

Enforcement of Foreign Judgments

Contributing editor
Patrick Doris



2017

GETTING THE
DEAL THROUGH

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Enforcement of Foreign Judgments 2017

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Preface

Enforcement of Foreign Judgments 2017

Sixth edition

Getting the Deal Through is delighted to publish the sixth edition of *Enforcement of Foreign Judgments*, which is available in print, as an e-book, via the GTDT iPad app, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Cyprus and Ireland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Patrick Doris of Gibson, Dunn & Crutcher LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
September 2016

Australia

Colin Loveday and Sheena McKie

Clayton Utz

1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Reciprocity of enforcement of judgments between Australia and other nations is reflected in the inclusion of those nations in the legislative scheme set down by the Foreign Judgments Act 1991 (Cth) (FJA) (section 5(1)). The legislative requirements are described more fully below. Reciprocal arrangements provide the basis for a country's inclusion in the legislation (see question 3).

At present, Australia does not have any multilateral treaty obligations that form the sole basis for the reciprocal recognition and enforcement of foreign judgments. However, although it is not a party, Australians doing business in Europe may also be impacted by the EC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968 (the Brussels Convention), the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Lugano 1988 (the Lugano Convention) and the San Sebastian Convention of 1989 (the San Sebastian Convention). Specifically, if a judgment is entered in one contracting state against a defendant resident in Australia it will be enforceable in all other contracting states.

In addition, Australia is a party to the bilateral treaty with the UK for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1994. This treaty provides further protection to Australian defendants, including by article 3(1), which provides that the British government will not recognise or enforce certain judgments under the Brussels Convention against a person domiciled or habitually resident in Australia.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Generally speaking, recognition and enforcement of foreign judgments go hand in hand. The FJA introduced a nationwide scheme by which judgments of foreign courts can be recognised and then enforced throughout Australia, replacing the previous state and territory-specific statutes.

A judgment registered under the FJA in the Supreme Court of a state or territory may be registered in the Supreme Court of another state or territory as if the judgment had been originally given in that Supreme Court on the day of registration (section 6(8) FJA; see also Part 6 of the Service and Execution of Process Act (1992) (Cth)).

Australia's federal system also means that the common law is enforceable across jurisdictions within Australia. That means that once a judgment has been recognised as enforceable by an Australian court, it will be enforceable in that and other state or territory jurisdictions.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

In Australia, the requirements for the recognition and enforcement of foreign judgments are found in both the common (case) law and federal

legislation through the FJA. The common law and the FJA apply similar rules.

The Foreign Judgments Regulations 1992 (Cth) (the Judgments Regulations) (given force under the FJA) include a schedule of countries with which Australia has a reciprocal arrangement for enforcement. In order for a successful litigant to rely on the FJA, the judgment in question must have been obtained from one of the recognised superior courts of the countries listed in the Schedule to the Judgments Regulations, or one of the specified inferior courts (regulation 5, Judgments Regulations).

The superior courts of countries specified in the Schedule to the Judgments Regulations include those of New Zealand, the provinces of Alberta, British Columbia and Manitoba in Canada, France, Germany, Hong Kong, Italy, Japan, Singapore, Switzerland and the UK. The inclusion of those countries is, generally speaking, based on the existence of a reciprocal enforcement arrangement with the country in question.

The substantive provisions of the Trans-Tasman Proceedings Act 2010 (Cth) came into force in October 2013. Based on an agreement made between the governments of Australia and of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, the Trans-Tasman Proceedings Act aims to:

- streamline the process for resolving civil proceedings with a trans-Tasman element;
- minimise existing impediments to enforcing certain New Zealand judgments and regulatory sanctions; and
- implement the Trans-Tasman Agreement in Australian law (section 3).

Equivalent legislation has been enacted in New Zealand. The Trans-Tasman Proceedings legislation makes it easier for parties in Australia to serve Australian originating process against parties in New Zealand and vice versa (Part 2), to serve subpoenas (Part 5), to appear remotely in proceedings (Part 6) and to recognise and enforce judgments (Part 7).

For countries that do not have a reciprocal enforcement arrangement with Australia (eg, the US), the common law principles apply. The common law principles do not draw a distinction between foreign jurisdictions.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Not applicable; Australia is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Under the FJA, a judgment creditor (being a person in whose favour a judgment was given (whether or not in relation to the payment of a sum of money under the judgment)) may apply to have a foreign judgment registered in an appropriate court at any time within six years after the date

of judgment, or the date of last judgment where there have been appellate proceedings (section 6(1)). The court may, by order, extend the period within which an application can be made for registration (section 6(5)). The limitation period is the same for New Zealand judgments under the Trans-Tasman Proceedings Act (section 67(5)).

The enforcing court may consider the statute of limitations for enforcement in the foreign jurisdiction when determining whether a foreign judgment is registrable. If the judgment cannot be enforced in the foreign jurisdiction, it is unlikely to be able to be registered in the relevant Australian jurisdiction (section 6(6)(b) FJA).

Likewise, under the common law, a foreign judgment will not be enforceable unless it is enforceable in the country of origin. Part 4.6, Division 3 of the (Uniform) Evidence Act 1995 (eg, Commonwealth, NSW) deals with the adducing of evidence of foreign law and the effect of such evidence in Australian courts.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

The FJA applies to enforceable money judgments, which include judgments for an amount of money other than taxes or similar charges, or a fine or other penalty (except in relation to a New Zealand tax debt or a Papua New Guinea income tax payment) (section 3). Such a judgment is not enforceable under the FJA unless it is final and conclusive and was given in a court to which the enforcement provisions extend (section 5(4)).

Regulations may be prescribed that extend the application of the FJA to non-monetary judgments (section 5(6)); however, no regulations have been made to date.

A judgment is taken to be final and conclusive even though an appeal may be pending or it may be subject to appeal in the courts of the country of the original court (section 5(5)).

A judgment also covers final or interlocutory judgments or orders in civil proceedings and certain arbitral awards that have become enforceable by a court of the foreign country (section 3).

The Trans-Tasman Proceedings Act applies to final and conclusive judgments given in proceedings, including civil proceedings, criminal proceedings requiring payment of compensation, damages or reparation to an injured party or of a regulatory regime criminal fine or a New Zealand market proceeding (section 66).

Under the common law, foreign judgments may not be enforceable unless they are for the payment of a sum of money that is fixed or can be calculated (for judgments in personam). In some instances, equity might permit the enforcement of non-monetary judgments.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

A plaintiff who has obtained a judgment of an applicable court in an overseas country to which the FJA extends may file an application in the Supreme Court of any state or territory in Australia for registration of the judgment (section 6(2)(c)). For certain proceedings under the New Zealand Commerce Act 1986, the appropriate court for a money judgment is either the Federal Court of Australia or the Supreme Court of a state or territory; the appropriate court for a non-monetary judgment is the Federal Court of Australia (sections 6(2)(a) and (b)).

Section 67 of the Trans-Tasman Proceedings Act provides in which Australian courts registration must be sought for particular types of judgment. For example, an application to register a New Zealand market proceeding judgment must be made in the Federal Court, but an application to register a judgment that imposes a civil pecuniary penalty may be made in a superior Australian court or an inferior Australian court that has power to impose a civil pecuniary penalty of the same value as the penalty imposed by the judgment.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

The main consequence of recognition will usually be to pave the way for enforcement of the judgment, the procedure for which is examined below.

To recognise a judgment in Australia means, in principle at least, to give it the effect it has under the law of Australia.

An action in an Australian court for the recovery of an amount payable under a judgment to which the FJA applies first requires the judgment to be registered (section 10). Under the FJA, a registered judgment has the same force and effect as if the judgment had been originally given in the court of registration as and from the date of registration. That also means that proceedings may be taken on that registered judgment, the registering court has the same control over its enforcement, and the amount for which the judgment is registered carries interest (section 6(7)).

If registration has been effected under the FJA but is set aside, or would have been set aside if registered, or if the judgment is not capable of recognition at common law, the foreign judgment will be unenforceable in an Australian court (sections 12(2) and (3)).

Each Australian court must recognise a registered judgment as conclusive between the parties to it in all proceedings founded on the same cause of action (ie, as *res judicata* or by way of estoppel in future proceedings (section 12(1)).

Under the Trans-Tasman Proceedings Act, a New Zealand judgment may be enforced in Australia as soon as it is registered, and notification of it has been given to every person liable under the judgment (sections 73 and 74).

If Part 2 of the FJA does not apply to the judgment or if the judgment cannot be enforced under the mutual New Zealand arrangements, a party must seek to enforce the judgment by way of the common law rules.

Under the common law, the foreign judgment cannot be enforced in Australia unless it is first recognised. This means that, for a foreign judgment in personam, a court must be satisfied that:

- the foreign court exercised a jurisdiction over the judgment debtor that Australian courts will recognise (eg, because the defendant was present in or a resident of the foreign jurisdiction, or submitted to the jurisdiction of the foreign court);
- the foreign judgment is final and conclusive;
- there is identity of parties; and
- the foreign judgment is for a fixed and certain sum.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

If the judgment meets the requirements for registration under the FJA or the Trans-Tasman Proceedings Act, the court must register the judgment. A judgment is not registrable under the FJA where, at the date of application, it has been wholly satisfied or could not be enforced in the country of the original court (section 6(6)).

An application to set aside registration may be made by the person against whom a registered judgment is enforceable (section 7(1) FJA). The court has no discretion but to set aside the registration of a judgment where it is satisfied of one of the circumstances set out in section 7(2) of the FJA. Those circumstances include where the courts of the country of the original court had no jurisdiction in the circumstances of the case, the judgment was reversed on appeal or set aside in the original court, or where the judgment has been wholly satisfied.

Under the Trans-Tasman Proceedings Act, an Australian court may set aside a New Zealand judgment registered in Australia if:

- the court is satisfied that enforcement would be against public policy; or
- the judgment was registered in contravention of the Act or both of the following apply:
 - the judgment was given in a proceeding the subject matter of which was immovable property or was given in a proceeding in rem the subject matter of which was moveable property; and
 - that the property was, at the time of the proceeding in the original court or tribunal, not situated in New Zealand (section 72).

The starting point under the common law is that judgments that meet the requirements for recognition are *prima facie* entitled to be enforced in Australia. Ordinarily it is not open to a defendant to challenge the merits of the foreign decision. With the possible exception of fraud, where the original court has considered an issue (including a defence), that issue

cannot be reheard and redetermined upon an action for enforcement of a foreign judgment.

The limited defences to enforcement available under the common law are largely analogous to the circumstances under which judgments may be set aside under the FJA, and include:

- where the judgment was obtained by fraud (equivalent section 7(2)(a)(vi) FJA);
- where the foreign judgment is contrary to public policy of the enforcing jurisdiction (section 7(2)(a)(xi) FJA); and
- where the foreign court acted contrary to natural justice (section 7(2)(a)(v) FJA).

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

No. However, a judgment debtor may apply to have the judgment set aside under section 7(1) of the FJA if it can satisfy any of the elements in section 7(2), including:

- the judgment is not, or has ceased to be, a judgment to which Part 2 of the FJA applies;
- the judgment was registered for an amount greater than the amount payable under it at the date of registration;
- the judgment was registered in contravention of the FJA;
- the courts of the originating country had no jurisdiction in the circumstances of the case;
- the judgment was obtained by fraud;
- the judgment has been reversed on appeal or otherwise set aside in the courts of the originating country;
- the judgment has been discharged or wholly satisfied; or
- enforcement of the judgment (not being for the payment of New Zealand tax) would be contrary to public policy.

See also question 9 in relation to the Trans-Tasman Proceedings Act.

Alternatively, a judgment debtor may apply to the court in which the judgment is registered for a stay of enforcement of the judgment if it can be satisfied that the judgment debtor has appealed, or is entitled to and intends to appeal, against the judgment (section 8(1) FJA and section 76 of the Trans-Tasman Proceedings Act). Accordingly, if a court makes an order that enforcement of a judgment be stayed, the judgment debtor must bring the appeal by a specified day or within a specified period (section 8(2) FJA).

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

A foreign judgment can be recognised under the FJA on condition that the judgment in question is an enforceable money judgment (see question 6) that is final and conclusive and has been given by a court recognised under the FJA and Judgments Regulations (section 5(4) FJA). A judgment is not to be registered if, at the date of application, it has been wholly satisfied or it could not be enforced in the country of the original court (section 6(6) FJA).

Similarly, a judgment that is registrable under the Trans-Tasman Proceedings Act will be capable of being enforced in Australia only if, and to the extent that, at the time it is being or is to be enforced, the judgment is capable of being enforced in the original court or tribunal or in another New Zealand court or tribunal (section 75). If notice of registration has not been given to the person liable under the judgment, then the party registering the judgment will not be able to enforce it for the period of 45 working days of the Australian court after the day of registration (section 74).

For the recognition of foreign judgments under the common law (see also question 8), the court must be satisfied that the foreign court exercised jurisdiction over the judgment debtor, the foreign judgment is final and conclusive and for a fixed and certain sum (for judgments in personam) and there is identity of parties between the original foreign judgment and the application for recognition in the relevant Australian court.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

Under the FJA, there are a number of additional factors that may be relevant to enforcement of a foreign judgment that may be considered by

a court on application by a judgment debtor to have the registration of a judgment set aside (section 7(2)). Likewise, under the common law, there are certain defences that may be available to preclude recognition or enforcement of a foreign judgment (see question 9).

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

No; although if a foreign court acted contrary to the principles of natural justice, it may be grounds for having registration of a judgment set aside under the FJA, or a defence to recognition under the common law.

Under the Trans-Tasman Proceedings Act, notification of registration of a judgment must be given to the person liable under the judgment (section 73). If that notification is not given, a period of 45 working days must pass before the judgment may be enforced (section 74).

Section 7(2)(a)(v) of the FJA makes clear that a ground for setting aside a foreign judgment includes where the judgment debtor did not receive notice of the original proceedings in sufficient time to enable the judgment debtor to defend the proceedings, and where the judgment debtor did not appear in original proceedings.

Under the common law, natural justice requires that a party has been given the opportunity to present their case to an impartial tribunal and that each relevant party has been given due notice of proceedings. Due process is generally assessed by having regard to the laws of the original forum (ie, the foreign court), rather than according to Australian standards.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

Registration of a foreign judgment must be set aside if the enforcing court is satisfied that the courts of the country of the original court had no jurisdiction in the circumstances of the case (section 7(2)(a)(iv)). The 'no jurisdiction' ground is qualified by reference to section 7(3) of the FJA, which provides a number of circumstances in which the courts of the original court are 'taken to have had jurisdiction' (subject to certain exceptions set out in sections 7(4) and (5)).

Jurisdiction will be assumed (eg, for a judgment given in an action in personam) where the judgment debtor voluntarily submitted to the jurisdiction of the original court or appeared in the foreign proceedings as a plaintiff or cross-claimant, or where the judgment debtor resided in or (as a body corporate) had its principal place of business in the foreign country (section 7(3)(a)). Different rules apply to other types of judgment, including those in respect of immoveable property, and actions in rem that apply to moveable property (section 7(3)(b)).

Where a New Zealand judgment is registrable under the Trans-Tasman Proceedings Act, it will be registered in Australia, subject to the notice requirements under the Act, which must be given to every liable person. A 'liable person', in relation to a judgment, means a person against whom the judgment was given or is enforceable under New Zealand law. The legislation does not require examination of whether the original court had personal jurisdiction over the defendant, except that registration must be set aside on application of a liable person if judgment was given in respect of immoveable property or moveable property for an action in rem, where the property was not situated in New Zealand at the time of the proceeding in the original court or tribunal (section 72).

Under the common law, the fundamental premise is that the foreign court had jurisdiction over the defendant at the time when the jurisdiction of the foreign court was invoked. Generally speaking, the foreign court has jurisdiction over a defendant who was present or resident in the foreign jurisdiction, or who otherwise voluntarily submitted to its jurisdiction (eg, by appearing in foreign proceedings or agreeing by contractual clause). Other bases for jurisdiction (which are not necessarily as strong) include reciprocity or comity (that is, that the local (enforcing) court should recognise jurisdiction of the foreign jurisdiction in circumstances similar to those that would be permitted by the local court) or a defendant's national-ity or ordinary residence.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

If the foreign court does not have subject-matter jurisdiction over the controversy, it will be unenforceable. Even if a judgment could be challenged in the foreign court, but the court had jurisdiction to deal with its subject matter, the enforcing court cannot refuse to enforce the judgment. Such lack of jurisdiction cannot be remedied by the parties' consent. This holds true under the common law and the FJA (section 6(6)(b)). Similarly, if a judgment could not be enforced in New Zealand, it will not be able to be enforced in Australia (section 65 of the Trans-Tasman Proceedings Act).

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

As mentioned in question 13, if a foreign court acted contrary to the principles of natural justice, it may be grounds for having registration of a foreign judgment set aside under the FJA, or a defence to recognition under the common law. In essence, this means that a defendant in the original proceedings must have been given sufficient notice to provide them with an opportunity to be heard and to defend the subject proceedings. There is no express provision in the Trans-Tasman Proceedings Act, except that, if a judgment could not be enforced in New Zealand, it will not be able to be enforced in Australia (section 65).

Australia is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (opened for signature 15 November 1965), which came into force for Australia on 1 November 2010. Australian court rules have now (or soon will have) been amended to include nationally harmonised provisions to implement the Convention (eg, Part 10, Division 10.6 of the Federal Court Rules; Part 11A of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR)). The Hague Service Convention facilitates the service of a document abroad between signatory countries, and provides a set of procedures that must be followed to effect international service of a document.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Inconvenience of the foreign jurisdiction to the defendant is not a basis for declining to enforce a foreign judgment.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

The court will only examine the foreign judgment for allegations of fraud if such issues are raised in an argument to have registration of the judgment set aside under the FJA (section 7(2)(a)(vi)) or as a defence to enforcement under the common law. The Trans-Tasman Proceedings Act is silent on the effect of fraud; however, registration of a New Zealand judgment will be set aside if it was registered in contravention of the Act or if the court is satisfied that enforcement of the judgment would be contrary to public policy in Australia (section 72(1)).

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Generally speaking, an issue cannot be reheard and redetermined upon an action for enforcement of a foreign judgment. The court will only examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws where such issues are raised in an argument to have registration of the foreign judgment set aside under the FJA (section 7(2)(a)(xi)), except where the judgment relates to the payment

of money in respect of New Zealand tax) or as a defence to enforcement under the common law.

On application by a liable person, an Australian court must set aside the registration of a New Zealand judgment if the court is satisfied that enforcement of the judgment would be contrary to public policy in Australia (section 72(1) of the Trans-Tasman Proceedings Act).

In enforcing judgments under the common law or the FJA, the courts are often loath to invoke public policy as a ground for refusing recognition or enforcement of a foreign judgment. This is because public policy between nations may vary considerably, and the position stems from an inherent respect for and recognition of the institutions and laws of foreign sovereign states.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

The common law provides that, where there is a conflict between a foreign judgment and an earlier judgment in the enforcing court on the same matter between the same parties, the enforcing court will prefer the earlier judgment in its own forum. Likewise, where there is a conflict between the decisions of two foreign courts or two decisions of a foreign court, the earlier decision will, generally speaking, prevail.

Under the FJA, a court may set aside the registration of a judgment if it is satisfied that the matter in dispute in the proceedings in the original court had, before the date of the judgment in the original court, been the subject of a final and conclusive judgment by a court having jurisdiction in the matter (section 7(2)(b)).

Under the Trans-Tasman Proceedings Act, an Australian court may register part of a judgment (the registrable provisions) if the judgment is one in relation to different matters, where some matters would constitute a separate registrable New Zealand judgment (section 72). Otherwise, the circumstances under which registration of a New Zealand judgment may be set aside in Australia are limited to where enforcement will be contrary to public policy, the judgment was registered in contravention of the Act or the judgment related to immoveable property not situated in New Zealand (section 72).

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

The FJA does not refer to principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor. However, according to the FJA, the 'judgment debtor' refers to the person against whom the judgment was given and includes a person against whom the judgment was enforceable under the law of the original court (section 3) (see also section 4 of the Trans-Tasman Proceedings Act). As such, it is conceivable that a judgment could be enforced against a third party if it was enforceable against that third party under the law of the original court. The parties to the proceedings that led to the foreign judgment and to the proceedings for enforcement in the forum must be identical and in the same interest.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

Australian courts must stay proceedings commenced in contravention of a valid and operative international arbitration agreement. In addition, a court may set aside registration of a judgment under the FJA, or allow the defendant's defence to recognition at common law, where the fact of an enforceable agreement to use alternative dispute resolution may be relied on as, for example, the basis for an argument that the foreign judgment was infected by fraud. If that does not apply, there is no specific provision of the FJA or common law rule in that regard that would apply to permit a court to reopen a decision about the merits of the original case in the foreign jurisdiction.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

No foreign jurisdictions are given greater deference than others under the FJA or under the common law in relation to the recognition and enforcement of foreign judgments. However, the Judgments Regulations specify a number of superior and inferior courts whose judgments are recognised under the FJA, which of course makes it more straightforward to enforce the judgments of those jurisdictions (via the clearly defined statutory procedure). Likewise, the commencement of the Trans-Tasman Proceedings Act should make it easier for judgments to be enforced in both Australia and New Zealand.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The FJA and the common law provide that Australian courts may not recognise a part or whole of a judgment that is unenforceable in the foreign court or if it has been satisfied in part. In addition, a judgment may be recognised in part in circumstances, for example, where public policy dictates that a part of the judgment should not be recognised by the Australian court (eg, if an award for punitive damages was not available under Australian law). In such cases, the enforceable part of the judgment may still be recognised if it is possible to separate the two.

Under the FJA, the relevant part of the judgment that can be recognised under the legislation will be registered (see section 6(12-14)). If the judgment is incorrectly registered, it can be set aside under section 7(2)(a) (ii), (ix) and (x) of the FJA.

Under the Trans-Tasman Proceedings Act, an Australian court may register part of a judgment (the registrable provisions) if the judgment is one in relation to different matters where some matters would constitute a separate registrable New Zealand judgment (section 72).

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

In recognising a foreign judgment under the FJA that is expressed in a foreign currency, the court converts the currency and registers the judgment for an equivalent amount of Australian currency based on the prevailing exchange rate on the second business day before the application for registration was made (section 6(11)(b)) unless the judgment creditor stated in the application that the creditor wishes the judgment to be registered in that currency (section 6(11)(a)). The prevailing exchange rate is an average from three authorised foreign exchange dealers selected by the judgment creditor (section 6(11A)).

A judgment registered under section 6 of the FJA is to be registered for the reasonable costs of and incidental to registration and, where an amount of money is payable, for any interest that by the law of the country of the original court becomes due under the judgment up to the time of registration (section 6(15)). The relevant Rules of Court (eg, rule 53.3 of the UCPR 2005 (NSW)) require evidence of interest payable to be demonstrated to the court. Once the judgment is registered, interest accrues on the judgment in accordance with the law of the enforcing Supreme Court as though the judgment was given on the date of registration (section 6(7) FJA).

If a sum of money payable under a New Zealand judgment is expressed in a currency other than Australian dollars, then a person applying for registration of that New Zealand judgment may request the judgment be registered in a particular currency. Otherwise, the judgment will be registered as if it were for an equivalent amount in Australian currency, calculated in accordance with the rate of exchange on the working day (the conversion day) of the Australian court before the working day of that court on which the entitled person made the application for registration (section 69 of the Trans-Tasman Proceedings Act).

Where, under the common law, a plaintiff wishes to enforce a foreign judgment for a fixed or readily calculable sum, the plaintiff can sue the judgment debtor for that amount as a liquidated sum. Once the recognised judgment becomes entitled to be enforced in Australia, the relevant Rules

Update and trends

There have been no new developments in foreign judgment enforcement in Australia over the past year. However, recent steps have been taken to progress the work of the Hague Conference on Private International Law 'Judgments Project', which Australia supports. The Judgments Project refers to work relating to cross-border litigation in civil and commercial matters; specifically, the international jurisdiction of courts and the recognition and enforcement of their judgments abroad. In 2016, a Working Group on the Judgments Project completed a Proposed Draft Text and set up a Special Commission to prepare a draft Convention. The first Special Commission was held on 1-9 June 2016 and a second will be held on 16-24 February 2017. A draft Convention has now been released for discussion.

of Court apply to the judgment debt. Otherwise, the law of the foreign court, insofar as it can be, will be applied to the judgment sum.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Section 7 of the FJA (and section 72 of the Trans-Tasman Proceedings Act) provides a statutory mechanism by which recognition of a foreign judgment (registration) can be set aside. In addition, if the registering court is satisfied that the judgment debtor has appealed, or is entitled and intends to appeal, against the foreign judgment, the court may order that enforcement of the judgment under the FJA be stayed pending the final determination of the appeal, until a specified day or for a specified period (section 8(1)). Such an order may be made, including such conditions (eg, as to giving security) as the registering court thinks fit (section 8(4)) (see also section 76 of the Trans-Tasman Proceedings Act).

For non-FJA matters, the law of the local forum applies to procedural matters, including the time for appealing and security for costs.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

A plaintiff who has obtained a judgment of the relevant kind may apply to the Supreme Court of a state or territory (or the Federal Court, in appropriate cases, see section 6(2) FJA) for registration of the judgment (section 6(1)).

Subject to the FJA and proof of matters prescribed by the Rules of Court, the Supreme Court of a state or territory or the Federal Court, as appropriate, is to order the judgment to be registered (section 6(3)).

The Rules of Court vary from jurisdiction to jurisdiction. For the New South Wales Supreme Court, the relevant Rules are found in Part 53 of the UCPR in respect of registration and enforcement of judgments under the FJA and in Part 32 in respect of enforcement of judgments registered under the Trans-Tasman Proceedings Act.

In New South Wales, proceedings for registration of a judgment under the FJA are to be commenced in the Supreme Court by summons, joining the judgment creditor as plaintiff and the judgment debtor as defendant. Unless the court otherwise orders, the summons need not be served (rule 53.2(3) UCPR).

An application for registration of a judgment must be supported by the minimum evidence required by the UCPR (rule 53.3). Notice of registration must be served on the judgment debtor (rule 53.6(1)). Once registered, and subject to allowing time for an application to be set aside, the judgment may be enforced as a judgment of the court (rule 53.8). Before any step is taken for enforcement, an affidavit of service of the notice of registration must be filed or the court must be otherwise satisfied of service (rule 53.8(2)).

Under the common law, once a foreign judgment is recognised by an Australian court, it is *prima facie* enforceable under Australian law. That is, subject to any defences a debtor may be entitled to raise, the judgment may be enforced as imposing an obligation on the judgment debtor to pay the judgment sum as a liquidated amount.

Alternatively (or in addition), the judgment creditor might seek to bring an action on the original cause of action, relying on the judgment as creating an estoppel (and preventing the defendant from raising any defence other than fraud, which was or could have been raised in the original action).

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

When initiating proceedings, plaintiffs may spend considerable time determining what is the appropriate forum for their action. This is particularly true for multinational corporations or cross-border transactions (eg, internet sales). Choice of law rules generally mean that the substantive law for the action is the place of the wrong in tortious claims or where the breach of contract occurred. In Australia, a court must be satisfied that Australia is a clearly inappropriate forum (*forum non conveniens*). In doing so, the court may consider where the parties reside, or where their places of business are, where relevant events occurred, as well as the convenience and expense of a particular jurisdiction. The courts may also have regard, in contractual claims, to a governing law or jurisdiction clause.

From a recognition and enforcement perspective, it is preferable for a plaintiff to seek to register a judgment under the FJA (or under the Trans-Tasman Proceedings Act). Those statutory regimes set down a process

by which a judgment can be registered. It therefore provides greater certainty to plaintiffs. Prima facie, once a judgment is registered it is enforceable, subject to an application to set aside registration. Recent cases in Australian courts turned largely on the facts.

It is essential that plaintiffs understand the requirements for recognition and enforcement of a foreign judgment, including jurisdictional aspects and whether a judgment can be considered to be final and conclusive. In the original court, the plaintiff should take all necessary steps to ensure the defendant has an opportunity to be heard before a decision affecting their interests is made and, ideally, submits to the jurisdiction in some clear way (eg, making an appearance, filing a cross-claim, engaging in correspondence with the party and with the court). This will assist in refuting a claim that the defendant did not have an adequate opportunity to be heard and to present its case in the original court.

In addition, plaintiffs seeking to take advantage of a foreign judgment in an Australian court should have an understanding of the defences that might be raised under common law, or the grounds that might be relied upon for setting aside registration of a judgment under the FJA. Evidence of the original judgment and its enforceability in the foreign jurisdiction will be required to support an application for recognition.

Under the common law, the foreign judgment may be used by way of estoppel (either by a plaintiff or by way of defence, depending on the circumstances). In such circumstances, questions about what issues have or could have been agitated in the foreign proceedings might lead to substantial dispute before the court.

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Austria has a positive approach to entering into international treaties for the reciprocal recognition and enforcement of foreign judgments. Austria is a signatory to numerous bilateral and multilateral treaties.

From a practical point of view the most important treaty with regard to the recognition and enforcement of foreign judgments is Regulation (EC) No. 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) (Brussels Ia Regulation). The Brussels Ia Regulation lays down uniform rules to facilitate the free circulation of judgments in the European Union (EU) and applies to legal proceedings instituted on or after 10 January 2015. The Brussels Ia Regulation replaces Regulation (EC) No. 1215/2012 of 22 December 2000 (the Brussels I Regulation, together with the Brussels Ia Regulation, is the Brussels Regime), which remains applicable to all legal proceedings instituted prior to 10 January 2015. The Brussels Ia Regulation provided for certain changes with regard to the recognition and enforcement of member state judgments in other member states. One of the key changes was the abolition of the exequatur procedure (the need to obtain a court order before enforcing a foreign judgment). Now, a judgment creditor simply has to present a copy of the judgment and a standard form certificate to begin the enforcement process. The main controversy during the reform process was around the proposal to reduce the grounds upon which recognition and enforcement can be resisted (in particular by removing the public policy exception). This proposal was dismissed in the end; the Brussels Ia Regulation essentially states the same grounds already existing under the Brussels I Regulation. Besides, the following treaties also contain regulations on the recognition and enforcement of foreign judgments between member states of the EU:

- Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007, establishing a European Small Claims Procedure;
- Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006, creating a European order for payment procedure;
- Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004, creating a European Enforcement Order for uncontested claims; and
- Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (Lugano Convention) between the EU member states and Iceland, Norway and Switzerland, which came into force on 1 January 2010, follows the legal framework of the Brussels Regime and facilitates the mutual recognition and enforcement of judgments handed down by the national courts of the EU member states and the other contracting parties named above.

Further multilateral treaties to which Austria is signatory are:

- the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960, as amended by the additional Protocol of 28 January 1964 and by the Protocol of 16 November 1982;

- the Convention concerning International Carriage by Rail of 9 May 1980 (COTIF);
- the Convention on the Registration of Inland Navigation Vessels of 25 January 1965, including Protocols no 1 and 2;
- the Convention of 5 October 1961 abolishing the Requirement of Legalisation for Foreign Public Documents;
- the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road; and
- the Convention of 1 March 1954 on Civil Procedure.

It must be noted that the bilateral treaties with other EU member states – due to the existence of the aforementioned multilateral treaties – are of no further relevance with regard to the enforcement of foreign judgments of other EU member states. Bilateral treaties with non-EU member states are:

- the Convention on the Recognition and Enforcement of Judgments and Settlements in Civil and Commercial Matters of 23 May 1989 between Austria and Turkey;
- the Treaty on the Recognition and Enforcement of Judgments and Public Deeds in Civil and Commercial Matters of 23 June 1977 between Austria and Tunisia;
- the Convention on the Recognition and Enforcement of Judgments, Arbitral Awards, Settlements and Public Deeds of 5 July 1973 between Austria and Liechtenstein; and
- the Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters of 6 June 1966 between Austria and Israel.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

There is uniformity in the law on the enforcement of foreign judgments in Austria.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The sources of law are the aforementioned regulations and international (bilateral and multilateral) treaties, if applicable, and Austrian statutory law relevant in connection with the recognition and enforcement of foreign judgments, namely, the Austrian Code of Civil Procedure (ACCP), the Austrian Jurisdiction Act (AJA) and the Austrian Enforcement Act (AEA). Austrian case law is not binding, but strongly taken into consideration by the courts.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Austria is not a signatory of the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The statute of limitation is a question of substantive, and not of procedural, law. Thus, the limitation period varies depending on the claim in question and the law applicable to such a claim, which means that the limitation period and the interruption of the limitation period must be assessed under the law that governs the claim in question.

Under Austrian law, a judgment may be enforced within 30 years of its entry into legal force, irrespective of which limitation period has been applicable to the claim awarded in the judgment. The limitation period starts from the day the judgment becomes legally binding. It is interrupted where a motion for enforcement is filed with and finally granted by the competent court.

In the case of a final judgment of a foreign court, Austrian law differentiates between the following two scenarios: if the foreign judgment is in principle enforceable in Austria, the statute of limitation must be assessed under the law applicable to the claim awarded in the judgment. Thus, Austrian courts may reject the declaration of enforceability where, under the applicable foreign law, the right to enforce the judgment has already become time-barred. Where the foreign judgment is not enforceable in Austria, such a final judgment only interrupts the statute of limitation under the law applicable to the claim awarded in the judgment and causes the limitation period to start to run again.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

In general, all remedies ordered by a foreign court are enforceable in Austria. It is essential that the foreign judgment represents a writ of execution in its country of origin, and that the foreign judgment is (at least temporarily) enforceable in the country in which it was rendered. It is not necessary for the foreign judgment to take the form of a domestic writ of execution within the meaning of the AEA. The foreign judgment must, however, meet certain requirements asserting its determinability and form as a writ of execution.

According to the Brussels Regime, where a judgment contains an order that is not known to the law of the member state addressed, the measure or order should, to the extent possible, be adapted to one that has equivalent effects attached to it and pursues similar aims.

However, Austrian public policy has to be considered when assessing whether remedies are enforceable in Austria. Only remedies that do not violate the fundamental principles of Austrian law will be enforceable. Austrian law, for example, does not countenance punitive damages. While there is no applicable case law, in literature it is argued that the concept of punitive damages could violate Austrian public policy and, thus, would not be enforceable in Austria.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Cases seeking enforcement of foreign judgments must be brought to the competent court in Austria. According to the AEA the competent court for the declaration of enforceability in general is the district court of the opposing party's domicile. Once the declaration of enforceability has become effective, the foreign judgment may be enforced equal to domestic enforceable titles.

The application for the declaration of enforceability may be filed in conjunction with the motion for enforcement. If, in such cases, the competent court for the declaration of enforceability and the one for the motion for enforcement fall apart, the application must be filed with the court competent for the enforcement proceedings.

The competent court for the motion for enforcement is:

- the district court where the land property that shall be the object of enforcement is registered;
- the district court where the immovable property that is not registered is located;
- the district court of the opposing party's domicile in the case of enforcement in receivables; or

- the district court of the third party's domicile in the case of garnishment orders.

Jurisdiction clauses entered into between the parties are inadmissible and not to be considered with regard to the declaration of enforceability and the motion for enforcement.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

In general, the enforcement of foreign judgments in Austria is contingent upon the application and issuance of a declaration of enforceability. Once the declaration of enforceability has become effective, the judgment may be enforced (ie, the process for enforcement may be initiated). As already outlined above, the application for the declaration of enforceability may, however, be filed in conjunction with the motion for enforcement at the same time with the same court.

Contrary to this twofold process for obtaining recognition separate from the process for enforcement, the procedure for enforcement of EU member state judgments is subject to a simplified procedure, which, since 10 January 2015, is governed by the Brussels Ia Regulation. Under the Brussels Regime, as a general rule, a judgment rendered in an EU member state is recognised in other member states without any separate recognition proceeding. Further, a judgment given in a member state, which is enforceable in that member state, is enforceable in any other member state without any declaration of enforceability. Notwithstanding, there are a number of limited grounds on which the recognition and the enforceability of a foreign judgment can be denied under the Brussels Regime. In terms of enforcement, a judgment rendered in another member state and enforceable in that state shall be enforced in any other member state when it has been declared enforceable there upon the application of any interested party. The judgment creditor only has to provide a copy of the judgment and a certificate certifying that the judgment is enforceable and containing an extract of the judgment as well as relevant information on the recoverable costs of the proceedings and the calculation of interest.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

In general, a foreign judgment may not be reviewed as to its substance. Besides the general requirements for the issuance of a declaration of enforceability (enforceability in the country of origin and reciprocity), the declaration of enforceability may be denied if:

- pursuant to the (hypothetically applied) Austrian rules on jurisdiction, the foreign court would not have jurisdiction over the legal matter;
- the right to be heard has been violated, namely, the opposing party could not properly participate in the foreign proceedings due to irregularities in the proceedings; or
- the judgment manifestly violates basic principles of Austrian law (public policy).

Simplified special rules apply with regard to judgments of other EU member states. Under no circumstances may a foreign judgment of another member state be reviewed as to its merits (prohibition of the *révision au fond*). According to the Brussels Regime, upon the opposing party's application recognition and enforcement shall be refused if:

- the recognition or enforcement is manifestly contrary to Austrian public policy;
- the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable the defendant to arrange for his or her defence;
- it is irreconcilable with a judgment given in a dispute between the same parties in Austria; or
- it is irreconcilable with an earlier judgment given in another EU or non-EU member state involving the same cause of action and the same parties.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

The parties to the proceedings may, within four weeks, file an appeal against the decision with which the declaration of enforceability was granted. However, such an appeal does not form a reason to stay the enforcement proceedings. If the opposing party has appealed the writ of execution, it has the possibility to apply for a stay of the proceedings in accordance with the AEA.

If the writ of execution is modified or suspended in its country of origin after the declaration of enforceability has become legally effective, the opposing party may file for the suspension or alteration of the declaration of enforceability. This application may be filed in conjunction with a motion to close, restrict or at least stay the enforcement proceedings.

If the enforcement is already approved before the issuance of a final declaration of enforceability (due to a conjunct motion for declaration of enforceability and enforcement), the enforcement proceedings must be initiated, but any realisation acts (eg, foreclosure sale of property or real property or transfer of receivables) are not to be initiated until the declaration of enforceability has become final and legally binding.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

The basic mandatory requirements for the declaration of enforceability under Austrian law are that:

- the foreign judgment is enforceable in the country it was rendered; and
- reciprocity is ensured between the country of origin and Austria, either by bilateral or multilateral treaties or by other regulations (eg, regulations on reciprocity).

Notwithstanding the above, even in the case that reciprocity is ensured by one of the above-mentioned means, declaration of enforceability may be refused if it is established that reciprocity is not practised by the country of origin.

Even if these mandatory requirements for enforceability are met, the declaration of enforceability may be refused under Austrian law if:

- pursuant to the Austrian rules on jurisdiction the foreign court would not have jurisdiction over the legal matter;
- the opposing party could not properly participate in the foreign proceedings due to irregularities in the proceedings; or
- in the case of a violation of Austrian public policy.

From a procedural point of view the foreign judgment must be submitted in original or in a copy issued by the court that rendered the judgment. Further, a certified translation of the foreign judgment must be submitted. A judgment rendered in another member state of the EU is recognised in Austria without any special procedure.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

No additional non-mandatory factors must be considered when filing for a declaration of enforceability of a foreign judgment (of a non-EU member state).

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

When deciding upon whether the foreign judgment violates the fundamental principles of Austrian procedural law, the courts also take into consideration whether the judgment was rendered in due process. Austrian procedural public policy will be deemed as violated where the proceedings violated the basic principles of fair trial. Examples of such violations include the denial of the party's right to be heard or the violation of the right to an appropriate legal defence (eg, lack of due service of procedural orders or inappropriately short preparation periods).

The same objections will be taken into consideration under the Brussels Regime when deciding upon an application of the opposing party for refusal of recognition or enforcement based on an alleged violation of Austrian public policy.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

When deciding upon the declaration of enforceability, Austrian courts will examine whether, pursuant to Austrian rules on jurisdiction, the foreign court had jurisdiction over the legal matter. When assessing this prerequisite it is sufficient for the jurisdiction of the foreign court to have been established under any of the Austrian provisions on jurisdiction, no matter whether this legal ground was actually applied in the state of origin. The objection of missing jurisdiction, for example, may be successfully established in the case of a default judgment of a court that did not have jurisdiction over the controversy and to which the defendant did not submit at any stage of the proceedings.

Under the Brussels Regime, the jurisdiction of the court of origin shall not be reviewed by the enforcing court. Further, the Brussels Ia Regulation states that the test of public policy may not be applied to the rules relating to jurisdiction. In exceptional cases (eg, consumers and employees) the court, in its examination of the grounds of jurisdiction, shall be bound by the findings of fact on which the court of the state of origin based its jurisdiction.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The above also applies to the question of whether the enforcing court will examine whether the foreign court had subject-matter jurisdiction over the dispute.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

The issuance of a declaration of enforceability of a foreign judgment may be declined if the defendant was not served with the document that instituted the proceedings and, thus, did not have sufficient time to arrange for his or her defence. Such an objection can be cured where the defendant actually participated in the subsequent proceedings. Also, pursuant to Austrian case law, the service of a document in a foreign language to an Austrian addressee is not deemed to be properly served if no translation of the document into German is attached. Such an objection may, however, be disregarded in the case that the defendant was able to understand the content of the respective document instituting the proceedings.

Pursuant to the Brussels Ia Regulation, the recognition and enforcement of a judgment may be refused where the judgment was given in default of appearance if the defendant was not served with the document that instituted the proceedings (or with an equivalent document) in sufficient time and in such a way as to enable him or her to arrange for his or her defence.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Austrian courts will not consider the 'fairness' or the relative inconvenience of a foreign judgment when deciding upon the declaration of enforceability of the judgment, as long as the judgment does not violate Austrian procedural or substantive public policy. The same applies to the application of the opposing party to refuse recognition or enforcement under the Brussels Regime.

Update and trends

Brexit will, of course, influence the enforcement of UK judgments in Austria (and vice versa). However, until the UK formally exits the EU, the current enforcement regime remains into force. Whether and how UK judgments in a post-Brexit scenario will be enforced in Austria depends on the outcome of the negotiations between the UK and the EU and which option is implemented (signing of the 2007 Lugano Convention; negotiating individual treaties with the member state; negotiating amendments to the Brussels Ia Regulation so that the current regime continues to apply; etc).

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Where the opposing party establishes that the foreign judgment suffers a violation by fraud, such violation may be deemed as a violation of the very basic principles of Austrian law. In the case that the declaration of enforceability would conflict with Austrian public policy, Austrian courts may refuse the issuance of the declaration of enforceability. The same applies to the application of the opposing party to refuse recognition or enforcement under the Brussels Regime.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Generally, Austrian courts examine foreign judgments for their consistency with Austrian public policy (procedural and substantive public policy). However, according to Austrian case law the public policy standard is defined very narrowly. Refusing the declaration of enforceability or the enforcement of foreign judgments only refers to the violation of the fundamental principles of Austrian jurisdiction, for example, the mandatory principles of constitution or criminal law. Under no circumstances may a foreign judgment be reviewed as to its merits.

Objections to enforcement are not observed ex officio, but must be put forward by the parties. In practice, objections to enforcement based on this ground are fairly common, but very rarely successful.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Austrian courts may refuse the issuance of the declaration of enforceability if the foreign judgment contradicts other final and conclusive judgments involving the same parties. Under the Brussels Regime the court may refuse the recognition and enforcement if:

- the judgment is irreconcilable with a judgment given between the same parties in the addressed member state; or
- the judgment is irreconcilable with an earlier judgment given in another member state or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the addressed member state.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

The principles of agency or alter ego to enforce a judgment against a party that is not stated in the judgment do not apply in Austria. A foreign judgment can only be enforced against the party that is named as debtor in the foreign judgment.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

As already outlined above, when deciding upon the declaration of enforceability, Austrian courts will examine whether pursuant to Austrian rules on jurisdiction the foreign court had jurisdiction over the legal matter. In general, under Austrian law, the court has to dismiss a complaint if it relates to a matter that is subject to an arbitration agreement (unless the respondent makes submissions on the merits of the dispute or orally pleads before the court without raising objections to this effect, or the court establishes that the arbitration agreement is invalid or unenforceable). Thus, depending on the circumstances of the case, Austrian courts may come to the conclusion that, pursuant to Austrian rules on jurisdiction, the foreign court did not have jurisdiction over the legal matter and, thus, will reject the application for declaration of enforceability.

The Brussels Ia Regulation does not apply to arbitration proceedings. According to the recitals of the Brussels Ia Regulation, an EU member state court ruling on the validity of an arbitration agreement is not subject to the rules of recognition and enforcement of the Brussels Regime, regardless of whether arbitration is a principal or incidental question. Thus, an EU member state court is not required to recognise another EU member state court's judgment on the validity of an arbitration agreement. Further, EU member state courts may recognise and enforce arbitral awards under the New York Convention, which takes precedence over the Brussels Regime, even if the arbitral award conflicts with another EU member state court judgment (eg, if the court rules that the arbitration agreement was invalid).

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Apart from legal facilitations and simplifications that go hand in hand with EU regulations, bilateral and multilateral treaties, and ultimately the principle of established reciprocity, there are no foreign judgments that are treated favourably in Austria.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The declaration of enforceability may also recognise only parts of a judgment, for example where parts of the judgment would violate Austrian public policy, whereas the other parts meet the prerequisites to be enforceable under Austrian law. For instance, the declaration of enforceability may be granted with respect to the awarded capital, but not for the awarded interest. However, such a separation only comes into question if it is possible to separate the admissible part clearly and distinctly from that which would violate public policy.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

When recognising a foreign judgment, Austrian courts do not convert the damage award into local currency. However, once realisation acts are being undertaken, the award must be converted into local currency.

Court costs and attorneys' fees, as well as interest claims, are usually taken into account when deciding upon the enforceability of a foreign judgment. The interest rate, generally, is governed by the law that also applies to the principle claim. However, it should be noted that rates that are not sufficiently determined may not be declared enforceable. Further, interest rates that violate Austrian public policy (eg, an interest rate of 100 per cent per annum) may not be declared enforceable. Under Austrian law, interest is a matter of substantive law. Pursuant to the Austrian Civil Code the interest rate is determined as a basic percentage of 4 per cent per annum and, pursuant to the Austrian Commercial Code in the case of

disputes between non-consumers, with 9.2 per cent per annum above the base interest rate as published by the Austrian National Bank.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

The decision on the declaration of enforceability may be appealed within four weeks (in certain cases within two months) after the decision has been delivered to the parties of the proceedings. Where the opposing party files an appeal against the decision, the applicant is granted the right to file a reply to such an appeal within four weeks after being served the appeal. The decision on the declaration of enforceability may be appealed partially or in its entirety. The appealing party is not bound by the prohibition of novation, namely it is not restricted to only support or confute the facts that have already been brought forward during the first instance proceedings.

If the motion for enforcement is already approved (due to a conjunct motion for declaration of enforceability and enforcement) before the declaration of enforceability has become legally binding, the enforcement proceedings must be initiated, but any realisation act must be refrained from until the declaration of enforceability has become final and legally binding. This ensures that the foreign judgment will be enforceable against the opposing party insofar as the opposing party's assets may already be seized and attached but not yet realised. Realisation acts (eg, foreclosure sales of property and immoveable goods) may be initiated once the declaration of enforceability becomes final.

The enforcement of foreign judgments of other EU member states (being recognised in Austria without any special procedure) may be ensured under the AEA by filing a request for a pre-enforcement to secure monetary claims. This measure, however, applies only to monetary claims.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once a foreign judgment has been declared enforceable in Austria, execution of the said judgment follows the same rules as a domestic judgment. The enforcement of judgments is regulated by the AEA. Austrian enforcement law provides for various types of enforcement. A distinction is made, on the one hand, as to whether the title to be enforced is directed at a monetary claim or at a claim for specific performance and, on the other hand, against which assets enforcement is to be levied. The usual methods for the enforcement of judgments are seizure of property and real property, attachment and transfer of receivables, compulsory leasing and judicial auction.

The enforcement itself will be executed by a bailiff. Bailiffs are responsible for actually carrying out the enforcement: seizing moveable property, drawing up a list of the debtor's assets etc. Bailiffs are executives of the court and must comply with the court's orders and instructions. They are ordered to pursue enforcement measures until the order is complied with or it is apparent that it cannot be complied with.

The competent court for enforcement proceedings is either the district court where the land property or other immoveable property that shall be the object of enforcement is located or the district court of the opposing party's domicile; or, in the case of garnishment orders, the district court of the third party's domicile.

It takes approximately one to two months until a decision on recognition and enforcement is rendered in first instance. This period may be prolonged by a further three to six months if the decision is appealed. The duration of the execution proceedings as such depends on whether the debtor opposes the execution measures and whether, and to which extent, the debtor possesses executable assets in Austria. Further, the parties to enforcement proceedings may request the stay of enforcement proceedings. The AEA enumerates certain grounds for such a stay of proceedings, including an application to set aside the judgment or a motion for the suspension or alteration of the declaration of enforceability. If the stay of the enforcement proceedings might endanger the satisfaction of the enforcing creditor's claim, the court may order an appropriate security deposit from the applicant.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Especially for companies acting on an international basis, it is important to be able to set up an effective enforcement strategy across multiple jurisdictions once a dispute has arisen. The provision for recognition and enforcement of foreign judgments decides whether a judgment can be passed in a country in which the debtor resides or possesses assets. But even at the very beginning of a business relationship, parties should think of possible enforcement in the event of a dispute. Even at the stage of the drafting of the contract, thought should be given as to where a possible judgment could be enforced.

Seeking enforcement of a foreign judgment in Austria requires assets to be located in Austria. Publicly available information on the debtor's assets is scarce in Austria, as publicly available registers contain information only on land property and company shares. There is no public information available regarding the existence of bank accounts or other moveable property. Law firms (which often cooperate with private investigators) can be of help when recovering assets in Austria.

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Bermuda

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Bermuda has not entered into any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

The same law is applicable throughout Bermuda.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

In Bermuda, the methods of enforcement of most judgments obtained outside of the jurisdiction are:

- pursuant to the Judgments (Reciprocal Enforcement) Act 1958 (the 1958 Act) and by Orders in Council made thereunder with respect to judgments obtained in the Superior Courts of the United Kingdom and the various Commonwealth jurisdictions listed in the 1958 Act;
- at common law by legal action with respect to judgments given in foreign jurisdictions not covered by the 1958 Act; and
- pursuant to the New York Convention 1958 and the Bermuda International Conciliation and Arbitration Act 1993 with respect to arbitration awards made in another contracting state (the 1993 Act).

Decisions of the Supreme Court of Bermuda, the Court of Appeal of Bermuda and the Judicial Committee of the Privy Council sitting in London form the binding decisions on the Courts of Bermuda.

In the case of *Masri v Consolidated Contractors International SAL* [2009] Bda LR 12, the Court explained the sources of law for the 1958 Act:

[...] the Administration of Justice Act 1920 (UK) introduced a reciprocal enforcement of judgments regime within Her Majesty's Dominions, creating a special network of judicial cooperation among countries with strong political and legal-cultural ties streamlining the more cumbersome common law rules for enforcing money judgments [...]. The Foreign Judgments (Reciprocal Enforcement) Act 1933 (UK) made provision for the extension of this regime to truly 'foreign' countries as well [...].

The 1958 Act is generally regarded as giving effect in Bermuda law to the 1920 UK Act. The UK Act is drafted to apply explicitly to judgments of the Superior Courts of the United Kingdom (section 2(1)), although the Act may be (and has been) extended to other Commonwealth countries under section 9. The scope of operation of the 1958 Act, in geopolitical terms, is essentially the same as that contemplated by the 1920 UK Act. In the course of the hearing, however, Mr Adamson (appearing for the judgment creditor) helpfully drew the Court's attention to the fact that in some respects the 1958 Act is based not on the 1920 UK Act alone, as might be expected, but includes some

provisions derived from the 1933 UK Act as well. This highlights the need to have careful regard to the actual provisions of the Bermuda statute and not apply UK case law based on a similar statutory regime in a footloose and fancy free way.

Where the 1958 Act does not apply, enforcement may be secured under Bermuda's Common Law Rules. The highest authority of common law decisions is the Judicial Committee of the Privy Council.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Bermuda is not a party to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Under section 3(1) of the 1958 Act a judgment creditor can apply to have a judgment registered in the Supreme Court up to six years after the date of the judgment or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in the proceedings.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

The judgments to which the 1958 Act applies include orders in civil proceedings and judgments and orders in criminal proceedings for the payment of a sum of money. The Court will look at the substance of what is being sought to be enforced rather than the nature and description of the legal proceedings in which the order to pay was made. The judgment of the Court must be final and conclusive between the parties. The judgment will be deemed final and conclusive notwithstanding that the judgment may be subject to an appeal in the foreign jurisdiction. The test of finality of the judgment is how the judgment is treated by the foreign court. If the foreign court treats the judgment as *res judicata* it will be considered a final judgment by the Bermuda court. However, in the case of *Laep Investments Ltd v Emerging Markets Special Situations 3 Ltd* [2015] CA (BDA) 10 Civ the Bermuda Court of Appeal held that a stay order issued by the Brazilian courts meant that a Brazilian arbitration award was not final and conclusive. Accordingly, there could be no question of the Bermuda Courts allowing enforcement in respect of an award which was subject to a stay in the country where it had been made. In *Young v Hodge et al* [2001] Bda LR 70, the court expressed the view that a sum claimed on account of costs could not be registered as a judgment under the 1958 Act since the sum was not a final and conclusive determination of the claim for costs. If the sum claimed can be readily calculated it will satisfy the test of a sum of money under

the 1958 Act. The application for enforcement cannot contain a sum in the foreign judgment in respect of taxes or other charges of a like nature or in respect of a fine or other penalty. If the foreign judgment orders the judgment debtor to do anything other than to pay the judgment creditor a sum of money (eg, to comply with an order for specific performance of a contract) it will be unenforceable, although it can nonetheless be recognised under the 1958 Act and may be *res judicata* at common law, thereby creating a cause of action estoppel. There are no provisions in the 1958 Act permitting the grant of an interim or permanent injunction. See *Berliner Bank AG v John Karageorgis and Silver Carriers SA* [1997] Bda LR 37. However, in *Mubarak v Mubarak & Twenty First Century Holdings Ltd* [2000] Bda LR 63, the Bermuda Court granted a *Mareva* injunction in support of a foreign judgment that had not been registered under the 1958 Act. The Court was prepared to grant the *Mareva* injunction against a third party controlling the assets on the basis that the injunction was sought at the same time as the application to register the judgment. This authority has been fortified by the amendments to RSC Order 11 Rule 1(1)(m), which establishes that a judgment creditor has a cause of action from which the Bermuda Court has in personam jurisdiction before the foreign judgment is registered under the 1958 Act. This amendment establishes the cause of action from which an injunction can be granted in support of a foreign judgment.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Applications seeking enforcement of a foreign judgment in Bermuda must be brought in the Supreme Court of Bermuda.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Recognition and enforcement are considered to be separate ways of treating foreign judgments under the 1958 Act. It is possible for a foreign judgment to be recognised under both the 1958 Act or at common law in circumstances where enforcement is not possible because the judgment is in respect of something other than a debt. This situation is provided for in section 3(6) of the 1958 Act. The same approach is adopted under the 1993 Act in Arbitration proceedings. In *Laep Investments Ltd v Emerging Markets Special Situations 3 Ltd* [2015] CA (BDA) 10 Civ the Bermuda Court of Appeal held that a stay order issued by the Brazilian courts meant that a Brazilian arbitration award was not final and conclusive. The Court of Appeal took the approach that the recognition order would remain in place; however, execution was set aside pending the outcome of the appeal in Brazil.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

At common law the Supreme Court decision of *Ellefsen v Ellefsen*, Civil Jurisdiction Bda 1993 No. 202 decided that a foreign judgment that is final and conclusive on the merits cannot be impeached for any error of either fact or law. This principle would also apply to a foreign judgment registered under the 1958 Act. At common law the case of *Ellefsen v Ellefsen* decided that the only grounds for resisting the enforcement of a judgment are:

- want of jurisdiction in the foreign court according to the view of English law;
- that the judgment was obtained by fraud;
- that its enforcement would be contrary to public policy; and
- that the proceedings in which the judgment was obtained were contrary to natural justice.

