

## **Law and Policy on the Accreditation and Imposition of Foreign Verdicts in South Asia and the Way Forward**

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### **ABSTRACT**

This paper reflects a comprehensive analysis of laws and policy on the realization and implementation of overseas Courts verdicts relevant to business and other disputes of civil nature in South Asia. It elucidates the principles which are shared in laws and policy of the South Asian legal system. Therefore, this research explores that the laws which are canvassed here share many principles inter-alia doctrines of reciprocity and comity of nations. It has been observed that there exist common defenses in the laws of South Asian states regarding the implementation of overseas Courts decisions. However, there is a practical need for harmonization of existing laws and policy for the purpose of economic integration in the South Asian region. The Harmonization is possible among South Asian states for economic growth and development of the region. In this contextual perspective, there is a dire need to build a consensus and political will among the policy makers to harmonize the laws and policy for the purpose of enhancing the commercial activities to achieve economic growth in the region.

**Key Words:** Foreign Judgments, Reciprocity, Legal Regime, South Asia, Accreditation

### **Introduction**

The world is moving towards the globalization where It is not possible for any state to live in isolation the inference of globalization has reached to such a level where it is difficult for the individuals to carry on their socio-economic activities in reclusiveness and this approach does not refer only to the people in their neighborhood or their countrymen, in fact this notion applies to whole world. In the current era of modern technology and advancement in trade especially business relations have extended to the international level. In this contextual perspective the parties enter into the contract and in the event of a dispute relevant to Civil and Commercial issues, the judgment holder sometimes needs to go to the State of the

Judgment debtor for the implementation of Court decision. No foreign judgment can be recognized if it is found to be inconsistent with the law of the land of enforcing Country; however, there are two principles i.e. reciprocity and comity for the realization and implementation of overseas Courts Decisions. The said principles are established through agreements between the States. In case if there exists no agreement between the States, then the Court of one State will observe the courtesy of other State regarding enforcement towards the first State's individuals [1] (Hotchkiss,1994). In globalized economy, there are different rules and regulations set by each state as to how a foreign judgment is recognized and enforced [2] (Agarwal, 1997). However, there are two criteria's which have to be followed by South Asian states i.e. (a) the judgment should be conclusive and final (b) the court has passed the judgment had original jurisdiction. Moreover, for the realization and implementation of overseas Courts decisions all the procedural requirements must be satisfied under the applicable law of the land [3] (Carolyn, 1994). It has been examined that the important challenge is jurisdiction and Public Policy as there is no uniformity among the states. In South Asia no foreign judgment recognized and enforced if it is against the Public Policy. It is pertinent to mention here that South Asian States have their own national laws and policy to recognize foreign judgments and there is a dire need to formulate a regional policy to regulate such judgments and this attitude will lead towards the prosperity, economic growth, trade and investment in the region.

### **Doctrinal Evolution in International Economic Law**

International Economic Law (IEcL) regulates the economic relations among the states and provides a platform for the settlement of business and investment conflicts. However, the realization and implementation of overseas Courts decisions in disputes of business transactions and disputes of civil nature, is a new and evolving concept in the domain of the IEcL. Historically speaking, local law was applied to the foreigners and foreign judgments were not enforced in the other countries due to the notion of sovereignty. However, with the emergence of globalization, the new approach was developed regarding the realization and implementation of overseas Courts decisions. The Countries realized that the national development has a closest connection with the realization and implementation of overseas Courts decisions. Therefore, it is argued that, the realization and implementation of overseas Court decisions, are very important for the purpose to enhance the business transactions and to attract the foreign investment among the states and this attitude would build the confidence of the stakeholders. The parochial approach on the doctrine of sovereignty has been distorted and a dynamic approach was adopted in the better interest of the foreign investment and trade. In this development the international experts of IEcL in their writings and research work played a significant role to change the negative attitude in the holistic attitude, and they established the direct relevance of realization and implementation of overseas Courts decisions with the trade and investment.

