



RECOGNITION AND ENFORCEMENT OF JUDGMENTS

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Recognition and Enforcement Generally

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

United States

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RECOGNITION GENERALLY, ENFORCEMENT DISTINGUISHED – U.S.

Before a judgment can be enforced in a given jurisdiction, it must first be "recognized." Although the terms are often used interchangeably, recognition and enforcement are different concepts.

- "**Recognition**" of a foreign judgment occurs when the court of one country or jurisdiction accepts a decision made by the courts of another "foreign" country or jurisdiction, and issues a judgment in substantially identical terms without rehearing the substance of the original lawsuit. Recognition means treating the claim as having been determined in favor of one of the litigating parties and is an acknowledgment of foreign competence and of the settling of a dispute.
- "**Enforcement**," by contrast, is the implementation of the judgment or award. It occurs when a court, upon request of a prevailing party, requires the losing party to satisfy the judgment or award.

CERTAIN TERMINOLOGY – U.S.

- In this presentation, the term "**foreign-country judgments**" refers to a judgment rendered by a court outside of the United States.
- The term "**sister-state judgment**" refers to a judgment rendered by a U.S. court that is subject to mandatory recognition under the Full Faith and Credit Clause of the U.S. Constitution.
- Note that state statutes often use the term "foreign judgment" to refer to a sister-state judgment, not a foreign-country judgment



RECOGNITION OF US FEDERAL AND SISTER-STATE JUDGMENTS – U.S.

- Once a creditor has obtained a money judgment issued by a court of competent jurisdiction within the United States, that judgment may readily be enforced throughout the rest of the United States.
- Specifically, a state court judgment will be recognized and is enforceable throughout the United States by resort to the courts of other states, and a federal court judgment will be recognized and is enforceable throughout the United States by resort to both the federal and state courts



RECOGNITION OF SISTER-STATE JUDGMENT BY A STATE COURT – U.S.

- When a judgment creditor wishes to enforce a state-court judgment in a different state court, then the judgment debtor may convert the judgment into a judgment of the other state.
- Article IV, Section 1, of the U.S. Constitution requires each state to give "full faith and credit" to the official acts and judgments of every other state.
- The states have given effect to that requirement by providing a mechanism through which a judgment of one state can be converted into a judgment of another state.
- Most states have adopted uniform legislation (the **Revised Uniform Enforcement of Foreign Judgments Act of 1964**) that provides a simple procedure for the conversion of money-judgments. (For example, New York codified this uniform legislation in Article 54 of the NY CPLR.)
- Under the Revised Uniform Enforcement of Foreign Judgments Act (or by a functionally equivalent procedure), a state court judgment may ordinarily effectively be converted into the judgment of a sister-state court.

RECOGNITION OF FEDERAL JUDGMENT BY A STATE COURT – U.S.

- When a judgment creditor wishes to enforce a U.S. federal court judgment in a different state, it may ordinarily effectively convert such federal judgment into a judgment of the other state. It may do so under the **Uniform Enforcement of Foreign Judgments Act** adopted by most U.S. states (or by a functionally equivalent procedure).



RECOGNITION OF FEDERAL JUDGMENT BY ANOTHER FEDERAL COURT – U.S.

- Under the **federal judgment registration statute (28 U.S.C. § 1963)**, if a U.S. federal court judgment is final by appeal or the expiration of the time for appeal, the judgment creditor may register the judgment in any other federal district court simply by filing a certified copy of the judgment and paying a nominal fee. The registered judgment has the effect of (and is enforceable to the same extent as) a judgment originally rendered by the court in which it is registered.
- If a federal judgment remains subject to appeal (but where execution has not been stayed pending the appeal because the judgment debtor has not posted security for a stay pursuant to the Federal Rules of Civil Procedure) the judgment may be registered (and then enforced) in other federal district courts "for good cause shown."
- Generally, "good cause" exists where it is shown that the judgment debtor has insufficient assets in the rendering jurisdiction to satisfy the judgment, but substantial assets reachable through proceedings in the other district or districts in which the registration is sought.

RECOGNITION OF STATE COURT JUDGMENT BY FEDERAL COURT – U.S.

- There are no general provisions by which a judgment of a court of one of the states may be enforced in the federal courts. This is a consequence of the limited jurisdiction of the U.S. federal courts.



RECOGNITION OF FOREIGN-COUNTRY JUDGMENTS – U.S.

- In the United States, foreign-country judgments are recognized by courts according to general principles of **international comity** and specific standards developed in the **common law** of the individual constituent states and territories of the United States, and, where adopted, according to one of two uniform statutes governing the recognition of foreign money-judgments (the **Uniform Foreign Money-Judgments Recognition Act of 1962** and the **Uniform Foreign-Country Money Judgments Recognition Act of 2005**).

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RECOGNITION OF FOREIGN-COUNTRY JUDGMENTS BY FEDERAL COURT – U.S.

- Recognition of a foreign-country judgment by a US federal court is governed by state law.
- There is no generally-applicable federal statute for the recognition of foreign-country judgments.
- The federal court will apply the law of the state in which it sits.

