

Domestication and Enforcement of Foreign Judgments.....Really Foreign Judgments

By Nicholas D. Krawec

Increased globalization of commercial transactions has given rise to an increased likelihood that collection attorneys will be retained to domesticate and enforce foreign judgments against a debtor in the attorney's jurisdiction. Now, of course, you undoubtedly are familiar with the Uniform Enforcement of Foreign Judgments Act, which applies to the domestication and enforcement of judgments from sister states, which is based on the full faith and credit clause of the U.S. Constitution.¹ What this article deals with is the domestication and enforcement of *really foreign* judgments, i.e., judgments rendered by the courts of a foreign nation. Because judgments of foreign nations are not entitled to full faith and credit, but rather are subject to principles of comity, the process of domestication and enforcement of foreign nation money judgments is governed by the Uniform Foreign Money Judgment Recognition Act (UFMJRA).

The UFMJRA has been enacted in 32 U.S. states.² Under Section 9 of the UFMJRA, the act applies to "any foreign judgment that is final and conclusive and enforceable where rendered, even though an appeal therefrom is pending or it is subject to appeal." *UFMJRA* §9. Section 2 of the UFMJRA defines the term "foreign judgment" as "[a]ny judgment of a foreign government granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment in matrimonial or family matters," and the term "foreign

¹ "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *U.S.C.A. Const. Art. 4, § 1*.

² The National Conference of Commissioners on Uniform State Laws, *Foreign-Country Money Judgments Recognition Act Summary* (2015). In 2005, the Uniform Law Commissioners drafted an amendment to the Uniform Act, the amendment being The Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA). The reader should research which, if either, version is enacted in your jurisdiction.

government” is defined as “[a]ny governmental unit other than the United States, or any state, district, Commonwealth, territory or insular possession thereof, or the Panama Canal Zone, the Trust Territory of the Pacific Islands or the Ryukyu Islands.” *UFMJRA*, §2.

Under Section 3 of the UFMJRA, if the foreign judgment meets the requirements of Section 9 of the UFMJRA, then it is conclusive between the parties thereto to the extent that it awards or denies recovery of an amount of money, unless a ground for non-recognition under the UFMJRA applies. If the foreign nation judgment is conclusive between the parties, then it “is enforceable in the same manner as the judgment of another state which is entitled to full faith and credit.” *UFMJRA*, §3. Thus, the procedural mechanism for domesticating and enforcing a *conclusive* foreign nation money judgment will depend upon the procedure in your particular state for domesticating a judgment from the court of a sister state, whether that is bringing an action on the foreign judgment, or simply filing a request to index the foreign nation money judgment on the docket of your state court, and proceeding to execute thereon.³

However, there are exceptions to the enforcement of judgments of a foreign court, i.e., grounds for non-recognition. Those exceptions are: (1) the defendant in the suit filed in the foreign court did not receive sufficient advance notice of the foreign court proceedings to be able to defend (i.e., lack of due process); (2) the obtaining of the judgment by fraud; (3) the cause of action on which the foreign nation judgment is based is contrary to the public policy of the U.S. state in which enforcement is sought (which, in most U.S. states, would *not* be grounds for denying full faith and credit to the final judgment of the courts of a sister state); (4) the foreign

³ In Pennsylvania, this writer has successfully domesticated a Canadian money judgment by the filing of a Praecipe (Request) to Index Foreign Money Judgment Pursuant to 42 Pa.C.S. §22001, *et seq.*, attaching thereto a certified copy of the money judgment from the record of the Canadian court, then proceeding to issue a writ of execution thereon. No suit on the foreign money judgment was required to be filed.

judgment conflicts with another final judgment; (5) the proceeding in the foreign nation's court was contrary to an agreement between the parties with regard to the forum for proceedings to resolve disputes under their agreement (i.e., contrary to the provisions of a contractual forum selection clause); or, (6) if jurisdiction of the foreign court is based solely on personal service, "the foreign court was a seriously inconvenient forum for the trial of the action." *UFMJRA* §4.

Furthermore, a money judgment of a foreign nation's court will not be enforced in a U.S. State under the UFMJRA, if it is non-conclusive, which section 5 of the UFMJRA defines as (1) a judgment that was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;⁴ (2) a judgment rendered by a foreign court which did not have personal jurisdiction over the defendant; or (3) a judgment rendered by a foreign court which did not have jurisdiction over the subject matter.

If you have a conclusive, foreign nation money judgment, then proceed to domesticate it in accordance with the procedure you would use in your state to domesticate a sister state judgment. Generally, in doing so, you should obtain, if possible under the procedures of the foreign nation's court, a certified copy of the judgment along with a triple sealed certification of the judgment from the court that rendered the judgment, along with a certified copy of the docket entries incidental to the judgment. Often, however, you may just be limited to a certified copy of the foreign nation's court judgment, because that is all the foreign court would issue. In some instances, you may also need to file in the judgment domestication proceedings, an Apostille from the foreign country where the Judgment was rendered. An Apostille is a certification that the judgment document is valid within the nation where the judgment was originally issued or

⁴ Whether the foreign court which rendered the judgment for which domestication is sought is part of such a system is likely to be decided on a case by case basis in the court in which foreign judgment domestication proceedings are brought.

certified. The Apostille certifies the authenticity of the signature on the judgment, such as that of the Court Clerk, the Judge, or other Court official, and certifies the authority of the person signing the judgment and the identity and authenticity of any official stamp or seal affixed to the judgment. The Apostille must be issued in the jurisdiction where the judgment was issued, or was certified. It is usually a one page document embossed with the Official Seal of a jurisdiction and includes the signature of the person issuing the Apostille. Whether you need an Apostille depends on whether the foreign nation from which your judgment was obtained has signed the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents (also known as the Apostille Convention). The apostille itself is a stamp or printed form consisting of 10 numbered standard fields. On the top is the text “*APOSTILLE*,” under which the text Hague Convention of 5 October 1961 (or the French translation thereof) is placed. In the numbered fields the following information is added:

