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## You Can Run But You Cannot Hide

A Primer of the Law of Cross Border Enforcement of Judgments and Asset Seizure

Chapter 1: BRAZIL / UNITED STATES (enforcing Brazil judgments in US Courts)

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The world is becoming a smaller place, and in no discipline is this truer than the field of transnational commerce. With the explosion of commercial activity beyond national boundaries, and the corresponding increase of the pace of the movement of people and assets, the topic of tracing and attaching debtor assets has gained in attention, importance and frequency. The expansion of global commerce has also sparked an increase in cross border litigation and the intersection of national laws. Disputes often occur, and when parties do not satisfy their debts, creditors must turn to the courts not only of their home country, but in locations where the debtor and/or his/her assets are located. Courts are more than ever facing the need to analyze processes and decisions of courts in other countries, and litigants are more than ever taking court judgments and seeking to apply them in other countries. A body of law on the cross border enforceability of judgments is

rapidly developing. This is important to understand, because even with a judgment against a debtor in the creditor's home country, the judgment is not of any value without the ability to collect on it. As a result, creditors today often face two phases of litigation – a first to obtain the legal judgment at home, and the second, to collect on it in a foreign venue.

The doctrines in use today on enforceability of foreign judgments have existed for some time. In 1895, the U.S. Supreme Court established the doctrine that still applies today, that foreign judgments “be given full credit and effect” in U.S. courts so long as “the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proof, and opportunity to defend against them.” *Hilton v. Guyot*, 159 U.S. 205-06 (1895). When it comes to seeking to enforce a foreign judgment in the United States, it is not the same in every state. In fact, no two states are alike. Domestication of foreign judgments (the process of recognizing the judgment in the U.S.) in the U.S. is not the same across all of the United States because there is no federal law that governs the enforcement of foreign country judgments. Both federal courts as well as state courts within a state, apply state law to the issue. But which state's law governs? Federal courts in diversity cases will apply choice of law rules to select the appropriate state law that governs the action to recognize and enforce the foreign money judgment.

The good news for creditors is that New York has historically been a favorable jurisdiction to creditors to recover ill gotten gains, or simply recovering assets that debtors have secreted into the U.S. And New York state courts are familiar with this process. As New York's highest court has repeatedly proclaimed: “New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts.” *CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V.*, 100 N.Y.2d 215 (2003). As is explained below, this has only grown stronger in recent years, with the Koehler decision and other creditor favorable precedents.

Faced with claims to domesticate foreign judgments (the process of enforcing a foreign money judgment in New York or other US courts is termed “domestication” or “recognition”), New York courts have historically followed the Uniform Foreign Country Money Judgments Act (UFCMJA), memorialized in Article 53 of the C.P.L.R. (New York Civil Procedure Law and Rules). In fact, most states in the United States have enacted some form of the UFCMJA, which makes a “foreign judgment enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.” Unif. Foreign Money-

Judgments Recog. Act, Section 3 & 4 (and cmt.)(1962)(UFMJRA). While there are a number of provisions and relevant court decisions on this topic, it is generally well accepted that a foreign judgment is enforceable in New York if it is **final and enforceable in the country that rendered it**.

There are essentially three critical elements in order to domesticate a foreign judgment in New York. The New York court will need to find that the foreign country judgment was rendered by a foreign court that 1) provided an impartial tribunal or procedures, 2) compatible with due process of law and that 3) the foreign court had personal jurisdiction over the defendant. Importantly, “finality” as referenced under the UFMJRA has been interpreted in a particular way in New York.

While a form of finality needs to be proven, “finality” of the foreign proceedings is perhaps the most misunderstood, and also most contested, element. “Final” has not been interpreted by New York courts as requiring that the appeals process be fully and finally completed or that all appeals be exhausted. C.P.L.R. Section 5306.<sup>1</sup> Rather, a judgment is enforceable even if an appeal in the Brazil’s Supreme Court is pending, or even if a debtor has not taken an appeal at all. What is necessary is that the debtor has had a sufficient opportunity to challenge the creditor’s legal claims, and that the claims have been properly and fairly litigated in the foreign court. In other words, that sufficient due process has been afforded.

If the foreign country judgment is from a country which is a signatory to the Hague Convention, then an “apostilled” copy of the judgment, properly executed under the Hague procedures, is sufficient proof of the foreign judgment. If the country is not a party to the Hague Convention, then the judgment must be authenticated through consular legalization.

Finally, supporting Affidavits by the foreign creditor (preferably an attorney in good standing and knowledgeable about the Brazil procedures) and its New York counsel, are necessary to support the domestication and recognition of the foreign judgment.

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<sup>1</sup> Although a New York court stay the proceedings until the appeal in the foreign jurisdiction is resolved.

## Defenses

The debtor can defeat the domestication process in New York if one of two circumstances exist. First, if the foreign judgment was the product of a system that did not provide for an impartial court or procedures compatible with due process; or second, (b) if the foreign court did not have personal jurisdiction over the defendant.