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However, in the domain of IEcL two significant principles were evolved i.e. “first, *comity of nations* and *second reciprocity*”. The Courts of diverse jurisdiction adopted a dynamic approach in the interpretation of these principles and started a new era for the promotion of trade and investment in the interest of all stakeholders of world economy. In this regard, The US Supreme court elaborated the phrase “*Comity of nations*” in landmark case *Hilton vs. Guyot* [4] (Guyot, 1895) and the court expressed that:

“Neither a matter of an absolute obligation on the one hand nor of mere courtesy and good will.....it is the recognition, which one nation allows within its territory to the legislative, executive or judicial acts of another.....”

Therefore, in the light of the above observations it may be explained that comity of nations is a courtesy between states, as admiration shown by one state for the laws, policy and judgments of other state. So, the realization and implementation of overseas Courts decisions, is only possible when enforcing Courts accept the Jurisdiction and judgments of another state [5] (Paul, 2008). In South Asian states the criteria is stringent regarding realization and implementation of overseas Courts decisions, such as, judgments must be final and conclusive, and not against the law and policy of the enforcing State etc. On the other hand the reciprocity is the reciprocal treatment and respect of the states with each other. In the words of eminent jurists [6] (Michaels,2009), the reciprocity is a phenomenon where the “states will and should grant recognition and acceptance of judicial decisions of other states and in the response, their own decisions would be recognized and respected.”

In the lights these observations, this attitude of the country cause a problem for private litigants. It is admitted factor that no country can survive in isolation in the globalized word. A balance approach is required to justify the principle of reciprocity so; it can be used to persuade other states to enter into agreements. It is pertinent to mention here that, most of the countries have a list of reciprocal countries that is accepted at the official level called as list of reciprocal countries. More or less, same practice is observed in South Asian states.

## **Legal Regime on Recognition and Enforcement**

### **National Law**

It has been examined that the countries across the globe recognize and enforce Civil and Commercial judgments under Domestic law, treaty, in Asian countries the civil and commercial decisions of Courts are implemented through domestic

law. In Pakistan, the CPC provides the mechanism for realization and implementation of overseas Courts decisions. The CPC also envisages with the possible defenses against the realization and implementation of overseas Courts decisions. The term foreign judgment is defined in section 2(6) CPC 1908, and Section 13 of CPC deals with the implementation of the decisions of the Overseas Courts. In Pakistan a decision of overseas Court is implemented on the ground of reciprocity and comity of nations subject to the stipulations envisaged in section 11 and 13 of C.P.C.

## **International Law**

In the domain of international law, it is a settled principle, that if there is no agreement between the States then States are under no compulsion to recognize or enforced civil or commercial judgments in their territorial jurisdiction. Moreover, the enforcement of decisions of the Overseas Courts can be denied if those are inconsistent with the law of the land. In this regard, the courts of competent jurisdiction have an absolute authority to examine the foreign judgment on the touch stone of principles of international law. In landmark cases (*Pellegrini vs. Italy*), (*Drozdz and Janousek vs. France and Spain*), (*Prince Hans-Adam II of Liechtenstein vs. Germany*), the courts laid down the criteria regarding the realization and implementation of overseas Courts decisions.

## **Treaties**

In common practice, the countries recognize the overseas Courts decisions against each other through bi-lateral treaties, mutual conventions, global enforcement mechanism and through regional instruments. Bi-lateral treaties provide a foundation for reciprocity and expand the scope of recognition. Such as a convention between Belgium and France, the regional treaties exist among the group of states like regional enforcement convention existed in Latin America [7] (group of states) and *MERCOSUR* [8] (trade block, 1994). The most relevant Middle Eastern treaties [9] (conventions, 1995), include the 1952 Agreement with respect to execution of judgments. It is pertinent to mention here that, still there is no regional agreement exists in ASEAN though drafting of convention has been suggested for realization and implementation of overseas Courts decisions in disputes relating to business transactions and other disputes of civil nature.

