53 is subject to any controlling law of the United States. This amendment would effectively prohibit recognition under CPLR Article 53 of any foreign-country money judgment in violation of the federal SPEECH Act, 28 U.S.C. § 1402, which protects against enforcement of foreign libel judgments unless the applicable foreign law provided the judgment debtor with at least as much protection as the First Amendment of the U.S. Constitution or the judgment debtor would have been found liable if the case had been heard under United States law.

amendments do not change the applicable procedures for recognition of a foreign-country money judgment, but when read in conjunction with proposed new § 5307 ("Effect of recognition"), they make it clearer that Article 53 governs foreign-country judgment *recognition*, which is a precondition to enforcement. Article 53 does not deal with judgment enforcement. The amendments further clarify that a foreign-country money judgment, unlike a sister-state judgment, must first be recognized under Article 53 before it can be enforced under the registration and enforcement procedures of CPLR Article 54 or otherwise. This clarification effectively rejects some earlier decisions in other states holding that the registration procedure of the ULC's Uniform Enforcement of Foreign Judgments Act (the model for Article 54) could be used directly to enforce a foreign-court money judgment without a prior judgment granting recognition. *See, e.g., Society of Lloyd's v. Ashenden*, 233 F.3d 473 (7th Cir. 2000).

Like current § 5303 (a), proposed § 5303 (b) differs slightly from the text of the 2005 Act in that it recognizes the availability of New York's unusual accelerated judgment procedure, a motion for summary judgment in lieu of complaint pursuant to CPLR § 3213, as an alternative, more expeditious means to obtain judicial recognition of a foreign-court money judgment. A motion for summary judgment in lieu of complaint is an appropriate vehicle for an action for recognition of a foreign-court money judgment because, by its express terms, CPLR § 3213 applies to actions "based upon an instrument for the payment of money only or upon any judgment".

These new procedural provisions of Article 53 do not constitute a substantive change of law, but rather provide a useful clarification and codification of existing law.

d. New Grounds for Mandatory and Discretionary Non-Recognition

i. *Mandatory Non-Recognition for Lack of Subject Matter Jurisdiction*

New § 5304 (a) (3) would require non-recognition where the foreign court lacked subject matter jurisdiction.

The foreign-country court's lack of subject matter jurisdiction is already a discretionary basis for non-recognition under existing CPLR § 5304 (b) (1). Thus, this amendment would not mark a significant change from existing law. Lack of subject matter jurisdiction was included as a mandatory ground for non-recognition of foreign-country judgments under the 1962 Uniform Act, but New York's Article 53 was one of the few state enactments of the 1962 Act that made this ground discretionary. The proposed amendment would thus make New York law consistent with that of the many states that have long required their courts to deny recognition to foreign-court money judgments where the rendering court lacked subject matter jurisdiction. This change would deter forum shopping and avoid possible conflicts between New York and sister states in which a foreign judgment deemed unenforceable in another state for lack of subject matter jurisdiction could nevertheless be recognized in New York and then enforced throughout the United States based on the New York decision.

Significantly, under CPLR Article 54, and notwithstanding the Constitution's Full Faith and Credit Clause, New York will not enforce a sister state judgment if the court lacked subject matter jurisdiction. *See* CPLR § 5402 (b) (a foreign state judgment "is subject to the same

procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of the supreme court of this state"); *Farmland Dairies v. Barber*, 65 N.Y.2d 51, 55 (1985) ("'the judgment of one court is conclusive and binding in another State only if the first court had jurisdiction to render it'") (quoting *Underwriters Nat. Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U.S. 691, 704-05 (1982)). Thus, under current law, money judgments issued by foreign-country courts are provided greater respect than money judgments of sister states. There is no clear rationale for this anomaly. Adoption of the new law would make New York's treatment of foreign-country money judgments consistent with its treatment of sister-state judgments, which are required to be given full faith and credit.

