



Enforcement of Foreign Judgments

in 28 jurisdictions worldwide

2012

Contributing editors: Mark Moedritzer and Kay C Whittaker



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Enforcement of Foreign Judgments 2012

Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

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ISSN 2048-464X

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Global Overview

Mark Moedritzer and Kay C Whittaker

Shook, Hardy & Bacon LLP

It is often said that the world is becoming a smaller place. Technology allows us to travel internationally with relative ease and at great speeds. We can literally send packages around the world overnight. The internet has also made it so easy for people on opposite sides of the globe to keep in touch that even young children can master it. As a result of all this increased ease of travel and communication, international trade has blossomed and with it, international disputes and litigation.

This book looks at how a number of geographically and culturally diverse countries approach a common question – under what standards and conditions should court orders and judgments entered in foreign countries be recognised and enforced in our own countries?

The concept of ‘recognition’ of a foreign judgment is that a judgment from one jurisdiction is accepted in another jurisdiction, and that the latter jurisdiction issues a judgment against the debtor in substantially identical terms without rehearing the merits of the original lawsuit. Once a foreign judgment is recognised, the successful litigant in the original case can pursue enforcement in the recognising country. If the judgment is a money judgment and the debtor has assets in the recognising jurisdiction, the judgment creditor has access to all the enforcement remedies of the recognising jurisdiction as though the case had originated there. If the judgment grants another form of relief, such as an injunction, the recognising court will enter whatever orders are appropriate to make the original judgment effective in the recognising jurisdiction.

There are a number of bilateral and multilateral treaties and conventions governing the recognition and enforcement of foreign judgments. Some countries are party to several such agreements with other nations, such as Cyprus, the Netherlands, Saudi Arabia and the UK, whereas other countries, such as Australia, Nigeria and the United States, are not party to any. In the absence of a reciprocal binding agreement for recognition of foreign judgments, foreign judgments are typically recognised based on principles of comity, ie, a mutual deference between courts in different countries.

With or without international treaties or conventions, though, all of the countries that submitted chapters for this book recognise the importance of having standardised rules and procedures for the recognition and enforcement of foreign judgments.

In countries that are party to one or more reciprocal treaties or conventions, recognition and enforcement of foreign judgments entered in a reciprocating country is often quite simple and straightforward, with rules that are clear and easy to follow. In the European Union, for example, there is already a substantial body of rules for the mutual recognition of judgments between member states (see the UK chapter which references the EU provisions). Currently the European Commission

is pursuing a policy aimed at removing the need for a judgment in one member state to be validated and declared enforceable by the courts of another member state before it can be enforced there. The European Commission reasons that the existing mutual recognition processes are an unnecessary hindrance to cross-border enforcement, which can add substantially to the costs of recovery, depending on a case’s complexity. Eventually this would lead to any EU judgments being directly enforceable in all other EU member states.

In certain countries that do not have reciprocal treaties, legislators have enacted laws that set the standards for evaluating foreign judgments within each of the territories within the recognising country. Finally, some jurisdictions rely on the common law – made up of judicial precedent – for guidance on factors to be considered and standards to be applied in deciding when to recognise and enforce a judgment entered in a foreign court. Not surprisingly, courts that rely on common law or evolving concepts such as whether the foreign judgment violates the recognising jurisdiction’s public policy tend to have somewhat greater flexibility in deciding whether to recognise the foreign judgment.

Regardless of the source of the country’s law on the recognition and enforcement of foreign judgments, however, there are certain hallmarks that have virtually universal acceptance. For example, a defendant must have been subject to personal jurisdiction in the foreign country before another court will recognise a judgment entered against the defendant. Further, the defendant must have been afforded a modicum of procedural due process in the jurisdiction where the judgment was entered, including being given sufficient notice of the action, an opportunity to be represented by counsel of his or her choice, an opportunity to present evidence and to cross-examine witnesses, a fair and impartial decision-maker and an opportunity to appeal any adverse judgment.

Where basic due process considerations have been met, courts will typically not re-examine judgments entered by foreign courts on their merits. The right to re-open issues of liability already decided by a court in another country, if available at all, is likely to be extremely limited. Available challenges may include such arguments as whether the foreign judgment was obtained through fraud, is contrary to the public policy of the enforcing jurisdiction or is inconsistent with another binding judgment or a requirement that the parties submit their dispute to an alternate dispute resolution forum.

By and large, foreign judgments that are not denied recognition based on any of these challenges are universally recognised and enforced with relatively few exceptions or problems. However, courts continue to be watchful for instances of egregious procedural due process abuses. For example, in *Osorio v*

Dole Food Co, 665 F Supp 2d 1307 (SD Fla 2009), aff'd, 635 F3d 1277 (11th Cir 2011), a United States federal district court recently refused to recognise a \$97 million judgment entered by a Nicaraguan court on behalf of a group of Nicaraguan banana plantation workers against two US companies – the banana grower and a pesticide manufacturer – where the US court found the defendants had exercised their statutory opt-out rights under Nicaraguan law, thereby divesting the Nicaraguan trial court of subject matter and personal jurisdiction over the dispute. The US court further found that:

- the US defendants had been required to submit multi-million dollar deposits upon the filing of the lawsuit that were not commensurate with deposits required of litigants from any other country;
- the trial court had applied an irrefutable presumption of causation that was inconsistent with international concepts of due process;
- the trial court had set a mandated minimum damage award per litigant that had no parallel in Nicaragua's legal system;
- the trial court had mandated a summary-type proceeding inappropriate for what constituted a complex question of liability;

- the trial court abolished statutes of limitations for a particular class of claims against these two US defendants, thereby subjecting the defendants to unlimited retrospective liability; and
- the defendants had been afforded only a limited right of appeal and denied a stay of execution, also inconsistent with rights typically afforded to litigants in Nicaraguan courts.

The US court found that all of these factors demonstrated that the judgment was not rendered under a system that provided procedures compatible with the requirements of due process, that recognition would be repugnant to Florida's public policy and that the tribunal was not fair and impartial, but rather had targeted wealthy US companies for particularly onerous and one-sided treatment.

In the main, however, cases like *Osorio* tend to be the exception, with recognition and enforcement of judgments entered in foreign jurisdictions being the more common outcome in the majority of typical circumstances.

For a more detailed understanding of how foreign judgments are treated in different countries, the reader is encouraged to review the chapters of this book and to consult any of the well-qualified authors for assistance with their needs in obtaining recognition and enforcement of a foreign judgment.



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