RECENT DEVELOPMENTS

Bachchan v. India Abroad Publications Inc.: NON-RECOGNITION OF ENGLISH LIBEL JUDGMENTS IN NEW YORK

On January 31, 1990, India Abroad Publications Incorporated (India Abroad), a New York news wire service, transmitted a story to newspapers in India regarding the activities of Ajitabh Bachchan.[1] Copies of these newspapers were later distributed in the United Kingdom. The story reported that Swiss authorities had frozen a bank account, belonging to Bachchan, that had been used to pay commissions to a Swedish arms company. The arms company had previously been charged with paying kickbacks to obtain large munitions contracts from the Indian government. Several publications in India and elsewhere had previously reported Bachchan's alleged involvement in the scandal. Bachchan denied that he was the holder of the bank account in question and stated that neither he nor any member of his family had any connection with the munitions contract. India Abroad did not publish an apology as Bachchan requested, although it reported that a Swedish newspaper had apologized and paid Bachchan a settlement for publishing the story. Bachchan brought an action for libel against India Abroad in the High Court of Justice in London, England. The High Court awarded damages, which Bachchan sought to obtain in an enforcement action in the courts of New York against the newspaper's assets in that state. The Supreme Court of New York County held that the judgment was repugnant to the public policy of New York because it had been rendered without the safeguards for freedom of the press and speech required by the United States Constitution[2] and the Constitution of the State of New York.[3] The court therefore exercised its discretion under Section 5304(b)(4) of New York's Civil Practice Law and Rules to refuse to recognize the English money-judgment. *Bachchan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (Sup. Ct. 1992).

In *Hilton v. Guyot*,[4] the United States Supreme Court established the

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1. Bachchan was a friend of Rajiv Gandhi, the late prime minister of India, and is the brother and manager of a movie star and former member of Parliament.

2. U.S. CONST. amend. I.

3. N.Y. CONST. art. I, § 8.

4. 159 U.S. 113 (1895).

principle that, absent any "special reason"[5] for denial of enforcement, the United States should afford comity to the judgments of other nations' tribunals.[6] The Court defined comity as

> 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.[7]

Hilton became the basis for the Uniform Foreign Money-Judgment Recognition Act (Uniform Recognition Act), upon which most states, including New York, patterned their foreign money-judgment recognition statutes.[8] Decisions after the completion of the Uniform Recognition Act continued to grant recognition in most circumstances, and courts usually declined to recognize a foreign judgment only for lack of procedural safeguards or on strong public policy grounds.[9]

Both federal and state courts have held that state conflict-of-law rules govern the treatment of foreign judgments.[10] The law of recognition and enforcement of foreign judgments has developed primarily through the common law. Several states, including New York, have adopted a form of the Uniform Recognition Act in response to *Hilton* and to the decisions of their own courts. The Uniform Recognition Act was created to codify the existing common law

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5. The *Hilton* Court's "special reasons" for denying enforcement of foreign judgments were: (1) lack of personal or subject matter jurisdiction; (2) lack of proper notice of the proceedings to the defendant; (3) failure to conduct impartial or civilized proceedings; (4) fraud in procuring the judgment; (5) lack of finality of the foreign judgment; and (6) contravention of the public policy of the state in which enforcement is being sought. *Id.* at 202-03.

6. *Id.* at 202-03.

7. *Id.* at 163-64.

8. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT §§ 1-11, 13 U.L.A. 263-75 (1986) [hereinafter *Uniform Recognition Act*].

9. *See* Tahan v. Hodgson, 662 F.2d 862, 866 (D.C. Cir. 1981) (explaining that a foreign judgment violates American public policy if it is "repugnant to fundamental notions of what is fair and just").

