FRAUD AS A BASIS FOR REFUSAL OF RECDGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENTS.

a. A Brief Presentation of the Problem:

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At common law, as well as under other legal systems, fraud not only voids any transaction in favour of an agrieved party, but similarily vitates a judgement so obtained.

Although several common-law writs, such as "audita querela" or "coram nobis", could be considered as a basis for impeaching a fraudulent judgement at common law, fraud is essentially an equitable defense, developed under the Anglo-American legal system. As such this defense contains the main features of equity and its technical pecularities.

Oddly enough, common-law courts in transplanting this equitable device in the field of private international law, have condoned its restricted role in dealing with domestic judgements, and impeach foreign judgements not only upon allegation of extrinsic fraud but also, if equity requires, in the case of an allegation of intrinsic fraud retry the whole case in order to do justice to innocent party.

In case of domestic judgements public policy does not permit retrying a conclusive judgement, but in dealing with foreign judgements, equity (or in other words the discretionary power of the judge) searches only for reliance on fraudulent representations of the successful party and if necessary

will retry the original case. Moreover, relief is granted in the case of foreign judgement whether the innocent party relied upon the fraudulent manoeuvres and consequently lost his cause of action, or the foreign court in relying upon the misrepresentations of the successful party reached a wrong decision.

Generally speaking, fraud in the context of recognition of foreign judgements, is only a matter of factual determination by the judge, and in several decisions has been loosely defined by chance.

The purpose of this paper is to examine various English and American cases which have dealt with the problem of fraud as a basis for refusal of foreign judgements; and to search, as far as possible, for some general standards which the courts take into consideration in impeachind a judgement for fraud. Because of the American federal system, in dealing with American decisions, I have tried to distinguish between interstate and international treatment of the problem, as fas as this distinction seems to be reasonable in the light of the courts decisions.

Lack of statutory provision, or even a recent important decision in the United States, dealing with the problem of fraud, makes it difficult for me to solve, with a degree of certitude, some of the problems that the paper presents.

With concern to recognition policies one my distiinguish two main approaches as follows:

"1- Systems in which foreign adjudications are given substantially fewer preclusive effects than are accorded domestic adjudications.

2- Systems in which the tendency is to treat, so far as preclusive effects are concerned, foreign and domestic adjudications alike"(1).

Fraud as a Basis

In the first system, such as the French approach until recently execution can be had upon foreign judgements after they have been declared executory by a domestic court(2). Therefore, one is not tompted to search for the extent of relief granted in the foreign judgements in this system(3). But in the second system, such as common law doctrine of conclusiveness of foreign judgements, one must consider how far these legal systems tolerate a judgement rendered under a foreign jurisdiction.

In England on the authority of *Abolloff v. Oppenheimer*(4) and *Vadala v. Lawes*(5) the court on allegation of fraud upon the foreign judgement, sufficiently substantiated by facts, may clearly re-open the whole case, and retry the issue on its merits, whether or not the facts constitutind the alleged fraud were known to the defendant at the time of originel hearing(6).

In the United States by virtue of the "full faith and credit" clause of the constitution, there is a different treatment with regard to the defense of fraud in dealing with a sister-state judgement or a foreign judgemont. In the case of sister-state Judgements courts refuse in principle the recognition of judgements only when there is an extrinsic fraud(7); whereas in case of the foreign judgements, it appears from the language of the court in *Hilton v. Guyot*(8) that following the English approach, there is a tendency to impeach a foreign judgement, obtained by fraud, even if the same question of fraud was presented to and decided by the foreign court.

However, the actual tendency of American courts is not to re-examine the merits of a case on the ground of allegation of intrinsic fraud, the test is to grant a foreign judgement such equitable reliefs as are available according the lex-fori(9).

b. What Constitutes fraud in General?