## **Law and Policy in South-Asia**

### **Pakistan**

It is a well settled standard of international law that the Court of one state must regard the decisions or judgments passed by the Court of other state, provided that its decision must not be inconsistent with the domestic laws of executing state.

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However, in case of Pakistan certain stipulations must be satisfied such as jurisdiction, merit of the case, correct view about international law, proceeding must be conducted in accordance with the principles of natural justice. There should be no element of fraud, breach of law and public policy of Pakistan. Moreover, it is important to mention here that the principle of res-judicata must be observed while implementing the decisions of overseas Courts. In Pakistan the Code of Civil Procedure, 1908 and Limitation Act, 1908 deal with the criteria and procedure regarding the realization and implementation of overseas Courts decisions. The relevant provisions deal with the realization and implementation of overseas Courts decisions are section 13 [10] (CPC,1908), 14 [11] (CPC,1908), 29 [12] (CPC,1908) 43 [13] (CPC,1908), 44 [14] (CPC,1908), 45 [15] (CPC,1908). Section 13 C.P.C explains that when a decision of overseas Court is not certain and conclusive then it cannot be enforced. However, there are two categories of judgments in Pakistan under C.P.C, one which is given by a competent Court of reciprocating state and the other judgment which is pronounced through the Court of competent jurisdiction of non-reciprocating state. The foreign judgment of reciprocating states shall be enforced through the proceeding in the light of section 44-A C.P.C; however, in other cases foreign judgment of non-reciprocating states shall be enforced through filing a fresh civil suit upon judgment. It is pertinent to mention here that decision of overseas Court can be implemented within 06 years for the date when it was announced [16] (Limitation, 1908). In this contextual perspective the Superior Courts of Pakistan in the recent past has decided number of cases on the realization and implementation of overseas Courts decisions, which reflect the positive attitude of Courts in Pakistan and way forward for policy makers. In a land mark case of *Messers Farm And Foods Internatonal V/S Hamid Mahmood* [17] (Mahmood, 2006), Court held that “The foreign judgments of non-reciprocating states can be treated as a cause of action and enforced through filing a fresh suit. Moreover the Court held that the foreign judgment should be conclusive and final”. In another case of *Habib Bank Limited V/S Bahjani Scrap Trading Company Llc* [18] (Emirates, 2011) the suit was decreed as the same was filed on the basis of a decision of an overseas Court, which was conclusive and final in all aspects. In *Shahid Siddique V/S Sharja National Travels And Tourist Agency* [19] (saba, 2011) the Court held that “UAE is not a reciprocating state, therefore, its judgment cannot be treated as conclusive and final and cannot be enforced as per se. in *Habib Bank Limited V/S Azam Majeed* [20] (virk,2009).The Lahore High court held that “A foreign judgment, which complies with the condition of Sec. 13 is binding when the matter adjudicated upon was directly adjudicated between the same parties and has decided on merits”. In another case of *Habib Bank Limited V/S Bahjani Scrap Trading Company Ltd* [21] (Emirates,2011) In this case Sindh High Court dismissed the execution of foreign judgment. It is held that upon obtaining foreign judgment of reciprocating state,

the judgment can be enforced through proceeding under S. 44-A, and no need of filing a fresh suit on the judgment”.

## **Sri-Lanka**

In Sri-Lanka only money judgments given by the Courts of UK, Ireland, Netherland and some other Commonwealth Nations, can be enforced. Reliance can be placed upon section 41 of the “Reciprocal Enforcement of Judgment Ordinance 1921”, and the rules of court made there under by the “supreme court of Sri Lanka 1921” and the “Hague Convention on the realization and implementation of overseas Courts decisions in civil and commercial conflicts 1971”. It is pertinent to mention here that although Sri Lanka is a signatory to above mentioned “Hague Convention”, yet, it has not incorporated the provisions of this convention into its national law as there is no implementing statute to enact the Hague Convention in Sri Lanka.

