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When You're Not in Kansas Anymore: Untangling the Conundrum of Enforcing United States Money Judgments in Foreign Countries

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Bigger Markets in a Smaller World

In today's world, American businesses are looking more and more beyond the borders of the United States for opportunities to buy and sell goods and services. The result of this globalization of trade is an incredible and unprecedented increase in access for domestic American companies to the greater international market. Unfortunately, it also sets the stage for a myriad of international legal issues if a deal goes bad. While there is little legal conflict over the creation of international business relationships, issues become exponentially more complicated when an American company seeks to enforce its contract against a foreign party. This enforcement may involve attempts to collect monetary damages for breach of contract, to force the foreign company to comply with a contract, or to protect any other "legal" right under a contract. This article is designed to identify some of the issues which any American business should consider as part of a pre-litigation plan for an international contract dispute.

The types of contracts used in the international market are as numerous as the companies that execute them. These contracts often contain agreements to submit any disputes to some form of binding international arbitration, such as the United Nations Convention on Contracts for the International Sale of Goods. If a company agrees to such binding alternative dispute resolution, then litigation is likely not an option and, thus, not an issue. However, there are many disadvantages to international arbitration or other alternative dispute resolution methods and, as a result, many American companies do not include such clauses in their contracts.

This article addresses issues that can arise when litigation is the only option. Specifically, this article contemplates that an American company entered into a contract with a foreign company; the foreign company breached the contract; the American company sued the foreign company here in North Carolina and obtained a money judgment ("U.S. Judgment"); and, in order to satisfy the judgment, the American company will have to pursue the foreign company's assets in the foreign company's home country.

There is no doubt that an American company gambles 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, the litigation will have been an enormous waste of time, effort, and money. On the other hand, the prospect of litigating in a foreign country is a daunting one, and obtaining an enforceable U.S. Judgment may be more desirable than hiring foreign counsel to pursue an entire lawsuit in another country pursuant to its laws and

procedures. With proper planning and a thorough understanding of the goals of the litigation, an American company can position itself for success in prosecuting and collecting on a U.S. Judgment in a foreign country.

So What Exactly Does it Take to Enforce a U.S. Judgment Abroad?

I. The Concept of "Recognition"

In order to answer this question, it is important to note initially that a court's judgment typically has no direct force outside of the court's territorial jurisdiction. In addition, 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 what the circumstances are, or the Netherlands and Saudi Arabia, which require a treaty with the "rendering" jurisdiction), is that a foreign country will consider enforcing an American 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 internal laws. This process is called "recognition" and essentially involves the foreign court or agency determining that a particular claim or dispute has been adjudicated satisfactorily by the country requesting recognition of its judgment, and that the claim or dispute needs no further litigation. This "recognition" by the foreign country is the critical step in the ultimate enforcement of the U.S. Judgment. While a very few foreign countries, such as Portugal and Belgium, require a full review of the merits of the relevant case, the majority of foreign countries will hold a less comprehensive hearing to determine whether to recognize a U.S. Judgment, focusing on issues such as those discussed in this article. Nevertheless, in either situation, an American company undoubtedly will need to obtain the assistance of local counsel in the foreign country.

II. The Showing Required to Obtain Recognition

The four issues generally addressed at a typical recognition hearing provide an American company with a roadmap for pre-litigation planning. They are:

1. Did the United States have jurisdiction over the foreign company?
2. Was the foreign company given fair notice of the lawsuit?*
3. Is the U.S. Judgment "valid, final, and on the merits"?
4. Is the U.S. Judgment consistent with the public policy of the foreign country?

A. Jurisdiction

The first issue that must be addressed is whether the American court in which the American company is contemplating filing the lawsuit, be it state or federal, has the power to require the foreign company to enter the American legal arena and defend against the 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, both domestic and abroad.