"Fraud is an extrinsic, collatoral act; which vitates the most solemn proceedings of courts of judtice... judgements like all other acts are impeachable from without, and that although it is not permitted to show that the courts were mistaken, it may be shown that they were misled"([10]) Although this statement is ordinarily quoted for definition of fraud, neverthelees it seems that this genernal statement does not cover the various factual differences that would arise in this concern. However, there is a suggestion to distinguish between intrinsic and extrinsic fraud in dealing with allegation of fraud upon foreign judgements (and also sister-state judgements). This dichotomy suggests that in case of the intrinsic fraud the party alleging it have had in the original trial the opportunity to prove the fraud, and therefore, the judgement is conclusive even in this concern, whereas extrinsic fraud is considered as a new evidence which has not been known to the defeated party during the litigation, or he was fraudulently with-held from submiting these allegations to the original court.

In answering the question what constitutes fraud in dealing with the foreign judgements, one is not able to find a general solution. Main characteristics of fraud or deceit at common law, such as reliance, proximate cause, scienter, and mistake of material facts sometimes appear in the face of the may of the cases discussed in this paper; but this is not the general rule. The courts are even reluctant to define what they mean by fraud in this context; they seem rather to emphasis on maintaining a discretionary power for themselves. The objective criteria do not satisfy them, sometimes the subjective elements and mostly the underlying factual circusstances are investigated. Hence it seems to me rather difficult to reach a satisfactory solution at this stage, and it is advisable to go through the various aspects of the problem

in England and in the United States in order to show what constitutes fraud in dealing with foreign judgements.

c. An analysis of the whole problem;

A general survey of the whole problem shows that Anglo American treatment of the defense of fraud is much influenced by the various factual elements. The courts in recognizing foreign judgements are primarily concerned with their ideas of fairness of procedure and justice. Talking about extrinsic or inirisic fraud is useful but is by no means determinative in all cases. In a federal system, such as the United States, in dealing with the sister state judgements, extrinsic fraud is the only basis of refusal in this concern. But this standard loses its colour on an international scale. Certainly several elements determine the extent of the court's derivation from the standard of extrisic fraud; one of them is reciprocity and the other one is similaritiés between the legal institutions of renderiog and recognizing jurisdiction. I may assume that the latter test is more determinative and to a large extent covers the former element.

In civil law countries considerations of public policy indicate that to what extent the courts may tolerate to recognize a foreign judgement, notwithstanding the allegations of intrinsic fraud. Public policy and its prerequisite element of "minimum equivalence", as is conceived is civil law countries, not only serves as a general instrument in dealing with problem of fraud in obtaining a foreign judgement, but also covers a similar idea of "natural justice". But this generalization is by no means acceptable. Fraud, as is conceived in Anglo-American legal system, is quite distiguishable from "public policy" or "natural justice". Whereas it is not my business to go through the defination of public policy in this paper, it is obvious that the fraud of the sucessful party pertaining to the merits of the case, never would

be considered as against public policy of recognizing forum([11]). Civilians ordinarily discuss about fraudulent changing of domicile and irregularities of procedure as the best examples of the defense of fraud and cases that they cite are primarily concerned with fraudulent securing of jurisdiction and unfair proceedings([12]).

d. Fraud and Denial of Natural Justice:

Denial of natural justice is also enumerated among other bases of refusal of recognition. It ordinarily means that The foreign judgement was not rendered by an impartial tribunal or under a procedural system compatible with the requirements of due process of law"([13]). Although one may find decisions that consider fraud as an aspect of denial of natural justice([14]), but the definition of denial of natural justice as mentioned above clearly distinguishes between these two bases of refusal. Nevertheless some causes of fraud, such as fraud on the part of foreign court may, as well, fall under the rubric of broad reading of the denial of natural justice([15]).

At the present time in proposing model acts and multilateral treaties, international organizations generally avoid defining "fraud", and taking into consideration the difference between extrinsic and intrinsic fraud. It is due to the fact that in several countries fraud does not exist as a separate defense, and in many countries fraud is "included in the defense of public policy. Furtheremore, in many countries where this defence apears it has not been defined"([16]).

Therefore, even if these model acts and treaties be ratified by different countries, still recognizing forum will be quite free to decide upon allegations of fraud according to its standards of private international law.

Different factual situations and discretionary power which is

necessarily entrusted to judges in dealing with problem of fraud is a cause of confusion that together with different legal systems prevailing in different parts of the world makes it difficult for the student to search for a standard definition of fraud. The solution depends upon whether we are talking of recognition in a federal system or in international sense, and whether we are talking of recognition in Anglo-American system or continental legal system and also which particular State we are going to study the peculiar features of fraud.

