Enforcement of Foreign Judgments 2020
A practical cross-border insight into the enforcement of foreign judgments
Fifth Edition

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Chapter 4

The Personal Jurisdiction Filter in the Recognition and Enforcement of Foreign Judgments in the United States

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Introduction

In today’s global business landscape, plaintiffs who obtain court judgments outside the United States against defendants who are based, or have significant assets, in the United States may seek to enforce such judgments in the United States. In these circumstances, U.S. courts asked to recognise and enforce foreign court judgments generally apply “jurisdictional filters”, among other criteria that govern recognition and enforcement, to assess whether the non-U.S. or “foreign” court that rendered the judgment at issue properly exercised jurisdiction in the underlying case. If a U.S. court determines that the foreign court did not have personal jurisdiction over the defendant in the original litigation, the U.S. court will not recognise or enforce the foreign judgment.

In U.S. courts, the task of determining whether a foreign court had personal jurisdiction sufficient to meet U.S. standards for recognition and enforcement is not always straightforward. This chapter explores a number of complex issues that may arise in a U.S. court’s scrutiny of this question. This chapter also offers guidance for holders of non-U.S. judgments or litigants in foreign court proceedings who anticipate actions in the United States to recognise and enforce a foreign judgment.

Section I provides an overview of the legal regime governing the recognition and enforcement of foreign judgments in the United States. Section II explores the issue of what law applies to a U.S. court’s assessment of the foreign court’s exercise of personal jurisdiction over the defendant. Section III addresses U.S. courts’ process of identifying, interpreting, and applying foreign law as part of the personal jurisdiction analysis. Section IV examines ways in which a defendant’s decision on how to proceed in the foreign litigation can have implications on potential personal jurisdiction defences in subsequent U.S. recognition and enforcement proceedings. Section V covers recent trends in the jurisprudence, in particular how service-of-process requirements in the foreign jurisdiction and the presence of a contractual forum-selection clause designating the foreign forum affect a U.S. court’s assessment of the foreign court’s personal jurisdiction.

I. The Legal Regime Applicable to the Recognition and Enforcement of Foreign Judgments in the United States

There is currently no federal statute governing the recognition and enforcement of foreign judgments throughout the United States. Nor is there presently in force in the United States any international agreement regarding the recognition and enforcement of foreign judgments. Although there is now a Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, the United States has not signed or ratified the Convention. Given the absence of a single nationwide standard, the laws of the 50 individual states govern the recognition and enforcement of foreign judgments in the United States. The majority of states have codified their respective rules in legislation, typically modelled after the 1962 Uniform Foreign Money Judgments Recognition Act (“UFMJRA”) or the 2005 Uniform Foreign-Country Money Judgments Recognition Act (“UFCMJRA”) (collectively, the “Uniform Acts”). The rules in approximately 15 states are reflected in judicially-developed common law.

Importantly, notwithstanding these varying sources of governing law, most state law standards for the recognition and enforcement of foreign judgments are broadly similar. The relative uniformity of the prevailing statutory and common law principles is largely rooted in the standards articulated by the U.S. Supreme Court in its 1895 decision in Hilton v. Guyot. In Hilton, the Supreme Court emphasised principles of international comity and due process in setting out basic rules for the recognition of foreign judgments. The Court’s articulation in Hilton of a general federal common law standard for the recognition and enforcement of foreign judgments was subsequently replaced by the application of state law standards. Nonetheless, most states have adopted Hilton’s basic approach in their respective statutory or common law rules, which generally provide that final and conclusive foreign judgments are presumptively entitled to recognition and enforcement unless certain mandatory or discretionary grounds for non-recognition apply.

II. U.S. Courts’ Scrutiny of the Foreign Court’s Exercise of Personal Jurisdiction

U.S. state and federal courts universally consider circumstances where the foreign rendering court did not have personal jurisdiction over the defendant to be a basis to deny recognition of the foreign judgment. Under the Uniform Acts, a U.S. court is required to refuse recognition of a foreign judgment if the foreign court lacked personal jurisdiction. Similarly, common law principles, as reflected in the Restatement (Fourth) of Foreign Relations Law and the decisional law of the states where the Uniform Acts are not in force, deem a foreign court’s lack of personal jurisdiction to be a mandatory ground in any U.S. court for non-recognition of the judgment at issue. The assertion that a foreign rendering court lacked jurisdiction over the defendant is one of the most frequently litigated defences to the recognition and enforcement of foreign judgments in U.S. courts.