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RECOGNITION OF FOREIGN-COUNTRY JUDGMENTS – U.S.

- Most states have adopted one of the two uniform acts addressing recognition of foreign-country judgments created by the National Conference of Commissioners on the Uniform State Laws (NCCUSL).
 - The **Uniform Foreign Money-Judgments Recognition Act of 1962** is often abbreviated as UFMJRA but will be referred to here as the "**1962 Recognition Act**".
 - The **Uniform Foreign-Country Money Judgments Recognition Act of 2005** made important revisions to the 1962 version. This act is often abbreviated UFCMJRA but will be referred to here as the "**2005 Recognition Act**".
- Both versions (referred to collectively as the "**Recognition Acts**"), in large part, codify principles of international comity, which were recognized by the US Supreme Court in ***Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895)**.

RECOGNITION OF FOREIGN-COUNTRY JUDGMENTS UNDER STATE LAW – U.S.

- The Recognition Acts have been adopted by 33 states, with 13 states (and the U.S. Virgin Islands) adopting the 1962 Recognition Act, and 20 states (and the District of Columbia) adopting the recently revamped version, the 2005 Recognition Act. (For example, New York adopted a form of the 1962 Recognition Act, codified with modifications in Article 53 of the NY CPLR.)
- The 17 states not adopting either of these acts generally apply **common-law principles and sections 481 and 482 of the Restatement (Third) of Foreign Relations Law (1987) (Restatement (Foreign Law))**.
- Both the Recognition Acts, as well as the common-law rules set forth in the Restatement (Foreign Law), enshrine the comity principles recognized by the Supreme Court in *Hilton*.
- As a result, while there are three discrete bodies of law governing recognition in the United States, each of those bodies of law derives from the same basic source.

REQUIREMENTS OF RECOGNITION UNDER THE COMMON LAW – U.S.

- As the Recognition Acts draw from common law principles (and as some states have not adopted one of the Recognition Acts and continue to rely on such principles), this presentation starts with a discussion of the common law principles, which in turn are described in **Sections 481 and 482 of the American Law Institute's Restatement (Third) of Foreign Relations Law.**

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REQUIREMENTS OF RECOGNITION UNDER THE COMMON LAW – U.S.

- **Section 481(1)** of the Restatement (Foreign Law) provides the following guidance on which foreign-country judgments may be recognized:
 - (1) Except as provided in § 482, a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.
- **Section 482** sets forth the mandatory and discretionary defenses to recognition of a foreign-country judgment.
 - (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
 - (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
 - (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.

REQUIREMENTS OF RECOGNITION UNDER THE COMMON LAW – U.S.

- **Section 482** (cont.)
 - (2) A court in the United States need not recognize a judgment of the court of a foreign state if:
 - (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
 - (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
 - (c) the judgment was obtained by fraud;
 - (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;
 - (e) the judgment conflicts with another final judgment that is entitled to recognition; or
 - (f) the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

REQUIREMENTS OF RECOGNITION UNDER THE COMMON LAW – U.S.

- In terms of procedure, under the Restatement (Foreign Law), recognition proceedings must be initiated by a **civil action** and the court must have **jurisdiction over the judgment debtor or his or her property**.
- Under **section 481(2) of the Restatement (Foreign Law)**, a foreign-country judgment that is entitled to recognition may be enforced "in accordance with the procedures for enforcement of judgements applicable where enforcement is sought."



REQUIREMENTS FOR RECOGNITION UNDER THE RECOGNITION ACTS – U.S.

- Adoption of the **1962 Recognition Act** marked the first attempt to codify the comity concepts that were recognized in Hilton and refined over time in the Restatement (Foreign Law).
- That act, and the **2005 Recognition Act** that has supplanted it in several states, define the judgments to which they apply and create a presumption that such judgments will be entitled to recognition.
- The acts set forth a series of defenses to recognition—some mandatory, some left to the discretion of the court—that, if established, require or permit the court to refuse to recognize the judgment.



APPLICABILITY OF THE RECOGNITION ACTS – U.S.

- The first key concept in any discussion of the Recognition Acts is the definition of a **covered judgment**. Though structured a bit differently, the Recognition Acts' elements are similar.
- The **1962 Recognition Act** "applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal there from is pending or it is subject to appeal." Under section 3, a judgment is "conclusive between the parties to the extent that it grants or denies recovery of a sum of money."
- The **2005 Recognition Act** "applies to a foreign-country judgment to the extent that the judgment: (1) grants or denies recovery of a sum of money; and (2) under the law of the foreign country where rendered, is final, conclusive, and enforceable."

APPLICABILITY OF THE RECOGNITION ACTS – U.S.