Under sections 4(1) (a) and (b) of the 1958 Act, a judgment debtor can resist registration of a foreign judgment upon the following grounds:

- that the foreign judgment is not a judgment to which the 1958 Act applies or the judgment was registered in contravention of the 1958 Act;
- the foreign court had no jurisdiction;

- the judgment debtor did not receive sufficient notice of the proceedings to enable it to defend the proceedings and did not appear;
- the judgment was obtained by fraud;
- the rights conferred by the judgment are not vested in the person seeking its enforcement; or
- the matter in dispute giving rise to the registered judgment was previously determined and subject to a final and conclusive judgment by a court having jurisdiction over the matter.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

There is no provision under the 1958 Act to obtain an injunction to restrain the registration and enforcement of a foreign judgment. However, if a judgment debtor could satisfy the court that it had a compelling case in support of the defences under the 1958 Act or the defences to registration at common law there appears to be no reason in principle why an injunction should not be granted to restrain the registration of the foreign judgment.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

Under the 1958 Act, a foreign judgment that is final and conclusive between the parties and in respect of a definite sum of money can be registered and enforced. The registered judgment shall, for the purposes of execution, be of the same force and effect and the Supreme Court shall have the same control over the execution of a registered judgment as if the judgment was originally given in the Supreme Court and entered on the date of registration. Registration is mandatory where the requirements of the 1958 Act are satisfied. Foreign judgments enforced at common law must be in respect of a definite sum of money, which is a final and conclusive determination.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

In *Cross Border Capital Limited v Overseas Partners Re Ltd* [2004] Bda LR 17, the Supreme Court held that the definition of superior court in the 1958 Act did not include a judgment initially granted in the County Court in England and subsequently transferred to the High Court of England, despite the fact that the High Court in England had issued a certificate under section 10 of the 1920 Act on the premise that reciprocal enforcement was available. It is clear that the absence of a reciprocal arrangement permitting a Bermuda magistrates' court judgment from being enforced in the UK courts was an important factor in the decision of the Bermuda Supreme Court.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

At common law in *Muhl, Superintendent of Insurance of the State of New York (in liquidation) v Ardra Insurance Co Ltd* [1997] Bda LR 36, the Supreme Court of Bermuda held that it was contrary to public policy to permit a judgment to be enforced that had been obtained following a wilful decision to disregard an injunction issued by the Bermuda Court. The Court further held that the judgment sought to be enforced was obtained in breach of the English concept of substantial justice, the defendant not being permitted to defend itself unless it posted a sum of security that the foreign court had no reason to think that it could pay. There is no statutory equivalent to this decision under the 1958 Act.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

It is a precondition of enforcement both under the 1958 Act and at common law that the judgment debtor was subject to the personal jurisdiction of the foreign court. The common law test for jurisdictional competence

now accepted in Bermuda is present in the jurisdiction as set out in *Adams v Cape Industries plc* [1990] Chapter 433 applied in the Supreme Court of Bermuda decision *Barcardi Ltd & Others v Rente Investments Ltd* [2005] Bda LR 60. This is the test that the Bermuda Courts would in all likelihood apply if the question of jurisdictional competence had to be decided under the 1958 Act. The Bermuda Courts will apply the English conflict of laws principles to determine whether the Foreign Court properly exercised jurisdiction over the defendant in foreign proceedings. The Foreign Court will properly exercise jurisdiction over the defendant if the defendant submitted to the jurisdiction of the Foreign Court. Submission can take three forms:

- submission by voluntary appearance;
- submission by prior agreement (a useful explanation of this principle is found in the case of *Fiona Trust & Holding Cor v Privalov* [2007] UKHL 40); or
- submission to a counterclaim by the claimant, as discussed in the case of *Murthy v Sivajothi* [1999] 1 All ER 721, 730.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

Under the 1958 Act, the Foreign Superior Court granting the judgment shall not be deemed to have jurisdiction if the property is immoveable and was outside of the jurisdiction of the Court granting the judgment.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Under the 1958 Act, the judgment debtor can set aside registration of the judgment if he or she did not receive notice of the foreign proceedings in sufficient time to enable him or her to defend the proceedings and did not appear at the proceedings. No exact time limit is prescribed by the 1958 Act.

Under the 1958 Act and common law, personal service must be effected on the judgment debtor in accordance with the usual rules of service upon a party residing overseas. *Masri v Consolidated Contractors International Bda LR 12* and *Mubarak v Mubarak and Twenty First Century Holdings Ltd* [2002] Bda LR 63 both confirmed that despite the wording of Rule 4 of the Judgments (Reciprocal Enforcements) Rules 1976, the practice on an application to register a judgment under the 1958 Act is for the application to register a judgment to be made ex parte, and upon registration the order of registration is served upon the judgment debtor.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

As previously discussed, in *Muhl (in liquidation) v Ardra Insurance Co Ltd* [1997] Bda LR 36, the Supreme Court held that it was contrary to public policy to permit a judgment to be enforced that had been obtained following a wilful decision to disregard an injunction issued by the Bermuda Court.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

A judgment debtor can resist the enforcement of a foreign judgment on the basis of fraud under the 1958 Act and at common law. In *Consolidated Contractors International Co SAL v Masri* [2011] UKPC 29 the Privy Council said the following:

The allegation fraud was of an unusual nature. It related not to any aspect of the substantive judgments issued by Gloster J on liability or quantum. Rather it related to the basis upon which the English High Court came to assume jurisdiction to determine the claim against CCIC. The Committee will assume, without deciding, that a fraud leading to the wrongful acceptance by a court of jurisdiction is capable in principle of being relevant fraud under section 4(1) [...]

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Although it may be possible to resist the enforcement of the foreign judgment at common law on the grounds of public policy, there is no equivalent provision under the 1958 Act. In *Masri v Consolidated Contractors* [2009] Bda LR 12 the Court rejected the proposition that Rule 12 of the 1976 Rules permitted an argument that enforcement of a foreign judgment was contrary to the public interest.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Where there are two competing foreign judgments pronounced by courts of competent jurisdiction that are final and conclusive, the Bermuda Court would, in all likelihood, recognise the judgment that is registered first in time.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

The court will not apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor. In *Masri v Consolidated Contractors International Co SAL v Teyseer Contracting Company WLL* [2010] Bda LR 21, the court held that there can be no fundamental legal objection to the notion of a receiver being appointed to collect a judgment debtor's share of a joint debt. The court went on to say:

Difficult practical questions may arise for a receiver, and a court asked to give discretionary directive relief in circumstances where enforcement action is contemplated against assets which are either (a) not held in the Judgment Debtor's name at all; or (b) held prima facie on a joint basis.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

The court is permitted to grant an injunction to restrain enforcement of a judgment if that judgment was obtained in breach of an enforceable agreement to use an alternative dispute resolution procedure. See *OAO "CT-Mobile" v IPOC International Growth Fund Limited* [2006] Bda LR 69.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

The Commonwealth jurisdictions to which the 1958 Act applies by virtue of the Judgments Extension Order 1956 and the Judgments (Reciprocal Enforcement) Australia Order 1988 are the Federal Courts of Australia as well as the State or Territory Courts of New South Wales and the Northern Territory, the Bahamas, Barbados, Dominica, Gibraltar, Grenada, Guyana, Hong Kong, Jamaica, the Leeward Islands, Nigeria, St Lucia, St Vincent and the UK, including England and Wales, Scotland and Northern Ireland.

The 1958 Act does not apply to the US or to any of the member states of the European Union other than the UK. Section 9(1) makes it plain that for the 1958 Act to be extended to Commonwealth territories other than those listed above, the Governor of the islands of Bermuda must be satisfied that reciprocal provisions have been made by the legislature of the Commonwealth territories with whom Bermuda would seek to have reciprocal enforcement rights.

For jurisdictions not included in the 1958 Act, enforcement of foreign judgments in Bermuda is determined according to common law principles. In these circumstances the judgment creditor is required to commence a fresh action in Bermuda identical to the foreign proceedings and then

apply for summary judgment. The judgment creditor can then argue that the foreign judgment is conclusive of the issues between the parties (*Kader Holdings Company Ltd V Desarrollo Inmobiliario* [2013] CA (BDA) 13 Civ).

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

If a foreign judgment has been partly satisfied, the remaining balance due and owing on the judgment can still be registered for enforcement. The court has authority to divide a composite judgment into those parts that are registerable from those parts of the judgment that would not meet the requirements of the 1958 Act (refer to section 3(6) of the 1958 Act).

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

The judgment in a foreign currency should be converted to the currency of Bermuda on the basis of the rate of exchange prevailing at the date of the foreign judgment. Interest payable on the foreign judgment under the applicable foreign law will accrue up to the time of registration. Thereafter, the sum carries interest at the statutory rate under Bermuda law. The judgment creditor is entitled to reasonable costs of registration, including the cost of a certified copy of the foreign judgment. At common law, interest will accrue as part of the foreign judgment.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

There is a right to appeal from a judgment recognising or enforcing a foreign judgment. The appeals process permits appeals to the Court of Appeal in Bermuda and the Privy Council. See *Consolidated Contractors International Co SAL v Masri* [2011] UKPC 29, (2011) 78 WIR 141. The judgment debtor must make the original application challenging recognition or enforcement by summons that is heard by a Supreme Court judge in chambers. The judge has power to set aside registration or to suspend

execution on the judgment unconditionally or in such terms as the courts think fit. There are no rules under the 1958 Act for the provision of security for costs by a person applying for registration of judgments. In *Artha Master Fund, LLC v Dufry South America* [2011] Bda LR 17, the Bermuda Courts indicated that security for costs would be considered in reciprocal enforcement proceedings.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once a foreign judgment is registered under the 1958 Act the judgment may be enforced as if it had been made by the Supreme Court. The full range of enforcement procedures available if the action had been commenced in Bermuda are available to the judgment creditor (*Masri v Consolidated Contractors International Co SAL and Teyseer*). At common law an action must be started in order to enforce a foreign judgment. Once judgment has been entered, the Supreme Court will exercise the same powers of enforcement available in respect of judgments registered under the 1958 Act.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

A major pitfall confronting litigants who wish to appear in foreign proceedings for the limited purpose of contesting the jurisdiction of the Foreign Court is the absence of a statutory provision in Bermuda equivalent to section 33 of the United Kingdom Civil Jurisdiction and Judgments Act 1982. The position under the 1958 Act and at common law is precarious. A litigant who enters a conditional appearance in the foreign jurisdiction to set aside the foreign proceedings may be taken as having submitted to the jurisdiction, even if the appearance did not involve arguing the merits of the case. In *Arabian American Insurance Co v Al Amana Insurance & Reinsurance Co Ltd* [1994] Bda LR 27 the Supreme Court of Bermuda held as follows:

The common law, as established by the English Court of Appeal's decision in Henry v Geoprosco International Ltd [1976] QB 726, was that an appearance to contest jurisdiction on the basis that a discretion should be exercised against claiming jurisdiction constituted submission. That decision left open the question whether an appearance to contest jurisdiction constituted submission. That decision has been much criticized, and I frankly have doubts as to whether it would, or should now be followed. Certainly I consider that, if it is to be followed it should be limited to its strict ratio decidendi.

Brazil

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Brazilian laws are generally favourable towards cooperation with other countries. Besides the statutory rules on judicial cooperation that apply to any foreign state, there are also bilateral treaties signed between Brazil and a number of states, such as France (1985), Peru (1993), Italy (1995), Argentina (1995) and Uruguay (1996). Those treaties are not identical, but most of them contain provisions aiming at expediting the acts that must be performed for the competent exequatur to be obtained from the Brazilian Superior Court of Justice.

Multilateral treaties have also been signed by Brazil on judicial cooperation with countries of the American continent under the Organization of American States (OAS) and the Common Market of the South (MERCOSUR). It is worth noting that Brazil is party to the OAS Inter-American Convention on International Commercial Arbitration of 1975 (Panama Convention), the OAS Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).

Except for the constitutional requirement of recognition of any foreign judgment by the Superior Court of Justice prior to its enforcement in Brazil, no relevant reservations have been made by Brazil to such treaties.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Enforcement of foreign judgments is ruled by federal law, which is applicable uniformly throughout Brazil.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Enforcement of foreign judgments in Brazil is founded in the Federal Constitution and regulated by ordinary legislation (mainly the Code of Civil Procedure), the applicable international treaties (which, once approved by the National Congress and enacted by a presidential decree, are incorporated into the Brazilian legal system) and the internal rules of the Superior Court of Justice.

The Brazilian Federal Constitution states that any foreign award – either issued by a judicial court or an arbitral tribunal – must be recognised by a specific superior court prior to its enforcement before Brazilian trial courts, irrespective of the existence of reciprocity or specific international treaty or convention between the country of origin of the judgment and Brazil. The current constitutional regulation, through article 105, I, 'i', determines the Superior Court of Justice as the only competent court in Brazil to hear cases concerning the 'recognition of foreign judgments and the granting of *exequatur* to letters rogatory' procedure regulated by the Superior Court of Justice's Internal Rules (*Regimento Interno*, RISTJ). The recognition proceeding is limited to the verification of formal aspects of

the foreign judgment in light of Brazilian sovereignty, public order and the principle of dignity of the human person. The merits of the foreign judgment are not revisited.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Brazil is not a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

There is no specific provision in Brazilian law with respect to the limitation period for enforcement of a foreign judgment. Guiding Precedent (*Súmula*) No. 150 of the Brazilian Federal Supreme Court states that 'enforcement is time-barred within the same period applicable to the relevant action [in which the enforceable judgment was rendered]'. Based on this precedent, most Brazilian scholars affirm that the limitation period for enforcement of a judgment is the same as that applicable to the filing of the court action or arbitration in the relevant foreign jurisdiction.

The limitation period for enforcement of a foreign judgment starts to run from the date on which the judgment became final and unappealable at the relevant jurisdiction.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Application for the enforcement of a foreign court order in Brazil (or the converse), such as summons, injunctive reliefs and subpoenas, must be made to the competent authorities by means of letter rogatory. The letter rogatory must comply with any applicable international convention as to admissibility and enforcement. If there is no applicable convention, the letter rogatory is translated into the language of the country where the order is to be carried out (in this case, Brazilian Portuguese), and is sent to the competent court through diplomatic channels. The enforcement of letter rogatory from foreign courts is subject to the Internal Rules of the Superior Court of Justice, as modified by Amendment No. 18 of 17 December 2014.

Before the Constitutional Amendment No. 45-2005, dated 30 December 2004 (which transferred the jurisdictional competence for analysis of letters rogatory and exequaturs from the Federal Supreme Court to the Superior Court of Justice), the established understanding of the Federal Supreme Court was to deny exequatur for any foreign order that could be understood as having a constrictive nature, such as an order for the freezing of assets or exhibition of documents in support of a foreign litigation.

In the last few years, however, the Superior Court of Justice and some Brazilian scholars, mostly based on the provision of article 216-O, first

paragraph, of the STJ Internal Rules (the exequatur shall be granted to letters rogatory related to both decision and non-decisional acts) have been manifesting – and even encouraging – a possible turnaround in the interpretation formerly adopted by the Federal Supreme Court. In recent case law, the exequatur to constrictive orders has been granted by the Superior Court of Justice so far primarily in cases where there is an express authorisation provided in judicial cooperation conventions or bilateral treaties signed by Brazil and the relevant foreign jurisdiction (all mainly when there are criminal acts in discussion or under investigation).

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

As mentioned, the current constitutional regulation determines the Superior Court of Justice (STJ) as the only competent court in Brazil to hear cases concerning the ‘recognition of foreign judgments and the granting of *exequatur* to letters rogatory’.

Once recognition is granted by the STJ, actual enforcement is requested before the federal courts of the place where the obligation must be performed or where the respondent is domiciled.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

The process of recognition of a foreign judgment is carried out exclusively before the Superior Court of Justice and aims at transforming said judgment into an enforceable decision within Brazilian territory (ie, equivalent to any judgment rendered within Brazilian territory). The process for enforcement of the then recognised foreign judgment is ultimately carried out before the federal court with jurisdiction over the place in which the obligation must be performed or the respondent is domiciled and aims at actually enforcing the orders of the judgment.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

A defendant cannot raise merits-based defences or any other defences related to the scope of the foreign award. Through the process for recognition of the foreign judgment, the STJ will solely analyse the compliance of formal requirements under Brazilian law, as well as whether the foreign judgment is in accordance with national sovereignty, public policy and the dignity of the human person.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Although the grounds for defence are defined in the applicable laws and rules, the defendant is entitled to fully exercise its right of defence in both the process for recognition of the foreign award before the Superior Court of Justice and the subsequent process for enforcement thereof before the competent federal court.

In exceptional and duly justified circumstances, however, the defendant may file for injunctive relief to prevent proceedings from either being initiated (anti-suit injunction) or following its regular course (stay-effect injunction). To that end, the defendant must prove that the processing of the recognition and/or the enforcement requests would cause it irreparable damages. Even in such a situation, however, the claimant party may plead for the regular development of the proceedings by offering security (bond) in an amount to be determined by the court.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

The Internal Rules of the Superior Court of Justice (RISTJ) sets forth, in its articles 216-C and 216-D that the recognition will be granted if:

- the judgment is entered by a competent court in the jurisdiction of origin;
- the parties are regularly served process in the original case;
- the judgment is final and unappealable, complying with the necessary formalities in the country where the award was rendered; and
- the judgment is legalised by the Brazilian consulate and translated into Portuguese by a sworn translator in Brazil.

In addition, the RISTJ also establishes that the recognition will be denied if the award or the letter rogatory awaiting exequatur violates Brazil’s national sovereignty, public policy or the dignity of the human person. In the case of a foreign arbitral award, it is also necessary to demonstrate the existence of a valid arbitration agreement and its sworn translation into Portuguese.

The recognition of foreign judgments in Brazil commences with the interested party presenting a recognition request (in the form of a petition or application in writing) to Brazil’s Superior Court of Justice, and providing the necessary documents to demonstrate the fulfilment of the formal and substantive requirements for ratification.

After the filing of the recognition request, the President of the Court may demand that the interested party presents additional documents or amend its initial application. Should the court interpret that documents presented by the plaintiff are sufficient and the request is adequate, it will determine that service of process be effected on the defendant, which will then have the opportunity to present its response.

If the defendant assents to the recognition request, the President of the Court him or herself decides the case. Should the defendant challenge the request, the court may determine the plaintiff and defendant to provide, respectively, their reply and rebuttal, and the case is remitted to the Superior Court of Justice’s Special Court (composed by the most senior Justices of the Court). The Public Attorneys’ Office is then notified to present an opinion on the case.

Finally, after the Public Attorneys’ Office has given its opinion, the Special Court proceeds to render its final decision.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

Except for the existence of specific terms and requirements set forth in some bilateral or multilateral treaties to which Brazil is a party, there are no other factors for recognition of a foreign judgment to be considered than those mentioned above.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

There is no specific requirement that the judicial proceedings where the judgment was entered should correspond to the proceedings in Brazilian jurisdiction. Nevertheless, the STJ should consider whether a minimum degree of respect for the due process of law has been observed, as the foreign judgment must not violate Brazil’s public policy, national sovereignty or the dignity of the human person. The defendant must have been duly served process and given the opportunity to present its case in the foreign proceedings; in the event that a default judgment occurred, it must be evidenced that it was carried out lawfully.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

Article 216-D of the RISTJ requires that the foreign judgment was issued by ‘a competent authority’, which means that the court where the judgment was entered should have had personal jurisdiction over the defendant. In its request for recognition, the claimant should expressly state that this requirement has been met. If the defendant, in its response to the claimant’s request, challenges compliance with this requirement, the parties will be allowed to produce all sorts of evidence as may be necessary to prove their allegations.

Update and trends

In 2016 Brazil ratified the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the Apostille Convention), which was concluded at The Hague in 1961, through the enactment of Federal Decree 8,660. The convention aims at removing the requirement of diplomatic or consular legalisation of foreign documents, which may facilitate the submission of requests for recognition and enforcement of foreign judgments, among others.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The answer to question 14 is also applicable. The court where the judgment was entered should have had both personal and subject-matter jurisdiction over the defendant.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

In principle, service of process on the defendant should follow the law governing the relevant action. However, it is considered a matter of public policy – and is therefore mandatory – that service of process on a party who is resident or domiciled in Brazil to appear in a legal action initiated at a foreign court must be made in Brazil through a letter rogatory (it cannot be made by fax or letter sent by lawyers, for example). The letter rogatory and the documents attached thereto should be translated into Portuguese by an official translator and sent to Brazil through diplomatic channels. The service must be supervised by a Brazilian court and carried out by a court official.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Under Brazilian law, the relative inconvenience of the foreign jurisdiction to the defendant is not a cause for the recognition and enforcement requests to be denied, provided that the Brazilian defendant has been duly served process and given full opportunity to present its case before the foreign court.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Upon analysing the request for recognition, the STJ will focus on the formal requirements mentioned above, and will not analyse the merits of the foreign judgment. However, if the occurrence of fraud is proved and such fraud is proved to have impaired the exercise by the defendant of its right of defence, this may be accepted by the STJ as a cause of denial of the claimant's request for recognition and subsequent enforcement.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

The STJ will decline to recognise the validity of the foreign judgment if it violates Brazil's national sovereignty, public policy or the dignity of the human being. Inconsistency with Brazil's substantive laws is not relevant unless such inconsistency is deemed a violation of these three principles.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

There is no specific rule as to how the STJ should act if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties, whether in the country where the foreign judgment was taken or in a third country. In principle, once it is proved that the foreign judgment sought to be enforced is final and unappealable and was rendered by a competent court, the existence of another decision rendered outside of Brazil should not be taken into consideration by the STJ.

However, if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment issued in Brazil involving the same parties and the same subject matter, the Brazilian judgment will be considered *res judicata* and should prevail, thus impeding the foreign judgment from being enforced.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

As a rule, the request for recognition at the STJ should be processed between the same parties to the action where the judgment sought to be recognised was rendered, and the subsequent enforcement will commence against the named judgment debtor. However, during the course of the enforcement proceedings, the creditor may request application of the disregard doctrine based on article 50 of the Brazilian Code, which states that the corporate veil of a company may be disregarded by the court to achieve the personal assets of its managers and shareholders at the request of the interested party and/or the Public Prosecutor Office, in the event of abuse of power, characterised by deviation from its purpose (where it is proved that the company distorted its objectives and was used to cover up the practice of irregularities) and commingling of assets (where there is equity confusion between the assets of the partners and the corporate entity in which they take part).

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

If the parties had an enforceable arbitration agreement and the party seeking to enforce disregarded such an agreement and directly resorted to court, if the defendant submitted a timely motion to dismiss based on non-compliance by the claimant with the arbitration agreement and if the court even so proceeded with the action until final judgment, then it is likely that the defendant will succeed in its challenge to the claimant's request for enforcement of the judgment at the STJ. This is because Brazilian law fully recognises the enforceability of the arbitration agreement and the principle of competence-competence, which preserves the powers of arbitrators to decide on their own jurisdiction. Other alternative means of dispute resolution, such as mediation and conciliation, although provided in Brazilian legislation as well, do not have the same enforceability as arbitration.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

No. Due to some bilateral and multilateral treaties, some requests for judicial cooperation may be given greater deference, but recognition and enforcement of foreign judgments are all subject to the same treatment by the STJ and subsequently by the competent federal court.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Article 216-A, second paragraph, of the RISTJ sets forth that 'foreign judgments may be partially recognised'. That means that only a part or certain parts of the judgment may be recognised, but the STJ is not expected to alter or limit a damage award.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

The STJ recognises the foreign judgment in its complete terms, including the amount of the damage award in the original currency, which may or may not include court costs and related fees, as well as other factors, such as interest at the rate established in the judgment. Filing of the subsequent enforcement proceedings at the federal court requires conversion of the damage award into Brazilian reais, and from this moment on the amount in reais will start to accrue inflation-based monetary adjustment and legal interest at the rate established by Brazilian law until actual payment by the debtor.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

The party may appeal from a judgment recognising a foreign judgment either to the STJ itself or to the Federal Supreme Court, in accordance with the relevant rules. Enforcement of the recognised foreign judgment may then be immediately initiated at the competent federal court.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

The recognised foreign judgment has the same force and validity as a national judgment and its enforcement follows the provisions of the Brazilian Code of Civil Procedure with respect to the enforcement of judicial executive titles. Once the enforcement request is filed by the creditor, the debtor is served to pay within 15 days. If payment is not made within such period, a penalty of 10 per cent is automatically added to the debt and the creditor is entitled to appoint the debtor's assets it wishes to be constrained for payment purposes. After the constriction and evaluation of the attached assets, the debtor is again served to file, if so desired, an opposition, which does not affect the course of the enforcement proceedings unless the judge determines otherwise. The range of defences is limited. If the defendant again does not pay the debt, the attached property shall be evaluated and sold in a public auction and the values are reverted to pay the creditor. The Brazilian legal system does not provide for any criminal sanction for debtors.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

The Brazilian judicial system is trustworthy, not protectionist and gives the same deference to national and foreign litigators. However, the duration of court proceedings is still the most significant pitfall in pursuing an expeditious outcome for any dispute in Brazil, due to the enormous number of court proceedings under way before both the common and the federal courts. A process for recognition of a foreign judgment at the STJ, if contested by the defendant, may take up to two years to be concluded, and the subsequent process for enforcement of the recognised judgment may take from two to three years.

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Cayman Islands

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

The Cayman Islands has not itself entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments (except in relation to Australia). However, the Cayman Islands is a British overseas territory, and the UK can extend its ratification of treaties to the Cayman Islands by Order in Council. No treaties for recognition or enforcement of judgments have been so extended.

The Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (the 1996 Law) provides a statutory regime for recognition and enforcement of foreign judgments but so far only applies in relation to judgments from Supreme Courts in various Australian states and territories, and the Australian Federal and High Courts.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Not applicable.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Enforcement of foreign judgments in the Cayman Islands is usually through the common law route (ie, suing in a new main proceeding upon the foreign judgment as an unpaid debt obligation). Such an action will be conducted under the local litigation regime. The exception is the statutory regime for reciprocal recognition and enforcement of judgments contained in the 1996 Law, which currently only applies to judgments from supreme courts in various Australian states and territories, the Australian Federal Court and the Australian High Court.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

The Cayman Islands is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

A six-year limitation period applies both for common law enforcement and under the 1996 Law. The period starts with the date of the judgment or, when there have been appeals, the date of the last judgment.

The Cayman Islands court would not consider the statute of limitations of the foreign jurisdiction.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Money and non-money judgments are both enforceable in the Cayman Islands at common law. See *Bandone v Sol Properties* [2008 CILR 301], in which the Cayman Islands court confirmed that in personam judgments may be recognised and enforced through equitable remedies or, if required, under the principle of comity. When deciding whether to enforce a non-money judgment, the court will have regard to general considerations of fairness, but will not re-examine the merits of the underlying case.

If seeking recognition or enforcement of a judgment under the 1996 Law, there are statutory requirements that:

- the foreign judgment must be final and conclusive;
- the foreign judgment is a money judgment; and
- the foreign judgment was given after 1996 Law came into force.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Regardless of whether enforcement is sought at common law or under the 1996 Law, the proceedings must be brought in the Financial Services Division of the Cayman Islands Grand Court.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Enforcement at common law is a two-stage process: a new main proceeding must be brought on the back of the judgment to create a domestic judgment. Once judgment has been obtained from the Cayman Islands court (often on an application for summary judgment), the full range of domestic enforcement methods are available.

When it is applicable (ie, in relation to Australian judgments only at this time (see question 1)), the process under the 1996 Law is made up of three stages. The judgment creditor must first apply ex parte to the Grand Court for registration of the judgment. If the court is satisfied that the judgment meets the statutory criteria, the judgment will be registered. The judgment debtor then has a limited time within which to apply to set aside registration on specified grounds. If registration is not challenged, or is confirmed, the registered judgment is treated as if it were a judgment of the Grand Court. Domestic enforcement methods are then available.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

In theory, merits-based defences can be brought in response to a new main proceeding to enforce a foreign judgment at common law. However, this will be limited to attacking the validity of the obligations created by the foreign judgment; the Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment or entertain re-opening of the merits of the underlying dispute.

A defendant may raise as a defence to common law enforcement the existence of a different enforceable foreign judgment granted in his or her favour that nullifies or impacts upon the foreign judgment sought to be enforced. The judgment debtor may also be able to raise as a counterclaim any other liability that the judgment creditor has to the judgment debtor (including another foreign judgment in the judgment debtor's favour).

When registration or enforcement is sought under the 1996 Law, limited grounds of challenge are available in section 6:

- the court issuing the judgment did not have valid jurisdiction to pronounce the judgment;
- the judgment debtor, being a defendant in the proceedings in the original court, did not receive proper notice of those proceedings in time to defend the proceedings and did not appear;
- the foreign judgment was obtained by fraud;
- the enforcement of the judgment would be contrary to public policy;
- the rights under the judgments are not vested in the person by whom the application was made; and
- there is a previous final and conclusive foreign judgment dealing with the same subject matter.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Whether enforcement at common law or registration under the 1996 Law would be sought, the judgment debtor could theoretically try to obtain an anticipatory injunction to prevent such steps being taken. The judgment debtor would have to make out grounds to object to the enforcement or registration and that it is just and convenient to grant the injunction rather than to allow enforcement or registration to take their normal course and for the judgment debtor to raise their objection at the appropriate time during that process.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

There are no specific mandatory requirements for recognition or enforcement of a foreign judgment at common law, other than that the foreign judgment must be a regular judgment and must be final and conclusive.

Statutory recognition under the 1996 Law requires:

- the judgment must have been from one of the jurisdictions to which 1996 Law applies (currently limited to judgments from supreme courts in various Australian states and territories, the Australian Federal Court, and the Australian High Court);
- the foreign judgment must be final and conclusive;
- the foreign judgment must have been given after the 1996 Law came into force;
- registration must be sought within the applicable limitation period of six years; and
- at the date of the application, the judgment must not already have been wholly satisfied or enforced and must still be capable of enforcement in the country of the foreign judgment.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

There are no nonmandatory factors for recognition, either at common law or under the 1996 Law.

Update and trends

The draft to the Foreign Judgments Reciprocal Enforcement Law, which was published in 2013, contemplates expanding the number of countries that may register judgments in the Cayman Islands. When the current draft law is eventually enacted, it will apply to the Bahamas, Bermuda, British Virgin Islands, Canada, Guernsey, Isle of Man, Jersey, New Zealand, Ireland, Singapore and the UK.

Other proposed changes include the removal of the reciprocity requirement as is presently needed in order to determine whether a judgment should be recognised and registered.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

There is no such formal requirement at common law or under the 1996 Law. The Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment, but it may be an aspect of the public policy considerations to recognition and enforcement.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

There is no such formal requirement for enforcement at common law. The Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment.

Enforcement under the 1996 Law requires the court to examine whether the foreign court had jurisdiction over the judgment debtor. It will set aside registration of the foreign judgment when it is proven that the foreign court lacked jurisdiction. Section 6(2) requires that the court consider whether the judgment debtor:

- agreed, prior to the commencement of the proceedings, that he or she would submit to the jurisdiction of that court in respect of the subject matter of the proceedings;
- was resident in the country of that court, or carried on business there, at the time when the proceedings were instituted;
- voluntarily submitted to the jurisdiction of the court as evidenced by his or her voluntarily appearing in the proceedings; or
- was a plaintiff in, or counterclaimant in, the proceedings in the original court.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The Cayman Islands court does not generally apply concepts of subject-matter jurisdiction. However, the Cayman Islands court will not enforce criminal fines and tax judgments, whether at common law or under the 1996 Law.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

For enforcement by the common law route, the Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment.

The 1996 Law requires a judgment debtor to have been properly served in accordance with the law of the foreign country in order for that judgment to be registered in the Cayman Islands. Failure to provide sufficient notice forms one of the bases upon which the court must set aside registration.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment, even if that foreign jurisdiction may not have been a convenient one for the judgment debtor.

The 1996 Law provides an exhaustive list of grounds for which registration of a foreign judgment may be set aside, which does not include inconvenience of the foreign jurisdiction to the judgment debtor.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Fraud is one of the limited grounds on which a judgment debtor may seek to impeach an apparently regular foreign judgment in order to prevent enforcement of it at common law.

Statutory registration will be refused under section 6 of the 1996 Law if the foreign judgment has been obtained by fraud.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

No. However, the Cayman Islands court will consider whether enforcement of the foreign judgment would conflict with Cayman Islands public policy. (The scope for such a challenge is very narrow and refusal on the grounds of public policy will only arise when there has been a breach of the most basic notions of morality and justice.)

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

The existence of a conflicting foreign judgment involving the same parties or parties in privity with them may provide a valid defence or counterclaim to enforcement at common law.

The statutory scheme for recognition allows the court to set aside registration if there is an earlier final and conclusive foreign judgment dealing with the same subject matter (see section 6(1)(b)).

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

Generally, no.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

The Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment when considering common law enforcement.

Failure to use agreed ADR mechanisms is not a ground to refuse recognition under the 1996 Law.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Judgments from countries to which the 1996 Law has been extended are given the benefit of a streamlined statutory scheme for recognition (currently the superior courts in Australia and its external territories only).

Apart from this, no special deference is given to judgments from one foreign country over those of another foreign country.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

When seeking enforcement at common law, the judgment creditor may elect to pursue enforcement of certain parts of the judgment only. In particular, Cayman Islands public policy is against recognition of punitive damages awards, enforcement of which is therefore often not pursued.

The 1996 Law permits registration of part of a judgment only, and to remove from the foreign judgment any parts that cannot properly be registered.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

When enforcing at common law, the new main proceeding can be expressed in the foreign currency. Conversion to local currency will be effected either when the local judgment is entered or at the time of enforcement.

Under the 1996 Law the judgment is converted into Cayman Islands dollars at the rate of exchange prevailing on the date the judgment was given in the foreign court (see section 4(3)).

When the foreign judgment includes costs, interest or both, these may form part of the judgment debt to be enforced in the Cayman Islands, both at common law and under the 1996 Law.

When the foreign judgment contains no award for interest, the Cayman Islands judgment (whether obtained by new main proceeding at

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common law or registration under the 1996 Law) will accrue interest at the standard rate from the date of the Cayman Islands court's judgment award unless it orders otherwise.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

When enforcing at common law by new main proceeding, or registering under the 1996 Law, the usual local rights of appeal to the Cayman Islands Court of Appeal are available.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once the foreign judgment has become a Cayman judgment through a new main proceeding at common law, or has been registered in the Cayman Islands under the 1996 Law, it may be enforced in the same manner as any other judgment of a Cayman Islands court. The full range of domestic enforcement procedures is available.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Not applicable.

Chile

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Chile is party to the following treaties regarding the recognition and enforcement of foreign judgments and arbitral awards (although this chapter does not specifically refer to foreign or international arbitral awards, it is worth noting the relevant regulation on the matter):

- the Treaty on International Procedural Law 1889 (the Montevideo Treaty);
- the Agreement on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labour and Administrative Matters between the States Parties of Mercosur (the Mercosur Agreement);
- the Pan-American Convention on Private International Law (the Bustamante Code); Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);
- the Inter-American Convention on International Commercial Arbitration (the Panama Convention); and
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

Chile included one reservation to the Bustamante Code, which is that its rules are applicable as long as they do not oppose current or future Chilean laws. Chile's approach, set forth mainly in legislation, is to allow the recognition of foreign judgments as long as they meet minimum requirements of international due process in order to protect Chilean sovereignty, public policy and the rule of law.

Chile's approach to entering into treaties related to recognition and enforcement of foreign or international arbitral awards is to recognise the value of international commerce, to promote arbitration as a useful mechanism for dispute resolution, and to promote Chile as a seat of arbitration.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

There is uniformity in the law on the enforcement of foreign judgments within Chile. Chile is a unitary state. Chile's legislation and ratified treaties apply to all Chilean territory.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

In Chile, the main source of law regarding the recognition and enforcement of foreign judgments is legislation. Specifically, Title XIX Book I of the Code of Civil Procedure regulates the recognition of foreign judgments. However, these rules indicate that, when there is a treaty between Chile and the country that rendered the foreign judgment, the treaty will prevail over national legislation. Title I Book III of the Code of Civil Procedure regulates the enforcement of foreign judgments through an expedited proceeding, and Book II of the same Code regulates the enforcement through an ordinary proceeding.

Also, the Code of Civil Procedure provides that its rules on recognition of foreign judgments are applicable to recognition of foreign arbitral awards, which also means that the treaties on foreign awards (ie, the New York Convention) prevail over the rules set forth in the Code. The recognition and enforcement of awards rendered in international commercial arbitration are governed by Law 19.971 on International Commercial Arbitration.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Chile is not party to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Also, Chile has not ratified the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

In Chile, there is no explicit rule with regard to the limitation period to enforce a foreign judgment. This means that the general rules regarding limitations to enforce Chilean judgments also apply to foreign judgments. According to these rules, a foreign judgment could be enforced in Chile through an expedited proceeding within three years of it becoming final, and through an ordinary proceeding within five years of it becoming final. Nevertheless, there is no rule clarifying whether the limitation period should run from the moment the foreign judgment became final in the country of origin or from when the judgment was recognised in Chile. Some scholars state that the limitation period should run from when the foreign judgment became final in the country of origin. (See, for example, Carlos Anabalón, *Tratado Práctico de Derecho Procesal Civil Chileno*, 2nd edition, p. 311.) However, a recent decision by the 3rd Civil Court of Santiago stated that the limitation period should run from when the judgment becomes enforceable within Chile (ie, after the recognition decision has been issued and served) (see 3rd Civil Court of Santiago, Case No. 19625-2011).

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

In principle, remedies such as money judgments, permanent injunctions or orders for specific performance issued by a foreign court are enforceable in Chile, although the proceeding to pursue its enforcement might be different. However, if the remedy contravenes Chilean public policy it will not be enforceable (eg, punitive damages).

Additionally, Chilean courts tend to refuse the recognition of foreign interim measures issued by international arbitral tribunals or foreign courts. This also applies to interim injunctions. As the exequatur is conceived to recognise 'final decisions', the Supreme Court has ruled in the

past that such procedure applies only to final awards, and not to interim measures or provisional orders. For example, in one case the Supreme Court denied the recognition of an interim measure issued by an arbitral tribunal under the auspices of the American Arbitration Association (see Supreme Court, Case No. 5468-2009).

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Unless otherwise provided by an international treaty, a petition for the recognition of a foreign judgment or a foreign or international arbitral award, must be brought before the Chilean Supreme Court through an exequatur proceeding. If the Supreme Court grants the exequatur, the enforcement of such a recognised judgment must be requested before the first instance civil court that would have had jurisdiction to rule on the case had it been brought before a first instance civil court in Chile.

An example of a treaty that provides that a petition for recognition is not needed for decisions issued pursuant to it is the ICSID Convention. This Convention provides that '[e]ach Contracting State shall recognise an award rendered pursuant to this [ICSID] Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State' (ICSID Convention, article 54).

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

As indicated above, the process for obtaining judicial recognition of a foreign judgment (an exequatur) is separate from the process for enforcement of a recognised foreign judgment. The purpose of the exequatur proceeding is to determine whether the foreign judgment should be recognised.

Unless otherwise provided by a treaty, a petition for the recognition of a foreign judgment must be brought before the Chilean Supreme Court through an exequatur proceeding. If the judgment is recognised, the petition for enforcement can be brought before a lower civil court. The same applies for foreign and international arbitral awards.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

Chilean law places no restrictions on the defences that may be filed by the defendant. However, due to the scope of the exequatur proceeding the defences should be related to the set of criteria defined by Chilean law for recognition of foreign judgments (ie, minimum requirements for international due process). Then, if the enforcement is requested within three years of it becoming final (and is thus carried out according to the expedited proceeding), the defences are limited to those indicated by article 464 of the Code of Civil Procedure. But, if the enforcement is requested between the third and fifth year after it became final (and is thus carried out according to the ordinary proceeding), there are no limits with regard to the defences the defendant can raise.

If the recognition is governed by an international treaty, such as the New York Convention, the defendant will be able to file only those defences allowed by the treaty to challenge the recognition of the foreign judgment or foreign award. With regard to the recognition of international arbitration awards, the defendant will be able to challenge the recognition based upon the grounds indicated in Chapter VIII, Law 19.971, which are those of the 1985 Model Law. In a recent decision, the Supreme Court indicated that, in the context of an exequatur proceeding of an arbitral award, is not possible to discuss legal and factual issues that were discussed before the tribunal that issued the award, or to discuss defences that can be filed in the enforcement proceeding, but only to review the legal requirements established in Law 19.971 to determine whether to recognise the award. This because the purpose of recognition proceedings is limited to determining whether or not to authorise the enforcement of awards rendered in foreign countries (Supreme Court, Case No. 7854-2013).

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

There is no injunctive relief to prevent foreign judgment recognition and enforcement proceedings in Chile. However, Chilean law allows defendants the right to present an opposition during the recognition proceeding as well as during the enforcement proceeding.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

The Chilean Code of Civil Procedure has established a system to allow the recognition of foreign judgments comprised of three alternative criteria that must be followed in the sequence established by the law. First, if an international treaty regarding recognition of foreign judgments exists with the country of origin of the foreign judgment, the analysis of recognition will be done according to that treaty. Second, in the absence of any treaty, Chilean law looks to whether Chilean judgments are recognised by the country of origin of the foreign judgment whose recognition is sought. In practice, even if there is a treaty or reciprocity with the country of origin, the Chilean Supreme Court might not recognise the foreign judgment if it, or the proceeding from which it resulted, goes against Chilean public policy or the rule of law according to the next criteria.

Third, when those criteria cannot be applied, the Code of Civil Procedure lists four minimum requisites that a foreign judgment must meet to be recognised and ultimately enforced in Chile (this is known as international regularity or the minimum international due process standard):

- that it contains nothing contrary to Chilean laws (with the exception of the procedural laws under which the judgment would have been issued in Chile);
- that it does not oppose Chilean national jurisdiction;
- that the party against whom the judgment is invoked has been duly served with the action. However, this party could prove that, for other reasons, it was prevented from presenting a defence; and
- that it is final and irrevocable in accordance with the laws of the country in which it was rendered.

The first and second requisites are aimed directly at the protection of Chilean public policy and the rule of law. The first requires that the foreign judgment is issued pursuant to the procedural laws of the foreign country (following the principle *lex locus regit actum*) and, at the same time, that it does not violate Chilean substantive laws. The second means that the foreign judgment cannot decide on matters over which, according to Chilean law, Chilean courts have exclusive jurisdiction. The third requisite intends to ensure that the underlying judicial proceeding respects the principle of due process of law, especially the right to a defence. This requisite goes beyond the formality of having served the defendant; it allows the party against whom the foreign judgment is invoked to demonstrate that, despite being served, it was unable to exercise a meaningful defence. The fourth requisite, that the foreign judgment has to be final and irrevocable in the country of origin, responds to the need for legal certainty. This requisite is met when the foreign judgment is not subject to any additional appeal or recourse in the country of origin.

Regarding international commercial arbitration awards, Law 19.971 provides limited grounds for refusing recognition or enforcement which are included in the 1985 UNCITRAL Model Law.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

As mentioned above, factors such as reciprocity and international minimum due process must be considered in the absence of a treaty between Chile and the country of origin of the foreign judgment. When reviewing whether a foreign judgment meets the minimum requirements for recognition, the Supreme Court has stated, among other things, that it will not recognise judgments issued procured by fraud (Supreme Court, Case No. 24.097-2014).

Update and trends

On 30 August 2016, the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents entered into force in Chile. As its article 1 states, this Convention applies to all public documents which have been executed in the territory of one contracting state and which have to be produced in the territory of another contracting state. The Convention was ratified by Chile on 16 December 2015 and implemented into Chilean law through Law 20.711 (and its Regulation), which modified the Code of Civil Procedure, the Code of Judicial Organisation and other legal bodies. With regard to recognition and enforcement of foreign judgments it will be enough to submit the foreign judgment with its apostille rather than a legalised copy of such judgment.

With regard to Chile's efforts to enact a new Code of Civil Procedure, the current Administration has not made it a priority during 2016. Thus, we do not anticipate that a new code will be enacted within the next year. The new Code, if and when enacted by the Chilean Congress, will establish new rules regarding the recognition and enforcement of foreign judgments. As of now, however, the new rules would not change the current requirements that a foreign judgment must meet in order to be recognised and enforced in Chile. Nevertheless, the new Code would allow the judge to verify *ex officio* the fulfilment of the recognition requirements, and to request evidence.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

The Chilean Supreme Court might not recognise a foreign judgment if it, or the proceeding from which it resulted, goes against Chilean public policy or the rule of law. However, that does not mean that the foreign proceeding should have followed the Chilean proceeding. In fact, the criterion of international regularity, when applied, requires that the foreign judgment must be issued pursuant to the procedural laws of the foreign country. The foreign judgment must not violate Chilean substantive laws.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

During the recognition proceeding, the Supreme Court may analyse whether the judgment was issued by a court with jurisdiction over the defendant. Among other things, the foreign judgment cannot have decided a matter over which, according to Chilean law, Chilean courts have exclusive jurisdiction. Also, when analysing whether the court where the judgment was entered assured due process and the right to a defence, the Chilean Supreme Court may analyse whether that court had personal jurisdiction over the defendant.

With regard to the availability of this defence during the enforcement proceeding, Chilean law is silent. However, if the enforcement takes place through an expedited proceeding the personal jurisdiction defence regarding the court where the judgment was issued should not be available because the available defences are listed by article 464 of the Code of Civil Procedure. If the enforcement takes place through an ordinary proceeding, the personal jurisdiction defence regarding the court where the judgment was issued could be raised, as the defences are not regulated by the law. Nevertheless, if personal jurisdiction regarding the court where the judgment was issued was discussed and decided during the *exequatur* proceeding, it is likely that the defence will be rejected due to the *res judicata* effect of the *exequatur* decision.

With regard to international commercial arbitration, Law 19.971 does not include the defence of personal jurisdiction regarding the court where the judgment was issued among the defences. To raise it, the party against whom the award is being enforced would need to prove that the award violates Chilean public policy.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

During the recognition proceeding, the Supreme Court may analyse whether the judgment was issued by a court with subject-matter jurisdiction. Principally, the foreign judgment cannot decide a matter over which, according to Chilean law, Chilean courts have exclusive jurisdiction. In connection with this point, it is worth noting that the Chilean Supreme Court has interpreted article 16 of the Chilean Civil Code, which provides that assets located in Chile are subject to Chilean 'law', to mean that they are also subject to Chilean jurisdiction (see, for example, Supreme Court, Case No. 1419-2010 and Case No. 7480-2013).

According to Law 19.971, recognition or enforcement of an international commercial arbitration award may be rejected if it was not an arbitrable matter according to Chilean law (eg, criminal law matters).

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

The defendant must have been given notice of the original action in the country of origin according to the procedural rules of that country. However, the mere formality of having served the defendant is not enough. Article 245 of the Chilean Code of Civil Procedure requires that 'the party against whom the judgment has been invoked has been duly notified of the action. But [this party] could prove that, due to other reasons, it was prevented from presenting a defence.' Chilean law intends to ensure that the underlying judicial proceedings respected the right of defence.

In 2011 the Chilean Supreme Court rejected the petition for recognition of a foreign judgment in a case where the defendant had not been served. In the opinion of the Court, the service of process needs to provide certainty that the defendant knew the content of the action, so he or she could understand it and react to it (see Supreme Court, Case No. 1393-2012).

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Allegations in relation to *forum non conveniens* principles do not provide a basis for opposing the recognition or enforcement of judgments under Chilean law. However, a foreign judgment, and the proceedings by which it originated, must not contravene Chilean public policy and international minimum standards of due process (which include the right to a meaningful defence).

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Chilean courts will neither recognise nor enforce a foreign judgment that was procured by fraud. Fraud prevents the judgment from meeting the requirements of not violating Chilean public policy and assuring due process and the right to a meaningful defence.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

If an international treaty applies, it would depend on what the treaty provides. In the absence of an applicable treaty, the Chilean Supreme Court will examine the foreign judgment to assure consistency with Chile's public policy. Chilean law establishes a requirement that the judgment for which recognition is sought must not contain anything contrary to Chilean law.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

The court could reject the recognition or enforcement of a foreign judgment if it conflicts with another final and conclusive judgment involving the same parties, as long as its recognition, for example, contravenes the principle of *res judicata*.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

Under Chilean law, a court's decision has no binding force except between the parties and in respect of that particular case. Thus, a foreign judgment is only enforceable against the parties to whom it is directed, and with regard to which it is possible to evaluate whether the legal requirements for recognition were met (eg, service, meaningful defence etc). Enforcing a judgment against a party other than the named judgment debtor would violate Chilean public policy, as well as the requirement to assure a meaningful defence in the proceeding where the judgment was entered to the party against whom the enforcement is sought.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

If the parties had a valid and enforceable agreement to use alternative dispute resolution, and the defendant proves that this requirement was violated by the party seeking to enforce the foreign judgment, Chilean courts would not recognise the judgment (perhaps unless there was a discussion over the matter in the proceeding that originated the foreign judgment). Under Chilean law, parties who had agreed to use alternative dispute resolution are prevented from bringing an action in an ordinary court, unless both parties, explicitly or tacitly, consent to do so.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Judgments from countries that recognise and enforce Chilean judgments are given greater deference. However, the Chilean Supreme Court has always strictly analysed foreign judgments to determine whether they meet the requirements set forth by the treaty or by Chilean law to be recognised, regardless of their place of origin.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The Chilean Supreme Court can recognise only part of a foreign judgment. For example, the Chilean Supreme Court once rejected the part of a foreign judgment that referred to divorce because at that time divorce was not allowed by Chilean law, but recognised the part of the same foreign judgment that referred to custody and care of the children (see Gutiérrez, Cristián, *El exequátur y su evolución jurisprudencial*, p. 130.) It is also very likely that the Chilean Supreme Court would refuse to recognise part of a foreign judgment that demands punitive damage award, since punitive damages are not permitted by Chilean law.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

The recognition proceeding does not have specific requirements in this regard. However, the damage award must be converted into local currency to initiate an enforcement proceeding. It is not a duty of the court to make the conversion. In accordance with article 20 of Law 18.010, '[d]ebts denominated in foreign currency shall be converted to its equivalent in Chilean currency at the selling rate of the payment day [...]' In its petition for enforcement, the party seeking enforcement shall indicate in equivalent Chilean currency the selling rate of the liquid amount in the foreign currency for which enforcement is required (Law 18.010, article 22). The party seeking enforcement must submit a certificate issued by a bank operating in the Chilean market referring to the day the application was filed or any of the preceding 10 days (Law 18.010, article 21). According to the provisions of article 22, prior appraisal by the court is not required. The same article provides some important rules: for example, discussion on the equivalence of foreign currency may not be grounds for opposing enforcement.

The Chilean Supreme Court has refused to recognise foreign judgments when the amount of compensation cannot be determined on the basis of that judgment (see Supreme Court, Case No. 1753-2010).

The rate of interest, as well as the court costs generated in the foreign process, are governed by the foreign judgment. Interest and cost claims are enforceable in Chile unless they violate public policy (eg, if the foreign judgment established a greater rate of interest than allowed by Chilean law). If the foreign judgment did not establish a rate of interest, interest may be requested before the enforcement court. Under Chilean law any money debts generate interest.

The costs arising in the recognition or enforcement proceedings are governed by Chilean law. If the party against whom the judgment is enforced opposes the recognition or enforcement and is defeated, the court will decide whether it should be ordered to pay the costs depending on whether the party had plausible grounds to litigate.

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26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

There is no appeal against the decision recognising a foreign judgment. Regarding the enforcement proceeding, the decision of the courts is subject to the general challenges contained in Chilean law.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

According to Chilean law, the judgment should be enforced through an expedited proceeding if the enforcement petition is filed and served to the defendant within three years of it becoming final. If the requirements to initiate an expedited proceeding are not met, and the petition for enforcement is filed and served to the defendant within five years of it becoming final, the foreign judgment must be enforced through an ordinary proceeding. Foreign judgments against the state must be enforced through a special proceeding called a treasury lawsuit.

The enforcement proceeding of arbitral awards will vary depending on the applicable treaty (eg, if an international treaty is applicable, the

enforcement proceeding will follow the rules of that treaty). For example, the ICSID Convention provides that '[e]ach Contracting State shall [...] enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State' (ICSID Convention, article 54). It is worth mentioning that in the ICSID case between Chile and MTD (ICSID Case No. ARB/01/7) the state of Chile was sentenced to pay compensation to MTD, which was paid by Chile without the need to start an enforcement proceeding (through an administrative decree). If the treaty makes no provision regarding the enforcement or if there is no applicable treaty, Chilean law provisions should be applied.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

In general, the Chilean exequatur proceeding works as a reliable means of getting recognition for those foreign decisions that were procured upholding minimum requirements of international due process. A potential pitfall is the Supreme Court's interpretation that assets located in Chile are subject to Chilean jurisdiction exclusively. This interpretation seems to go beyond the letter of article 16 of the Civil Code, and presents a problem for recognising foreign judgments that were issued by foreign courts applying Chilean law to the assets located in Chile. Another pitfall is the Supreme Court's tendency not to recognise interim measures and interim injunctions.

China

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

As of 8 September 2016, China has entered into 37 bilateral judicial assistance treaties on civil or commercial matters, 33 of which contain regulations regarding recognition and enforcement of foreign judgments, namely treaties with Uzbekistan, Kazakhstan, Kirghizia, Tajikistan, Turkey, Cyprus, Laos, Vietnam, Mongolia, Bulgaria, Belarus, Poland, Russia, Romania, Ukraine, Hungary, Lithuania, Spain, Italy, France, Greece, Cuba, Egypt, Morocco, North Korea, United Arab Emirates, Kuwait, Brazil, Argentina, Peru, Algeria, Bosnia and Herzegovina and Tunisia. Decisions rendered by the courts of the above-mentioned states may be enforceable in China.

With regard to multilateral treaties, China is a party to the International Convention on Civil Liability for Oil Pollution Damages, according to which any judgment regarding oil pollution damages that is given by a court with jurisdiction and is enforceable in the state of origin shall be recognised in any contracting states. Apart from such treaties, China is not a signatory to any other multilateral treaties regarding recognition and enforcement of foreign judgments.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

The laws on the enforcement of foreign judgments, mostly the Civil Procedure Law and judicial interpretation issued by the Supreme People's Court (SPC), are uniformly applicable throughout Mainland China.

However, Hong Kong, Macao and Taiwan are usually regarded as different jurisdictions, and therefore different laws on the enforcement of foreign judgments apply. For instance, a judgment obtained in a court outside Hong Kong may be enforced in Hong Kong through the common law or under the Foreign Judgments (Reciprocal Enforcement) Ordinance.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

In general, sources of Chinese law regarding enforcement of foreign judgments consist of (i) treaties to which China is a party, (ii) legislations, (iii) interpretations of laws, and (iv) case law:

- (i) bilateral or multilateral treaties to which China is a party which contained regulations regarding recognition and enforcement of foreign judgments are important sources of law;
- (ii) laws and regulations are the primary sources of law in China. In terms of enforcing foreign judgments, the Civil Procedure Law (2012), the General Principles of Civil Law (1986) and the Law on the Application of Law for Foreign-related Civil Relations (2010) are the most relevant;
- (iii) interpretations issued by the SPC are deemed as authoritative. While deciding cases related to recognition and enforcement of foreign judgments, Chinese Courts would usually refer to the Interpretation of the Civil Procedure Law issued by the SPC (2015); and

- (iv) precedents are not primary sources of law in China, as China is a civil law country. Nevertheless, SPC case law or opinions provided by the SPC are often followed by the lower courts. For instance, a Letter of Replies issued by the SPC to the lower courts, which stipulates why the foreign judgments in question can or cannot be enforced, is a crucial reference to ascertain the law on enforcing foreign judgments in China.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

As mentioned above, China is not yet a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

As stipulated in article 547 of the Interpretation of the Civil Procedure Law issued by the SPC, article 239 of the Civil Procedure Law shall apply with respect to the limitation period for recognition and enforcement of foreign judgments. Article 239 provides that the limitation period for applying for enforcement of judgments is two years.

As to when such limitation period commences to run, three possible scenarios should be taken into consideration:

- it runs from the last day of the period of performance specified in the judgments;
- if a judgment requires performance in instalments, the two-year period runs for each instalment from the last date of the specified performance period; and
- if a period of performance is not specified in the judgments, it runs from the effective date of the judgments.

Furthermore, pursuant to article 547 of the Interpretation of Civil Procedure Law issued by the SPC, where the party applies only for recognition, without applying for enforcement at the same time, the limitation period for enforcement shall be recalculated from the date when the ruling issued by the Chinese courts on the recognition application comes into force.

Lastly, Chinese courts are unlikely to consider statutes of limitation in terms of recognition and enforcement of foreign judgments in foreign jurisdictions.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Insofar as the remedies are available under Chinese law, they are usually enforceable unless otherwise provided by bilateral treaties to which China is a party.

Damages and specific performance are available remedies under Chinese law. With regard to temporary injunctive relief, it is usually issued pending the outcome of a lawsuit and therefore is unlikely to be recognised and enforced because it is not a final decision rendered by the Court.

