

What Lenders Need to Know About Enforcement of Foreign Country Court Judgments Within the US

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Introduction

In last year's International Issue, this publication contained articles discussing the growing trend of US lenders to extend asset based loans to foreign borrowers, and the structuring, terms and documentation of those overseas loans. Of course, unexpected changes in the global economy or a simple downturn in the financial fortunes of an overseas borrower can adversely impact on a lender's ability to collect even on a seemingly well-structured and amply collateralized loan. Foreign country litigation may ensue. However, a judgment in the lender's favor may be a pyrrhic victory where the collateral has decreased in value, and the lender cannot collect in the foreign state where the judgment was rendered.

This article will discuss the mechanism available to both US and non-US lenders to utilize US courts to enforce foreign country judgments, even where the underlying transaction and the ensuing litigation occurred entirely outside of the US. It will also discuss provisions that both US and non-US lenders can include in their loan documents to maximize the opportunity to enforce foreign judgments in the US.

Judgment Recognition Must Precede Judgment Enforcement

Before a foreign country court judgment may be enforced within the United States, it must be recognized by a US court—either federal court or state court. When a foreign country judgment is recognized by a court in the United States, it becomes a US court judgment, which is then entitled to full faith and credit in all other jurisdictions within the US.

In contrast with the rules concerning the confirmation of international arbitration awards, which is governed by federal law, the procedures and rules applicable to the recognition of foreign country judgments are governed by state law. At present, approximately thirty-five states (including New York, California, Texas, Florida, Illinois and Delaware) have adopted either the

Uniform Foreign Money Judgment Recognition Act of 1962 (1962 Act) or the Uniform Foreign Country Money Judgment Recognition Act of 2005 (2005 Act). Both Acts have similar rules and procedures. Moreover, courts in the remaining states often apply the Uniform Act rules as a matter of common law.

Monetary vs. Non-Monetary Judgments

The Uniform Acts only cover monetary judgments. The Acts do not cover non-monetary judgments such as injunctive relief, specific performance, and judgments regarding title to, or right to possession of, property. However, generally, where a foreign country judgment contains both monetary and non-monetary relief, the US court in which recognition is sought, will, at the very least, recognize the monetary portion of the judgment.

Moreover, even though non-monetary foreign country judgments are not subject to recognition under the Uniform Acts, they may still be recognized and enforced by the US courts under the common law of the state in which the plaintiff is seeking recognition of the foreign judgment.

Procedure for Obtaining US Recognition of a Foreign Country Judgment

How does a prevailing plaintiff obtain recognition of its foreign judgment in the US? For example, assume that a London-based lender obtains a French court judgment on its loan to a French company. The London lender then discovers that there are insufficient assets in France to satisfy that judgment. However, the lender has reason to believe that the French borrower and/or its guarantor has assets in the US, and the lender wants to enforce that French judgment against those US assets.

As noted above, the first step that the lender must take is to obtain US court recognition of that foreign country judgment. In most states, recognition of the foreign judgment is obtained by the prevailing plaintiff with the foreign country judgment commencing an expedited form of civil action on notice to the losing party.¹ The petition or other pleading which commences that expedited action must attach a certified copy of the foreign country judgment translated into English. New York state courts have consistently held that an action to obtain recognition of a foreign country judgment may be brought against the foreign defendant even if the prevailing plaintiff cannot establish a basis for the New York court's jurisdiction over the defendant or the defendant's assets.² (By way of contrast, it should be noted that a US court action to confirm an

¹ A number of states that have enacted the 1962 Act, including Florida, still permit the prevailing party in the foreign court proceeding to register the foreign country judgment with the court without advance notice to the loser. The losing party is then given the opportunity to vacate that new state judgment.

² *Lenchyshyn v. Pelko Elec., Inc.*, 281 A.D.2d 42, 49, 723 N.Y.S.2d 285, 291 (N.Y. App. Div. 2001) (“Considerations of logic, fairness, and practicality dictate that a judgment creditor be permitted to obtain recognition and enforcement of a foreign country money judgment without any showing that the judgment debtor is subject to personal jurisdiction in New York. . . . [T]he judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment”). This principle was most recently reiterated by the New York Appellate Division in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Servs. Co.*, 117 A.D.3d 609, 611, 986 N.Y.S.2d 454, 458 (N.Y. App. Div. 2014) (New York Law “does not provide for

international arbitration award may only be commenced in a US court which could otherwise exercise jurisdiction over the parties to the arbitration with respect to their underlying dispute.)

Once the plaintiff commences the US court action for recognition of the foreign country judgment, the burden shifts to the defendant to prove that one of the limited grounds for refusal to recognize the foreign judgment exists.

There are only a small number of mandatory grounds for non-recognition of a foreign country court judgment including: (1) the foreign court judgment was rendered under a judicial system which does not provide for impartial tribunals, or procedures compatible with basic due process of law; (2) the foreign court did not have personal jurisdiction over the defendant; (3) the foreign court did not have subject matter jurisdiction over the dispute; and (4) the foreign court judgment was penal in nature, rather than compensatory.

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In addition to those mandatory bases for non-recognition, there are a number of discretionary grounds for non-recognition of a foreign judgment, including: (1) the defendant did not receive sufficient notice of the foreign court proceedings in order to prepare a proper defense; (2) the foreign court was a seriously inconvenient forum for the defendant; (3) the judgment was obtained by extrinsic fraud; and (4) the questionable integrity of the court rendering the judgment in the specific case, as opposed to the country's overall judicial system.

