

The argument that external fraud should be the sole criterion for refusing to recognize and enforce foreign court judgments and its prospects

O argumento de que a fraude externa deveria ser o único critério para recusar a reconhecer e executar sentenças judiciais estrangeiras e suas perspectivas

Gao Yan¹

ABSTRACT

The recognition and enforcement of commercial judgments and rulings in the cross-border context have always been a crucial aspect of international trade transactions. Particularly in the wake of the COVID-19 pandemic, which caused a global economic halt, international trade disputes have surged, making the recognition and enforcement of international commercial judgments increasingly significant. The fraud exception in the cross-border recognition and enforcement of commercial judgments has emerged as a pressing issue. It is prevalent in practice and presents complex challenges that require resolution. This article will discuss whether external fraud should be the sole criterion for refusing to recognize and enforce foreign judgments. The aim is to logically outline the institutional framework for the recognition and enforcement of judgments in the realm of cross-border transactions.

Keywords: Fraud exception; Substantive review; External fraud; Individual case justice

RESUMO

O reconhecimento e execução de decisões e decisões comerciais no contexto transfronteiriço sempre foram um aspecto crucial das transações comerciais internacionais. Particularmente na sequência da pandemia COVID-19, que causou uma parada econômica global, surgiram disputas comerciais internacionais, tornando o reconhecimento e execução de julgamentos comerciais internacionais cada vez mais significativos. A exceção da fraude no reconhecimento e execução transfronteiriços de julgamentos comerciais surgiu como uma questão urgente. É prevalente na prática e apresenta desafios complexos que requerem resolução. Este artigo discutirá se a fraude externa deveria ser o único critério para recusar a reconhecer e executar julgamentos estrangeiros. O objetivo é logicamente delinear o quadro institucional para o reconhecimento e execução de decisões no domínio das transações transfronteiriças.

Palavras-chave: Exceção de fraude; Revisão substancial; Fraude externa; Justiça individual

¹Student of Law-Lanzhou University(Lanzhou,China).

SUMMARY:

INTRODUCTION;1.OVERVIEW OF FRAUD EXCEPTIONS IN RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS;2PRACTICE OF THE INTERNATIONAL COMMUNITY IN RECOGNIZING THE EXCEPTION OF FRAUDULENT EXECUTION OF FOREIGN JUDGMENTS;2.1 DEBATE SURROUNDING FRAUD AS A STANDALONE GROUND FOR DENYING RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS ;2.2 CONTROVERSY OVER THE CONTENT OF FRAUD IN FRAUD EXCEPTIONS;3.THE DILEMMA AND PROSPECTS FOR THE SYSTEM OF FRAUD EXCEPTIONS;3.1 DIFFICULT TO CLARIFY THE CRITERIA FOR DISTINGUISHING BETWEEN INTERNAL FRAUD AND EXTERNAL FRAUD;3.2 ESTABLISHING THE BURDEN OF PROOF FOR FRAUD DEFENSES - HIGH STANDARDS;3.3EMERGING TECHNOLOGIES AID IN THE IDENTIFICATION SYSTEM FOR FRAUD;3.4THE BALANCE BETWEEN PROCEDURAL JUSTICE AND CASE JUSTICE;4.CONCLUSION;REFERENCES

INTRODUCTION

The recognition and enforcement of judgments from one country's courts in other's, particularly in commercial disputes, poses not only a challenge to national sovereignty but also impacts the interests of the disputing parties. Striking a balance between collective justice and individual justice has become crucial and has garnered the interest of numerous nations. Today, the majority of countries adopt an open approach to the recognition and enforcement of foreign judgments, aiming to foster an efficient and amicable cross-border judicial environment. This article explores the concept of the fraud exception, which states that "a judgment was obtained through fraud." Drawing from the ancient legal maxim that "fraud vitiates everything," the fraud exception has seen rapid development across the globe. Many countries have established this exception as a standalone provision, recognizing its significance and distinctiveness, particularly in relation to matters of public order. However, the international community has yet to harmonize the application of the fraud exception in judicial proceedings. Countries have differing opinions on whether external fraud is the sole content of the fraud exception system and on the judgment and application of external fraud in judicial practice. Consequently, this lack of uniformity has, to some extent, complicated the recognition and enforcement of cross-border commercial judgments.