So far as case law is concerned, monetary orders are generally enforceable, while no judgments concerning recognition of orders for specific performance have yet been found.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

According to article 281 of the Civil Procedure Law, a party may apply directly to the Intermediate People's Court where the judgment debtor resides or where the property under enforcement is located for enforcement of foreign judgments.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Under Chinese law, recognition and enforcement of foreign judgments are two separate processes, which can be demonstrated by the following:

- according to article 546 of the Interpretation of Civil Procedure Law issued by the SPC, where a foreign judgment requires enforcement, a party shall first apply to the courts for recognition. Only when the court issues a ruling of recognition can the foreign judgment be enforced in China;
- recognition and enforcement are handled by two different divisions of the courts. Usually, the recognition of foreign judgments is handled by the divisions responsible for foreign-related commercial matters, while the enforcement is handled by the enforcement division of the courts; and
- the procedure for recognising a foreign judgment requires a hearing or hearings conducted by a panel of three judges, while the procedure for enforcement follows the same laws and regulations with regard to enforcement of domestic judgments, according to which no hearing would be necessary.

Nevertheless, the applicant can apply for the recognition and enforcement of foreign judgments at the same time.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

In principle, Chinese courts would not review the merits of the decisions rendered by the foreign courts. However, in considering whether the grounds for refusal of recognition and enforcement are present, Chinese courts are not precluded from reviewing the substance of the foreign decisions. In particular, when considering whether the foreign judgment is consistent with the basic principles of the laws or public policy of China, Chinese courts may have to look into the merits of the judgments.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Such injunctive relief is unlikely to be obtained. Under Chinese law, injunctive reliefs are only applicable under limited circumstances, for instance, in maritime disputes, IP infringement matters or tort claims in relation to personal reputation. Prevention of foreign judgment enforcement

proceedings does not fall within the scope of applying injunctive relief under Chinese law.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

The Civil Procedure Law and its judicial interpretation set out the following basic requirements for recognition of a foreign judgment:

- the judgment seeking recognition and enforcement is rendered by the court of a foreign state with which China has entered into a bilateral judicial assistance treaty regarding recognition and enforcement of judgments or with which China has a relationship of reciprocity (article 281 of the Civil Procedure Law);
- the judgment seeking recognition and enforcement should be final and effective (article 282 of the Civil Procedure Law);
- the judgment seeking recognition and enforcement is not contrary to the basic principles of the laws, sovereignty, security or public interests of China (article 282 of the Civil Procedure Law);
- where the judgment seeking recognition and enforcement is rendered in default, the defaulting party has been duly served (article 543 of the Interpretation of Civil Procedure Law); and
- no proceedings between the same parties, based on the same facts and having the same purpose (i) are pending before the Chinese courts; (ii) have resulted in a decision by the Chinese courts; or (iii) have resulted in a decision by a court of another state which has been recognised in China (article 533 of the Interpretation of Civil Procedure Law).

In addition, most of the bilateral judicial assistance treaties to which China is a party require that the court rendering the judgment shall have jurisdiction over the dispute.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

Besides the requirements set out in the Civil Procedure Law, different bilateral treaties to which China is a party generally impose additional requirements for recognition and enforcement, for instance, proper applicable law.

Article 22(2) of the bilateral treaty between China and France provides that a judgment may be refused for recognition if the court rendering the judgment has applied the law other than that which would have been applicable according to the rules of private international law of the state addressed (the state where the judgment is rendered) in the event that the judgment decides a question relating to either the status or the capacity of a natural person.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

The Civil Procedure Law and most bilateral judicial assistance treaties to which China is a party stress the importance of due process in recognition and enforcement of foreign judgments, in particular the requirement to ensure proper service of process.

As is shown in relevant case law, what constitutes proper service of process depends on the relevant treaties to which China is a party, instead of the law where the judgment is rendered. According to most bilateral judicial cooperation treaties, direct service by registered mail is not permissible.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

Bilateral judicial cooperation treaties to which China is a party generally contain a requirement that the judgment seeking for recognition and enforcement is given by a court considered to have jurisdiction over the dispute. However, how to satisfy such a requirement varies across different treaties.

For instance, in the bilateral treaty between China and Italy, article 22 provides detailed requirements to ascertain whether or not the court rendering the judgment has jurisdiction, according to which if the defendant had, at the time when the proceedings were instituted, his or her habitual residence or a branch office in the state where the judgment is rendered, the court shall be considered to have personal jurisdiction.

Meanwhile, article 22(1) of the bilateral treaty between China and France provides that the recognition and enforcement of foreign judgment should be refused if according to the law in the state addressed the judgment was given by a court considered to have no jurisdiction over the dispute. Therefore, in the case of recognition and enforcement of French judgments in China, whether the court has personal jurisdiction over the defendant depends on Chinese law.

In conclusion, how to satisfy the requirement of personal jurisdiction depends mostly on the relevant bilateral treaties entered into by China.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

As mentioned above, it is required that the judgments were given by a court which has jurisdiction over the dispute for the purpose of recognition and enforcement. However, how this requirement is met depends on the specific bilateral treaty in force.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Under Chinese law, defendants should be duly served in a way that is compatible with the relevant bilateral judicial cooperation treaties to which China is a party. Generally, bilateral treaties between China and other states contain the requirements for proper service. Most treaties require that service shall be effected through central authorities. Therefore, sending judicial documents by postal channels is usually considered unacceptable.

In view of the above, actual notice alone is not sufficient. Additionally, there are usually no specific requirements with respect to how much notice is sufficient.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

In general, Chinese laws and most bilateral treaties to which China is a signatory do not specifically provide that inconvenience of the foreign jurisdiction to constitute a ground for refusing recognition and enforcement of a foreign judgment.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

In general, Chinese laws and most bilateral treaties entered into by China do not specifically provide that the foreign judgment shall be refused for recognition and enforcement if it was obtained by fraud. However, it is possible that the Chinese court would decline to recognise a judgment obtained by fraud on the ground that it is incompatible with the basic principles of law or public policy in China.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

It is stipulated in article 282 of the Civil Procedure Law that foreign judgments entitled for recognition and enforcement in China shall not be contrary to the basic principles of the laws and public policy of China.

Update and trends

As China is actively promoting the Silk Road Economic Belt and the 21st century Maritime Silk Road, also known as 'The Belt and the Road', there has been a heightened focus on judicial cooperation between China and the countries involved in The Belt and the Road, in particular in the enforcement and recognition of foreign judgments.

In 2015, the SPC has issued a number of guiding cases related to The Belt and the Road, one of which concerned the recognition and enforcement of a foreign judgment given by a Polish court. In the said case, the Ningbo Intermediate Court reaffirmed the obligations of China to give equal protection to both domestic and foreign parties by complying with its bilateral judicial assistance treaties, and held that the foreign judgment in question shall be recognised and enforced. To some degree, this indicates China's willingness to further develop and enhance the laws and judicial practices on recognition and enforcement of foreign judgments.

The scope of public policy is not specifically defined in Chinese law and is usually subject to the discretion of judges. However, the SPC has given a restrictive interpretation with respect to public policy in the *Castel Electronics Pty Ltd* case, which is related to the recognition and enforcement of foreign arbitral awards. According to the *Castel* case, violation of public policy means serious violation of the fundamental interests of China, such as violation of sovereignty or public safety.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

According to article 533 of the Interpretation of Civil Procedure Law, for a case over which both Chinese courts and a foreign court have jurisdiction, if one party institutes an action in the foreign court whereas the other party institutes an action in China, the Chinese court may still seize the case. If, after a judgment is rendered, the foreign court or a party requests the Chinese court's recognition and enforcement of the judgment rendered by the foreign court concerning the same case, the Chinese court shall decline such request, unless otherwise provided by the bilateral treaties to which China is a party.

Moreover, article 533 provides that if a foreign judgment has already been recognised by a Chinese court and a party institutes a proceeding over the same dispute in China, the Chinese court shall not seize the matter. In conclusion, if a proceeding regarding the same dispute has been pending before a Chinese court or has resulted in a decision which was given by a third country and has already been recognised by a Chinese court, the foreign judgment concerning the same dispute is not entitled to recognition and enforcement in China.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

It is unlikely for Chinese courts to enforce foreign judgments against a party other than the named judgment debtor based on the principles of agency or alter ego.

In the enforcement phase, the enforcing court would no longer examine the merits of the case and is only responsible for strictly executing the judgment. Therefore, enforcement is generally directed against the named judgment debtor and enforcement against third parties is applicable in the following limited circumstances as provided by the Civil Procedure Law and other relevant regulations:

- according to article 232 of Civil Procedure Law, where the named judgment debtor is a legal person or any other organisation which has been terminated, enforcement can be directed against the successor to the rights and obligations of such legal persons or organisation; or
- according to article 61 of Regulations regarding Enforcement of Judgment issued by the SPC (1998), where the judgment debtor is unable to repay the debt, but the debtor has mature creditor's right towards a third party, the enforcing court, upon application of the

judgment creditor or debtor, may enforce the judgment against the said third party if the third party has not raised any objection.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

For the purpose of recognition and enforcement of foreign judgments in China, it is generally required that the decision was given by a court which has jurisdiction over the dispute. In the event that there is an enforceable agreement to use alternative dispute resolution, such as a valid arbitration agreement with no evidence suggesting the party waiving arbitration jurisdiction, the court rendering the judgment would not be considered as having jurisdiction over the dispute, and thus the application for recognition and enforcement of a foreign judgment is likely to be declined.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Besides the requirements provided in the Civil Procedure Law and other relevant regulations which are equally applicable to all states, the grounds to refuse recognition and enforcement of foreign judgments vary across bilateral judicial assistance treaties to which China is a party. Therefore it is possible that judgment from some foreign jurisdiction would be reviewed according to less stringent requirements than judgment from others for the purpose of recognition and enforcement in China.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Chinese laws and relevant bilateral treaties are silent on whether the court could recognise only part of a judgment, or limit the damage award, particularly in cases where punitive damages are awarded and is contrary to Chinese law with respect to granting damages: for instance, article 114 of the Chinese Contract Law prohibiting significantly high liquidated damages agreed by the parties.

25 Currency, interest, costs

**In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls?
If interest claims are allowed, which law governs the rate of interest?**

The enforcement of foreign judgments follows the laws and regulations applicable to enforcement of domestic judgments. Generally speaking, in enforcing judgments involving foreign currency, the enforcing division

would convert the damage award to local currency. As to which currency exchange rate to be used, different courts in China would have different practices. For instance, the Beijing High Court in its Regulation Regarding Enforcement of Judgments (2014) provides that the exchange rate at the date when the judgment is actually executed is to be adopted.

In addition, interest claims are allowed. In the event that the parties fail to agree on the interest rate, the Chinese court usually refers to LIBOR or the rates issued by the Chinese central bank.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Under Chinese law, there is no right to appeal from a judgment recognising or enforcing a foreign judgment.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once a foreign judgment is recognised and the application for enforcement is filed, the case will be moved from the division in charge of the recognition procedure to the enforcement division. The enforcing division may take the following measures to enforce the judgment as provided in the Civil Procedure Law:

- where the party against whom enforcement is sought fails to perform obligations determined in a legal instrument as required by a notice of enforcement, the party shall report its current property status and its property status for one year before receiving the enforcement notice. If the party refuses to report or submits a false report, the Chinese court may, according to the severity of the circumstances, impose a fine or detention on a party who is a natural person, his or her legal representative, the primary person in charge or directly liable persons of the relevant entity (article 241); and
- where the party against whom enforcement is sought fails to perform obligations determined in a legal instrument as required by a notice of enforcement, the Chinese court shall have the right to enquire from the relevant entities about the deposits, bonds, stocks, fund shares and other property of the party against whom enforcement is sought. The Chinese court shall have the right to seize, freeze, transfer or sell the property of the party against whom enforcement is sought according to different circumstances (article 242).

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

China is unlikely to recognise a court judgment (except divorce judgments) made by a country with which it has no bilateral treaty or no relationship of reciprocity. According to article 544 of the Interpretation of Civil



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Procedure Law, if a court judgment is rendered in a state which has neither entered into a bilateral judicial assistance treaty with China nor has a relationship of reciprocity with China, the Chinese court shall rule to dismiss the application, unless the judgment in question is a divorce judgment.

Although China has signed a number of bilateral judicial assistance treaties with other states, it has not entered into such bilateral treaties with its important trade partners such as Japan, the UK and the US. Therefore judgments rendered in these countries are unlikely to be recognised or enforced in China unless they are divorce judgments.

Cyprus

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

The law pertaining to recognition and enforcement of foreign judgments in Cyprus can be found in a number of different sources (ie, multilateral treaties, EU Regulations, domestic laws and the principles of common law).

Multilateral treaties

The Republic of Cyprus is a signatory to the following multilateral conventions relating to the recognition and enforcement of foreign judgments:

- the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters and Supplementary Protocol thereto;
- the Convention on the Recovery Abroad of Maintenance;
- the European Convention on the Recognition and Enforcement of Decisions concerning the Custody and/or Restoration of Custody of Children;
- the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- the European Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and
- the European Convention on the Recognition and Enforcement on Certain International Aspects of Bankruptcy.

Bilateral treaties

Cyprus is also bound by bilateral treaties relating to the recognition and enforcement of foreign judgments with Belarus, the Czech Republic, Germany, Montenegro, Serbia, Slovenia, Slovakia, Ukraine, Russia, Georgia, Bulgaria, China, Greece, Hungary, Poland, Syria and Egypt.

European Union regime

Since the succession of Cyprus to the European Union, it is also bound by the following regulations:

- EC Regulation No. 44/2001 (Brussels I Regulation) as replaced by EC Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Regulation 1215/2012 (the EU Regulation) applies to judgments issued on or after 10 January 2015. For (i) legal proceedings instituted, (ii) authentic instruments formally drawn up or registered, and (iii) court settlements approved or concluded before 10 January 2015, Regulation 44/2001 is still applicable.
- EC Regulation No. 805/2004 (the European Enforcement Order) provides for the enforcement procedure of uncontested claims. This regulation applies to judgments for specific sums of money that have been obtained in uncontested proceedings (ie, the debtor admitted liability or failed to appear or to object).
- Where a civil claim does not exceed the amount of €2,000, it can be enforced in other member states pursuant to the provisions of EC No. 861/2007 (Small Claims Procedure).

- Uncontested money debts may also be enforceable in other member states under the provisions of the EC 1896/2006 as amended (European Payment Order Procedure).

The Republic of Cyprus is willing and ready to enter into and conclude multilateral and bilateral treaties regarding the recognition and enforcement of foreign judgments without making any reservations that would severely alter their effect or render their provisions meaningless.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Yes, the law relating to enforcement of foreign judgments is the same throughout the jurisdiction of the Republic of Cyprus.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

In addition to the multilateral and bilateral treaties and the EU Regulations referred to in question 1 above, the sources of law regarding the enforcement and the recognition of foreign judgments also include the following:

Statutes – domestic laws

- The Judgments of Foreign Courts (Recognition, Registration and Enforcement by Convention) Law of 2000 (Law 121(I)/2000) provides for mutual recognition and enforcement of judicial decisions issued in countries with which Cyprus has concluded an agreement; these are Belarus, Bulgaria, China, Czech Republic, Egypt, Georgia, Greece, Hungary, Poland, Russia, Serbia, Slovakia, Slovenia, Syria and Ukraine.
- The registration of judgments obtained in the United Kingdom is governed by the Reciprocal Enforcement of Certain Judgments issued by the Courts of the Commonwealth Countries, Cap 10 (Cap 10).

Pursuant to article 169 of the Constitution of Cyprus, conventions or treaties relating to commercial matters ratified by the Republic of Cyprus will have priority over domestic law.

Common law

The principles of the common law will apply to the recognition of judgments which originated from countries that have not concluded relevant treaties with the Republic of Cyprus and in the absence of any applicable domestic legislation.

Under common law, the creditor will need to file a new action that will be based on the provisions of the foreign judgment. The judgment must be final and for a definite sum. Any recognition and enforcement under common law will be refused where:

- the issuing court lacks jurisdiction according to the conflicts of law rules of Cyprus;
- the foreign judgment was obtained by fraud;
- the foreign judgment is contrary to the public policy of Cyprus; and
- the foreign judgment is contrary to the requirements of natural justice.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Cyprus signed and ratified the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. However, the Convention has no practical effect, as Cyprus has not signed any supplementary agreement with any other party to the Convention.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The EU Regulation does not provide for limitation periods. However article 4 of Cap 10 provides that the creditor may apply for the recognition of a foreign judgment within six years of the foreign judgment or, where the judgment was appealed, from the date of the last judgment in the foreign proceedings.

Under section 10 of the Limitation of Actionable Rights Law of 2012 [Law 66(I)/2012], the relevant limitation period for an action on a foreign judgment would be 15 years from the date when the judgment became final.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

The types of enforceable order are usually specified in the bilateral or multilateral treaties to which Cyprus is a party. Generally, all lawful orders are enforceable, including money judgments, interim and permanent injunctions, and orders for specific performance.

Pursuant to article 2, the Regulation provides for enforcement of any judgment given by a court or tribunal of a member state, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as decisions on the determination of costs or expenses by an officer of the court. The term judgment also includes provisional and protective measures ordered by a court or tribunal which by virtue of the Regulation has jurisdiction as to the substance of the matter. However, it does not include a provisional/protective measure which is ordered without the defendant being summoned to appear unless the judgment is served on the defendant before enforcement. Moreover, as per the provisions of article 55, a judgment ordering payment by way of a penalty shall be enforceable only if the amount of the payment has been finally determined by the court of origin.

The provisions of Law 121(I)/2000 apply to any foreign judgment of a court or tribunal or any arbitral award issued in countries with which Cyprus has concluded an agreement for mutual recognition and enforcement of judicial decisions (see question 3). The said judgments must be enforceable in the country of origin and they include interim, provisional and protective measures ordered by a court or tribunal in the country of origin.

The provisions of Cap 10 include judgments or orders made by a court in civil or criminal proceedings for a sum of money regarding compensation or damages to the injured party.

At common law, the judgment must be final and for a definite sum.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

There is no particular court in this regard. The judgment creditor may choose to have the judgment registered either in the District Court where the debtor resides or carries on his or her profession, or where the property to which the judgment relates is situated.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Even though the provisions of the Regulation make separate reference to recognition and enforcement, it must be noted that under article 36 a judgment given in another member state shall be recognised without any special procedure being required. The only requirements for a party seeking to invoke the judgment are (i) to produce a copy of the judgment that satisfies the conditions necessary to establish its authenticity and (ii) to produce a certificate which is issued pursuant to article 53. The respondent may argue that recognition should be refused only on the grounds stated in article 45 (see question 9). Once it is recognised, the foreign judgment is enforceable since, as per the provisions of article 39, a judgment given in a member state which is enforceable in that member state shall be enforceable in the other member states and no declaration of enforceability is required. The enforcement of a judgment shall be refused only where one of the grounds referred to in article 45 exists.

We note though that under the provisions of the European Enforcement Order and the Small Claims Procedure no registration is required.

Under the provisions of domestic legislation and common law, the process for obtaining recognition and the process for enforcement of a foreign judgment are considered interconnected in Cyprus, and the foreign judgment will not be enforceable before it has been recognised by a domestic court.

Once enforcement is ordered, the foreign judgment will be on the same footing and has the same status and can be executed as if it had been given by a domestic court. We note though that there are cases where a foreign judgment will be unable to be enforced (ie, declaratory judgments), and the plaintiff will only seek its recognition.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

EU Regulation

As per the provisions of article 52 of the EU Regulation, a judgment given in a member state may not be reviewed as to its substance in the member state addressed. When examining an application for the recognition of a foreign judgment under the said regime, the court presumes that the judgment satisfies all the conditions for its recognition in another member state and its examination is limited to confirming that there are no grounds for refusal of recognition. Under article 45 of the EU Regulation any interested party may apply for a decision that there are grounds for refusal of recognition. These grounds are the following:

- recognition is manifestly contrary to the public policy of the member state addressed;
- the judgment was given in default of appearance, and the defendant was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence. Recognition will not be refused, though, if the defendant failed to commence proceedings to challenge the judgment issued in default;
- the judgment is irreconcilable with another given in a dispute between the same parties in the member state in which recognition is sought;
- the judgment is irreconcilable with an earlier judgment given in another member state or in a non-member state between the same parties with the same issue and involving the same cause of action where the earlier decision fulfils the conditions required for recognition in the state of recognition; and
- the judgment conflicts with sections 3, 4 or 5 of Chapter II (ie, jurisdiction in matters relating to insurance, consumer contracts and employment contracts) and with section 6 of Chapter II (ie, the provisions for exclusive jurisdiction).

Where one of the above grounds is found to exist, the enforcement of a foreign judgment shall be refused (article 46).

The court shall decide on the application for refusal of enforcement without delay, and this decision may be appealed by either party.

Law 121(I)/2000

In accordance with Cyprus Law No. 121(I)/2000, the defendant's objection to the foreign judgment is limited to the jurisdiction of the court, to the demonstration of satisfaction or fulfilment of the decision, or to the existence of any other conditions provided for in the bilateral treaty (article 5(1)(e)).

Cap 10

The grounds on which registration under the statutory law may be set aside reflect the common law principles. Under article 6(1) of Cap 10, the judgment debtor may apply to set aside the registration of a foreign judgment in the following instances:

- the judgment is outside the scope of Cap 10;
- the judgment was issued by a court that did not have jurisdiction to try the case;
- the judgment debtor did not receive proper notice of the proceedings before the court and did not appear during those proceedings;
- the judgment was obtained by fraud;
- recognition is manifestly contrary to the public policy of the member state addressed;
- the rights conferred under the judgment are not vested in the person seeking registration and enforcement;
- the matter in dispute was finally and conclusively determined by a court having jurisdiction on this matter; and
- an appeal is pending or could be filed.

Common law

Under common law the recognition and enforcement of a foreign judgment are totally discretionary, and the courts in Cyprus may not recognise a foreign judgment in the instances referred to in Cap 10 (which, as stated above, reflect the common law principles).

10 Injunctive relief**May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?**

Pursuant to the provisions of the Courts of Justice Law 14/1960 as amended, the courts of Cyprus are competent and have jurisdiction to grant any interim order, in all cases, in which it appears to the court just and convenient to do so, provided that the following conditions are met:

- a serious issue exists that is to be tried in relation to the main proceedings;
- it appears that the applicant has a probability of obtaining a favourable judgment in the main proceedings;
- there is a great risk that, if the interim order is not granted, it will be difficult or impossible for justice to be served at a later stage; and
- the balance of convenience is in favour of the applicant.

However, the right to obtain an injunction is not a cause of action and cannot stand on its own. Injunctions are issued on an interim basis and are merely ancillary to a pre-existing cause of action against the respondent.

In theory, an interested party may apply for an interim injunction restraining persons within their jurisdiction from enforcing a foreign judgment in Cyprus. However, there is no precedent to this effect because (i) as stated above, injunctions can only be granted on an interim basis and (ii) because the main grounds on which the request for injunctive relief will be based (ie, fraud, lack of jurisdiction and lack of proper notice) are explicitly listed among the grounds for challenging registration and enforcement of foreign judgments in the various statutes and other instruments governing enforcement.

With regard to the enforcement proceedings of EU judgments in Cyprus, EU Regulation provides that in the event of an application for refusal of enforcement of a foreign judgment, the court in the member state addressed may, on the application of the person against whom enforcement is sought, suspend either wholly or in part the enforcement proceedings (article 44). Moreover, according to the provisions of article 51, the court before which an application for refusal of enforcement is submitted or the court which hears an appeal lodged under article 49 or article 50 may stay the proceedings if an appeal has been lodged against the judgment in the member state of origin or if the time for such an appeal has not yet expired. In the latter case, the court may specify the time within which such an appeal is to be lodged.

11 Basic requirements for recognition**What are the basic mandatory requirements for recognition of a foreign judgment?**

Please refer to questions 1 and 3 and questions 14 to 20.

12 Other factors**May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?**

The recognition and enforcement of a foreign judgment depend on the existence of a bilateral or multilateral agreement between the state of origin and the state of enforcement. A foreign judgment emanating from a country with which Cyprus has not signed any bilateral or multilateral agreements cannot be enforced in Cyprus without the filing of a fresh action under common law. Under common law the enforcement of the foreign judgment is discretionary and for the exercise of its discretion the court may consider any other factor that is relevant to the facts of the case.

13 Procedural equivalence**Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?**

As a general rule, the court will not analyse the procedural equivalence of the original court's proceedings when considering whether the recognition and enforcement of a foreign judgment will be permitted.

Under the EU Regulation regime, it is presumed that a basic minimum standard of adequate and fair process will be achieved in all member states, and there is a strong (though rebuttable) presumption that procedures in all member states are in line with article 6 of the European Convention on Human Rights. As the CJEU noted in Case C-116/02 *Gasser GmbH v Misat Srl*:

[I]t must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments.

The same principle applies to the enforcement proceedings under domestic legislation, since the originating court's procedural provisions have been considered when the relevant bilateral treaties were concluded and the scope of Cap 10 covers the Commonwealth countries which have similar proceedings.

Under common law the defendant may raise some procedural issues (eg, that the judgment was obtained by fraud or that the proceedings in which the judgment was given were conducted in a manner which was contrary to natural justice), but in any case the court will be very reluctant to carry out a detailed review of whether the procedures that have resulted in the judgment correspond to due process.

14 Personal jurisdiction**Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?****EU Regulation**

Under the EU Regulation persons domiciled in a member state shall, irrespective of their nationality, be sued in the courts of the member state (article 4). In addition, the Regulation provides a list of matters in respect of which a person domiciled in one member state may be sued in the courts of another member state. The jurisdiction of the court of origin may not be reviewed (subject to very limited exceptions). These exceptions are stipulated in article 45(1)(e), which provides that the recognition of a foreign judgment shall be refused if it conflicts with sections 3, 4 or 5 of Chapter II (ie, jurisdiction in matters relating to insurance, consumer contracts and employment contracts) or with section 6 of Chapter II (ie, the provisions for exclusive jurisdiction).

Law 121(I)/2000

As stated above, article 5(1)(e) provides that the defendant may object to the recognition and enforcement of a foreign judgment if the court of origin did not have jurisdiction to try the case, on the basis of the conflicts of law rules that are applicable in Cyprus.

Cap 10

As stated above, the judgment debtor may apply to set aside the registration of a foreign judgment if the judgment was issued by a court that did not have jurisdiction to try the case. The court of origin is deemed to have jurisdiction in cases where:

- the judgment debtor submitted to the jurisdiction of the court by voluntarily appearing in the proceedings;
- the judgment debtor filed a claim or counterclaim in the proceedings in the court of origin;
- the judgment debtor had before the commencement of proceedings agreed to submit to the jurisdiction of that court;
- the judgment debtor was at the time when the proceedings were instituted domiciled or had its principal place of business in the country of the court of origin;
- the judgment debtor had an office or place of business in the country of the court of origin and the proceedings were connected with a transaction effected through that office or place;
- the property in question was at the time of the proceedings situated in the country of origin; or
- the jurisdiction of the court of origin is recognised by the laws of the court where the applicant is seeking enforcement.

Common law

As stated above, recognition and enforcement of the foreign judgment is discretionary under common law, and the courts in Cyprus will consider whether the issuing court lacked jurisdiction or not in accordance with the conflicts of law rules applicable in Cyprus.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

Subject-matter jurisdiction is usually relevant where specific bilateral or multilateral treaties are concluded, and they are applicable only regarding specific subject matters. The Regulation provides a list of matters in respect of which a person domiciled in one member state may be sued in another member state and expressly exclude certain matters from its application. Given the above, the courts in Cyprus will have to determine whether the foreign judgment will be enforceable in Cyprus pursuant to the provisions of the Regulation or whether the common law principles must be applied.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Under article 28(2) of the Regulation, the court shall stay the proceedings if it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him or her to arrange for his or her defence, or that all necessary steps have been taken to this end.

Under Cap 10 the judgment debtor may apply to set aside the registration if he or she did not receive proper notice of the proceedings before the court so as to be enabled to defend the claim, and did not appear during those proceedings.

Under common law, a lack of notice to the defendant will most probably result in a finding that the requirement of natural justice was not satisfied.

In all cases the defendant must be served with the necessary documents in sufficient time and in a such a way as to enable him or her to arrange for his or her defence.

Update and trends

The new EU Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) is now applicable. Under the new regime a judgment given in one member state on or after 10 January 2015 is immediately enforceable in the other member states of the EU, without any need for a declaration of enforceability. Other than that, there have been no new developments with regard to foreign judgments enforcement in Cyprus.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

No. With respect to jurisdiction, the Cypriot court will only examine whether the foreign court had jurisdiction and not whether the jurisdiction was convenient to the defendant. In *Owusu v Jackson and Others* (Case C-281/02) it was decided that a court of a member state may not decline the jurisdiction conferred on it by the Brussels Convention on the ground of forum convenience. This conclusion was also endorsed by the Supreme Court of Cyprus in its judgment in *Hampton Advisory Group S.A v 1. Bost Ad and other* (2012) 1 CLR 549.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Under the EU Regulation, judgments obtained contrary to the public policy of Cyprus will not be recognised. While fraudulent actions may also be contrary to the public policy, fraud per se will not be enough to investigate these allegations. However, pursuant to the provisions of Cap 10 and the common law, a foreign judgment that was obtained by fraud will not be recognised or enforced in Cyprus.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Yes. Under the provisions of the EU Regulation, Cap 10 and the common law, the courts in Cyprus will not recognise or enforce a foreign judgment which is contrary to Cyprus public policy. There is no legislative provision defining the concept of public policy, which is a variable notion, depending on changing manners, morals and economic conditions. The Supreme Court of Cyprus in its judgment *Attorney General of the Republic of Kenya v Wirtschaft AG* (1999) 1A CLR 585 defined public policy as the fundamental values which a society recognises in a specific period of time.

In view of the above, some examples of foreign judgments that may be contrary to the public policy include judgments (i) obtained by fraud, (ii) obtained in breach of article 6 of the ECHR or other fundamental rights of the parties, and (iii) which were irreconcilable with existing judgments in Cyprus between the same parties and on the same facts.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

All enforcement regimes provide that the recognition of a foreign judgment may be challenged in cases where a conflicting judgment exists. The conflicting judgment must be between the same parties and based on the same cause of action.

In order to prevent conflicting decisions, article 29 of the EU Regulation provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seized shall stay its proceedings until the jurisdiction of the court first seized is established.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

No, the judgment will be enforceable only against the named judgment debtor.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

The EU Regulation does not apply to arbitral awards, and there is no reference to the effect of an agreement for alternative dispute resolution (ADR) in any of the above-stated regimes. In practice, if the parties had an enforceable agreement for ADR and this requirement was not followed, save where the defendant has voluntarily submitted to the jurisdiction of the foreign court by voluntarily participating in proceedings, the domestic court will refuse registration of a foreign judgment where the bringing of the proceedings in the foreign court is contrary to an agreement between the parties that the dispute was to be settled by ADR.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

The recognition and enforcement of judgments issued in other EU member states are subject to the provisions of the Regulation, which is a speedier and more straightforward procedure. Cyprus also provides deference to those foreign jurisdictions with which Cyprus has concluded bilateral agreements regarding recognition and enforcement of foreign judgments.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The general rule is that the Cypriot courts will enforce a foreign judgment as it was issued. However, the courts are able to sever parts of foreign judgment that are not able to be enforced in Cyprus and partially recognise the judgment. Moreover, in accordance with article 54 of the EU Regulation, if a judgment contains a measure or an order which is not known in the law of the member state addressed, that measure or order shall, to the extent possible, be adapted to a measure or an order known in the law of the member state which has equivalent effects attached to it and which pursues similar aims and interests. Moreover, as per the provisions of article 55 of the Regulation, a judgment given in a member state which orders a payment by way of penalty shall be enforceable only if the amount of the payment has been finally determined by the issuing court.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Where the sum payable under the judgment is in a currency other than the official currency of Cyprus (ie, the euro), an affidavit must be attached to the application for registration of the foreign judgment, stating the awarded amount converted in euros and the interest accrued up to the date of filing. The court's order for registration and enforcement will also provide (i) for interest after the enforcement and until full settlement, as per the provisions of the foreign judgment or for legal interest (currently at the rate of 4 per cent per year) accruing from the date of the enforcement order, and (ii) for the legal fees incurred by the claimant during the registration and enforcement proceedings. Legal fees awarded to a litigant will also bear legal interest from the date that they were awarded.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

See question 9. If an appeal is filed, the party trying to enforce the foreign judgment can apply for security for costs under our Civil Procedures Rules. Security for costs ensures that he or she will be able to recover costs from the unsuccessful appellant. Two conditions must be satisfied to obtain security for costs:

- the appellant must be domiciled outside the EU; and
- the court must be satisfied that the appellant will be unable to pay the respondent's costs if ordered to do so.

The court has an inherent jurisdiction to grant or refuse to grant an order for security for costs. If an order for security for costs is not satisfied within the time directed by the court, the appeal may be dismissed. The amount of security that may be ordered is the amount of the costs expected to be incurred while defending the appeal filed against the court's order for the enforcement of the foreign judgment.

Pursuant to article 44 of the EU Regulation, in the event of an application for refusal of enforcement of a judgment, any person against whom enforcement is sought may apply to the court and request the enforcement to be conditional on the provision of security.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once recognition is ordered, the foreign judgment will be on the same footing and have the same status, and can be enforced as if it had been given by a domestic court. If a party fails to comply with a judgment made



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against him or her, measures can be taken for the execution and enforcement of the judgment to enable the successful party to obtain the remedy to which it is entitled. These measures are:

- a writ of execution for the sale of moveables;
- garnishee proceedings (requiring a third party who owes money to the judgment debtor to pay the money to the judgment creditor);
- the registration of a charging order over the immoveable property or the chattels of the judgment debtor;
- a writ of delivery of goods, ordering those goods to be delivered to the judgment creditor;
- a writ of possession of land, ordering that land to be delivered to the judgment creditor;
- committal for breach of an order or undertaking;
- a writ of sequestration ordering the seizure or attachment of property; and
- bankruptcy or liquidation proceedings against the judgment debtor.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Due to the many different rules pertaining to the recognition or enforcement of foreign judgments and the different grounds for the refusal or setting aside of enforcement, the identification of the applicable regime in each respective case has proved to be a challenging and demanding task.

Ecuador

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Ecuador has signed and ratified several international conventions that are relevant to this matter, namely:

- the Havana Convention on Private International Law of 1928 (the Bustamante Code);
- the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention);
- the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention); and
- the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 (the Montevideo Convention).

Regarding the New York Convention and the Panama Convention, Ecuador has invoked the commercial and reciprocity reservations.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Ecuador is a unitary republic, meaning that an internal legal regime resembling any form of federalism is non-existent. There is absolute uniformity on the law on the enforcement of foreign judgments within the single Ecuadorian jurisdiction.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The relevant sources of law are the General Organic Code of Procedures and the Organic Code of the Judiciary.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Ecuador is not a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The law does not establish a limitation period for enforcement of foreign judgments. There is discussion on this matter; some experts argue that

the general statute of limitation for ordinary actions applies and others argue that there is no limitation. Due to the lack of case law, this point remains uncertain.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Enforceable remedies are orders that contain: (i) an obligation to pay a sum of money, (ii) an obligation to deliver an asset, and (iii) an obligation not to do something. We do not have any knowledge of attempts to enforce injunctions issued by foreign courts and there is no express provision for this purpose.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Yes, article 102 of the General Organic Code of Procedures states that:

Recognition and enforcement of foreign judgments, arbitral awards and mediation agreements that are final under the legislation they were enacted, shall be heard by a specialised division of a provincial court depending upon the subject matter involved and in the defendant's district. Enforcement of foreign judgments, arbitral awards and mediation agreements shall be heard by a trial judge in the defendant's place of domicile having jurisdiction over the subject matter [...]

Articles 143 and 208.6 of the Organic Code of the Judiciary align with the above-mentioned provision.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Under Ecuadorian law, these procedures are separate and different. Once the judgment is recognised by the provincial court under article 102 of the Organic Code of Procedures (see question 7), the enforcement phase or legal proceedings for collection commences before a first-instance civil judge (trial judges who hierarchically sit under the provincial courts). These proceedings include precautionary measures to ensure debt collection.

The legal proceedings for collection commence when the interested party requests the Ecuadorian judge to enforce the foreign judgment. Once the petition for enforcement is received, the judge issues an order referred to as a writ of execution (ie, 'a writ in which the judge orders, once the judgment has become final, that the debtor designate sufficient assets to cover the debt plus interest and court costs, if awarded against him, or that he pay within the next twenty-four hours' (Carlos Puig Vilazar, *Índice de Procedimiento Civil Ecuatoriano*, Volume V, page 42)).

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

In principle, there are narrow grounds for challenging a foreign judgment, and the only defences should be based on lack of compliance with the requirements for recognition (see question 11); nevertheless, a defence based on constitutional due process guarantees (a contradiction in respect to the right of defence) cannot be simply discarded.

An exception may apply regarding foreign awards or judgments entered against the Ecuadorian State, considering that the petitioner must demonstrate no violation of the Ecuadorian Constitution and, in general, Ecuadorian law (see question 12).

In addition, international treaties such as the New York Convention establish grounds for opposing recognition of a foreign judgment.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

No, Ecuadorian law and the international treaties of which Ecuador is a party do not provide the right of the local party to oppose the enforcement proceedings based on seeking injunctive reliefs. Constitutional actions to prevent enforcement based on possible violations of constitutional rights have recently been used by litigators in order to prevent enforcement of judgments, without positive results.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

The basic mandatory requirements are:

- the decision respects all the formal requirements to be considered authentic and legal in its country of origin;
- the decision is final (*res judicata*) under the laws of the country where it was issued;
- the decision is duly legalised;
- the decision is translated to Spanish;
- evidence demonstrating that the defendant was served with notice of the original action in the foreign jurisdiction and due process was respected; and
- the party seeking enforcement details the legal domicile of defendant.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

If the decision is one issued against the Ecuadorian state, the courts will also analyse whether it complies with the Ecuadorian Constitution, as well as Ecuadorian laws and regulations.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

A standard of procedural equivalence will be imposed by the judge who is asked to recognise the judgment. This standard will mostly reflect the Ecuadorian constitutional provisions (article 76 of the Ecuadorian Constitution) on due process guarantees (such as legality, presumption of innocence, right to be heard by a competent judge, proportionality, right to be heard under equal conditions, right to be assisted by counsel, *non bis in idem* and sufficient motivation of the judgment).

Update and trends

The recently enacted Organic Code of Procedures creates a new regime for the recognition and enforcement of foreign awards. It remains an open question as to how the courts will construe the text of the law and how they will resolve any possible contradictions between the law and international conventions.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

The court could examine the jurisdiction of the court of issuance under the general requirements of procedural equivalence (see question 13) and as part of the due process requirement (see question 11).

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The court could examine the jurisdiction of the court of issuance under the general requirements of procedural equivalence (see question 13) and as part of the due process requirement (see question 11).

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

The correct service of process in the main claim is always a requirement for proper recognition and enforcement. There is no case law on the topic since the General Organic Code of Procedures was enacted in May 2015 and entered into force in May 2016. However, Ecuadorian judges may use the national standards to decide this point, requiring that reasonable efforts were carried out to serve notice of the original action in the foreign jurisdiction.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The court could examine the process from which the judgment emerged under the general requirements of procedural equivalence (see question 13) and the requirement that a foreign judgment must not contravene Ecuadorian law (in judgments against the Ecuadorian state, see question 12) and public policy (as a requirement of the New York Convention). If minimum procedural equivalence is met, the court should not consider the relative inconvenience of the foreign jurisdiction for declining enforcement of the foreign judgment.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

The court will examine an allegation of fraud in light of the requirement that a foreign judgment must not contravene Ecuadorian law (in judgments against the Ecuadorian state, see question 12) and public policy in order to comply with the international treaties and conventions in force.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Yes, it will examine the foreign judgment for consistency with Ecuadorian public policy (as a requirement of the New York Convention). In cases of foreign judgments or awards against the state the court will analyse

whether or not the judgment contravenes the Ecuadorian Constitution and, in general, Ecuadorian law.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

If there are conflicting decisions, the judges will apply the public policy principle and refuse enforcement of the decision if it is concluded that it contravenes Ecuadorian public policy. We do not know of any case brought in court raising this issue.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

The recently amended Corporate Statute requires an independent civil action to pierce the corporate veil of a company. There is a possibility that the enforcing court will require that the party who is seeking enforcement pursues this action before executing the foreign judgment.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

The court could examine the compliance of multi-tiered clauses under the general requirements of procedural equivalence (see question 13) and as part of the due process requirement (see question 11).

For example, the Ecuadorian Arbitration and Mediation Law establishes that, for instance, if one of the parties argues the existence of an arbitral clause, the courts need to open a short evidentiary process to prove the existence of the clause. If such a clause is proven, the judge will refrain from hearing the case and will order the parties to resort to arbitration.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Generally, every jurisdiction is given the same treatment for recognition and enforcement. This does not mean that execution from certain jurisdictions may not be simpler or easier due to the existence of specific bilateral or multilateral treaties.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Ecuadorian courts can limit the recognition and enforcement of part of a judgment, mainly in cases where public policy has been violated (eg, awards that include recognition of punitive damages or compound interest (or both), which are contrary to the strictly compensatory principles and nature of Ecuadorian civil laws). We do not know of any case brought in court raising this issue.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Ecuador's currency is the US dollar, and no conversion is made unless the quantum of the award is expressed in another currency, such as euros. Any judgment rendered by a local Ecuadorian court will be expressed in US dollars. As previously stated, foreign judgments may not contravene Ecuadorian public policy, which is why interest rates may not exceed the maximum set by Ecuador's Central Bank.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Article 105 of the General Organic Code of Procedures denies the right of appeal from a judgment recognising a foreign judgment or award. It is not clear whether parties could file an appeal of cassation. There are no judicial precedents in this matter under the General Organic Code of Procedures. Parties could also file independent suits before the Constitutional Court arguing the violation of constitutional rights. We do not know of any case brought in court raising this issue, and see potential difficulties considering that possible violations of due process rights may have already been revised by the court recognising the judgment.

Regarding the enforcement phase, appeal from the writ of execution (see question 8) is limited to cases where said writ decides upon matters not brought in the principal judgment or if it contradicts said judgment. Parties could also file independent suits before the Constitutional Court arguing the violation of constitutional rights.

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27 Enforcement process**Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?**

Within the enforcement process, the parties may request the adoption of enforcement measures that depend on the type of obligation required to be performed.

If the obligation required to be performed by the defendant is an obligation to pay a sum of money, the judge shall fix the sum to be paid as interest and order the debtor, if the award is against him or her, to designate assets equivalent to the value of the principal, interest and court costs within 24 hours. If deemed necessary, the judge may appoint an expert for settlement of interest. If the defendant fails to designate the assets that are to be attached, if such designation is malicious or if the assets so designated are insufficient to cover the debt or are located outside the country, the plaintiff shall be entitled to designate the assets to be attached. Once the debtor's assets are attached, they are appraised and sold at auction and the debt is paid to the creditor out of the proceeds of the auction sale. If the judge orders the seizure of the debtor's funds, payment will be made with those funds.

Where the obligation involved is to deliver an asset, the defendant will be forced to deliver it (if necessary, by the use of law enforcement officers). With regard to obligations that are to be performed, the judge will order that they be performed on account of the debtor. If the assets cannot be delivered or the obligations cannot be performed on account of the debtor, the judge will determine the indemnity to be paid for non-compliance and order the relevant collection through the sale of attached real property. If the obligation is an obligation to grant or execute an instrument, the judge will perform this on behalf of the party required to do so.

Finally, if the obligation is an obligation not to do, the judge must determine the amount of damages resulting from the breach if the action cannot be undone.

28 Pitfalls**What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?**

Common pitfalls include the following:

- the time frame for recognition and enforcement procedures (as stated in question 27). Although a maximum of 30 days has been established for the decision on recognition and due to the fact the General Organic Code of Procedures has recently entered into force, we have no experience that confirms compliance with said time frame. Regarding the enforcement phase, the General Organic Code of Procedures does not specify a time frame for its resolution; and
- contradictions between the General Organic Code of Procedures and international treaties (eg, under the General Organic Code of Procedures, the burden of proof rests on the petitioner, whereas under the New York Convention said burden rests on the party opposing recognition or enforcement).

The writ of execution is subject to appeal and constitutional challenge in limited cases (see question 26).

France

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

In this regard, as well as others, the enforcement of foreign non-EU judgments must be distinguished from the enforcement of judgments between EU members as outlined in this chapter.

Enforcement of judgments between the EU members

EU regulations and treaties

The issues of enforcement of judgments between EU members were, in particular, governed by Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the old Brussels I Regulation) (for relations between Denmark and other EU member states, the Agreement between the European Community and the Kingdom of Denmark on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 21 March 2013 applies (which includes the new Brussels I Regulation)). A reformed regulation of Brussels I (Regulation (EU) No. 1215/2012) was adopted by the Council on 6 December 2012 and published in the official journal on 20 December 2012. This recast regulation has applied since 10 January 2015 and replaced Council Regulation 44/2001 (the new Brussels I Regulation). Important modifications have been adopted, the most important of which is that exequatur proceedings have been abolished. However, the old Brussels I Regulation continues to apply to the recognition and enforcement of all judgments given in proceedings initiated before 10 January 2015. An EU regulation is binding and directly applicable in all member states. As a member of the European Union, France is required to observe and apply the respective EU regulations regarding the recognition and enforcement of judgments between EU members. Besides the Brussels I Regulation, the following EU regulations contain rules on the recognition and enforcement of judgments between EU members:

- Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, which came into force on 31 May 2002; repealed and replaced by Regulation No. 848/2015 of 20 May 2015 which will come into force on 26 June 2017;
- Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order (EEO) for uncontested claims (the European Enforcement Order Regulation), which came into force on 21 January 2005;
- Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European Order for payment procedure (the European Payment Order Regulation), which came into force on 31 December 2006; and
- Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (up to €2,000) (the European Small Claims Procedure Regulation), which came into force on 1 January 2009.

For relations between the EU member states and Norway, Iceland and Switzerland, the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of the

European Community with Iceland, Norway and Switzerland of 30 October 2007 (the new Lugano Convention) applies.

Enforcement of foreign non-EU judgments

Furthermore, France is bound by multiple international treaties dealing with the reciprocal recognition and enforcement of foreign judgments. All the relevant treaties are listed on www.legifrance.gouv.fr; however, the most important treaties are listed below.

International treaties – multilateral treaties

Multilateral treaties containing rules on the recognition and enforcement of foreign judgments cover a plurality of special cases (excluding family law):

- navigation on the Rhine (revised Mannheim Convention of 17 October 1868) or the canalisation of the Moselle (Convention of 27 October 1956);
- the exequatur of costs or expenses (the Hague Conventions of 1 March 1954 on Civil Procedure and of 25 October 1980 on International Access to Justice);
- contracts for international carriage of goods by road (CMR Convention of 19 May 1956) or international carriage by rail (COTIF of 9 May 1980);
- liability in the field of nuclear energy (Brussels Convention of 31 January 1963, supplementary to the Paris Convention of 29 July 1960, as amended by the additional Protocol of 28 January 1964, the additional Protocol of 16 November 1982 and the additional Protocol of 12 February 2004); and
- liability and funding for oil pollution damages (the International Convention on Civil Liability for Oil Pollution Damage, Brussels of 29 November 1969, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, of 18 December 1971 and the 2003 Protocol establishing an International Oil Pollution Compensation Supplementary Fund, London, of 16 May 2003).

International treaties – bilateral treaties

An extensive network of bilateral treaties of legal cooperation or legal assistance exists with the following states, usually containing a chapter on the recognition and enforcement of reciprocal judgments: Algeria; Argentina; Austria; Belgium; Benin; Bosnia and Herzegovina; Brazil; Bulgaria; Burkina Faso; Cameroon; Canada (Quebec); Central African Republic; Chad; China; Croatia; Czech Republic; Democratic Republic of the Congo; Djibouti; Egypt; Gabon; Hungary; Italy; Laos; Macedonia; Madagascar; Mali; Mauritania; Monaco; Mongolia; Morocco; Niger; Poland; Portugal; Romania; San Marino; Senegal; Serbia and Montenegro; Slovakia; Slovenia; Spain; Togo; Tunisia; United Arab Emirates; United Kingdom and Hong Kong; United States; Uruguay; Vietnam; and Yugoslavia.

It should be noted that many of these treaties, such as the treaty with the United States, refer only to family law.

Treaties with members of the European Union apply only to questions that are not subject to the European regulations (see above).

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

France is a highly centralised state. Therefore, there is uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

In principle, the national and supranational legislation mentioned above is the only source of law for the enforcement of foreign judgments. However, the legal practice for civil and commercial matters is constantly being defined and refined by the French Supreme Court.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

France has not signed the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

As far as enforcement of a foreign decision is concerned, articles L111-3 and L111-4 of the French Code of Civil Enforcement Procedures (previous articles 3-1 and 3 of Law No. 91-650 of 9 July 1991 concerning the reform of civil procedures on enforcement, modified by Law No. 2008-561 of 17 June 2008 concerning the statute of limitations in civil law and then abrogated on 1 June 2012 by order No. 2011-1958) stipulate a limitation period of 10 years starting with the declaration of enforceability of the foreign decision (the term 'enforcement' is employed here only with regard to enforcement in a technical sense; this does not comprise the recognition and declaration of enforceability (see below)). However, no possibility of a remedy suspending the execution of the declaration of enforceability should still exist.

A declaration of enforceability depends on the applicable rules, namely, the above-named European regulations and conventions, international agreements and bilateral conventions, or French rules on private international law.

However, article 3-1 also provides that the period of 10 years does not apply if the actions for debt recovery that are taken into account in the decision have set a longer time limit. In this case, the French court enforcing the decision would have to take the longer prescriptions of the foreign jurisdiction into account.

It should be noted that, contrary to enforcement, there are no rules as to the prescription of the recognition of a foreign judgment. Therefore, the recognition of foreign decisions can take place at any time and the above-mentioned limitation period of 10 years will only start to run at such time.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

All remedies ordered by a foreign court are enforceable (except for interim injunctions), according to both French private international law and European conventions, and international agreements or conventions. However, French courts do not recognise decisions on punitive damages that are disproportionate to the harm sustained and the contractual breach (see Court of Cassation, First Civil Chamber, 1 December 2010, appeal No. 09-13.303; more recently, see Court of Cassation, Criminal Chamber, 15 October 2014, appeal No. 13-83.884). Therefore, in the case of French courts finding that the punitive damages awarded are disproportionate, they will refuse to order the enforcement of such a decision.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Enforcement of foreign non-EU judgments

For the enforcement of foreign judgments according to French private international law, the presiding judge of the district court has subject-matter jurisdiction (article R212-8, Code of Judicial Organisation). The local jurisdiction will be determined by the domicile of the defendant (article 42, Code of Civil Procedure) or the registered office of the legal person (article 43, Code of Civil Procedure).

Enforcement of judgments between the EU members

The old Brussels I Regulation

For decisions that are subject to the old Brussels I Regulation (Regulation (EC) No. 44/2001), the presiding judge of the district court also has subject-matter jurisdiction according to article 39(1) in conjunction with Annexe II of the old Brussels I Regulation (however, the recognition will take place ipso jure). The local jurisdiction will be determined by the domicile of the defendant or the place of enforcement (article 39(2) of the old Brussels I Regulation).

The new Brussels I Regulation

The new Brussels I Regulation (Regulation (EU) No. 1215/2012) only applies to judgments given in proceedings commenced on or after 10 January 2015 (see article 66 of the new Brussels I Regulation). Under the new Brussels I Regulation, a judgment given in a member state which is enforceable in that member state shall be enforceable in the other member states without any declaration of enforceability being required (article 39 of the new Brussels I Regulation).

European Payment Order Regulation (No. 1896/2006)

According to article 18(1) of the European Payment Order Regulation, the declaration of enforceability will be rendered by the court that issued the order. According to article 6(1) of this Regulation, the rules of Brussels I apply to this question of international competence unless the defendant is a consumer. In this case, only the jurisdictions in the member state where the consumer is domiciled will be competent.

The competent enforcement administration is determined by French law (article 21 of the European Payment Order Regulation). More specifically, enforcement procedures shall be governed by the law of the member state of enforcement.

European Enforcement Order Regulation (EEO) (No. 805/2004)

A foreign judgment certified as an EEO according to the European Enforcement Order Regulation shall be enforced in France under the same conditions as a judgment rendered in France.

European Small Claims Procedure Regulation (No. 861/2007)

For the European small claims procedure (see article 1382 et seq of the Code of Civil Procedure) the district court and the commercial court have subject-matter jurisdiction. The local competence is defined according to the Brussels I Regulation). A judgment delivered under this procedure is recognised and enforceable in other member states (except Denmark) without any need for a declaration of enforceability.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

According to French private international law, foreign judgments are recognised and enforced by way of an exequatur procedure. Therefore, the judgment must first be recognised (ie, it needs to obtain full legal effect not only in the issuing state, but also in France). After receiving enforceable status through the declaration of enforceability, enforcement proceedings can start.

According to the European idea of creating a common area of freedom, security and justice, the treaties of recognition are based on the principle of mutual confidence in jurisdiction and decisions. Due to this principle, a foreign judgment in civil and commercial matters is in general recognised ipso jure in other member states without any special procedure being required (article 33(1) old Brussels I, article 36 new Brussels I) (for the

possibilities available to challenge the recognition of a foreign judgment under Brussels I, see question 9).

As a result of the recognition by law, the beneficiary can directly apply to the chief clerk of the district court for the declaration of enforceability (article 38, old Brussels I Regulation and article 509-2(1), Code of Civil Procedure). This formality remains a requirement for the enforcement of a foreign judgment (this is also the case under the old Brussels I regime). However, this requirement has been abolished by Regulation No. 1215/2012. Under the new Brussels I regime, a judgment given in one member state is enforceable in all other member states. There is no longer any need to apply for a declaration of enforceability.

Due to the European Enforcement Order Regulation establishing an EEO for uncontested claims in all member states (except Denmark), the process of declaration of enforceability is no longer required (article 5 of the European Enforcement Order Regulation).

The member state in which the judgment has been rendered will issue an EEO certificate provided that the procedural requirements of certification of articles 6(1) and 12(1) of the European Enforcement Order Regulation are complied with (eg, the regular service of the documents ensuring compliance with the rights of defence or the compatibility of the judgment with the rules of jurisdiction or court proceedings established by the Brussels I Regulation).

The enforcement of an EEO in France will be governed by French law.

In the same way, the European Payment Order Regulation simplifies cross-border litigations in European Union countries (except Denmark) by abandoning the process of recognition and the requirement of declaration of enforceability (article 19 of the European Payment Order Regulation).

Finally, the European Small Claims Procedure Regulation simplifies small claims litigations in civil and commercial matters not exceeding the sum of €2,000. A judgment delivered under this procedure is recognised and enforceable in other member states (except Denmark) without any need of declaration of enforceability (ie, article 20(1) of the European Small Claims Procedure Regulation). The party seeking enforcement only has to produce an original copy of the judgment and of the certificate of the judgment, and if necessary a duly certified translation into the language of the member state of enforcement.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

Enforcement of foreign non-EU judgments

According to French private international law, the defendant cannot obtain a review of the case. French legal practice only permits a defence of non-compliance with procedural regularities according to French international public policy, the lack of competence of the foreign court or the existence of fraud against law in the prior action.

Enforcement of judgments between the EU members

The debtor's possibilities to attack a foreign judgment under the Brussels I Regulation are also limited: under no circumstances may a foreign judgment be reviewed as to its substance (see article 36 of new Brussels I and article 45(2) of old Brussels I).

The only possible means of defence are defined in articles 34 and 35 of the Regulation. According to article 34, recognition of a foreign judgment will be refused in cases of a manifest conflict with French public policy, provided that the defendant had no possibility of defence in the prior action, and in cases of incompatibility with an earlier judgment involving the same cause of action and the same parties in the member state of recognition, another member state or a third state.

Although article 35(3) states the principle that the competence of the jurisdiction in the country of origin must not be reviewed, it allows exceptions to this principle with regard to decisions in matters relating to insurance or to consumer contracts, or decisions by the exclusive jurisdictions according to article 22 of Brussels I. In these cases, a lack of competence will constitute a reason for the refusal of recognition.

The reasons for a refusal provided for by articles 34 and 35 can be taken into consideration during different stages of the process of recognition and enforcement if there is a legal action either to solely obtain the recognition or to raise an incidental question of recognition (article 36 of the Regulation), and within the appeal procedure lodged by the defendant

after the decision on the application for a declaration of enforceability (article 49 Brussels I).

The burden of proof concerning the reasons provided for by articles 34 and 35 of Brussels I falls on the defendant.

Defences that the debtor could already have raised within the prior action are also excluded. They can only be raised as part of an appeal against the foreign judgment in the member state where the decision was rendered.