- As is clear from this language, each of the Recognition Acts applies to a "**final**" judgment that "grants or denies recovery of a sum of money in a civil case." In order to be "final," the judgment must be **final, conclusive, and enforceable** under the law of the foreign country where rendered.
- In the 2005 Recognition Act, NCCUSL explained the elements of finality, conclusiveness, and enforceability as "distinct," but "interrelated concepts".
 - A judgment is **final** when it is not subject to additional proceedings in the rendering court other than execution.
 - A judgment is **conclusive** when it is given effect between the parties as a determination of their legal rights and obligations.
 - A judgment is **enforceable** when the legal procedures of the state to ensure that the judgment debtor complies with the judgment are available to the judgment creditor to assist in collection of the judgment.
- This explanation clarified similar language from the 1962 Recognition Act.

APPLICABILITY OF THE RECOGNITION ACTS – U.S.

- In addition to being final and conclusive, the judgment must **award a sum of money in a civil case**. The principal exception to the acts' coverage in this respect is that they do not apply where the judgment is for taxes, a fine or other penalty, or a judgment regarding domestic relations.



APPLICABILITY OF THE RECOGNITION ACTS – U.S.

- Generally, each of the elements of a recognizable judgment are required and should be pled by the judgment creditor. A complaint for this cause of action³⁸ is relatively simple and generally requires only the following elements:
 - briefly allege the facts leading to the foreign-country judgment;
 - attach the foreign-country judgment as an exhibit to the complaint;³⁹
 - allege that the judgment (a) was rendered after proper service of process, (b) by a court of competent jurisdiction, and (c) is unsatisfied;
 - in a jurisdiction having adopted one of the Recognition Acts, note that the judgment falls within the scope of the Recognition Act, meaning that it is a money judgment that is final, conclusive, and enforceable where rendered; (continued)
 - at the very least, note that none of the defenses to recognition apply; and
 - pray for an order declaring the foreign-country judgment is conclusive between the judgment debtor and creditor and entitled to recognition and enforcement.

GROUNDS FOR NON-RECOGNITION UNDER THE RECOGNITION ACTS – U.S.

- As noted above, each of the Recognition Acts provide that foreign-country judgments are presumptively recognizable unless the judgment debtor can establish that one of the defenses to recognition is satisfied. Thus, once the judgment creditor has demonstrated prima facie that the judgment is subject to recognition, it will be recognized unless the judgment debtor can establish that one of the grounds for nonrecognition applies.
- The Recognition Acts include a number of defenses to the recognition of foreign-country judgments. Some of the defenses are mandatory, meaning the judgment cannot be recognized if the elements of the defense are established; other defenses are within the court's discretion.



ENFORCEMENT OF JUDGMENTS – U.S.

- **State Court Actions:** In the United States, each state has its own unique laws providing the enforcement remedies that are available. Although the state laws are not uniform, this presentation provides a general overview of a number of those remedies below.
- **Federal Court Actions:** If enforcement is sought in a US federal court, the law of the state where the federal court sits generally governs. Specifically, **Federal Rule of Civil Procedure 69(a)(1)** provides: "A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies."

OVERVIEW OF COMMONLY-AVAILABLE ENFORCEMENT REMEDIES – U.S.

- Judgment Lien
- Execution and Garnishment
- Restraining Notice of Order
- Turnover Order
- Receivership

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JUDGMENT LIEN – U.S.

- In many states, a valid and final judgment results in a "**judgment lien**" that attaches to the judgment debtor's non-exempt real property (and in a handful of states, in the judgment debtor's personal property after compliance with certain procedures). The judgment lien confers the right of the creditor to "levy" against the property. That is, it allows the plaintiff-creditor the ability to go to court and seek approval to foreclose on the debtor's real property.
- Typically, only real property that is located within the county where the judgment was rendered is included within the judgment lien. To acquire liens in other counties, the judgment-creditor typically must docket or record the judgment there.
- States vary as to when precisely the lien attaches (e.g., whether it occurs upon the (i) rendering; (ii) docketing; or (iii) recording of the judgment) and what should be done in order to perfect such lien).
- There are also a number of complex issues that can arise concerning, for example, the type of interest in property that is subject to the judgment lien, property that is co-owned, property that is acquired after the judgment has been rendered, priority of competing liens, and so forth.

EXECUTION – U.S.

- In addition to foreclosing upon a judgment lien in the debtor's real property, another common enforcement mechanism is "**execution.**"
- A court will issue a "**writ of execution**" that will direct the sheriff or similar court officer to "**levy**" on defendant's real or personal property within the territorial jurisdiction of the court and to sell such property for the purpose of satisfying the judgment obtained. With respect to personal property, levy usually takes the form of the sheriff actually seizing the property and taking it into his possession. With respect to real property, the levy involves the officer filing the appropriate public notice, typically with the county clerk in the deed records for the county where the land is located. The writ of execution will often simply identify a maximum amount that the sheriff should levy (as opposed to specific property for execution). In practice, the judgment-creditor will provide the sheriff with a description of the debtor's property for execution.
- The levy creates a form of judicial lien called an "**execution lien,**" which enables the judgment creditor to obtain liquidation of the subject property and provides the judgment creditor with a priority in the property vis-a-vis other claimants.
- The final step in the execution process involves a **sale** of the property levied upon.

GARNISHMENT – U.S.