A decision of overseas Court can be implemented within one year in Sri Lanka from the date of its pronouncement, but not all the overseas Courts decisions need to be registered and enforced in Sri Lanka. The registering Sri Lankan Court is empowered enough to deny the realization and implementation of overseas Courts decisions on the following grounds [22] (Ordinance, 1921), if: a) the decision is given by incompetent Court. b) The judgment debtor did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court. c) Or the judgment debtor was not duly summoned or served. d) Or fraud is the part of that decision. e) Or the decision is in the contradiction of principles of the law of the land and public policy. f) If any appeal is pending with regards to the foreign judgment under consideration to cap it all, it can therefore be said that yes foreign judgments can be enforced in Sri Lanka, subject to the restrictions imposed by the ordinance of 1921. It is as bright as daylight that only those foreign judgments can be enforced, which are in the opinion of the registering Sri Lankan courts just, convenient and not opposed to public policy.

## **India**

The Indian CPC section 13 relates with the realization and implementation of overseas Courts decisions, the law enumerate that the decision of overseas Court should be conclusive and final in nature and otherwise, the court has the jurisdiction to deny the enforcement on these grounds a) If the court has no jurisdiction [23] (CPC, 1908), b) violation of merit [24] (CPC, 1908), c) incorrect interpretation about international law [25] (CPC, 1908), d) violation of natural justice [26] (CPC, 1908), e) element of fraud against public policy [27] (CPC, 1908). Section 44 and 44A deal with the execution procedure of the foreign judgment in India. The Indian Supreme Court held in cases, “*Satya vs. Teja Singh*” [28] (Singh, 1975) and “*Marasimha Rao vs. Venkata Lakshmi*” [29] (Lakshmi,

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1991) held that the principle of res-judicata would be applicable on foreign judgments in India if that case is decided on merit.

## **Nepal**

The answer to the given preposition is that yes, the judgments of foreign courts can be enforced in Nepal only in the presence of an agreement between the Nepal and that State whose Court has given the verdict, and only such judgments would be enforced as has been given on any of the matters covered under the treaty. In the absence of bilateral treaty, Mutual Legal Assistance can be sought by requesting the government of Nepal through diplomatic channel but that request must be accompanied by the assurance of reciprocity. It is pertinent to mention here that mutual legal assistance cannot be sought with regards to matters of civil nature if the value of the subject matter is less than 100 rupees or in criminal matters, if the offence is punishable for less than one year and fine of less than 50 thousand rupees or if against public order. For this purpose reliance can be placed upon Section 3, 4, 5, 23, 24, 36, and 37 [30] (Act, 2015) (hereinafter referred as The Act). According to sec 5(h) of the Act, foreign state can ask for enforcement of decrees in Nepal and when we use the phrase foreign state we mean a state which request Nepal for mutual legal assistance under sec.2(i) of the same Act. Sec 25 of this Act entails that a country may request the Nepal for enforcement of its judgments through diplomatic channels only if there is no subsisting treaty because if there is a subsisting treaty then states have to abide by the terms of that treaty as enumerated under section 720 of The Muluki Civil Code [31] (Muluki, 2074) and section 03 of the Act instead of requesting for mutual legal assistance. Upon receipt, the request shall be forwarded to central authority of Nepal for final approval under sec.27 of the act and after approval of request, the foreign judgments will be recognized by High courts and enforced by District courts only if the judgment has been issued by a competent court, has attained finality and is fit to be enforced by issuing court of foreign state, keeping in view the exchange of mutual legal assistance the Nepal courts would take all necessary measures for enforcement of the same under 37 of the Act [32] (Muluki, 2074)