A threshold choice-of-law question is fundamental to this inquiry: what law provides the applicable standards by which a U.S. court must assess the foreign court’s exercise of personal jurisdiction over the defendant? The potentially applicable law includes U.S. law (i.e., the law of the U.S. state where enforcement of the foreign judgment is sought), foreign law, or, in the case of reciprocal recognition and enforcement agreements, the law of the state or country where the judgment was rendered.
law of the state where the judgment was rendered), a combination of both U.S. and foreign law, or international law or norms. The Uniform Acts do not directly address the law applicable to the determination of whether the foreign court had personal jurisdiction over the defendant. The reason may be that, as one federal appellate court observed, “there is currently a division of authority on this question.”

Although U.S. courts have adopted disparate approaches to this issue, courts have ordinarily required – at a minimum – that the foreign court’s exercise of personal jurisdiction comply with the jurisdictional due process requirements for personal jurisdiction imposed by the U.S. Constitution. In other words, a U.S. court will not enforce a foreign judgment if the foreign court would have lacked personal jurisdiction over the defendant based on U.S. constitutional standards, which require the defendant to have minimum contacts with the forum such that the court’s exercise of jurisdiction over the defendant does not offend “traditional notions of fair play and substantial justice.” U.S. courts have also examined the foreign court’s exercise of personal jurisdiction under the foreign court’s standards, without diminishing the baseline applicability of U.S. jurisdictional principles. Other courts have considered whether the foreign court’s exercise of personal jurisdiction comports with both U.S. jurisdictional standards and the law applicable in the foreign court. U.S. courts may also refer to international principles in analysing whether the foreign court had personal jurisdiction over the defendant.

In addition to requiring that the foreign court has properly exercised personal jurisdiction, both Uniform Acts set out a non-exhaustive list of specific circumstances “that are adequate as a matter of law to establish that the foreign court had personal jurisdiction.” If it is sufficient to establish that a foreign court had personal jurisdiction – and, accordingly, a U.S. court may not refuse to recognise a foreign court judgment for lack of personal jurisdiction – if any one of the following jurisdictional bases is present:

1. The defendant was served with process personally in the foreign country;
2. The defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant;
3. The defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign country with respect to the subject matter involved;
4. The defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country;
5. The defendant had a business office in the foreign country and the proceeding in the foreign court involved a [cause of action or claim for relief] arising out of business done by the defendant through that office in the foreign country; or
6. The defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a [cause of action or claim for relief] arising out of that operation.

These enumerated bases of personal jurisdiction further reflect the application of the “minimum contacts” test under U.S. jurisdictional standards to a U.S. court’s determination of whether to recognise and enforce a foreign judgment, as discussed above.

III. U.S. Courts’ Application of Foreign Jurisdictional Principles

U.S. courts that look to foreign law as part of their analysis must identify, interpret, and apply foreign law and standards that may be quite different from the due process concepts applied under U.S. personal jurisdiction law. Litigants should arm U.S. courts with the applicable foreign law, especially if the foreign court did not analyse jurisdiction or did so incorrectly. This may particularly be the case where the defendant did not appear in the foreign court, and therefore, the foreign court did not address the question of whether its law permitted the exercise of jurisdiction over the particular defendant. In some cases, foreign jurisdictional requirements entail only technical service requirements that can be readily determined by the U.S. court. Other cases may require the interpretation of foreign-language statutory provisions and decisional law. Litigants should ensure that the court has accurate translations of the laws at issue. Furthermore, U.S. courts are free to consider almost any relevant material or source, and litigants should consider submitting helpful secondary sources interpreting the relevant foreign law.

Where foreign law issues are sufficiently complex, litigants often rely on expert witnesses to help establish the contours of relevant foreign law and guide the court’s analysis of foreign jurisdictional requirements.