- "**Post-judgment garnishment**" is essentially execution against defendant's property that is in the possession of third parties (a "garnishee") as well as debts owed to the debtor by those third-parties. Indeed, in many states, "garnishment" is merely a process in aid of execution (or in aid of pre-judgment attachment; see article titled "Pre-Judgment Judicial Remedies (United States)"). In other states, garnishment is a separate remedy, independent of execution (or attachment), and may require a separate proceeding against the third-party garnishee.
- For garnishment, a court will issue a "**writ of garnishment**" that will typically order the sheriff or other judicial officer to serve a summons or notice of garnishment on the third party garnishee who holds the property of the defendant or owes a debt to the defendant. The garnishee will then be required to answer the garnishment within a stated period, and identify the assets or debts that it holds for or owes to the debtor. It will also be required to hold the property until the court determines who ultimately is entitled to it.
- In most states, a garnishment creates a judicial lien on the indebtedness or tangible property subject to garnishment. As with execution, the lien provides the plaintiff with the legal ability to foreclose on the assets subject to garnishment. It also provides a priority as to other parties (the priority date accorded to the lien varies by state).

GROUNDS FOR EXECUTION/GARNISHMENT – U.S.

- The grounds for the issuance of the writ of execution are relatively simple.
- There must be a valid, final, unsatisfied money judgment rendered against the debtor, and the motion and affidavit of the creditor must so indicate.
- To be executable, the judgment must be valid in the sense that it is not barred by the statute of limitations, stayed pending appeal or further proceedings, or dormant.



PROPERTY SUBJECT TO EXECUTION/GARNISHMENT – U.S.

- Generally, unless exempt by statute, **all property** (whether tangible or intangible, personal property or real estate) in which the debtor has an interest (whether legal or equitable) may be subject to execution or garnishment. This generally includes all forms of personal property and realty in which the debtor has an interest, but local law dictates. Only the defendant's interest in the property is attachable or subject to garnishment.
- Examples might include real estate, fixtures, goods, money, bank and brokerage accounts, corporate stock, and so forth.
- Garnishment reaches debts owed to the debtor (e.g., wages, salaries and commissions). In addition, garnishment may reach property that comes into the possession of the garnishee after the service of the notice of garnishment, but whether it does so varies by state.

PROCEDURAL REQUIREMENTS – U.S.

- The statutes typically require the judgment creditor to submit a motion and supporting affidavit. The affidavit must establish the existence of an unsatisfied judgment. Unless a statute otherwise provides, the writ of execution is issued by the clerk of the court where the judgment is entered and is directed to the sheriff of the county where the assets of the debtor are located.
- The rules concerning the procedure for the actual execution sale and who shares in the sale proceeds vary widely by state and should be consulted.
- Generally speaking, the property sold in an execution sale is sold subject to senior liens, which continue in the asset after the sale. Junior lenders may receive proceeds, because their liens are extinguished.

RESTRAINING NOTICE OR ORDER – U.S.

- Another tool that may be available to a judgment creditor is a **judicial restraining or freezing order** that prohibits the transfer of any property in which the judgment debtor has an interest, with disobedience being punishable as a contempt of court.



NEW YORK'S RESTRAINING NOTICE – U.S.

- New York has a particularly powerful tool called a "**restraining notice**." Under **NY CPLR 5222**, an attorney for the judgment creditor may issue a notice on the judgment debtor or a garnishee, which enjoins the person from transferring the defendant's property (except to the sheriff or pursuant to a court order). It is effectively a temporary injunction, and acts as such under the signature of the lawyer without need for a court order or any other preliminary leave. Disobedience of a restraining notice is punishable as a contempt of court.
- If the judgment creditor has any indication about who may have possession of some of the debtor's property, the restraining notice is a good thing to serve promptly, after the entry of judgment, on any such persons.
- It acts as a kind of freeze on such of the debtor's assets as the served person may have, during which the judgment creditor can use other devices, such as an execution, to try to have the property turned over. It may be served on any garnishee, with the exception of the judgment debtor's employer, but special restrictions apply when the notice attempts to reach the exempt contents of the judgment debtor's bank account.

NEW YORK'S RESTRAINING NOTICE – U.S.

- A restraining notice served on a garnishee is effective only if, when served, the garnishee owes a debt to or has property belonging to the judgment debtor.
- If the garnishee has such debt or property at that moment, the restraint will apply to that property as well as to all other property "thereafter coming into" the garnishee's possession. (Note that if the garnishee does not possess any such property or obligation at the moment of service, the restraint never takes effect at all.)
- The restraint precludes the garnishee from selling, assigning, transferring, or otherwise disposing of the obligation or property to anyone but the sheriff, unless the sheriff or court directs otherwise.



OTHER FORMS OF RESTRAINING ORDERS – U.S.