Under the new Brussels I Regulation, the judgment debtor can prevent a judgment from being enforced for the same reasons according to article 46. The reasons for a refusal of recognition and enforcement provided for in articles 34 and 35 of the old Brussels I Regulation have been integrated in article 45 of the new Brussels I Regulation. They remain unchanged.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Under French law, the judgment debtor cannot obtain injunctive relief to prevent foreign judgment enforcement proceedings in France. The judgment creditor can only be prevented from enforcing a foreign judgment in the case of bankruptcy proceedings having been initiated against the judgment debtor or in the case of immunity from execution having been granted to the judgment debtor (eg, a public legal entity or a state).

Otherwise, a foreign judgment can be enforced in France by way of an exequatur procedure before the relevant district court. In the event that the conditions of the exequatur are fulfilled, the court will grant exequatur. A foreign judgment in civil and commercial matters falling within the scope of the old Brussels I Regulation is, in general, recognised *ipso jure* in other member states without any special procedure being required. The judgment creditor must only apply for a declaration of enforceability (see article 38(1) of the old Brussels I Regulation).

A judgment given in one member state which falls into the scope of Regulation (EU) No. 1215/2012 is immediately enforceable in another EU member state, without any need for a declaration of enforceability (see article 39 of the new Brussels I Regulation).

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

According to current French legal practice with regard to foreign non-EU judgments, a foreign judgment will be recognised if it complies with international regularity.

International regularity comprises three conditions: the competence of the foreign jurisdiction, the absence of fraud against law and compliance with international public policy.

It should be noted that, independently of the effects rendered by recognition and enforcement, there are also other effects to a foreign judgment according to French legal practice; a foreign judgment will therefore be considered as a fact (the existence of the judgment will generate consequences that will equally generate consequences in France, for example, the order in a foreign country may constitute a case of force majeure for the French debtor), as a proof (the establishment of facts in the foreign judgment can serve as a proof within another case) and as a title (eg, allowing a request for a protective measure).

Under the scope of Brussels I, the recognition of a foreign judgment is made as a right in other member states (article 33(1) old Brussels I and article 36(1) new Brussels I). Nevertheless, the Regulation determines the basic requirements for recognition (in articles 35 and 36 of old Brussels I and article 45 of new Brussels I) (see above).

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

There are no other non-mandatory factors to be considered. All factors for recognition of a foreign non-EU judgment are defined by French private international law (see question 11).

Brussels I also does not contain non-mandatory factors.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

Enforcement of foreign non-EU judgments

According to French private international law, the following rules on procedural requirements exist.

As explained above, the foreign judgment must be internationally regular. The judge in charge of recognition and enforcement will, therefore, verify that the foreign judgment complies with international public policy and that the parties did not commit any fraud against the law. He or she will also verify the competence of the foreign judge. The foreign judgment also has to be enforceable in its original country.

The criterion of compliance with international public policy especially allows for an examination of procedural equivalence, but only as far as the principles of fair process are concerned.

Enforcement of judgments between the EU members

For a European civil procedure according to the Brussels I Regulation, no requirement of procedural equivalence exists. By applying Brussels I, member states already ensure a homogeneous legal landscape throughout the EU.

In any case, the rights of defence have a particular importance under Brussels I. Article 45 of new Brussels I (article 34 of old Brussels I) is mainly applicable to judgments in contumacy and guarantees the principle of a contradictory process in cases of an incorrect or late notice of the action. Therefore, following an objection raised by the judgment debtor, the French court will examine whether the judgment debtor had sufficient opportunities to defend him or herself in the prior action. The criterion of adequate notice cannot be generally defined; it is determined by the court according to the circumstances of each case.

Additionally, French legal practice, as confirmed by the European Court of Justice (ECJ, *Krombach*, 28 March 2000), generally penalises procedural errors violating the right to a fair trial that constitute an infringement of article 6 of the European Rights Convention on Human Rights. However, procedural errors do not, in general, prevent the recognition of a foreign judgment. Recognition is only refused in cases of a manifest violation of the principles of procedural justice on which the French legal system is based.

As a result, it is not the procedural equivalence that is decisive, but rather the respect of due process of law fixed in article 45(I b) of Brussels I.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

The French legal system only distinguishes between subject-matter and local jurisdiction. The concept of personal jurisdiction does not exist under French law. Therefore, the enforcing court will not examine whether the court that rendered the judgment had personal jurisdiction over the defendant.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

Enforcement of foreign non-EU judgments

Since the *Cornelissen* case (Court of Cassation, First Civil Chamber, 20 February 2007, Appeal No. 05-14082), the enforcing court is only obliged to verify the indirect competence of the foreign court, which means that there must be a connection between the subject matter of the dispute and the foreign court to which the dispute has been referred. Furthermore, French courts must not have had exclusive subject-matter jurisdiction.

The enforcement of judgments between the EU members

According to the Brussels I Regulation, the subject-matter jurisdiction of the court rendering the judgment will not be examined by the French court (article 45(3) of new Brussels I and article 35(3) of old Brussels I).

The international jurisdiction of the foreign court will be examined only in exceptional cases provided for in article 45 of new Brussels

I Regulation (article 35 of old Brussels I Regulation). This is especially the case in consumer law or insurance law disputes, or in the case of French courts having exclusive jurisdiction according to article 24 of Brussels I. For example, in proceedings that have as their object rights in rem immovable property or tenancies of immovable property, the courts of the member state in which the property is situated have exclusive jurisdiction (article 24 of new Brussels I and article 22 of old Brussels I).

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Enforcement of a foreign non-EU judgment

According to French private international law, the foreign judgment must be enforceable and have been served in the foreign country.

In order to obtain recognition and enforcement in France, the claimant must prove the service of the judgment. However, according to legal practice, it does not constitute an infringement of procedural public policy if the service does not mention the means of redress authorised in the foreign country. The claimant must also prove that notice of action has been served to the defendant. The enforcing court must ensure that the defendant had knowledge of the proceedings or, failing this, that the requirements of the provisions of article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters have been met by the foreign court.

The enforcement of judgments between the EU members

The old Brussels I Regulation

According to article 26, the foreign court is obliged to verify whether the defendant has been able to receive the document instituting the proceedings, or an equivalent document, in sufficient time to enable him or her to arrange for his or her defence, or that all necessary steps have been taken to this end in order to ensure compliance with the fundamental principle of a fair trial, including that no party to the legal proceedings may be judged without having had the opportunity to state his or her case. The requirements of sufficient notice are not fixed in Brussels I but will be established according to the specific circumstances of the individual case. However, Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial matters applies instead of the provisions of the Brussels I Regulation if the document instituting the proceedings or an equivalent document had to be transmitted from one member state to another pursuant to this regulation. Requirements of sufficient notice are fixed in article 19 of this Regulation.

The new Brussels I Regulation

According to article 45, recognition shall be refused where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him or her to do so.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Other factors than those presented in this chapter will not be taken into consideration by a French court.

18 Vitiation by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

According to French private international law, the recognising and enforcing court in France will not examine the foreign judgment as to its substance. However, the court can refuse recognition or enforcement of the judgment if it was rendered on a fraudulent basis.

French legal practice distinguishes between:

- fraud against the law (eg, fraudulent manipulation of the rules on recognition and enforcement of foreign decisions);
- fraud against the court (eg, if the claimant had fraudulently determined his or her residence in a foreign country in order to base the jurisdiction in this foreign country);
- fraud with regard to the judgment (eg, in the case of a claimant pleading before a foreign jurisdiction with the intent to come back to France in order to enforce the decision, knowing that under these conditions, the judge of recognition and enforcement will apply only an attenuated public policy and not the full public policy); and
- fraud with regard to the rights of defence (eg, a claimant's manipulations in order to deprive the defendant of the possibility to correctly defend his or her rights). Judgments falling within the scope of the Brussels I Regulation obtained by fraud violate the principle of public policy and therefore will not be recognised in France according to article 45 of the new Brussels I Regulation (article 34 of the old Brussels I Regulation).

The defence of fraud must be raised by the damaged party, except in cases of fraud affecting French state interests, such as in antitrust law or law of foreign exchange matters, which are automatically examined by the enforcing court.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Enforcement of a foreign non-EU judgment

According to French private international law, foreign judgments sought to be enforced in France have to comply with the condition of international procedural regularity (the aspect of public policy that is relevant here). International procedural regularity principally concerns the rights of the defence.

If the foreign judgment is in contradiction with international procedural regularity, the court will refuse to enforce it (eg, if a foreign jurisdiction applies a nationalisation law that does not provide any compensation to dispossessed persons, the court will not enforce the judgment by virtue of its violation of the principle of public policy).

The enforcement of judgments between the EU members

According to article 45 of new Brussels I (article 34 of old Brussels I), the French court will examine the foreign judgment for its compliance with public policy. The term 'public policy', as used in article 45 has to be interpreted as international public policy that is based on a more limited understanding of the term compared to the notion of general French public policy. In its decisions *Hoffmann/Krieg* (4 February 1988) and *Krombach* (28 March 2000), the European Court of Justice affirmed that the notion of public policy in Brussels I has to be interpreted autonomously (ie, not according to French private international law).

Nevertheless, international public policy, as well as French private international law, also includes a procedural notion; therefore the French court examines the regularity of the prior procedure (independence and impartiality of the court, right to be heard, right of equal treatment and right to a fair trial) as under French private international law.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

According to French private international law, a final and conclusive judgment has the authority of *res judicata*, that is, the court cannot allow the enforcement of a foreign judgment that is in conflict with a former judgment, whether it is French or foreign.

This rule also applies under the Brussels I Regulation.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

A judgment can only be enforced against the named judgment debtor. In France, courts do not apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

According to French legal practice, parties who have agreed on alternative dispute resolution (ADR) are prevented from bringing an action in a state court. When one party to the alternative dispute resolution clause brings an action in a state court in violation of the clause, the other party can contest the jurisdiction of the state court. French courts would declare the action inadmissible unless the clause is manifestly invalid.

Under French private international law, there is no legal practice concerning the question raised here. But if the defendant failed to invoke before the foreign state court that an enforceable ADR clause exists, it is unlikely that he or she will be successful in arguing that his or her rights under the clause have not been respected in order to prevent the enforcement of the foreign judgment. If the defendant raised the issue before the foreign state court, then one can argue that the violation of the clause constitutes a violation of procedural public policy. However, it depends on the circumstances of the case.

In contrast to this hypothesis, based on private international law, non-compliance with a clause on ADR has no impact on the enforcement of a foreign judgment under Brussels I in France, as non-compliance is not explicitly mentioned in articles 34 or 35 of old Brussels I (article 45 of new Brussels I) as a reason for objection. Article 35(3) of old Brussels I (article 45(3) of new Brussels I) explicitly excludes applying the test of public policy to rules relating to jurisdiction, meaning that under Brussels I, non-respect of an ADR clause cannot be attacked by arguing that this would be contrary to public policy in the competent jurisdiction. Therefore, a judgment on the substance of the matter given by a court after having determined that an arbitration clause or another ADR clause is null and void, inoperative or incapable of being performed can be enforced in another member state under Brussels I Regulation.

A judgment which considers whether or not an arbitration clause is null and void, inoperative or incapable of being performed does not fall into the scope of Brussels I Regulation.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

As demonstrated, European regulations facilitate the recognition and enforcement of judgments within the European Union. However, no preference can be given to judgments from certain jurisdictions based on such legal grounds.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

According to French private international law, the court can recognise only part of a judgment unless the judgment is indivisible (ie, in cases where, if one of the measures is recognised, all of them must be recognised).

French judges have no competence to reduce or increase a damage award.

In addition to this, French decisions cannot allow any punitive damages because this kind of compensation does not exist in the French system.

According to actual legal practice, a foreign decision that includes punitive damages is not against public policy, but if the amount of punitive damages appears to be disproportionate with regard to the damage, the court will not recognise the foreign decision.

According to article 48 of old Brussels I, the enforcement of only parts of a judgment is possible. A partial recognition of a judgment is not

mentioned; however, a partial recognition is admissible. This would be the case if the foreign judgment concerns several matters. As a result, Brussels I can be applied only in parts or the reasons for objection of articles 34 and 35 can be applicable to only some of the actions. A partial recognition or a partial enforcement is not mentioned in the new Brussels I Regulation, but should be possible under the same conditions as described above.

A reduction or increase of the amount due is not admissible under Brussels I.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

For foreign judgments that are recognised and enforced according to French private international law, and where the judgment is executed in France, the court will convert the award into euros.

The judge rendering the declaration of enforceability cannot allow interest if the foreign judge did not do so. However, the judge in charge of recognition and enforcement can allow interest in arrears, which begin to run from the day of the declaration of enforceability and must be paid according to French law.

Concerning the enforcement of judgments under EU regulation Brussels I, the French court does not convert the currency during the process of recognition and declaration of enforceability. It is only at the moment of the effective payment to the bailiff that the conversion is effected (this issue is increasingly irrelevant, as most member states have adopted the euro).

Concerning legal interests according to the foreign decision, the claimant has to seize the enforcing court in order for the due sum to be fixed.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

According to French private international law, the means of redress against a declaration of enforceability are an appeal and third-party proceedings.

An appeal suspends the execution of a district court decision in France, and also a declaration of enforceability.

The judgment will be enforceable against the defendant after the exhaustion of all available remedies, after which the decision will be conclusive and final. (French doctrine allows for the possibility of provisional enforcement by lodging a security before the exhaustion of remedies.) The old Brussels I Regulation establishes an independent system of legal protection.

Decisions in favour of an application for a declaration of enforceability may be appealed against and, according to article 43(2) and Annexe III of old Brussels I, the Court of Appeal is competent for decisions concerning the approval of the application.

For decisions rejecting an application for a declaration of enforceability the presiding judge of the district court is competent (article 509(7), Code of Civil Procedure). For legal proceedings before the district court, the parties have to be represented by a lawyer (article 751(1) of the French Code of Civil Procedure).

During the time limit specified for lodging an appeal against the declaration of enforceability, pursuant to article 43(5) of Brussels I and until the court has ruled on any such appeal, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought (article 47(3) of Brussels I).

If an ordinary appeal against the judgment has been lodged in the foreign country, the competent court may suspend the proceedings according to article 46(1) of Brussels I.

If a suspension of the proceedings is not suitable, the judge makes the enforcement conditional on the provision of a security determined by him or her at his or her legal discretion, in order to reduce the risk of insolvency (article 46(3) of Brussels I).

In addition to the appeal against the decision in favour of a declaration of enforceability, the enforcement itself can also be appealed against by

Update and trends

The new Brussels I Regulation (Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)) is now applicable. Under the old Brussels I Regulation (Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), the judgment creditor who wanted to enforce a judgment given in one member state in another member state had to apply for a declaration of enforceability. This requirement no longer exists. A judgment given in one member state in a judicial proceeding initiated on or after 10 January 2015 is immediately enforceable in the other member states of the EU, without any need for a declaration of enforceability. The judgment debtor can prevent a judgment given in one member state from being immediately enforced in France only for the reasons provided for in article 46 of the new Brussels I Regulation (eg, manifest conflict with French public policy; lack of competence of the foreign court in matters relating to insurance or to consumer contracts; or, in the case of French courts, having exclusive jurisdiction according to article 24 of the new Brussels I Regulation).

the party concerned. This appeal is lodged in accordance with French law (article 542 et seq, Civil Procedure Code).

Between the EU member states, the new Brussels I Regulation no longer requires a party wishing to enforce a foreign judgment in France to obtain a judgment in France recognising or enforcing this foreign judgment. A judgment given in a member state which is enforceable in that member state shall be enforceable in the other member states without any declaration of enforceability being required (see article 39). An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures that exist under the law of the member state addressed (see article 40).

The European Enforcement Order Regulation (article 5) does not include the possibility to oppose against the recognition of an EEO. Nevertheless, article 21(1) establishes the possibility of a refusal of enforcement in cases of irreconcilability of the judgment with a prior judgment and the suspension and the limitation of the enforcement. According to article 23 of the European Enforcement Order Regulation, the enforcing court can limit the enforcement proceedings to protective measures, make enforcement conditional on the provision of a security or suspend the enforcement proceedings.

With regard to the Regulation on European Payment Order, the defendant has to lodge his or her appeal before the court of origin by using the standard form F set out in Annexe IV of the Regulation (article 12(4)(b)) within 30 days from the service of the order.

The enforcement will be rejected according to article 22(1) of the Regulation if the judgment, certified as a European Payment Order, is irreconcilable with an earlier judgment given in any member state or in a third country.

The European Small Claims Procedure Regulation disposes of a particular legal protection: according to article 18(1) of the Regulation (Minimum Standards for Review of Judgments), the defendant who, without fault, is not capable of reacting in due time to the prior action, can obtain a review of the foreign judgment by the foreign court.

It is important to note that the European small claims procedure allows for enforcement without the provision of a security.

Only in cases of an appeal against the judgment, the competent court can make the enforcement conditional on some security, limit the enforcement procedure to protective measures or, under exceptional circumstances, suspend the enforcement proceedings.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

According to French private international law, the claimant must ask for the exequatur of the judgment in order to enforce the judgment.

If the exequatur is allowed, the judgment is enforceable and the claimant can use coercion to obtain his or her obligation or award. The applicable rules are laid down in articles 11-37 of Decree No. 92-755 of 31 July 1992 (recently modified by Decree No. 2012-783 of 30 May 2012).

After the judgment has been declared enforceable and a request for enforcement (according to article 39(1) and Annexe II of old Brussels I) has been sent to the presiding judge of the competent district court, the judge will make a decision about the enforcement proceedings (article 38(1), old Brussels I).

The claimant must be notified of the decision authorising enforcement proceedings and such notification must be served (together with the judgment if this has not already been served) to the party against whom enforcement is sought, even though a contradictory proceeding is not intended (ie, article 42, Brussels I now abolished by Regulation No. 1215/2012).

The enforcement proceedings of all European decisions under the regulations mentioned above are governed by French law. In France, bailiffs are responsible for enforcing judgments.

Under Regulation (EU) No. 1215/2012, a party who wishes to invoke in a member state a judgment given in another member state shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity and the certificate issued pursuant to article 53, certifying that the judgment is enforceable and containing an extract of the judgment as well as, where appropriate, relevant information on the recoverable costs of the proceedings and the calculation of interest (articles 37 and 42 of new Brussels I).

An enforceable judgment shall carry with it by operation of law the power to proceed to any protective measures that exist under the law of the member state addressed (article 40 Brussels I).

Where enforcement is sought of a judgment given in another member state, the certificate issued pursuant to article 53 shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. The certificate shall be accompanied by the judgment, if not already served on that person (article 43(1) Brussels I).

Where the person against whom the enforcement is sought is domiciled in a member state other than the member state of origin, he may request a translation of the judgment in order to contest the enforcement if the judgment is not written in or accompanied by a translation into either a language which he understands or the official language of the member state in which he is domiciled or, where there are several official languages in that member state, the official language or one of the official languages of the place where he is domiciled (article 43(2) Brussels I).

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Due to the large number of different rules applying to the recognition or enforcement of foreign judgments (ie, French private international law, European regulations and international bilateral or multilateral treaties (see question 1)), it is a challenge to identify, within a reasonable amount of time, the rules that are applicable in any respective case.



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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Germany has entered into a number of bilateral and multilateral treaties both as a sovereign state and as a member state of the EU with regard to the reciprocal recognition and enforcement of foreign judgments.

European Union

The following treaties were entered into by Germany as a sovereign and member state of the EU:

- the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. This convention is still in effect for the regions of the EU member states where European Community law is not applicable as set forth in article 52 of the Treaty on European Union in conjunction with article 355 of the Treaty on the Functioning of the European Union, as well as for decisions made before commencement of Council Regulation (EC) No. 44/2001 and Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), respectively;
- Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Lugano, 16 September 1988 (88/592/EEC). This convention was concluded between the member states of the European Community and certain member states of the European Free Trade Association (EFTA) and was a 'parallel convention' to the 1968 Convention described above. This convention was concluded between the six original member states of the European Community, and was amended several times thereafter to extend its application to new states that had acceded to the community;
- Council Regulation (EC) No. 1346/2000, 29 May 2000, on insolvency proceedings;
- Council Regulation (EC) No. 44/2001, 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Based on article 66 Regulation (EU) No. 1215/2012 this Regulation also applies to old cases;
- Council Regulation (EC) No. 2201/2003, 27 November 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters, and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000;
- agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – Council Regulation (EC) No. 44/2001, and henceforth Regulation (EU) No. 1215/2012;
- Regulation (EC) No. 805/2004 of the European Parliament and the Council of 21 April 2004, creating a European Enforcement Order for uncontested claims;
- Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006, creating a European order for payment procedure;
- Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007, establishing a European Small Claims Procedure;
- Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concluded at Lugano (the New Lugano Convention). This convention was concluded between the European Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation;
- Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000;
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters;
- Council Regulation (EC) No. 4/2009, 18 December 2008, on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations;
- Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession. This regulation shall apply from 17 August 2015, except for articles 77 and 78, which shall apply from 16 January 2014, and articles 79, 80 and 81, which shall apply from 5 July 2012;
- Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters repealing Regulation (EC) No. 44/2001;
- Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Official Journal of the European Union L 79/4, 21 March 2013;
- Commission Regulation (EU) No. 936/2012 of 4 October 2012 on amending the Annexes to Regulation (EC) No. 1896/2006 of the European Parliament and of the Council creating a European order for payment procedure;
- Regulation (EU) No. 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters – it shall apply from 18 January 2017;
- Regulation (EU) No. 542/2014 of the European Parliament and of the Council of 15 May 2014 amending Regulation (EU) No. 1215/2012 as regards the rules to be applied with respect to the Unified Patent Court and the Benelux Court of Justice;
- Council implementing Regulation (EU) No. 663/2014 of 5 June 2014 replacing Annexes A, B and C to Regulation (EC) No. 1346/2000 on insolvency proceedings;
- Commission delegated Regulation (EU) 2015/281 of 26 November 2014 replacing Annexes I and II of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
- Commission Regulation (EU) 2015/263 of 16 January 2015 amending Annexes I to IV to Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;

- Commission implementing Regulation (EU) 2015/228 of 17 February 2015 replacing Annexes I to VII to Council Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations;
- Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, only in effect and binding in the participating member states Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Sweden, Slovenia and Spain; and
- Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, only in effect and binding in the participating member states: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Sweden, Slovenia and Spain.

Multilateral treaties

Germany has entered into the following multilateral treaties:

- Hague Convention of 17 July 1905 on civil procedure. This convention is still in effect in relation to the Republic of Iceland;
- Hague Convention of 1 March 1954 on civil procedure concerning the recognition and enforcement of court orders as to the procedural costs;
- Convention on the Contract for the International Carriage of Goods by Road;
- New York Convention on the Recovery Abroad of Maintenance, 20 June 1956;
- Convention on Third Party Liability in the Field of Nuclear Energy, 29 July 1960;
- Hague Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations;
- Hague Convention of 15 April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children;
- Convention concerning International Carriage by Rail; Uniform Rules concerning the Contract of International Carriage of Passengers by Rail; Uniform Rules Concerning the Contract of International Carriage of Goods by Rail;
- Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;
- Hague Convention of 30 June 2005 on Choice of Court Agreements;
- Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance; and
- Hague Protocol on the Law applicable to maintenance Obligations, concluded 23 November 2007.

Bilateral treaties

With the exception of the treaties with Israel and Tunisia, almost all bilateral treaties entered into among EU and/or EFTA member states are effectively meaningless due to the multilateral treaties in effect; the bilateral treaties will remain applicable, however, limited to the law of succession, for all deaths prior to 17 August 2015 as Regulation (EU) No. 650/2012 entered into force in the EU except Denmark, Ireland and the United Kingdom with regard to deaths after 16 August 2015.

- Austria: convention between the Federal Republic of Germany and Austria on the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, 6 June 1959;
- Belgium: convention between the Federal Republic of Germany and the Kingdom of Belgium on the mutual recognition and enforcement of judgments, arbitration awards and authentic instruments in civil and commercial matters, 30 June 1958;
- Greece: convention between the Kingdom of Greece and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters, 4 November 1961;
- Israel: treaty between Germany and Israel on the Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters, 20 July 1977;

- Italy: convention between Germany and Italy on the recognition and enforcement of judgments in civil and commercial matters, 9 March 1936;
- Netherlands: convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters, 30 August 1962;
- Norway: treaty between Germany and Norway on the Mutual Recognition and Enforcement of Judgments and other Awards in Civil and Commercial Matters, 17 June 1977;
- Spain: convention between Spain and the Federal Republic of Germany on the recognition and enforcement of judgments, settlements and enforceable authentic instruments in civil and commercial matters, 14 November 1983;
- Switzerland: treaty between Germany and Switzerland on the Mutual Recognition and Enforcement of Court Decisions and Arbitration Awards in Civil and Commercial Matters, 2 November 1929;
- Tunisia: treaty between Germany and Tunisia on Legal Protection and Legal Assistance, the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Commercial Arbitration, 19 July 1966;
- Turkey: convention on Successions between the German Reich and the Republic of Turkey – Attachment to article 20 of the Consular Treaty, 28 May 1929; and
- United Kingdom: convention between the United Kingdom and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments in civil and commercial matters, 14 July 1960.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

The recognition and enforcement of foreign judgments is uniformly regulated in Germany.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Sources of law include the multilateral and bilateral treaties mentioned above and, among other more specific statutory rules, the universally applicable Code of Civil Procedure and the Code for the Implementation of Intergovernmental Treaties, Directives and Conventions of the EU on the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Germany has not signed the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The statute of limitations is considered with regard to the claim made and the law applicable for the claim. The statute of limitations' period is tolled while the claim is pursued by the legal action available in the foreign country. The tolling of the statute of limitations ends six months after final adjudication or any other termination of the proceedings enacted in pursuit of the claim (section 204(2)1 German Civil Code).

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Judgments granting punitive or treble damages violate German public policy to the extent that the compensation granted by the foreign court exceeds the sum of the average compensation (difference) and any compensation for immaterial damages and the related procedural costs. The same applies to judgments based on class action suits that involuntarily affect German citizens. In such cases the foreign judgment will not be recognised or enforced.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

The case must be brought in the first instance to the locally competent court. The venue for a claim is the debtor's domicile. If a debtor has no domicile, the venue will be where the assets against which the plaintiff intends to enforce the claim are located. If the debtor holds assets at multiple locations within Germany, the plaintiff is free to choose among the venues available.

Subject-matter jurisdiction (district court or regional court) depends on the amount in dispute. When calculating the overall amount in dispute, the procedural costs of the prior proceedings in the foreign jurisdiction are included. The time of filing of the claim in foreign currency is the critical date for the calculation of the amount in dispute and the related question of one court's competence.

A choice-of-forum clause entered into by the parties is non-binding with regard to the declaration of enforceability.

With commencement of Regulation (EU) No. 1215/2012 mandatory proceedings to obtain a declaration of enforceability have been abolished to the widest extent possible within the European Union. Therefore, based on article 39 Regulation (EU) No. 1215/2012 as of 10 January 2015 all judgments of courts of the EU member states will be recognised and are enforceable without any further proceedings to obtain a declaration of enforceability. The same applies, *mutatis mutandis*, to enforcements under public (official) deeds and settlement agreements in court. Subject to article 25 f. Regulation (EU) No. 1215/2012 a prorogation of jurisdiction is acceptable.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Generally, foreign judgments are recognised in Germany by operation of law. A specific declaration of recognition is not required. A foreign judgment for payment obtained in a civil proceeding will be declared enforceable in an *exequatur*. With commencement of Regulation (EU) No. 1215/2012 mandatory proceedings to obtain a declaration of enforceability have been abolished to the widest extent possible within the European Union.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

The *exequatur* is a normal court proceeding, and all provisions relating to court proceedings are therefore applicable provided that the judgment in an *exequatur* is delivered without any examination or consideration of the foreign judgment's legitimacy. Such a judgment will only be delivered upon final adjudication of the foreign judgment, and no such judgment will be delivered:

- if the courts of the state to which the foreign court belongs do not have jurisdiction according to German law;
- if a defendant, who has not entered an appearance in the proceedings and who takes recourse to this fact, was not duly served the document by which the proceedings were initiated, or was not served in time to allow for self-defence;

- if the judgment is incompatible with an earlier (German or other) judgment or if the proceedings on which such judgment is based are incompatible with proceedings that were pending earlier in Germany;
- if recognition of the judgment would lead to a result that is obviously incompatible with essential principles of German law, and in particular if the recognition is not compatible with fundamental rights; or
- if reciprocity has not been granted.

With commencement of Regulation (EU) No. 1215/2012 mandatory proceedings to obtain a declaration of enforceability have been abolished to the widest extent possible within the European Union.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Due to the fact that an *exequatur* is a normal court proceeding, the losing party is free to appeal against the *exequatur* judgment to the competent court of appeals, and then to appeal on points of law to the *Bundesgerichtshof*, the German Federal Court of Justice. Partially simplifying special rules are in effect in many EU member states.

The debtor is free to demur based on facts coming into being after final adjudication of the *exequatur* judgment by means of an action to oppose enforcement. This action is available with regard to objections against the German *exequatur* judgment, for example because of a subsequent annulment of the relevant judgment or limitations on its enforceability and, at least from the German point of view, substantive objections against the foreign judgment. The subject matter of the action raising an objection to the judgment claim is the enforceability of the German *exequatur* judgment. As such, an action to oppose enforcement may not be brought until a German court has granted enforcement of the foreign judgment.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

A foreign judgment will only be recognised when a final substantive judgment in a civil matter has been delivered.

Foreign judgments will be declared enforceable in Germany when they have an enforceable content, for example, an obligation to pay. If recognition is impossible no enforceability will be granted. As stated above, foreign judgments will generally only be recognised upon their final adjudication. At the very least, the foreign judgment must have obtained a certain conclusiveness and finality and may no longer be appealed by the losing party based on the foreign country's procedural rules. When these preconditions are met, even judgments delivered in summary proceedings (injunctive processes, temporary orders and proceedings covering attachments) will be recognised. The possibility to apply for a retrial or to appeal on a prerogative writ (eg, a constitutional complaint) after final adjudication does not exclude or hinder recognition. The same applies to potential lack of a substantive legal effect or potential modification due to altered circumstances.

With commencement of Regulation (EU) No. 1215/2012 mandatory proceedings to obtain a declaration of enforceability have been abolished to the widest extent possible within the European Union.

Based on the New Lugano Convention and Council Regulation (EU) No. 1215/2012, every judgment by a member state's courts must be recognised by all other member states even if the judgment is only provisionally enforceable. Additionally, foreign judgments may be recognised and declared enforceable for purposes of a provisional attachment. However, foreign judgments in summary proceedings are only to be recognised when they are not delivered in a unilateral proceeding, but delivered or confirmed after the opposing party is granted the opportunity to defend.

Foreign judgments that are still appealable, injunctive processes and temporary orders will be recognised under the following treaties and conventions:

- Treaty between Germany and Tunisia on Legal Protection and Legal Assistance, the Recognition and Enforcement of Judgments in Civil and Commercial Matters and on Commercial Arbitration – temporary orders regarding cash benefits prior to final adjudication;
- Convention between the Federal Republic of Germany and Austria on the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters;

- Convention between the Federal Republic of Germany and the Kingdom of Belgium on the mutual recognition and enforcement of judgments, arbitration awards and authentic instruments in civil and commercial matters;
- Convention between the Kingdom of Greece and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments, settlements and authentic instruments in civil and commercial matters;
- Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the mutual recognition and enforcement of judgments and other enforceable instruments in civil and commercial matters; and
- Convention between the United Kingdom and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments in civil and commercial matters.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

No such factors may be taken into consideration.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

On examination of the foreign judgment's consistency with German public policy, the foreign court's procedures are taken into consideration as well. The request for recognition will be declined when the foreign court's proceedings do not satisfy the fundamental requirements of German procedural law. The examination is not about the differences between foreign procedural rules and German procedural law, but rather about whether the foreign procedures deviate from the German sense of justice in a way that is incompatible with German law. German courts generally take a deferential view in this regard. Procedural errors must be addressed in the underlying proceedings to the fullest extent possible otherwise the party is burdened with the related complaint in the exequatur proceedings.

Breaches of German public policy have included the denial of a party's right to be heard, misrepresentation of the foreign court's competence, judgments obtained on the basis of fraud or deception, judgments due to bias or partiality and a decision on a case that wilfully causes damages contra bonos mores. An exclusion from court proceedings based on contempt of court may only be deemed a violation of German public policy when the decision appears to be disproportionate. Additionally, an injunction limiting a party's ability to initiate proceedings in Germany violates German public policy.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

One of the basic requirements for the recognition of foreign judgments in Germany is that all parties involved in the proceedings and the subject matter are subject to the personal jurisdiction of the underlying proceedings' court in the foreign country.

Another requirement is that the foreign court must be internationally competent. International competence is decided based on the provisions of German law. The German court has to decide on its competence provided the German binding provisions had been applied irrespective of whether German law is familiar with the provisions applied as to the competence.

Upon examination and consideration of the recognition of the foreign judgment, the German court deciding on the exequatur is free to undertake fact-finding on its own; it is not bound by the foreign court's findings.

The competence of the foreign court may be based on the general venue. The court within the jurisdiction where a person has their general venue is competent for all actions that may be brought against that person, unless an exclusive venue has been established for court actions (eg, general venue of the place of residence, general venue of extraterritorial German citizens, general venue of persons without a place of residence, general venue of legal persons).

Significant deviations are stipulated in the European Rules of Civil Procedure, and partially simplifying special rules are in effect in many EU

member states. Subject to article 25 f. Regulation (EU) No. 1215/2012 a pro-rogation of jurisdiction is acceptable.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The enforcing court will always examine the foreign court's subject-matter jurisdiction, which may be established on the basis that the plaintiff holds or owns assets located in the foreign state where the judgment was entered and, in particular, in the district where the foreign court is located. An asset's location is deemed to be the debtor's place of residence or business, provided that if any kind of security has been provided, subject-matter jurisdiction will also lie with the court where such security is located.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Recognition of a judgment handed down by a foreign court shall be ruled out if the defendant, who has not entered an appearance in the proceedings and who takes recourse to this fact, was not duly served the document by which the proceedings were initiated, or was not allowed adequate time to build a defence.

Within the EU and based on Council Regulation (EU) No. 1215/2012 the following applies:

On the application of any interested party, the recognition of a judgment shall be refused where the judgment was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

A German court will not take this fact into consideration provided that the foreign judgment under consideration was entered by a court that had subject-matter jurisdiction.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

As stated above, foreign judgments that violate German public policy (eg, usury, judgments obtained by fraud) will not be recognised or enforced, and no exequatur relating thereto will be handed down.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

A foreign judgment may not be recognised and declared enforceable if it violates German public policy. The foreign judgment will be examined by the German court with regard to both its substantive content and its procedural realisation regarding potential violations of German public policy. If a foreign judgment is based on a provision that violates German public policy, the judgment as such is not necessarily deemed to violate German public policy. Rather, the decisive factor is the outcome of the proceedings and not exclusively the foreign court's opinion or the rules applied to reach the respective judgment. In practice, this public policy caveat is applied in an extremely limited manner – not every violation of a binding national procedural provision is treated as a violation of German public policy, as this would inevitably lead to a forbidden *révision au fond*. Therefore, German courts will only assume a violation of German public order when

the application of foreign law leads to results directly contravening the fundamental principles of German rules and the related sense of justice, which are unacceptable from the national point of view. Even a violation of civil rights granted under the German Constitution does not automatically infringe German public policy; in such cases integral parts of the civil rights must be compromised.

A public policy violation will only be affirmed if essential and fundamental civil rights regarding the proceedings have been compromised in such a way that the foreign judgment may no longer be looked upon as being handed down in a constitutional manner.

The foreign judgment's examination by the German court will not take place in isolation from all other potential deviations from German law, but rather based on the overall picture. A wealth of minor deviations may suffice to accept a public policy violation due to accumulation.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Recognition and enforceability of foreign judgments in Germany are excluded if the foreign judgment contradicts earlier German or other foreign judgments with a final adjudication. The same applies if the underlying proceedings were repugnant to earlier proceedings in Germany.

If two foreign judgments are incompatible, the priority principle is applied. If a foreign and a German judgment are incompatible, the German judgment is given absolute priority. This absolute priority even prevails if the German court's judgment was handed down after the foreign court's judgment.

The enactment of foreign proceedings with respect to a matter already pending in another foreign country's court has no consequence for the recognition and enforceability of the foreign judgment. However, the priority principle is applied again with regard to the foreign judgments.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

The principles of agency or alter ego will not be applied in Germany. Enforcement will only be permissible against the party named as debtor in the foreign judgment and the related exequatur judgment.

German law allows, however, for the transfer and assignment of rights by means of an amendment of the court certificate of enforceability. By this means, the legal successor of an obligee may enforce under an existing instrument if the legal succession as such can be proven, and a new trial may be avoided.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

In Germany, all parties to any agreement are free to enter into an alternative dispute resolution scheme, which is also deemed to contain a waiver of the right to trial.

The judgment for enforcement, however, is to be delivered without a review of the underlying decision's legality. Therefore, neither the factual nor the legal findings of the judgment nor the foregoing proceedings are to be examined by the German court. The examination with regard to a potential violation of German public policy is extended to the foreign dispute resolution proceedings. However, recognition may only be denied if the foreign judgment and such proceedings are incompatible with fundamental principles of the German procedural rules, which is dealt with on a case-by-case basis.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

All foreign judgments are accorded the same deference.

Update and trends

On 1 October 2015 the Hague Convention of 30 June 2005 on Choice of Court Agreements entered into force in the European Union except Denmark. The Convention offers parties to a cross-border commercial agreement an alternative to arbitration by ensuring the effectiveness of exclusive choice of court agreements for internationally active companies.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

German courts accept a limitation of the application for recognition and enforceability with regard to the amounts and the subject matters for a partial exequatur.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

The court does not convert the damage award, even if the debtor is allowed to settle the outstanding amounts in domestic currency. The conversion as such is made by the competent executing authority. The foreign judgment may state which moment in time is binding for the conversion, to mitigate against any risks of currency fluctuations. An application for an exequatur may not be declined because of doubts regarding the conversion rate or complications calculating the actual claim relating to monetary reforms. Based on German law, the conversion rate at the time of the settlement of a claim is decisive. To the extent that the debtor needs to obtain clearance by the competent foreign economic authority prior to the payment, the exequatur will only be granted with the caveat of the clearance being granted.

Debts in any foreign currency are to be settled when enforced in such currency. A payment in domestic currency will not halt the enforcement as long as the obligee does not accept a payment in domestic currency.

Interest and costs of recognition and enforcement proceedings, including attorneys' fees, are taken into account. The interest rate payable to the obligee is based on the foreign judgment or the laws of the state handing down the underlying judgment.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Please see question 10.

An exequatur judgment is provisionally enforceable even if it contains a constitutive declaration. The declaration of provisional enforceability is usually made on the condition that the obligee must provide security or the debtor may forestall when providing security in favour of the obligee. The amount of the security to be provided is calculated on the basis of the value of the claim plus all costs plus interest.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

The competent German court issues an enforceable copy of the exequatur judgment to enable the obligee to enforce the claim thereunder.

The responsibility for enforcement against moveable personal property lies with a marshal, who must be expressly instructed by the obligee. The court competent for execution is responsible for enforcements against real property as well as receivables. An enforceable copy of the exequatur judgment must be attached to each and every application for enforcement to both the marshal and the court competent for execution.

With commencement of Regulation (EU) No. 1215/2012 mandatory proceedings to obtain a declaration of enforceability have been abolished

to the widest extent possible within the European Union. Therefore, based on article 39 Regulation (EU) No. 1215/2012, as of 10 January 2015 all judgments of courts of the EU member states will be recognised and are enforceable without any further proceedings to obtain a declaration of enforceability. The same applies, mutatis mutandis, to enforcements under public (official) deeds and settlement agreements in court.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

German law contains a number of complex rules and regulations dealing with recognition and enforcement of foreign judgments, and given the variety of incidents and cases it is almost impossible to identify the most common pitfalls.

In all events, involving German counsel as early as possible is strongly recommended to avoid issues that may arise later in the process.



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NB Hong Kong's unique status as a Special Administrative Region (HKSAR) of China means that, while it falls under the sovereignty of China, it has an entirely autonomous government, legal and monetary system that is independent of that of mainland China. Hong Kong has two separate sets of legislation for the enforcement of foreign judgments – in respect of mainland China and other foreign countries that have corresponding reciprocal enforcement arrangements. Please note that the terms China or mainland/mainland China, and Hong Kong or HKSAR, are used interchangeably and are references to the same place.

1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Yes. Hong Kong is party to a bilateral treaty with China on the Arrangement on Reciprocal Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned, in respect of the enforcement of civil and commercial judgments in each other's jurisdictions. This bilateral treaty has been further encapsulated under Hong Kong legislation, the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597, MJREO) (see questions 3 and 6).

Other than with China, Hong Kong has not entered into any international treaties for the reciprocal recognition of enforcement of foreign judgments. In general, since China resumed sovereignty over Hong Kong on 1 July 1997, Hong Kong's approach to entering into these treaties will be governed by China's decision on whether to extend the territorial application of such treaties to Hong Kong as well (eg, China extended the territorial application of the Convention on the Recognition of and Enforcement of Foreign Arbitral Awards, the New York Convention, to Hong Kong on 1 July 1997).

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Not applicable, because Hong Kong consists of only one jurisdiction.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Foreign judgments may be enforced in Hong Kong under statute or at common law.

The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319, FJREO) enables the enforcement of foreign judgments via a process of registration of judgments from superior courts in designated countries that have reciprocal arrangements with Hong Kong. The designated countries are Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, the Netherlands, New Zealand, Singapore and Sri Lanka. The rules governing the registration and enforcement of foreign

judgments pursuant to the FJREO are found under the subsidiary legislation, Order 71 of the Rules of the High Court (Cap 4A, RHC).

The MJREO provides for the mutual enforcement of final judgments between Hong Kong and China in respect of the payment of a sum of money in civil and commercial cases only. The rules governing the registration and enforcement of judgments obtained in the mainland pursuant to the MJREO are found under the subsidiary legislation, Order 71A of the RHC.

Foreign judgments emanating from countries other than those listed above, including the UK and US, only have recourse under common law, meaning that proceedings must be commenced on the foreign judgment in the Hong Kong courts by writ.

The judgment creditor does not have to relitigate the underlying cause of action. However, as the judgment debtor is generally not allowed to reargue any defences to the underlying cause of action, a writ based on a foreign judgment is usually followed by a summary judgment application.

The ordinance provisions can be found at: www.legislation.gov.hk.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Not applicable, as Hong Kong is not a party to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Under section 4(1) of the FJREO, a judgment creditor has six years after the date of the judgment to have the judgment registered in the Court of First Instance of the High Court of Hong Kong (CFI). When there have been proceedings by way of appeal against the judgment, then the judgment creditor has six years after the date of the last judgment given in those proceedings to register the judgment. However, the CFI does retain discretion as to whether to allow registration of the judgment 'subject to proof of the prescribed matters and to the other provisions of [the FJREO]' (see also question 11).

Under section 7 of the MJREO, the time limit for making an application for registration of a mainland judgment is two years. The time commences to run either:

- when a period for performance of the mainland judgment has been specified in the judgment, from the last day of the period; or
- the date from which the judgment takes effect.

There is no provision in either of the ordinances for the Hong Kong courts to consider the statute of limitations of the foreign jurisdiction.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Under the FJREO, only final money judgments, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, may be enforceable in Hong Kong.

Under the MJREO, only final judgments requiring the payment of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty) in civil or commercial cases may be enforceable. These cases involve disputes arising from civil or commercial contracts in which the parties have made a prior express agreement (whether in writing or by any electronic means), and specified a designated court of the mainland or Hong Kong to have sole jurisdiction to resolve a dispute.

At common law, a foreign money judgment, including a mainland judgment, may be recognised and enforced by action as a debt, subject to the following overriding principles:

- the judgment is given by a court of competent jurisdiction, as determined by the Hong Kong courts in accordance with the rules of private international law;
- it is a judgment for a definite sum of money; and
- it is a final judgment conclusive on the merits of the claim.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

A party seeking to enforce a foreign judgment pursuant to the FJREO or MJREO should apply to the CFI to register the foreign judgment. Similarly, a party seeking to enforce a foreign judgment in Hong Kong pursuant to the common law must also commence proceedings in the CFI.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Section 4 of the FJREO and section 5 of the MJREO both require a foreign judgment to first be registered in the CFI before it will be recognised in Hong Kong. The judgment creditor must first apply for leave from the CFI to register the foreign judgment. The CFI will then assess each judgment individually to ensure that it fulfils the necessary criteria as stipulated in section 4 of the FJREO and section 5 of the MJREO before giving leave to the applicant to register the foreign judgment.

Once leave is given to register the foreign judgment and the notice of registration of the judgment is properly served on the judgment debtor personally, the foreign judgment can be enforced in the same way as a Hong Kong judgment. A number of enforcement options are available, such as writs of fieri facias, garnishee proceedings and charging orders.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

A party may apply to set aside the foreign judgment on the basis of limited grounds as set out in the ordinances as follows:

In section 6(1)(a) of the FJREO, the registration of the judgment shall be set aside if the registering court is satisfied that:

- the judgment does not fall under the provisions of the FJREO or was registered in contravention of any of the provisions of the FJREO;
- the court issuing the judgment did not have jurisdiction to issue the judgment;
- the judgment debtor (ie, defendant) did not receive notice of the proceedings in sufficient time to enable him or her to defend the proceedings and did not appear;
- the judgment was obtained by fraud;
- the enforcement of the judgment is contrary to the public policy in the country of the registering court; or
- the rights under the judgment are not vested in the person making the application for registration.

In addition, pursuant to section 6(1)(b) of the FJREO, the CFI may exercise its discretion to set aside the registration of the judgment if it is satisfied that the matter in dispute in the original court had been a final and conclusive judgment by that court having jurisdiction in the matter.

Section 18(1) of the MJREO is modelled after section 6(1) of the FJREO.

In section 18(1) of the MJREO, the registration of the judgment shall be set aside if the CFI is satisfied that:

- the judgment is not a mainland judgment that satisfies the requirements specified in section 5(2)(a) to (e) of the ordinance (see question 11, second set of bullets);
- the judgment has been registered in contravention of the ordinance;
- the relevant choice of mainland court agreement is invalid under the law of the mainland unless the original court has determined that the agreement is valid;
- the judgment has been wholly satisfied;
- the courts in Hong Kong have exclusive jurisdiction over the case according to the law of Hong Kong;
- the judgment debtor who did not appear in the original court to defend the proceedings was not summoned to appear according to the law of the mainland or was summoned but was not given sufficient time to defend the proceedings according to the law of the mainland;
- the judgment was obtained by fraud;
- the judgment on the same cause of action between the parties to the judgment has been given by a court in Hong Kong or an arbitral award on the same cause of action between the parties has been made by an arbitration body in Hong Kong;
- a judgment on the same cause of action between the parties to the judgment has been given by a court in a place outside Hong Kong, or an arbitral award on the same cause of action between the parties has been made by an arbitration body in a place outside Hong Kong, and the judgment or award has already been recognised in or enforced by the courts in Hong Kong;
- the enforcement of the judgment is contrary to public policy; or
- the judgment has been reversed or otherwise set aside pursuant to an appeal or a retrial under the law of the mainland.

Separately under common law

In a common law action brought on a foreign judgment, a number of defences may be raised by the judgment creditor (although the defences may be limited), such as:

- the lack of jurisdiction of the foreign court according to the rules of private international law;
- the judgment was obtained by fraud or in breach of natural justice;
- the judgment is inconsistent with a prior Hong Kong judgment or foreign judgment that is entitled to recognition in Hong Kong; or
- it would be contrary to Hong Kong public policy to enforce the judgment.

However, a judgment debtor is generally not allowed to reargue any defences to the underlying cause of action. See the last set of bullet points.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Provided the foreign judgment falls within the scope of the FJREO or MJREO, a defendant may prevent foreign judgment enforcement proceedings by making an application to set aside the registration of the judgment, on the basis of the grounds outlined above. The rules governing an application to set aside the registration of a judgment are found at Order 71 rule 9 RHC (FJREO) and Order 71A rule 8 RHC (MJREO).

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

Under section 3 of the FJREO, the basic requirements for recognition of a foreign judgment are:

- there is reciprocity of treatment in respect of the enforcement of foreign judgments between Hong Kong and the reciprocating country;
- that the courts of the foreign country are deemed superior courts of that foreign country;

- that the judgment is final and conclusive and in respect of a sum of money (other than taxes, penalties, or fines); and
- the court makes an order directing that the provisions of the FJREO shall extend to that foreign country.

Under section 5 of the MJREO, the basic requirements for recognition of a foreign judgment are that the judgment must be:

- from a court chosen by the parties by prior express agreement and designated by the MJREO (section 5(2)(a) MJREO);
- certified as final and conclusive and as being enforceable in the mainland; and
- an order for the payment of a sum of money (other than taxes, penalties, or fines).

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

The factors that are to be taken into consideration as outlined above are specified and mandatory. However, the CFI also has discretion to decide whether to allow the foreign judgment to be registered and will assess each case on an individual basis. As to the situations in which the court may exercise its discretion, refer to questions 5, 9, 18, 19 and 20.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

No.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

Pursuant to section 6(2)(a) of the FJREO, the foreign court is deemed to have jurisdiction in the case of a judgment given in an action in personam in the following circumstances:

- if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings;
- if the judgment debtor was plaintiff in, or counterclaimed in, the proceedings in the original court;
- if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court;
- if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
- if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.

Pursuant to the MJREO, there is no such requirement to show personal jurisdiction over the defendant. Rather, the ordinance requires that the civil or commercial contracts in dispute must specify that the mainland or Hong Kong courts have sole jurisdiction to determine a dispute arising out of the contract.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

Pursuant to section 6(2) of the FJREO, when the issue of subject matter is raised, the court needs to be satisfied that the foreign court had jurisdiction. The foreign court will be deemed to have jurisdiction when:

- the court has personal jurisdiction over the parties if any of the requirements for personal jurisdiction, as expressed in question 14, are met;

- the subject matter is moveable or immoveable property and the property was, at the time of the proceedings, in the original court situate in the country of that court; or
- in respect of a judgment given in any other action other than mentioned in the paragraphs above, if the jurisdiction of the original court is recognised by the law of the registering court.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Both the FJREO and MJREO require that the judgment debtor, being the defendant in the original court, received notice of those proceedings in sufficient time to enable him or her to defend the proceedings. Failure to provide sufficient notice to the judgment debtor of the proceedings forms one of the bases upon which the CFI must set aside registration of the foreign judgment.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

No, inconvenience of the foreign jurisdiction to the defendant is not a basis for the CFI to decline to register a foreign judgment under the FJREO and MJREO.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Pursuant to section 6(1)(a)(iv) of the FJREO and section 18(1)(g) of the MJREO, a foreign judgment that has been obtained by means of fraud is a ground for the CFI to set aside registration of the judgment. If a judgment debtor makes an application to set aside the registration of a judgment and there is an allegation of fraud involved, the CFI will have to examine carefully whether the judgment was obtained by fraud in the foreign courts and exercise its discretion accordingly.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Pursuant to section 6(1)(a)(v) of the FJREO and section 18(1)(j) of the MJREO, the CFI may set aside the registration of the foreign judgment if the enforcement of the foreign judgment is contrary to public policy in the country of the registering court or the mainland, respectively.

Under common law, one of the defences that the judgment debtor can raise is that enforcing the foreign judgment is contrary to Hong Kong public policy (see question 9), and the court will exercise its discretion in respect of these cases.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Pursuant to section 6(1)(b) of the FJREO, if the foreign judgment is inconsistent with a previous final and conclusive judgment by a court having jurisdiction in the matter, then the CFI has the discretion to set aside the registration of the foreign judgment.

With respect to the MJREO, there is no such provision, because section 6 of the MJREO specifies the circumstances when a mainland judgment is considered to be final and conclusive as between the parties to the judgment, which is related to the level of the mainland court that has issued the judgment.

Update and trends

Two recent Hong Kong decisions highlight for the difficulties judgment debtors may face in having foreign judgments set aside in Hong Kong:

- In *吳作程 v 梁儒, Allat Holding Company Limited, and Others* (HCMP 2080/2015), the CFI dismissed the defendants' application to set aside an order for the registration of a People's Republic of China (PRC) judgment. The plaintiff had obtained the PRC judgment from a Shenzhen court in proceedings arising from a contract dispute and registered it in Hong Kong pursuant to the MJREO. The defendants sought to set aside the Hong Kong registration order (the Hong Kong application). Separately, the defendants also applied in the PRC to set aside an order enforcing the PRC judgment (the PRC application) but did not apply to set aside the underlying judgment itself. The CFI dismissed the Hong Kong application, holding that the defendants failed to prove that the PRC judgment was not enforceable in the PRC (as required for a set aside application); the filing of the PRC application was insufficient in this regard. The CFI further noted that it was the defendants' duty to vigorously pursue the PRC application to show the CFI that the PRC judgment was not enforceable in the PRC, but the defendants had also failed to do this. This case is also notable, as it appears to be the first case reported involving the MJREO, despite that ordinance having been in effect since 2008.
- In *L v B* (HCCT 41/2015), the CFI ordered that the respondent provide security of HK\$41.6 million to stay enforcement of a foreign arbitral award. The applicant sought, and obtained, the

CFI's leave to enforce the award in Hong Kong as a judgment of the CFI, but the respondent applied to set aside the judgment and stay the CFI proceedings pending its challenge of the award in a foreign court. The CFI exercised its discretion to impose terms on the respondent, which required evaluation of the strength of the argument that the underlying award was invalid and whether there would be difficulties in enforcing the award in Hong Kong. The CFI further noted that it would have regard to the 'primary aim of the Court' to assist with enforcement of arbitral awards, among other things. Although the respondent claimed irregularities in the underlying arbitration and a 'conceptual difficulty' if the CFI enforced the award while the foreign court set it aside, the CFI found that there was no evidence that the award was manifestly invalid and stated that, if the foreign court set the award aside, the applicant likely could repay the respondent any amount recovered in Hong Kong. Therefore, the CFI saw fit to adjourn the application to set aside the judgment on the condition that the respondent pay HK\$41.6 million as security, which was approximately the amount of the award itself.

These two cases support the notion that Hong Kong recognises and respects established foreign judgments and awards and that judgment creditors with valid judgments may look to Hong Kong courts for reliable and favourable recognition and enforcement. At the same time, while judgment debtors have opportunities to challenge recognition and enforcement, they may face hurdles in such efforts.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

If a judgment creditor wishes to enforce a judgment against a party other than the named judgment debtor, then the judgment creditor will need to commence fresh proceedings against such party and plead the circumstances under which the judgment creditor maintains that the third party is an agent, alter ego or proxy.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

There is no specific provision in the FJREO and MJREO with regard to parties having an option to use alternative dispute resolution to resolve a dispute. section 18(1)(h) and (i) of the MJREO does provide that, when an arbitral award on the same cause of action between the parties has been made by an arbitration body in Hong Kong, or an arbitral award on the same cause of action between the parties has been made by an arbitration body in a place outside Hong Kong, and the award has already been recognised in or enforced by the courts in Hong Kong, then these would be grounds for the CFI to set aside the registration of the judgment.

When the parties have an enforceable agreement to use alternative dispute resolution, and the party seeking to enforce has not followed this requirement, it is likely that the judgment debtor would have already raised this defence in the foreign court and that this issue would have already been heard and determined by that foreign court before it granted final judgment.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Judgments of any reciprocating countries pursuant to the FJREO listed in question 3, and pursuant to the MJREO from mainland China, are registrable in the CFI provided that they meet the requirements for registration as outlined above. Once registered, those judgments are treated as though they are Hong Kong judgments and enforced in the same manner. Judgments from jurisdictions others than those listed in question 3 and mainland China, are not directly enforceable in Hong Kong and fresh proceedings must be commenced in the CFI to sue upon the judgment and a fresh judgment obtained in such proceedings (see question 3).

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The Hong Kong Court will only register money judgments. Therefore, if on the application for the registration of a judgment it appears to the CFI that the judgment is in respect of matters other than money judgments, the CFI will only register the part of the judgment in respect of the payment of a sum of money, but not in respect of the other provisions (section 4(5) FJREO and section 9 MJREO).

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls?

If interest claims are allowed, which law governs the rate of interest?

Because the foreign judgment will be enforced in the same manner as a Hong Kong judgment, section 4(3) of the FJREO and section 11 of the MJREO provides that, when the judgment to be registered is expressed in a currency other than Hong Kong currency, the judgment when registered shall be registered in the equivalent sum in Hong Kong currency on the basis of the rate of exchange prevailing at the date of registration.

Pursuant to Order 71 rule 3(1)(d) of the RHC, in respect of registration of foreign judgments under the FJREO, an application for registration of a foreign judgment in Hong Kong should specify the amount of interest, if any, that – under the law of the country of the original court – has become due under the judgment up to the time of registration.

