

# SMB LEGAL NOTES

Shorall McGoldrick Brinkmann  
attorneys • phoenix • flagstaff

## Cross-Border Dispute Resolution in Arizona:

- *Enforcing Foreign and Out-of-State Judgments in Arizona Courts*
- *The Enforceability of Arbitration Awards Inside and Outside of Arizona*
- *Maintaining Client Confidentiality Across Borders*
- *Parallel Litigation in Multiple Jurisdictions*

## ENFORCING OUT-OF-STATE JUDGMENTS IN ARIZONA

In today's global economy, businesses often have assets located in more than one jurisdiction. While a person may recover a judgment in one place, it may become necessary to pursue the judgment debtor to another jurisdiction to collect anything on the judgment. A party to a lawsuit may also want to take advantage of the preclusive effect of a foreign judgment in any subsequent lawsuit in Arizona. As a border state, Arizona has courts that are historically acquainted with the issues surrounding the recognition and enforcement of non-Arizona judgments.

Any judgment issued by a court outside the State of Arizona is a "foreign" judgment under Arizona law. Judgments issued in one of Arizona's sister-states within the United States may be quickly domesticated in Arizona courts under the Uniform Enforcement of Foreign Judgments Act. The out-of-state judgment will still need to be "exemplified" under federal law to be entitled to full faith and credit in Arizona. The holder of the judgment will also need to seek legal counsel to ensure that the out-of-state judgment was properly obtained

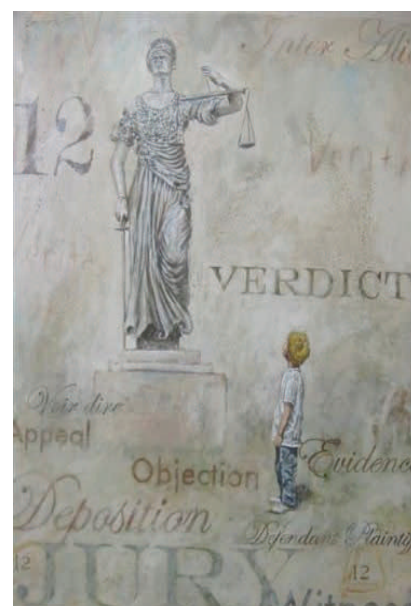
in its state of issuance. Otherwise, an Arizona court may still refuse to recognize the judgment.

A judgment issued by a court in a foreign country does not have the benefit of the Full Faith and Credit Clause of the U.S. Constitution. Instead, an Arizona court's recognition of a foreign country judgment will depend upon a number of factors, many of which rest with the court's discretion. The requirements for authenticating a foreign country judgment, for use in evidence in an Arizona court, will vary depending upon the treaties in force between the United States and the judgment's country of origin. The holder of a foreign country judgment will also need to ensure the status of the judgment under the law of the original country of issuance. Litigation over whether to enforce foreign country judgments can become quite complex, so a judgment holder should be well-prepared before filing an enforcement action.

In recent years, the Arizona Legislature has resisted calls to adopt any of the uniform acts relating to foreign country judgments. Currently,

many other states, including California, have adopted these uniform laws to simplify the process of domesticating a foreign country judgment. In Arizona, this process continues to be controlled by ongoing court decisions that may require interpretation by lawyers.

Before any judgment is obtained, foreign legal proceedings may already become relevant within Arizona. Where an overseas lawsuit involves people, property or businesses situated within Arizona, federal law allows the federal district court in Arizona to oversee ancillary discovery proceedings in support of that lawsuit. Under these discovery procedures, foreign parties can obtain evidence within Arizona for their out-of-state litigation, with greater freedom than most evidentiary treaties afford. While ancillary discovery proceedings give overseas litigants a powerful evidentiary tool, they require the expertise and assistance of local counsel in Arizona to yield real benefits. As Arizonans and their businesses continue to reach out to the rest of the world, proceedings connected to overseas lawsuits will only increase.



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## SMB LEGAL NOTES

### OUT-OF-STATE ARBITRATION AWARDS IN ARIZONA

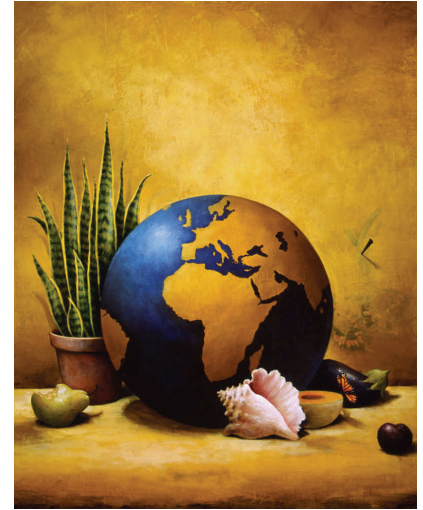
Business concerns across the globe have come to rely on alternative dispute resolution procedures, instead of local courts, to obtain efficient resolution of commercial disagreements. Alternative dispute resolution, or ADR, is most often thought of as either mediation or arbitration, although many other forms have been developed over the years. Mediation, referred to as “conciliation” in a number of European countries, allows the parties to utilize a third-party to reach agreement on solutions to their disputes. Where the parties have agreed ahead of time to mediate their disagreements, Arizona courts are empowered to refer the parties’ case to a mediator, but the courts are not required to do so.