- In other states, a creditor may be able to obtain a restraining order similar to a restraining notice through the court. Such relief may be available expressly under state statute or rule. Or such relief may derive from the court's power to injunctive relief (e.g., under Federal Rule of Civil Procedure 65, in a federal case), in the event legal remedies at law (such as execution) are not available.
- The grounds for obtaining such an injunction are essentially the same as those for obtaining a preliminary injunction generally. Accordingly, the court will consider:(1) the likelihood of success on the merits; (2) whether the plaintiff will suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of an injunction.
- In the context of post-judgment proceedings, courts have held that a judgment creditor seeking an injunction against a judgment debtor to prevent it from transferring or dissipating its assets shows a "likelihood of success on the merits" if the assets in question belong to the defendant and are subject to the court's judgment.

TURNOVER ORDER – U.S.

- Another tool available is the "**turnover order**" (which may also be known as a "**delivery order**" or "**payment order**"). A turnover order is basically a court order that requires the judgment debtor or third party to turn over the judgment debtor's property to the judgment creditor. It is useful when the debtor's property is not otherwise obtainable through execution or garnishment (for example, if the sheriff is unable to reach the property because it is in debtor's house).
- For example, in New York, under **NY CPLR 5225(a)**, where it is shown that a judgment debtor is in possession of money or other personal property in which he has an interest, the judgment creditor may obtain a court order requiring the judgment debtor to pay such money or deliver such personal property to the judgment creditor. Under **NY CPLR 5225(b)**, a judgment creditor may obtain similar such relief against a third party in possession of money or other personal property in which the judgment debtor has an interest by bringing a special proceeding against such third party. And under NY CPLR 5227, a judgment creditor may obtain order requiring a third party that is indebted to the judgment debtor to pay the judgment creditor the debt upon maturity, or it may direct that a judgment be entered against such person in favor of the judgment creditor.

TURNOVER ORDER – U.S.

- Turnover orders are particularly powerful as they are "**in personam**" and therefore potentially reach property located outside the jurisdiction of the court.



RECEIVERSHIP – U.S.

- A receivership is an equitable and legal remedy where a court appoints a disinterested person during the pendency of litigation to represent and protect the interests of all person in particular property, fund or entity, usually by taking possession or control over the property, fund or entity.
- Appointment of receivership is a harsh remedy that provides the creditors with tremendous leverage over the debtor. Appointment of a receiver is a matter of discretion with the court.