1.OVERVIEW OF FRAUD EXCEPTIONS IN RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

According to current international treaties on the recognition and enforcement of foreign judgments, each convention does not have clear provisions on the fraud. For example, in the 1971 Convention on the Recognition and Enforcement of Foreign Civil and Commercial Judgments, the 1973 Hague Convention on Maintenance, and the 2005 Convention on Choice of Court Agreements, it is stipulated that "fraud related to the procedure" is the basis for refusing to the recognition and enforcement of foreign judgments, but only a brief summary of the fraud exception is provided without a detailed explanation and expansion of this defense. In the 2005 Agreements, it is regulated that fraud is a deceptive act based on intentional psychology, for example, if the plaintiff intentionally serves a warrant or causes the warrant to be served at an incorrect address; The plaintiff intentionally provided the defendant with incorrect meeting times or attempted to bribe the judge or conceal evidence that had a significant impact on the result of the case.

The 2019 conference provides for fraud exceptions. The Hague Convention on the Recognition and Enforcement of Foreign Judgments is composed of a preamble and four chapters, totaling 32 articles. It sets out the scope of application and jurisdiction for recognizing and enforcing foreign civil and commercial judgments. The Convention brings legal certainty and predictability to parties involved in cross-border transactions, thereby promoting the global circulation of civil and commercial judgments. According to Article 7 of the Convention regarding refusal of recognition and enforcement, the recognition and enforcement of a judgment made by a court in one country for a civil or commercial case in another country is no longer limited to traditional considerations such as jurisdiction, finality, and public policy (Wang Jianqi, 2023). Furthermore, "the judgment was obtained through fraud" is explicitly listed as one of the grounds for refusal of recognition and enforcement.² However, there are no other specific applicable provisions. The provision on fraud exceptions in the interpretation report of the convention mentions that fraudulent behavior may be related to both procedural aspects and the content submitted to the original court.³

² In <http://DOI:10.27373/d.cnki.gwjxc.2023.000259>. Last access: April 26, 2025

³ In <https://www.asser.nl/asserpress/journals/nederlands-internationaal-privaatrecht-nipr/>. Last access: April 20, 2025

2. PRACTICE OF THE INTERNATIONAL COMMUNITY IN RECOGNIZING THE EXCEPTION OF FRAUDULENT EXECUTION OF FOREIGN JUDGMENTS

2.1 Debate Surrounding Fraud as a Standalone Ground for Denying Recognition and Enforcement of Foreign Judgments

In contemporary times, various nations have established distinct regulations concerning the independent status of fraud exceptions. Civil law jurisdictions, such as Germany and Japan, typically classify fraud exceptions under the umbrella of public order. In many civil law countries in Europe, the exceptions of recognition and enforcement of foreign court judgments are all included in the scope of public policy exceptions.⁴ Article 27(1) of the Brussels Convention specifies that a judgment may not be recognized if it contravenes the public policy of the requested state. Nevertheless, the convention delineates two scenarios that fall outside the scope of public order as fraud exceptions: firstly, it bars parties from invoking fraud as a defense in the absence of new evidence; secondly, it encompasses matters that could have been, but were not, presented during the initial trial, or issues that may still be introduced in subsequent proceedings. Common law countries support listing fraud defenses separately as an independent defense. The United Kingdom considers external fraud to be a component of the fraud defense, which can provide grounds to oppose the recognition and enforcement of foreign judgments. Its judicial practice has also widely adopted this theory.⁵ As mentioned earlier, the Hague Conference clearly regards fraud exceptions as a system independent of public order,⁶ The Civil Procedure Law of China has also established independent provisions for the defense against fraud.

