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FOREIGN JUDGMENTS

Getting Paid on Foreign Country Judgments: Recognition and Enforcement in the United States



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Even after a hard fought battle in litigation concludes with entry of a judgment, judgment creditors cannot rest on their legal victories. Once a judgment has been obtained, the next step is collection and payment. If payment is not voluntarily made, enforcement is a necessary step regardless of whether the case is in litigation or arbitration. The enforcement of international judgments and arbitral awards may seem especially daunting. But as international business continues to expand in the global economy, companies will undoubtedly see more international disputes and will be dealing with more international judgments and arbitral awards, either as judgment creditors or debtors.

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Although some foreign jurisdictions have been resistant to recognize judgments entered in the United States, state and federal courts in the United States have developed a relatively consistent method of recognition and enforcement of foreign country money-judgments through the enactment of the Uniform Foreign-Country Money Judgments Recognition Act, which has been adopted by a majority of states in the United States. Recognition of foreign county money-judgments has been streamlined by the Recognition Act, promulgated in part to encourage reciprocal recognition of U.S.-based judgments by other foreign jurisdictions. Although the international business community is seemingly closer than ever, there are no international treaties governing the recognition and enforcement of foreign judgments between countries.

The Recognition Act provides an effective mechanism for recognition of foreign country monetary judgments. The New York and Panama Conventions, international treaties governing the recognition of arbitral awards to which the United States is a signatory, also allow for more certainty with respect to enforcing arbitration awards in signatory countries. Upon recognition in the United States, a judgment creditor has a wide array of judgment enforcement tools available to secure collection pursuant to the state law. If executable assets of a judgment debtor to a foreign country judgment or arbitration award can be located in the United States, the Recognition Act, the New York Convention, and the Panama Convention should be considered for streamlined recognition and enforcement, subject to applicable defenses. This article provides a general overview of the recognition process in the United States.

Common Law Recognition Of Foreign Country Judgments

A foreign judgment is "recognized" when a local court concludes that a particular dispute has already been adjudicated by a foreign court and that the merits of the underlying dispute will not be litigated further. The act of requesting recognition of a foreign judgment

is referred to as “domesticating” the judgment. In the United States, states are required to recognize a judgment obtained in another U.S. state under the full faith and credit clause of the U.S. Constitution.¹ However, there is neither a constitutional basis, nor a federal statute that requires the recognition and enforcement of judgments obtained in foreign countries.

In *Hilton v. Guyot*, 159 U.S. 113 (1895), the U.S. Supreme Court treated the enforceability of foreign country judgments by the United States or any state as a matter of choice governed by the “comity of nations,” and concluded that comity, i.e. mutual respect or accommodation, called for the enforcement of foreign judgments on the basis of reciprocity. “Comity is ‘the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation.’”² Extension of comity to a foreign judgment is “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.”³

The bedrock principles of comity were established long ago in *Hilton*:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.⁴

Enactment of the Recognition Act

Judgment creditors generally relied on state common law regarding recognition until the adoption of the Uniform Foreign-Country Money Judgments Recognition

Act. In 1962, the National Conference of Commissioners on Uniform State Laws approved and recommended the Recognition Act for enactment. Subsequently, 32 states and territories adopted the Recognition Act or some parts of it: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, U.S. Virgin Islands, Virginia, and Washington.⁵

In the remaining states that have not adopted the Recognition Act, judgment creditors must rely on the states’ common law rules to enforce a foreign judgment. Common law principles of reciprocity also govern judgments that fall outside the scope of the Recognition Act.⁶

Foreign Judgments Within the Scope of the Recognition Act

The Recognition Act generally applies only to final judgments of a foreign country granting or denying a sum of money, and the statute excludes recognition of foreign country judgments for taxes, fines, or other penalties as well as foreign country judgments for support in a matrimonial or family matter.⁷ Thus, because the Recognition Act expressly applies only to money judgments, the statute does not generally apply to allow for filing and recognition of foreign divorce decrees or portions of judgments not pertaining to monetary awards.⁸

Again, just because a judgment is outside the scope of the Recognition Act does not mean it is unenforceable. Rather, it means common law principles of comity, reciprocity and due process will apply instead. Additionally, the procedural mechanisms for registration and enforcement under the Recognition Act will generally not apply, and a lawsuit seeking a declaration concerning the foreign judgment will likely need to be filed.

