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Guidelines for Enforcing Money Judgments Abroad

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Need for planning

When litigation involves a debtor domiciled or with assets in another country, it is important for counsel to plan in advance how to enforce abroad any money judgment that may be obtained. Although there are similarities between countries as to the requirements and procedures to enforce foreign money judgments, there are also significant differences; failure of counsel to properly examine these issues in advance of contract execution or in advance of commencing litigation may result in the money judgment being unenforceable in the country where the judgment debtor has assets. If the judgment is unenforceable, the judgment creditor will be faced with the prospect of commencing litigation anew against the judgment debtor in the foreign country, with all the inherent risks.

Beware: few international conventions apply

International law does not, in the absence of a treaty, require one nation to enforce the civil and commercial judgments from the courts of another nation. In sum, if a treaty does not apply it is for the subject country to determine the effects, if any, of a foreign judgment.

Over the last several decades the United States has developed a liberal attitude toward enforcing foreign money judgments. Although the United States is not a party to any bilateral agreement requiring the enforcement in the US of foreign money judgments, in most of the recent cases decided by US state or federal courts, the United States has granted enforcement. It must be recognised, however, that this liberal attitude is not indicative of the current world attitude towards the enforcement of foreign money judgments.

The vast majority of countries in the world have had an historically in-bred tendency toward self protection and have been naturally suspicious of foreign judgments. Most countries have been inclined to interpret their requirements for enforcement of foreign judgments strictly to ensure that the laws and acts of foreign governments and courts do not conflict with national interests, in particular the rights of the judgment debtor and other parties in the action who are resident in the country.

In recent years international understanding has reduced the lack of confidence of courts in the competence and reliability of the courts of foreign countries; despite this reduction in protectionism which has occurred in recent years, from a practical standpoint it remains difficult to enforce a money judgment abroad. It is because of this recognised difficulty in enforcing judgments that multilateral treaties have been adopted in the last three decades by countries desiring to ensure predictable and efficient enforcement of their judgments. Unlike the relatively straightforward situation for overseas enforcement of arbitral awards (*ie*, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the 'New York Convention'), there is no single convention which governs the international enforcement of judgments from courts. For example, the European Community has instituted the 'Brussels Convention' of 1968; in 1989 it also entered into the Lugano Convention with the members of the European Free Trade Association. These two conventions, when completely ratified, will provide a system of judgment enforcement between most West European nations. Additionally, the Inter-American Convention of 1979 is designed to remove uncertainty by ensuring the enforceability of judgments among eight Latin American nations.

Nonetheless, today the applicability of a treaty to the enforcement of a foreign money judgment remains the exception rather than the rule. Most courts continue strictly to interpret their requirements for judgment enforcement. These courts follow the view that, in the absence of a treaty, a foreign nation's judgment will *not* be enforced unless local law requirements are *clearly* met.

Understanding the country's requirements for enforcement

Introduction

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In the absence of a treaty, enforcement of a foreign money judgment will be determined by reference to the foreign country's internal law, so counsel must be particularly aware of the peculiarities of the country's requirements and procedures that govern enforcement of foreign money judgments.

Typically, the court in the country in which enforcement of the foreign money judgment is sought (the 'foreign country') has a hearing to determine whether the judgment before it meets local law requirements for enforcement, and these requirements generally include the following:

- (a) that the court of origin had jurisdiction over the judgment debtor;
- (b) that the judgment debtor was properly notified of the commencement of the court of origin's proceedings;
- (c) that enforcement of the judgment would not violate local public policy; and
- (d) that the foreign judgment is a final judgment.

In addition, depending on the foreign country concerned, the country will in all likelihood examine one or more other issues, such as whether reciprocity exists with the country of origin, whether a prior inconsistent judgment exists, and whether the court of origin applied the correct law under a proper conflicts of law analysis. Although most countries will not review the merits of the original action, some will do so to a limited extent, especially if fraud or a violation of public policy is alleged by the judgment debtor.

Discussion

The following discussion is of selected aspect of issues relating to the enforcement abroad of money judgments along with a notation of countries where the issue may arise. The listing of countries, however, is for the purpose of illustration only; the issue may also arise in other countries.

1. *Issues involving attitude on enforcement*

Counsel should ascertain whether the foreign country has a negative attitude as to the enforcement of foreign money judgments.

- (a) *Total refusal*. For instance, some countries refuse to enforce all foreign money judgments (for example, Indonesia).
- (b) *Enforcement only if treaty*. If there is no treaty with the country of origin of the judgment, certain countries, such as Denmark, Finland, Iceland, Norway, the Russian Federation, Saudi Arabia and Sweden, will refuse to enforce a money judgment. In these countries, it will be necessary to commence a new action against the judgment debtor, if that is possible.

2. *Reciprocity issues*

Historically, several foreign countries mandated a showing that the other country would enforce judgments of a similar nature from their courts. For example, the United States historically required reciprocity between the country of origin of the judgment and the United States before the US would enforce a foreign money judgment.¹ Although many countries have eliminated the reciprocity requirement, some have not; examples of countries that have taken the position that reciprocity is still required are Austria, Egypt, Germany, Guatemala, Israel, Japan, Jordan, Korea, Nigeria, Peru, Singapore, Syria, Taiwan, and the United Arab Emirates.