10. If the foreign judgment is based upon issues which relate to a federal question, then the appropriate federal law would apply. However, the U.S. Supreme Court has not considered whether federal or state law should apply to the recognition of foreign judgments. *See* Robert B. von Mehren & Michael E. Patterson, *Recognition and Enforcement of Foreign Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37, 39 (1974).

principles of recognition, rather than to enact new rules.[11] Section 4(a) of the act enumerates the circumstances in which denial of a foreign money-judgment is mandatory, and Section 4(b) lists the circumstances under which it is within a court's discretion to deny recognition.[12]

Section 5304 of New York's recognition statute (New York Recognition Act)[13] is identical to Section 4 of the Uniform Recognition Act, except that lack of subject matter jurisdiction is not grounds for mandatory denial in New York; rather, it is placed in the permissive denial section (§5304(b)). The New York Recognition Act provides that foreign money-judgments that are final, conclusive, and enforceable where rendered are enforceable in New York with the same full faith and credit as judgments granted by sister states.[14] However, a foreign judgment will not be recognized where the procedures of the foreign court are incompatible with constitutional due process or where the foreign court

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11. *See* Commissioners' Prefatory Note to the Uniform Foreign Money-Judgment Recognition Act, 9B U.L.A. (1967).

12. Uniform Recognition Act, *supra* note 8, § 4. Section 4 states:

> (a) A foreign judgment is not conclusive if:
> (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
> (2) the foreign court did not have personal jurisdiction over the defendant; or
> (3) the foreign court did not have jurisdiction over the subject matter.
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> (b) A foreign judgment need not be recognized if:
> (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
> (2) the judgment was obtained by fraud;
> (3) the cause of action on which the judgment is based is repugnant to the public policy of this state;
> (4) the judgment conflicts with another final and conclusive judgment;
> (5) the judgment in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
> (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

13. N.Y. CIV. PRAC. L. & R. §§ 5301-09 (McKinney 1978).

14. *Id.* § 5303.

had no jurisdiction over the defendant.[15] Additionally, New York "need not" recognize foreign judgments if "the cause of action on which the judgment is based is repugnant to the public policy of [New York]."[16]

In New York, a foreign proceeding is repugnant to public policy if it was conducted in a manner, or based on a cause of action,[17] that is so contrary to the laws of the recognizing forum that recognition or enforcement of the judgment would seriously offend New York's notions of fairness or sound policy. Courts generally do not "deny recognition on public policy grounds merely because the law or practice of the foreign country differs, even if markedly, from that of the recognizing forum."[18] If the difference in law is fundamental[19] and affects an important state interest, however, the courts may decline to enforce the judgment.[20]

The libel law of England differs significantly from that of the United States. "Under English law, any published statement which adversely affects a person's reputation, or the respect in which that person is held, is prima facie defamatory,"[21] and malice is then inferred.[22] An English libel plaintiff need only establish that the words complained of refer to him, were published by the defendant, and bear a defamatory meaning.[23] A plaintiff need not prove the falsity of the statement, fault on the part of the defendant, or an intentional or negligent disregard of proper journalistic standards.[24] A defendant, however,

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15. *Id.* § 5304(a)(1-2).

16. *Id.* § 5304(b)(4) (referring to the "public policy test").

17. The New York Recognition Act, N.Y. CIV. PRAC. L. & R. § 5304(b)(4), and the Uniform Recognition Act, *supra* note 8, § 4(b)(3), provide that a foreign money judgment need not be enforced if "the cause of action on which the judgment is based is repugnant to the public policy of this state." This focus upon the cause of action is narrower in scope than most court decisions applying the public policy test.

18. Von Mehren & Patterson, *supra* note 10, at 61; *see* International Firearms Co. v. Kingston Trust Co., 189 N.Y.S.2d 911 (1959).

19. Ackermann v. Levine, 788 F.2d 830, 841 (2nd Cir. 1986) (citing *Tahan*, 662 F.2d at 866); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 443 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

20. *See* von Mehren & Patterson, *supra* note 10, at 63; Note, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 VAND. J. TRANSNAT'L L. 969, 994 (1989).

21. *Bachchan*, 585 N.Y.S.2d at 663.