Pursuant to Order 71A rule 3(1)(d) of the RHC, in respect of registration of mainland judgments under the MJREO, an application for registration of a mainland judgment in Hong Kong should specify the amount of the interest, if any, that by the law of the mainland has become due under the judgment up to the time of registration together with the costs duly certified by the original court for the judgment.

In summary, the law of the foreign jurisdiction upon which the foreign judgment is applying for registration in Hong Kong is the law that governs the rate of interest claimed under the foreign judgment.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Pursuant to section 7 of the FJREO, a judgment debtor may apply to set aside the registration of the foreign judgment on the basis that an appeal is pending, or that he or she is entitled and intends to appeal, against the judgment. If the applicant satisfies the court as such, the court may either set aside the registration or adjourn the application to set aside the registration until after the expiration of such period, as appears to the court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal.

Pursuant to Order 71 rule 4 of the RHC, the Hong Kong court may order the judgment creditor to give security for the costs of the application for registration and of any proceedings that may be brought to set aside the registration, except as otherwise provided for by an order of the court. However, there is no corresponding provision for the defendant to provide security for costs to ensure the judgment will be enforceable against the defendant if it is later affirmed.

Pursuant to section 19 of the MJREO, if the CFI is satisfied that an appeal against the judgment is pending or the case on which the judgment was based is ordered to be retried by a competent designated court, the CFI may, on such terms as it thinks just, either set aside the registration or adjourn the application until after the expiry of such period as appears to the court to be reasonably sufficient to enable the applicant to take the necessary steps to have the appeal disposed of by the competent tribunal.

Pursuant to Order 71A rule 4 of the RHC, the Hong Kong court may order the judgment creditor to give security for the costs of the application for registration of a mainland judgment and of any proceedings that may be brought to set aside the registration. Similarly to the FJREO, there is no corresponding provision for the defendant to provide security for costs to ensure the judgment will be enforceable against the defendant if it is later affirmed.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once the foreign judgment is registered in Hong Kong, it may then be enforced in the same manner as any Hong Kong judgment. See question 8.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

The RHC, which normally contains detailed commentary on court application procedures, does not specify in orders 71 and 71A any particular pitfalls to be avoided when seeking recognition or enforcement of a foreign or mainland judgment in Hong Kong. However, a judgment creditor seeking to make an application to register a foreign or mainland judgment should follow the requirements for preparing their evidence in support of application pursuant to Order 71 rule 3 and Order 71A rule 3, RHC, to maximise their chances of obtaining leave from the court to enforce the judgment.

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

India is party to bilateral treaties with the reciprocating countries notified under the Code of Civil Procedure 1908 (the Code) for the purpose of recognition and enforcement of foreign judgments, namely the United Kingdom, Aden, Fiji, Republic of Singapore, the United Arab Emirates, Federation of Malaya, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua and New Guinea and Bangladesh.

India follows the basic and customary principles of international law for entering into these treaties, including the principles of comity and *res judicata*.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

In India, there are no states that have a separate legislative scheme for recognition and enforcement of foreign judgments. The Code, being the central statute, is uniformly applicable throughout the country.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

There are three primary sources of law in relation to enforcement of foreign judgments in India:

- legislation enacted by Parliament (ie, the Code) – section 44A of the Code illustrates a legal fiction whereby a judgment rendered by a superior court of a reciprocating territory (as notified by the Central Government in the official gazette) is enforced in India as if it were a decree passed by Indian district courts. However, a judgment emanating from a non-reciprocating territory cannot be directly enforced in the same manner and a new suit must be filed for its enforcement in which such judgment holds only evidentiary value. Furthermore, it may be noted that both the aforementioned categories of judgments are required to comply with the conditions elucidated in section 13 of the Code which provides for a foreign judgment to be conclusive in nature. However, section 14 of the Code raises a presumption in favour of the competency of jurisdiction of the foreign court rendering the concerned judgment;
- bilateral treaties with the reciprocating countries with regard to recognition and enforcement of foreign judgments to which India is a party; and
- judicial precedents – the landmark case of *Moloji Nar Singh Rao v Shankar Saran* reads that a foreign judgment not emanating from a superior court of a reciprocating territory cannot be executed in India without the filing of a new suit in which the said judgment has only evidentiary value.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

India is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

As per the provisions of the Code, foreign judgments from reciprocating territories are executable in India as decrees passed by Indian district courts. The Limitation Act 1963 prescribes the time limit for execution of a decree and for filing of a suit in the case of a foreign judgment.

As per the provisions of the statute of limitation, the following time period is prescribed for the execution of decrees:

- three years in the case of a decree granting a mandatory injunction commencing from the date of the decree or where a date is fixed for performance; and
- 12 years for execution of any other decree commencing from the date when the decree becomes enforceable or where the decree directs any payment of money or the delivery of any property to be made at a certain date or in a recurring period, when default in making the payment or delivery in respect of which execution is sought takes place (provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limitation).

A judgment obtained from a non-reciprocating territory can be enforced by filing a new suit in an Indian court for which a limitation period of three years has been specified under the Limitation Act 1963, commencing from the date of the said foreign judgment.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Remedies granted by courts of non-reciprocating territories are not directly enforceable in India and for that purpose a new civil suit has to be filed. Remedies awarded by superior courts of reciprocating territories, however, are enforceable under section 44A of the Code, provided such decrees are money decrees (not including taxes or other charges of a similar nature, in a fine or other penalty or a sum payable under an arbitral proceeding).

Furthermore, judgments granting injunction (mandatory or prohibitory) and judgments passed in default (ie, *ex parte* foreign judgments) that are final and conclusive in nature, are executable in India.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

As per the provisions of the Code, a judgment from a reciprocating territory seeking enforcement in India must be filed before the district court having jurisdiction to entertain the matter in dispute.

If the judgment or decree has been passed by a court of a non-reciprocating territory, then a suit must be filed before the competent Indian court. Once the Indian court is satisfied that the foreign judgment is binding and conclusive between the parties, the court will pass a judgment and decree in relation to the suit.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Recognition is a precondition for enforcement of foreign judgments, which may be accorded on the basis of international treaties with regard to recognition and enforcement of foreign judgments. Recognition involves acceptance of a judicial decision by courts of a foreign jurisdiction in materially identical terms without rehearing the substance of the original lawsuit. Recognition alone precludes re-litigation of the same issues in domestic proceedings, invoking the principle of *res judicata*. Enforcement, on the other hand, envisages filing an execution petition where a foreign judgment is from a reciprocating territory under section 44A of the Code (in case of fulfilment of conditions), or a suit where a foreign judgment is obtained from a non-reciprocating territory.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

As per section 13 of the Code, a judgment cannot be recognised unless it is given on the merits of the case, among other factors. The defendant can therefore raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction. For instance, a judgment where the defence is struck off without investigation is held to be not on merits and hence not conclusive. In addition to merits-based defences, a defendant can also challenge the foreign judgment on grounds of competency of jurisdiction; incorrect view of international law or a refusal to recognise applicable Indian law; denial of natural justice; fraud; or if it sustains a claim founded on breach of law enforced in India.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Enforcement of judgments from reciprocating territories being executable in India as domestic decrees cannot be challenged by an injunction. Such enforcement may be challenged, however, by way of an appeal or by an application for stay of execution as laid down under the provisions of the Code.

Judgments from non-reciprocating territories are enforceable by the filing of a new suit; injunctive relief cannot be obtained against the filing of the suit.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

As one of the fundamental requirements of recognition, a foreign judgment must not be inconclusive under the Code. As per section 13 of the Code, a foreign judgment will be inconclusive if it:

- is pronounced by a court that was not of competent jurisdiction;
- is not given on the merits of the case;
- appears to be founded on an incorrect view of international law or a refusal to recognise Indian law (where applicable);
- is in violation of principles of natural justice;
- is obtained by fraud; or
- sustains a claim founded on a breach of Indian law.

The Code presumes in favour of the competency of jurisdiction of the foreign court unless proved to the contrary. The landmark judgment of *Ramanathan Chettyar and Another v Kalimuthu Pillay and Another* elucidates the following circumstances in which the foreign court is said to have competent jurisdiction:

- where the defendant is a subject of the country in which the judgment was passed;
- where the defendant is a resident of the country in which the action was commenced;
- where the defendant has in a previous case filed a suit in the same forum;
- where the defendant has voluntarily appeared; and
- where the defendant has contracted to submit himself to the jurisdiction of the foreign court.

Recognition of a foreign judgment also depends upon the conditions of reciprocity which are the foundation of international treaties governing the recognition and enforcement of foreign judgments in India.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

The provisions of the Code with regard to recognition and enforcement of foreign judgments are mandatory in nature. There appear to be no other non-mandatory provisions.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

The Code sets out the conditions to make a foreign judgment conclusive and thereby enforceable in India. Such a judgment is required to be in consonance with the principles of natural justice, substantive and procedural laws in India delivered by a court of competent jurisdiction and not obtained by fraud. The foreign court that delivers the judgment must fulfil the above-mentioned conditions to be in conformity with the judicial proceedings of the country.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

The Code precludes enforcement of a foreign judgment if it has not been pronounced by a court of competent jurisdiction, while also raising a presumption in favour of competency of jurisdiction of the foreign court. The conditions to determine competency of jurisdiction have been expounded in the case of *Ramanathan Chettyar* (see question 11). Therefore, the enforcing court would examine issues of personal jurisdiction in terms of whether the parties voluntarily submit to the jurisdiction of the court or whether the defendant has, in an earlier case, initiated an action in the same forum.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The Code precludes enforcement of a foreign judgment if it has not been pronounced by a court of competent jurisdiction, while also raising a presumption in favour of competency of jurisdiction of the foreign court. The conditions to determine competency of jurisdiction have been expounded in the case of *Ramanathan Chettyar* (please refer to question 11). Therefore, it is required to examine subject-matter jurisdiction only to the extent of its applicability as per the law of the country in which the decree is passed. Furthermore, it may be required to determine the subject-matter jurisdiction in terms of whether the decree is passed by a superior court of a reciprocating country, in which case it can be enforced as if it were passed by a domestic district court.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

A defendant is required to be served with a reasonable notice of the original action. However, there are no definite criteria to determine reasonableness of the notice; it must be deduced simply from the peculiar facts and circumstances of each case. The issuance of prior notice of the institution of the suit to the defendant is an essential component of the principles of natural justice which is to be complied with for a judgment to be conclusive. Execution of the decree cannot be restrained on the grounds of non-compliance with technical and procedural formalities with respect to rendering of the notice to the defendant.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The relative inconvenience of the foreign jurisdiction to the defendant would only be considered if the defendant:

- has not submitted him or herself to the jurisdiction of the foreign court;
- has not appeared voluntarily; or
- does not reside in the country where the decree was passed.

If these conditions, as elucidated by the Indian judiciary in the case of *Ramanathan Chettyar*, have not been satisfied or if the defendant has in a previous case filed a suit in the same forum that has granted the decree, then the competency of foreign jurisdiction is upheld and the defendant is precluded from raising the issue of inconvenience of the jurisdiction.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Section 13 of the Code makes a foreign judgment obtained by fraud unenforceable in India. The Supreme Court of India in the case of *Satya v Teja Singh* has interpreted section 13 to the effect that fraud as to the merits of the case may be ignored but fraud as to the jurisdiction of the foreign court delivering the judgment is a vital consideration in the recognition of the decree passed by that foreign court.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

The Code makes a foreign judgment unenforceable in India if it breaches the domestic substantive laws, as has also been upheld in various judicial precedents. In order to be enforceable in India, a foreign judgment must also conform to Indian public policy as elucidated by the Supreme Court of India in the case of *Satya v Teja Singh*. Since it is a settled law that a foreign judgment cannot be enforced in India if it contravenes the domestic substantive laws, it is implicit that it must comply with the public policy of India that forms the constitutional foundation for Indian legislation.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

The principle of res judicata embodied in the Code prohibits a court of competent jurisdiction from trying a suit on a matter that has been substantially and finally decided in a prior suit between the same parties. Hence, a decree passed by a superior court of a foreign country cannot be enforced in India if it contravenes an earlier conclusive judgment passed by a competent court in a suit between the same parties, as it is enforced as a domestic decree. A foreign judgment passed by a court of a non-reciprocating country can only be enforced by filing a new suit in India where the foreign decree is merely a piece of evidence with persuasive value. In such a case,

the judgment debtor can raise the claim of res judicata and forestall the suit at the preliminary stage.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

Principles of agency or alter ego cannot be applied to enforce a foreign judgment against a person other than the named judgment debtor, or a party who has not been represented in the proceedings, as such enforcement would be contrary to the principles of natural justice and hence inconclusive under the Code. However, Order 21 Rules 46-A to 46-I of the Code deal with the 'garnishee order', which is an order passed by an executing court directing or ordering the debtor of the judgment debtor (ie, the garnishee) to repay the debt directly to the court in favour of the judgment creditor, and not to the judgment debtor. A garnishee order is an order of the court to attach money or goods belonging to the judgment debtor in the hands of a third person.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

If the foreign judgment has been fraudulently obtained by withholding the arbitration agreement from the court delivering the judgment, the enforcing court will uphold the objection raised by the defendant and refuse enforcement of the concerned judgment. Furthermore, the Arbitration and Conciliation Act 1996 upholds the right of a party to refer a matter to arbitration as a contractual right and binds a judicial authority to refer for arbitration a matter which is the subject of an arbitration agreement when an objection is raised in that regard by either party. An objection raised in relation to violation of the aforesaid legislation would also preclude the enforcement of the judgment by the Indian courts. These principles are also enumerated in section 13 of the Code.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

In India, judgments obtained from superior courts of reciprocating territories are directly enforceable under the Code. However, judgments of courts from non-reciprocating territories are enforceable only after filing a new civil suit in India, wherein the foreign judgment simply has evidentiary value. Such deference given by Indian courts to judgments from reciprocating territories owes itself to subsisting bilateral treaties with such territories based on the customary international law principle of pacta sunt servanda (every treaty entered into must be observed).

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

A judgment from a superior court in a reciprocating territory may be partially enforced based on the principle of severability as if it were passed by an Indian court. A judgment passed by a court in a non-reciprocating territory may be enforced only by the filing of a new suit in which only that part of the judgment that is in consonance with Indian law will be accorded evidentiary value for the purpose of its recognition and enforcement.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

The landmark judgment of the Supreme Court of India in *Forasol v Oil & Natural Gas Commission* has placed reliance on the contract between international parties to determine the currency in which damages are to be paid, in concurrence with the international principle of conflict of laws. It was

held that as a practice to be followed by the judiciary, the plaintiff may be allowed to claim the damages either in Indian currency at the conversion rate prevailing on the date when the decree or foreign judgment is delivered or in the foreign currency only upon an authorisation by the Foreign Exchange Department in this regard.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Foreign judgments pronounced by superior courts of reciprocating territories are enforceable in India in the same manner as a judgment from a domestic district court. Therefore, a right to appeal against such judgments exists in the same manner as the right to appeal from the judgment of an Indian court. The judgment, once affirmed, will be executed in accordance with section 51 of the Code, whereby the court may order measures such as attachment and sale of property or attachment without sale, or delivery of property specifically decreed, and in some cases arrest (if needed) in enforcement of a decree.

Judgments emanating from courts of non-reciprocating territories may be enforced by filing a new suit in which the original judgment only has persuasive value. Therefore, issues of enforcement and appeal do not arise in respect of such judgments till they have been affirmed by the domestic civil court.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

A recognised foreign judgment can be enforced in India in two ways. The Code permits enforcement of a judgment from a superior court of a reciprocating territory in the same manner as a decree passed by a domestic district court. Section 51 of the Code will then apply whereby the court may order measures such as attachment and sale of property or attachment without sale, or delivery of property specifically decreed, and in some cases arrest (if needed) in enforcement of a decree. However, the Code does not permit direct enforcement of judgments from non-reciprocating territories without the filing of a new civil suit in which the said judgment only has evidentiary value.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Recognition and enforcement are accorded only to the judgments from the few reciprocating territories with which India has signed reciprocal agreements and not to judgments from any other jurisdiction. Further, foreign judgments that are inconclusive under section 13 of the Code, even if they are from reciprocating territories, would not be enforced in India.



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Indonesia

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

The Indonesian legal system follows the tradition of the civil law system and, pursuant to section 436 of the Indonesian Regulation on Civil Procedures (*Het Reglement of de Burgelijke Rechtsvordering voor de Rad van Justitie op Java en het Hoogerechtshof van Nederlandsh - Indië*, also known as the *Reglement op de Rechtsvordering* (Staatsblad 1847 No. 52 as amended)), foreign judgments are not automatically enforceable in the territory of Indonesia. Therefore, as a general rule, foreign judgments are not enforceable in Indonesia. The single exception to this rule will be discussed below.

Article 436 of the Regulation on Civil Procedures stipulates:

Apart from the events mentioned in article 724 of the Commercial Code and in other legal stipulations, no sentences that have been passed by foreign judges or courts may be executed within Indonesia. (AB.34; ISR.159; K.568J, 658, 711, 724; Rv.440; F.2-6°; IR. 224; RBg.258; Cons.7; Pr.546.). The lawsuits may be handled and settled anew by the judge in Indonesia.

Article 724 of the Indonesian Commercial Code relates to the calculation of damages arising from the carriage of goods by sea. The article stipulates that:

Calculation and division of general damages is based upon a request by the shipmaster and experts. The experts are appointed by parties or by a judge within its legal territory upon which such calculation and division must be drawn up. The experts must be sworn-in prior to the execution of their duties. The division must be legalised by a judge within its jurisdiction. Outside the territory of Indonesia, the general damages are drawn up by the relevant competent foreign authority.

Therefore, with the exception of foreign judgments relating to the calculation and division of general damages in relation to the carriage of goods by sea, foreign judgments cannot be enforced in Indonesia.

In addition to the above, in choosing the foreign court as the forum for settling commercial disputes in Indonesia, it is important to note that Indonesia is not party to any multilateral or bilateral treaties with other countries for the reciprocal recognition and enforcement of judgments. In the absence of applicable bilateral or multilateral treaties, a judgment rendered by a foreign court shall not be enforced in Indonesia.

A party who has obtained a favourable foreign judgment is still required to file a suit (relitigate) against its Indonesian counterpart before an Indonesian court. This means that when the parties have chosen a foreign forum (other than an Indonesian court) in a contract involving an Indonesian party, it will not be possible for the foreign party to enforce the foreign judgment in Indonesian jurisdiction against the said Indonesian party.

The Indonesian courts are not bound by the judgments rendered by foreign courts. Nevertheless, in practice and under certain circumstances, the judgment of a foreign court can be used in an Indonesian court as supplementary documentation only (inconclusive evidence) on the matter that has been decided by the foreign court. In the recent case of *JP Morgan v PT*

Kalbe Farma, which was registered in the District Court of Central Jakarta (DCCJ) under No. 89/PDT/G/2009/PN.JKT.PST, the presiding judges of the DCCJ rejected the submission of a decision of an English court to be enforced in Indonesia. This decision followed the previous jurisprudence as set forth in Supreme Court Decision No. 2944K/Pdt/1983, dated 29 November 1984.

Notwithstanding the above, in practice, choosing a foreign court is only recommended if:

- secured assets (including cash deposits) belonging to the Indonesian counterparts are located or placed in the foreign country; or
- there exists a bona fide guarantor (corporate or individual) who is a foreign national residing outside the Indonesian jurisdiction.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Indonesia is a unitary state consisting of 33 provinces which are autonomous regions, with a uniform system of laws and regulations. The Supreme Court is vested with the power to govern the judicial system in the country, and the same procedures for dispute resolution are applicable throughout the country. However, as referred to in question 1, based on section 436 of the Indonesian Regulation on Civil Procedures, foreign judgments are not automatically enforceable in the territory of Indonesia.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

As stated in question 1, foreign judgments are not enforceable in Indonesia. Therefore, in practice, arbitration fora are becoming the preferred method for settling commercial disputes involving an Indonesian party or parties to a contract.

The basic provisions relating to arbitration in Indonesia are set out in Law No. 30 of 1999, dated 12 August 1999 (the Indonesian Arbitration Law), which stipulates that an agreement to arbitrate must be made in writing either before or after the dispute arises. The parties to the contracts are free to determine the applicable procedural rules in a written arbitration clause before the dispute arises or a separate arbitration agreement after the dispute has arisen. Not only an individual person but also a government body or a state-owned company in Indonesia could be party to the arbitration agreement. The Indonesian Arbitration Law stipulates that only disputes that are commercial in nature or those concerning rights which, according to the laws and regulations, are fully under the control of the parties to the dispute may be settled through arbitration. In addition, if the disputes, which are in accordance with Indonesian laws, cannot be settled amicably, they cannot be submitted to arbitration. In practice, disputes that cannot be submitted to arbitration are, among others:

- criminal cases;
- industrial relationship cases;
- administrative cases;
- bankruptcy cases; and
- other related family matters (eg, divorce and adoption).

Through Presidential Decree No. 34 of 1981, dated 5 August 1981, Indonesia ratified the New York Convention on the Recognition and Enforcement

of Foreign Arbitral Awards 1958. Following this ratification and before the enactment of the Indonesian Arbitration Law, the Supreme Court issued Regulation No. 1 of 1990 regarding the Procedure for the Enforcement of Foreign Arbitral Awards.

In addition to the above, Indonesia also signed and ratified (as the 27th member state) the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (the ICSID Convention). The ICSID Convention was signed on 16 February 1968, ratified on 28 September 1968 and entered into force in Indonesia on 28 October 1968.

Indonesia has entered into several bilateral investment treaties (BITs) with several countries. The arbitration mechanism under the ICSID Convention has mostly been stipulated in these BITs. No standard terms or model language have been adopted in the BITs to which Indonesia is a party. However, the BITs mostly contain similar provisions in promoting and protecting investment bilaterally.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

As explained previously, Indonesia is not party to any multilateral or bilateral treaties with other countries for the reciprocal enforcement of foreign judgments, including the Hague Convention. The Hague Convention is therefore not applicable to the Indonesian jurisdiction.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

As stated in question 1, foreign judgments are not enforceable in Indonesia. The prevailing Indonesian laws do not regulate any time limitation for enforcing a foreign arbitration award.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

As explained previously, Indonesian courts are not bound by the judgments rendered by foreign courts. A party who has obtained a favourable foreign judgment is still required to file suit (re-litigate) against its Indonesian counterpart before an Indonesian court. In practice and under certain circumstances, the judgment of a foreign court can be used in an Indonesian court as supplementary documentation only (inconclusive evidence) on the matter that has been decided by the foreign court.

The civil litigation process in Indonesia could be brought and would involve examination and decisions through the following tier levels of the courts:

Courts of the first instance

All civil cases will be brought in first instance before the district court. Bankruptcy and intellectual property cases will be brought to the commercial court, and labour cases will be submitted to the labour court. These courts are in first instance to adjudicate and decide the relevant cases. In the commercial court and labour court, any party that appeals against the decision of this first instance can only submit its last appeal to the Indonesian Supreme Court.

High courts

The high courts form the courts of second instance at the provincial level. As the appellate court, the high court generally would not examine the facts

and evidence submitted by the disputed parties, since these matters should have been examined and verified by the first level court. In practice, if the facts and the evidence have been taken into consideration by the first level court, the presiding judges of the high court will mostly stress their review of legal interpretation, legal reasoning and the legal basis of the decision made by the first level court. Generally, there will be no public hearing required by the presiding judges of the high court in order to make a decision on the case at this appeal stage.

The Supreme Court

Once the decision of the high court has been decided, either party may also request a second appeal to the Supreme Court, which is the last level court to make a final and binding decision over the civil case as well as the administrative case. The presiding judges in the Supreme Court will make a decision in a closed hearing among themselves in deciding the relevant case.

Judicial review

Under certain limited conditions, following the final and binding decision of the Supreme Court being granted, the losing party may use an extraordinary means to request a judicial review in order to nullify the final and binding court judgment that has been made by the Supreme Court. The decision to be granted at the judicial review stage will be decided by other presiding judges of the Supreme Court. In the event that the Supreme Court is of the opinion that the application for judicial review could be accepted for the re-examination of the judgment, the presiding judges of the judicial review stage will deliberate the following:

- they can reject the application for judicial review by declaring that the final and binding judgment made by the Supreme Court for which re-examination is requested shall remain enforced, by giving the legal basis for their considerations; or
- they can annul the final and binding judgment of the Supreme Court for which re-examination is requested, and it shall render a new judgment over the case.

As long as the final and binding judgment has not been turned down or annulled by the judicial review process, the final and binding judgment made by the Supreme Court can be executed and enforced by the winning party.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

See questions 1 and 7.

If any relevant party does not comply with the foreign arbitration award voluntarily, the other relevant party may apply for an execution decree before the chairman of the relevant district court in Indonesia (having jurisdiction over the defendant). At this stage, the chairman will further examine the compliance of the foreign arbitration award with the requirements stipulated under the prevailing laws in Indonesia. Due to this examination process, there is a possibility that the chairman could issue a judgment that refuses the execution of the foreign arbitration award, and there is no legal remedy that could be taken against such judgment. Any relevant party could apply for the annulment of the foreign arbitration award if it is proven that:

- any letter or document used in the arbitration process, after the award has been given, was proved to be a forged document;
- new and important evidence was found after the award was given; or
- the award was granted under fictitious circumstances, claimed to have taken place by one of the disputing parties.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

Since the foreign party as a plaintiff cannot enforce any foreign judgment in Indonesia against the Indonesian party as a defendant, this gives an advantage to the defendant, and thus the matter should be re-litigated in front of the relevant Indonesian court.

10 Injunctive relief**May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?**

As stated in question 1, injunctive relief to prevent the enforcement of foreign judgments is not available in Indonesia, since the foreign judgment itself cannot be enforced in Indonesia. The plaintiff as a party who has obtained a favourable foreign judgment is still required to file a new suit (relitigate) against its Indonesian counterpart before an Indonesian court. In this relitigation proceeding, remedies for the plaintiff can be obtained by court order (in the general civil case litigation process) by instituting a new claim through a civil lawsuit. In this civil case, any plaintiff who has a claim may request a court attachment (prejudgment attachment) of the related property and an interim court injunction. Both of these legal remedies may only be submitted to the court of first instance and may only be granted by the Indonesian court after the claim is submitted by the plaintiff.

The prejudgment attachment is only preliminary in nature and gives the claimant security until the enforcement of the claim is realised by the court. It should be noted, however, that the civil proceeding to obtain a final, binding and enforceable court judgment in Indonesia is a time-consuming process and may take years to complete, during which process the defendants may dispose of their assets if the court has not granted the prejudgment attachment over the defendants' assets. Therefore, the judgment made in favour of the plaintiff would not be enforced effectively if no prior prejudgment attachment existed and, at the time of the final judgment, the defendants' assets are insufficient to cover the claims submitted by the plaintiff. This motion may be submitted together with the claim or submitted before the judgment made by the court of first instance. Based on Circular Letter of the Indonesian Supreme Court No. 5 of 1975, the prejudgment attachment may only be granted by the court of first instance after the presiding judges have examined all evidence in relation to the case. In practice, this prejudgment attachment may only be granted after the court hearing on the examination of evidence has been taken place.

The plaintiff also may seek the possibility of obtaining an interim court injunction to prevent the defendant conducting any action that may hamper or jeopardise the interest of the plaintiff in submitting its claim in the court. To enable the interim court injunction to be considered by the presiding judges, there are some requirements to be fulfilled by the plaintiff; notably, that the submission of this application must be based on prima facie evidence or written valid evidence to support the necessity of requesting this motion. In practice, the presiding judges will also reject the motion if the substance of the matter is similar or duplicates the claims on the merit of the case submitted by the plaintiff in the lawsuit. If this interim court injunction is granted by the court, this judgment will provide relief (ie, a court order to direct or prohibit certain conducts of the defendants or the co-defendants). Based on Circular Letter of the Indonesian Supreme Court No. 3 of 2000, the interim court injunction can only be granted by the court after the presiding judges have examined all the evidence in relation to the case. In practice, this injunction may only be granted after the court hearing on the examination of evidence has been taken place.

11 Basic requirements for recognition**What are the basic mandatory requirements for recognition of a foreign judgment?**

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

12 Other factors**May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?**

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

13 Procedural equivalence**Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?**

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

14 Personal jurisdiction**Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?**

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

15 Subject-matter jurisdiction**Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?**

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

16 Service**Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?**

The serving of a notice to enforce a foreign judgment would not be relevant and applicable in Indonesia, since the foreign judgment itself cannot be enforced in Indonesia.

With regard to the general rules of serving a notice of foreign court documents to the Indonesian party in Indonesia, note that Indonesia is not party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1969 (the Convention), or any other convention relating to the service of foreign process, other than a bilateral agreement with Thailand.

The Convention applies in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad. Article 8 of the Convention states that each contracting state shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents. Article 10(b) states that provided the state of destination does not object, the present Convention shall not interfere with the freedom of judicial officers, officials or other competent persons of the state of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination.

Since Indonesia is not party to the Convention, the effectiveness of the service of foreign court documents must be performed and effectuated in accordance with Indonesian laws. Pursuant to articles 388 and 390 of the Indonesian Civil Procedural Law and the Guidance of Technical Administration and Technical General Civil Court, 2007 edition, it is required that the writ of summons for each party to attend a court hearing is conducted by the appointed bailiff or substitute bailiff at the party's place of residence, place of stay or place of domicile.

In view of the above, the service of foreign court documents in Indonesia shall be performed by a court bailiff of the relevant Indonesian court, who has been appointed by the relevant judge in the jurisdiction where the document is served. This mode of service applies to both local and foreign court documents. Therefore, the services of foreign court documents cannot be carried out by a courier or an agent of the plaintiff or any individual who is not a bailiff or court officer. Other methods of service will be deemed valid under the laws of Indonesia.

In addition to this, the service of foreign judicial or court documents in Indonesia involves the embassy or consulate of the foreign country in Indonesia, the Ministry of Foreign Affairs (MOFA), the Ministry of Law and Human Rights (MOL), the Supreme Court and the competent district court. The procedure for serving foreign court documents in Indonesia is as follows:

- the Indonesian embassy in the country of trial attests the authenticity of the court documents (this is done by stamping the court documents with the embassy seal);
- the court documents are then delivered to the country of trial's foreign ministry for delivery to the Indonesian embassy located in the country of trial;
- the Indonesian embassy then addresses the court documents to the MOFA in Jakarta;
- the MOFA subsequently delivers the court document to the MOL;

- the MOL delivers the court documents to the Indonesian Supreme Court, which then delivers them to the relevant Indonesian district court that has jurisdiction in the area where the Indonesian defendant is domiciled;
- the head of the district court instructs a bailiff of the court to serve the court documents to the defendant. If the defendant is uncooperative, the bailiff serves the summons through the village office;
- the bailiff draws up a short report of the service made (in the Indonesian language). In the report, the bailiff states whether the summons was received by the defendant directly or through the village office. A written acknowledgement from the village head or an authorised officer of the village office should be included in the report. This method provides sufficient evidence that the defendant has been duly served;
- the district court then delivers (sometimes through the Supreme Court) the bailiff's report to the MOFA; and
- the MOFA conveys the bailiff's report to the Indonesian embassy located in the country of trial and the Indonesian embassy will then deliver the documents to the Ministry of Foreign Affairs of the country of trial.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

See question 1. As a matter of enforcing an international arbitration award, several Indonesian jurisprudences show that the Indonesian courts have adopted many public policy defences in rejecting the recognition to enforce international arbitration awards.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

See question 1. In the event that the foreign judgment is in conflict with the Indonesian court judgment, the Indonesian court will not consider the foreign court judgment.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

The Indonesian Arbitration Law stipulates that in the event that parties agree to settle disputes between them through alternative dispute resolution (ie, arbitration), the Indonesian courts do not have the jurisdiction to adjudicate a dispute where the parties to the contract are bound to an arbitration agreement, since any arbitration agreement concluded in writing by the parties will preclude any right of the parties in the future to submit the dispute to the court. Therefore, the Indonesian courts must reject the agreement and should not be involved in any dispute under the arbitration proceedings.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

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25 Currency, interest, costs

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Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Not applicable. As stated in question 1, foreign judgments are not enforceable in Indonesia.

Ireland

Julie Murphy-O'Connor and Gearoid Carey
Matheson

1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Ireland has not entered into any bilateral treaty arrangements with regard to the reciprocal recognition and enforcement of foreign judgments.

However, Ireland has entered into a number of multilateral treaties which are relevant to the recognition and enforcement of foreign judgments in Ireland. The law applicable to the enforcement of such judgments depends primarily on the jurisdiction which has issued the foreign judgment, as well as the date and subject matter of the foreign proceedings.

The principal treaty-based scheme relating to recognition and enforcement of judgments to which Ireland is a party is the EU. The Brussels I Regulation (Council Regulation (EC) 44/2001) and more recently the Brussels I Recast Regulation (Council Regulation (EC) 1215/2012) (which have almost entirely supplanted the Brussels Convention of 1968, which applies in addition to a number of territories of EU member states which territories themselves are outside of the EU) (together the 'Brussels Regime') on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters provide detailed provisions relating to the recognition and enforcement of EU judgments. The Brussels I Recast Regulation applies to proceedings issued on or after 10 January 2015 and the Brussels I Regulation applies to proceedings commenced before that date, so it is still of relevance.

The objective of the Brussels Regime is to provide an efficient means for enforcement of judgments obtained in the court of one member state in all other member states. The definition of judgment used in the relevant instruments is broad and covers any judgment given by a court or tribunal of a member state, irrespective of what it may be called. However, the Brussels Regime excludes revenue, customs and administrative matters and also does not apply to orders relating to matrimonial relationships, bankruptcy, social security, arbitration or wills and succession. A principal difference between the Brussels I Regulation and the Brussels I Recast Regulation is that under the former an application is required to the local court for recognition and enforcement, whereas under the latter such procedure is abolished and article 39 provides that no declaration of enforceability is required before the relevant judgment is enforceable in another EU member state.

The EU has also made provision for three other procedures aimed at simplifying and speeding up recognition and enforcement in particular cases.

Pursuant to Regulation 805/2004, the European Enforcement Order process was created for cases where the judgment was issued in a specific sum in uncontested proceedings, which allows the issuing court to certify the judgment. This can then be recognised and enforced in a straightforward way in other member states.

Regulation 861/2007 created the Small Claims Procedure, which allows cross-border claims to be brought under a simplified procedure for civil or commercial claims which do not exceed €2,000, excluding interest, expenses and disbursements.

Finally, the European Order for Payment was established pursuant to Regulation 1896/2006 (as amended), providing for standardised forms and procedures for pursuing uncontested money debts without monetary

limit. The Small Claims Procedure and the European Order for Payment allow enforcement in member states without the need for certification or registration in the first instance.

The Lugano Convention on jurisdiction and the recognition of judgments in civil and commercial matters 2007 is also applicable to the enforcement in Ireland of judgments involving the EFTA States of Iceland, Norway and Switzerland. The Lugano Convention is broadly akin to the regime under the Brussels I Regulation.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Ireland does not have a federal system and accordingly there is uniformity in the law and procedure within the jurisdiction with regard to the enforcement of foreign judgments.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The substantive law on recognition and enforcement of judgments in Ireland derives from a number of sources, which we address in turn.

- European Union Treaty Law (and the Brussels I Regulation (44/2001) and Brussels I Recast Regulation (1215/2012) (together the 'Brussels Regime') pertaining to judgments of EU member states;
- the Lugano Convention, which pertains additionally to judgments from the EFTA states of Iceland, Norway and Switzerland (and which is broadly akin to the regime under the Brussels I Regulation);
- the Jurisdiction of Courts and Enforcement of Judgments Act 1988 and the Jurisdiction of Courts and Enforcement of Judgments (Amendment) Act 2012 (which incorporate the Brussels Convention (the predecessor to the Brussels Regime) and Lugano Convention into Irish law); and
- common law enforcement, which relates to recognition and enforcement of judgments where the originating countries are not EU member states or the EFTA states to which the Lugano Convention applies. At common law, such a foreign judgment is not directly enforceable in Ireland, but will be treated as if it creates a contract between the parties and the creditor will need to bring an action in Ireland for a simple contract or debt claim by way of summary proceedings. Such foreign judgment must be for a definite sum, be final and conclusive, and be given by a court of competent jurisdiction, albeit that recognition and enforcement can be challenged on numerous grounds.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Ireland is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Although the Brussels Regime and the Lugano Convention do not themselves provide for limitation periods, judgments to be recognised and enforced thereunder must generally still be enforceable in the state in which given. There is authority from the CJEU (*Apostolides v Orams* (2009) ECR I-03571) to the effect that enforceability of a judgment in the member state of origin constitutes a precondition for its enforcement in another member state.

For enforcement at common law, the relevant foreign judgment is deemed to create a contract debt. The limitation period for contractual claims of six years from the date of the judgment debt applies in Ireland.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

The Brussels Regime and Lugano Convention define 'judgment' very broadly and state that it means any judgment given by a court or tribunal of a member state, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court. This therefore includes non-money judgments and interim orders, including injunctions, which means that recognition and enforcement of a broad range of effects is permissible. The grounds for refusing recognition of the judgment are limited and are prescribed in the relevant instrument (addressed further below).

By contrast, recognition and enforcement under Irish common law is only permissible in respect of money judgments, meaning that the damages or costs awarded must have been assessed and quantified or, at the very least, be susceptible to a simple arithmetical process. The decision must also be final and conclusive, which means that it must be final and unalterable by the court that pronounced it. Even if an appeal is pending, the judgment may still be considered final and conclusive unless the appeal has the effect of staying the judgment. For enforcement at common law, the judgment must also have been given by a court of competent jurisdiction, which means that it must have had jurisdiction under Irish conflict of law rules to deliver the final and conclusive judgment in respect of which recognition and enforcement is sought. In addition, the Irish court may refuse jurisdiction if there is no solid practical benefit to enforcement such that it would be futile (see question 28). Accordingly, what is capable of enforcement at common law is of far narrower scope. However, the grounds for challenging recognition and enforcement at common law are broader than under the Brussels Regime or Lugano Convention.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

The Irish High Court is the relevant court in which to bring an application for the recognition and enforcement of foreign judgments. However, depending on monetary thresholds, lower civil courts have jurisdiction in respect of the European Enforcement Order and Small Claims Procedures.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Recognition is the process of giving the same effect or status to the judgment in the country where enforcement is sought as in the state where the judgment was given. Under Irish law, enforcement is typically understood as being made subject to the process of execution. As a precursor to that, however, the judgment will need to be recognised such that recognition of the judgment, save in very limited circumstances, is a precondition to enforcement. It is only where enforcement (execution) is not required that recognition alone might be sought, for example, declaratory relief. Since only foreign money judgments may be recognised and enforced at common law in Ireland, it would be extremely unusual for recognition to be

sought on its own, as enforcement (execution) is typically the objective in pursuing the proceedings.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

Irish courts will generally give effect to a validly obtained foreign judgment and will not enquire into errors of fact or law in the original decision.

The Brussels Regime and Lugano Convention include express prohibitions on the review of a judgment from a member state as to its substance. Notwithstanding that, a defendant may object under those instruments on the basis that the original court lacked jurisdiction to hear the matter (and the instruments themselves contain detailed and specific provisions with regard to jurisdiction principles). In addition, recognition may be refused:

- if it would be manifestly contrary to public policy in the member state addressed;
- if the defendant was not served with the proceedings so as to allow him or her properly to arrange his or her defence; or
- if the judgment is inconsistent with existing judgments in Ireland or another member state.

At common law, the Irish High Court has discretion to refuse recognition and enforcement of foreign judgments on the following bases:

- fraud in procuring the foreign judgment (irrespective of whether fraud has been raised as a defence in the foreign proceedings or not);
- lack of jurisdiction (whether of the foreign court or the Irish court);
- it is contrary to Irish public policy;
- it is contrary to principles of natural justice (such as the right to be given due notice of the proceedings and an opportunity to be heard by an impartial tribunal); and
- where the judgment is inconsistent with an earlier judgment based on the same cause of action between the same parties (whether analysed on a *res judicata* or issue estoppel basis).

The question of recognition and enforcement is somewhat complicated where an appeal has issued, but the general position under each regime is that the courts have discretion to grant a stay of the proceedings pending determination of the appeal.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

The Irish courts have no authority to prevent foreign courts from acting to issue or enforce judgments, but there is English authority (which is persuasive in Ireland) to suggest that they would have jurisdiction to restrain persons subject to their jurisdiction from enforcing in Ireland a judgment obtained in breach of contract or by fraud (see *Ellerman Lines Ltd v Read* [1928] 2 KB 144). However, this has never arisen in any Irish case, not least because recognition and enforcement can be challenged on broadly equivalent grounds under the applicable regimes.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

An overview of the basic requirements for recognition and enforcement is set out under questions 1, 3 and 6. The bases on which recognition and enforcement may be resisted (and which are necessarily relevant to the basic requirements for enforcement) are summarised under question 9 and specific elements are addressed under questions 14–20 below.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

The Brussels Regime and Lugano Convention are prescriptive as to what may be taken into account for recognition and enforcement of judgments subject to those regimes.

However, at common law, the Irish Courts have discretion on whether to recognise foreign judgments subject to that regime. The public policy considerations that may be applicable are not closed and it is clear from case law that what may be permissible in another jurisdiction is not necessarily consistent with Irish public policy (see, for example, *Sporting Index Ltd. v O'Shea* [2015] IEHC 407). Furthermore, in the consideration of natural justice principles, each case will be determined on its own specific facts.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

The Irish courts will generally not consider the procedural equivalence of the original court's processes when determining proceedings seeking recognition and enforcement of a particular judgment.

The Brussels Regime and Lugano Convention systems are premised on the assumption of a basic minimum standard of adequate process across all member states. While relevant Irish case law is limited, there is a body of persuasive English authority to the effect that under such regimes it is not appropriate for the courts of an enforcing state to carry out a detailed review of whether the processes in the original jurisdiction had involved a fair trial.

For enforcement at common law, there is no formal need to demonstrate that the proceedings before the original court corresponded to due process in Ireland. However, as identified under question 9, the extent to which the judgment is contrary to principles of natural justice can be a ground to resist enforcement and a defendant may seek to assert that the foreign process did not accord with such principles.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

The Brussels Regime and Lugano Convention contain detailed provisions with regard to personal jurisdiction which provide for general rules and specific exceptions with regard to where a party may be sued. Where those jurisdiction rules have been complied with, the enforcing court will be bound by the findings of fact in the original judgment.

For common law enforcement, the Irish courts will consider whether the original court had personal jurisdiction consistent with Irish conflict of law rules which require submission to the jurisdiction of the foreign court by the defendant. Typically, under Irish law, this usually be understood as arising by virtue of:

- the defendant's prior agreement to that effect in a contract;
- their presence in the jurisdiction at the time of the proceedings; or
- their participation in the foreign proceedings, whether by filing a voluntary appearance without qualification or making a counterclaim in the matter.

Assertion of jurisdiction by a foreign court on the bases of nationality or allegiance of the defendant, the domicile of the defendant, reciprocity, the cause of action accruing in the foreign country or the possession of property by the defendant in the foreign country may not of themselves be sufficient basis for the Irish courts to accept that the foreign court had jurisdiction.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

Under the Brussels Regime and Lugano Convention specific provision is made with regard to jurisdiction in respect of the subject matter of certain disputes such as insurance, consumer contracts and employment contracts. There are, in addition, particular categories of dispute in respect of which exclusive jurisdiction is conferred by the relevant instruments (eg, proceedings relating to immovable property). Conversely, those instruments identify categories (or the subject matter) of disputes which fall outside the scope of those instruments. Accordingly, a court in Ireland may need to consider the subject-matter jurisdiction of the original court when determining whether recognition and enforcement can be pursued under those regimes.

At common law, if the original court did not have subject-matter jurisdiction, the decision will be unenforceable. However, such issues are only likely to arise where the subject matter of the dispute impacts on the submission of the defendant to that jurisdiction and will generally be of significance in cases dealing with judgments in rem.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

The Brussels Regime and Lugano Convention provide that the judgment is not to be recognised if the defendant was not served with the document that instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange his or her defence. However, irregularity of service is unlikely to provide a basis to resist recognition and enforcement if the defendant has been made aware of the proceedings and has failed to take steps in respect thereof when it was possible to do so.

As identified under question 9, at common law recognition and enforcement may be refused if the judgment involved is contrary to the principles of natural justice and public policy. Accordingly, in reliance on those grounds, a defendant could seek to resist recognition and enforcement before the Irish court on the basis of the absence of proper service or notice of the proceedings, or the failure of an opportunity to arrange for a defence to be raised.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

In essence, whether the original court was a *forum non conveniens* is not itself a basis under any regime for resisting recognition and enforcement, although some of the factors relevant to a *forum non conveniens* analysis may be relevant to the question of jurisdiction and/or service or notice of the proceedings.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Fraud itself is not a basis to refuse recognition and enforcement under the Brussels Regime and Lugano Convention, but depending on the nature of the activity involved it could be said to be contrary to public policy, which is a stated basis for refusal of recognition and enforcement. However, an Irish court would be slow to refuse recognition and enforcement on this basis if there were procedures for investigating the alleged fraud in the original jurisdiction and the local court considered those allegations in reaching its conclusion.

As identified under question 9, recognition and enforcement of a judgment procured by fraud may be refused at common law. This is so irrespective of whether the fraud is by the original court or the plaintiff, and irrespective of whether fraud has been raised as a defence in the foreign proceedings (see the persuasive English authority of *Owens Bank Ltd v Bracco* [1992] 2 AC 443). However, an Irish court is likely to give some weight in exercising its discretion over allowing recognition and enforcement in such circumstances on whether or not, and how, allegations of fraud were addressed by the original court.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

The Irish courts will not allow recognition and enforcement of a foreign judgment where it is contrary to Irish public policy. Such public policy considerations are not closed and it is important to note that what may be permissible in another jurisdiction may not necessarily be consistent with Irish public policy (see for example *Sporting Index Ltd. v O'Shea* [2015] IEHC 407).

The Brussels Regime and Lugano Convention provide that recognition may be refused where it is manifestly contrary to public policy in the member state addressed. Irish case law has identified that ‘manifestly’ is a threshold issue which highlights the exceptional nature of the public policy basis (see *Sporting Index Ltd. v O’Shea* [2015] IEHC 407) and other cases stress how the issue involved must be ‘fundamental’ with regard to the rights of an individual or the public good. Accordingly, the Irish courts will apply a high standard in determining whether or not an alleged breach of public policy warrants the refusal of recognition on this ground under such regimes.

At common law too, a judgment which is contrary to the principles of Irish public policy may be refused by an Irish court. Although there is no direct Irish authority with regard to the standard applicable to the public policy exception in respect of common law recognition and enforcement, it would be anomalous if the same considerations that applied pursuant to the Brussels Regime and Lugano Convention did not also apply. In this regard, it is of note that the most closely analogous case has identified being contrary to public policy as involving ‘some element of illegality’, being ‘injurious to the public good’ and ‘offensive to the ordinary responsible and fully informed member of the public’ (see *Brostrum Tankers AB v Factorias Vulcano SA* [2004] 2 IR 19 addressing the public policy exception to the enforcement of arbitral awards under the New York Convention). Accordingly, in order to successfully invoke the public policy exception to Irish common law enforcement a defendant has a high threshold to reach.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

The Brussels Regime is designed to avoid the possibility of conflicting judgments (see section 9 of both the Brussels I Regulation and the Brussels I Recast Regulation), as is the Lugano Convention (see also section 9).

At common law, there is no specific authority which identifies the approach of the Irish court to recognition and enforcement of foreign judgments where there is a conflicting judgment involving the same parties. However, based on persuasive English authority, a conflicting judgment on the same or similar issue could be a basis on which recognition and enforcement might be refused, depending on which judgment has priority. In determining priority, it would appear from the persuasive common law authority that the judgment to be given priority is to be determined by reference to that which was first rendered. Accordingly, a conflicting judgment should only be effective in precluding recognition and enforcement of (another) foreign judgment where the conflicting judgment was first rendered.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

As a general principle, enforcement is only possible against the interest of a named judgment debtor and principles of agency and alter ego are not relevant. The circumstances where, for a corporate judgment debtor, a judgment creditor would be entitled to look behind the strict legal personality of that corporate entity are very limited and the threshold to be met to obtain such an order is very high.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

The question of whether the parties had an enforceable agreement to use alternative dispute resolution (excluding arbitration) is something for the court where judgment was pronounced to consider upon the application of the defendant/judgment debtor. If such an issue was not raised, or was determined in the negative by the court in which judgment was pronounced, the Irish court should not look behind the judgment and should proceed to recognise and enforce it. There is no Irish authority confirming that agreements to use alternative dispute resolution (excluding arbitration) are enforceable and any persuasive authorities from other common

law jurisdictions would indicate that the circumstances in which such agreements would be enforceable are extremely limited.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Since challenges to proceedings seeking recognition and enforcement are rare, and since Irish authority is necessarily limited, it is not possible to offer any definitive view on whether judgments from specific countries are subject to greater scrutiny. Formally, there is no difference, and judgments of all jurisdictions pursuant to the relevant enforcement regime should be treated equally.

This is certainly the case where enforcement is sought of a judgment under the Brussels Regime or the Lugano Convention.

From a practical perspective, enforcement at common law (which, under Irish law, would involve all jurisdictions save those subject to the Brussels Regime and Lugano Convention) is likely to be somewhat more straightforward where the country in which the relevant judgment was pronounced is a common law country, as the legal system and applicable legal principles would be more familiar to the Irish courts. Indeed, substantive and procedural ‘equivalence’ was identified by the Irish High Court in *Drumm* [2010] IEHC 546 as a basis to justify recognition of US bankruptcy proceedings.

However, by virtue of the procedural rules applicable, and the broader nature of what may be enforced, judgments subject to the Brussels Regime and the Lugano Convention are more amenable to straightforward recognition and enforcement in Ireland than judgments from jurisdictions which are subject to enforcement at common law.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The Irish courts can, when considering recognition and enforcement, make such orders in respect of only part of a judgment if deemed appropriate. Certain elements of a judgment may be contrary to principles of public policy or may otherwise be ineligible under the relevant enforcement rules (eg, they may constitute taxes or penalties). In circumstances where a portion of a judgment is considered unenforceable, the balance may still be recognised and enforced.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Proceedings seeking the recognition and enforcement of foreign judgments in Ireland must include a statement of the amount claimed, which is typically done in the currency of the foreign judgment. The proceedings will usually indicate the interest accrued to the date of issue of the proceedings and will specify the basis on which interest continues to accrue (if at all). An award of costs will generally be enforceable if quantified (and the Brussels Regime and Lugano Convention specifically extend the definition of judgment to this). Assuming that the proceedings seeking to recognise and enforce the foreign judgment were successful, the full amount will be calculated in the local currency for the purpose of execution. The court fees and costs of the Irish enforcement proceedings may also be awarded against the defendant.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

There is a right of appeal under all regimes. Under the Brussels I Regulation and Lugano Convention, the application for enforcement is made to the Master of the High Court and the party against whom enforcement is sought has one month from service of the order made to appeal to the High Court. Any High Court determination is subject to further appeal to

the Court of Appeal. Under the Brussels I Recast Regulation, the foreign judgment does not need a declaration of enforceability and is automatically recognised, but the defendant may of course seek to challenge any enforcement steps taken in this jurisdiction and any determination of that challenge is capable of appeal.

For common law enforcement, a High Court ruling with regard to the proceedings seeking recognition and enforcement is subject to an automatic right of appeal to the Court of Appeal. The Court of Appeal Rules (which are detailed) will apply to the procedure.

The only basis on which a judgment creditor can seek to preserve assets to facilitate execution in respect of the foreign judgment once recognised and enforceable is to obtain a *Mareva* or freezing injunction. The test for obtaining such an order is high and it will be necessary to demonstrate the intention of the defendant to dissipate assets with the objective of frustrating the judgment creditor.

If a defendant lodges an appeal with the possible objective of delaying matters, the judgment creditor may fear that the costs of dealing with an (unmeritorious) appeal would be irrecoverable. However, it is possible to obtain security for costs against an appellant, which can, if ordered and not paid, result in the appeal being stayed or dismissed. Such orders may be granted by an Irish Court if the appellant is resident outside the jurisdiction (and outside the jurisdictions covered by the Brussels Regime and Lugano Convention) and if there is reason to believe they will be unable to pay the respondent's costs if ordered to do so.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

A judgment creditor, including one with a foreign judgment which has been recognised and enforced, may exercise a number of options to collect a judgment debt, including the following:

- An execution order (or order of *fieri facias*) orders the seizure and sale of goods belonging to the judgment debtor in Ireland by publicly appointed sheriffs. In reality, this is frequently ineffective.
- A judgment mortgage may be registered against real property in Ireland owned by the judgment debtor and will then operate as if the judgment debtor had mortgaged the property to the judgment creditor. If payment is not made, the judgment creditor can force the sale of the property by court application and can take the debt owed from the proceeds of the sale.
- A charging order may be obtained by the judgment creditor over any Irish government stock, funds, annuities, or any stocks or shares in any public or private company in Ireland owned by the judgment debtor. An application to the Irish courts may also be made to charge stock of an English-registered company carrying on business in Ireland. Where a charging order is made, the relevant shares or securities 'stand charged' with the payment of the judgment debt, until the debt has been repaid. Generally, the charging order will provide that the chargee is entitled 'to all such remedies as he would have been entitled to as if such charge had been made in his favour by the judgment debtor'. A charging order will take effect subject to any prior ranking

security in respect of the relevant shares or securities. Once the charging order is made absolute and served on the debtor, the debtor may not transfer or otherwise dispose of the shares.

- Garnishee orders may be sought where it appears that the debtor has no assets of his own but there is money due and owing to him from a third party based in Ireland (the 'garnishee'). In those circumstances, the judgment creditor may seek to have that debt paid to him instead. The garnishee must be within the jurisdiction, although a garnishee may include a firm, any member of which is resident within the jurisdiction. Such a debt may include a credit balance on the judgment debtor's bank account. A judgment creditor can apply to court, without notice to any other party, for a conditional order preventing the garnishee from repaying the debt to the judgment debtor, pending a hearing at which the judgment debtor is entitled to attend to 'show cause' why the order should not be made absolute. Once the order is made final (ie, an absolute garnishee order is granted) and upon service of the garnishee order on the garnishee, the garnishee is obliged to pay the debt owed to the judgment debtor directly to the judgment creditor.
- An equitable receiver may be appointed over the judgment debtor's Irish property. Equitable execution is a mode of relief granted to the judgment creditor where the ordinary methods of execution are unavailable or unlikely to be effective and all other reasonable available avenues to execute the judgment have been exhausted. Future assets may be attached, in appropriate circumstances, in this manner. In certain cases, a receiver may be appointed by way of equitable execution even before judgment in order to prevent dissipation of assets pending a judgment. Appointment of a receiver by way of equitable execution does not give a judgment creditor any mortgage, lien or charge over the assets to which he is appointed. If the receiver takes possession of the relevant assets he does so not for the judgment creditor, but for the court, and an application for directions as to how to deal with the property is required to be made, for example, to sell the property and pay the proceeds over to the judgment creditor.
- Liquidation of an Irish-registered debtor company can also be effective in securing payment. A judgment creditor can petition the court for the appointment of a liquidator to wind up the judgment debtor company (if Irish) and to realise the assets of the company for the benefit of its creditors. Directors of a liquidated Irish company could, if the liquidator believes it appropriate, be subject to proceedings themselves and could, in exceptional circumstances, be made personally liable for the debts of the debtor company.
- A judgment creditor can also seek an order to obtain information from the judgment debtor about its assets. Applications under this procedure, known as discovery in aid of execution, are made on an *ex parte* basis. The court may order the attendance of the judgment debtor (or officers of a corporation) for oral examination and/or the provision by the judgment debtor of documentation prior to examination. This is not effective where the judgment debtor is not domiciled or registered in Ireland.

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28 Pitfalls**What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?**

Care should be taken to establish which recognition and enforcement regime is applicable to the judgment. Different processes apply depending on whether the judgment to be recognised and enforced is one subject to the Brussels Regime or the Lugano Convention or whether it is from a jurisdiction where the judgment will need to be enforced pursuant to the Common Law. It should be noted that for judgments from EU member states it will be important to establish when the proceedings commenced, as different regimes apply depending on whether the proceedings issued before or after 10 January 2015 (as explained under question 1).

Care should also be taken where one is dealing with a default judgment, as such cases can cause concerns to be raised with regard to whether the original court had jurisdiction, whether the proceedings were properly served and/or whether the defendant was given a proper opportunity to mount a defence. Where the underlying judgment is under appeal complications can also arise.

It should also be borne in mind that the range of what may be enforced pursuant to the Brussels Regime or the Lugano Convention is subject to a definition of 'judgment' which is very broad and covers any judgment given, whatever it may be called, and includes injunctions. By contrast, enforcement at common law is limited to money judgments only.