Few U.S. courts have addressed explicitly whether to defer to a foreign court’s factual findings relevant to jurisdiction. Some courts have proceeded to consider the parties’ factual submissions without addressing whether the foreign court made relevant factual findings and whether such findings are binding. Some courts have declined to revisit certain factual findings of the foreign court related to personal jurisdiction, such as the fact that an agreement submitted to the foreign court was genuine or the facts surrounding service of process.

Litigants should submit evidence of relevant facts, particularly where there are allegations of fraud or where the foreign court did not consider a particular personal jurisdiction defence because the defendant did not appear. Note, however, that at least one court has required that the plaintiffs show that the foreign court’s exercise of personal jurisdiction was justified based on the evidence submitted to the foreign court.

IV. Considerations for Defendants in Foreign Court Proceedings

Defendants in foreign court proceedings that anticipate recognition and enforcement proceedings in the United States would be wise to consider at the outset of the case how best to proceed in the foreign litigation, taking into account the approach of U.S. courts at the recognition and enforcement stage to questions of personal jurisdiction in the foreign court. For example, defendants should decide whether to appear in the foreign court for the limited purpose of contesting service or personal jurisdiction, or for the broader purpose of also contesting the merits, informed in part by U.S. approaches to recognition and enforcement, as such decisions may have consequences for a defendant’s personal jurisdiction defences in subsequent U.S. proceedings. There are three principal options for the defendant: 1) appear in the foreign court and defend on the merits, including challenging service and/or personal jurisdiction; 2) appear in the foreign court for the limited purpose of challenging service and/or personal jurisdiction; or 3) decline to appear in the foreign court and allow a default judgment.

As stated in the Uniform Acts, a defendant who chooses the first option and litigates on the merits generally waives a future personal jurisdiction defence to the recognition or enforcement of the foreign judgment by a U.S. court. Whether a defendant who raises a timely challenge to the foreign trial court’s personal jurisdiction and loses may proceed to litigate the merits without waiving its jurisdictional objections in subsequent U.S. recognition and enforcement proceedings depends on whether the appearance on the merits was “voluntary.” Where a defendant voluntarily enforces a Japanese judgment in federal court in New York, the defendant had objected to personal jurisdiction in Japan.
The New York court explained that a defendant who appears only to contest jurisdiction does not waive jurisdictional objections to enforcement on the basis of that appearance. However, the court suggested that “conceivably” some situation could arise where defending on the merits was no longer “voluntary”, such that jurisdictional objections to recognition of the judgment would not be waived.

A defendant who chooses the second option, appearing only for the limited purpose of challenging personal jurisdiction, generally does not waive its personal jurisdiction defence in the United States. Courts in the United States have held that there may be no res judicata effect to a foreign court’s rejection of jurisdictional challenge. As one court explained: “Since a foreign court’s determination that it has personal jurisdiction does not necessarily comport with the prerequisites of this country’s Constitution for such a finding, an assertion of jurisdiction by a foreign court should not preclude a challenge here. Such a challenge is not, in fact, a second bite of the apple on the jurisdiction issue.” The UFCMJRA suggests that this is the correct approach. At least one court has held, in an action to enforce a Canadian judgment in Illinois, that where a defendant raises a personal jurisdiction defence in the foreign court and loses, it is barred from raising the defence again on the basis of res judicata, even if the defendant did not litigate on the merits in the foreign court.

The court relied on the fact that the defendant had raised a personal jurisdiction defence in the Ontario trial court but “pursued no further action in the Ontario court to challenge or reverse [the ruling] on jurisdiction.” In addition, a foreign court under its laws may not recognise a limited appearance and may hold that the defendant has waived its personal jurisdiction defence by appearing at all.

For defendants who choose the third option and decline to participate at all in the foreign proceedings, the right to present a personal jurisdiction defence in U.S. courts is preserved. U.S. courts have noted the risk, however, in deciding not to appear in a foreign court even when the defendant believes the foreign court lacks personal jurisdiction. Although the defendant will not have waived a personal jurisdiction defence, the enforcing court may not determine that the foreign court properly exercised personal jurisdiction.