Both the United States and North Carolina have very liberal views of personal jurisdiction. From an American court perspective, whether a North Carolina court has personal jurisdiction over a 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 North Carolina. Examples of contacts include advertising or distributing products for sale in North Carolina. One such contact can be sufficient if it was intentionally directed at North Carolina and the American company's lawsuit arose out of that one contact. In other situations (for example, generalized advertising such as a website or an ad in a national or international publication that just happens to be seen by a North Carolina company in North Carolina), personal jurisdiction may require that the foreign company have many contacts with North Carolina before a North Carolina court acquires the power to make

the foreign company appear or otherwise suffer the consequences.

A liberal view of personal jurisdiction is not the case worldwide. For example, Brazil and Switzerland refuse to enforce foreign judgments against their nationals unless there is a clear indication that the national intended to submit itself to the foreign court's jurisdiction. 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 by applying the law of that foreign country. This is particularly true in Europe. For example, Italian courts typically will not have jurisdiction over a defendant unless the defendant is domiciled in Italy or the contract was to be performed in Italy. Therefore, the Italian courts will not enforce a U.S. Judgment against an Italian company unless the Italian company was domiciled in the United States or the contract was to be performed in the United States. Thus, in addition to determining whether personal jurisdiction over the foreign company will be found by a North Carolina court under U.S. or North Carolina law, the American company also must consider whether personal jurisdiction would be found using the law and rules of each foreign country in which enforcement of the U.S. Judgment will be attempted. While it is possible for this analysis to be accomplished from America, it is advisable to consult with foreign counsel to confirm the certainty of personal jurisdiction.

B. Notice, Notice, Notice

Perhaps the most important factor in convincing a foreign country to recognize a 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. Essentially, the plaintiff American company assumes the burden of making the foreign company aware of the lawsuit and the opportunity to defend. A foreign country will be far less inclined to recognize or enforce a U.S. Judgment when it was obtained without the knowledge of the foreign company. Luckily, guidelines are available to assist an American company with providing satisfactory notice of the lawsuit to the foreign company.

Some countries, such as Canada, require only that service of a lawsuit be completed in accordance with the laws of the serving jurisdiction (for example, North Carolina). By contrast, other countries have much more stringent requirements. First and foremost, the service or notice requirements of the foreign country in which an attempt to enforce a U.S. Judgment will be made should be consulted and followed to the extent reasonably possible. Often, the applicable foreign law will defer to various treaties governing the manner by which service of legal papers is made. In complete contrast to the lack of treaties between the United States and foreign nations with respect to the enforcement of judgments, there are a number of treaties to which the United States is a signatory which govern the service of legal papers and process. These treaties are extremely important, as they often provide the means to overcome one of the most prevalent objections to enforcing a foreign judgment – lack of notice because of improper service of legal papers.

The most important of these treaties is the so-called Hague Convention ("Convention"). If a foreign country is a signatory to the Convention (and many are), an American company can be confident using the Convention's procedures to notify the foreign company of a lawsuit. The procedures required by the Convention are mandatory and exclusive with respect to member countries. Under the Convention, each member country designates a "central authority" which receives "requests" for service coming from other member countries. These requests must be sent from what the requesting country considers to be a "competent authority." The Convention requires that the request conform to the Model attached to it which requires the inclusion of certain summaries and certificates. The Convention may require that the documents be translated to the language of the country in which service is being made. Assuming the request for service complies with the Convention and is transmitted to the foreign country's central authority, the receiving central authority will arrange for the service of the legal document by a method prescribed by its internal law or by a method

requested by the applicant, provided that method is compatible with the receiving country's internal law. It is imperative that a representative of the foreign country with authority to accept service be served. Once that service has been effected, the Convention requires that the serving central authority issue a certificate indicating that the document was served; the method, place, and date of service; and the person to whom the document was delivered.

The Convention does allow for other forms of service (such as by mail), but the safest means is to strictly comply with the procedures set forth above, as some countries, such as Japan, have declined to recognize U.S. Judgments where process was served by mail alone. The U.S. Department of State is a good resource for making sure that the service of process is in compliance with the Convention.

Finally, whether the Convention or some other treaty governs service, it is extremely important to make every effort to keep the defendant foreign company abreast of each and every event occurring in the litigation in order to ensure that no issues of service arise during a hearing on the recognition of the U.S. Judgment.