3. *Review of merits issues*

A few countries will review the merits of the original action but in differing degrees. In Quebec, the defendant can plead any defence available to him in the original action, and the Quebec court will thus examine the merits of the case at least so far as the merits are relevant to the judgment debtor's defence. In Belgium, the court will review the merits to determine the facts, law, and statute of limitations, while the courts of Italy will review the merits if the original judgment was obtained by default, if the judgment debtor is able to prove that the foreign money judgment is based on an error of fact, or if the judgment debtor was unable to produce a document in the original trial due to force majeure or the act of the judgment creditor. On the other hand, a Portuguese court may review the merits if the debtor is Portuguese. Counsel should also be aware that even though the law of some countries does not permit examination of the merits of the case, the courts appear to be doing so (for example, the United Arab Emirates).

4. *Jurisdiction issues*

The lack of jurisdiction of the court of origin over the judgment debtor is perhaps the most often noted reason for a foreign court's refusal to enforce a foreign money judgment.

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(a) *Test for jurisdiction.* A wide variety of tests are applied by courts to determine whether the court of origin had jurisdiction; generally the fact that the court of origin had jurisdiction under its procedural rules will not be determinative. In many countries, the court will determine whether the court of origin had jurisdiction under rules similar to its own. For example, Germany, Greece, Japan, Korea, Mexico, Portugal, South Africa and Taiwan may not enforce the judgment if a local court would not have had jurisdiction under the facts presented. Furthermore, in Australia and Israel the court of origin's jurisdiction will not be recognised simply because a court in Australia or Israel would have had jurisdiction; in Israel, for example, the relevant question is whether the court of origin had jurisdiction according to Israeli standards of private international law.

(b) *Exclusive jurisdiction.* The court of origin's jurisdiction will not be recognised if it is in conflict with the exclusive jurisdiction rules of the foreign country. An unusual example appears under French law, under which French courts have exclusive jurisdiction over cases involving French nationals, unless the exclusive jurisdiction conferred under French law has been waived by the French national. Swiss law is similar to French law. Another example of exclusive jurisdiction is jurisdiction over land; in many countries (including Brazil, Egypt, Korea, Mexico, Peru, Portugal, Tunisia, and Venezuela) only local courts may hear cases involving real property located in that country. There are several other examples of matters which are considered to be within the exclusive competence of local courts (such as Portugal's exclusive competence over proceedings related to labour relations in Portugal), and, therefore, counsel would be wise to examine in detail the exclusive competence of the foreign country. However, it should be noted that under Article 5(1) of the Brussels and Lugano Conventions, Portugal's exclusive competence over proceedings related to labour relations no longer applies as between Portugal and the other Contracting States.

(c) *Submission to jurisdiction by the judgment debtor.* As mentioned above under 4(b), in some countries the court of origin will not have jurisdiction unless the judgment debtor submitted (expressly or impliedly) to the jurisdiction of the court of origin; the party's contractual choice of the court of origin as the forum for resolving disputes is normally sufficient evidence of the party's express submission to that court's jurisdiction. In the absence of an express submission to jurisdiction and since countries such as France, Brazil and Switzerland will not enforce judgments against their resident unless the resident *clearly intended to submit* to the court of origin's jurisdiction, counsel should ensure that the judgment debtor's actions constitute a valid implied submission to jurisdiction.

5. *Service of process issues*

There are special requirements in some countries (including Austria, Guatemala, Japan, Korea, Mexico, Panama, Portugal, South Africa, Spain, Switzerland, Taiwan, Uruguay and Venezuela) concerning the method of service of process on the judgment debtor by the court of origin, and these should be considered along with the applicable provision of the 1965 Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil and Commercial Matters. For instance, in Mexico, the court of origin must have affected personal service on the judgment debtor, and such personal service may have to be through the use of letters rogatory. The Republic of Korea is similar in that it appears to require that service on a judgment debtor must have been made through a local Korean court. Even if service was sent through the proper channels, the judgment may not be enforced if the judgment debtor was not provided with sufficient notice of the type of claim filed against him; thus, in some countries (perhaps Japan) a full or partial translation of the service documents into the local language may be necessary.

6. *Public policy issues*

Public policy is frequently a successful defence. The determination of what constitutes the 'public policy' of the foreign country is often difficult; generally, courts will use the public policy defence if a significant political, economic, or social policy of the foreign country is seriously affected. The public policy defence in some countries may also include the following:

(a) *No enforcement if no claim under local law.* In certain cases the foreign country will refuse to enforce the foreign money judgment if the claim on which the foreign judgment is based could not have been brought in the foreign country. Countries applying this rule are Costa Rica, Greece, Guatemala, India, Jordan, Mexico, Paraguay, Portugal, Spain and Thailand.