Additionally, a “foreign country” under the Recognition Act generally refers to a governmental unit *other than* the United States; a state, district, commonwealth, territory, or insular possession of the United States; the Panama Canal Zone; and the Trust Territory of the Pacific Islands.⁹

¹ U.S. Const. art. IV, § 1; Uniform Enforcement of Foreign Judgments Act (1948).

² *Dependable Highway Express Inc. v. Navigators Insurance Co.*, 498 F.3d 1059, 1067 (9th Cir. 2007) (quoting *Hilton*, 159 U.S. at 164).

³ *Id.* (internal quotation omitted)

⁴ *Hilton*, 159 U.S. at 202-03; see also *Asvesta v. Petroutsas*, 580 F.3d 1000, 1010-11, 2009 BL 192485 (9th Cir. 2009) (finding Greek court’s decision that mother had not wrongfully retained child in custody dispute was not entitled to comity); see also *Downs v. Yuen*, 298 A.D. 2d 177 (N.Y. App. Div. 2002) (enforcing Hong Kong divorce judgment entered under general principles of comity, even though portion of award was not enforceable under state statute on recognition of foreign money judgments); *Nahar v. Nahar*, 656 So. 2d 225, 229 (Fla. Dist. Ct. App. 1995) (“[I]t appears that any foreign decree should be recognized as a valid judgment, and thus be entitled to comity, where the parties have been given notice and the opportunity to be heard, where the foreign court had original jurisdiction and where the foreign decree does not offend the public policy of the State of Florida.”).

⁵ In 2005, the National Conference of Commissioners approved and recommended a revised Recognition Act that clarified certain aspects of the 1962 Act. The following states have adopted the 2005 version of the Recognition Act: California, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, and Washington. See <http://www.uniformlaws.org>.

⁶ See, e.g., *Downs*, 298 A.D. 2d at 177.

⁷ See, e.g., *Tex. Civ. Prac. & Rem. Code* § 36.001; 36.002.

⁸ See, e.g., *Sanchez v. Palau*, 317 S.W.3d 780, 786, 2010 BL 131373 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (holding that Texas Recognition Act did not authorize trial court to recognize a 2008 Mexican divorce decree); *Brosseau v. Ranzau*, 81 S.W.3d 381, 388 (Tex. App.—Beaumont 2002, pet. denied) (holding, when appellant was not asking for enforcement of portion of foreign country judgment that pertained to money, that the “UFCMJRA pertains to a money judgment” and that appellant’s case did not fall within the parameters of the act).

⁹ See, e.g., *Tex. Civ. Prac. & Rem. Code* § 36.001.

Importantly, the foreign judgment must be final to invoke the recognition procedures under the Recognition Act.¹⁰ Finality of the judgment is determined according to the laws of the foreign country.¹¹

Filing Procedure Under the Recognition Act

A final foreign country money judgment filed in accordance with the Recognition Act becomes enforceable in the same manner as a judgment of a sister state that is entitled to full faith and credit.¹² To domesticate a foreign judgment, the judgment creditor should typically file, in the county of residence of the judgment debtor or in accordance with other applicable venue laws, an authenticated copy of the judgment along with an affidavit setting forth the name and last known address of the judgment debtor and judgment creditor (as well as the contact information for the creditor's attorney) with the clerk of any Texas court with jurisdiction.¹³ An authenticated copy of the judgment is typically a copy certified by the clerk of the foreign court; but the judgment must be authenticated in accordance with an act of Congress, a statute of the state of registration, or a treaty or other international convention to which the United States is a party.¹⁴ If the judgment is not in English, a translated version of the judgment should also be filed.

The clerk and/or the judgment creditor is then required to mail to the judgment debtor notice of the filing of the foreign judgment.¹⁵ Proof of mailing should be filed of record.¹⁶

If a judgment creditor identifies assets of its judgment debtor in the United States sufficient for collection, the creditor should domesticate the foreign judgment with the clerk of the state court with jurisdiction over the debtor and/or the assets. The judgment creditor may file in state court or, if in accordance with federal subject matter jurisdictional requirements, in federal court, typically diversity jurisdiction, in which the underlying state laws (and applicable and adoption of the Recognition Act) will apply.