## **Bhutan & Maldives**

For Bhutan only couple references have been found regarding the scope of foreign judgment in their Civil and Criminal Procedure Code 2001. Though indirect but these could be studied for further interpretation. These references are being reproduced hereunder: First Reference in case of Bhutan: Extra-territorial Jurisdiction “20. The Supreme/High Court shall exercise jurisdiction outside Bhutan on the bases of the following principles: (a) territorial; (b) nationality; (c) passive personality; (d) protective; (e) universality; (f) flag jurisdiction; and (g) airspace.” The above could, however, be taken on the principle of reciprocity, i.e.

where a treaty or agreement to this effect exists. Else, this provision would remain inapplicable to foreign judgments. Second Reference in case of Bhutan: Service of Warrant through Extradition

“164.6. A warrant may be served by the intervention of a foreign state, where the suspect to be served is outside Bhutan and in a country with which the right of an extradition has been established by treaty, convention or mutual agreement.”

In the second reference, the wording itself is explanatory of the applicability of the provision. Further study regarding the direct provisions in this respect and the relevant case law would be needed to strengthen the understanding of applicability of foreign judgments in case of Bhutan.

### **Maldives**

No reference to the foreign judgment has become available either in the Civil Procedure Code of Maldives or in their constitution. Just like Bhutan, this would, therefore, also need a further work viz-a-viz the provisions in this respect, as well as regarding the relevant law.

### **Conditions for Enforcement in South Asia**

In South Asia, individual states within the region have developed their domestic laws to govern the recognition and enforcement of foreign judgments. Interestingly, certain key conditions for recognizing and enforcing foreign judgments appear to be commonly shared among these South Asian states.

For a foreign judgment to be eligible for enforcement, it must meet specific criteria. First, the court that rendered the judgment must have had jurisdiction over the judgment debtor. Additionally, the judgment must be final and conclusive according to the National Legal System (NLS) of the country in question. However, there are circumstances in which a foreign judgment cannot be enforced. These include instances where the judgment was obtained through fraudulent means, where enforcing the judgment would go against public policy, and where the judgment contradicts the principles of natural justice [33] (Schmitthoff, 2007). There are various defences available when it comes to recognizing and enforcing foreign judgments. One such defence relates to jurisdiction. The court responsible for enforcing the judgment must be satisfied that the judgment debtor fell within the jurisdiction of the court that originally issued the judgment [34] (Schmitthoff, 2007). If a court renders a judgment without proper jurisdiction, it is considered null and void. In the case of foreign judgments, the determination of a court's competence is based on principles of international law rather than the domestic laws of the enforcing court. Therefore, whether the foreign court had jurisdiction



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over the case is conclusively determined by the foreign court itself, and it is not within the purview of the enforcing court to assess the competence of foreign courts based on its domestic laws [35] (K.B. Agarwal 1997).

Under international law, a court lacks jurisdiction to hear a case involving the title or possession of immovable property situated outside its territorial jurisdiction. However, a foreign court can be considered competent if the property in question falls within its territorial boundaries [36] (K.B. Agarwal 1997). Moreover, in cases of personal disputes or those involving movable property, the lawsuit should be filed in the court within whose jurisdiction the defendant resides at the time of initiating the lawsuit. In the realm of International Economic Law (IEcL), a foreign judgment is generally not enforced if it was rendered in violation of the parties' agreement to settle disputes through arbitration or in the courts of a different country, such as the Hague Convention on Choice of Court Agreements. Consequently, the adjudicating court will have jurisdiction if the defendant willingly submits to the court's authority in the concerned state. In today's globalized world, it has become common practice to incorporate a choice of law and choice of forum clauses in commercial contracts to facilitate the resolution of civil and commercial disputes.

### **Final and Conclusive**

To enforce a foreign judgment, it must meet the requirement of being both final and conclusive in every aspect. This means that the judge must determine the merits of the matter between the parties and abide by the principle of *res judicata*. Furthermore, for a judgment to be considered final and conclusive, it must be issued by a court that possesses jurisdiction over the subject matter.