22. Darby v. Ouseley, 156 Eng. Rep. 1093, 1096 (Ex. Ch. 1856).

23. *Bachchan*, 585 N.Y.S.2d at 663.

24. *See generally* LORD HAILSHAM, HALISBURY'S LAWS OF ENGLAND § 28(1)-(5) (4th ed. 1979).

may justify his words only by proving their truth.[25] Furthermore, English libel law does not distinguish between public figures and private persons.[26]

To establish a prima facie case for libel in the United States, on the other hand, a plaintiff bears the burden of proving: (1) a false and defamatory statement concerning the plaintiff; (2) a publication of the statement; (3) fault on the part of the defendant; and (4) a "special harm" of a pecuniary nature or some other actionable harm.[27] The Supreme Court in *Philadelphia Newspapers v. Hepps*,[28] held that statements involving a matter of public concern or interest,[29] require even a private figure plaintiff to show the falsity of the statement. The Court believed that "[t]o do otherwise could only result in a deterrence of speech which the Constitution makes free."[30] In *Hepps*, the Supreme Court rejected the American common law rule, the current rule in England, "that the defendant must bear the burden of proving truth."[31] In its place, the Court imposed the present "constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."[32]

Also at odds with the English law is the distinction in *Hepps* between public and private plaintiffs, which requires courts to determine whether the plaintiff is a public or private figure in order to determine the applicable burden of proof.[33] Under United States law, a public figure must prove, in addition to the basic elements of libel, that the defendant published the defamatory statement with "'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[34] A private figure does not have to prove knowledge of falsity or reckless disregard of the truth on the part of the

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25. Cooper v. Wakely, 173 Eng. Rep. 1148 (1828).

26. *Bachchan*, 585 N.Y.S.2d at 663.

27. *See generally* RESTATEMENT (SECOND) OF TORTS § 558 (1976).

28. 475 U.S. 767 (1986).

29. A statement is of "public concern" if the community at large would consider it important. *See, e.g.*, Pickering v. Board of Education, 391 U.S. 563, 568 (1968).

30. *Hepps*, 475 U.S. at 777.

31. *Id.* at 776.

32. *Id.*

33. *Id.* at 775.

34. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). The *Sullivan* test was extended to include "public figures" in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

defendant.[35]

In the noted case, the Supreme Court of New York County applied New York's limitations on libel actions to bar the enforcement of Bachchan's foreign judgment. The court first noted the grounds for non-recognition of a foreign judgment as provided in the New York Recognition Act.[36] Applying the facts of the case to the appropriate provisions of the New York Recognition Act, the court found that Bachchan's claim contained none of the characteristics that trigger mandatory denial of enforcement under the Act.[37] The court then sought to ascertain whether the "cause of action on which the judgment [was] based [was] repugnant to the public policy of [New York],"[38] in order to determine whether the court possessed discretion to deny enforcement.[39] Bachchan argued that the reference in the New York Recognition Act to "causes of action,"[40] rather than to judgments, limited the court's power to deny recognition to those causes of action that are not available in New York. A libel cause of action is an actionable tort in New York and a court should therefore enforce the judgment without determining whether the defendant's actions would be culpable under New York law. The court rejected this reasoning, however, finding "it doubtful whether this court has discretion to enforce the judgment if the action in which it was rendered failed to comport with the constitutional standards for adjudicating libel claims."[41] The court further stated that "if . . . the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and it is deemed to be, constitutionally mandatory."[42] Therefore, if the libel law in England did not offer the free speech protections granted by the United States Constitution, the denial of recognition of English libel judgments would effectively become mandatory.[43]

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35. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

36. N.Y. CIV. PRAC. L. & R. § 5304 (McKinney 1978).

37. *Bachchan*, 585 N.Y.S.2d at 662; N.Y. CIV. PRAC. L. & R. § 5304(a).

38. N.Y. CIV. PRAC. L. & R. § 5304(b)(4).

39. *Bachchan*, 585 N.Y.S.2d at 662.