The Recognition Act will require filing and docketing of a lawsuit, but citation is generally not issued under the statute; rather, as stated, notice of the filing is simply mailed to the judgment debtor. Further, if the judg-

ment qualifies for recognition under the act, the scope of judgment debtor's "defenses" to recognition is limited to those areas of challenge provided in the statute, as discussed below. The Recognition Act is a "short-cut" to recognition and enforcement, but the judgment must be eligible and none of the non-recognition defense can apply.

Defenses to Recognition Under the Act

Pursuant to the Recognition Act, a court is required to recognize a foreign country judgment that is final, conclusive, and enforceable where rendered unless the judgment debtor establishes that one of the enumerated statutory grounds for non-recognition applies.¹⁷ The judgment debtor has a specified period of time to file a motion for non-recognition. In Texas, a judgment debtor has 30 days from the date of service of the notice of filing of the judgment to file a motion for non-recognition (and 60 days if the party is domiciled in a foreign country).¹⁸

The Recognition Act sets forth three mandatory and six discretionary grounds for non-recognition of a foreign judgment. If any of the following mandatory grounds for non-recognition are established by the judgment debtor, the court *must not* recognize the foreign judgment:

(1) The judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) The foreign country did not have personal jurisdiction over the judgment debtor; or

(3) The foreign country did not have subject matter jurisdiction over the matter.¹⁹

Courts have interpreted the first ground, impartiality and due process, narrowly.²⁰ A foreign court need not follow every procedure that a U.S. court would have done. The test is whether the procedures used by the foreign court violated fundamental notions of decency and fairness.²¹

The fact that a foreign judgment was a default judgment will not in itself be a sufficient defense against recognition. However, it can give rise to other defenses, in particular, lack of personal jurisdiction, if the default was improperly entered, for example, without sufficient service.²²

Pursuant to the following discretionary grounds for non-recognition, the court *may* refuse to recognize the foreign judgment:

¹⁷ See, e.g., TEX. CIV. PRAC. & REM. CODE § 36.004.

¹⁸ See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 36.044.

¹⁹ See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 36.005.

²⁰ See, e.g., *S.C. Chemixem S.A. v. Velco Enterprises Ltd.*, 36 F. Supp. 2d 206, 214-15 (S.D.N.Y. 1999) (recognizing Romanian judgment because the court could not say that the Romanian judicial system was wholly devoid of due process even though corruption remained in the judicial system which was "far from perfect").

²¹ See, e.g., *Ackerman v. Levine*, 788 F. 2d 830, 841-42 (2d Cir. 1986) (recognizing foreign judgment despite differences in foreign judicial procedures).

²² See, e.g., *Siedler v. Jacobson*, 383 N.Y.S. 2d 833, 834 (App. Term. 1976) (holding that Austrian court's basis for exercise of jurisdiction was too weak to "serve as a jurisdictional predicate sufficient to grant conclusive effect to the default judgment sued upon.")

¹⁰ See, e.g., *Tex. Civ. Prac. & Rem. Code*, §§ 36.002, 36.004, 36.0041; see *Bahr v. Kohr*, 928 S.W. 2d 98, 100 (Tex. App.—San Antonio 1996, writ denied) (determining whether foreign judgment was final before holding motion to modify was filed untimely).

¹¹ See, e.g., *Hernandez v. Seventh Day Adventist Corp.*, 54 S.W.3d 335, 336 (Tex. App.—San Antonio 2001, no pet.); *Continental Transfert Technique Ltd. v. Federal Government of Nigeria*, 800 F. Supp. 2d 161, 163, 2011 BL 200702 (D.D.C. 2011) (holding English judgment entered against Nigerian government in amounts set forth in arbitral award issued in United Kingdom would be enforced in United States under Uniform Foreign-Money Judgment Recognition Act (UFMJRA), even though stay of judgment had been granted by English court on condition that Nigeria provide £100 million in security pending final outcome of Nigerian proceedings, absent showing that Nigeria had posted required bond).

¹² See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 36.001-36.008.

¹³ See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 36.041-36.043.

¹⁴ See, e.g., TEX. CIV. PRAC. & REM. CODE § 36.0041.

¹⁵ See, e.g., TEX. CIV. PRAC. & REM. CODE §§ 36.042-36.043.

¹⁶ See, e.g., TEX. CIV. PRAC. & REM. CODE § 36.043.