Furthermore, leave of the Irish court is required to issue and serve proceedings seeking common law recognition and enforcement of judgment, which application is usually made *ex parte*. In such cases, an application can subsequently be made by the defendant to set aside service on the grounds that the Irish court lacks jurisdiction based on the lack of a solid practical benefit to the proceedings in circumstances where there are no, or no likely possibility of there being, assets in the jurisdiction against which to enforce (see *Albaniabeg Ambient ShpK v Enel SpA & Enelpower SpA* [2016] IEHC 139, in which the authors acted for the successful respondents). It should also be noted that such jurisdictional challenges will often be dealt with as a preliminary issue and any ruling made on such issue is itself subject to an automatic right of appeal. This can add to the costs of such enforcement proceedings and can mean further delay until an ultimate decision on recognition and enforcement is obtained.

Japan

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

At present, Japan is not party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

In Japan, enacted laws are applied uniformly across the entire country. A party who has received a final and binding judgment before a foreign court can file a petition to obtain leave of enforcement through an execution judgment on the judgment of a foreign court under article 24 of the Civil Execution Act (CEA), provided that such a judgment meets the requirements of article 118 of the Code of Civil Procedure (CCP). The judgment can be enforced by obtaining an execution judgment.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Japan is a civil law jurisdiction and legislation is the main source of law. The enforcement of foreign judgments is dealt with in the CCP and the CEA with article 118 of the CCP and article 24 of the CEA being the key provisions.

Article 118 of the CCP provides that a final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:

- the jurisdiction of the foreign court is recognised under laws or regulations or conventions or treaties;
- the defeated defendant has received service (excluding service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service;
- the content of the judgment and the court proceedings are not contrary to public policy in Japan; and
- a mutual guarantee exists (ie, reciprocity).

To enforce a foreign judgment, the claimant must obtain an execution judgment of the foreign judgment under article 24 of the CEA.

Article 24 of the CEA provides that:

- (i) an action seeking an execution judgment on a judgment of a foreign court shall be under the jurisdiction of the district court having jurisdiction over the location of the general venue of the obligor, and when there is no such general venue, it shall be under the jurisdiction of the district court having jurisdiction over the location of the subject matter of the claim or the seizable property of the obligor;
- (ii) an execution judgment shall be made without investigating whether or not the judicial decision is appropriate;
- (iii) the action set forth in point (i) shall be dismissed without prejudice when it is not proved that the judgment of a foreign court has become

- final and binding or when such judgment fails to satisfy the itemised requirements listed under article 118 of the CCP; and
- (iv) an execution judgment shall declare that compulsory execution based on the judgment by a foreign court shall be permitted.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Japan is not a signatory of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The CCP and the CEA do not provide for any limitation period for the enforcement of a foreign judgment. However, with regard to rights approved by a final and binding court judgment, article 174-2 of the Civil Code provides that the statute of limitations for a payment claim that becomes due upon a final and binding judgment is 10 years, even if any statute of limitations provides for any period shorter than 10 years. Therefore, if 10 years have passed after a final and binding judgment has been rendered, such a judgment may be considered to conflict with item 3 of article 118 of the CCP, which provides that where 'the contents of the judgment [...] are not contrary to public policy in Japan,' and may therefore not be recognised and enforced.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

A foreign judgment must be final to be recognised and enforced. Interim orders or injunction orders that can be appealed in the original jurisdiction do not satisfy the requirements, and leave of enforcement will not be granted by the court.

No direct enforcement of specific performance is allowed if the nature of the obligation does not permit enforcement (article 414(1) of the Civil Code).

For the enforcement of a monetary claim, the CEA allows for compulsory execution and the debtor's general properties (real properties, ships, moveable properties, claims and other property rights) can be seized and sold in a public auction sale, and the sales proceeds are used for the enforcement of the monetary claim (section 2 of Chapter 2 of the CEA).

For the enforcement of the obligation to deliver property, a request for surrender or delivery may be made under articles 168 and 169 of the CEA and an indirect compulsory execution method is also available under articles 173 and 172 of the CEA.

For the enforcement of an obligor's performance obligation, execution may be made by a third-party substitute (paragraph 2 of article 414 of the Civil Code and article 171 of the CEA) or through an indirect

compulsory execution method under article 172 of the CEA (money payment to secure performance).

For the enforcement of an obligor's obligation not to act on anything, a petition may be filed with the court to remove the results of the obligor's actions at the expense of the obligor or impose any other reasonable disposition for the future (paragraph 3 of article 414 of the Civil Code and article 171 of the CEA). In addition, an indirect compulsory execution method may be used under article 172 of the CEA.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

A petition for the execution judgment of a foreign judgment needs to be filed with the district court having jurisdiction over the location of the general venue of the obligor in Japan, or if there is no such general venue, with the district court having jurisdiction over the location of the subject matter of the claim or of the obligor's property to be seized (CEA, article 24(1)). After the execution judgment has been entered to establish the claim, the claimant needs to file a petition for execution with the competent district court (or in the case of seizure of real property, the district court having jurisdiction over the location of the subject's real property).

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

As explained in question 7, the obligee needs to file a petition for the execution judgment of a foreign judgment and establish its claim and, thereafter, file a separate motion for compulsory execution.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

There is only limited room for merits-based defences. In a petition for execution judgment, the appropriateness of the foreign judgment is not considered (paragraph 2 of article 24 of the CEA); all that is considered is whether the judgment is final and binding and whether it meets all the requirements of article 118 of the CCP (see question 2).

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

The CCP and the CEA do not provide for injunctive relief to prevent the enforcement of a foreign judgment.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

The following requirements must be met for a foreign judgment to be recognised:

- a final and binding judgment of a foreign court exists (main text of article 118 of the CCP);
- the jurisdiction of the foreign court is recognised under laws, regulations or treaties (see item 1 of article 118 as well as questions 14 and 15);
- the defeated defendant has received service of a summons or order necessary for the commencement of the suit or has appeared without receiving such service (see item 2 of article 118 and question 16);
- the content of the judgment and court proceedings are not contrary to public policy in Japan (see item 3 of article 118 and questions 13, 18, 19 and 22); and
- a mutual guarantee exists (see item 4 of article 118). This means that a Japanese judgment of the same kind as the relevant judgment can be effective in the country to which the foreign court making the judgment belongs under conditions that do not materially differ from those under article 118 (Supreme Court judgment of 7 June 1983). According to a Tokyo District Court judgment of 20 March 2015, in order to

determine the existence of a mutual guarantee, Japanese courts shall consider the application of the law (ie, the case law and the opinions of the authority), as well as the wording of the law. For this reason, China is disqualified because the Chinese Supreme Court's view is that a Japanese judgment is not effective in Chinese jurisdiction and that other Chinese courts should follow that opinion.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

In principle, no factors other than those described in question 11 are examined for a petition for execution judgment of a foreign judgment (see question 9).

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

The CCP and the CEA do not require a foreign judgment to be made following the same procedures as those followed by Japanese courts. However, item 3 of article 118 of the CCP is understood as requiring impartiality from the bench, an adversarial system and the application of proper procedures as part of procedural public policy. For example, if any fraud has been used to obtain a judgment, the approval of such a judgment is deemed contrary to procedural public policy (Tokyo High Court judgment of 27 February 1990).

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

The enforcing court examines whether the jurisdiction of the foreign court is recognised under laws, regulations or treaties in accordance with item 1 of article 118 of the CCP. Basically, the foreign court must have international jurisdiction under Japanese rules on international jurisdiction. The revised CCP that came into force on 1 April 2012 includes additional provisions under article 3-2 et seq dealing with cases where Japan has international jurisdiction. Therefore, whether the jurisdiction of the foreign court is recognised or not depends on whether the foreign court has international jurisdiction over the case when applying the rules provided for in article 3-2 et seq of the CCP.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

Item 1 of article 118 of the CCP requires that the foreign court making the judgment has jurisdiction under laws, regulations or treaties. The jurisdiction of the foreign court is recognised when the foreign court making the judgment is considered to have international jurisdiction under Japanese rules on jurisdiction under the CCP, which are hypothetically applied to the case.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Item 2 of article 118 of the CCP requires the defeated defendant to have received service of a summons or order necessary for the commencement of the suit or to have appeared without receiving such service. It also provides that service by publication does not suffice.

According to a Supreme Court judgment of 28 April 1998, the aforementioned service of a summons or order does not need to be done in accordance with Japanese laws, but it must notify the defendant of the commencement of the suit and must not interfere with the defendant's right to defence; if there is any treaty on the method of service executed between the country where the judgment is made and Japan, the service must be made using such a method. For example, if Japan and the relevant foreign

country are both parties to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the method specified in this convention must be adopted. The Hague Convention provides that it does not preclude the party from exercising its authority to make a service directly by post unless the contracting state declares that it refuses such service. Japan has not made such a declaration of refusal. However, in Japan, service directly made by post is considered not to meet the requirements provided in item 2 of article 118 of the CCP.

In addition, a Tokyo High Court judgment of 18 September 1997 requires that service of a summons or order includes a Japanese translation if the defendant is a Japanese national, regardless of his or her language skills.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The court will consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment. According to a Supreme Court judgment of 11 November 1997, international jurisdiction should be determined reasonably in accordance with the principle of fairness between the parties as well as the principle of appropriate and efficient court proceedings.

As explained in question 15, the jurisdiction of the foreign court is recognised when the foreign court making the judgment is considered to have international jurisdiction under Japanese jurisdictional rules provided for in the CCP, which are hypothetically applied to the case. The CCP provides that where any of the following are located in Japan, international jurisdiction is recognised in consideration of the aforementioned precedent:

- the defendant's place of residence;
- the place of performance of the contractual obligations;
- the location of the administration office or sales office;
- the place where an illegal act was carried out; or
- the location where the result arises.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Yes. Item 3 of article 118 of the CCP requires that the content of the judgment and court proceedings are not contrary to public policy or morality in Japan. Any foreign court judgment obtained through defrauding the defendant or the court does not meet this requirement.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Yes. Item 3 of article 118 of the CCP requires that the content of the judgment and court proceedings is not contrary to public policy or morality in Japan. If the content of the foreign judgment conflicts with Japanese laws or Japanese final judgments, the recognition and enforcement of such a foreign judgment may be denied. For example, the Supreme Court judgment held on 11 July 1997 that a foreign judgment imposing the payment of punitive damages, which are not recognised under the laws of Japan, was contrary to public policy.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

There are two different opinions about cases where a foreign judgment is in conflict with a final judgment issued in Japan, but no Supreme Court precedent exists. One opinion is that if there is any conflict, approval of the foreign judgment is always contrary to public policy (the Osaka District Court judgment dated 22 December 1977) and the other opinion is that approval of the foreign judgment is contrary to public policy only if a final Japanese judgment has already been issued before the foreign judgment.

Regarding the handling of cases where a foreign judgment conflicts with another foreign judgment, there are two different opinions: one that

the prior final judgment prevails and the other that the subsequent judgment prevails. There is no court precedent on this issue.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

In principle, a judgment is enforceable only against the named judgment obligor. In some cases, a judgment may be enforced against a third party under the theory of 'piercing the corporate veil', but this is very rarely applied.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

If the defendant has appeared in the foreign court without making a claim under the ADR agreement, the hypothetical application of Japanese laws establishes jurisdiction by appearance (article 12 of the CCP). Therefore, the case falls under item 1 of article 118 of the CCP, 'the jurisdiction of the foreign court is recognised under laws, [...]' and the relevant foreign judgment would be approved and enforced.

However, as explained in question 18, item 3 of article 118 of the CCP requires that the content of the judgment and court proceedings are not contrary to public policy or morality in Japan. If, for example, the foreign judgment has been obtained through defrauding the defendant or the court, the case does not meet the requirement under item 3 of article 118 and the court would not approve and enforce the foreign judgment.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

In theory, no, although certain judicial systems have a better reputation than others in terms of due process of law and fairness.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The amount of damages can be revised in light of public policy rules (article 118(3) of the CCP). As mentioned in question 18, the Supreme Court has found that a foreign judgment requiring the payment of punitive damages (a concept not recognised under Japanese law) was contrary to public policy. In this case, the court did not approve and enforce the punitive damages portion but only approved compensatory damages, because punitive damages under the laws of the state of California were tantamount to a penalty while Japanese tort law only recognises compensatory damages.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

The court does not convert the damage award to local currency and it will take into account factors such as interest and court costs and exchange controls, unless the interest rate is deemed excessive in light of public policy.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

For a judgment approving and enforcing a foreign judgment, the same appeal procedures as those applicable to other judgments apply. It is possible to appeal judgments of first instance courts twice. The first appeal is

for an ex post facto review of judgments of first instance courts (whether or not claims made in first instance courts are right or wrong is not directly reviewed). An appeal regarding first appeal judgments may be made to the Supreme Court as a second appeal. An appeal concerning issues related to facts is not allowed in a second appeal. A second appeal is allowed only if such an appeal is made on the grounds of breach of the constitution or other laws or ordinances. Courts subsequently review the procedures of original judgments and the process of determination accepting the facts admitted in original judgments. Both first and second appeals are performed against a first instance court by submitting documents within 14 days from the date on which the relevant original judgment document was served.

The claimant needs to await enforcement until the execution judgment becomes final. However, if provisional execution is approved in the judgment made by a first instance court, the claimant may execute the judgment before a final judgment is made. The defendant can bring a motion to stay compulsory execution of judgment by providing security under article 403 of the CCP and article 39 of the CEA.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

The approval and execution of judgments are examined and judged through the same procedures, and a judgment approving a foreign judgment is treated as an execution judgment under article 24 of the CEA.

After obtaining the relevant judgment, the claimant can perform compulsory execution against individual properties of the obligor by filing a petition with the court.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

One common pitfall involves the method of service of written complaints and other documents from a foreign country to Japan.

In Japan, service is the exercise of the sovereign authority with respect to civil proceedings and is performed under the court's authority. Therefore, service via courier or direct delivery by a plaintiff residing in a foreign country to a defendant in Japan is considered to be invalid under item 2 of article 118 of the CCP. If there is any treaty on the method of service between Japan and a foreign country, service should be made in accordance with such treaty. If there is no such treaty, service should be made in accordance with diplomatic rules. A Tokyo High Court judgment of 18 September 1997 required the service of summons or order to include a Japanese translation if the defendant was a Japanese national, regardless of his or her language skills. It should be noted that a Japanese translation must be attached when documents are served on a Japanese defendant.

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Korea is not party to any bilateral or multinational treaties for the reciprocal recognition and enforcement of foreign judgments. However, Korea has its own principle to recognise and enforce foreign judgments in the law and court precedents, and Korean courts are generous in recognising and enforcing foreign judgments based on the principle of reciprocity. Korea has been party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards since 1973.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

The Korean Code of Civil Procedure (CCP) provides for the conditions that must be satisfied in order to enforce a foreign judgment within the territory of Korea, and such procedures are uniformly applied to any foreign judgments for the purpose of recognition and enforcement in all Korean courts.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The CCP is the primary source of law for recognising foreign judgments in the Korean jurisdiction, and court precedents can be supplementary sources of law in specific cases.

Article 217 of the CCP provides that a final judgment concluded by a foreign court or any equivalent ruling can be regarded as effective if each of the following conditions are met:

- the international jurisdiction of the foreign court should be recognised according to the principle of international jurisdiction under Korean law and decree or treaties;
- a legitimate service of process was made to the defendant;
- the recognition of the foreign final judgment or equivalent ruling is not against good morality or public policy in Korea; and
- the reciprocal guarantee is secured, or there is no substantial difference in recognising the final judgment or equivalent ruling, between the Republic of Korea and the country to which the foreign court belongs.

A foreign judgment can be regarded as effective under Korean laws if it satisfies all of the above conditions. However, in order to enforce such a foreign judgment in Korea, a party should seek an execution judgment of the foreign judgment from the competent Korean court. As to the enforcement of foreign judgments, the Code of Civil Execution (CCE) provides that a compulsory enforcement of a foreign judgment can proceed after the legitimacy of such a foreign judgment is declared in an execution judgment issued by the Korean court. Further, the CCE provides that an execution judgment of a foreign judgment can be issued unless the foreign judgment is not proven to be final and concluded and fails to meet the conditions set forth in article 217 of the CCP.

A newly enacted article 217-2 in 2014, which provides an express basis for the Korean court to refuse to approve excessive compensation awards (including punitive damages) or excessive litigation costs, is set out below:

- (i) where a final judgment on compensation of damages will cause an outcome that is markedly contrary to the basic order of the laws of the Republic of Korea or an international treaty ratified by the Republic of Korea, the court shall not approve, in whole or in part, the relevant final judgment; and
- (ii) when reviewing the requirement of paragraph (i), the court must consider whether the compensation of damages as recognised by the foreign court includes litigation costs and expenses (including the attorney's fee) as well as the scope thereof.

Korean law provides for the compensation of actual damages in principle. However, foreign courts may order punitive damages in their judgment on compensation. This has provided the basis for discussion that an express basis is needed to enable the Korean court to deny the enforcement of an award beyond the scope of actual damages. Moreover, it is also necessary to only partially recognise a foreign judgment if the award amount includes purportedly excessive litigation costs including attorneys' fees.

One of the requirements under article 217 is that the recognition of judgment is not against the good morality or public policy of Korea. Initially, it was proposed that the effect of compensation exceeding the scope of actual damages should be automatically deemed as being contrary to good morality or public policy. However, in light of the fact that even Korean law allows the court to order compensation exceeding the scope of actual damages in certain circumstances, article 217-2 was newly enacted to allow the court to exercise discretion in applying article 217-2 based on the totality of circumstances.

Recently, the Korean Supreme Court confirmed that the legislative intent of article 217-2 of the CCP cannot be deemed as limiting recognition of a foreign ruling even in terms of compensatory damages (not punitive damages) solely on the ground that the amount of damages is excessive (Supreme Court Judgment 2015da207747 rendered on 28 January 2016; Supreme Court Judgment 2015da1284 rendered on 15 October 2015).

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Korea has not signed the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, and therefore the Convention has no application in enforcement proceedings in Korean courts.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The CCP does not provide for any limitation period for enforcement of a foreign judgment. In principle, such a limitation period will be determined

according to the law of the foreign country. If a foreign judgment to be enforced in Korea is no longer effective under the law of the foreign country, the Korean court will refuse recognition and enforcement of the foreign judgment. The limitation period will run from the date when a foreign judgment becomes effective in the foreign jurisdiction.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

A money judgment, or a similar judgment seeking recovery of moveable or immoveable assets, can be enforceable by Korean courts. However, such a judgment must be final and conclusive after all available appeals are exhausted. Interim relief, provisional attachment or disposition cannot be enforced by the Korean court, since they are not regarded as final and conclusive judgments as set forth in the CCE.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

A party seeking recognition and enforcement of a foreign judgment in Korea must file a suit against the defendant before the Korean district court that can exercise general jurisdiction over the defendant. Normally, the court located at the place where an individual defendant resides or a corporate defendant has its head office, branch offices or business places shall exercise the exclusive jurisdiction over such a suit.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

A foreign judgment can be effective in Korea as long as it meets the conditions set forth in articles 217 and 217-2 of the CCP. A party can separately file a suit for recognition of a foreign judgment before the Korean court or can claim the effect of the foreign judgment as an affirmative defence in other civil proceedings. However, in order to enforce a foreign judgment, the plaintiff must file a suit to seek enforcement of a foreign judgment before the competent court according to the CCE. The court will review whether or not the foreign judgment meets the conditions set forth in the CCE before the court makes its decision on the enforceability of the foreign judgment.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

In principle, a defendant cannot raise merits-based defences to liability or to the scope of the award imposed by a foreign judgment. Article 27 (paragraph 1) of the CCE clearly states that an execution judgment must be issued without review of the merit of the subject of the foreign judgment. The defences that can be raised by a defendant are limited to those issues such as jurisdiction, public policy or reciprocal guarantee, which are not related to the substantive issues of the foreign judgment.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Under Korean law, no way exists for a party to prevent foreign judgment enforcement proceedings by obtaining injunctive relief. Instead, a party can seek a decision to suspend or restrict execution of foreign judgments as set forth in the CCE. Article 49 of the CCE enumerates six instances to suspend or restrict execution if a party submits one of the following documents to the execution court:

- an exemplification of a judgment with executive force stating the purport of revoking a judgment to be executed or its provisional execution, or that of refusing a permit for compulsory execution or of ordering a suspension thereof, or that of ordering a revocation of compulsory execution (sub-paragraph 1);

- an exemplification of a judgment stating the purport of ordering a temporary suspension of compulsory execution (sub-paragraph 2);
- a document attesting that a security has been furnished in order to avert an execution (sub-paragraph 3);
- a deed stating the purport that a creditor has been paid a reimbursement subsequent to the rendering of a judgment to be executed, or that a consent has been given to a deferment of a performance of obligations (sub-paragraph 4);
- a certified copy of protocol or a certificate prepared by the junior administrative officer of a court attesting that a judgment to be executed and other trial have become null and void due to a withdrawal of a lawsuit (sub-paragraph 5); or
- an exemplification of a compromise protocol or of a notarial deed stating the purport that a compulsory execution is not to be effected, or a request for, or an entrustment of, a compulsory execution is withdrawn (sub-paragraph 6).

Article 50, paragraph 1 of the CCE states that in the case of sub-paragraphs 1, 3, 5 and 6 of article 49, the already-effected execution disposition shall be revoked, and in the case of sub-paragraphs 2 and 4 of the same article, the already-effected execution disposition shall be subjected to a temporary injunction.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

As stated in question 3, the CCP lists four conditions that must be satisfied for a foreign judgment to be recognised as effective in Korea: the existence of international jurisdiction of the foreign judgment, service of process, public policy and reciprocal guarantee. The basic requirement is that a foreign judgment must be final and conclusive, exhausting all the appeals before the foreign courts. However, there is no requirement under the CCP that a foreign court must have subject-matter jurisdiction over the dispute, although lack of subject-matter jurisdiction may be related to the requirement of public policy in some cases.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

Most of the factors to be considered in recognition of a foreign judgment are related to the four mandatory conditions outlined in question 11, and Korean laws do not provide for non-mandatory or discretionary factors to be considered by the court in actual cases. Reciprocity is a mandatory consideration in recognition of a foreign judgment. The Korean courts have so far recognised reciprocity with Japan, China, Canada and the states of Texas, California and Washington, while denying a reciprocal guarantee against Australia.

Korea entered into the treaty on judicial assistance in civil and commercial matters with Australia on 17 September 1999. The Foreign Judgments Regulations 1992 in Australia, which is the Statutory Rules 1992 No. 321 made under the Foreign Judgments Act 1991, was amended to Statutory Rules No. 334 of 22 December 1999. These new Regulations included the courts of the Republic of Korea within the category of superior courts for the purpose of reciprocal enforcement of judgments for the first time. Thus, Australian courts can recognise money judgments issued by Korean courts given the assurance of substantial reciprocity of treatment.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

Foreign proceedings where a judgment was entered must not infringe upon the basic principles or court proceedings as set forth in the CCP. This is an issue of violation of procedural public policy. If the independence of a foreign court is not secured or if an opportunity of proper defence is not granted to a defendant by the foreign court, the procedural public policy is said to be violated and the enforcement of such a foreign judgment shall be denied by a Korean court.

However, minor discrepancies in court proceedings, omission of legal reasoning in the opinion or jury trial are not regarded as violations of the

procedural public policy. Thus, failure to open pretrial discovery procedure will be regarded as a minor discrepancy not affecting the enforceability of the foreign judgment.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

As seen above, the international jurisdiction of the foreign court should be recognised according to the principle of international jurisdiction under Korean law and decree or treaties. As long as the territorial jurisdiction of a foreign judgment can be recognised pursuant to the CCP, and foreign proceedings to be conducted by the foreign court are not against the general principle of law in Korea, the international jurisdiction of the foreign court can be recognised.

The Korean court will first review if a foreign judgment has the international jurisdiction in its own authority even without an affirmative defence being raised by a defendant. If a foreign judgment is found to be lacking the international jurisdiction as pursuant to the above principle, the Korean court will dismiss the enforcement proceeding without further review of remaining issues.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The Korean court is not empowered to review the subject-matter jurisdiction of a foreign judgment in its own authority as long as the foreign judgment is properly entered by the competent foreign court.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

The CCP requires that a legitimate service of process must be made to a defendant in a foreign proceeding. A defendant must have been served with legitimate and adequate notice of a legal proceeding in a foreign court in order to give the defendant sufficient time to defend in that proceeding. The legitimacy of the service of process can be reviewed pursuant to the law of the foreign country, but the method of service of process must be allowed under Korean law as well.

The methods of service of process as allowed under the CCP are an ordinary official delivery of court documents by special mail, special or night-time delivery of court documents by bailiffs or public notice of court documents on court bulletin boards. The CCP does not allow hand delivery of court documents, delivery by private mail or delivery by private messenger. In cases of service of process to a defendant in a foreign country, the diplomatic channel is used for this purpose.

Thus, a service of process made by a foreign court to a defendant located in Korea by mail or by a private messenger, and not by the formal diplomatic channel, cannot be accepted as the legitimate service of process under Korean law. Korea is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention) from 2000, reserving an explicit objection to the service of process by mail.

The Seoul High Court declared that the service of process is regarded illegitimate if a complaint and a writ of summons were delivered to the defendant in Korea by an international courier service, not through the Central Authority, since Korea had objected to the service of process by private mail at the time of signing up for the Hague Service Convention. The illegitimacy in service of process cannot be rectified by simply submitting a response unless the defendant actually appeared and pleaded before the foreign court (Seoul High Court Judgment 2013na2012912 rendered on 12 March 2015).

The Supreme Court recently ruled that the service of process is made if the defeated defendant could have the opportunity to actually defend itself in a foreign court proceeding even if the defendant is not properly served pursuant to the method and procedure on service of process as provided

Update and trends

Two recent Supreme Court decisions rendered in late 2015 and in early 2016 advocated and reinforced the policy of favouring the recognition and enforcement of a foreign judgment.

The Supreme Court limited applying article 217-2 of the CCP only in recognition cases of foreign judgments awarding punitive or treble damages by narrowly interpreting that the above provision is enacted to limit to the proper extent the recognition of foreign court judgments awarding punitive damages or others in excess of actual damages. According to the Supreme Court rulings, a foreign judgment merely awarding compensatory damages can be fully recognised and enforced by Korean courts, regardless of the excessiveness of the awarded amount or the adoption of a controversial calculation method (such as the Entire Market Value Rule in US patent cases).

The Korean Supreme Court also took a lenient position by expanding the legitimacy of service of process from the practical viewpoint of 'actual defence in foreign court proceeding' away from strict compliance with the requirements of service of process.

in Korean law (Supreme Court Judgment 2015Da207747 rendered on 25 January 2016).

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

In principle, the relative inconvenience of the foreign jurisdiction to a defendant cannot be the basis for refusing enforcement of a foreign judgment as long as the foreign judgment has international jurisdiction.

However, one notable Korean court precedent issued in 1995 deals with the issue of relative inconvenience of the foreign jurisdiction in a product liability claim case. The plaintiffs were a US importer and a US insurance company, and the defendant was a Korean manufacturer of telephone products. The defendant was sued by the plaintiffs due to alleged defects in the products before the circuit court in Florida. The Korean court refused to recognise the international jurisdiction of the Florida court where the foreign judgment was entered, as it is difficult to reasonably foresee that a defendant would be sued before such a foreign court, since the defendant does not have substantial nexus with such a court.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Procurement of a foreign judgment by fraud (submission of false evidence or perjury) has been regarded as a violation of procedural public policy and the Korean Supreme Court confirmed this position (88 Meu 184, 191). The court stated that procurement of a foreign judgment by fraud can be a cause to refuse recognition.

However, recently the Korean Supreme Court reversed this position by setting a generous guideline on this issue (2002Da74213). The court opined that procurement of a foreign judgment by fraudulent methods, such as use of forged or discarded documents or use of perjury, cannot be a cause to refuse recognition and enforcement unless such fraudulent acts are proven in a guilty judgment and an affirmative defence of fraud was blocked before the foreign court.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

The CCP requires that the recognition of a foreign judgment is not against good morality or public policy in Korea. The Korean court will examine the public policy issue in the enforcement proceedings. One example regarding the issue of public policy is a case where the Korean court recognised 50 per cent of an excessive monetary compensation awarded by a foreign judgment based on public policy grounds.

Another issue is whether the Korean court will recognise a foreign judgment awarding punitive damages, and the prevailing opinion is negative in recognition of such a foreign judgment based on public policy grounds.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

In the event that a second foreign judgment to be enforced is in conflict with the previous final and conclusive judgment involving the same parties, the recognition will be denied on the second foreign judgment. One of the Korean court precedents deals with this issue.

After the Korean judgment was concluded between parties in a divorce action, the plaintiff filed a divorce action against the same defendant before the court in Nevada and the Nevada court entered the judgment in favour of the plaintiff. The Korean court stated that such a foreign judgment is in conflict with the judicial effect of the Korean judgment, and thus violates Korean public policy. The court determined that such a foreign judgment is lacking the conditions for recognition of a foreign judgment set forth in the CCP and is therefore not effective in Korea.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

The Korean Supreme Court clearly prohibits extending the enforcement of judgments on third parties, other than those named in the judgment, in order not to impair the clarity and stability of civil proceedings and execution procedure. This rule was applied in a case where a paper company was established by abusing a corporate entity, in violation of the principle of good faith, for the purpose of evading liability of a debtor company (Supreme Court Judgment 93da44531 rendered on 12 May 1995).

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

Even if a party procures a foreign judgment irrespective of an arbitration agreement, the Korean court will not review this issue as a mandatory condition. The issue should be reviewed pursuant to the law of the foreign country, not from the perspective of Korean law.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

All foreign judgments are treated the same and reviewed under the same criteria as set forth in the CCP. The Korean court is quite generous in

recognising foreign judgments, regardless of the nationality. However, we have seen more examples of the recognition of US court judgments in recent years.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

As noted in question 19, the Korean court recognised a US judgment up to 50 per cent of the amount of award in view of various factors such as substantial nexus between actual damages and compensation, equitable sharing of damages among parties and judicial policy when the judgment actually awarded punitive damages. The court opined that it is empowered to limit the amount of damages, since an excessive amount of damages awarded by a foreign judgment is against Korean public policy.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

The Korean court normally renders a judgment of granting a foreign judgment as legitimate and enforceable in Korea without converting the amount of damage award into the Korean currency. The Korean court also does not consider interest, court costs and exchange controls in recognising a foreign judgment. A party can enforce the judgment by converting the damage award into the Korean currency at the exchange rate applicable at the time of enforcement.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

The right to appeal against a judgment rendered by a lower court is guaranteed and a losing party can appeal against the judgment within 14 days from the date of receipt. The judgment, even if appealed and pending during appeal proceedings, can be enforceable on the assets owned by the losing party as long as the lower court issues the order of provisional enforcement of the judgment.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

When a Korean judgment to recognise a foreign judgment is concluded after all the appeals are exhausted, the winning party can enforce the Korean judgment against any assets owned by the defendant. The plaintiff should obtain the letter of execution of such a Korean judgment from the

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court and must then apply for the actual execution process of the Korean judgment with the competent court where the defendant's assets or properties to be enforced are located. The execution process is undertaken by a bailiff, and the method of execution differs according to the types of properties.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

A party seeking enforcement of a foreign judgment in Korea must check if a reciprocal guarantee is provided for between the foreign country and Korea. The Korean court is becoming more lenient in providing a reciprocal guarantee in recognising foreign judgments, in order to keep pace with international trends of judicial cooperation and reciprocal guarantee.

Another issue is if a foreign judgment can be enforceable in Korea in view of Korean public policy. Recent Korean court precedents are more generous in interpreting the notion of 'public policy' in order to recognise a foreign judgment that was allegedly procured by fraud, that is by using false and forged documentary evidence or by perjury, except when such fraudulent acts were proven by strict evidence such as a foreign guilty judgment.

Mexico

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Since 1991, Mexico has been party to the Convention between the United States of Mexico and the Kingdom of Spain for the Recognition and Enforcement of Civil and Commercial judgments and arbitral awards.

Mexico has also been party to the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (the Montevideo Convention) since 1987. Mexico limited the application of the Convention to exclude punitive judgments involving property, and made interpretative declarations on when the court's jurisdiction is considered to be satisfied and the need to request enforcement of judgments by means of letters rogatory.

Mexico is also party to the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (the Paz Convention).

International treaties signed by Mexico are incorporated as domestic law by means of article 133 of the Constitution, which means that they are legally binding for all Mexican authorities, including local courts.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Commercial and civil matters are governed by different rules in Mexico. The proceedings for the recognition and enforcement of foreign judgments differ depending on the subject matter, which is also the case with the recognition and enforcement of arbitral awards.

Foreign judgments on commercial matters need to follow the procedural provisions of the Commercial Code, which is a federal statute and applies uniformly in every state of the country. Conversely, in order to request recognition and enforcement of a foreign judgment on civil subject matters, article 570 of the Federal Code of Civil Procedure provides that this statute must be observed.

While some local (state level) civil codes of procedure provide rules for the recognition and enforcement of foreign arbitral awards, most of them are consistent with the provisions of the Federal Code of Civil Procedure.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The main sources of law for the recognition and enforcement of foreign judgments are:

- the international treaties signed by Mexico;
- the internal statutes referred to in question 2; and
- the precedents rendered by the Supreme Court of Mexico and Federal Courts of Appeal.

The enforcement of foreign judgments on commercial matters is governed by the Commercial Code, particularly article 1347-A, which provides the requirements that the foreign judgment should fulfil to be recognised.

On civil matters, the foreign judgment must follow the provisions of the Federal Code of Civil Procedure, particularly article 571.

Also, foreign arbitral awards on commercial matters are recognised and enforced through special rules contained in the Commercial Code, particularly in articles 1461 to 1463.

The last, but no less important, source of law regarding the enforcement of foreign judgments is the precedents (or case law) issued by the Supreme Court and the Federal Courts of Appeals. These precedents are binding on all Mexican courts, and serve the purpose of clarifying and correcting deficiencies in the statutes.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Mexico is not party to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. If it were, it is safe to assume that Mexican courts would require strict compliance with its provisions before recognising a foreign judgment.

This is because Mexico's domestic law provides that all the international treaties that it is party to are automatically incorporated as domestic law by means of article 133 of the Constitution. This means that all Mexican courts are required to strictly comply with its provisions.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Neither the Commercial Code nor the Federal Code of Civil Procedure provides a specific limitation period for the enforcement of a foreign judgment. However, statutes provide for a default limitation period of 10 years.

It is important to consider that the period would commence to run not from the date the judgment is issued, but from the date it becomes final and binding.

As limitation periods are considered to be a prerequisite for the valid integration of the claim, they may be studied by the enforcing court at any time, even *ex officio*. Courts are likely to ignore this aspect unless the opposing party brings it up.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

It is important to note that Mexico is not party to the Inter-American Convention of Preventive Measures. However, Mexican courts are likely to enforce a remedy ordered by a foreign court if such a remedy fulfils the requirements for its enforcement in accordance with the Mexican statutes, as the case may be.

The court may refuse the enforcement of remedies that are against Mexican public policy and actions brought with respect to rights in rem as opposed to personal contractual rights.

Additionally, Mexican courts may also consider reciprocity when enforcing any order. If there is sufficient evidence that a court from the requesting country would not enforce an analogous order from a Mexican court, the enforcement of said order could be dismissed.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

The competent courts for the enforcement of foreign judgments, whether on civil or commercial subject matters, are the district courts in accordance with article 18 of the Federal Code of Civil Procedure and with article 53 of the Organic Statute of the Judicial Branch.

In civil matters, according to article 573 of the Federal Code of Civil Procedure, the competent court is either the court where the defendant is domiciled or the court where the assets are located.

In commercial matters, first instance local and federal courts have concurrent jurisdiction, but the competent court to enforce a foreign judgment will always be the one located where the defendant is domiciled or where the assets are located, on application of the rule contained in article 573 as stated above.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Mexican statutes do not distinguish between recognition and enforcement of foreign judgments, but it is understood that the exequatur or recognition proceeding aims to analyse whether the judgment should be included in the Mexican legal system and be valid to be enforced by Mexican courts.

The result of this process may be the recognition or homologation of the judgment by Mexican courts, and thus the declaration of its validity.

Once the judgment is recognised, the enforcement process to be followed is the same as for the execution of any other Mexican judgment. Therefore, the procedural rules contained in the Federal Code of Civil Procedure shall be followed.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

No. Article 571 of the Federal Code of Civil Procedure limits which defences may be raised by the defendant against the enforcement of the foreign judgment, which are essentially only formal objections. Additionally, article 575 of this statute provides that the court is not allowed to review the merits of the foreign judgment.

In such a case, the defendant would only be able to oppose the court's ruling of recognition. This means that the defendant could not argue on the merits of the judgment, and could raise only procedural exceptions.

The same rule applies to the recognition and enforcement of foreign arbitral awards, as the Commercial Code provides that the challenge of an arbitral award in Mexico should follow the special procedure contained in articles 1470 to 1476. The court is not allowed to review the merits of the award (unless the enforcement of the award may constitute a breach of international public policy).

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

No, Mexican courts do not provide injunctive relief to prevent the enforcement of a foreign judgment.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

Once the rendering court requires that the Mexican court recognise the foreign judgment, the domestic court will consider whether the judgment meets two kinds of requirements: procedural requirements and

substantive requirements (simultaneously contained in articles 1347-A of the Commercial Code and 571 of the Federal Code of Civil Procedure).

Procedural requirements

- Fulfilment of the formalities provided in the international treaties signed by Mexico regarding letters rogatory and notifications. This means that enforcement of the judgment shall always be requested by the rendering judge by letter rogatory (with the exception of the enforcement of arbitral awards, where the request of recognition and enforcement is on behalf of the claimant);
- the claim has been served to the defendant in due legal form. Mexico recognises that the law governing notification to the defendant is that of the rendering country; if there is proof that the notification was personally made to the defendant, it is enough to grant his or her right of hearing and defence;
- that the judgment is final, or where appropriate has res judicata force in the state in which it was rendered (and there is no ordinary recourse for challenging it);
- the judge or court rendering the judgment is competent in the international sphere to try the subject matter and to pass judgment on it, in accordance with the law of the state in which the judgment award or decision is to take effect;
- the judgment is recognised in all territories of the rendering country. This requirement is in accordance with article 5 of the Paz Convention; and
- that the action is not *lis pendens* for the same parties before Mexican courts.

Authentic copies of the documents of proof

- A certified copy of the judgment and its translation to Spanish, and if required, with the legalisation or apostille;
- a certified copy of the documents proving the service to the defendant; and
- a certified copy stating that the judgment has the force of res judicata.

Substantive requirements

- The judgment was not rendered as a consequence of an action in rem. Mexico recognises that the only competent court to rule over in rem actions is the court where the 'thing' is located (*forum rei sitae*); and
- the enforcement of the judgment is not manifestly contrary to the public policy of Mexico.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

In exceptional cases, Mexican courts may refuse the enforcement of the foreign judgment if it is demonstrated that in the rendering country the enforcement of similar judgments is not granted. However, international reciprocity for the recognition and enforcement of foreign judgments could only be argued if the rendering country is not party to a treaty on judicial cooperation with Mexico.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

Generally, Mexican courts attach a great deal of importance to service of process or notice to the parties, because they are the cornerstone of due process and also a matter of public policy. It could be expected that Mexican courts will pay special attention to the due notice of the claim and the judgment when deciding on its enforcement.

It is considered that the defendant had proper notice when he or she had knowledge of the action against him or her and was allowed to raise arguments and exceptions.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

The Mexican court should analyse in general terms whether the foreign court assumed direct jurisdiction over the subject matter pursuant to the internationally accepted criteria that are compatible with Mexican laws.

Therefore, the recognition and enforcement of the foreign judgment could be denied if the foreign court had no international jurisdiction to hear and decide on the subject matter.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The Mexican court could analyse whether the foreign court had subject-matter jurisdiction over the controversy in general terms. Also, the Mexican court could deny the enforcement of the foreign judgment if Mexican courts have exclusive jurisdiction over the subject matter.

Article 568 of the Federal Code of Civil Procedure provides the following subject matters of exclusive jurisdiction of Mexican courts:

- lands and water in the Mexican territory;
- resources in the Mexican Economic Exclusive Zone;
- government acts; and
- Mexican embassies' internal regimes.

Mexican courts also have exclusive jurisdiction on the subject matters contained in article 6 of the Paz Convention.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Article 571 IV of the Federal Code of Civil Procedure and article 1347-A IV of the Commercial Code require that the claim was personally served to the defendant in order to ensure his or her right of hearing and proper defence.

Mexican courts should therefore not deny recognition and enforcement of foreign judgments with a defaulting respondent if the notification was made personally.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

No. According to article 575 of the Federal Code of Civil Procedure and the international treaties signed by Mexico, neither the first instance court nor the Court of Appeals are allowed to review or rule on the justice, fairness, motivation, factual or legal grounds of the judgment.

Therefore, the Mexican courts can only examine whether the foreign judgment fulfils the formal requirements (such as its authenticity and those explained in question 11) in accordance with Mexican law. The only exception is that the courts can also examine the merits to analyse whether or not the judgment contravenes public policy.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

No. Mexican law does not provide for the denial of recognition or enforcement of foreign judgments for allegations of fraud. However, some Mexican lawyers could argue that fraud constitutes a breach of public policy.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

In accordance with article 571 VII of the Federal Code of Civil Procedure and article 1347-A VII of the Commercial Code, Mexican courts shall ensure that the foreign judgment does not breach the international public policy of Mexico before recognising and enforcing a foreign judgment.

Mexican courts could deny recognition and enforcement after analysing the merits of the judgment, if it is found to be grossly contrary to international public policy.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

In first instance, the Mexican court should refuse the recognition or enforcement of the foreign judgment in accordance with article 571 VI of the Federal Code of Civil Procedure and 1347-A VI of the Commercial Code. However, cases regarding conflicting decisions are examined on a case-by-case basis.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

No. The Mexican court can only enforce the foreign judgment against the defendant or judgment debtor.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

If the foreign judgment fulfils all the requirements contained in the Commercial Code or the Federal Code of Civil Procedure, the Mexican court should enforce it.

It is understood that if neither the plaintiff nor the defendant claimed the compliance of the arbitration clause at the trial that gave rise to the foreign judgment, they waived the right to alternative dispute resolution.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

If the judgment was rendered in a state that is party to the Montevideo and Paz Conventions, then the rules of such conventions apply.

Once a foreign judgment is recognised by a Mexican judge it always becomes equivalent to any other Mexican judgment and should, therefore, follow the same procedure for its enforcement.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Mexican courts are not allowed to alter or limit the damage award, but, according to article 577 of the Federal Code of Civil Procedure, Mexican courts may only recognise and enforce part of a judgment in two cases:

- if the judgment could not be effective in all its terms, for example, if some parts of the judgment are contrary to public policy; or
- at the request of an interested party.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Yes. As provided in article 576 of the Federal Code of Civil Procedure and article 1348 of the Commercial Code, the only substantive issues that may be entertained by the Mexican courts are the subject matters regarding the seizure of property, appraisals, auctions and others related to the enforcement of the foreign judgment.

Therefore, the liquidation of determinable but not yet determined amounts of the foreign judgment shall be decided by the enforcing court.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Yes, both the claimant and the plaintiff can appeal the judgment of recognition and the enforcement of a foreign judgment as provided in article 574 of the Federal Code of Civil Procedure.

Additionally, the parties could challenge the appealing judgment by means of a direct amparo procedure before a district court of first instance if their constitutional rights have been breached during the proceedings.

However, it is very important to take into account that the amparo procedure does not allow the parties to present any new arguments that were not addressed before the court of first instance and the court of appeals, because amparo courts do not have jurisdiction to examine de novo the merits of the first instance judgment.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once the foreign judgment on civil matters is recognised, the competent court will enforce it in accordance with the Federal Code of Civil Procedure.

Regarding the enforcement of judgments in commercial matters, the court will also enforce it as any other domestic judgment through a summary proceeding of enforcement.

Regarding the enforcement of foreign arbitral awards, the claimant shall follow the special proceeding provided in articles 1471 to 1476 of the Commercial Code.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Mexican lawyers tend to appeal recognition or enforcement court orders in order to delay the proceeding, because some resources, such as the amparo proceeding, can suspend the enforcement of the judgment.

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

At present, Nigeria is not a signatory to any multilateral or bilateral treaties for the reciprocal recognition and enforcement of foreign judgments. Foreign judgments are enforced in Nigeria by virtue of the Foreign Judgments (Reciprocal Enforcement) Act, Chapter F35, Laws of the Federation of Nigeria 2004 (the 2004 Act) and the Reciprocal Enforcement of Judgments Act 1922, Chapter 175, Laws of the Federation and Lagos 1958 (the 1958 Act). Section 3 under Part 1 of the 2004 Act (which contains provisions for the registration of foreign judgments) provides that where the Minister of Justice of the Federation of Nigeria is satisfied that in the event of the benefits conferred by Part 1 of the 2004 Act being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured with regard to the enforcement in that foreign country of judgments made by a superior court in Nigeria. The Minister may, by order, direct the extension of Part 1 to that foreign country. No such order has been made by the Minister of Justice to date. Section 10(a) of the 2004 Act allows the enforcement of foreign judgments of countries to which Part 1 of the 2004 Act has not been extended, provided that such applications for enforcement are made within 12 months after the foreign judgment or within such other time as the court may permit.

Certain foreign judgments may also be enforced under the 1958 Act. This Act deals with the registration and enforcement of judgments obtained in Nigeria and the United Kingdom and other parts of Her Majesty's (Queen of the United Kingdom) dominion and territories, and was not repealed by the 2004 Act as decided by the Nigerian Supreme Court in the case of *Witts & Busch Ltd v Dale Power Systems Plc*. The constitutional approach in entering any bilateral or multilateral treaties is that until such an international treaty signed by Nigeria is enacted into law by the National Assembly, it has no force of law and its provisions will not be justiciable in the court of law within the country. This connotes that, before the enactment into law by the National Assembly of such a bilateral or multilateral treaty to which Nigeria is a signatory, the signed treaty has no force of law and Nigerian courts cannot give effect to it, as they can with other laws. This same process is applicable to every amendment made to any international treaty to which Nigeria is a signatory or party.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Nigeria operates a federal system of government comprising 36 states and a central federal government. Although each state has a legislative assembly, the authority to make laws on issues regarding the enforcement of foreign judgments is constitutionally vested in the National Assembly, which is the federal legislative body, as such powers are contained in the exclusive legislative list of the Constitution. There are therefore no intra-state variations and there is uniformity in the law on the enforcement of foreign judgments.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The primary sources of law are:

- the 1958 Act;
- the 2004 Act and the Rules of Court made pursuant to section 5 of the Act;
- the Sheriffs and Civil Processes Act Chapter S6, 2004;
- the various civil procedure rules of the superior courts before which registration and enforcement are sought; and
- the Judgment Enforcement Rules under section 94 of the Sheriffs and Civil Processes Act.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Nigeria is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Its provisions, therefore, do not apply to the application for registration and enforcement of foreign judgments in Nigeria.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

A judgment creditor in respect of a judgment to which Part 1 of the 2004 Act applies may apply to a superior court in Nigeria to have the judgment registered at any time within six years after the date of the judgment, or where there have been proceedings by way of an appeal against the judgment after the date of the last judgment given in those proceedings. An appeal is defined under the Act to include any proceeding by way of discharging or setting aside a judgment, an application for a new trial or a stay of execution.

Notably, where the Minister is yet to make an order extending the application of Part 1 of the Act to a country, the applicable time limit will be, as provided under section 10 of the Act, 12 months or longer, depending on what is allowed by a superior court of record in Nigeria.

For applications for enforcement made pursuant to the 1958 Act, such applications may be brought within 12 months after the date of the judgment or a longer period if allowed by the registering court.

There are no circumstances stipulated by the Act under which an enforcing court would consider the statute of limitation of the foreign jurisdiction.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

The only order made by a foreign court that is enforceable in Nigeria pursuant to the 2004 Act is a final judgment conclusive between the parties

thereto, under which some money is payable (excluding sums that are payable in respect of taxes or other charges of a like nature, such as fines or penalties).

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Yes, the 2004 Act requires registration of a foreign judgment to be sought before a superior court. A superior court is defined under the Act as the High Court of a State or of the Federal Capital Territory, Abuja, or the Federal High Court. After the foreign judgment is registered, it can then be enforced by the registering court. However, in exercising an abundance of caution, it is pertinent to seek registration of a foreign judgment in a court whose jurisdiction covers the subject matter of the original suit conducted outside Nigeria. In *Access Bank Plc. v Akingbola*, decided in 2014, the High Court of Lagos State ruled that the instant judgment of the High Court in England could not be registered and enforced in the Lagos State High Court. The court based this decision on the ground that the subject-matter of the suit which led to the judgment was a matter within the exclusive jurisdiction of the Federal High Court under section 251(1)(e) of the Constitution of Federal Republic of Nigeria 1999 as a matter under the Companies and Allied Matters Act, and if the original action had been tried in Nigeria, the right court siesed with the jurisdiction would be the Federal High Court. The Court therefore concluded that the application to register same should have been sought at the Federal High Court and quashed the registration of the judgment which was earlier granted in respect of the judgment.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

The process of recognition involves a court hearing by a judge who must first consider an application for the registration of the foreign judgment. Should the application be granted, the judgment will be registered in the Register of Judgments. Once the judgment is registered and has not been set aside on appeal, it can then be enforced by the judgment creditor. Enforcement, on the other hand, may or may not involve a court hearing. Upon recognition or registration of a foreign judgment, a judgment creditor may seek to enforce the foreign judgment (which is now deemed to be the judgment of the court that registered it) by the various means of execution provided under the Sheriffs and Civil Processes Act. This includes execution by issuance of a writ of attachment that empowers court bailiffs to seize property of the judgment debtor, and execution via garnishee proceedings that will involve a court hearing by which moneys due to the judgment debtor from third parties are attached in satisfaction of the judgment debt. Where property is to be attached, the judgment creditor must obtain a writ of execution or fieri facias from the relevant court. The process of obtaining a writ of execution is mostly administrative and very rarely involves a court hearing except in certain situations stipulated under the rules of the various courts, where it is necessary that the leave of the court must be sought before a writ of execution can be issued.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

A defendant cannot raise merits-based defences to liability or defences as to the scope of the award. The grounds for setting aside the registration of a foreign judgment are clearly stipulated under the 2004 Act and are limited to issues such as fraud, public policy, jurisdiction, lack of service or lack of sufficient time after service to respond to the action in the foreign court prior to the entry of judgment. The courts in Nigeria have held that a registering court has no appellate jurisdiction over the foreign court and cannot therefore embark upon a merits-based assessment of the foreign judgment sought to be registered.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

There is no provision in the 2004 Act for a party to obtain injunctive relief seeking to prevent the enforcement of foreign judgment proceedings in Nigeria. In *Kalu v FGN* (2014) 1 NWLR Part 1389, page 479, the Appeal Court held that injunctive remedy being in personam is directed against the litigant and not the court or its proceedings. The available remedy for a defendant, akin to mandatory injunction, is to bring an application to set aside the registration of a foreign judgment. However, this can only be entertained if the foreign judgment was registered in contravention of the Act, if the original court that gave it lacked jurisdiction, if it was obtained by fraud or if the rights under it are not vested in the person who made the application for registration. Similarly, the registering court can set aside a judgment if the judgment debtor did not receive notice of the proceedings in the original court that gave it and thereby did not appear, making the said judgment a default judgment.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

The mandatory requirements for registration or recognition of a foreign judgment are as follows:

- the 2004 Act must be applicable to such judgment and the judgment must be a final judgment;
- the judgment debtor as defendant in the original action must have received notice of the proceedings (beside service of the processes) in sufficient time to enable him or her to defend the proceedings;
- the foreign court must have jurisdiction in the circumstances of the case and the foreign judgment must be enforceable by execution in the country of the original court;
- the judgment must have been obtained regularly without any form of fraud;
- the foreign judgment must conform to public policy in Nigeria;
- the judgment creditor must be the applicant for the registration of the judgment;
- the judgment must not have been wholly satisfied; and
- the judgment must be one under which some money is payable not being sums that are payable in respect of taxes or other charges of a like nature, or fines or penalties.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

No non-mandatory factors that are outside the provisions of the 2004 Act may be considered in an application for the registration of a foreign judgment.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

There is no requirement under the 2004 Act that the judicial proceedings in the foreign court must correspond to due process in Nigeria.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

The Nigerian courts do examine whether the foreign court had personal jurisdiction over a defendant. One of the grounds under the 2004 Act for setting aside the registration of a foreign judgment is whether the original court had no jurisdiction in the circumstances of the case. The Act further defines for this purpose 'when the original court shall be deemed to have jurisdiction and when the original court shall be deemed not to have jurisdiction' for judgments in an action in personam or in an action in rem. For an action in personam, the original court shall be deemed not to have jurisdiction if the judgment debtor, being a defendant in the original

Update and trends

There has been a controversy about the conditions precedent to the registration of a foreign judgment in Nigerian courts. The controversy is focused on whether, from the ordinary interpretation of the applicable laws, it is a condition precedent that the subject matter of the original action must fall within the purview of the jurisdiction of the Nigerian Court in which an application to register the foreign judgment has been sought before such Nigerian Court can register the Judgment.

In this respect, a Judge of the High Court of Lagos State granted an application to register a Judgment delivered by the High Court in England. However, the Respondent, in *Access Bank Plc. v Akingbola* (2014) 3 CLRN 124, applied to the court to quash the registration of the judgment on the basis that the court lacked jurisdiction to grant same. The High Court of Lagos State ruled that the instant judgment of the High Court in England could not be registered and enforced in the Lagos State High Court. This court based its decision on the ground that the subject matter of the suit which led to the judgment was a matter within the exclusive jurisdiction of the Federal High Court under section 251(1)(e) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) (the Constitution) as it arises from the operations

of the Companies and Allied Matters Act, and if the original action had been tried in Nigeria, the court sited with the jurisdiction would be the Federal High Court. The court therefore concluded that the application to register same should have been sought at the Federal High Court, and quashed the registration of the judgment which was earlier granted in respect of the judgment.

It is worth noting that in *Access Bank Plc. v Akingbola* (2015) 5 CLRN 77, also decided in 2014, the judgment creditor subsequently filed another application for the recognition and enforcement of the same judgment in the Federal High Court. However, the Federal High Court refused to grant the application on the ground that the High Court in England, which heard the matter, refused to grant leave to the judgment debtor to appeal against the judgment. The court ruled that if the matter had been heard in Nigeria, the judgment debtor would have had a constitutional right to appeal without leave as provided in section 241(1) of the Constitution. The court therefore found that the refusal for leave to appeal is contrary to the provisions of the Constitution.

The above decisions are subjects of appeal.

proceedings, was a person who under the rules of public international law was entitled to immunity from the jurisdiction of the courts of the country of the original court and did not submit to the jurisdiction of that court. With specific regard to enforcement under the Act, the foreign court is deemed to have jurisdiction and the foreign judgment is registrable and enforceable in Nigeria only if the judgment debtor voluntarily appears or otherwise agrees to submit to the jurisdiction of the relevant foreign court, or the judgment debtor was resident in the jurisdiction of the relevant foreign court at the time when the proceedings were instituted.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The 2004 Act does not specifically direct the enforcing court to examine whether the original court had subject-matter jurisdiction over the controversy, but by inference this is implied. In considering the mandatory conditions for registration, such as the foreign court's jurisdiction in the circumstances of the case, the enforceability by execution of the foreign judgment and whether the foreign judgment was obtained by fraud or not, the registering court may have to visit the subject-matter jurisdiction of the original court.

This is also contingent on whether the foreign judgment is in rem or in personam. Section 6(2)(b) of the Act deals with judgment in rem of which the subject matter is moveable property. The registering court will have to consider before registration of the judgment if the property (subject matter) was at the time of the proceedings before the original court situated in the country of that court. Section 6(2)(a) of the Act deals with judgment in personam, the registering court will have to consider the residence of the defendant in the original action, that is, whether the judgment debtor was resident in the country of the foreign court at the time of the proceedings, or (if the judgment debtor is a body corporate) whether its principal place of business is in the original country or the business being the subject matter was to be performed or executed in the country of that court.

Finally, under the Act, the registering court will also consider the subject-matter jurisdiction where there is controversy as to whether the proceedings of the original court ran contrary to an agreement by parties to settle their dispute otherwise than by proceedings in the courts of the foreign country.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

The judgment debtor must receive actual notice of the proceedings of the original action in the foreign court within sufficient time to enable him or her to appear and defend the proceedings. Under section 6(1)(a)(iii) of the 2004 Act, one of the grounds for setting aside a registered foreign

judgment is that, notwithstanding that the processes in the original court may have been duly served on the judgment debtor (who is a defendant in the original proceedings), he or she did not receive notice of those proceedings in sufficient time to enable him or her to defend the proceedings and did not appear.