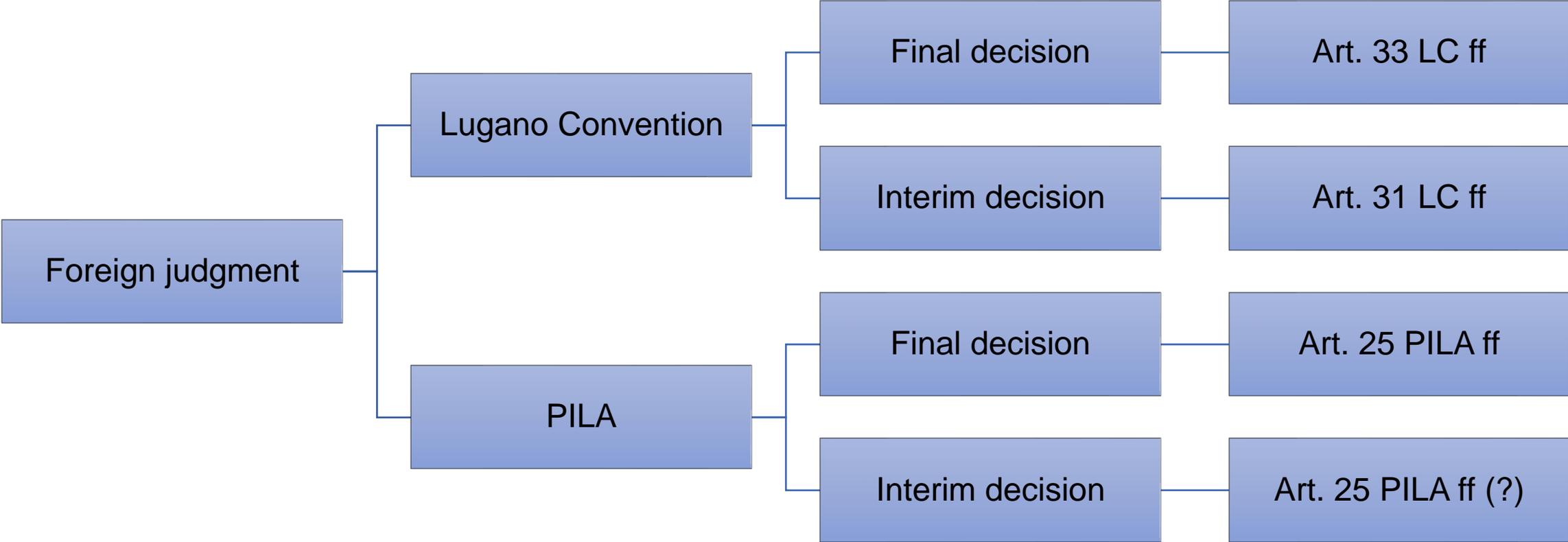


RECOGNITION AND ENFORCEMENT OF JUDGMENTS

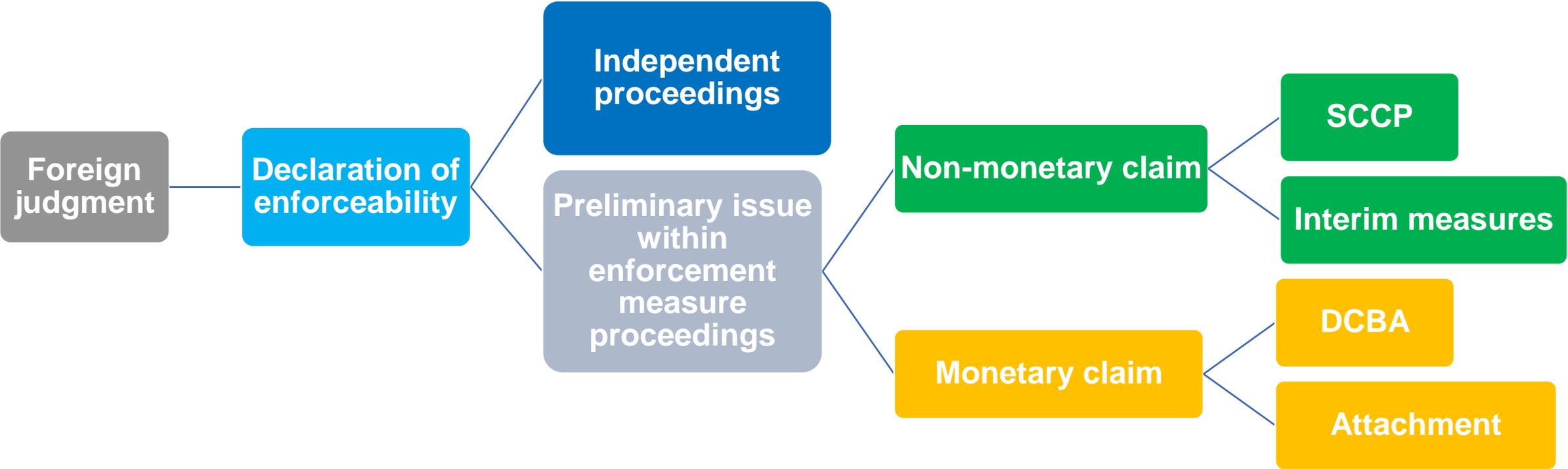
Switzerland

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JUDGMENT RECOGNITION & ENFORCEMENT – Switzerland



JUDGMENT RECOGNITION & ENFORCEMENT – Switzerland



JUDGMENT RECOGNITION & ENFORCEMENT – Switzerland

Art. 25 PILA: A foreign judgment is recognized/enforced in Switzerland if:

- a. the judicial or administrative authorities of the state where the decision was rendered **had jurisdiction**; (= indirect jurisdiction)
- b. the decision is **no longer subject to any ordinary appeal** or if it is a **final** decision; and
- c. if there is **no ground for denial** under Article 27.

JUDGMENT RECOGNITION & ENFORCEMENT – Switzerland

Art. 27 PILA Grounds for non-recognition of a judgment:

- manifestly incompatible with **Swiss public policy**
- that it did not receive **proper notice** under either the law of its domicile or that of its habitual residence, unless the party proceeded on the merits without reservation
- that the decision was rendered in **violation of fundamental principles of Swiss procedural law**, including the fact that the party concerned was denied the right to be heard
- that a dispute between the **same parties and with respect to the same subject matter** has been initiated in Switzerland first or has already been decided there, or that such dispute has **previously been decided** in a third state, provided the latter decision fulfils the requirements for recognition in Switzerland

Recognition and Enforcement of Judgments

Brazil

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JUDGMENT RECOGNITION – Brazil

- Legal framework:
 - Federal Statutory Provisions (Art. 961 of the BCCP; Art. 15 of Decree-Law No. 4657/42; Arts. 34-40 of the BAA)
 - Treaty Provisions (e.g. New York Convention of 1958); and
 - Internal Rules of the STJ (Amendment 18 of 2014)
- The STJ only issues a *writ of enforcement* after the recognition decision becomes *res judicata*

ENFORCEMENT PROCEDURES – Brazil

- A foreign award must be recognized by the STJ to produce legal effects
- Creditor may then commence enforcement proceedings before a Federal Court at the trial level (Art. 515, BCCP)
- Enforcement judge is responsible for
 - issuing all decisions (from an order of service of process to expropriation measures)
 - having jurisdiction to decide any challenges that may be raised by the defendant
- Enforcement judge will have the support from officers of the court and bailiffs, and even from court-appointed experts