An added wrinkle arises where the defendant challenging personal jurisdiction has co-defendants who proceed on the merits. But a defendant does not necessarily make a voluntary appearance if it does not formally join in the co-defendants’ appearance.

Even after judgment has been entered in the foreign trial court, a defendant must be careful not to waive its personal jurisdiction defence for purposes of resisting recognition of the judgment in the United States. An action taken after the final judgment is entered in the foreign court may be considered a “voluntary appearance” for purposes of personal jurisdiction. For example, appealing a foreign judgment in the appellate courts of the foreign jurisdiction may waive a personal jurisdiction defence if the appeal addresses the merits.

V. Trends in the Jurisprudence: Service of Process and Forum-Selection Clauses

There are additional complexities that may arise in a U.S. court’s scrutiny of the foreign court’s exercise of personal jurisdiction over the defendant. U.S. courts have also considered how service of process requirements in the foreign jurisdiction and the presence of a contractual forum-selection clause designating the forum where the judgment was rendered may affect the U.S. court’s assessment of the foreign court’s personal jurisdiction. U.S. courts in recent years have considered whether the foreign court’s exercise of personal jurisdiction requires the plaintiff to meet the technical requirements for service of process in addition to the substantive dimensions of personal jurisdiction.

One federal appellate court to address the question determined, under California law, that the foreign court could not validly exercise personal jurisdiction over the defendant because the defendant had not been properly served, even if the defendant had notice of the action. A state court in California took the same approach. These courts required both proper service under the law of the foreign court and that the notice be “reasonably calculated to apprise a defendant of the suit”, as required by U.S. due process standards.

Conversely, another federal appellate court addressed the narrow question whether, under Pennsylvania law, a defendant could avoid enforcement of a foreign judgment based on a failure to meet the requirements for service of process, where the defendant had executed a forum-selection clause accepting the foreign forum and had been personally served; the deficiency was that the service occurred by a process server, not a sheriff as required under state law. The defendant in the California case had not executed a similar forum-selection clause and had not been personally served. The highest state court in New York similarly relied on a forum-selection clause to permit the exercise of personal jurisdiction in the selected forum, even when technical service requirements of the Hague Convention had not been met and the defendant had actual notice.

A number of cases in recent years have addressed whether forum-selection clauses are sufficient to impart personal jurisdiction in the foreign court. Although an early lower court decision held that a forum-selection clause is insufficient to permit the exercise of personal jurisdiction, most courts to recently address the issue “reject personal jurisdiction challenges … where the defendant agreed to a forum selection clause designating the foreign jurisdiction as the venue for legal disputes.”

These decisions are consistent with domestic cases dealing with U.S. courts’ exercise of personal jurisdiction over defendants who executed forum-selection clauses designating U.S. states as appropriate fora.

Endnotes
1. See 1962 Uniform Foreign Money Judgments Recognition Act, § 4(a) (requiring non-recognition of a foreign judgment on grounds of unfair foreign courts, lack of personal jurisdiction, or lack of subject matter jurisdiction), § 4(b) (permitting non-recognition of a foreign judgment on grounds of lack of notice, fraud, public policy, an inconsistent judgment, violation of a forum-selection clause, or inconvenient forum); 2005 Uniform Foreign-Country Money Judgments Recognition Act, §§ 4(b), 4(e) (setting out substantively similar mandatory and discretionary grounds for non-recognition of a foreign judgment).

also sometimes referred to as 'indirect grounds of jurisdiction.'”); Audrey Feldman, Note, Rethinking Review of Foreign Court Jurisdiction In Light of the Hague Judgments Negotiations, 89 N.Y.U. L. Rev. 2190, 2193 (2014) (“Recognition and enforcement of judgments is largely based on so-called ‘jurisdictional filters,’ or review of the court of origin’s jurisdiction by the court where recognition and enforcement of a judgment is sought.”).