Indeed, current § 5304 (b) (1)'s purported grant of discretion to recognize a foreign-court money judgment where the foreign court lacked subject matter jurisdiction appears to conflict with the bedrock principle that lack of subject matter jurisdiction deprives any court of power to render a valid judgment. As stated by a federal court applying § 5304 (b) (1): "The reason for this rule is fundamental: 'jurisdiction over a case is power to render a binding judgment in it; if there is no jurisdiction, there is no power.'" *Allendale Mut. Ins. Co. v. Excess Ins. Co., Ltd.*, 970 F. Supp. 265, 272 (S.D.N.Y. 1997) (quoting *Disher v. Information Resources, Inc*., 873 F.2d 136, 139 (7th Cir.1989)), *vacated on other grounds*, 172 F.3d 37 (2d Cir. 1999). By making lack of subject matter jurisdiction a ground for mandatory non-recognition, new § 5304 (a) (3) will prevent the injustice of possible New York enforcement of manifestly invalid foreign-country money judgments.[8]

ii. *Discretionary Non-Recognition on Grounds of Foreign Corruption*

New § 5304 (b) (7) would make explicit that New York courts have discretion to deny recognition where the foreign-country judgment "was rendered in circumstances that raise substantial doubt about the integrity of the rendering courts with respect to the judgment." As stated in the ULC Comments to the 2005 Uniform Act, non-recognition based on doubts concerning the integrity of the foreign court's proceedings "requires a showing of corruption in the particular case that had an impact on the judgment that was rendered." ULC Cmt 11 on Section 4 of 2005 Uniform Act. Under longstanding New York common law rules, New York courts already have equitable power to deny enforcement of a foreign judgment in these circumstances. *See Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 555-67 (S.D.N.Y. 2014), aff'd, 833 F.3d 74, 141-42 (2d Cir. 2016).[9] Thus, this new provision would not be a significant change in New York

[8] As noted above, proposed new CPLR § 5304 (c) would impose on the objecting party the burden of proving the foreign court's lack of subject matter jurisdiction. This would require the objecting party to prove that subject matter jurisdiction did not exist under the law of the foreign country. *See, e.g., Wimmer Canada, Inc*., 299 A.D. 2d at 51 (finding that Canadian court had subject matter jurisdiction based on unrefuted expert affidavit of Canadian counsel). In determining whether the foreign court had subject matter jurisdiction, a New York court could also defer to a final ruling of the foreign court on the issue. *See ICC Chem. Corp. v. TCL Industries (Malaysia) SDN*, 206 F. Appx 68 (2d Cir. 2006) (rejecting judgment debtor's challenge to subject matter jurisdiction of Singapore court where issue was litigated in Singapore and judgment debtor did not appeal adverse ruling).

[9] While an offshoot of the *Chevron* case remains in litigation before the district court, the pending litigation does not affect the prior holding, affirmed by the Second Circuit, that a New York court has discretion to deny recognition to a foreign-country judgment obtained by corruption.

law, but rather would codify an equitable power that has long been recognized.

Current § 5304 (a) (1) codifies the mandatory, non-discretionary rule that recognition of a foreign-country money judgment must be denied if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with due process of law." Mandatory denial requires the party opposing recognition to prove that the entire judicial system of a foreign country is incapable of rendering justice, without regard to whether the decision in the particular case may have been just. New York courts have held that "since [§ 5304 (a) (1)] refers to 'a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law', it cannot be relied upon to challenge the legal processes employed in a particular litigation on due process grounds." *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 296 A.D.2d 81, 89 (1st Dep't 2002) (emphasis in original), *aff'd*, 100 N.Y.2d 215 (2003), *cert. denied*, 540 U.S. 948 (2003).

Courts in New York and other states have recognized that § 5304 (a) (1) and other provisions derived from its source, 1962 Uniform Act § 4(b) (1), do not apply to a claim based on the lack of fairness or integrity of a specific foreign-country proceeding. Courts seldom find claims of lack of fairness or integrity persuasive. Nevertheless, a number of courts applying these provisions have considered such claims only to reject them as lacking merit. *See, e.g., Tonga Air Services, Ltd. v. Fowler*, 826 P.2d 204 (Wash. 1992) (considering and rejecting on the merits arguments of denial of due process through failure to grant continuance when lawyer could not appear and lack of verbatim transcript of proceedings); *Society of Lloyd's*, 233 F.3d at 477 (Posner, J.) (citing the Illinois statute's use of the word "system" as a bar to the judgment debtor's attempt to focus on the fairness of the particular foreign proceeding, but then considering judgment debtor's arguments on the merits and finding no violation); *CIBC Mellon Trust Co.*, 296 A.D.2d at 89-90 (considering and rejecting the defendant's arguments on the merits).