There is no stipulation of the length of notice that will be considered as sufficient, but Nigerian courts will usually in such cases follow the common law rules of reasonable notice, which will be subject to the circumstances of each particular case.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The relative inconvenience of the foreign jurisdiction to the defendant is not one of the grounds for declining to register or enforce a foreign judgment under the 2004 Act. Where the parties by whatever agreement under which the dispute arose or by conduct voluntarily appeared or submitted to the foreign court jurisdiction, the registering court will not consider relative inconvenience.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

One of the grounds for setting aside the registration of a foreign judgment under the 2004 Act is that judgment was obtained by fraud. The courts, therefore, ordinarily examine the foreign judgment for any allegation of fraud.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

One of the grounds for setting aside the registration of a foreign judgment is that the enforcement of the judgment would be contrary to public policy in Nigeria. There is no specific requirement that the foreign judgment should be consistent with substantive laws in Nigeria.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

The registering court may set aside the registration of a foreign judgment if it is satisfied that the matter in dispute in the proceedings in the original court had previously on the date of the judgment been the subject of a final and conclusive judgment of another court having jurisdiction in the matter in the original foreign country. The 2004 Act does not specify whether the

judgment obtained in the original proceedings must have been between the same parties or their privies, but the common rule applied by Nigerian courts in such cases is that a previous judgment is only binding between the same parties and on the same issue.

The language of the 2004 Act suggests that where there are conflicting judgments, a subsequent or latter judgment would not be registered and enforced. Although there is no case law on the point in Nigeria in the event of conflicting judgments between the parties on the same issue, it appears from the language of the statute that the judgment that came first chronologically is the one that would be registered and enforced.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

A judgment is a final decision of the court on a particular subject matter and such judgment is binding only on the parties to the action and parties affected by the judgment. The court cannot apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor who was the defendant in the proceedings that led to the judgment. The alter ego is a distinct person; hence, no judgment delivered against a specific person can be enforced on the alter ego. The principle of agency is equally not applicable and a foreign judgment cannot be enforced against a third party agent that is not named as the judgment debtor in the foreign judgment.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

Subsection 6(3)(b) of the 2004 Act provides that, if the bringing of proceedings in the original court was contrary to an agreement under which the dispute in question was to be settled other than by proceedings in that court, the court in Nigeria will hold that the foreign court lacks jurisdiction and will refuse to register the foreign judgment, and if registration had been procured by the judgment creditor ex parte, such registration may be set aside by the registering court.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

No more deference is accorded to a judgment of any one foreign jurisdiction over others. However, only judgments of the courts of the United Kingdom and Ireland, and courts of other parts of Her Majesty's dominions and territories are registrable and enforceable under the 1958 Act. Under section 3 of the 2004 Act, the Minister of Justice may extend Part 1 of the Act, which permits registration and enforcement of foreign judgments

within six years from the date of such judgment to any country that accords reciprocal treatment to judgments of superior courts in Nigeria. The Minister for Justice has not extended the said part to any country to date. Section 9 of the 2004 Act applies Part 1 of the Act to judgments of courts of all Commonwealth countries. Accordingly, in respect of judgments of such Commonwealth countries, an application for registration may be made within six years of the date of such judgment. Aside from the foregoing, which relate to the applicability of Part 1 of the 2004 Act to certain countries, no special or greater deference is accorded to the judgments of the courts of any one country.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Where a foreign judgment is in various parts or on different matters, the registering court can register part of the judgment. Under section 4(4) of the 2004 Act, where part of the judgment had been satisfied and part unsatisfied, the court can register the part that is unsatisfied. Additionally, section 4(5) of the Act provides that where part of a judgment can be properly registered, the judgment may be registered in respect of that part alone.

There is no provision under the Act for alteration or reduction of award or damages made in a foreign judgment. This will amount to exercising a supervisory or appellate control over the foreign court, which is not permitted under Nigerian law.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Section 4(3) of the 2004 Act provides that where the sum payable under a judgment that is to be registered is expressed in a currency other than the currency of Nigeria, such judgment shall be registered as if it were a judgment for such sum in the currency of Nigeria, based on the rate of exchange prevailing at the date of the judgment of the original court equivalent to the sum awarded. The registering court will, in addition to the original judgment sum, award interest and also reasonable costs of and incidental to registration, including the costs of obtaining a certified true copy of the judgment from the original court. This is, however, applicable only to judgments of countries in respect of which the Minister of Justice has extended Part 1 of the 2004 Act. For judgments registered pursuant to section 10(a) of the 2004 Act or judgments registered pursuant to the 1958 Act, the foreign judgment may be registered and enforced in foreign currency.

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26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

A party may appeal to a higher court, in this case the Court of Appeal, against a decision recognising and enforcing a foreign judgment. The appeal process is distinct from the process of setting aside the recognition and enforcement of the foreign judgment that is made at the High Court before which the judgment is first sought to be recognised and enforced. Where the High Court has made a final order recognising the award, the judgment debtor may thereafter appeal to the Court of Appeal seeking to set aside the order of the High Court.

Where a foreign judgment has been registered and an appeal is pending, the Court of Appeal in *Purification Tech v A-G Lagos State* (2004) 9 NWLR Part 879, page 665 held that the existence of an order of stay of execution of judgment does not preclude a judgment creditor from seeking to use garnishee proceedings to enforce judgment. This suggests, therefore, that the judgment creditor may apply for a garnishee order attaching sums of money due to the judgment debtor from third parties, which in Nigeria are mostly commercial banks, in the face of a pending appeal and application for stay. The judgment creditor may also apply for a post-judgment *Mareva* order of injunction that freezes the judgment debtor's accounts pending the hearing and determination of the appeal. This effectively freezes the bank accounts of the judgment debtor or restrains him or her from moving his or her assets outside the jurisdiction or dissipating them below the adjudged sum within the jurisdiction.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once registered, the foreign judgment shall for the purpose of execution be of the same force and effect as a judgment of a superior court of record in Nigeria. Proceedings may be taken on the registered judgment, the sum for which the judgment is registered shall carry interest and the registering

court shall have the same control over the execution of a registered judgment as if the judgment had been originally given in the registering court and entered on the date of registration.

After registering, all the processes by which a judgment of a superior court may be enforced in Nigeria are available to the enforcement of a foreign judgment. They include, but are not limited to, writs of attachment of real and personal property (moveable and immoveable), garnishee proceedings and attachment of the person of the judgment debtor to prison where he or she is unable to pay the debt after other means of enforcement have failed. A judgment creditor may also apply to the court for the issuance of judgment summons and writ of sequestration in order to enforce the registered judgment.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

The most common pitfall is where a defendant ignores a foreign court process that eventually results in a judgment that is sought to be enforced under the provisions of the 1958 Act. The case of *Grosvenor Casinos v Halaoui* (2009) 10 NWLR, Part 1149, page 309 is authority for the principle that a foreign judgment entered against a defendant resident in Nigeria who does not willingly appear in the foreign court or otherwise submit to its jurisdiction is not registrable in Nigeria under the 1958 Act. In such cases, it is better to proceed under sections 9 or 10 of the 2004 Act. Although Part 1 of the 2004 Act provides a limitation period of six years, because that part has not been extended to any country by the Minister of Justice, the limitation period for applying for registration of foreign judgments (except judgments to which section 9 of the 2004 Act applies) is 12 months from the date of such judgment. Frequently, applications for registration of foreign judgments are made outside the limitation period of 12 months without an application for extension of time to the registering court. This usually results in such applications being defeated on a technical basis. Furthermore, applications for registration of foreign judgments are sometimes stalled or slowed down by appeals that may continue for years and reach the Supreme Court of Nigeria, resulting in significant delays.

Switzerland

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Switzerland is party to a number of bilateral and multilateral treaties governing the recognition and enforcement of foreign judgments.

In practice, the most relevant multilateral treaty is the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Lugano Convention, 30 October 2007), entered into by Switzerland and the European Union as well as Denmark, Norway and Iceland. The Lugano Convention entered into force on 1 January 2011 and replaced the former Lugano Convention of 1988, which was in force in Switzerland from 1992 to 2010. The Lugano Convention is, in essence, the equivalent of the Brussels I Regulation of 2001 (Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). In this context, it should be noted that the Lugano Convention has not been amended to mirror the changes made to the Brussels I Regulation by the recast Brussels I Regulation which took effect in January 2015 and there are no plans to amend the Lugano Convention.

Moreover, Switzerland is party to a number of bilateral treaties on recognition and enforcement in civil and commercial matters, in particular, with Germany, Austria, Belgium, Spain, Italy, Liechtenstein, (the former) Czechoslovakia and Sweden.

Generally speaking, Switzerland has traditionally been cautious about entering into treaties on the recognition and enforcement of foreign judgments, particularly in the interest of protecting the position of parties having their domicile or seat in Switzerland. This approach has changed under the Lugano Convention, which provides for broad recognition and enforcement of judgments rendered in a member state of the European Union (including Denmark), Norway or Iceland in Switzerland.

Where there are no applicable treaties, the recognition and enforcement of foreign judgments is governed by the Swiss Private International Law Act (PILA).

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Yes, there is uniformity in the law in this regard throughout Switzerland.

Up until 31 December 2010, Switzerland had as many as 26 different codes of civil procedure (ie, one in each canton). As a result, the procedure of enforcement of foreign judgments differed depending on where enforcement was sought.

As of 1 January 2011, the procedural landscape completely changed; the unified Swiss (federal) Code of Civil Procedure (CCP) entered into force. As a consequence, all enforcement proceedings are now governed by federal law (ie, the CCP and the Debt Collection and Bankruptcy Code (DCBC)).

While the law on procedure is thus uniform, one should bear in mind that the CCP is relatively new, and it will take some time to build a uniform practice throughout the country. Moreover, the judicial organisation of the cantonal courts is regulated by cantonal, not federal, law. In addition, the language in which the proceedings are conducted (and in which

all pleadings need to be made and all written briefs and exhibits need to be filed) depends on what the official language of the court's district is (German, French or Italian). Consequently, the practice of enforcement may still differ from canton to canton.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Sources of law are the applicable international treaty, if any (in particular, the Lugano Convention; see question 1) and statutory law (in particular, the PILA, the CCP and the DCBC). Case law is relevant only for the interpretation of the statutes; it may not overrule legislation.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Switzerland is not a signatory of the Hague Convention. It is unclear whether Switzerland will become a signatory.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Limitation periods are traditionally considered to be an issue of substantive, not procedural, law under Swiss law. There is no specific limitation period for the enforcement of foreign judgments. In essence, a foreign judgment can be enforced in Switzerland as long as it is enforceable in the country where it was rendered (both under the Lugano Convention and under the PILA).

If the law of the country where the judgment was rendered provides for a limitation period for the enforcement of the judgment as such and this period has lapsed, Swiss courts are likely to consider the foreign judgment as non-enforceable.

In addition, the debtor may invoke the exception that the substantive claim that was awarded in the foreign judgment has become time-barred after the judgment was rendered under the (substantive) law which governs the claim.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

The Lugano Convention does not limit the remedies that can be enforced. Any remedy ordered by a foreign court of a Convention member state can therefore be enforced in Switzerland (with the exception of remedies that would be in manifest contradiction to Swiss public order; see question 19). In particular, orders for specific performance can be enforced in Switzerland regardless of whether the defendant was ordered to do something, to refrain from doing something or to tolerate something. Not only

final judgments but also interim injunctions are enforceable under the Lugano Convention.

The situation is different under the PILA (which applies where the Lugano Convention is not applicable): the prevailing view is that, under the PILA, a judgment must be final to be enforceable, so that interim injunctions are not enforceable.

While foreign interim injunctions are, in principle, enforceable under the Lugano Convention, their enforceability can raise complex issues in practice, and there are certain rules developed by the case law of the European Court of Justice (ECJ) to be respected, in particular the ECJ's decisions in *Van Uden* and *Mietz*. As a result, it is generally more difficult to enforce foreign interim injunctions than a final judgment. Moreover, for practical reasons, it may often be the better route to apply for interim injunctions directly in Switzerland than to attempt to enforce a foreign interim injunction.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Generally, a request for enforcement must be filed with the cantonal enforcement court. Since the organisation of the cantonal courts is subject to cantonal law (see question 2), the actual title of the competent court may vary from canton to canton. As a rule, enforcement proceedings are conducted by a single judge or by the president of a district court.

Enforcement can generally be sought in the district in which the debtor is domiciled or has its seat, as well as in the district where enforcement measures are to be taken (eg, where the assets to be frozen are located). In contrast to the law in force up to the end of 2010, Swiss courts may issue freezing orders with effect throughout Switzerland (provided that some assets, or the domicile or seat of the debtor, are within the court's own district).

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Generally, recognition takes place incidentally in other proceedings (ie, even without having initiated specific recognition proceedings); in particular, foreign judgments may be recognised within enforcement proceedings.

Enforcement, on the other hand, requires that a Swiss court has declared the foreign judgment enforceable. As shown below, however, Swiss courts have traditionally accepted that Swiss enforcement proceedings for money claims under the DCBC can be initiated even before a foreign judgment has been declared enforceable in separate proceedings. This applies even within the scope of the Lugano Convention, which would, actually, provide for a specific procedure to be followed in order to declare a foreign judgment enforceable.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

A defendant cannot raise merits-based defences to liability or to the scope of the foreign judgment.

Under the Lugano Convention, there is no room for a review of the merits of a foreign judgment. In practice, enforcement of a foreign judgment can only be prevented if a manifest violation of the public order of Switzerland can be established or if the judgment conflicts with an earlier judgment on the same subject and between the same parties (see questions 19 and 20).

The situation is similar under the PILA. There are, in principle, no merits-based defences subject to public order issues (see question 11).

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

It is disputed whether and under which conditions the debtor may obtain injunctive relief against enforcement proceedings or a declaratory judgment

confirming the non-enforceability of a particular judgment in Switzerland. Much depends on the specific circumstances of the case. Alternatively, one might also consider filing a 'protective letter' as a pre-emptive measure against a looming freezing request regarding certain assets. Such a 'protective letter' is usually in effect for six months, but can be extended. However, the practical impact of a 'protective letter' is rather limited.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

Under the Lugano Convention, a foreign judgment (from a Convention member state) is declared enforceable if the formal requirements of article 53 are met (article 41, Lugano Convention). The party seeking the declaration of enforceability therefore needs to produce the following documents:

- a judgment (given by a court of a member state and falling within the scope of application of the Lugano Convention), to be provided in original or in an authentic copy (article 53, Lugano Convention); and
- the standard form of Annex V satisfying the requirements of article 54 of the Lugano Convention or other documents proving the enforceability of the judgment in the state of origin. In this context, it should be noted that the judgment need not be final in the country of origin (see question 6); it is sufficient that the judgment is enforceable under the laws of the country of origin. Where the enforceability is subject to a security to be provided by the creditor, evidence needs to be provided that such a condition has been met.

In contrast to the old Lugano Convention (in force in Switzerland until 31 December 2010; see question 1), there is no need to provide evidence that the judgment was served on the defendant (see article 47(1), Lugano Convention 1988).

It may be necessary to provide additional documents if the judgment was given in default of appearance of the defendant. In such a case, it must be shown that the defendant was duly served with the documents that instituted the proceedings or with an equivalent document showing that he or she was enabled to arrange for his or her defence (article 34(2), Lugano Convention; see also question 16).

The court can require a translation of the relevant documents in the official language of the place where the enforcement proceedings will take place (ie, German, French or Italian). Such translations need to be certified by a person qualified to do so in one of the member states of the Lugano Convention (article 55(2), Lugano Convention).

In the first stage of the enforcement proceedings, the foreign judgment is declared enforceable without any review under articles 34 and 35 of the Lugano Convention. Even a judgment violating Swiss public policy could therefore be declared enforceable. In this stage of the proceedings, the party against which enforcement is sought is not entitled to file any submission on the enforcement application (article 41, Lugano Convention).

In the second stage of the enforcement proceedings (the appellate proceedings) the defendant may, however, raise one or more of the very limited grounds specified in articles 34 and 35 of the Lugano Convention (see question 9). In particular, he or she may claim that the recognition and enforcement would be manifestly contrary to Swiss public policy (see question 19), that he or she was not able to arrange for his or her defence (see question 16), that enforcing the judgment would be irreconcilable with an earlier judgment between the same parties in Switzerland (the state where enforcement is sought) or with an earlier judgment given in another member state (see question 20), or that the judgment was given in violation of an exclusive jurisdiction under the Lugano Convention (article 35, Lugano Convention).

Additional arguments may be raised by the defendant where enforcement is sought for a judgment that is not yet final (article 46, Lugano Convention). In this context, article 46(2) of the Lugano Convention provides for special rules as to judgments that were given in Ireland or the United Kingdom. In this case, any form of appeal available in the state of origin is treated as an 'ordinary' appeal for the purposes of this article. Accordingly, the Swiss proceedings may be stayed if the deadline for filing an appeal in the UK or in Ireland has not yet expired or if such an appeal has been lodged (without regard to the nature of such an appeal). This particularity often requires special confirmation as to whether additional appeals might be available in the UK or in Ireland against the judgment.

In general, there are only a few cases where arguments under articles 34 and 35 of the Lugano Convention were successfully raised.

Outside the scope of the Lugano Convention, a judgment can be recognised under the PILA if the following (cumulative) conditions are met:

- the foreign court had jurisdiction under the rules of the PILA (see questions 14 and 15);
- the foreign judgment is final (ie, no ordinary appeal can be filed against the foreign judgment) (see question 6);
- the foreign judgment is not obviously irreconcilable with the Swiss public order (see question 19);
- the defendant was properly served or has accepted the jurisdiction of the foreign court (see question 16);
- the procedure leading to the judgment did not violate basic principles of Swiss law, in particular, the defendant was able to exercise its right to be heard; and
- the dispute has not first been pending in Switzerland or has not first been decided by a Swiss court or by a court in a third country the judgment of which could be recognised in Switzerland (see question 20).

Apart from these limited grounds for refusing enforcement of a foreign judgment, there are no further grounds for review (articles 25 and 27, PILA).

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

The factors to be considered for recognition and enforcement of a foreign judgment are exhaustively set forth in the Lugano Convention (or other treaties, if applicable; see question 1) and the PILA respectively. There are no additional non-mandatory factors to be taken into account. In particular, reciprocity is not a condition.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

The foreign judicial proceedings in which the foreign judgment was rendered do not need to be equivalent to Swiss standards.

Only severe violations of due process (amounting to a violation of fundamental principles of Swiss procedural law or violations of the right to be heard) would be an obstacle to the enforcement of a foreign judgment (see question 19).

In a case where the foreign judgment was given in default of appearance of the defendant, it is necessary that the document instituting the proceedings was duly served on the defendant (see question 16).

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

Under the Lugano Convention, Swiss courts are not entitled to review whether the court of a member state of the Lugano Convention had jurisdiction over the defendant, irrespective of whether this court had based its jurisdiction on the Lugano Convention or on its own national law. The Lugano Convention allows for a review of jurisdiction in very limited instances only, for instance, in insurance and consumer cases or where exclusive jurisdiction rules as set forth by article 22 of the Lugano Convention were not complied with.

Judgments from countries other than Lugano Convention member states can, on the other hand, only be recognised and enforced if the foreign court had jurisdiction over the defendant pursuant to the rules set out in the PILA (see question 11).

Under the PILA, the jurisdiction of the foreign court is deemed given if the foreign court's jurisdiction was based on a valid jurisdiction agreement or if the defendant proceeded to the merits without objecting to the jurisdiction. In addition, a foreign decision relating to the law of obligations (eg, commercial matters) is recognised in Switzerland if it was rendered in the state of the defendant's domicile or his or her habitual residence, insofar as the claims relate to an activity carried out in such a state (article 149, PILA), whereby 'domicile' refers to the state where the defendant resides with the intent of establishing permanent residence (article 20(1)(a), PILA), while 'habitual residence' refers to the place where the defendant lives during a certain period of time, even if this period initially appears to be

of a limited duration (article 20(1)(b), PILA). For companies, the registered office is equivalent to domicile (article 21(1), PILA) and the company's registered office is located at a place designated in the by-laws or in the articles of association or where the company is in fact managed if no such place is designated (article 21(2), PILA).

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

As outlined in question 14, the Lugano Convention prohibits the review of the jurisdiction of a court in a member state.

For judgments that are outside the scope of application of the Lugano Convention, the provisions of the PILA apply. Accordingly, foreign decisions are recognised if the court had personal jurisdiction (see question 14) or in the following circumstances:

- in contractual matters – if the judgment was rendered in the state of performance (unless the defendant was domiciled in Switzerland);
- for claims arising out of the operation of a branch – if the decision was rendered at the location of such place of business;
- if the decision pertains to unjust enrichment – if it was rendered at a place where the act or the enrichment occurred (provided that the defendant was not domiciled in Switzerland);
- if the decision pertains to an obligation in tort – if it was rendered at a place where the harmful act or the result occurred (unless the defendant was domiciled in Switzerland);
- for claims under an employment contract – if it was either rendered at a place of the enterprise or at the place of work (provided that the employee was not domiciled in Switzerland); and
- for decisions relating to a consumer contract – if the decision was rendered at a consumer's domicile or a habitual residence and if additional requirements are met.

As can be seen from the above, foreign judgments are, as a rule, only recognised and enforced if the foreign court had a specific and close connection to the dispute and if the defendant was not domiciled in Switzerland. Accordingly, in order to be able to enforce a claim against a resident in Switzerland, one must usually bring an action in Switzerland or in another European country.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

In principle, the defendant must have been formally served in compliance with all applicable rules (in particular, the Hague Convention on the Service of Judicial Documents Abroad). Actual notice of the foreign proceedings is not sufficient (unless the defendant has accepted the jurisdiction of the foreign court).

In the case of a judgment given in default of appearance of the defendant, even minor formal shortcomings in service may make it impossible to have the resulting judgment enforced in Switzerland if enforcement is sought under the PILA. Under the Lugano Convention, the position is less strict. Rather than referring to a formal test, article 34(2), Lugano Convention only requires original service on the defendant to have been effected 'in sufficient time and in such a way as to enable him or her to arrange for his or her defence'. In contrast to most countries, the defendant may in Switzerland raise the objection that he or she was not timely served even if he or she could have challenged the original judgment (article 34(2), Lugano Convention). This is because Switzerland declared a reservation in this regard. Consequently, a default judgment cannot be enforced in Switzerland if the defendant was not timely served in the first place, even if he or she could have appealed against the decision in the country of origin. This needs to be taken into account early on in the proceedings; the claimant should make sure that the defendant was properly served.

Switzerland takes a very formal stance on proper service. Service of judicial documents in connection with foreign proceedings on parties in Switzerland must be done in strict accordance with the Hague Convention. Service in Switzerland also requires translation of the document to the

Update and trends

In a decision of 13 April 2016, the Swiss Federal Supreme Court confirmed, in relation to the enforcement of a judgment given in default of appearance of the defendant, that actual notice of the foreign proceedings is not sufficient. Instead, the document instituting the proceedings (eg, the claim form) needs to be served in accordance with the formal requirements applicable at the place of domicile of the defendant (see also question 16).

official language of the place where service is to be performed (ie, German, French or Italian).

Any attempt to serve parties in Switzerland in non-compliance with the Hague Convention is, from a Swiss law point of view, invalid and will make it impossible or at least difficult to have a resulting judgment enforced in Switzerland. In addition, such an attempt may constitute a criminal offence under article 271 of the Swiss Penal Code ('blocking statute').

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Inconvenience of the foreign jurisdiction to the defendant is not a basis for declining to enforce a foreign judgment. The issue is whether the foreign court had jurisdiction (see questions 14 and 15). If it had jurisdiction, the foreign judgment is to be recognised and enforced, regardless of whether the foreign jurisdiction was inconvenient for any reason whatsoever.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

In general, no. Both under the Lugano Convention and national law, the foreign judgment will not be examined as to allegations of fraud as such. If, however, fraud amounts to a manifest violation of Swiss public policy, it may become relevant under the Lugano Convention as well as under the PILA (see question 19).

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Violation of Swiss public policy is a ground for refusal of recognition and enforcement under the Lugano Convention (article 34(1)) as well as under national law (in particular, article 27, PILA). A further review of the foreign decision is excluded, with the exceptions outlined in questions 14, 15 and 20, as well as with regard to proper service (see question 16).

The concept of 'public order' is, similar to other jurisdictions, relatively vague. One important aspect of public policy is the fairness of the foreign proceedings (in particular, that the parties had ample opportunity to present their case). In addition to the formal requirements to be met by the foreign decision, there are also material restrictions as to the content of the foreign judgment. In particular, Swiss courts have consistently refused to enforce punitive damages awarded by foreign judgments, based on the argument that such damages would be contrary to Swiss public order (see also question 24).

Apart from these limited exceptions, the foreign judgment cannot be reviewed as to its substance. Accordingly, consistency with the substantive laws of Switzerland is, in general, not required and the Swiss court is not entitled to examine the foreign judgment in this regard.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

A judgment from a Lugano Convention member state cannot be recognised and enforced in Switzerland if it is in conflict with an earlier judgment in the same cause of action and between the same parties, provided

that this earlier judgment could be recognised in Switzerland (article 34(4), Lugano Convention).

The same applies for judgments from jurisdictions other than Lugano Convention member states (ie, under the PILA). Here, in addition, recognition of a decision must also be denied if the dispute between the same parties and with respect to the same subject matter is pending before a Swiss court. In other words, the Swiss court does not need to have rendered its decision yet in order to prevent enforcement of a foreign judgment. By initiating Swiss proceedings, one may therefore prevent the recognition or enforcement of a foreign award in the same matter.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

Enforcement of a judgment against a party other than the named judgment debtor (or its assignors or successors) is possible under exceptional circumstances only. Third-party assets, namely, assets formally held by a third party, may be subject to a freezing order and eventually seized if a prima facie case can be made that they actually belong to the judgment debtor and that relying on the third-party ownership would be abusive or that the third-party ownership is fraudulently alleged.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

Under the Lugano Convention, non-compliance with an enforceable agreement to use alternative dispute resolution does not constitute a reason for not enforcing a foreign judgment.

Under the PILA, it would depend on the nature of the ADR agreement and the circumstances. In the case of a valid agreement to arbitrate, a Swiss court is likely to deny enforceability of a state court judgment.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

While the enforcement process for judgments from Lugano Convention member states may be simpler, no greater deference is generally given to judgments from certain jurisdictions.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

A Swiss court may decide to declare only a part of the foreign judgment enforceable. Article 48 of the Lugano Convention provides that judgments given in respect of several matters do not need to be enforced entirely. Enforceability can be declared for one matter or more than one matter. In addition, an applicant may confine his or her request on the declaration of enforceability of only parts of the judgment (article 48, Lugano Convention).

The same applies under the PILA. In particular, a foreign judgment awarding punitive damages can be enforced only insofar as damages would also be compensated under Swiss law. Accordingly, the enforcement of a judgment also awarding punitive damages is not entirely excluded in Switzerland even if enforcing the full award would constitute a violation of Swiss public policy (see question 19).

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

The foreign judgment is not altered and the rate of interest is entirely governed by the foreign judgment (or the law applicable on the merits).

For technical reasons, the Swiss enforcement system (under the DCBC) requires the creditor to convert the claim into Swiss currency when he or she seeks enforcement. However, such conversion does not alter the fact that the debtor is, in principle, liable to pay the requested amount in the currency in which the claim was awarded.

As to foreign exchange controls, the situation is more complex. The PILA allows the taking into consideration of foreign provisions that are mandatorily applicable. Depending on the circumstances, such exchange control regulations may therefore also be of relevance in enforcement proceedings.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Under the Lugano Convention, the decision to declare a foreign judgment enforceable may be appealed (article 43). The appellate court can refuse to enforce the foreign judgment only on one of the grounds specified in articles 34 and 35 of the Lugano Convention or if procedural requirements were not met.

Despite the fact that article 47(2) of the Lugano Convention provides for a right to proceed to protective measures as soon as the judgment has been declared enforceable, Swiss courts refuse to grant freezing orders unless the applicant can provide prima facie evidence that there are assets in Switzerland that belong to the defendant. These requirements may have been somewhat lowered by the revised Lugano Convention, but the creditor is still required to specify the assets that should be frozen. If the applicant is not in a position to do so, no provisional measures will be granted. Accordingly, an applicant wishing to freeze certain assets would need to obtain evidence as to assets belonging to the defendant.

In general, the situation is similar under the PILA.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Under Swiss law, there are basically two possibilities to declare a foreign judgment enforceable. First there is the 'ordinary' route, as defined by the Lugano Convention itself (ie, requesting a separate declaration of enforceability). Secondly, a judgment (awarding a monetary claim) can also be

declared enforceable within the framework of ordinary debt collection proceedings (more specifically, within the procedure to set aside the debtor's objection to the summons to pay). In the latter case, the proceedings are to a large extent governed by Swiss national law (rather than the Convention).

Generally, we believe that this alternative is being used more frequently in Switzerland than the 'ordinary' route as set forth by the Lugano Convention (and similarly by the PILA). One important reason for this is that the risk is limited; an unsuccessful attempt to enforce a judgment within these proceedings does not have a res judicata effect (while the situation is less clear under the Lugano Convention), so a creditor is not prevented from bringing the enforcement request again at a later stage. Additionally, this alternative can be faster (given that debt collection proceedings need to be initiated anyway at some stage and given that an appeal in the debt collection proceedings does not have suspensive effect).

The creditor can, of course, also choose to follow the path defined by the Lugano Convention, in which case the local enforcement process follows the declaration of enforceability.

For historical reasons, the enforcement process for money claims is different to the enforcement of other claims. Money claims are enforced in debt collection proceedings (which are initiated by requesting a summons to pay). If the debtor objects to the summons to pay, such an objection needs to be set aside in summary proceedings in which the debtor can raise very limited arguments only (such as payment of the debt, that the claim is time-barred or that the creditor agreed to a deferral of the payment date). Afterwards, and depending on the status of the debtor, the enforcement process is continued by the opening of bankruptcy proceedings or by the seizure of particular assets and the income of the debtor.

For other claims, the court declaring the foreign judgment enforceable would usually also determine how these claims are to be enforced.

Option to freeze assets

The request to declare the judgment enforceable can be combined with the request to freeze certain assets in Switzerland, be it during the enforceability proceedings or after the judgment has been declared enforceable (see question 26).

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Perhaps not the most common, but arguably the most dangerous, pitfall in seeking recognition and enforcement in Switzerland might be article 271 of the Swiss Penal Code (see question 16).

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

Other than the multilateral treaties on family law, Turkey is not a signatory to multilateral treaties for the reciprocal recognition and enforcement of foreign judgments. However, Turkey is party to conventions such as the Convention on the Contract for the International Carriage of Goods by Road (CMR) and Convention concerning International Carriage by Rail (COTIF) which contain provisions for recognition and enforcement of foreign judgments, but only for disputes in relation to the application of aforementioned conventions.

However, Turkey has entered into bilateral treaties with Albania, Algeria, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, China, Croatia, Egypt, Georgia, Iran, Iraq, Italy, Kazakhstan, Kuwait, Kyrgyzstan, Lithuania, Macedonia, Moldova, Mongolia, Oman, Poland, Republic of Turkish Northern Cyprus, Romania, Slovakia, Tajikistan, Tunisia, Turkmenistan, Ukraine and Uzbekistan for the reciprocal recognition and enforcement of foreign judgments and judicial assistance in respect of commercial and civil matters.

Other than these treaties, Turkish courts recognise and enforce the judgments of many countries, such as Germany, the United Kingdom and the United States, on the basis of de facto reciprocity between these countries and Turkey. Please note that the evaluation of de facto reciprocity is conducted on a state-by-state basis for the United States.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

There is uniformity in the law on the enforcement of foreign judgments among different jurisdictions in Turkey.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The Act on Private International Law and International Procedural Law (PIL) No. 5718 dated 27 November 2007 is the main legislation that regulates recognition and enforcement of foreign judgments.

By virtue of article 90 of the Turkish Constitution, international agreements duly put into effect bear the force of law. Therefore, relevant international agreements also constitute a source of law regarding the enforcement of foreign judgments.

Precedents of the court of appeals are also important. However, in principle the precedents of the court of appeals are not binding in Turkish law apart from the decisions on the unification of conflicting judgments.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Turkey is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Under Turkish law, there is no specific limitation period for the enforcement of a foreign judgment. However, article 8 of the PIL regulates the statute of limitations for legal transactions and relationships that carry foreign elements. According to this article, the statute of limitations is subject to the law applicable to the legal transaction or relationship. The court of appeals in its various decisions has stated that limitation periods are not related to public order and provisions of foreign law should be applicable on this issue (Court of Appeals 4th Chamber, Merit No. 2003/10163, Decision No. 2004/1408 and Court of Appeals 11th Chamber, Merit No. 1998/383, Decision No. 1998/3945).

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Pursuant to article 50 of the PIL, foreign judgments regarding civil law matters are enforceable as long as they are final under the laws of the foreign country.

The bilateral treaties between Turkey and Italy as well as Turkey and Tunisia set forth that only foreign judgments that are unappealable and enforceable under the laws of a foreign country can be enforced.

In addition to the matters determined in article 50 of the PIL, it has been opined that not only judgments rendered by civil courts but also the decisions rendered by the administrative courts are enforceable, provided that they are in relation to civil law matters.

The enforcement of interim injunctions is not regulated under the PIL. With reference to article 50 of the PIL, in Turkey there is a view that interim decisions will only be enforceable provided that the dispute is finally resolved by the foreign court with these interim decisions. However, there is also the opinion that, in practice, the interim injunctions are not enforceable under Turkish law since they are not final decisions.

Article 50 of the PIL further sets forth that foreign judgments that are rendered by criminal courts with regard to personal rights are enforceable as well.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Cases seeking enforcement of foreign judgments must be brought in a particular court. Article 51 of the PIL regulates the competent courts for enforcement of foreign judgments. According to this article, the civil courts of first instance are competent for the enforcement of foreign judgments. Nevertheless, there is no unity in practice, as some civil courts of first instance reject the applications due to lack of jurisdiction and send the file to the relevant commercial, intellectual property or labour courts.

Article 51 of the PIL also regulates the jurisdiction of the courts. Pursuant to this article, the case seeking enforcement of a foreign judgment must be filed before the court where the debtor is domiciled. If there is no domicile address for the debtor, then the case can be filed before the court where the debtor has his or her domicile. If none of these exist, the case can be filed before the courts at Ankara, Istanbul or Izmir.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

The process for obtaining judicial recognition for a foreign judgment is almost the same as the process for enforcement. However, contractual or de facto reciprocity is not required for the recognition of a foreign judgment (see below for detailed explanations on requirements of recognition and enforcement).

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

Under Turkish law, defendants cannot raise merits-based defences. Pursuant to article 55 of the PIL the defendant is limited to narrow grounds for challenging a foreign judgment.

Pursuant to articles 54 and 55 of the PIL the defendant may challenge the foreign judgment by alleging that:

- there is no contractual or de facto reciprocity;
- the judgment is on an issue subject to the exclusive jurisdiction of the courts;
- the foreign judgment is rendered by a court unrelated to the matter in dispute and the parties;
- the judgment violates Turkish public order;
- the foreign court did not respect the right of defence of the party against whom the judgment is requested to be enforced in Turkey;
- the foreign judgment is not final under the laws of the foreign country;
- there is a ground preventing the enforcement of the foreign judgment (eg, a reason for the restitution of the judgment (see the explanation under question 18)); or
- the foreign judgment has been already wholly or partially executed.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

No, a party cannot obtain injunctive relief to prevent foreign judgment enforcement proceedings. The decisions that can be given by the enforcing court are regulated under article 56 of the PIL and, according to this article, the court can either accept or dismiss the enforcing of the foreign judgment. In this regard, the court cannot grant injunctive relief to prevent foreign judgment enforcement proceedings.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

The requirements for recognition of a foreign judgment are regulated under articles 54 to 58 of the PIL and can be summarised as follows:

- the foreign court must have respected the right of defence of the party against whom the judgment is requested to be enforced in Turkey;

- the foreign judgment must be final under the laws of the foreign country;
- the foreign judgment should not be on an issue subject to the exclusive jurisdiction of the Turkish courts; and
- the foreign judgment must be in compliance with Turkish public order.

If these conditions are met, the court will decide for the recognition of a foreign judgment.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

There is no non-mandatory factor. As explained in question 11, the factors for recognition of a foreign judgment are explicitly regulated in articles 54 to 58 of the PIL.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

There is no other requirement of procedural equivalence. However, foreign judgments that violate Turkish public order cannot be recognised or enforced.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

Turkish law does not recognise the concept of personal jurisdiction, and therefore the enforcing court does not conduct such an examination.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

According to article 54 of the PIL, upon the objection of the defendant, the Turkish court will examine the jurisdiction of the foreign court over the controversy. The court, upon the objection of the defendant, will examine whether or not the judgment was granted by the court of a country that considered it competent although it has no actual relation either with the matter in dispute or the parties. Thus, the Turkish court shall not ex officio examine the subject-matter jurisdiction of the foreign court except upon the objection of the defendant. If the foreign court has no jurisdiction over the defendant, the foreign judgment cannot be enforced.

According to the same article, the court will ex officio examine whether the judgment is given on an issue that is under the exclusive jurisdiction of Turkish courts.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

Pursuant to article 54 of the PIL, the defendant must be properly served with the original action in the foreign jurisdiction. Also, there is an opinion that all procedures made during the action should be duly served, since this is part of a fair trial. Therefore, the notice of the original action should also be formally served.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

The court will not conduct a fairness examination on the foreign judgment. The court's examination will be limited to the enforcement requirements determined in articles 54 and 55 of the PIL. However, intervention of the court will come into question if the judgment violates Turkish public order.

Update and trends

A burden which parties mostly encounter when applying for the enforcement of a foreign decision is court fees. It is argued whether the claimant should pay proportional court fees or fixed court fees. Different Chambers of the Court of Appeals adopt different approaches. However, in a recent decision dated 31 March 2016, the Court of Appeals ruled that the claimant should pay proportional court fees amounting to 6.831 per cent of the amount in dispute. Thus claimants should take into account that they can pay proportional court fees while they are applying for the enforcement of a foreign decision in Turkey.

As explained before, the foreign judgment must be in compliance with Turkish public order.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

The vitiating of the foreign judgment by fraud is not regulated under the PIL.

However, pursuant to the judgment of the Second Chamber of Court of Appeals dated 15 November 1984 (Merit No. 1984/9293 and Decision No. 1984/9484), the reasons for the restitution of the judgment constitute a breach of the public order.

The reasons for the restitution of the judgment are regulated under the Turkish Procedural Code. According to the Procedural Code, if the judgment is affected because of the fraudulent acts of the winning party, this constitutes a reason for the restitution of a judgment. In this regard, it can be concluded that the court will ex officio examine the foreign judgment in terms of fraud.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

In principle, the court will not examine the foreign judgment for consistency with substantive laws. However, the foreign judgment should not be on an issue subjected to the exclusive jurisdiction of the Turkish courts, such as cases arising from immovables' right in rem as well as in cases arising from consumer or insurance agreements.

With regard to public policy, the Turkish court will ex officio examine whether enforcement of foreign judgment violates Turkish public order or not. The foreign judgment cannot be enforced if it violates the Turkish public order.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Enforcement of the conflicting decisions is not regulated under the PIL. However, there is an opinion that if the foreign judgment is in conflict with another final and conclusive judgment, the foreign judgment cannot be enforced by the Turkish court. It should be noted that, in order to speak of conflicting decisions, the parties and the subject matter of the foreign judgment must be the same as in the final and conclusive judgment. The final and conclusive judgment can be either the Turkish court's judgment or another foreign judgment that had already been recognised or enforced by the Turkish court.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

No, the Turkish court cannot enforce a judgment against a party other than the named judgment debtor. As a general principle, the judgments are binding only for the parties in the dispute.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

There is no explicit provision in the PIL on this issue. In the decision of Kadikoy, 4th Commercial Court dated 17 June 2008 (Merit No. 2007/1020 and Decision No. 2008/386) the court rejected the defendant's objections regarding alternative dispute resolution on the basis of the following grounds:

There is no dispute that the Uzbekistan judgment becomes final and conclusive after the appeal process in Uzbekistan where the defendant submitted his arbitration objection. Thus the final and conclusive judgment containing no provisions which may violate the Turkish public order should be enforced since all requirements stated in article 54 of the PIL were met.

Although the Turkish court of appeals has not discussed this issue until now, provided that the conditions of the enforcement have been met, it is highly likely that they will accept enforcing the judgment disregarding the parties' objections as to an agreement on alternative dispute resolution on the basis that the foreign court should have evaluated the alternative dispute resolution matters.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

Turkey does not give greater deference to some foreign jurisdictions. However, it should be noted that determination of de facto reciprocity may take longer since the courts sometimes prefer to confirm the reciprocity with the Turkish Ministry of Justice.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

The Turkish court examines a foreign judgment in order to determine whether the requirements for enforcement are met or not. The court may decide to enforce the foreign judgment as a whole or in part as per article 56 of the PIL.

However, the court may not alter or limit the damage award as long as the award does not violate Turkish public order. It should be noted that there is an opinion that, due to their nature, punitive damages are considered incompatible with the principles of Turkish liability law and Turkish public order. Similarly, damages exceeding actual loss are considered incompatible with Turkish public order.

It should also be noted that, pursuant to opinion, if the claimant requests only a part of the judgment to be enforced, the said part will be enforced by the court.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Turkish courts do not convert the damage award into local currency. However, during the collection process, the debtor may prefer to make the payment in Turkish liras. The court costs and the official attorneys' fees, which will be determined in favour of the successful party according to the annual tariff of the Turkish Bar Association, will be in local currency.

With regard to interest, it should be noted that the interest rate determined in the foreign judgment shall be applied until the collection procedure in Turkey.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Pursuant to article 57 of the PIL, court decisions regarding the recognition or enforcement of a foreign judgment can be appealed as per the general provisions of the Turkish Procedural Code.

Under Turkish law, the courts first render their short decisions. After two or three weeks reasoned decisions are issued. The civil court's decision can be appealed within two weeks as of the notification of the reasoned decision before the regional appellate courts. The parties are also entitled to appeal the decision rendered by the regional appellate courts before the court of appeal within one month of the notification of the regional appellate courts' decision.

The appeal process prevents the execution of the Turkish court's decision regarding the enforcement of the foreign judgment. In other words, the foreign judgment cannot be executed until the Turkish court's decision regarding the enforcement of a foreign judgment becomes final and unappealable.

It should also be noted that if the debtor does not comply with the Turkish court's decision regarding the enforcement of the foreign judgment, the claimant can have the decision executed by application to the bailiff's office. The debtor must comply with the executive order within seven days of the notification. Otherwise, the claimant can apply for the attachment of the assets that the debtor may have.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Under Turkish law, the recognition and enforcement of a foreign judgment are regulated separately. In principle, the enforceable judgments can be enforced whereas the determination judgments can be recognised. The party can request an enforceable judgment to be recognised as well. However, in such a case the party cannot enforce this judgment. The recognised judgment can be used as conclusive evidence and decision.

The process of enforcement of a foreign judgment is regulated under articles 50 to 57 of the PIL.

The claimant must file a case for enforcement of a foreign judgment before the civil court of first instance that has jurisdiction.

The plaintiff petition must include:

- the names and addresses of the parties and their attorneys if any;
- the country, court, date, number and the summary of the judgment; and
- the claimant's request of the said part if only a part of the judgment is to be enforced.

The original or the approved copy of the judgment, the approved letter that shows that the judgment is final and their approved translations must be attached to the plaintiff petition.

The requirements for the enforcement of a foreign judgment are as follows:

- contractual or de facto reciprocity;
- the foreign court must have respected the right of defence of the party against whom the judgment is requested to be enforced in Turkey;
- the foreign judgment court must be final under the laws of the foreign country;
- the foreign judgment should not be on an issue subjected to the exclusive jurisdiction of the Turkish courts; and
- the foreign judgment should not violate the Turkish public order.

If these conditions are met, the court will grant enforcement of the foreign judgment.

As explained above, once the enforcement decision granted by the court becomes final and binding, the plaintiff can make an application to the bailiff's office and request the office to send an execution order to the defendant. The defendant must comply with the execution order within seven days. If the defendant fails to perform according to the execution order, the claimant can apply for the attachment of the assets that the debtor may have.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

One of the most common pitfalls is the length of the proceedings. In practice, recognition or enforcement of a foreign judgment would take around three months to one year, excluding the appeal, which takes around six to 18 months. The parties are also entitled to ask for a revision of the decision. The review of the court of appeal judgment takes a further six months.

Public order is another common pitfall, since the laws do not regulate the definition of the public order. In principle, Turkish public order is and shall be interpreted narrowly by the courts, and in this respect only the judgments that contradict indispensable and essential Turkish legal principles are considered as violating Turkish public order.

There have been court of appeal precedents stating that judgments, where there is no discussion of reasoning, cannot be enforced, since they do not enable the courts to assess the requirements for enforcement and therefore breach Turkish public order. For example, summary judgments under common law have been problematic with respect to recognition and enforcement. Nevertheless, the decision of the Joint Chambers of the Court of Appeals, dated 10 February 2012, merits No. 2010/1, decision No. 2012/1, stated that the mere fact that a foreign decision is lacking reasoning does not prevent that decision from being enforced. Decisions rendered by the Joint Chambers of the Court of Appeals are binding on other chambers of the appeal court as well as the local (ie, first instance) courts. Thus, the recognition or enforcement of a foreign judgment can no longer be denied due to the violation of Turkish public order only because the judgment does not include a discussion of reasoning.

Contractual or de facto reciprocity can be another pitfall for the enforcement of a foreign judgment. Although Turkey has signed bilateral

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treaties with 30 countries, there are still many countries whose decisions cannot be enforced in Turkey due to the principle of reciprocity.

Furthermore, the competent court issue is also one of the pitfalls. Although civil courts of first instance are competent for the enforcement of foreign judgments, there is no unity in practice as some civil courts of first instance reject the applications due to lack of jurisdiction and send the file to the relevant commercial, intellectual property or labour courts. There is also no unity in the precedents of the Court of Appeals and this

fact affects the length of the proceedings. For instance, for disputes arising from intellectual property law, according to some precedents of the Court of Appeals, intellectual property courts are the competent courts, whereas other precedents indicate commercial courts as the competent courts. In those cases, there is a risk that the court may reject the case due to lack of competence and the counterparty may appeal this decision to prolong the proceedings.

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

The law pertaining to recognition and enforcement of foreign judgments in the UK can be found in a number of different sources, including treaties, statutes and the common law. The application of the law depends primarily on the jurisdiction whose courts have issued the foreign judgment ('original' judgment or court), as well as the date of issue and subject matter of the foreign proceedings. Further details on non-treaty sources of law can be found in question 3. The UK comprises three separate court systems in England and Wales, Scotland and Northern Ireland. While the treaty obligations and the key relevant statutes apply equally to all three jurisdictions, the common law and applicable procedure may vary. This chapter focuses primarily on the law and procedure of England and Wales.

Recognition and enforcement of judgments

The UK is party to treaty-based schemes for the enforcement of judgments as a member of the European Union and the European Economic Area.

The Recast Brussels Regulation Council Regulation (EC) 1215/2010 (the Recast Regulation), which reformed the Brussels I Regulation, Council Regulation (EC) 44/2001, provides for the speedy and simplified enforcement of judgments obtained in the courts of one member state in all other member states. The Recast Regulation came into force on 10 January 2015 and applies to any case brought on or after that date (Brussels I will continue to apply to any case which was brought prior to 10 January 2015). The Recast Regulation (and as applicable the Brussels I Regulation) applies to orders of courts and tribunals of any nature in civil and commercial matters, with the exception that it specifically excludes revenue, customs and administrative law matters. It also does not apply to orders pertaining to matrimonial relationships, wills, succession, bankruptcy, social security or arbitration. Judicial decisions on the Recast Regulation and the Brussels I Regulation by the Court of Justice of the European Union (CJEU) are binding on member states. Under both the Recast Regulation and the Brussels I Regulation the default rule on jurisdiction applies, meaning that if a defendant is domiciled in an EU member state such as the UK, he or she must be sued in the UK unless the claim falls into one of the exceptions listed in the instrument. For example, in tort actions the defendant may be sued where the harmful event took place and in contract cases the jurisdiction where the contract is to be performed.

Judgments covered by the Brussels I Regulation first need to be registered in the part of the UK (England and Wales, Scotland or Northern Ireland) in which enforcement will be sought, by way of an application for registration (registration is referred to in many of the EU/EEA instruments as obtaining a declaration of enforceability). This process is known as *exequatur*. A defendant may object on grounds that the original court lacked jurisdiction to hear the matter (the Brussels I Regulation contains detailed provisions in that regard); if recognition and enforcement would be manifestly contrary to UK public policy; if the defendant was not served with proceedings in time to enable them to prepare a proper defence; or if conflicting judgments exist in the UK or other member states. However, the Recast Regulation abolishes this procedure and article 39 of the Recast Regulation provides that a judgment that has been given in a member

state and enforceable in that member state shall be enforceable in the other member state without the need for a declaration of enforceability. However, as described more fully at questions 9, 19 and 20, below, an application can be made for the courts of the relevant member state to refuse enforcement by the party against whom enforcement is sought if the enforcement would be manifestly contrary to UK public policy; if the defendant was not served with proceedings in time to enable them to prepare a proper defence; or if conflicting judgments exist in the UK or other member states.

Insofar as matters within the scope of the Recast Regulation and the Brussels I Regulation are concerned, they supersede the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968. This is also true for the following member states: Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Cyprus, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Ireland, Romania, Slovakia, Slovenia, Spain and Sweden. The two Regulations also supersede a number of bilateral enforcement treaties which the UK had previously entered into with other member states. The Brussels Convention continues to apply between a limited number of territories and EU member states. The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (in force since 2010 and replacing the previous Convention of the same name) applies to enforcement of judgments given in Iceland, Norway and Switzerland on substantially similar terms to the Brussels I Regulation.

The European system also includes three procedures aimed at simplifying and speeding up the process and reducing the cost of recognition and enforcement. Where these procedures are used, the resulting judgments can be enforced without the need for further registration in other member states.

Where a judgment for a specific sum of money has been obtained in uncontested proceedings, meaning the debtor has admitted to liability, failed to object or failed to appear, the judgment can be certified by the issuing court under the European Enforcement Order Regulation (No. 805/2004) (EEO Regulation). The certified judgment can then be recognised and enforced in other member states with little possibility of the defendant opposing its enforcement, except in the case of conflicting judgments. The EEO Regulation applies to judgments given after 21 January 2005 and requires that certain minimum procedural standards be met prior to certification. The EEO Regulation's application is limited to contracts concluded between certain classes of parties; the CJEU has previously held that the EEO Regulation does not apply to contracts between two persons who are not engaged in commercial or professional activities; see *Vapenik v Thurner* (Case C-508/12) [2013] CJEU (5 December 2013).

As an alternative, where a civil or commercial claim does not exceed €2,000, excluding interest, expenses and disbursements, cross-border claims may be brought under the simplified procedure laid down in Regulation (EC) 861/2007 (Small Claims Procedure). From 14 July 2017 this limit will increase to €5,000.

A third avenue exists in the European Order for Payment Procedure (EOP Procedure) under Regulation (EC) No. 1896/2006 (as amended by 936/2012). The EOP Procedure provides standardised forms and procedures for pursuing uncontested money debts, without imposing any maximum value. Judgments given under the Small Claims or EOP Procedures are enforceable in other member states without the need to first be certified or registered. In Case C-215/11, *Szyrocka v SiGer Technologie GmbH*

(2012) ECR Page 00000 (2012), All ER (D) 172 (Dec), the CJEU gave its first ruling on the EOP Procedure, clarifying that although national courts are not permitted to impose additional requirements for an EOP Procedure, they remain free to determine the amount of court fees applicable. It also found that the claimant is able to claim all interest accrued up to the date of payment of the claim. All of the EEO Regulation, Small Claims and EOP Procedures lay down subject-matter and tribunal exceptions, which are similar but with slight differences to those found in the Regulation. The three procedures apply among all member states with the exception of Denmark.

The EU has signed and ratified the 2005 Hague Convention on Choice of Court Agreements (the 2005 Hague Convention) on behalf of all EU member states other than Denmark. The 2005 Hague Convention came into force as between the EU and Mexico on 1 October 2015 and will come into force as between the EU and Singapore on 1 October 2016. It has been implemented in UK law by an amendment to the Civil Jurisdiction and Judgments Act 1982 (CJJA).

The 2005 Hague Convention applies to judgments on the merits in civil and commercial matters where there is an exclusive choice of court agreement in place (unless one party is a natural person who is acting for primarily personal, family or household purposes). Such an agreement must be in writing or otherwise in a manner that renders it accessible for subsequent reference.

The 2005 Hague Convention specifically excludes a number of matters, namely: the status and legal capacity of natural persons, maintenance obligations, family law matters, wills and succession, insolvency, composition and analogous proceedings, the carriage of passengers and goods, certain maritime/shipping matters, competition matters, liability for nuclear damage, claims for personal injury brought by or on behalf of natural persons, tort or delict claims for damage to tangible property not arising from a contractual relationship, rights in rem and tenancies of immovable property, validity or nullity or dissolution of legal persons and the validity of decisions of their organs, validity of intellectual property rights other than copyright or related rights, infringement of intellectual property rights other than copyright and related rights unless proceedings could also be brought for breach of contract, or the validity of entries in public registers. The EU has also made a declaration under the 2005 Hague Convention that it will not apply to contracts of insurance other than reinsurance contracts, certain large risks arising connected with shipping, aircraft, railway rolling stock or goods used for commercial purposes, policy holders carrying on businesses over a certain size or contracts of insurance between parties domiciled in the same contracting state and conferring jurisdiction on that state even if the harmful event occurred abroad. This reflects the special provisions in relation to insurance which are set out in articles 15 and 16 of the Recast Regulation.

Under the CJJA there is a simple procedure for the recognition of judgments arising from 2005 Hague Convention states. Judgments will be registered for enforcement if they are enforceable or effective in their country of origin. The party against whom judgment is sought is not entitled to make submissions on an application for registration of a 2005 Hague Convention judgment and once registered such a judgment becomes enforceable as if it were a UK judgment. However, appeals can be made against a decision to register a judgment on the grounds that the judgment is not effective or enforceable in its state of origin, the relevant choice of court agreement was null and void, a party lacked capacity under the relevant law to enter into the choice of court agreement, proceedings were not notified to the defendant in a manner that would allow him to organise his defence (unless the defendant appeared and put his case in the original court and did not raise this) or the proceedings were notified to the defendant in the UK in breach of fundamental principles of service in the UK, the judgment was obtained by procedural fraud, enforcement would be manifestly incompatible with public policy in the UK (including if it is incompatible with basic principles of procedural fairness), or the judgment is incompatible either with an earlier judgment given in the UK between the same parties or with an earlier judgment given in another Hague Convention state between the same parties and in the same cause of action.