In my view, it is more reasonable to treat the defense of fraud separately from public policy provisions. On one hand, the content of public policy varies significantly across countries due to factors such as customs, dietary culture, and economic development levels. Therefore, procedural fraud that falls under public policy may be included in certain countries but excluded in others, creating legal gaps without legal constraints. This clearly does not protect the legitimate rights and interests of the parties involved. On the other hand, standards for determining whether a situation

⁴ In <https://scholar.smu.edu/til/vol11/iss2/4/>. Last access: April 12, 2025

⁵ In <https://corp.oup.com/?lang=en>. Last access: April 28, 2025

⁶ In <https://www.asser.nl/asserpress/journals/nederlands-internationaal-privaatrecht-nipr/>. Last access: April 20, 2025

constitutes an exception to public policy also differ among countries. Some countries have higher thresholds for identifying violations of public policy, while others do not, leading to some external frauds being unenforced in certain countries and allowing malicious parties to exploit legal loopholes.

2.2 Controversy over the content of fraud in fraud exceptions

Based on the above theory, fraud can be divided into external fraud and internal fraud, which are also known as substantive fraud and procedural fraud. External fraud refers to situations that occur outside of the trial process, depriving the losing party of the opportunity to fully exercise their litigation or defense rights. Intrinsic fraud refers to fraud that occurs during the trial process or when a legal relationship arises (Bishop, 1982). In practice, it is often expressed as forging or concealing evidence that has a significant impact on the judgment results in court trials.⁷ In the case of *United States v. Throckmorton*⁸, the United States Supreme Court proposed that if the losing party failed to fully present their case due to the fraudulent actions of the opposing party, such as failing to appear in court, being deceived by false concessions, being completely unaware of the case proceedings, the plaintiff's lawyer representing the plaintiff without authorization and allowing fraudulent behavior, and the lawyer disclosing the interests of the client or important information to the other party, these can all constitute reasons for the judgment to be invalid. I believe that external fraud should be included as an exception to fraud and internal fraud should not be included. The greatest difference between external fraud and internal fraud lies in whether the fraudulent act occurs within a legal relationship.

The reason internal fraud cannot be included as an exception within the scope of fraud is that it occurs within the original legal relationship and can be resolved by the court that made the original judgment. If the parties have the right to initiate legal proceedings or procedural rights in the original trial but have not exercised them, then protecting internal fraud may lead to the abuse of relief procedures by the parties involved (Powell, 1977). In the Powell case heard by the Canadian court, the court held that the judgment obtained from substantive fraud involved substantive matters of the case and refusing to recognize and enforce would violate the principle of *res judicata* (Michael

⁷ In <https://www.jstor.org/stable/755686>. Last access: April 28, 2025

⁸ In <https://www.law.cornell.edu/supremecourt/text/98/61>. Last access: April 28, 2025

H,1977).Therefore, substantive fraud cannot be used as a defense to recognize and enforce foreign judgments.⁹

In conclusion, external fraud—procedural fraud can serve as an independent ground for refusing to recognize and enforce foreign judgments.

3. THE DILEMMA AND PROSPECTS FOR THE SYSTEM OF FRAUD EXCEPTIONS

3.1 Difficult to distinguish the internal fraud and external fraud

Based on the previous text, external fraud falls within the scope of fraud exceptions, while internal fraud is not protected by the fraud exception system. However, in judicial practice, many cases do not show the characteristics of external fraud and it is often difficult to distinguish as well. For example, some courts in the United States claim that it is hard to distinguish between external fraud and internal fraud, so there is a need to abandon the distinction.¹⁰ However, I believe that distinguishing them is necessary. Only doing that can the fraud exception system be accurately applied and have the ability to protect the rights and interests of the parties involved better(Ruth Bader,1970).The distinction between external fraud and internal fraud cannot be made in a "one size fits all" manner. It should be analyzed based on the current international definitions of external fraud and internal fraud, as well as individual cases and specific issues. When there are situations where it is difficult to distinguish, the more favorable situation for protecting the interests of the vulnerable parties should be applied.