40. N.Y. CIV. PRAC. L. & R. § 5304(b)(4).

41. *Bachchan*, 585 N.Y.S.2d at 662. This finding is in accordance with the decisions of other courts. *See* von Mehren & Patterson, *supra* note 10, at 61.

42. *Bachchan*, 585 N.Y.S.2d at 662.

43. *Id.*

The court then examined the libel law applied by the High Court of Justice in London to determine "whether its provisions [met] the safeguards for the press which have been enunciated by the courts of [the United States]."[44] It was unnecessary to determine whether the plaintiff was a public or private figure under New York law.[45] Instead, the court compared the procedures of the English Court with the constitutionally mandated procedures employed by the United States Supreme Court and the courts of New York in suits by private persons complaining of press reports on matters of public concern.[46]

English law places the burden of proving the truth of an allegedly libelous statement on the defendant.[47] The only burden that a plaintiff must carry in an English libel action is proving that the defendant published a statement, bearing a defamatory meaning, that referred to the plaintiff;[48] unlike an American libel plaintiff, an English libel plaintiff must prove only falsity or fault.[49]

India Abroad's article was of public concern because of its relation to an international scandal.[50] Therefore, under United States law, Bachchan would have had to show the falsity of the statement or the defendant's fault in publishing it - actual malice.[51] Emphasizing the differences between placement of the burden of proof in England and America, the court concluded that English law did not require Bachchan to prove India Abroad's fault or the falsity of its statement, and therefore the English court did not safeguard the freedoms of speech and press as would be required in New York by the United States Constitution and the Constitution of the State of New York. Preserving the rights of free speech and press is a fundamental public policy, and the court therefore deemed Bachchan's judgment to be unenforceable in New York as contrary to New York public policy.[52]

Through its decision in *Bachchan*, the court effectively created a mandatory ground for denial of a foreign money-judgment in New York that is not stated in the New York Recognition Act. The court added violation of First

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44. *Id.*

45. *Id.* (noting that English courts do not distinguish between public or private figures).

46. *Id.* at 663.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 664.

51. *Sullivan*, 376 U.S. at 280.

52. *Hepps*, 475 U.S. at 776.

Amendment values to the mandatory denial category of the New York Recognition Act, which had previously been reserved for procedures violating the due process clause.[53] Essentially, the court determined that the placement of the burden of proof in English libel suits is so seriously repugnant to New York's notions of fairness and sound policy that Bachchan's libel judgment should not be enforced in New York. The court thereby effectively held that English libel judgments are *per se* unenforceable in New York.[54] This determination may be reasonable, but the court did not consider any of the cases in which courts granted recognition, even where the laws or procedures of the foreign country differed significantly from those of the United States.[55] Furthermore, by rendering English libel judgments *per se* unenforceable, the court precluded the enforcement of future libel awards, in which enforcement might not be repugnant to the public policy of New York.

The court in the noted case may have based its decision upon a policy that the United States may not want to require. State court determination of comity and policy with respect to the decisions of foreign courts may adversely affect the foreign policy and foreign relations of the United States, and therefore federal statutory preemption of the law of recognition of foreign judgments may be desirable. Centralized control of recognition would remove many of the inconsistencies presently involved in the application of the laws of the states severally, and this, in turn, would facilitate a more uniform foreign policy with respect to the law of recognition.[56] In addition, a uniform federal recognition law would ensure that state decisions would comport with federal policy toward foreign tribunals and foreign states.

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53. N.Y. CIV. PRAC. L. & R. § 5304(a).

54. *Bachchan*, 585 N.Y.S.2d at 662.

55. *See Hilton*, 159 U.S. 113; *Ackermann*, 788 F.2d 830; *Somportex*, 453 F.2d 435.

56. *See* Note, *Recognition of Foreign Country Judgments - A Case for Federalization*, 22 TEX. INT'L L.J. 331 (1987).