### **Based on Merits**

A foreign judgment cannot be enforced if it has been rendered by a court lacking jurisdiction based on the merits. In South Asian countries, their courts have the authority to assess whether a foreign judgment has been decided on its merits. If it is determined that the judgment was not based on the merits, it will not be enforceable in South Asian states. In cases where a judgment is rendered against a party due to their failure to appear, but they were given a fair opportunity to present their case and chose not to contest it, the judgment will be considered to have been decided on its merits. Similarly, even an *ex-parte* decision will be regarded as a decision based on the merits if it meets the necessary criteria.

## **Incorrect Interpretation of International Law**

Enforcement of a judgment is not possible if the proceedings appear to be founded on an incorrect interpretation of international law. According to the principle of "Loci Contracts," which is an accepted rule of international law, the rights and obligations of parties in a contract are primarily governed by the law of the state where the contract was formed. If a foreign judgment contradicts this rule, it will not be enforceable in South Asian states.

## **Violation of Principles of Natural Justice**

This pertains to the procedure followed in obtaining a foreign judgment, ensuring it aligns with the principles of natural justice. It must be ascertained that the proceedings were conducted in substantial compliance with the prevailing notions of fair play. The proper service of summons must be duly established. Furthermore, if the defendant was not granted an opportunity to present their case, if a judgment was rendered against a party who did not adequately participate in the court proceedings, if the defendant was not served with proper notice, if the judge displayed bias or partiality if there was an imprudent application of judicial reasoning or misuse of discretionary powers if a minor was sued without a guardian, or if the legal representatives of a deceased defendant were not included, the foreign judgment will not be enforceable. However, minor procedural errors will not invalidate the judgment. Importantly, it should be noted that an incorrect interpretation of the law will not render a judgment contrary to the principles of natural justice.

## **Judgements Obtained Through Frauds**

In the realm of justice administration, it is widely acknowledged that fraud taints even the most solemn transactions. Foreign judgments obtained through fraudulent means are considered null and can be set aside. The fraud must pertain to the procedure itself; thus, a judgment based on false evidence will not be acknowledged and enforced. Mere concealment of facts is insufficient to invalidate a foreign judgment. The fraud in question must either be committed by the court or by the party in whose favour the judgment was rendered.

## **Contrary to Public Policy**

The determination of public policy lies within the purview of the enforcing court. It is evaluated by the local principles of justice and fairness. Recognition of a foreign judgment will be denied if doing so would offend fundamental norms of morality and justice [37] (Schmitthoff, 2007). Courts cannot permit themselves to become instruments for violating the domestic laws of a country. Therefore, courts refuse to enforce foreign judgments that contravene the public policy of the

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respective jurisdiction. The enforceability of a foreign judgment cannot be solely based on the presentation of the foreign decree, as various considerations arise that necessitate judicial review [38] (Schmitthoff, 2007). A foreign judgment can only be enforced if it is not in conflict with the public policy of the country in question. For instance, in India, the court declined to accept a foreign judgment in the case of *Popat Virji v/s Damodar Jairam* [39] (Jairam, 1934) because, in the court's opinion, the judgment violated Indian laws. A similar ruling was made in the case of *National Thermal Power Cooperation v/s Singer Company and others* [40] (Singer, 1992).

### **Conclusion and Future Outlook**

Remarkable progress has been observed in South Asia about enhancing the efficacy of recognizing and enforcing foreign judgments. To this end, a set of 13 principles has been formulated by influential ASEAN member states, namely Australia, China, India, Japan, and South Korea. These principles encompass crucial elements such as enforcement, reciprocity, and jurisdiction about foreign judgments. Additionally, they offer comprehensive guidelines for individual member states on the implementation of these principles within their respective jurisdictions for the recognition of foreign judgments. South Asian countries must adopt this model as well, to streamline and strengthen their own recognition and enforcement mechanisms for foreign judgments.

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