ENFORCEMENT PROCEDURES – Brazil

- **Art. 216-D:** A foreign judgment is recognized/ enforced if:
 - I - such judgment is rendered by a competent court and is obtained in compliance with the legal requirements of the jurisdiction of the court rendering such judgment
 - II - proper service of process on the parties is made, or after sufficient evidence of the parties' absence has been given, as established pursuant to applicable law
 - III – such judgment is final and binding and, therefore, not subject to any appeal in the jurisdiction where rendered
- **Art. 216-F:** A foreign judgment is **not** recognized/ enforced if:
 - such judgment violates Brazilian national sovereignty, good morals, public policy or human dignity

RECOGNITION AND ENFORCEMENT OF JUDGMENTS

South Korea

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JUDGMENT RECOGNITION & ENFORCEMENT – South Korea

Procedure: Korean Civil Execution Act

Art. 26

regular civil procedure rules apply (special procedure for recognition/enforcement of *arbitral awards*)

- (i) stamp duty (0.175%~0.25% of the claim amount) and nominal service fee (less than USD 100) payable
- (ii) legal fees reimbursable but subject to the low ceiling (e.g. for a USD 1M claim, the ceiling is USD 15,000)

CAVE) the plaintiff seeking recognition/enforcement who does not have a residence or an office in Korea may have to post securities for litigation costs (i.e. the above items)

Art. 27

No *révision au fond*

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JUDGMENT RECOGNITION & ENFORCEMENT – South Korea

Procedure: Korean Civil Execution Act

- Three-tier system
 - (i) district court: 6-12 months
 - (ii) high court: 6-9 months
 - (iii) Supreme Court: up to 4 months (90%) or longer
- If prevailing in the first instance, the judgment becomes (tentatively) enforceable and the plaintiff may apply for civil execution based on the judgment (in particular, attachment on bank accounts, which effectively serves as a discovery device)

JUDGMENT RECOGNITION & ENFORCEMENT – South Korea

Substance: Korean Civil Procedure Act (No applicable treaty in existence)

Art. 217

- (i) foreign judgment that is final and conclusive; (no preliminary injunction or other interim measure enforceable)
- (ii) international jurisdiction of the court which rendered the judgment under Korean law or applicable treaties (i.e. indirect jurisdiction); (whether the original court has jurisdiction under the laws of the seat is irrelevant)
- (iii) proper service (other than by publication or similar means) in a timely manner to enable the defendant to prepare its defense (this requirement may be waived by the defendant's participating in the proceeding); (Korea is a party to the Hague Service Convention)

JUDGMENT RECOGNITION & ENFORCEMENT – South Korea

Substance: Korean Civil Procedure Act (Cont.)

Art. 217

(iv) no violation of (international) public policy of Korea; (only in very limited circumstances where the recognition/enforcement would be contrary to the public policy of Korea even from the perspective of international comity including violations of *res judicata*) and

(v) reciprocity or substantial similarity between the recognition and enforcement requirements of the state of origin and those of Korea (e.g. NY, MN, CA, Japan, Germany, England and Wales, Australia, China, Taiwan, Argentina, Hong Kong)

Art. 217-2

No punitive damages are recognized or enforced

Treble damages? No precedent but perhaps allowed

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Judicial Tools for Finding the Assets

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JUDICIAL TOOLS FOR FINDING THE ASSETS – U.S.

- A judgment creditor can obtain discovery concerning the judgment debtor's assets from any person, including the judgment debtor or third parties.
- Each state has its own unique laws governing post-judgment discovery. For enforcement of judgments in US federal court, a judgment creditor can obtain discovery either under the law of the state where the federal court sits or under the Federal Rules of Civil Procedure. Specifically, **Federal Rule of Civil Procedure 69(a)(2)** provides: "In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located."
- This allows the creditor to obtain **discovery from the judgment debtor** (e.g., , request documents, depose the judgment debtor) **as well as from third parties through subpoena.**

JUDICIAL TOOLS FOR FINDING THE ASSETS – Switzerland

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- No discovery
- Swiss banking secrecy
- No public share register

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- Access to personal data
- Public registers
- Criminal proceedings



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JUDICIAL TOOLS FOR FINDING ASSETS – Brazil

- No discovery in Brazil
- Art. 825 of the BCCP allows for a few types of expropriation:
 - *Adjudication*: the creditor will be entitled to transfer to himself the property/title of the attached asset
 - *Disposal of assets by private initiative (by the creditor)*: the creditor will be responsible for selling the assets in the open market. The proceeds of the sale will be reverted to it, and any exceeding part will be credited in favor of the debtor
 - *Appropriation of income from a company or establishments and other goods*

JUDICIAL TOOLS FOR FINDING THE ASSETS – South Korea

Korean Civil Execution Act

Art. 61 & 68: Disclosure Order (applicable only after the judgment becomes final)

Upon application, the court order the debtor to submit the list of its assets. If the debtor does not comply with the order, the debtor shall be taken into custody.

Art. 70: Letter Rogatory

If the result of the disclosure order was not sufficient, the creditor may apply letters rogatory to be sent by the court to relevant financial institutions, land and building registry office, motor vehicle registry office, etc.

Credit Information Company

The plaintiff may retain a credit information company any time (e.g. even before a foreign judgment is obtained), but the company's scope of investigation is limited to the information in the public domain.