3. As an additional “jurisdictional filter,” a U.S. court will not recognize or enforce a foreign judgment if the foreign court did not have subject matter jurisdiction over the dispute. U.S. courts generally consider whether the foreign court properly exercised subject matter jurisdiction under the law of the foreign jurisdiction. See Ronald Brand, Recognition and Enforcement of Foreign Judgments, FED. JUD. CT. INT’L. LITIG. GUIDE 20 (2012) (“[W]hen ruling on the question of subject matter jurisdiction, U.S. courts apply the jurisdictional rules of the foreign jurisdiction.”). Issues concerning subject matter jurisdiction are outside the scope of this chapter, which is limited to personal jurisdiction.


8. See id. at 202-03 (“[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, and conducting the trial upon regular proceedings, due to the exercise of personal prerogative authority of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.”).


10. See supra note 1.

11. UFMJRA § 4(a)(2) (“A foreign judgment is not conclusive if … the foreign court did not have personal jurisdiction over the defendant”); UFCMJRA § 4(b)(2) (“A court of this state may not recognize a foreign-country judgment if … the foreign court did not have personal jurisdiction over the defendant”).

12. See Restatement (Fourth) Foreign Relations Law § 483 (2018) (“A court in the United States will not recognize a judgment of a court of a foreign state if … the court that rendered the judgment did not have personal or subject-matter jurisdiction.”).

13. See id. at Reporter’s Notes 5, 6.

14. See Linda Silberman, 1 Transnat’l Joint Ventures § 5:3 (2019) (“Lack of judicial jurisdiction of the rendering court is the most common defense to recognition or enforcement of foreign judgments.”); Ronald Brand, Recognition and Enforcement of Foreign Judgments, FED. JUD. CT. INT’L. LITIG. GUIDE 17 (2012) (“Lack of jurisdiction over the defendant or the property involved in the judgment is the most common ground for refusal to recognize or enforce a foreign judgment.”).

15. Even Cabinet Corp. v. Kitchen Int’l, Inc., 593 F.3d 135, 142 (1st Cir. 2010).

16. See, e.g., Kaupthing ehf. v. Bricklayers & Trowel Trades Int’l Pension Fund Liquidation Portfolio, 291 F. Supp. 3d 21, 31 (D.D.C. 2017) (assessing whether Icelandic court’s assertion of personal jurisdiction “comports with both the Constitution’s Due Process Clause and D.C.’s long-arm statute”); Shell Oil Co. v. Franco, 2005 WL 6184247, at *6 (C.D. Cal. Nov. 10, 2005) (“[U]nder both [California’s] Recognition Act and the Restatement, a foreign judgment is unenforceable if the foreign court’s personal jurisdiction over the defendant was not, at a minimum, in compliance with the requirements of traditional notions of fair play and substantial justice under the due process clause of the United States Constitution.”) (internal quotation marks and citation omitted); CBIC Mellon Trust Co. v. More Hotel Corp. N.V., 296 A.D.2d 81, 95-96 (N.Y. App. Div. 1st Dep’t 2002), aff’d, 792 N.E.2d 155 (N.Y. 2003) (“In order to recognize and enforce the money judgments issued by the English High Court against defendants, plaintiffs had to show that based upon the evidentiary materials presented to the English court, the law of this state would permit the exercise of personal jurisdiction over defendants.”). See also Restatement (Fourth) Foreign Relations Law § 483, Reporter’s Note 5 (2018) (“Courts in the United States will not enforce a foreign judgment if the court rendering the judgment would have lacked personal jurisdiction over the person opposing recognition of the judgment under the minimum requirements of due process imposed by the Constitution.”). One of the authors and WilmerHale represented Shell Oil Company in Franco.

17. See Restatement (Fourth) Foreign Relations Law § 483, Reporter’s Note 5 (2018). In some cases, U.S. courts have assessed the foreign court’s exercise of personal jurisdiction under the standards of the state long-arm statute governing personal jurisdiction over out-of-state defendants, which may (but do not always) impose more restrictive standards than U.S. constitutional principles of due process. See Sung Hwan Co. v. Rite Aid Corp., 850 N.E.2d 647, 651 (N.Y. 2006) (“[A]bsent a finding of personal jurisdiction under the specific grounds enumerated in New York’s Recognition Act, our courts have typically looked to the framework of CPLR 302, New York’s long-arm statute, using it as a parallel to assess the propriety of the foreign court’s exercise of jurisdiction over a judgment debtor.”); Restatement (Fourth) Foreign Relations Law § 483, Reporter’s Note 5 (2018) (“A few cases go further [than U.S. constitutional principles] and also assess the foreign
court’s jurisdiction against the standards set in the recognition forum’s long-arm statute.”).