Arbitration usually represents a miniature trial before an arbitrator or panel of arbitrators, who ultimately issue an award of monetary damages to one of the parties. Arbitration has two main advantages over litigation through the courts: (1) it is usually faster and cheaper than litigation; and (2) an arbitration

award is much easier to enforce in another country than a court-made judgment. Over the years, arbitration procedures have at times become more costly and time-consuming, yet commercial parties continue to prefer arbitration, often to circumvent litigation in countries whose courts they wish to avoid. In most jurisdictions, including Arizona, courts are required to enforce arbitration agreements by suspending litigation and allowing the parties to arbitrate their disputes, and providing enforcement for the arbitrators’ decisions. Several arbitration centers have come into existence to provide dispute resolution services to the world’s largest commercial endeavors including the International Chamber of Commerce (ICC), American Arbitration Association (AAA), London Court of International Arbitration (LCIA), and the Arbitration Center of Mexico (CAM). International treaties allow these institutions’ decisions to be enforced in the parties’ home jurisdictions.

Arizona courts will group

arbitration agreements into four main categories: Arizona agreements, interstate agreements, international agreements, and Inter-American agreements. These classifications are imposed by a mixture of Arizona, federal, and international law, and will affect how an arbitrator’s award is enforced in Arizona and by which court. These classifications depend mainly upon who the parties to the agreement are and the nature of their commercial relationships. Obviously, when arbitration proceedings appear imminent, the parties should be aware of how their arbitration agreement will be classified as this will affect how a local court will treat the arbitrators’ orders and decisions. Despite the desirability of arbitration over litigation, parties with Arizona connections will still require experienced local litigation counsel to provide court enforcement of their arbitration agreements and their eventual awards, no matter where they plan to actually arbitrate their dispute.



*“an arbitration award is much easier to enforce in another country than a court-made judgment.”*

### MAINTAINING CONFIDENTIALITY ACROSS BORDERS

Obviously, different legal systems recognize different kinds of lawyers. In most American states there is only one sort of lawyer: the attorney, admitted to practice by the bar of each state’s supreme court. However, in many countries there can be as many as six types of lawyer. Most non-American jurisdictions recognize notaries as a separate legal profession in addition to the barristers and solicitors who represent parties in

court or prepare documents for important legal transactions. In all or most other countries, courts will recognize the importance of keeping clients’ conversations with their lawyers confidential.

However, American courts have already indicated that they will not recognize attorney-client confidentiality between clients and their patent agents. Regardless of the educational and ethical re-

quirements of overseas patent agents (who are full-fledged lawyers in some countries who simply hold a different category of license), a client’s communications with such professionals will usually not be protected in an American court. Consequently, it is important for clients who retain different professionals in various locations where they have business dealings to be mindful of which communications will remain secret.

*“Federal and Arizona courts will differ on their willingness to grant anti-suit injunctions.”*

## PARALLEL LITIGATION IN ARIZONA

In today’s global economy, many businesses have ongoing contacts and operations in multiple states and countries. While parties will often try to draft contracts that dictate where they can be sued, and under which country’s laws, the extent and methods of enforcement of these contractual provisions will vary from jurisdiction to jurisdiction. As a result, a business may be faced with a lawsuit in a jurisdiction outside of its home state, or may become involved in more than one lawsuit over the same dispute in multiple jurisdictions.

Federal and Arizona courts will differ on their willingness to grant anti-suit injunctions to restrain lawsuits filed elsewhere. Anti-suit injunctions are a controversial tool, increasingly used by some courts, to prevent parties within a jurisdiction from improperly pursuing their claims in foreign jurisdictions. Obviously, where a party wishes to confine litigation or arbitration to Arizona, it helps to have a contract in place that requires that disputes be settled in Arizona and pursu-

ant to Arizona law. Contractual clauses setting the parameters of dispute resolution such as forum selection clauses will also help the foreign business that finds itself in an Arizona court in violation of prior agreements. For parties who find themselves wrongly sued in Arizona, other forms of relief may be available, but are best sought from courts within Arizona. Parties wishing to avoid parallel litigation should consult counsel who are familiar with cross-border litigation rules and strategies, since the procedures and methods of obtaining effective anti-suit relief can be arcane and complex as they often involve sensitive issues and considerations under international law.