On the first point, due process, New York courts have repeatedly recognized that the procedures in courts in Brazil and the due process protections afforded are wholly sufficient. In a litany of cases, New York court have upheld Brazilian judgments, finding the court processes in Brazil civilian courts where commercial disputes are litigated of a very high level of sophistication.<sup>2</sup> It should also be noted that this first defense has otherwise been construed very narrowly by New York courts. This defense has only been successful in situations where the foreign country's system was seriously compromised and effectively and "generally incapable of providing a fair trial." *See e.g., Bridgeway v. Citibank*, 45 F. Supp2d. 276 (S.D.N.Y. 1999).

As to the defense of lack of personal jurisdiction, C.P.L.R. Section 5305 identifies six separate bases for finding personal jurisdiction, including:

1. The defendant was personally served in the foreign country;
2. The defendant voluntarily appeared in the proceedings;
3. The defendant agreed to submit to the foreign court's jurisdiction prior to the commencement of the proceedings against him;
4. The defendant was domiciled in the foreign state;
5. The defendant had a business office in the foreign state and the proceeding arose out of business being done by the defendant out of that office;
6. The defendant operated a motor vehicle or airplane in that country and the proceedings arose from that.

The creditor needs to prove only one of these bases exist. In addition, even if none of these bases applies, the New York court could still find personal jurisdiction present if there were sufficient contacts between the defendant and the

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<sup>2</sup> New York courts have found that the procedures in Liberia, Iran and Ecuador, were not sufficient.

foreign country. C.P.L.R. Section 5305(b). If either of these defenses are proven, they become “mandatory” defenses, meaning the court is required to dismiss the action.

However, even if neither of these defenses are available to the judgment debtor, New York courts have discretion to not recognize the foreign judgment, if one of six additional circumstances are present. In these cases, the court can, but is not required to, reject the foreign judgment. These include:

- A) The defendant did not have notice of the foreign proceeding;
- B) The foreign court did not have subject matter jurisdiction over the dispute;
- C) The judgment was the product of fraud upon the court;
- D) The foreign judgment is contrary to the public policy of New York;
- E) The judgment is in conflict with another final judgment on the same claim;
- F) The judgment was based on a defamation claim.

These are all rather self-explanatory. However, there has been considerable litigation over a couple of them in recent years, particularly item A-proper notice and service of process. There have been cases where courts have held that the defendant was not properly served under the Hague Convention, and then dismissed the case. *See e.g. Baker & McKenzie Zurich v. Frisone*, 2015 N.Y. Misc. Lexis 2037 (Sup. Ct., Nassau Cty., June 2, 2015). Thus, the notice question is an important one, that must be addressed fully in the Affidavit from the creditor’s local Brazil counsel supporting the motion for summary judgment in lieu of complaint.

If the debtor alleges one of these defenses, it will be the burden of creditor to establish that domestication is still proper, and does not offend traditional notions of fairness and public policy. In some of these situations, the creditor can fix the issue. In others, it cannot – (namely C, D and F. In A, B and E, the creditor can either go back and correct the mistake, or take measures and propose steps to correct them in the New York proceeding. It will be up to the Court. Thus, as no two cases are the same, there are no bright line rules here, unfortunately.

However, if the creditor is confident that none of these situations is present, it should feel very confident that the foreign judgment will be recognized and domesticated.

## Choosing the Jurisdiction

It is important to remember that a judgment creditor can seek to enforce the judgment in any jurisdiction where the judgment debtor's assets are located, since the courts of a state may properly exercise their jurisdiction over any property within that state. See *Shaffer v. Heitner* 433 U.S. 186, 210 (1977). The main consideration in choosing which state to bring an enforcement action depends upon the location of the defendant's assets. The creditor obviously must domesticate in a state where the creditor's assets are located. If multiple states are implicated, then strategy plays an important role. In most cases, it will make sense to first domesticate in New York –given the familiarity that the New York state courts have with this issue as well as the very favorable New York law on both process and domestication, as well as the legal tools available to creditors once a judgment is obtained. Once a New York judgment is achieved, it can then be submitted to the other, second state, for recognition. If the debtor has accounts in a bank that has a New York presence, the creditor can use the *Koehler* decision in many imaginative ways.

Importantly, as well, New York law has expanded in a very favorable creditor friendly way. In 2009, the New York Court of Appeals, New York's highest state court, issued an incredibly favorable decision for creditors. In *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009), the court held that federal and state courts in the state of New York could order banks subject to the state's jurisdiction to produce out of state assets owned by debtor/customers who have outstanding judgments against them, regardless of whether those assets are located in New York, or even within the United States. Thus, the presence in New York of a third party (the bank) holding a judgment debtor's assets can provide the hook to attach those assets even in they are otherwise outside the reach and jurisdiction of any U.S. court. In other words, a New York court may order a defendant to turn over out of state property even if the defendant is not the judgment debtor, but his garnishee. 12 N.Y.3d at 541. *Koehler* is still good law in New York, today, and provides a very strong tool in the creditor's arsenal.