19. See, e.g., Ossa v. Dale Food Co., 663 F. Supp. 2d 1307, 1324-26 (S.D. Fla. 2009), aff’d sub nom. Ossa v. Dow Chem. Co., 633 F.3d 1277 (11th Cir. 2011) (holding that defendants were not subject to personal jurisdiction in Nicaragua under applicable Nicaraguan law); Mạnhco & Co. v. Gilkey, 646 N.E.2d 86, 87 (Mass. 1995) (“under English law the court there had jurisdiction over the parties”); Hager v. Hager, 274 N.E.2d 157, 161 (Ill. App. Ct. 4th Div. 1971) (“TTHe record here fails to disclose that the laws of Greece contain such provisions giving extra-territorial effect to its processes. … Thus, for ought that the record here shows, the Greek Court did not have personal jurisdiction of defendant.”); Restatement (Fourth) Foreign Relations Law § 483, Reporter’s Note 6 (2018) (“Some States also allow a person opposing recognition of a foreign judgment to raise defects in the rendering court’s personal jurisdiction under the local law of the foreign country.”); Restatement (Third) Foreign Relations Law § 482, Comment c (1987) (“If the rendering court did not have jurisdiction over the defendant under the laws of its own state, the judgment is void and will not be recognized or enforced in any other state.”). One of the authors and WilmerHale represented Shell Oil Company in Ossa.


21. See Shell Oil Co. v. Franco, 2005 WL 6184247, at *5 (C.D. Cal. Nov. 10, 2005) (“Under international concepts of jurisdiction to adjudicate, a foreign state may exercise jurisdiction through its courts to adjudge with respect to a person or thing if the relationship of the nation to the person or thing is such as to make the exercise of jurisdiction reasonable.”) (internal quotations and citation omitted); Franco v. Dow Chem. Co., 2005 WL 2428829, at *6 (C.D. Cal. Oct. 20, 2003) (in addition to California’s Recognition Act, “under principles of comity among nations, lack of personal jurisdiction mandates rejection of a foreign judgment”) (internal quotations and citation omitted); Restatement (Third) Foreign Relations Law § 482, Comment c (1987).

22. UFMJRA § 5, Comment 1.

23. UFMJRA § 5(a); see also UFMJRA § 5(a) (setting out substantively similar bases for personal jurisdiction). The Uniform Acts also permit (but do not require) U.S. courts to recognize bases of personal jurisdiction other than those listed in Section 5 as sufficient to support recognition of a foreign court judgment. UFMJRA § 5(b); UFMJRA § 5(b).


27. See Fed. R. Civ. P. 44.1 (“A party who intends to raise an issue about a foreign country’s law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination must be treated as a ruling on a question of law.”).

28. See Voley Golf Indus., Inc. v. O’Ta Precision Indus., Inc., 603 F. App’x 576, 576 n.4 (9th Cir. 2015); AO Alfa-Bank v. Yakusheva, 21 Cal. App. 5th 189, 204 (Ct. App. 2018), as modified on denial of reh’g (Apr. 3, 2018).


34. Id.

35. Id. at 1221.

36. Id. at 1225.

37. Id.


40. Id.

41. UFMJRA § 5(a).

46. Id.
47. See Chiriá v. Conforte, 47 Fed. App’x 838, 842 (9th Cir. 2002) (in U.S. litigation, attempt by co-defendants’ counsel to join English defendants in a motion to dismiss, without their consent, did not constitute a joinder and accordingly did not constitute an appearance by the English defendants).
55. Id.
56. Id.
57. Id.
61. See, e.g., D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 103 (2d Cir. 2006); TruServ Corp. v. Vleys, Inc., 419 F.3d 584, 589 (7th Cir. 2005).
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