

## **How to make sure your US judgment can be enforced abroad**

*~ Nadja Vietz ~*

My law firm is frequently contacted by US lawyers with judgments they are seeking to enforce overseas. The lawyer is seeking our assistance to enforce its US court judgment against a foreign company that did business with the lawyer's US-based client. The procedural history is nearly always the same. The litigator served the defendant and, several months and many dollars later, he or she now has a US judgment. When the foreign company refuses to pay even pennies on the dollar on the judgment, the litigator realizes the judgment will need to be taken overseas for enforcement. Only then (and usually not until we relay this information) does the litigator realize very few countries will enforce US judgments. To have a chance at collection, the case often must be tried anew, only this time in a far less sympathetic forum.

These nightmares are far too common and their genesis is usually a contract that either calls for US litigation or is completely silent on jurisdiction. The wise business/lawyer has an arbitration provision, but unfortunately many contracts fail to contain this key element. I set forth below some suggestions for avoiding this nightmare, emphasizing European, particularly, German legislation.<sup>1</sup>

### **Recognition of US judgments under foreign local law**

The United States is not a party to any bilateral treaties or multilateral international conventions governing reciprocal recognition and enforcement of foreign judgments. The reasons for the absence of such agreements seem to be that foreign countries perceive US courts (particularly US juries) as granting excessive awards (particularly in tort cases and particularly with respect to punitive damage awards) and as too often asserting extraterritorial jurisdiction and disregarding international law. Absent a treaty, the question as to whether the courts of a foreign country will enforce a US judgment is governed by the local rules of the foreign country and by international comity.<sup>2</sup>

Generally, US judgments cannot be enforced in a foreign country without first being recognized by a court in that foreign country. The recognition and enforcement of US judgments depends not only on the domestic law of the foreign country, but also on the principles of comity, reciprocity and res judicata.<sup>3</sup> Foreign courts generally do not recognize US money judgments unless: (1) the US court had jurisdiction; (2) the defendant was properly served; (3) the proceedings were not vitiated by fraud; and (4) the

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<sup>2</sup> In Germany, the recognition and enforcement of foreign judgments is governed by special provisions of the German Code of Civil Procedure (Zivilprozessordnung or ZPO). ZPO Section 328 deals with recognition in general, while sections 722 and 723 regulate the procedure for enforcing foreign judgments.

<sup>3</sup> Some countries, such as China and Russia generally do not enforce US judgments under any circumstances.

judgment is not contrary to the public policy of the foreign country.<sup>4</sup> Most European countries have similar code provisions, setting forth something along the lines of these four rules, but enforceability of US judgments still varies widely from country to country even within Europe. Some countries tend to enforce US judgments and some countries virtually never do. It can generally be said that non-default judgments not involving tort claims or punitive damages are more likely to be enforced.

Enforcement problems in Europe usually arise when the US court lacked jurisdiction, when the defendant was not properly served, or when there are public policy concerns.

### **US Court Jurisdiction**

European courts will not recognize US judgments if the US court lacked jurisdiction. Special attention needs to be paid to the fact that for purposes of recognizing foreign judgments, jurisdiction must be *determined by the law of the European country*, not by US law. For instance, under the so-called “mirror-image principle,” German law projects its own jurisdictional rules on the foreign court, which is then treated as having international jurisdiction if a German court would have had jurisdiction had the situation been reversed.<sup>5</sup>

Under The Hague Choice of Court Convention, concluded in June 2005, signatories would recognize and enforce the judgments of other signatory countries when those judgments follow valid “choice of court agreements.”<sup>6</sup> This convention would enforce choice of court provisions and resulting judgments, much as the New York Convention does with arbitration clauses and subsequent arbitral awards.<sup>7</sup> The Convention, however, will not go into effect until at least two countries have ratified it. Thus far only Mexico has done so.<sup>8</sup>

### **Proper Service**

European courts also frequently deny enforcement of US judgments because of improper service of process. The defendant cannot assert this defense in the European court if it in any way engaged in the US lawsuit. Consequently, this issue usually arises when trying to enforce a default judgment. Proper service usually requires service to have been in accordance with the laws of the European country, and, in most instances, pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of November 15, 1965 as well.<sup>9</sup>

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<sup>4</sup> German codes also require (1) that the judgment be *res judicata*; (2) that no conflicting judgment exists; (3) that no prior proceeding have been instituted; and (4) that reciprocity exists. (ZPO Section 318)

<sup>5</sup> Similar rules exist in the laws of Switzerland and other European countries.

<sup>6</sup> The full text of this Convention is available on The Hague Conference’s website at [www.hcch.nl](http://www.hcch.nl).

<sup>7</sup> 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards

<sup>8</sup> Mexico ratified on September 26, 2007. The European Union is starting to look at ratification process. Ratification in the US might take years until implementation issues – including how to make state laws compatible with the convention – are resolved.

<sup>9</sup> A list of all signatory countries with objections and reservations can be found here [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=17](http://www.hcch.net/index_en.php?act=conventions.status&cid=17).

Article 2 of the Hague Convention calls on each country to designate a central authority to receive service requests from other countries. Article 5 provides that the central authority shall itself render service or have the document served by an appropriate agency pursuant to the country's own service of process laws or by a particular method requested by the applicant.<sup>10</sup>

It is essential to serve the right person with authority to accept such service, but it is equally important to provide the defendant with a translation of the complaint and summons.<sup>11</sup> Failing to translate the court documents would in most Hague Convention signatory countries preclude a finding of proper service, even where a defendant had ample notice of the lawsuit.<sup>12</sup> We see this requirement neglected at least as often as it is followed.

### **Public policy**

European countries will not recognize foreign judgments where doing so cannot be reconciled with their own laws. Enforceability will be denied if major principles such as the violation of fundamental rights or fundamental principles of local civil procedure or the like were disregarded by the foreign court that granted the judgment.

Since punitive and treble damage awards are generally regarded as excessive and contrary to the public policy of most European countries, these almost always should be removed from the US judgment before taking it to Europe for recognition and enforcement. Our experience is that the US federal courts are quite willing to give a new judgment with these damages removed, so as to make their judgment more likely to be enforced overseas.

### **Conclusion**

Getting US judgments recognized and enforced in European courts is possible, but only if the US litigation is handled from its inception with an eye towards European enforceability. Before filing suit here in the United States, it is critical to know the requirements for judgment recognition in the particular European country in which the judgment will eventually need to be recognized and enforced.

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<sup>10</sup> Some signatories signed the Hague Convention with reservations or objections. For instance, Germany expressly reserved its right to preclude service of process by mail, and only accepts service made through its central authority or by personal service, if agreed to by the defendant. However, there has been recent German case law holding that a defendant's actual notice in sufficient time to defend can remedy improper service, as long as service was proper under US law.

<sup>11</sup> See Article 5, paragraph 3 of the Hague Convention.

<sup>12</sup> Germany expressly reserved the right to require all papers served on its citizens be translated into German and the German Supreme Court recently confirmed that proper service must include such a translation.

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