1. Country ... [country name]
This public document
2. has been signed by ... [name]
3. acting in the capacity of ... [function]
4. bears the seal/stamp of ... [authority]
certified
5. at ... [location]
6. the ... [date]
7. by ... [name]
8. No. ... [apostille registration number]
9. Seal/stamp ... [of the authority giving the apostille]

Nations that have not signed the Convention must specify how foreign legal documents can be certified for its use. Two countries may have a special treaty on the recognition of each other's public documents, such as court judgments but in practice this is rare. Otherwise, the document must be certified by the foreign ministry of the country where the judgment originated and then by the foreign ministry of the government where the judgment will be used; one of the

certifications will often be performed at an embassy or consulate. This means the judgment must be certified twice before it can have legal effect in the receiving country.

In addition to the foregoing, you will likely be faced with a “currency conversion” issue. The foreign nation money judgment is likely to be entered in amount of the judgment rendering nation’s currency. As a general principle, state and federal courts in the U.S. do not have the power to award judgments in a foreign currency.⁵ Thus, in domesticating a foreign nation judgment, the judgment amount should be converted into U.S. dollars. In determining whether to apply the currency exchange rate in effect as of the date of the breach of contract, or in effect as of the date the judgment was rendered, that is generally going to be a question of state law. However, based upon the principle of placing the injured party (the judgment creditor) in the position in which he would have been had the breach of contract or loss not occurred, if the foreign currency in which the foreign judgment was originally entered has depreciated since the date of breach, then when initiating the domestication, the foreign judgment amount should be converted into U.S. dollars at the currency rate of exchange applicable on the date of the breach of contract. However, if the foreign currency in which the foreign judgment amount was entered has appreciated since the breach of contract, the foreign judgment should be domesticated at the rate of exchange in effect on the date of judgment rendition.⁶

Needless to say, Domestication of a judgment from a foreign nation is not a simple process.

Foreign arbitration awards

Often contracts between parties in an international transaction will contain an alternative

⁵ *Teca-Print A.G. v. Amacoil Machinery, Inc.*, 138 Misc. 2d 777, 525 N.Y.S. 2d 535 (1988)

⁶ *See, El Universal Compania Periodistica Nacional, S.A.de C.V. v. Phoenician Imports, Inc.*, 802 S.W. 2d 799 (Ct. App., Tex., 1990) citing Restatement of Foreign Relations Law of United States § 823 comment c (1986).

dispute resolution, or arbitration clause. The federal statute which enables one to enter judgment on the foreign arbitration award, is The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, codified at 9 U.S.C. §201, et seq. The Convention applies to an arbitration agreement or arbitration award arising out of a commercial contractual relationship. If the agreement or award arising out of that contractual relationship is entirely between citizens of the United States, it is deemed not to fall under the Convention unless that contract involves property located abroad, contemplates performance or enforcement of the contract abroad, or has some other reasonable relation with one or more foreign states. Under the Convention, a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

The federal district courts have original jurisdiction of a petition or complaint to enforce a foreign arbitration award based on federal question jurisdiction (arising under the laws and treaties of the United States), *regardless of the amount in controversy*.⁷ The Petition to enforce the foreign arbitration award may be brought in any federal district court in which, but for the arbitration agreement, an action related to the dispute between the parties could have otherwise been brought, or in the federal district court for the district which includes the place designated in the contract as the place of arbitration if such place is within the United States.⁸

The Convention effectively has a statute of limitations of three years for bringing an action to enter judgment on and enforce a foreign arbitration award. “The court shall confirm the

⁷ 9 U.S.C. §203

⁸ 9 U.S.C. §204

award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”⁹

A federal district court's role is limited, in that it *must* confirm the foreign arbitration award unless one of the grounds for refusal specified in the Convention applies to the underlying award.¹⁰ Grounds for refusal of enforcement of a foreign arbitration award include:

- Composition of the arbitral authority did not comply with the arbitration clause in the contract.
- Discovery that the award was based on false testimony.
- The Arbitration agreement was established by fraud or duress
- The Arbitration award was in manifest disregard of the law.
- The Arbitration award was overturned by the courts of the jurisdiction where the arbitration was held.

In order to petition to confirm and enter judgment on the foreign arbitration award, you should obtain a certified copy (and a translation, if necessary) of the foreign arbitration award to attach to the Petition.

Conclusion

The process of domesticating and enforcing in the U.S., money judgments rendered in a foreign nation's courts, or foreign arbitration awards, is complex, but it need not be intimidating. These judgments are likely to be in substantial amounts and will warrant the research, investigation and diligence that will be necessary to obtain the proper documentation of the foreign nation judgment to domesticate and enforce it in the United States. Usually, the foreign

⁹ 9 U.S.C. §207

¹⁰ *Admart AG v. Stephen and Mary Birch Foundation, Inc.*, 457 F.3d 302 (3d Cir., 2006)

judgment will be forwarded to U.S. counsel, by foreign counsel who obtained the foreign money judgment, and who has an interest in seeing you successfully domesticating and enforcing the judgment. Make use of that resource to ensure you get the proper documentation and/or certifications from the foreign court. As international transactions increase, new opportunities for collection and enforcement of foreign nation judgments in the U.S. can open up. Be ready to take advantage of those opportunities when they arise.

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