While some parties may seek to avoid parallel litigation, others may have to file a parallel lawsuit in Arizona to collect evidence for the proceedings they are actually pursuing elsewhere. Both state and federal law in Arizona contain statutory and procedural rules that allow for cross-border discovery, enabling parties to collect

evidence in Arizona under court supervision, for use in proceedings in other states or countries. Courts in Arizona also have procedural rules that govern applications to courts outside Arizona for the collection of evidence for use in Arizona proceedings. However, discovery in other jurisdictions can be perilous, and is illegal in some countries if not conducted properly. Consequently, parties to Arizona lawsuits involving evidence that remains abroad, or foreign parties wishing to obtain evidence in Arizona, should seek counsel who are knowledgeable both as to the wider applicable cross-border legal framework, and the local rules for obtaining the evidence they need.

The Arizona Court of Appeals’ 2009 decision in *Parra v. Continental Tire* will likely impose additional hurdles for parties seeking to have their Arizona lawsuits removed to another jurisdiction. However, new treaties being considered by the federal government may reverse this home-ward trend.

## NEW HAGUE CONVENTION MAY REQUIRE ENFORCEMENT

The 2005 Hague Convention on Choice of Court Agreements may become law in the United States if ratified by the Senate. The United States signed the Convention in 2009, along-side Mexico and the European Union. If the Convention comes into force it will have a direct impact on whether foreign country judgments should be enforced in state courts. Ultimately, the Convention requires that if the parties have entered into

a valid choice of court agreement (known to American lawyers as a “forum selection clause” and to English lawyers as an “exclusive jurisdiction agreement”), the judgment rendered by the parties’ chosen court must be enforced according to its terms by courts in other countries that have ratified the Convention. This Convention may also have far-reaching effects on foreign judgments that affect parties’ intellectual property

rights, which have historically been limited by local law.

The Convention was drafted by the Hague Conference on Private International Law (HCCL), whose treaty texts have been adopted by the United States and other countries for matters relating to international child custody disputes, service of process abroad, taking evidence abroad, and legalizing overseas documents.



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# Shorall McGoldrick Brinkmann

attorneys • phoenix • flagstaff

1232 east missouri avenue  
phoenix, az 85014  
602.230.5400  
602.230.5432 (fax)

**tom shorall, jr.**  
tomshorall@smbattorneys.com

**scott m. zerlaut**  
scottzerlaut@smbattorneys.com

**asa markel**  
asamarkel@smbattorneys.com

SMB was established in 1993 with the goal of providing experienced and efficient legal representation to businesses and individuals. SMB's litigation department is led by two AV-rated, certified specialists who are also members of the American Board of Trial Advocates. All partners and senior associates in SMB's litigation department have first-chair trial experience.

The **SMB Legal Notes** series is published by SMB's litigation department as new developments in the law arise. SMB also publishes an annual review of construction litigation for Arizona and California. Back issues of these publications can be requested by contacting any SMB attorney.

**SMB's attorneys are admitted to practice in both Arizona and California, allowing for strategic representation of businesses in the Southwest.**

## THE WARSAW AND MONTREAL CONVENTIONS

Arizona's airports in Phoenix and Tucson send and receive passengers, baggage, and freight to and from destinations all over the world. In fact, Arizona has seven foreign trade zones (FTZ's) in which products and components from abroad can be stored tariff-free before final disposition. However, where a flight is bound to or from an international destination, Arizona law does not apply to damages or injuries sustained during the trip. Instead, the Warsaw Convention, a treaty in effect in the United States since the 1930's, governs the rights of shippers and passengers who use international flights. As more passengers and cargo move between Arizona and the rest of the world, the importance of the Warsaw Convention and subsequent international protocols increases.

The Warsaw Convention's procedures apply whether a

passenger has a claim for personal injury or death during an international flight, or a claim for damage to baggage or freight shipped on an international flight. Determining precisely when a passenger or shipper's claim is governed exclusively by the Convention, rather than local law, can be very complicated. While American courts have been called upon to interpret the Convention for over seventy years, the Convention's official text is in French, which can require extensive research and discovery to properly interpret while a lawsuit is ongoing. Parties should not rely solely upon English versions of the Convention since these are merely translations. For example, the United States and United Kingdom actually have different official translations of the Convention.

Where the Warsaw Convention applies, it determines

where a person can sue, within what time-limits, and after what types of notice to the carrier. The Convention ultimately governs the limits of an air carrier's monetary liability, and the sorts of defenses a carrier can raise to avoid liability. At least a third of the world's countries, including the United States, have ratified the newer Montreal Convention, which changes many of the rules created by the Warsaw Convention and its protocols. The Montreal Convention is meant to unify and streamline the global system for resolving international air transport claims. However, since many countries have not yet ratified the Montreal convention, carriers, shippers, and passengers in the United States should be aware that either treaty could apply to their transactions.

