

Hide and Seek: Untangling the Conundrum of Having United States Money Judgments Recognized and Enforced in Foreign Countries

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Increasingly, American businesses are looking beyond the United States borders for opportunities to buy and/or sell goods and services. This globalization of today's markets has resulted in an incredible and unprecedented access to international goods and services. However, it also sets the stage for a myriad of international legal issues if the deal goes bad. While there is little legal conflict over the creation of international business relationships, issues become exponentially more complicated when the American company seeks to collect monetary damages for

a breach of contract, force the foreign company to comply with a contract, or protect any other "legal" right.

This article contemplates that your American company has obtained a money judgment in a North Carolina court ("U.S. Judgment") against a foreign company, and that you will have to chase that company's assets in another country to satisfy your U.S. Judgment. There is no doubt that you gamble by suing a foreign company in the United States and then attempting to enforce the U.S. Judgment abroad. If the enforcement of the U.S. Judgment fails, your litigation will have been an enormous waste of your company's time and money. However, obtaining an enforceable U.S. Judgment may well be more desirable than hiring foreign counsel to pursue an entire lawsuit in another country.

So What Exactly Will it Take to Enforce Your U.S. Judgment Abroad?

In order to answer that question, it is important to note that there are no treaties *requiring* foreign countries to enforce U.S. Judgments. That said, the general rule, with some exceptions (for example, China and Russia, where U.S. Judgments are rarely enforced no matter the circumstances), is that a foreign country will consider enforcing your company's U.S. Judgment if that country's court (or other relevant decision-making agency) is convinced that the same judgment could have been obtained and enforced under its domestic laws. This "recognition" by the foreign country is the critical step in the ultimate enforcement of the U.S. Judgment. While some countries, such as Portugal, will require a full review of the merits of your case, most foreign countries will only hold some form of hearing to determine whether to recognize your company's U.S. Judgment. This undoubtedly will require your company to retain local counsel in the foreign country, but your success at such a hearing requires proper action much sooner.

Recognition of Your Company's U.S. Judgment

Three general factors will be addressed at the formal proceedings that will determine if the foreign country

will recognize your company's U.S. Judgment:

1. Did the United States have jurisdiction over the foreign company?
2. Was the foreign company given fair notice of the lawsuit?
3. Is your U.S. Judgment consistent with the public policy of the foreign country?

Jurisdiction

The first issue is whether the court in which you are contemplating filing the lawsuit has the right to require the foreign company to defend against your company's lawsuit. This "in personam" or "personal" jurisdiction is an oft-cited reason for a foreign country's refusal to recognize a U.S. Judgment and has been the subject of numerous court decisions. Generally, whether the North Carolina court has personal jurisdiction over the foreign company is determined by whether the foreign company has made "sufficient contact" with North Carolina so that it is "fair" to require it to defend itself in the North Carolina.

Both the United States and North Carolina have very liberal views of personal jurisdiction. One contact can be sufficient if it was knowing and intentional and your company's lawsuit arose out of that one contact. In other situations, personal jurisdiction may require that the foreign company have many contacts with North Carolina before a North Carolina court acquires jurisdiction.

A liberal view of personal jurisdiction is not the case worldwide and, in fact, many foreign countries, disapproving of the American view, will not recognize or enforce a U.S. Judgment unless they determine that personal jurisdiction over the foreign company would have been found using the law of that foreign country. This is particularly true in Europe. Therefore, in addition to determining whether personal jurisdiction over the foreign company will be found under U.S. or North Carolina law, you also should consider whether personal jurisdiction would be found using the law and rules of the foreign country or countries in which you will attempt to enforce your U.S. Judgment.

Notice, Notice, Notice

Perhaps the most important factor in convincing a foreign country to recognize your U.S. Judgment is the giving of timely and proper notice to the foreign company that it is being sued, where it is being sued, and for what it is being sued. A foreign country will be less inclined to recognize or enforce a U.S. Judgment when it was obtained without the knowledge of the foreign company.

Some countries, such as Canada, require only that service be completed in accord with the laws of the serving jurisdiction (in your case, North Carolina). Other countries have much more stringent requirements. The law of the foreign country in which you are attempting to enforce your company's U.S. Judgment always should be consulted and followed to the extent reasonably possible. There are treaties governing the manner by which service of legal papers is made. The most important of these is the so-called Hague Convention. If a foreign country is a signatory to the Hague Convention (and very many are), your company can be confident using the Hague Convention's framework to notify the foreign company of your company's lawsuit.

While serving process under the Hague Convention is tedious and expensive, it is extremely important. Among other things, the Hague Convention requires the documents to be translated to the language of the country in which service is being made. It is also imperative that a representative of the foreign country with authority to accept service is served. The U.S. Department of State is a good resource for making sure that the service of process is in compliance with the Hague Convention.

Public Policy

As a last note on recognition, your U.S. Judgment must be consistent with the "public policy" of the foreign country in which you are trying to enforce it. Many foreign countries frown on some remedies commonly imposed by American laws and courts such as the American concept of civil punitive damage awards. It is important that your U.S. Judgment be narrowly tailored and include only damages which compensate your company for its loss. On request, some American federal courts will restructure U.S. Judgments to meet the standards of the foreign country. As most countries share similar notions of contract law, this public policy compliance requirement, with exceptions, should be satisfied easily.

Post-Recognition Enforcement of Your Company's U.S. Judgment

Once your company's U.S. Judgment has been recognized, the methods for enforcement of the U.S. Judgment vary greatly from country to country. There is simply too great a variation in the proceedings used to detail them in this article. However, and by way of example, some countries, such as Costa Rica and Spain, require the U.S. Judgment to be converted to their respective currencies. Some countries, such as Brazil, require a second hearing altogether. Since the actual seizure of the foreign company's property will occur under the law of the foreign country, your company will need to engage foreign counsel to play the primary role in carrying out the seizure.

Conclusion

This article only skims the surface of the numerous issues involved in the incredibly complicated and complex world that is international litigation. Although the recognition and enforcement of a U.S. Judgment abroad is a daunting task riddled with many procedural and political hurdles, the American company that enters such a domestic lawsuit with an eye toward the future enforcement of the U.S. Judgment will have a far greater chance of ultimate success in recovering for its loss.

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For further information regarding the issues described above, please contact Allen N. Trask, III.

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