(1) The judgment debtor did not receive notice of the proceedings in sufficient time to defend;

(2) The judgment was obtained by fraud;

(3) The cause of action on which the judgment is based is repugnant to the public policy of this state;

(4) The judgment conflicts with another final and conclusive judgment;

(5) The proceeding in the foreign country court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

(6) In the case of jurisdiction based only on personal service, the foreign country was a seriously inconvenient forum for the trial of the action.²³

Recognition and Enforcement Of Foreign Arbitration Awards

U.S. courts favor international arbitration and, generally, recognition and enforcement proceedings of foreign arbitral awards are summary in nature. Given the obstacles to recognition and enforcement of judgments and the unpredictability of litigation in a foreign jurisdiction, arbitration is the favored method of dispute resolution in the international context. However, when it comes to enforcement of arbitral awards the judicial system cannot be avoided. Enforcement typically involves turning the arbitration award into a judgment capable of enforcement in an applicable jurisdiction. If assets are later located in the United States, then the arbitral award, as converted to a foreign judgment, may be enforced in the United States, as discussed above.

A prevailing claimant however, may seek enforcement of an international arbitral award directly in the United States. The United States is a signatory of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and the Inter-American Convention on International Commercial Arbitration (Panama Convention).²⁴ The New York Convention has been ratified by over 140 nations and has been incorporated by the U.S. in Chapter II of the Federal Arbitration Act (“FAA”).²⁵ The Panama Convention provides for the enforceability of arbitration agreements and arbitral awards in the Latin American countries that are signatories and has also been incorporated into the FAA. Seventeen countries in North and South America have ratified the Panama Convention.²⁶ Under the FAA, actions for confirmation of foreign arbitral awards must be submitted

²³ TEX. CIV. PRAC. & REM. CODE §§ 36.005. Six states, including Texas, have adopted reciprocity as another ground for non-recognition. This ground provides that a foreign judgment will not be recognized if the rendering country does not enforce foreign judgments rendered by U.S. courts.

²⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975.

²⁵ See 9 U.S.C. §§ 201-208.

²⁶ See 9 U.S.C. §§ 301-307 (incorporation of the Panama Convention in the FAA).

for recognition within three years of the award having been made.²⁷

In the United States, the procedure for initiating a recognition and enforcement proceeding for a foreign arbitral award depends on the district court. Generally, the party seeking to enforce the arbitration award must file a certified copy of the arbitration agreement and award with the clerk of the court.²⁸ If the award is not in English, a certified translation must be included.²⁹ Foreign arbitral awards are presumptively enforceable and it is the burden of the party opposed to recognition to prove it should not be recognized.³⁰ Once confirmed, an arbitral award is enforceable as a federal judgment.³¹

The New York and Panama Conventions set out the following exclusive grounds to refuse recognition and enforcement of an award:

(1) The contracting parties suffered under some incapacity or the arbitration agreement was invalid;

(2) The losing party did not receive proper notice of the arbitration proceedings or was unable to present its case;

(3) The arbitration exceeded the scope of the arbitration agreement;

(4) The arbitration panel or procedure did not conform to the parties’ agreement or applicable law;

(5) The arbitration award has not yet become final;

(6) The subject matter was not subject to arbitration; or

(7) Enforcing the award would conflict with public policy.³²

Each of these grounds is narrowly construed by U.S. courts and arbitration awards are likely to be enforced by federal courts.³³

Conclusion

International business can be fraught with uncertainty, especially if something goes wrong and litigation or arbitration ensues. Arbitration, a popular election in international contracts, may not be the end of the road, especially if the losing party refuses to honor an arbitral award. The parties may find themselves back in court over recognition and enforcement of the award. The Recognition Act along with the New York and Panama Conventions work to provide some stability in the recognition and enforcement process in the United States and in the signatory countries to the foregoing conventions. The recognition regime established in the United States is not perfect, but it is a potential framework, although progress has been slow going, to a multilateral judgment recognition system.

²⁷ 9 U.S.C. §§ 207, 302.

²⁸ 9 U.S.C. §§ 207, 302.

²⁹ New York Convention, art. iv; see also 9 U.S.C. § 201 (the New York Convention shall be enforced by U.S. courts).

³⁰ 9 U.S.C. § 207.

³¹ 9 U.S.C. § 9.

³² New York Convention, art. v.; Panama Convention art. v.

³³ See, e.g., *Yusuf Ahmed Alghanim & Sons W.L.L. v. Toys R Us*, 126 F.3d 15, 23 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998) (“The showing required to avoid summary conformance [of an arbitration award] is high.”).