E. propositions ;

Due to the over increasing volume of international transactions, recognition of foreign judgements has become a vital necessity. Retaliatory and nationalistic approaches not only hinder the further development of private international law, but even do not serve as a reliable basis for protection of national interests. Considerations of nationality should ultimately be eliminated from the field of transactions. If one might be able to wipe out the element of nationality in discussing about recognition problems, there remains, however, other important considerations that one have to deal with them in any kind of proposition in favour of facilitating the international recognition of judgements.

First of all recognition primarily depends upon a jurisdiction test. Hence "... compliance with appropriate standards of adjudicatory jurisdiction can rationally serve recognizing courts as a rough hallmark attesting to the qualities of fairness... As Cheshire puts it a foreign judgement must be examinable on the first ground (of want of jurisdiction), for an obligation can be imposed only by an authority which is competent, but once it is admitted that an authority had such competence, it is inconsistent with the doctrine of obligation to review the correctness of any particular command that it may have issued"(17). Moreover private international law primarily

does not deal with the ideas of justice on the whole; its function is to see how far it is "possible" for a jurisdictiou to tolerate the extraterritorial solutions in favour of facilitating private international relations. Hence one may suggest that it is not up to recognizing forum to appty its standards of fairness and equity, in order to verify whether the reault reached by the rendering jurisdiction had been sound or not. Certainly the recognizing forum, for instance an American court, would not tolerate recognizing a judgement which is rendered in violation of due process of law, or is rendered by a court which lacks adjudicatory jusisdiction in international sense. But these limitations are properly distinguishable from a vague standard of of justice which English Courts take into considoration in retrying a foreign judgement upon allegation of intrinsic fraud.

Therefore, in the light of foregoing arguments I can not see any way to support the English doctrine of impeachment of the foreign judgements upon allegation of intrinsic fraud. It seems to me that thts attitude is originated from a conception of equity that may not be properly applied on an international scale.

Secondly, it is fair to say that the recogniton of foreign judgements is accepted in order to prevent the mischiefs of retrying a conclusive and litigated judgement. Hence the recognizing forum is not intersted in granting a farour to a foreign jurisdiction; but its objective is to decrease the volume of unsound, potential litigations that may be put before its courts. Therefore, one might reasonably propose for the elimination of reciprocity in this concern.

Different legal systems are still far from a general conception of law, and although comparative studies and international organizations have achieved an unexpected degree of legal understanding, yet there are certain

gaps beyond their reach. Defense of public policy serves to cover a multitude of these irreducible disputes. This vague term is duly adapted to make possible the ratification of bilateral and multilatoral treaties. Therefore, it seems to me that the best policy in drafting the international treaties is to insert, as far as possible, all peculiarities of nationol laws in this container, and let all other terms be expressly defined.

Fraud, as studied in this paper, is on one hand divided into extrinsic and intrinsic fraud; and on the other hand, divided into fraud on the part of foreign court and fraud on the part of successful party. It seems to me that retrying a foreign judgement upon allegations of intrinsic fraud is based upon considerations pf fairness and justice, a vague standard which is not to be considered in the context of recognition practice; therefore it is advisable to disregard the defense of intrinsic fraud in dealing with foreign judgements. Moreover extrinsic fraud should be defined in international treaties, in order to prevent further judicial interpretations. The definition should be based upon the presumption of equal treatment of domestic and foreign judgements. In other words, as public policy involves all irreducible disputes, it is not proper to establich another loophole in the field of recognition of the judgemonts. Extrinsic fraud is that kind of fraudulent manoeuvres or fraudulent violations of private arrangements between the parties that are not fltigated in the rendering forum. Furthermore, constituting elements of frand such as mistake of naterial facts, reliance, scienter and proximate cause all should be present in order to justify the impeachment of a conclusive judgement. With respect to allegations of fraud on the part of foreign court, I believe that the defense of public policy might as well cover this kind of fraud in its strict sense. One of the most important aspects of defense of public policy is the fundamental irregularities of procedure, and consequently if the foreign

court was itself fraudulent, or the judges purported any kind of fraud upon the losing party the recognizing forum would certainly find the defense of public policy as an adequate remedy.