Time Limits to Seek Recognition

There are time limitations for a winning party in the foreign court proceeding to file a recognition action in the US. In a state which operates under the 1962 Act, the prevailing party has the same length of time as that state's statute of limitations for the enforcement of a judgment. In states which have adopted the 2005 Act, the statute of limitations is the earlier of 15 years or the time during which the foreign judgment is effective in the country where it was issued.

non-recognition [of a foreign country judgment] on the ground that the New York court lacks personal jurisdiction over the judgment debtor”).

Enforcement of the Foreign Judgment

When a US court recognizes the foreign court judgment, it will issue its own judgment. That judgment carries the same strength and is as effective as every other US court judgment, and may be enforced throughout the US, and all US territories.

While judgment enforcement remedies vary somewhat from state to state, they generally fall within two categories. First, there are post-judgment discovery tools available to the judgment creditor in order to obtain information concerning the extent and location of the judgment debtor's assets. Second, there are rights and remedies available to the judgment creditor in order to collect on those assets in satisfaction of the judgment. For purposes of this Article, we will highlight the remedies afforded to judgment creditors under New York law. The rules in many other states are similar.

Post-Judgment Discovery Concerning the Judgment Debtor's Assets

Post judgment discovery (including document production, interrogatories and depositions) can be taken of the judgment debtor and also of any third party (within the jurisdiction of the New York courts) that may have information concerning the judgment debtor's assets. For example, if the foreign based judgment debtor (i) uses an accounting firm that has offices in New York, or (ii) is a client of a bank, investment banking firm or brokerage firm that has offices in New York, or (iii) does business with a company that has offices in New York, all of the aforementioned firms and companies can be subpoenaed by the judgment creditor to turn over all documents and information which they have concerning the extent and location of the judgment debtor's assets, and to be examined under oath concerning that information.

Execution on the Judgment

Once the judgment creditor has identified the location of its judgment debtor's assets, New York affords very broad remedies to execute on that judgment. Indeed, New York's highest court has observed that "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts."³

Judgment enforcement remedies under New York law include: (1) the issuance of restraining notices upon persons in possession of the judgment debtor's money or other property, without advance notice to the judgment debtor, to prevent the selling or transferring of such property until the judgment is satisfied; (2) ordering the judgment debtor to transfer its property to the judgment creditor; (3) ordering a third party in possession of the judgment debtor's assets to pay over or deliver those assets to the judgment creditor; (4) to the extent that third parties have debts to the judgment debtor, the court may direct that those debts will be "satisfied" through payment by those third-parties directly to the judgment creditor; and (5) the appointment of a Receiver to take possession of the judgment debtor's property, and then obtain the economic value of that property for turnover to the judgment creditor. Perhaps the most striking example

³ CIBC Mellon Trust Co. v. Mora Hotel Corp., 100 N.Y.2d 215, 221 (N.Y. 2003).

of the broad judgment remedies available under New York law is that a judgment creditor has the power to compel a foreign bank or other financial institution that has a branch office in New York to turn over the debtor's property that is physically located outside of New York and even outside of the U.S.⁴

A failure of the judgment debtor or any third party to comply with the foregoing judgment enforcement remedies constitutes a contempt of court, which can have adverse criminal and pecuniary ramifications on the contemptuous party.

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Drafting Tips

Set forth below are some suggestions concerning provisions that may be included by a lender in its foreign based loan transaction documents in order to maximize the effectiveness of the lender's access to, and utilization of, the US courts in aid of enforcing a foreign court judgment.

Have all parties (including guarantors) agree to submit to the personal jurisdiction of the New York courts, or other US jurisdiction of choice, for judgment recognition and enforcement purposes.

Specify that the US court presiding over the foreign country judgment recognition proceeding will also have jurisdiction to recognize the non-monetary aspects of the judgment.

Specify that the US court may, at its discretion, issue pre-judgment preliminary injunctions and temporary restraining orders to preserve the status quo during the pendency of the foreign judgment recognition litigation. (In New York, and in some other states, pre-judgment attachment is available to freeze the defendant's assets even absent such agreement).⁵

Specify whether (or not) an action seeking recognition of a foreign judgment can proceed during the course of the appellate proceedings in the foreign country where the judgment was rendered. Require the foreign based borrower and/or guarantor to keep a specified amount of funds on deposit with a bank within the jurisdiction where a foreign country judgment recognition action will be brought.

⁴ Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (N.Y. 2009). But see Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce, 21 N.Y.3d 55, 990 N.E.2d 114, 967 N.Y.S.2d 876 (N.Y. 2013) (Koehler does not permit attachment of judgment debtor's assets held by the New York bank's separately incorporated foreign affiliate).

⁵ See, e.g., Harvardsky Prumyslovny Holding, A.S.-V Likvidaci v. Kozeny, 117 A.D.3d 77, 983 N.Y.S.2d 240 (N.Y.A.D. 2014).

WHAT LENDERS NEED TO KNOW ABOUT ENFORCEMENT OF FOREIGN COUNTRY COURT JUDGMENTS
WITHIN THE US

Prohibit the transfer of the borrower's assets to any other entity -- even an affiliate -- without prior written consent of the lender.

Obtain the advance concession by the borrower and/or guarantor that any transfer in violation of the aforementioned provisions will be per se fraudulent as to the lender, and that such concession as to the fraudulent nature of transfer will be binding on the transferee.

Require the borrower and/or guarantor to provide regular periodic statements containing updated schedules of assets, and certifying that no transfers have been made in violation of the agreement.

Conclusion

International loan transactions between US lenders and foreign based borrowers continue to increase. An inevitable byproduct of cross-border loan transactions will be the need for US lenders to sue overseas in loan default situations. The utilization by lenders of the US courts in order to enforce foreign court judgments in their favor should serve to make cross-border loan transactions even more attractive to US and foreign lenders.

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