However, the fact that mandatory non-recognition under § 5304 (a) (1) is not the appropriate vehicle to raise a challenge to the fairness or integrity of a particular decision does not mean that a disadvantaged party has no remedy. In the *Chevron* case, both the district and circuit courts engaged in lengthy analyses of the status of foreign judgments under New York law and concluded that, in fact, independently of § 5304 (a) (1), common law affords New York courts the equitable power to deny recognition of a foreign-country money judgment obtained by fraud or corruption in the foreign court. The district court in *Chevron* employed a belt-and-suspenders approach in denying recognition to an Ecuadoran money judgment by first determining the judgment was unenforceable as a matter of common law because it had been obtained by bribery and corruption in the foreign proceeding and then, in addition, ruling the judgment was also unenforceable under CPLR § 5304 (a) (1) because Ecuador's judicial system was not fair or impartial and did not comport with the requirements of due process. *Chevron*, 974 F. Supp. 2d at 555-67, 604-17.

In affirming *Chevron*, the Second Circuit expressly rejected the argument that CPLR § 5304 (a) (1) is the exclusive remedy and, as such, deprives New York courts of the discretionary power to avoid recognition of foreign-country judgments obtained by fraud in a particular case. 833 F.3d at 141-42. The Court of Appeals cited a long line of pre-Article 53 New York cases holding that courts have the equitable power to grant relief from a fraudulently obtained foreign

judgment. *See, e.g., Gray v. Richmond Bicycle Co.*, 167 N.Y. 348, 355, (1901) ("even a foreign judgment may be successfully assailed for fraud in its procurement") (internal quotation marks omitted)); *Davis v. Cornue*, 151 N.Y. 172, 179-80 (1896) ("a court of one state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it"); *McDonald v. McDonald*, 228 A.D. 341, 344 (1st Dep't 1930) ("The rule is that a judgment rendered in our own, or a sister State, or in a foreign country, may be attacked collaterally for want of jurisdiction, or for fraud on the court, or between the parties to the action."). After reviewing these cases, the Court of Appeals concluded:

> We do not see that enactment of the Recognition Act [CPLR Article 53] overruled this line of cases. . . . Nothing in the legislative history of the Recognition Act stated that its enactment was intended to abrogate the above line of common-law cases recognizing the authority of courts of equity to grant *in personam* relief from a judgment procured by fraud. And indeed, since the enactment of the Recognition Act in 1970, that authority has continued to be exercised. *Tamimi v. Tamimi*, 38 A.D.2d 197. . . . (2d Dep't 1972) (reversing the posttrial dismissal of an action collaterally attacking a Thai divorce judgment allegedly procured by fraud). . . . We cannot conclude that New York common law ceased, in 1970, to allow New York courts to grant equitable *in personam* relief to a person victimized by a judgment procured by fraud.

833 F.3d at 142.

New § 5304 (b) (7), thus, is not a novel invitation to wasteful relitigation of legal and factual issues that already have been raised or could have been raised in the foreign court. It is the codification of longstanding rules protecting a party from fraud or other egregious abuse in a particular foreign case. It is narrowly drafted. It requires a showing of "substantial doubt" about the integrity of the rendering court. It further requires the party opposing recognition to meet its burden of showing that the particular foreign proceedings in which the judgment was entered lacked integrity (not just that the foreign court made an erroneous decision) and that the foreign judgment was the result of such lack of integrity. By making this a discretionary ground for non-recognition, the amendment also gives courts latitude to dismiss all but the most compelling claims that a foreign judgment was the result of corruption.

Moreover, the cases cited above which have considered and rejected challenges to foreign judgments based on lack of integrity show that courts can readily distinguish between collateral attacks based on the alleged lack of merit of the underlying case and those based on actual corruption of the foreign legal process. But even in a case where lack of integrity of the trial court is established, the failure of the defendant to challenge the outcome on appeal is a factor that the New York court may consider as a reason to deny relief. ULC Official Cmt 12 on Section 4 of 2005 Uniform Act.