3.2 Establishing the burden of proof for fraud defenses - high standards

The standard of proof required for the application of fraud defense refers to the standard that the losing party in the original trial must meet, in order to have the requested country's court review the fraud in the recognition and enforcement of foreign judgments. At present, this standard can be mainly divided into two types in various countries around the world: one is a lower standard that only

⁹ In <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/4339/index.do>. Last access:April 28, 2025

¹⁰ In <https://scholar.smu.edu/til/vol4/iss4/>. Last access:April 22, 2025

needs to arouse judge's suspicion, which represented by the United States; Another is the high standard that requires applicants to prove the existence of fraud.

I believe that the selection of the standard of proof for fraud defense should require the losing party in the original trial to fully prove the existence of fraud in the original judgment, and there should be a highly reliable and relevant evidence. The Supreme Court of South Korea adopted the above standard in the Da74213 case. This case holds that if the debtor is unable to raise a fraud defense in the court of the country where the judgment was made, such as a conviction for fraudulent behavior, but there is highly credible evidence to prove the existence of fraudulent behavior, they may request refusal to recognize and enforce the foreign judgment.¹¹ From this, it can be seen that the proof standard adopted by South Korean courts requires high proof standards such as conviction and judgment for fraudulent behavior (Sung Hoon Lee 2006). Adopting high standards is beneficial in preventing the abuse of rights by the parties involved in the original trial, improving litigation efficiency, and providing an opportunity for the losing party in the original trial who truly needs relief to not execute the original judgment, which helps to achieve a balance between overall justice and individual justice.

3.3 Emerging technologies aid in the identification system for fraud

With the emergence and development of emerging technologies, the evidence required in external fraud systems is no longer as difficult to obtain as it was before. While adopting strict proof standards can prevent the abuse of rights by the original parties involved, it also hinders some parties who truly have needs but are hindered by the difficulty of obtaining evidence from protecting their own legal rights. The birth of emerging technologies, such as digital process service technology, can effectively solve the above dilemmas. Digital process services can transform paper materials into electronic data through technological means, thereby better recording the various processes of transactions. When conducting cross-border transactions, we can use this technology to achieve electronic records of transaction records, communication records, etc., thus being able to fully preserve case information. In addition, block chain technology can also serve well in preserving evidence. By utilizing the unalterable characteristics of block chain technology, we can better

¹¹ In <https://jkl.snu.ac.kr/>. Last access: April 21, 2025

preserve key evidence and ensure its authenticity, providing tools for the court to efficiently determine the truth of evidence and achieve efficient trials.

3.4 The balance between procedural justice and case justice

In today's international community, globalization has promoted economic development worldwide and encouraged countries to consider cooperation from a global perspective. In global economic and trade activities, business development has made relationships between merchants closer, but it has also made these relationships more complex, undoubtedly becoming a challenge that the international community strives to overcome. This effort has driven cooperation in private dispute resolution mechanisms on a global scale. The recognition and enforcement of foreign court judgments and materials undoubtedly serve as a lubricant for this relationship, enabling disputes to be resolved more efficiently. If countries adopt a negative attitude toward these systems, it could hinder cross-border civil and commercial activities. Over time, economic and trade interactions between countries may gradually weaken or even disappear. Therefore, pursuing efficient adjudication is an inevitable trend. However, on this basis, protecting the legitimate rights and interests of parties is paramount and the ultimate goal of the system. Pursuing efficient procedures should be based on ensuring justice in individual cases, taking into account the interests of parties while respecting the original judgment as much as possible, providing the maximum relief within one's capacity, and achieving a balance between procedural justice and individual case justice.