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Interim Measures

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POTENTIAL INTERIM MEASURES – U.S.

- **Attachment and Garnishment** - "Attachment" is essentially the seizing of the defendant's property prior to judgment. "Pre-judgment garnishment" is essentially attachment of the property in the possession of third parties (a "garnishee") as well as debts owed to the debtor by those third-parties. Attachment and garnishment are not available for all types of claims. Attachment and garnishment typically only reaches property located within the territorial limits of the court's jurisdiction.
- **TRO / Injunction** - In *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), the US Supreme Court held that a federal court does not have authority under Rule 65 of the Federal Rules of Civil Procedure to issue a preliminary injunction enjoining a defendant from transferring assets in which no lien or equitable interest is claimed in order to secure an eventual money judgment. Likewise, under the law of many states, the court lacks the authority to issue a preliminary injunction preventing the defendant from dissipating assets unrelated to the underlying dispute (e.g., in which no legal or equitable interest is claimed) in order to preserve such assets to pay an eventual money judgment. See, e.g., *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 547, 729 N.E.2d 683, 686–87 (2000) (New York law). **However, there are exceptions to this limitation.**

POTENTIAL INTERIM MEASURES – U.S.

- **Replevin** - Replevin refers to actions for the repossession of specific personal property in which plaintiff has an interest, wrongfully taken or detailed by the defendant. The plaintiff's interest in the property may have been established by attachment or prejudgment garnishment. Replevin reaches only personal property, not real estate.
- **Sequestration** - Sequestration is a statutory remedy that allows a plaintiff with a security interest in personal or real property to ask the court to take custody of that property to prevent the defendant (or other person in possession) from concealing, disposing, mistreating, wasting, removing, or destroying the property during the pendency of a lawsuit.
- **Lis Pendens / Notice of Pendency** - For actions involving real property, a "lis pendens" or "notice of pendency" may be obtained. A "lis pendens" or "notice of pendency" refers to a written notice issued by a court to be recorded in the county clerk registry that warns that certain property is the subject matter of litigation and that any interest acquired during the pendency of the action are subject to its outcome. It does not create a lien.

POTENTIAL INTERIM MEASURES – Switzerland

Recognition and enforcement of foreign interim measures

- Unlikely under the PILA
- Possible under the Lugano Convention

Domestic interim measures in support of foreign proceedings

- 10 PILA

Domestic interim measures in support of recognition and enforcement of a foreign judgment

- Monetary claims → **attachment**
- Non-monetary claims → **interim measures** Swiss Code of Civil Procedure

POTENTIAL INTERIM MEASURES – Brazil

- STJ has the power to issue interim or conservatory measures in the course of recognition proceedings, in order to prevent the disappearance of assets or preserve the *status quo*:
 - *Freezing of Assets: Bjornar Emil Nyland v. Arne Hjalmar Olsen* (SEC No. 5.717/NO)
 - *Piercing of the Corporate Veil (and Freezing of Assets): Newedge USA LLC v. MFG* (SEC No. 5.692/US)
 - *Motion to Toll the Statute of Limitation (Ação de Protesto): Paladin PM Homes Brazil Investors v. Molnar Construtora e Incorporadora Ltda.* (MC No. 20.206/SP)

POTENTIAL INTERIM MEASURES – South Korea

Provisional attachment / Preliminary injunction

- (i) existence of monetary claim / non-monetary claim
 - (ii) necessity (e.g. possibility of dissipation or irreparable harm)
 - (iii) *prima facie* case for the above
- reviewed on an *ex parte* basis
 - available even before the commencement of the foreign proceeding
 - in almost all cases, the applicant is requested to post security (10%-40% of the claim amount)
 - bond (0.2-0/3% of the amount to be provided)?

Key Issues



KEY ISSUES – Switzerland

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- Switzerland as one of the largest financial centres
- A lot of private wealth investments: real estate, artworks, jewelry, holding companies, etc.

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- Swiss banking secrecy
- No discovery proceedings
- High threshold for lifting the corporate veil
- Cautio judicatum solvi



KEY ISSUES – Brazil

- Enforcement judge may decide on
 - Freezing of assets
 - Money transfers
 - Attachment of assets: the attachment consists in a preparatory act of future expropriation ordered by the court
 - "Online-Attachment" (through *BacenJud* the enforcement judge will order all banks and financial institutions in Brazil to attach all funds found in accounts and investments kept by the debtor, to the amount indicated in the attachment order)

KEY ISSUES – South Korea

- If you are to recognize/enforce a judgement in Korea, consult Korean counsel **before** initiating legal proceedings in your jurisdiction:
 - (i) take measures to put pressure on the opposing party
 - (ii) draft the prayers for relief precisely and properly (if you have a specific performance claim)
 - (iii) assess possibility of recognition/enforcement of the judgment in advance (e.g. punitive damages)
- You may want to pursue arbitration, rather than litigation:
 - (i) no review of international jurisdiction or reciprocity
 - (ii) more expedited procedure for recognition/enforcement

Questions & Answers

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