The Committee therefore concludes that proposed § 5304 (b) (7) is a salutary codification of existing common law and court practice that may protect New York residents or persons with significant New York commercial interests from patently abusive judgments entered by foreign courts. By clarifying an area of some confusion and expressly permitting courts to exercise their traditional equitable power to protect judgment debtors from fraudulent or corrupt foreign judgments, new § 5304 (b) (7) would be a welcome safeguard and improvement to Article 53.

iii. *Discretionary Non-Recognition for Lack of Due Process*

New § 5304 (b) (8), similarly, would give New York courts discretion to deny recognition where "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."

Like proposed § 5304 (b) (7), this provision would permit a court to look past the nature of the foreign country's overall legal system and consider whether the proceedings in the particular case were compatible with due process, without the need to establish that the procedures in all cases in that country fail to provide due process.

The standard for meeting the required showing of lack of due process is stringent. That standard was stated in *Hilton v. Guyot*, 159 U.S. 113, 202 (1895), as follows:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect then a foreign-country judgment should be recognized.

The question of whether due process is provided is the same whether one considers the particular case or cases generally in the foreign court system. The test is not whether the procedures of the foreign court were similar to New York procedures, but whether the foreign court's procedures provided basic fairness. As ULC Official Comment 5 on Section 4 (b) (1) of the 2005 Uniform Act (providing for mandatory non-recognition in cases of systemic lack of due process) expressed this standard, "A case of serious injustice must be involved." Once again, exercise of discretion may depend on whether the defendant pursued available procedures for appeal in the foreign country to seek redress.

Given the difficulty of meeting this high standard, it is unlikely that more than a few cases will present sufficient facts to justify non-recognition based on lack of due process in the underlying foreign proceedings. At the same time, however, new § 5304 (b) (8) would give courts welcome discretion to grant relief in those few cases of serious injustice.

e. Statute of Limitations

New § 5303 (d) would provide that "An action to recognize a foreign country judgment must be commenced within the earlier of the statute of limitations applicable in the foreign country (i.e., on enforcement of the judgment in that country) or 20 years from the date that the foreign country judgment became effective in the foreign country." Current Article 53 does not contain a statute of limitations. Proposed § 5303 (d) differs from the 2005 Uniform Act in that the Uniform Act provides that the limitations period will be the earlier of the applicable foreign statute of limitations or fifteen years, whereas the Bill adopts a twenty-year limitations period. This corresponds to the twenty-year statute of limitations applicable to actions to enforce a New York judgment under CPLR § 211 (b).

As a foreign-country judgment must be "enforceable where rendered" (§ 5302) in order to qualify for recognition under Article 53, the foreign judgment must still be enforceable within the statute of limitations of the country where it was obtained. *See Overseas Dev. Bank v. Nothman*, 103 A.D.2d 534, 543 (2d Dep't 1984) (refusing to recognize a foreign money judgment rendered in England where the judgment was no longer enforceable under England's six-year statute of limitations). New § 5303(d) codifies this limitation on recognition by expressly incorporating the foreign country's statute of limitations into Article 53 while at the same time recognizing New York's policy setting twenty years as the maximum period for enforcement of New York judgments.

By filling a gap in current Article 53, the proposed new statute of limitations provides welcome certainty in the procedure for seeking recognition of foreign-country money judgments.

V. RECOMMENDATION

The Committee recommends one stylistic change to the Bill dealing with the statute of limitations. In lieu of expressly stating the twenty-year limitations period, new § 5303 (d) should instead refer to and incorporate the applicable statute of limitations for enforcement of judgments provided elsewhere in the CPLR, as follows:

> An action to recognize a foreign country judgment must be commenced within the earlier of the statute of limitations applicable in the foreign country or the limitations period provided under this chapter for enforcement of a New York money judgment computed from the date that the foreign country judgment became effective in the foreign country.

VI. CONCLUSION

For the reasons detailed in this Report and in the Official Comments of the ULC to the 2005 Uniform Act, the Commercial Law and Uniform State Laws Committee of the New York City Bar Association recommends enactment of the Bill, and suggests the one stylistic change noted above.

Commercial Law and Uniform State Laws Committee
Alan Kolod, Chair

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