C. Validity and Finality

Most foreign countries require that, to be enforced, a judgment must be valid, final, and on the merits. These requirements are not always spelled out, nor are they always explained properly. Notwithstanding this uncertainty, it is advisable to assume that a U.S. Judgment must meet these requirements in order to be recognized.

Validity is typically determined by the law of the rendering court's state and is seldom an issue when an American state or federal court has actually issued the judgment. So long as the American company can offer some proof (by seal, letter from the court, or otherwise) confirming that the U.S. Judgment was issued by a proper court, the American company should be able to show the validity of the U.S. Judgment.

"Finality" generally means that no ordinary appeal can be filed to overturn the judgment. Depending upon the jurisdiction, this requirement may involve the notice requirement addressed above because the foreign company usually must be made aware that it has only a certain time period in which to appeal, after which the U.S. Judgment will become final. Most countries desire some sort of proof that no further appeals are available in the United States. Switzerland takes this a step further and requires the plaintiff to prove to the Swiss court that the judgment is final by producing the court files or a U.S. court certificate that the judgment is final.

Lastly, judgments typically must be on the merits of the dispute. In other words, decisions made on the basis of procedural matters alone are not likely to be recognized. This is a result of the incredible variance among countries with respect to legal procedures. A possible exception to this rule is the "default judgment" which, although considered to be a procedural result in the United States, may be enforced abroad in certain situations. The unique rules surrounding default judgments are discussed in more detail below.

D. Public Policy

A U.S. Judgment must be consistent with the "public policy" of the foreign country which is being asked to enforce it. In a 2001 survey, the Committee on Foreign and Comparative Law of the Association of the Bar of the City of New York identified four major grounds for the refusal of a foreign court to recognize a U.S. Judgment on the basis of public policy. These four grounds are:

- Judgments awarding multiple or punitive damages;
- Judgments deemed to have the effect of unacceptably restraining trade;
- Judgments based on decisions grounded in novel causes of action; and,

- Judgments deemed to be based on unique U.S. public policy or having a criminal nature.

Of these four grounds, only the first two are realistically relevant to an international business contract dispute. The first ground should be addressed from, or even before, the onset of the litigation. It is vitally important that a U.S. Judgment be narrowly tailored and include only damages which compensate the plaintiff for its loss under the contract at issue. Many foreign countries frown on the American concept of civil punitive damage awards, but most countries have notions similar to those of the United States and North Carolina with regard to contract law and compensatory damages. As a result, a narrow tailoring of the damages the American company requests to be included in the U.S. Judgment will help to ensure that the judgment will be recognized and not rejected for being violative of the foreign country's public policy.

There are a few exceptions to this general rule. For example, at least one Swiss court has determined that an award of punitive damages was worthy of enforcement. Notwithstanding a spattering of similar decisions, the American company should narrowly tailor the award of damages in the U.S. Judgment and exclude components such as multiple or punitive damages. On request, some American federal courts will restructure U.S. Judgments to meet the standards of the foreign country.

A much more amorphous concept is a U.S. Judgment that is considered by a foreign country to be an "unacceptable restraint of trade." This usually will become a factor when a U.S. Judgment attempts to control the commercial behavior of a party, such as enforcing a "non-compete" clause in a contract. If faced with the possibility of pursuing such a claim, an American company would be wise to discuss with foreign counsel the foreign country's concepts of free trade.

Finally, there may be unique cultural issues even with monetary relief. For example, the Middle Eastern conventions from 1983 and 1995 allow their member countries to refuse recognition of foreign judgments that violate or are otherwise contrary to Islamic law and public policy. These considerations will vary from country to country and should be considered not only prior to initiating litigation, but also prior to entering into a contract with a company from a country that is a signatory to such a convention.

III. The Special Case of Default Judgments

Default judgments result from a defendant's failure to answer or appear in court to defend a lawsuit and are not based on the merits of the claims asserted. In the United States, default judgments are obtained by motion of the plaintiff in lawsuits in which the defendant does not file an answer prior to the expiration of the statutory time for the defendant to do so. Default judgments typically award the damages or other relief requested in the Complaint, sometimes requiring a hearing for the judge to determine the exact damages or relief.