Once the motion for summary judgment in lieu of complaint is filed, and it is filed upon the defendant debtor either by in person service or outside of the U.S. through the Hague process, one of two things happens. The defendant debtor appears, and litigates and challenges the case, or the judgment debtor ignores it. If the debtor contests it, he/she will only be able to defeat it if one of the three deficiencies described at length above exist. If the creditor proves by a

preponderance of the evidence that the judgment is good; it was properly served; there was adequate notice and an opportunity to be heard; and there was jurisdiction in the home country court, judgment enters for the creditor. Or, if the defendant does not appear, then default judgment enters for the creditor.

In either case, the creditor has a judgment that he/she can then use to identify, attach and foreclose on the debtor's assets. It is important to note that there are many tools in New York available to creditors with New York judgments- shell companies can be pierced; bank accounts frozen; and real property attached with *lis pendens*.

### The Process

The process in New York can also be expedited. Typically, the creditor files a motion for summary judgment in lieu of complaint pursuant to Section 3213 of the C.P.L.R. As set forth above, the motion is supported by an Affidavit from local counsel in the foreign jurisdiction, that explains fully the process that has occurred, describes the notice of the proceeding, the challenges the debtor has made, and the litigation process that has taken place through to conclusion in the foreign court(s). A memorandum of law, setting forth the legal principles and corresponding bases entitling the creditor to relief, is also attached. With respect to the foreign Affidavit, it is important that the Affiant be knowledgeable not only of the process that has taken place, but the procedures of the foreign court generally. The Affiant is typically the creditor's attorney, who is licensed, admitted and in good standing in the bar of the foreign jurisdiction. The motion is also supported by an Affidavit from the creditor's local New York counsel, attesting to the process, confirming the affidavit from the Brazilian counsel, and supporting the creditor's domestication efforts.

### Service

Once the motion is filed, it must be properly served on the debtor. Proper service of the motion on the defendant debtor is critical, to initiate the action. It is important to note that it is not required that the defendant debtor reside in New York. There are a number of ways to effect service, and New York recognizes Hague procedures for out of country defendant debtors. As in any case, and as noted above, service on the defendant is required to be made consistent with the C.P.L.R. requirements, or if the defendant is not present within the United States, consistent with the Hague Convention. See e.g., Imax Corp. v. E-City

Entertainment (I) Pvt. Ltd., 2014 N.Y. Slip Op. 3170 (Sup. Ct. N.Y. July 2014). For practical purposes, it is important to understand that service must be made within 120 days of filing the motion, under New York procedures. Thus, timing of the filing should be considered in light of the level of confidence that the creditor has concerning knowledge of the debtor's whereabouts.

Importantly, it is not necessary for a New York court to have personal jurisdiction over the defendant. *See Abu Dhabi Comm Bank PJSC v. Saad Trading*, 986 N.Y.S.2d 454 (1<sup>st</sup> Dept. 2014). Additionally, it is not necessary for the defendant to have assets in New York when a judgment enforcement proceeding is commenced, as a creditor is able to stake his claim in anticipation of assets being identified in the jurisdiction. *Id.* These factors make New York a very attractive venue to bring a domestication action. In a number of U.S. states, this is not the law.

### Domestication

Once the foreign judgment is recognized by the New York Court, a foreign money judgment is treated as if it were a New York judgment. As such, a foreign creditor with a domesticated judgment can utilize New York's post judgment discovery and very favorable judgment enforcement procedures. With a judgment, the foreign plaintiff can issue subpoenas in New York to identify ownership interests – including upon area banks, shell corporations, other commercial enterprises. The foreign creditor can also attach assets, filing attachments on real properties owned by the defendant.

### Special Case of Default Judgments

A default judgment in Brazil is still able to be domesticated in New York. However, there are additional burdens and hurdles to overcome. As an initial matter, it will become a critical issue of fact whether the creditor properly served the defendant debtor in the foreign case. The creditor seeking to enforce the default judgment will also need to prove that the original court had jurisdiction to hear the case, and third, that recognizing the judgment would not violate "public policy." A default judgment will be more challenging, but there are cases upholding recognition of default judgments in the home country if proper service was effected, notice of the action was sufficiently made, and enforcement would not be unjust. This latter element turns on the facts of a particular case.



In all, it is a good time to be a creditor in New York seeking to enforce a money judgment from a country with strong legal systems, against a debtor with assets in the United States, or even outside the U.S. if a bank in New York holds that defendant's account. There are a myriad of available avenues, and numerous procedures that can be applied, to assist creditors pursuing their claims against home country debtors.

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