(b) *Application of proper law.* The judgment may not be enforced if the foreign country (e.g. France, India, Mauritius, Paraguay, the Philippines or Syria) determines that the court of origin applied the incorrect law under the foreign country's conflicts of law analysis. This is especially true if the foreign country, after applying its own conflicts of law analysis, determines that its own law should have been applied in the original action before the court of origin.

(c) *Multiple damages judgments.* In some countries (e.g. Australia, Germany, Hong Kong, Korea, Switzerland and the United Kingdom) judgments awarding damages in excess of the actual loss suffered by the judgment creditor may not be enforceable. Moreover, as a consequence of certain US antitrust litigation in the late 1970s, several countries, including the United Kingdom, South Africa and Australia passed legislation (called 'clawback' statutes) which limits or bans the enforcement of treble damage antitrust judgments.

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(d) *Interest*. For religious reasons, certain Middle East countries, including the United Arab Emirates and Saudi Arabia, either limit or prohibit the enforcement of the interest portion of a foreign money judgment.

7. *Issues regarding violation of local substantive laws*

A foreign country may refuse to enforce the foreign money judgment if the judgment is based on an agreement which violates the substantive law of the foreign country. For instance, Venezuela has specific legislation which requires the parties to submit any dispute under a technology transfer agreement to Venezuelan courts, and any choice of forum other than Venezuelan courts, and consequently any judgment based thereon, is deemed invalid. Similarly, in a limited number of countries, such as Greece, the judgment will not be enforced if it violates the foreign country's statute of limitations.

8. *Pending case and prior judgment issues*

Counsel should be aware that one means available in some countries to a judgment debtor who wishes to avoid the enforcement of a foreign money judgment is the filing of suit against the judgment creditor in local courts. In Egypt, for example, judgment debtors often seek to delay or prevent the enforcement of the foreign money judgment by filing a separate lawsuit in Egypt in which they ask an Egyptian court to declare the original foreign money judgment null and void. The same is true under Japanese law, which holds that a Japanese judgment will prevent the enforcement of a money judgment between the same parties regarding the same facts even if the foreign money judgment was final before the Japanese judgment. Similar rules in this regard are found under the laws of Peru, Portugal and Tunisia.

9. *Ripeness issues*

There is a difference of opinion between countries as to what constitutes a 'final judgment' eligible for enforcement. The court of Japan, Mexico, The Netherlands, Panama, Peru, Portugal, Spain, Switzerland, Taiwan, Thailand, Turkey and Venezuela will not enforce a judgment if an appeal is pending against the court of origin's decision.

10. *Statute of limitations issues*

Courts are not consistent in the application of statute of limitations to the foreign judgment. Furthermore, legislation may exist which bars a judgment from being enforced if the judgment was rendered several years prior to the enforcement action being brought; Bermuda, Brazil, Guatemala, Papua New Guinea, New Zealand and Nigeria are examples of countries having statute of limitations legislation expressly applicable to foreign money judgments.

Review the foreign country's procedure for enforcement

Even if the issues outlined above will not adversely affect the enforcement of the judgment, counsel should determine if the procedural rules of the foreign country could have a significant impact on enforcement. A list of procedural issues to consider follows.

(1) The foreign country may refuse to hear an enforcement case which solely involves nonresident even if the nonresident judgment debtor has assets in the foreign country (examples include Cyprus and Brazil).

(2) The foreign country, in addition to requiring its courts to approve the enforcement, may also require a government official or agency to approve or give an opinion on the legality of enforcement (examples include Israel, Mexico, South Africa, Spain and Venezuela).

(3) The foreign country may not allow the losing party to appeal the court's decision whether or not to enforce the foreign money judgment (examples include Chile, Costa Rica, Panama, Spain, Uruguay, and Venezuela).

(4) The foreign country may have exchange controls which limit or prevent the repatriation of funds (examples include Argentina, Chile, South Africa, and Sri Lanka).

(5) If the judgment is in a different currency, the foreign country may require the judgment to be converted into local currency, which may or may not render the judgment creditor whole (examples include Canada, Chile, Guatemala, India, Malaysia, Malta, Mexico, Papua New Guinea, the United States, and the United Arab Emirates).

(6) The foreign country may require an additional hearing on execution of the judgment which could significantly delay obtaining payment from the judgment debtor (for example, because Brazil requires a second hearing [i.e. an execution hearing], the expected length of time to enforce a foreign money judgment is about four years).

Conclusion

Counsel should not assume that a judgment will be enforceable abroad. Although regional treaties have been introduced during the last few years, there is no multilateral treaty on the horizon to standardise the law of foreign judgment enforcement and thereby make overseas enforcement easier. Understanding the country's internal law is imperative; foreign countries generally seek in their internal law to protect resident and local policies. Through planning, counsel should be able either to obtain reasonable assurances that the judgment satisfies the internal requirements or to determine that it is more appropriate to commence litigation in the country where the judgment debtor is domiciled or in a country where he has sufficient assets.

Note

¹ At present, six US states (Texas, Georgia, Massachusetts, Ohio, Idaho and Florida) continue to require reciprocity.