Default judgments require separate consideration when foreign enforcement is a possible issue because the probability of a default judgment in international litigation is high, as many foreign companies will attempt to hide behind their countries' borders.

The general rule appears to be that U.S. default judgments will not be recognized, regardless of the quality of the notice of the suit given to the defendant and of the opportunity to defend in the United States. Nevertheless, the chief way to combat non-recognition of a default judgment is to serve the defendant properly as set forth above. For example, Article 15 of the Convention provides that where a document has been transmitted abroad for service and the defendant has not appeared, judgment shall not be given unless the document was served under the Convention's requirements.

Despite this general rule, many countries in fact do recognize default judgments under certain circumstances,

although the methods vary greatly. For instance, Italian courts will recognize a default judgment if it was granted in accordance with the law of the originating court (in this case, a U.S. court). However, the Italian courts will examine the notice given to the defendant, which brings the analysis back to whether the defendant was served properly. Other countries undertake a more in-depth analysis of default judgments.

IV. Post-Recognition Enforcement of a U.S. Judgment

Once a U.S. Judgment has been recognized, the next step is to actually enforce the judgment on foreign soil against the assets of the foreign company. This involves an analysis of the enforcement options available in the foreign country as well as any necessary legal prerequisites. This analysis should be made even before the lawsuit is brought, if feasible, given that ineffective enforcement will render the entire process of litigating a matter a waste of time, effort, and money.

The methods for enforcement of a judgment vary greatly from country to country. There is simply too great a variation in the proceedings used to detail them all in this article. However, there are some general principles which can be highlighted. First, assuming that the U.S. Judgment has been recognized as set forth above, the general rule is that the enforcing party should have access to all of the enforcement remedies available to a prevailing party in an identical lawsuit originally filed in the foreign country. Some countries have enforcement procedures similar to those of the United States, such as attachment of property, judicial sales, and the like. Some countries even allow for more liberal access to a defendant's assets than would be available in the United States, such as having lower personal or company exemptions, or having different rules for piercing the corporate veil. Unfortunately, the converse also is true. Some countries have less effective means of enforcement, may have an ineffective system for getting the job done, may be susceptible to corruption, or may be non-responsive.

Final Considerations

There are other matters beyond just the actual enforcement of a U.S. Judgment that can be of concern and should be the topic of conversation with foreign counsel before bringing a lawsuit in the United States against a foreign company. By way of example, some countries, such as Costa Rica and Spain, require that U.S. money judgments be converted from dollars to their respective currencies. Some countries, such as Brazil, require a second hearing on the merits at the judgment stage. Non-English speaking nations almost certainly will require that the U.S. Judgment be legalized and translated into the language of the foreign country. Some countries even prohibit enforcement against certain entities altogether. For example, South Africa generally will not enforce a judgment against its mining industry, and the province of British Columbia, Canada, generally will not enforce judgments against its asbestos industry. While these considerations are ancillary to the more general topics set forth above, they should be part and parcel of any thorough pre-litigation plan.

Conclusion

This article only skims the surface of the numerous issues involved in the incredibly complicated and complex world that is international litigation. It may seem that there is no benefit to litigating here in the United States, only to have to engage in a whole other process of enforcement abroad. If this process is as complicated as this article highlights, a potential plaintiff may ask whether it is even worth it. This is a reasonable consideration and one that must be addressed. However, it is important to note that in litigation abroad, an American company will be arguing issues of liability on the home turf of the foreign company. In addition, it will be very difficult to efficiently manage a case which is being litigated thousands of miles away. By litigating issues of liability here in the United States, an American company positions itself to be required to argue *only* issues of recognition and enforcement abroad. This can be enormously beneficial if properly pursued.

Thus, 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 a U.S. Judgment in a foreign country will have a far greater chance of ultimate success in recovering for its loss.

** There is significant overlap between factors (1) and (2). Although the discussion on notice below addresses procedures for warning the defending party that it is being sued by "serving" it with notice of the suit and of the opportunity to defend, proper service necessarily involves issues of jurisdiction. For purposes of this article, the two have been segregated.*

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

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