4. CONCLUSION

As the process of globalization continues to evolve and deepen, international trade activities will become increasingly frequent and complex. The recognition and enforcement of foreign judgments are of paramount importance in international trade, playing a crucial role in resolving disputes in international commercial transactions. In particular, the fraud exception system (specifically referring to the external fraud exception system) has become a key factor in resolving international disputes. When dealing with specific cases, many fraudulent acts often have blurred boundaries and are not easily categorized as either internal or external fraud. This complexity poses a severe challenge to judges in applying the law, leading to inconsistent verdicts and undermining the

unity and authority of the judiciary. Moreover, there is no unified standard for proving fraud defenses internationally. For example, the lower standard of proof adopted in the United States, while lowering the threshold for parties to initiate review procedures, may also lead to issues of abuse of rights; conversely, the higher standards of proof implemented in countries like South Korea, although effectively curbing the abuse of rights, make it difficult for truly defrauded parties to obtain adequate legal remedies due to the lack of sufficient and reliable evidence, thus trapping them in a struggle for justice (PM& JJ, 1999)

However, from a theoretical perspective, this system faces a series of ongoing challenges in today's society. Questions such as whether external fraud should be the sole reason for refusing to recognize and enforce foreign judgments, how to distinguish between external and internal fraud, and how to determine what constitutes external fraud, all urgently need to be addressed. Nevertheless, with the rapid development of emerging technologies, the fraud exception system is seeing new hope. The emergence of digital process service technology and blockchain technology has provided unprecedented convenience for the collection, preservation, and authentication of evidence. Digital process service technology can convert traditional written materials into electronic data, fully documenting every step of a transaction, making evidence acquisition more convenient and efficient; blockchain technology, with its immutable nature, ensures the authenticity and integrity of key evidence, providing strong technical support for judicial authorities to identify fraudulent behavior, significantly enhancing the accuracy and credibility of fraud determinations. At the same time, while striving for better evidence preservation to identify fraud in terms of technology, the international community must also work together to balance procedural justice and case-specific justice. Countries should actively engage in dialogue and cooperation to reduce cross-border judicial conflicts caused by legal differences.

Not only that, in judicial practice, judges should maintain an impartial and cautious attitude. They must fully respect the finality of previous judgments to uphold the authority of judicial decisions, while ensuring that the legitimate rights and interests of the parties are effectively protected, so that justice can be demonstrated in every case. The exception for fraud will also continue to be optimized and improved through ongoing practical exploration and theoretical research. Through the joint efforts of the international community, this system will surely provide solid and reliable legal support for the stable development of international trade, contributing to the establishment of a more fair, orderly, and efficient global commercial legal order.

REFERENCE

Bishop R D.Burnette.S.(1982).United States Practice Concerning the Recognition of Foreign Judgments:International Lawyer (ABA).<https://www.jstor.org/stable/755686>.

Catherine Kessedjian. Is the Hague Convention of 2 July 2019 a useful tool for companies who are conducting international activities? [J]. Nederlands International Privaatrecht, 2020: 32. <https://www.asser.nl/asserpress/journals/nederlands-internationaal-privaatrecht-nipr/>.

Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Is the Hague Convention of 2 July 2019 a useful tool for companies who are conducting international activities?:Nederlands International Privaatrecht,2020. <https://www.asser.nl/asserpress/journals/nederlands-internationaal-privaatrecht-nipr/>.

Michael H. Brenscheidt.(1977).The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany,International.Lawyer,2.<https://scholar.smu.edu/til/vol11/iss2/4/>.

Powell v Cockburn.(1977).2C.S.R218.<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/4339/index.do>

PM North & JJ Fawett.(1999).Cheshire and North's Private International Law,Oxford University Press, p.444.<https://corp.oup.com/?lang=en>

Ruth Bader Ginsburg.(1970).Recognition and Enforcement of Foreign Civil Judgments:A Summary View of the Situation in the United States,(04) International Lawyer, 727-728.<https://scholar.smu.edu/til/vol4/iss4/>

Sung Hoon Lee.(2006)Foreign Judgment Recognition and Enforcement System of Korea [J]. Journal of Korean Law, 6(1):123-124.<https://jkl.snu.ac.kr/>

United States v. Throckmorton.(1878).98 U.S. 61, 65-68, 25 L. Ed. 93.<https://www.law.cornell.edu/supremecourt/text/98/61>

Wang Jianqi.(2023).On the exception of fraud in recognition and enforcement of a foreign court decision[D].institute of diplomacy. <http://DOI:10.27373/d.cnki.gwjxc.2023.000259>.