I may conclude that adapting a universal definition for fraud in multilateral traaties is the best solution of the problem and therefore, it is not advisable to get rid of this problem simply by proposing the impeachment of a foreign judgement when the judgement was rendered as a result of fraud([18]). This attitude not only does not serve as a useful device in dealing with common law judgements, but also introduces a new kind of defense in orther legal systems, which might be subject to even broader interpretations and eventually makes it more difficult to reach a universal solution in this area.

FOOTNOTES

1 - Von Mehren and Trautman, The Law of Multistate Problems, 1965, at page 870.

2 - "In Munzer v. Munzer", the "cours de cassation" held that "revision au fond" was not required before a foreign judgement would be enforced 1964. "The law of Multistate Problems, at page 856 n. 39. See also id at page 856.

3 - Though "revision au fond" is abolished in France but still I have much doubt that French courts would not re-examine the whole case upon allegation of fraud. Because, French courts do not say that there has been fraud on the part of foreign tribunal or parties, they simply state that French public policy is opposed to the enforcement of a judgement rendered by fraud. "This procedure offers a wider scope for rectifcation than the Anglo-American doctrine of fraud.

Fraud as a Basis

In order to invoke the plea of "public policy" which will bar the granting of an exequatur, it must appear that there was present the type of fraud which prevented the defendant from having an opportunity to be appeared, to have notice of the pendency of the action, or to prepare his defense". (foot-notes omited) J. G. Castol, Foreign money judgements, a comparative study, at page 240.

Franco-British treaty of 1934, deals with problem of fraud together with other aspects of public policy (Article 3) and French authors also consider it as such:

"... C'est l'application de l'adage "fraus omnia corrumpit". it y a la' une question de pur fait, que les juges francaise auront a apprecier. La formule du traitc est assez large pour s'appliquer à' de nombreuse situation, telles par example, qu'un changement de residence habituelle frauduleuse ou des irrugularites de procedeure". (Niboyet, Traite de droit international prive francais, sixth volume, at page 252).

4- Abouloff v. Oppenheimer, Court of Appeal, 10 Q.B.D. 295 (1882).

5- Vadala v. Lawes. Court of Appeal, 25 Q.B.D. 310 (1890).

6- R.H. Graveson, Modern Law Review, 12 Ju' 49.

7- United States v. Throckmorton. 98 U.S. 61 (1878).

8- Hilton v. Guyot, 159 U.S. 113 (1859).

9- Reestatement, Conflict of Laws, tentative draft No. 10, section 440, illustration (f).

10- The Duchess of Kingston's case, case, 2 S.L.C. 717 (1776).

11- One however, may argue that such a judgement is always subject to review in the rendering jurisdiction.

12- See, eg., Batiffol, Traite Elementaire de droit International Prive, 1946, at page 779.

13- Article 4(c) of the Model Act Respecting the Recognition of foreign (Money) Judgements, resolution of the 49th conference of the International Law Association, 1960.

14- Jacobson v. Frachon, 138. L.T, 386 (1928).

15- Denial of natural justice is not considered as a basis for refusal in the final act, drafted by Hague Conference on Private International Law, 1964, respecting the recognition and enforcement of foreign judgements.

16- "... The opinion was expressed that the word "fraud" in section 4(f) be defined so as to take into consideration the distinction between extrinsic and intrinsic fraud. I do not believe that this is necessary. As in the case of public policy, it might be better to leave the interpretation of fraud to the courts. In several countries fraud does not exist as a separate defense. It is included in the defense of public policy. Further more, in the many countries where this defenss appears it has not been defined". (Dr. Castel, report of 49th conference of International Law Assoication, 1960, at pape 306).

17- The Law of Multistate Problems. op. cit. at page 839. (footnotes omited).

18- See. Article 5(2) of the Final Act on the Recognition and Enforcement of Foreign judgements, Hague conference on Private Intrenational Law, Tenth (1964) Session.