Subject-matter treaties

The UK is party to a range of subject-matter treaties and conventions that provide for recognition and enforcement of specific types of judgments or awards. These are incorporated into law in the UK by legislation, and the provisions relating to recognition are generally modelled on the Foreign

Judgments (Reciprocal Enforcement) Act 1933 (FJA, see question 3). Examples include the Carriage of Goods by Road Act 1965, the Merchant Shipping Act 1995 and the Civil Aviation Act 1982.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

The law relating to enforcement of foreign judgments is substantively similar across England and Wales, Scotland and Northern Ireland. As noted above, the three jurisdictions have separate court systems with their own procedural rules.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The substantive law on recognition and enforcement of judgments in the UK derives from three key sources. Throughout this chapter we will refer to each in turn, as there are some noteworthy differences in the substantive and procedural requirements for enforcement under each:

- European treaty law: (see question 1) pertaining to the judgments of other EU member states and Iceland, Norway, and Switzerland;
- UK statutes: applying to judgments from specified jurisdictions which have historical or constitutional relationships with the UK or implementing conventions to which the UK is party as a result of its membership of the EU into UK law:
 - the Administration of Justice Act 1920 (AJA) provides for the registration of judgments issued by the superior courts of specified jurisdictions by which a sum of money is made payable, and also lists restrictions on the circumstances in which registration may be granted. Originally enacted to cover the dominions and territories of the Crown, it currently applies to Anguilla, Antigua and Barbuda, Bahamas, Barbados, Belize, Bermuda, Botswana, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Christmas Island, Cocos (Keeling) Islands, Cyprus, Dominica, Falkland Islands, Fiji, The Gambia, Ghana, Grenada, Guyana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, New Zealand, Nigeria, Territory of Norfolk Island, Papua New Guinea, St Christopher and Nevis, St Helena, St Lucia, St Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Solomon Islands, Sovereign base of Akrotiri and Dhekelia in Cyprus, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, Turks and Caicos Islands, Tuvalu, Uganda, Zambia and Zimbabwe;
 - the FJA applies to non-penal money judgments (ie, those not imposing penalties for a crime, exemplary damages or multiple damages (see question 24)) from specified jurisdictions that afford substantially similar reciprocal treatment of UK judgments in their courts. The FJA also extends to some interim and arbitration awards. The FJA currently applies to judgments from Australia, Canada (except Quebec), India, Guernsey, Jersey, Isle of Man, Israel, Pakistan, Suriname and Tonga; and
 - the Civil Jurisdiction and Judgments Act 1982, which incorporated the Brussels and Lugano Conventions and the 2005 Hague Convention (see question 1) into law in the UK.
- common law: relating to recognition and enforcement of judgments applies where the originating jurisdictions do not have applicable treaties in place with the UK, or in the absence of any applicable UK statute. Key examples include judgments of the courts of Brazil, China, Quebec, Russia and the US. At common law, a foreign judgment is not directly enforceable in the UK, but instead will be treated as if it creates a contract debt between the parties. The creditor will need to bring an action in the relevant UK jurisdiction for a simple debt, and summary judgment procedures will usually be available. Any judgment obtained will be enforceable in the same way as any other judgment of a court in the UK. Courts in the UK will not give judgment on such a debt where the original court lacked jurisdiction according to the relevant UK conflict of laws rules, was obtained by fraud, or is contrary to public policy or the requirements of natural justice. The judgment must be for a definite sum and be final, and must not have been issued in respect of taxes, penalties or multiple damages awards. The leading case on enforcement of judgments at common law, and

which summarises the key requirements, is *Adams v Cape Industries plc* (1990) Ch 433.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

The UK is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

The UK has opted in to the decision of the EU Council to authorise the opening of negotiations in relation to the Hague Convention on the Recognition and Enforcement of Foreign Judgments.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The Recast Regulation, Brussels I Regulation, and the Brussels and Lugano Conventions' systems for recognition and enforcement do not provide for limitation periods. Judgments must generally still be enforceable in the state in which they were given in order to be enforced in EU member states, including the UK (see for example article 6(1)(a) of the EEO Regulation No. 805/2004 and article 31 of the Brussels Convention). In Case C-420/07 *Apostolides v Orams* (2009) ECR I-03571, (2011) 2 WLR 324, in a matter referred to it by the English Court of Appeal concerning the enforcement in England of a judgment of the courts of Northern Cyprus, the CJEU confirmed that enforceability of a judgment in the member state of origin constitutes a precondition for its enforcement in another member state. However, practical difficulties in enforcement in the state of origin will not be enough to preclude enforcement in another member state.

The AJA provides that an application should be made to register the judgment debt within 12 months of the judgment date, though the court has the discretion to allow applications after that time. The FJA provides that an application should be made to register the judgment debt within six years of the foreign judgment or, where the judgment has been subject to appeal, from the date of the last judgment in the foreign proceedings.

The CJJA provides that a judgment under the 2005 Hague Convention must be registered without delay. Under the 2005 Hague Convention a judgment must be enforceable in its jurisdiction of origin in order to be recognised and enforced under that convention.

Where a judgment is enforced at common law, the relevant limitation period is six years from the date on which the foreign judgment became enforceable.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

The Recast Regulation, Brussels I Regulation and the Brussels and Lugano Conventions provide for enforcement of any judgment given by a court or tribunal of a contracting state, whatever it is called by the original court, specifically including any decree, order, decision or writ of execution as well as the determination of costs or expenses by an officer of the court. The treaties specifically exclude orders given in the course of arbitration, but extend to non-money judgments or interim orders, including injunctions.

The AJA covers any judgment or order in civil proceedings where a sum of money is awarded, and includes arbitration awards so long as they have become enforceable in the original jurisdiction. The FJA is broader than the AJA, covering judgments or orders made by a recognised court in civil proceedings or in criminal proceedings for a sum of money in respect of compensation or damages to an injured party, as long as it is not in respect of a tax, fine or penalty. The judgment must also finally and conclusively determine the rights and liabilities of the parties in the state where it was given (though it is no bar to enforcement that an appeal is pending if there is no stay restraining enforcement of the lower court decision in place) or require the judgment debtor to make an interim payment to the judgment creditor. The FJA also makes specific provision for the enforcement of arbitration awards on similar terms.

The 2005 Hague Convention applies to decisions on the merits, but does not apply to interim measures of protection. A decision on the merits includes a determination of costs or expenses by the court, provided that the determination relates to a decision on the merits which can be recognised or enforced under that convention. The 2005 Hague Convention also applies to judicial settlements providing that they have been concluded by or approved by a court specified in an exclusive jurisdiction agreement and they are enforceable in the same manner as a judgment in their state of origin.

At common law, any judgment must be for a definite sum, meaning the damages or costs awarded must have been assessed and quantified or must be ascertainable by a simple arithmetical process. The judgment must be final and conclusive between the parties, though it may be subject to appeal. The result is that judgments for payment into court, injunctive relief or interim awards that might yet be rescinded or varied by the court will not be enforceable at common law. The Court of Appeal recently issued further guidance on the principle of finality, holding that a foreign judgment will be considered final and binding 'where it would have precluded the unsuccessful party from bringing fresh proceedings in the [foreign] jurisdiction'; *Joint Stock Company 'Aeroflot-Russian Airlines' v Berezovsky and Glushkov* [2012] EWHC 317 (Ch).

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

The High Court of England and Wales (Queen's Bench Division), Court of Session in Scotland and High Court of Northern Ireland are the relevant courts in which to bring an application for the recognition and enforcement of a foreign judgment in each respective part of the UK. Lower civil courts also have the ability to hear EEO Regulation or Small Claims Procedure cases, as well as cases at common law for money sums below the threshold for High Court jurisdiction.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Under the UK legislation implementing the Brussels I Regulation, the Brussels and Lugano Conventions and the 2005 Hague Convention, and under the AJA and FJA, judgments must be registered in the UK before they are enforceable. That process provides the defendant with an opportunity to oppose or appeal registration on certain limited grounds (see question 9). However, once a judgment has been registered (a process which differs from jurisdiction to jurisdiction depending on the enforcement regime which applies), it will be enforced in the same way as a judgment obtained in the UK, as would a UK judgment obtained through enforcement via the common law route.

The Small Claims and EOP Procedures, and the Recast Regulation, do not require registration prior to enforcement (as mentioned above), thus removing the separation between recognition and enforcement in those contexts. However, there are limited grounds under which an appeal can be brought against recognition and enforcement of a judgment under the Recast Regulation. In the first instance such an appeal is brought as an interim application to the court in which enforcement has been sought (see question 9).

A foreign judgment may in some circumstances be relied upon to ground a right or defend a claim in UK proceedings without first being registered, for example to show that the issue has already been decided between the parties elsewhere.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

The default position is that courts in the UK will give effect to a validly obtained foreign judgment and will not enquire into errors of fact or law in the original decision. The Recast Regulation, the Brussels I Regulation and the Brussels and Lugano Conventions contain express prohibitions on the review of a judgment from a member state as to its substance. However,

a defendant may object to the registration of a judgment under those instruments, or in the case of the Recast Regulation appeal recognition or enforcement, on the grounds that the original court lacked jurisdiction to hear the matter (both of the Regulations contain detailed provisions in that regard); if it would be manifestly contrary to UK public policy; if the defendant was not served with proceedings in time to enable the preparation of a proper defence; or in the case of existing conflicting judgments in the UK or other member states. The courts may not refuse or revoke a declaration of enforceability on any other grounds even if, for example, the judgment has already been satisfied (see Case C-139/10, *Prism Investments (Area of Freedom, Security and Justice)* (2011) ECR I-9511). There is no similar procedure for challenge of EOP and Small Claims Procedures judgments, since no registration is needed prior to enforcement, except where the judgment conflicts with an existing determination between the same parties.

The 2005 Hague Convention contains an express prohibition of review of the merits of any judgment and a provision that the registering court is bound by the findings of fact of the original court (unless the judgment was given in default). The party against whom enforcement is sought may not make submissions on an application for registration of a 2005 Hague Convention judgment, but can appeal any decision to register on the grounds that the judgment is not enforceable in its state of origin or on a number of additional specified grounds that are similar to those set out in the European regime. These are that:

- the relevant choice of court agreement is null or void;
- a party lacked capacity to enter into the relevant choice of court agreement under the relevant law;
- a party lacked capacity under the relevant law to enter into such choice of court agreement;
- proceedings were not notified to the defendant in a manner that would allow him or her to organise his defence (unless the defendant appeared and put his or her case in the original court without raising this) or the proceedings were served on the defendant in breach of fundamental principles of service in the UK;
- the judgment was obtained by procedural fraud;
- enforcement would be manifestly incompatible with public policy in the UK (including if it is incompatible with basic principles of procedural fairness); or
- the judgment is incompatible either with an earlier judgment given in the UK between the same parties or with an earlier judgment given in another Hague Convention state between the same parties and in the same cause of action.

At present there is no jurisprudence on these defences. However, it is probable that the UK court would be unlikely to take a broader approach to the public policy defence than it currently does under the common law. The fraud defence under the 2005 Hague Convention is narrower than the common law regime.

Under the AJA, the court's power to register a judgment is discretionary; it will order enforcement if it considers it just and convenient that the judgment should be enforced in the UK. This provides some scope for a merits-based review. The FJA directs the court to register judgments that fulfil its requirements rather than creating a discretionary power. The AJA prohibits registration and the FJA makes provision for setting aside registration in circumstances where the original court lacked jurisdiction, the judgment was obtained by fraud, an appeal is pending or intended to be filed, or the judgment is contrary to UK public policy. In addition, the FJA requires that the judgment be enforceable in the jurisdiction of origin in order to be registered and adds additional grounds for challenge where the rights under the judgment are not vested in the person seeking enforcement or where a conflicting judgment exists.

At common law, recognition of the judgment debt is discretionary. Courts in the UK will not give judgment in debt claims based on a judgment of a foreign court which lacked jurisdiction according to relevant UK conflict of laws rules, was obtained by fraud, or is contrary to public policy in the UK or to the requirements of natural justice. Under the CJJA section 32(1), a foreign judgment may not be recognised where it was obtained in breach of a valid choice of court or arbitration clause, unless the defendant submitted to the foreign court's jurisdiction. When considering the natural or substantial justice requirement, the court will consider the principles of justice rather than the strict rules, and it is not restricted to a lack of notice or denial of a proper opportunity to be heard, though mere procedural irregularity will not be sufficient to preclude recognition and enforcement. In

addition the UK court is unlikely to refuse to recognise a foreign judgment on grounds that could have been raised in the foreign proceedings.

If an appeal is pending in the courts of the jurisdiction of origin, under the Regulation, the Brussels and Lugano Conventions, the FJA or common law, courts in the UK have the discretion to grant a stay pending resolution of the appeal. Under the AJA, a judgment may not be registered where an appeal is pending in the original jurisdiction or where the defendant can show that he or she is entitled and intends to appeal.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

Courts in the UK have no power to prevent foreign courts from acting to issue or enforce judgments and will in the vast majority of cases enforce foreign judgments in the UK where the common law, statutory or treaty requirements are met. However, the UK courts do have the power to restrain persons subject to their jurisdiction from enforcing in the UK a judgment obtained in breach of contract or by fraud (*Ellerman Lines, Ltd v Read* (1928) 2 KB 144). The power to restrain enforcement has been used rarely, probably because contractual choice of court or fraud in the foreign court are listed explicitly among the restrictions on or grounds for challenging registration of judgments in the various statutes and other instruments governing enforcement. Further, the court will also consider delay as a potential barrier to granting an anti-enforcement injunction if the party could have sought an anti-suit injunction at an earlier date (see *Ecobank Transnational Inc v Tanoh* [2015] EWHC 1874 (Comm)).

A foreign judgment obtained in contempt of an anti-suit injunction issued by a court in the UK would not be enforceable in the UK on public policy grounds.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

An overview of the basic requirements for recognition of judgments in the UK under the various sources of law, including issues of jurisdiction and subject matter, is set out in questions 1 and 3. Each of these factors (which are discussed in greater detail in questions 14–20) are cast as preconditions for registration in some of the relevant statutes and other instruments, while in others they provide grounds for challenge once registration has been granted.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

Under the AJA, FJA and common law, the courts retain discretion on whether to recognise foreign judgments and may consider other factors in the exercise of their discretion. The courts do not consider reciprocity when determining the enforceability of specific judgments, though it is a factor on which the Crown must satisfy itself when extending the coverage of the FJA to new jurisdictions by Order in Council. The public policy considerations applicable to enforcement are not a closed list (see question 19), and any assessment of the requirements of natural justice will also necessarily be based on an assessment of the circumstances in each case.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

As a general rule, the UK courts will not engage in an analysis of the procedural equivalence of the original court's processes when considering an action for recognition and enforcement of a particular judgment. This approach is justified in part on the basis that the originating court's processes will have been considered when the UK entered into the relevant treaty-based enforcement arrangements. The FJA is only extended on a country-by-country basis to selected jurisdictions and the AJA's coverage is chiefly to former dominions and territories of the UK that have similar legal systems and processes.

Similarly, the Regulations and the Brussels and Lugano Convention systems are predicated on the assumption that a basic minimum standard

of adequate process will be achieved across all member states. In *Maronier v Larmer* (2003) QB 620, the English Court of Appeal held that the objectives of the Brussels Convention would be frustrated if the courts of an enforcing state could be required to carry out a detailed review of whether the procedures that had resulted in the judgment had complied with the fair hearing rights set out in article 6 of the European Convention on Human Rights (ECHR). Furthermore, the Court of Appeal held that there is a strong but rebuttable presumption that procedures in other signatory states are compliant with article 6, ECHR. In *Maronier*, negligence proceedings in the Netherlands had been instituted and served upon the defendant, whose lawyers filed a defence on his behalf. The proceedings were later stayed due to the claimant's bankruptcy. Almost 12 years later the proceedings were revived, but the defendant had since moved to England and was given no notice of the reactivation. The court held that the defendant had manifestly not received a fair trial under article 6, such that it would be contrary to English public policy to allow enforcement of the Dutch judgment. In *Laserpoint Ltd v The Prime Minister of Malta and Others* (2016) EWHC 1820 (QB) the Court found that it would not be in keeping with the article 6, ECHR to require ECHR issues arising from a considerable delay in prosecuting proceedings in Malta to be litigated before the Maltese court, as this would lead to considerable further delay. The applicability of article 6, ECHR to common law enforcement actions has also recently been confirmed by the Court of Appeal in *Merchant International Co Ltd v Natsionalna Aktsionerna Kompaniia Naftogaz* (2012) 1 WLR 3036. In addition, the Human Rights Act 1998 requires UK legislation to be read, insofar as is possible, in accordance with rights contained in the ECHR. Consequently, ECHR considerations may fail to be taken into account where any discretion is exercised under the AJA and FJA.

Under the CJA a registration decision can be appealed if one of the grounds for refusal or recognition or enforcement in the 2005 Hague Convention is made out. The public policy exemption specifically includes situations where the proceedings leading to judgment in the foreign court were incompatible with fundamental principles of procedural fairness in the UK. It is possible that this could provide an opening for UK judges to consider article 6, ECHR issues on such appeals. Further, given that the 2005 Hague Convention is open to signature to all states the argument that procedural elements have been considered as part of the negotiation process is not available, making such a review more likely as more states ratify the 2005 Hague Convention.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

The Recast Regulation and Brussels I Regulation set out in detail the basis of personal jurisdiction that focuses on the domicile of the individual as a general matter, providing a list of matters in respect of which a person domiciled in one member state may be sued in the courts of another member state. The Regulations provide for very limited review by the courts of the enforcing jurisdiction of the originating court's jurisdiction and the enforcing court will be bound by the findings of fact in the original judgment. Enforcement can be challenged on the basis that the parties agreed to an exclusive jurisdiction clause in favour of a different jurisdiction or that the original court assumed jurisdiction in violation of the specific provisions in the Regulation concerning insurance and consumer contracts. Article 25 of the Recast Regulation provides that parties, regardless of their domicile, can designate an EU member state court to be their exclusive jurisdiction where their disputes will be resolved. In contrast to article 23 of the Brussels I Regulation, article 25 of the Recast Regulation does not require one or more of the parties to be domiciled in an EU member state for them to be able to reach a jurisdictional agreement enforceable in application of the Regulation. This means that the parties to the exclusive jurisdiction clause can be domiciled in, for example, the US and Japan and designate the courts of England and Wales and France, and the courts of the country in question will have mandatory jurisdiction over any dispute, without need to seek permission to serve papers outside the jurisdiction. In addition, the 'substantive validity' of the exclusive jurisdiction clause will be determined by the law of the member state to which the parties have allocated jurisdiction.

The 2005 Hague Convention requires only that an exclusive choice of court agreement be in place, either in writing or in some other means of communication that is available for subsequent reference. The 2005 Hague Convention provides that states may make certain declarations to

protect personal jurisdiction over disputes originating within them. They may declare that their courts will not recognise or enforce judgments given by the courts of another contracting state if the parties to the dispute were resident in the requested state and all other elements relating to the dispute took place in the requested state.

At common law, courts in the UK will consider whether the original court had personal jurisdiction in accordance with conflicts of law rules in the UK. These choice of law rules provide for narrower bases for jurisdiction over foreign defendants than some similar legal systems, such as that of the US, where a defendant's engagement in various types of business or other activity in the forum can give rise to submission to the jurisdiction of that forum. Broadly, the UK's rules require that the defendant either was present in the territory of the foreign court (for corporations, this means their business has been transacted at a fixed place of business within the jurisdiction) or submitted or agreed to submit to that jurisdiction (eg, by making a voluntary appearance other than for certain limited purposes such as challenging jurisdiction), or made a cross-claim in the matter or agreed to an exclusive choice of jurisdiction clause in a relevant contract. Courts in the UK will decline to recognise a judgment obtained in breach of an agreement to determine the dispute in another manner, for example, to submit to a third jurisdiction or to utilise alternative dispute resolution processes, such as arbitration. In *Viczaya Partners Ltd v Picard and Another* (Gibraltar) (2016) UKPC 5, the Privy Council held that a jurisdiction agreement can be implied. Such an implied agreement does not have to be contractual in force, but if it is to be by way of an implied term in a contract such a term must fall to be implied either as a matter of fact or law under the governing law of the contract. It would not be sufficient that under the governing law of the contract the courts of the relevant state would exercise jurisdiction under their own jurisdictional rules. While not binding on the UK courts, this is highly persuasive authority.

The AJA and FJA requirements are similar to those at common law, with some minor differences: under the AJA, business presence is established if the defendant was 'carrying on business' in that state, while the FJA requires that the 'principal place of business' of the defendant was in the original jurisdiction or a transaction relevant to the proceedings was transacted through a place of business within the jurisdiction.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

The subject-matter jurisdiction of the original court is not usually an issue unless there are specific international treaty provisions of relevance or insofar as the subject matter of the dispute impacts on the applicability of an agreement by the defendant to submit to that jurisdiction.

The Regulations define personal jurisdiction in some cases by reference to the subject matter of the dispute, for example by providing a list of matters in respect of which a person domiciled in one member state may be sued in another. They also make specific provision for jurisdiction over disputes relating to topics such as insurance, consumer contracts and employment contracts (in relation to employment contracts see, for example, *Shannon v Global Tunnelling Experts UK Ltd* [2015] EWHC 1267 (QB)). The Regulations and the Brussels and Lugano Conventions also expressly exclude certain subject matter from their application. Consequently, a court in the UK may need to consider the subject-matter jurisdiction of the original court to determine whether the European enforcement regime applies and, if so, whether the judgment is enforceable under its terms.

The 2005 Hague Convention also specifies a number of subject matters to which it does not apply (see question 1).

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

The Recast Regulation, the Brussels I Regulation and the Brussels and Lugano Conventions provide that a judgment is not to be recognised if the defendant was not served with the document that instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence. However, the CJEU has suggested that a defendant may not rely on an irregularity of service

alone if he or she has been made aware of the proceedings and failed to take steps to enter a defence or challenge a judgment when it was possible to do so.

Under the 2005 Hague Choice of Court Convention an appeal against registration can be brought on the grounds that the document notifying the defendant of the proceedings or an equivalent document setting out the essential elements of the claim was not notified to the defendant with sufficient time to allow him or her to prepare his or her defence. This defence is not available if it is possible to contest service in the court of origin and the defendant did not do so. There is also a defence if the defendant was notified of proceedings in the UK in a manner which is incompatible with the principles of notice in UK. It is likely that to make out the latter defence, as with the common law position set out below, a mere defect in service would not suffice.

At common law, a lack of fair notice of the proceeding (with sufficient time for the preparation of a defence) will have a bearing on whether the requirements of natural justice have been satisfied. Whether at common law or under relevant UK statutes, a mere procedural irregularity in service will not be sufficient, so long as the defendant knew or ought to have known that they were required to arrange for a defence and have been given an opportunity to respond prior to the judgment being entered (*British Seafood Ltd v Kruk and another* (2008) EWHC 1528 (QB)). The requirements of article 6 of the ECHR will likely provide some minimum requirements for notice of proceedings in accordance with the case law discussed in question 13 (Case C-283/05, *ASML Netherlands BV v Semiconductor Industry Services GmbH* [2006] ECR I-12041). *Slutsker v Romanova* [2015] EWHC 545 (QB) provides an example of what constitutes proper service in a foreign jurisdiction under the Hague Convention on Service of Documents. Even though a court in a foreign jurisdiction may certify that the documents have not been validly served (eg, due to non-appearance of the defendant) an English court may still find that proceedings have been validly served if steps have been taken that would be sufficient to effect service.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Forum non conveniens principles do not provide a basis for resisting the recognition or enforcement of judgments under any of the relevant regimes. Some of the factors used in a forum non conveniens analysis will be relevant to the question of whether the foreign court had personal or subject-matter jurisdiction and service or notice of the proceedings on the defendant will also be a relevant factor. However, the factual nexus between the original jurisdiction and the dispute or convenience to the parties or witnesses are of no relevance to the analysis concerning recognition and enforcement.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Under the Recast Regulation, the Brussels I Regulation and the Brussels and Lugano Conventions, judgments will not be recognised where they are contrary to UK public policy, but fraud alone will not be enough to trigger this restriction if there are relevant procedures for investigating the allegation of fraud in the original jurisdiction and adequate local remedies. Courts in the UK take the view that the courts of the original jurisdiction are generally better placed to consider and deal with such issues (*Interdesco SA v Nullfire Ltd* (1992) 1 Lloyd's Rep 180).

The CJA provides that one of the grounds of appeal against a decision to register a 2005 Hague Convention judgment is that it was obtained by fraud in matters of procedure.

A judgment obtained by fraud (whether fraud by the original court or the claimant) will not be recognised or enforced in the UK under the common law, the AJA or the FJA. Courts in the UK will decline to treat a foreign judgment as final where it can be shown that it was obtained by fraud, even if the defendant failed to raise issues relating to fraud that were known to it during the course of the original proceedings (*Owens Bank Ltd v Bracco and others* (1992) 2 AC 443). It does not matter that the fraud has been raised and considered by the original court unless this has been done in the context of second and separate action not also tainted by fraud, in which case the Court of Appeal has held it would be an abuse of process or the defendant

would be estopped from pleading the fraud in resisting enforcement (*House of Spring Gardens Ltd and others v Waite and others* (1991) 1 QB 241).

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Under the Brussels I Regulation, the Recast Regulation, the Brussels and Lugano Conventions, the FJA, the 2005 Hague Convention and common law the UK courts will not enforce a foreign judgment where it is contrary to UK public policy. In the case of the AJA, the question is whether or not the underlying cause of action that is the subject of the judgment would have been entertained by courts in the UK for reasons of public policy. Although the list is not exhaustive and the case law provides that conceptions of public policy should evolve with the times, there is precedent for public policy considerations precluding the enforcement of judgments:

- for taxes, penalties or multiple damages (see questions 3, 24 and 25 and *SA Consortium General Textiles v Sun & Sand Agencies Ltd* (1978) QB 279;
- obtained in breach of article 6 of the ECHR (see question 13) or otherwise in breach of fundamental human rights;
- obtained by fraud (see question 18) and it has been held that the court is not precluded from investigating allegations of fraud by reason of potential embarrassment to diplomatic relations;
- (for non-EU judgments) obtained in breach of an anti-suit injunction or alternative dispute resolution clause (see question 22); or
- which are irreconcilable with existing judgments between the same parties on the same issues in the UK.

By contrast, under the EEO Regulation, EOP and Small Claims Procedures, only the existence of an irreconcilable UK judgment provides a ground for challenging enforcement.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Each of the various regimes for enforcement of judgments in the UK provides grounds for challenging recognition on the basis that there exists a conflicting enforceable decision as to the same causes of action between the same parties in the UK or another jurisdiction. The EEO Regulation, Small Claims and EOP Procedures additionally require that the irreconcilability was not and could not be raised as an objection during the proceedings where the judgment was given.

Article 31(2) of the Recast regulation provides that member state courts that are not the seat of an exclusive jurisdiction clause 'shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement'. Where there is no valid jurisdiction agreement in place and multiple courts have exclusive jurisdiction under the Recast Regulation, then any court other than the court first seized must decline jurisdiction in favour of that court.

The Brussels I provision related to *lis pendens* gave rise to controversy, as litigants occasionally issued proceedings in procedurally slow jurisdictions to delay unfavourable litigation outcomes in other member states, even when the courts of other member states were designated as the seat for resolution of disputes in a relevant forum selection clause (this is often referred to as an 'Italian Torpedo' action). This was because article 27(1) of the Brussels I Regulation provided that 'Where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.' Article 28(1) of the Brussels I Regulation provided that where the actions are related and pending in separate member states, any court other than the court first seised may stay its proceedings. The UK Supreme Court recently considered these provisions and narrowly delineated the circumstances in which actions will be considered to have the 'same cause of action' as provided for in article 27(1), see *In the matter of 'The Alexandros T'* [2013] UKSC 70. The Court held that the 'essential question is whether [the two sets] of claims are mirror images of one another, and thus legally irreconcilable'.

Update and trends

The Hague Convention on Choice of Court Agreements

The EU has signed and ratified the 2005 Hague Convention on Choice of Court Agreements on behalf of member states other than Denmark (this includes the UK). At present the only other jurisdiction to have signed and ratified the 2005 Hague Convention is Mexico. This means that there is now a streamlined mechanism for the enforcement of Mexican judgments in the UK where there is an exclusive jurisdiction clause in place. This regime will be extended to Singapore on 1 October 2016. Prior to this, judgments from Singapore and Mexico were enforced under the common law (see question 3). The 2005 Hague Convention is open for signature by all states and has been signed but not ratified by the United States.

The impact of Brexit

On 23 June 2016 the UK voted to leave the European Union. Until it formally exits the EU, which is unlikely to be before 2019, the UK will remain subject to EU law and international obligations that arise from its membership of the EU. It must be anticipated that transitional or new arrangements will be put in place in connection with the recognition and enforcement of judgements between the UK and the remaining EU and EFTA member states. The EEO, EOP and Small Claims Procedure would not be available in the post-Brexit UK.

The UK could ratify the 2005 Hague Convention on Choice of Court Agreements (of which the EU is a member on behalf of all member states other than Denmark) on its own behalf, which would mean that EU judgments would remain readily enforceable in the UK where there is an exclusive jurisdiction clause. This is not dependent

on agreement from the EU as the 2005 Hague Convention is open for signature by all states.

For the avoidance of doubt, in the absence of specific agreement, judgments from Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia would be enforced under the common law rules, which are described more fully at question 3.

The UK is an individual signatory to the Brussels Convention and acceded to this convention when it joined the EU. It has been suggested by some commentators that the rules for the recognition and enforcement of judgments from EU member states that are also parties to the Brussels Convention (Belgium, Germany, France, the Netherlands, Luxembourg, Italy, Denmark, Ireland, Spain, Portugal, Greece, Finland, Sweden and Austria) would default back to the Brussels Convention. It is unlikely that this would necessarily be accepted by the UK courts without further litigation. However, the implementing legislation for the Brussels Convention might conceivably be repealed as part of the measures taken by the UK government to give effect to formal exit from the EU.

The UK has a number of pre-Brussels Convention treaties with certain EU and EFTA member states which were incorporated into English law under the FJA. While it may be arguable that judgments from these states should be enforceable under the FJA, this is likely to be the subject of litigation. The relevant states are France, Italy, Austria, Germany, the Netherlands, Belgium and Norway. Therefore, the safest assumption to make is that the common law rules, being the least advantageous, will apply.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

A foreign judgment is treated as if it creates a contract debt between the parties and is only enforceable against the parties to whom it is addressed. In the case of corporate defendants, there are limited circumstances in which the principles of agency or alter ego might be applied such that another person might be liable for the debts of the corporate defendant. The threshold is very high in that it is necessary to show that an individual set up the corporate entity to avoid existing legal obligations such that their separate legal personality is rendered a sham or facade. In the case of a group of companies, it would be necessary to show that there was a sufficiently high degree of control and influence among those entities so that they should be treated as forming a single economic unit, and that the original court also has jurisdiction over the company against whom the claimant is seeking to enforce judgment (*Adams v Cape Industries plc* (1990) Ch 433).

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

The Recast Regulations, the Brussels I Regulation, the Brussels and Lugano Conventions do not apply to arbitral awards, with the result that the enforcement of such awards is dealt with under common law, the AJA or the FJA. The Regulations and the Conventions acknowledge that jurisdiction of the courts of member states can be established by prior agreement between the parties, but are silent as to the effect of an agreement to refer matters to alternative dispute resolution.

The general rule is that courts in the UK will not enforce awards obtained in breach of a contractual obligation to resort to a different forum for the resolution of disputes. Under the Civil Jurisdiction and Judgments Act 1982, section 32(1), a foreign judgment may not be recognised where it was obtained in breach of a valid choice of court or arbitration clause, unless the defendant submitted to the foreign court's jurisdiction.

The courts in the UK will, in certain circumstances, grant an anti-suit injunction restraining a party from seeking a decision in another forum where a contract provides for a court or arbitral tribunal in the UK to have jurisdiction, and foreign judgments obtained in contempt of such an order will not be enforceable in the UK on the grounds of public policy. However, the CJEU has ruled that an English court cannot issue an anti-suit

injunction against a party who had issued proceedings in the courts of another EU member state, in order to protect an agreement containing a London arbitration clause (*Case C-185/07, Allianz SpA v West Tankers Inc* (2009) ECR I-00663, (2009) AC 1138). The *West Tankers* decision has generated significant controversy and although the wording of the exclusion of arbitration remains untouched in the Recast Regulation, it deals with arbitration in Recital 12. It states that nothing in the regulation should prevent the courts of a member state:

[...] when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed in accordance with their national law.

Arbitration awards are enforceable under the AJA, FJA and at common law under the same conditions as outlined in question 6, in accordance with the incorporation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) into law in England, Wales and Northern Ireland by the Arbitration Act 1996, and in Scotland by the Arbitration (Scotland) Act 2010. However, in a recent decision the High Court refused enforcement of a New York Convention award under the principles of issue estoppel where a prior Austrian judgment had refused enforcement of the award, see *Diag Human Se v Czech Republic* [2014] EWHC 1639 (Comm).

The European Mediation Directive (EC) 2008/52 also provides procedures to promote and facilitate access to alternative dispute resolution procedures, and contains provisions to enable enforcement of those agreements in specified circumstances. The Civil Procedure Rules in England and Wales (and equivalents in Scotland and Northern Ireland) contain provisions implementing the Directive.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

The scheme of enforcement regimes applicable in the UK formalises any favourable treatment afforded to judgments from particular states. The EU and EEA scheme, the 2005 Hague Convention, AJA and FJA each apply only to specified nations (see questions 1 and 3), whose judgments are thereby more readily enforceable, via the procedures set out in the relevant instruments, than those of other jurisdictions. EU measures are predicated on the assumption of common minimum procedural safeguards and

progressive harmonisation of laws. The extension of application of the FJA to new jurisdictions depends on the Crown satisfying itself that reciprocal treatment will be afforded in such jurisdictions to judgments of courts in the UK, and the FJA makes provision for withdrawal of its application if less favourable treatment is given.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Courts in the UK are able to sever parts of a foreign judgment that are contrary to public policy (question 19) or otherwise ineligible under the relevant enforcement rules and recognise the balance. Where part of an award is in respect of taxes or penalties, that part may be severed. Or where an award is for multiple damages, the sum in excess of the compensatory amount will be unenforceable. Article 48 of the Regulation provides for severance as a general matter; where the original judgment cannot be registered in respect of all matters dealt with in a judgment, the courts shall give the declaration limited to only those eligible parts of the judgment. The 2005 Hague Convention also explicitly provides for the severability of parts of judgments.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls?

If interest claims are allowed, which law governs the rate of interest?

An application for registration of a foreign judgment in the UK must include a statement as to the amount, usually made in the currency of the foreign judgment, and an indication as to the interest accrued to that date with details of the entitlement to interest (potentially also continuing after that date). In most cases, irrespective of which enforcement regime is applicable, the full amount due will be calculated at the date of execution and the amount converted at that time (including interest accrued to that date).

The court fees and costs incurred by the claimant in enforcement proceedings may be assessed and awarded against the defendant by a court in the UK. As to costs in the original proceeding, see question 24.

An award of costs or attorneys' fees will generally be enforced by the courts in the UK. In question 6 we note that the Recast Regulation, Brussels I Regulation, Brussels and Lugano Conventions and 2005 Hague Convention explicitly extend to costs awards and such awards are enforceable at common law so long as the sum has been formally quantified.

Under the EEO Regulation, judgment sums may be certified by the original court in any currency as appropriate to the judgment. Where a person applies to a court in the UK to enforce an Order under the EEO Regulation expressed other than in pounds sterling, the application must contain a certificate of the sterling equivalent of the judgment sum at the close of business of the nearest date preceding the application. An application under the EOP Procedure must state the amount of the claim, including any interest, contractual penalties or costs where applicable. In Case

C-215/11, *Szyrocka v SiGer Technologie GmbH* (2012) All ER (D) 172 (Dec), the CJEU found that national courts remain free to determine the amount of court fees applicable under the EOP Procedure and that the claimant is able to claim all interest accrued up to the date of payment of the claim.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

The Brussels I Regulation and the Brussels and Lugano Conventions provide for registration of judgments by the courts without notice to the defendant, who then has an opportunity to appeal within two months of service. They provide for a right of appeal against registration of the judgment in England, Wales and Northern Ireland to their respective High Courts and in Scotland to the Court of Session.

Further appeals may only be on a point of law to the Court of Appeal in England, Wales and Northern Ireland, or to the Inner House of the Court of Session in Scotland. The AJA and the FJA also provide for registration without notice to the defendant, who then has an opportunity to apply to set aside the declaration. The CJA provides for applications without notice for registration of 2005 Hague Convention judgments. Appeals against a decision to register can be made to the High Court in England and Wales or Northern Ireland (or Court of Session in Scotland) with a further right of appeal to the Court of Appeal in England, Wales or Northern Ireland (or the Inner House of the Court of Session in Scotland) on a point of law. Under the EEO Regulation and Small Claims Procedure, challenges to enforcement are allowed only on the limited grounds that the judgment is irreconcilable with an existing judgment. Appeals are dealt with under the rules of the enforcing court.

Courts in the UK have the power to make an order requiring security for costs from any appellant if they are:

- resident outside the jurisdiction (but not in a Brussels or Lugano Convention of 2005 Hague Convention contracting state);
- there is reason to believe they will be unable to pay the respondent's costs if ordered to do so; and
- there is evidence of attempts to evade the consequences of the litigation. Where the defendant has lodged an appeal of the underlying judgment in the foreign court, the enforcing court in the UK may make protective orders or make enforcement conditional on the provision of security by the enforcing party or grant a stay of enforcement pending the appeal.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

When a foreign judgment has been recognised in the UK (whether by registration under the European system, AJA or FJA, or a fresh judgment under common law or requires no registration or recognition by virtue of the Recast Regulation, the EEO Regulation, EOP or Small Claims Procedures),

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the original judgment can be enforced in the same way as a UK judgment. In each of England and Wales, Scotland and Northern Ireland, the creditor may apply to the court for the imposition of one or more of a range of enforcement methods, including orders compelling the debtor to provide information about its affairs to enable enforcement, seizure of assets, garnishment of bank accounts or diversion of funds owed by third parties to the debtor, attachment of wages or other earnings or charges over land and other assets including securities. See, for example, *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm), which considered whether a freezing order could be issued against a non-party outside the UK in aid of enforcement.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Care is needed in identifying the applicable enforcement regime in the UK, based on the jurisdiction of the original judgment, timing and nature of the award, to ensure that the most up to date requirements are met by any application. The EU and EEA scheme continues to evolve with the Recast Regulation fully in force and applicable to any case initiated on or after 10 January 2015. Judgments obtained in default pose a particular area of risk as they may raise factual issues concerning whether the original court had jurisdiction, proper service of proceedings on the defendant or the time provided to the defendant to mount a defence. *Reeve v Plummer* [2014] EWHC 362 (QB) clarifies the position when a defendant challenges a default judgment in their country of origin. In this case the judge set aside the registration of a judgment on the basis that the Belgian courts had not yet reviewed the default judgment being challenged by the defendant.

United States

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

The US is not a signatory to any convention or treaty that requires recognition or enforcement of non-US court judgments. While this chapter does not specifically address international arbitration awards, it is worth noting that the US is a party to multilateral conventions that bear on US court enforcement of arbitration awards: the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Inter-American Convention on International Commercial Arbitration (the Panama Convention). Typically, foreign arbitration awards issued pursuant to the New York and Panama Conventions face an easier path to enforcement in the US than foreign judgments do, because of these Conventions.

The US is also party to the multilateral Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention). Awards falling under the ICSID Convention are to be treated by signatory states as though they were enforcing domestic court awards.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

No. Recognition and enforcement in the US is typically regulated on a state-by-state basis, though the law in most states can be traced back to the principles set forth in the US Supreme Court case *Hilton v Guyot*, 159 US 113 (1895).

Despite sharing origins in the *Hilton* case, state-law approaches to foreign judgments display some significant differences, including their treatment of a reciprocity requirement as a prerequisite to recognition and enforcement and their treatment of discretionary grounds for non-recognition of a foreign judgment.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Recognition of foreign judgments is governed by the statutory laws of the individual states or by common law. There is no federal statutory provision governing recognition or enforcement of foreign judgments; nor will foreign judgments be recognised in US courts through use of a letter rogatory.

The 1962 Uniform Foreign Money-Judgments Recognition Act (the 1962 Model Act) sought to generally codify the principles set forth in *Hilton v Guyot*, 159 US 113 (1895) and was drafted in significant part to help address a concern that foreign courts were refusing to recognise US judgments due to inconsistencies in US recognition and enforcement law. The 1962 Model Act was eventually adopted in substantial part by 32 states, the District of Columbia and the US Virgin Islands.

The 1962 Model Act was updated in 2005 and renamed the Uniform Foreign-Country Money Judgments Recognition Act (the 2005 Model Act), which has since been adopted by 21 states and the District of Columbia. Legislators in Massachusetts and New Jersey have introduced legislation to adopt the 2005 Model Act, but that legislation is still awaiting approval.

Thus, presently, some US states follow a version of the 1962 Model Act, some follow a version of the 2005 Model Act, and some regulate recognition and enforcement through common law principles reflected in case law.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

The US is not a signatory to this Convention.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

The 2005 Model Act provides that '[a]n action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country'. The statute of limitations varies, according to state law, in jurisdictions that have not adopted the 2005 Model Act. The 1962 Model Act, unlike the 2005 Model Act, does not address the question of a statute of limitations and leaves this issue to state law.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Typically, subject to certain requirements, US courts are willing to entertain the recognition and enforcement of foreign civil judgments for a fixed sum of money, excluding judgments for fines, penalties, or taxes.

Further, the US generally adheres to the rule that the courts of one nation will not enforce the penal laws of another nation. See *Huntington v Attrill*, 146 US 657, 673-674 (1892). The question of whether a statute of one state is a penal law depends on whether its purpose is to punish an offence against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. *Id.*; see also *Plata v Darbun Enterprises, Inc.*, 2014 WL 341667, *5 (Cal App 2014): '[T]he issue whether a monetary award is a penalty within the meaning of the [Recognition Act] requires a court to focus on the legislative purpose of the law underlying the foreign judgment. A judgment is a penalty even if it awards monetary damages to a private individual if the judgment seeks to redress a public wrong and vindicate the public justice, as opposed to affording a private remedy to a person injured by the wrongful act'.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Most US states require the party seeking recognition and enforcement of a foreign judgment to file an action in a court that has an adequate basis to exercise jurisdiction over the alleged judgment creditor. Actions may be

brought in a state court or a federal court. However, a federal court sitting in diversity will generally apply the substantive law of the state in which it sits, based on principles emerging from *Erie RR Co v Tompkins*, 304 US 64 (1938).

Federal common law principles may be applied in specialised cases.

A party may seek to enforce under the Federal Arbitration Act an international arbitral award obtained under the New York or Panama Convention.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

A foreign judgment cannot be enforced in the US before being recognised by a US court. As previously noted, the 1962 and 2005 Model Acts deal with the recognition of foreign judgments. See *Electrolines, Inc v Prudential Assurance Co*, 677 NW 2d 874, 882 (Mich Ct App 2003): '[A] foreign country money judgment cannot be enforced until it has been recognized and that the [Recognition Act] is not an enforcement act. The [Recognition Act] only serves the purpose of providing a court with a means to recognize a foreign money judgment'. Once a judgment has been recognised by a US court and is no longer subject to appellate review, the judgment creditor can commence the enforcement process.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

Depending upon which US state the recognition proceeding is filed in, defendants may avail themselves of specific defences recognised by common law or enumerated in the 1962 or 2005 Model Acts, or both (see question 11). Where a foreign judgment runs contrary to US constitutional principles, US courts will generally refuse to recognise and enforce it. See, for example, *Osorio v Dole Food Co*, 665 F Supp 2d 1307 (SD Fla 2009), aff'd sub nom *Osorio v Dow Chem Co*, 635 F3d 1277 (11th Cir 2011). In *Osorio*, the court refused to recognise the foreign judgment on multiple independent grounds, including lack of impartial tribunals, lack of due process and various conflicts with US and state public policy issues. *Id* at 1352; see also William E Thomson and Perlette Michèle Jura, US Chamber Institute for Legal Reform, *Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments* (2011), available at www.instituteforlegalreform.com/resource/confronting-the-new-breed-of-transnational-litigation-abusive-foreign-judgments/.

US courts, like many courts worldwide, will strive to avoid relitigating the merits of foreign cases in the context of judgment recognition; but as the Supreme Court cautioned in *Hilton*, that goal must be balanced against the need to protect US citizens in the administration of justice. *Hilton*, 159 US at 163-64: "'Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws'. See also *Laker Airways, Ltd. v Sabena, Belgian World Airlines*, 731 F 2d 909, 937 & n 104 (DC Cir 1984) ('authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act');

International arbitral awards obtained under the New York or Panama Convention are subject to specific defences to enforcement as laid out by the texts of those Conventions.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

There is currently disagreement across US states on this point. However, a recent federal appellate decision has affirmed an order granting injunctive relief in the foreign judgment context using the US's Racketeer Influenced and Corrupt Organizations Act (commonly referred to as 'RICO'). In an 8 August 2016 decision, a unanimous panel of the US Court of Appeals for

the Second Circuit affirmed in full the 2014 lower court judgment in favour of Chevron Corporation in *Chevron Corp v Donziger*, Case No. 14-826, which had granted Chevron equitable relief under the federal RICO statute and New York common law from a fraudulently procured \$9.5 billion Ecuadorian judgment.

The lower court's decision had detailed how New York plaintiffs' attorney Steven Donziger and his co-conspirators procured a multi-billion dollar Ecuadorian judgment against Chevron through corrupt means and then attempted to leverage it to extract a massive payment from the company. The Second Circuit noted that the defendants' wrongful conduct included fabricating evidence, bribing foreign officials in violation of the Foreign Corrupt Practices Act, and even ghost-writing the multi-billion-dollar judgment against Chevron and bribing the Ecuadorian judge to issue it.

Importantly, the Second Circuit affirmed in full the relief granted by the lower court, including enjoining Mr Donziger and his Ecuadorian clients from attempting to enforce the judgment in any court in the US, and placing a constructive trust over any proceeds they manage to collect from the judgment. The Second Circuit's decision addressed several important questions of law, including the ability of private plaintiffs to obtain equitable remedies under RICO. This federal decision, *Chevron Corp v Donziger*, should have important implications for other companies and individuals faced with similar corrupt schemes.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

A final, conclusive and enforceable judgment, often required to be a civil judgment for a fixed sum of money, is the starting point for recognition by a US court. See, for example, 2005 Model Act section 3(a)(2); 1962 Model Act section 3. Unlike some countries, this 'finality' requirement is not usually interpreted to mean that the foreign judgment is no longer subject to any appeals in the foreign jurisdiction, though in many US states if a foreign judgment is still subject to appeal in the issuing forum, a related recognition action in a US court will likely be stayed pending resolution of the appeal in the foreign jurisdiction.

Typical mandatory grounds for non-recognition

In states that follow the 1962 and 2005 Model Acts, mandatory non-recognition of a foreign judgment is generally required where:

- the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
- the foreign court did not have personal jurisdiction over the defendant; or
- the foreign court did not have jurisdiction over the subject matter.

For further information, see the Uniform Foreign Money-Judgments Recognition Act (1962) section 4(a) and the Uniform Foreign-Country Money Judgments Recognition Act (2005) section 4(b).

Typical discretionary grounds for non-recognition

The 2005 Model Act provides that courts in a state adopting the Act:

...need not recognize a foreign-country judgment if:

1. the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;
2. the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;
3. the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;
4. the judgment conflicts with another final and conclusive judgment;
5. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;
6. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;
7. the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or

8. *the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.*

For further information, see the Uniform Foreign-Country Money Judgments Recognition Act (2005) section 4(c). The 1962 Model Act includes the first six of the above discretionary grounds for non-recognition. US states that have not adopted either version of the model act are governed by common law principles, which also tend to embrace non-recognition grounds similar to those listed above.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

While *Hilton* contained a reciprocity requirement, such a requirement is expressly retained by only a small handful of US states. In addition, some US courts have specified that the principle of 'comity' must be applied in a manner consistent with 'the rights of [US] citizens, or of other persons who are under the protection of [US] laws'. *Hilton*, 159 US at 163-64; see also *De Brimont v Penniman*, 7 F Cas 309 (CCSDNY 1873) ('[comity] does not require [recognition], but rather forbids it, when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens').

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

Yes, both Model Acts provide for mandatory non-recognition of foreign judgments where the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law. These same requirements exist under common law principles governing recognition and enforcement.

As the court explained in *Osorio*, 'a judicial safety valve is needed for cases ... [in] which a foreign judgment violates international due process, works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens.' See *Osorio*, 665 F Supp 2d 1307 (No. 07-22693) (Order on Motion for Reconsideration at 7).

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

A defendant may seek to defeat recognition and enforcement of a foreign judgment on the basis that the foreign tribunal lacked personal jurisdiction over the defendant. A foreign judgment is not conclusive in a US court if the foreign country court did not have personal jurisdiction over the defendant. See *Bank of Montreal v Kough*, 430 F Supp 1243, 1246 (ND Cal 1977). Many US courts consider both whether the foreign court properly exercised jurisdiction under its own laws and whether it properly exercised personal jurisdiction under US principles. If the foreign or US standards for jurisdiction are not satisfied, the judgment will not be recognised in a US court.

That said, there are certain ways in which the defence of lack of personal jurisdiction can be waived. See, for example, the Uniform Foreign-Country Money Judgments Recognition Act (2005) section 5 (noting that a defence of lack of personal jurisdiction is waived if, among other things, the defendant was personally served in the foreign country, the defendant had agreed to submit to the jurisdiction of the foreign court, the defendant was domiciled in the foreign country at the time the lawsuit was commenced, etc).

A judgment debtor may be faced with the quandary of voluntarily appearing in a foreign action where they believe the odds are stacked against them, thereby potentially submitting to personal jurisdiction, or refusing to appear in the foreign action and permitting the expected judgment to be entered, while preserving a stronger position for challenging jurisdiction in a US court. This 'Catch-22' may put foreign defendants at a distinct disadvantage in the context of personal jurisdiction.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

A defendant may seek to defeat enforcement of a foreign judgment on the basis that the foreign tribunal lacked subject-matter jurisdiction over the action. Both Model Acts provide that lack of subject-matter jurisdiction is a defence against recognition of a foreign judgment. See also *Osorio*, 665 F Supp 2d at 1326 (holding that defendants invoked their opt-out rights under local law, thereby divesting the local trial court of jurisdiction and preventing recognition and enforcement of foreign judgment under Florida law). It is also possible to argue under common law rules that the foreign court did not have the power to render the decision in the case. See *Hilton*, 159 US at 166-67; Restatement (Third) of Foreign Relations section 482 cmt c (1987) ('A court in the United States need not recognize a judgment of the court of a foreign state if... the court that rendered the judgment did not have jurisdiction of the subject matter of the action.').

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

In general, the guiding principle in determining whether a litigant in the foreign court proceedings had notice of the proceedings so as to allow recognition and enforcement of the foreign judgment in a US court is whether a reasonable method of notification was employed and a reasonable opportunity to be heard was afforded to the person or entity affected. See *Somportex Limited v Philadelphia Chewing Gum Corp*, 453 F 2d 435, 443 (3rd Cir 1971); *Gardner v Letcher*, Slip Copy, 2014 WL 3611587, *1 (D Nev 2014): 'Here it is undisputed that no summons was served and that the "Summary of the Document to be Served" form was not completely filled out. There is also no evidence that service was accomplished by other means that would have satisfied the Hague Convention. Therefore, service under the Hague Convention was void and the Swiss court did not have personal jurisdiction over Defendant'; Uniform Foreign Money-Judgments Recognition Act (1962) section 4(b): a foreign judgment need not be recognised if 'the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend'; and Uniform Foreign-Country Money Judgments Recognition Act (2005) section 4(c) (same).

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Yes. However, objecting to a foreign judgment on the basis that the foreign forum was inconvenient is not a defence that is frequently invoked. The 1962 Model Act, which is still followed by several US states, provides that a US court may deny recognition where 'the original action should have been dismissed by the court in the foreign country on grounds of forum non conveniens'. See also Uniform Foreign-Country Money Judgments Recognition Act (2005), section 4(b)(6): 'in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action'.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

Yes. Courts may refuse to recognise a judgment after showing that the foreign judgment was obtained fraudulently. See *United States v Throckmorton*, 98 US 61, 65 (1878); *Bridgestone/Firestone, Inc Tires Prod Liab Litig*, 470 F Supp 2d 917 (SD Ind 2006) (refusing to recognise Mexican judgment where plaintiff colluded with judicial officer), rev'd on other grounds, 533 F 3d 578, 593-94 (7th Cir 2008); in re *Topcuoglu's Will*, 174 NYS 2d 260 (NY Surr Ct 1958) (refusing to recognise Turkish judgment procured through fraud); *Matter of Estate of Weil*, 609 NYS 2d 375 (1994) (refusing to recognise Israeli probate judgment procured through fraud); Uniform Foreign Money-Judgments Recognition Act (1962) section 4(b)(2); and Uniform

Foreign-Country Money Judgments Recognition Act (2005) section 4(c) (2).

Specifically, '[i]n considering whether a litigant is entitled to relief from a prior judgment on the ground of fraud, [US] courts usually consider whether (1) the fraud (whether intrinsic or extrinsic) prevented a full and fair presentation of the litigant's claim or defense in the prior action or otherwise would render it unconscionable to give effect to the prior judgment, (2) the party seeking relief was diligent in discovering the fraud and attacking the judgment, and (3) evidence of the fraud is clear and convincing'; *Chevron Corp. v Donziger*, 886 F Supp 2d 235, 285 (SDNY 2012).

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Yes, US courts may refuse to recognise judgments that contravene public policy. See, for example, Uniform Foreign Money-Judgments Recognition Act (1962) section 4(b)(3); Uniform Foreign-Country Money Judgments Recognition Act (2005) section 4(c)(3)). In general, a foreign judgment is contrary to public policy of the enforcing state where the judgment 'tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property'; *Ackermann v Levine*, 788 F 2d 830, 841 (2d Cir 1986).

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Under the law of US states adopting one of the Model Acts, '[a] foreign judgment need not be recognised if [...] the judgment conflicts with another final and conclusive judgment[.]'. See, for example, the Uniform Foreign Money-Judgments Recognition Act (1962), section 4(b)(4); the Uniform Foreign-Country Money Judgments Recognition Act (2005), section 4(c)(4); and the Restatement (Third) of Foreign Relations Law section 482(2)(e) (1987).

For example, in *Byblos Bank Europe, SA v Syrketi*, 10 NY 3d 243 (NY 2008), the New York Court of Appeals noted that New York courts may, in the exercise of discretion, refuse to enforce a foreign judgment that 'conflicts with another final and conclusive judgment'. Ultimately, the Byblos court held that the New York trial court did not abuse its discretion under New York's Recognition Act in denying recognition of a Belgian judgment, which disregarded and conflicted with a previously rendered Turkish judgment.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

This is a complex issue not treated uniformly in all states.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

All states that follow or have enacted the 1962 or 2005 Model Acts recognise that '[a] foreign judgment need not be recognized if... the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court'. See Uniform Foreign Money-Judgments Recognition Act (1962) section 4(b)(5); Uniform Foreign-Country Money Judgments Recognition Act (2005) section 4(c)(5): 'A court of this state need not recognise a foreign-country judgment if... the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court'; and the Restatement (Third) of Foreign Relations Law section 482(2)(f).

Update and trends

Yes. Discussions about implementing a uniform recognition and enforcement standard have been somewhat revived and the increasing number of suspect foreign judgments filed in US courts has started to prompt several scholars and organisations to question whether more stringent standards should be in place in all US courts for foreign judgment recognition and enforcement.

Courts have generally applied this section of the Model Acts to cases in which parties had previously agreed to a particular forum, or had agreed to arbitrate. See, for example, *Tyco Valves & Controls Distribution GMBH v Tippins Inc*, No. CIV A 04-1626, 2006 WL 1914814 at *7 (WD Pa Oct 10, 2006) (declining to enforce German judgment because it was contrary to an agreement between the parties to arbitrate); *Nicor International Corp v El Paso Corp*, 318 F Supp 2d 1160, 1167 (SD Fl 2004) (applying Texas common law and finding that proceedings in the Dominican Republic were not entitled to recognition because they were contrary to an agreement to arbitrate); *The Courage Co v The Chemshare Corp*, 93 SW 3d 323, 336 (Tx Ct App 2002) (refusing to recognise or enforce Japanese judgment because the parties had agreed to arbitrate); and *Montebueno Marketing, Inc v Del Monte Corporation-USA*, 2014 WL 1509250 (9th Cir 2014): 'The district court [correctly] found that the Philippine litigation that produced the foreign judgment here was "contrary to" an arbitration agreement between Montebueno and Del Monte'.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

While the Model Acts do not specifically provide for disparate treatment between foreign countries' judgments, US courts may find, in practice, that certain countries' legal systems are less reliable than others. Conversely, courts may also find that certain foreign legal systems are consistently reliable and compatible with US due process of law. See, for example, *Soc'y of Lloyd's v Ashenden*, 233 F 3d 473, 476 (7th Cir 2000): 'The courts of England are fair and neutral forums', and '[t]he origins of our concept of due process of law are English' (quoting *Riley v Kingsley Underwriting Agencies Ltd*, 969 F 2d 953, 958 (10th Cir 1992)).

In addition, in the few US states that still require reciprocity of judgment recognition, foreign states not providing for reciprocal treatment are de facto disfavoured.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Case law is still developing on the alteration of awards at the recognition and enforcement stage. A few US courts have suggested that this may be possible. See, for example, *Ackermann v Levine*, 788 F 2d 830 (2d Cir 1986) ('[We note that courts are not limited to recognizing a judgment entirely or not at all. Where a foreign judgment contains discrete components, the enforcing court should [endeavour] to discern the appropriate "extent of recognition."'). However, foreign judgments suffering from certain types of defects are impossible to 'partition' so as to grant partial recognition. For example, foreign judgments procured by fraud or rendered under a system lacking due process or impartial tribunals cannot be 'cleansed' or made reliable by partition.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Yes. Varying standards are applied by US courts to determine the date of conversion, which will affect the exchange rate between US dollars and the foreign currency in which the judgment was rendered. The 'breach-day' rule fixes the exchange rate at the date the foreign judgment was rendered. The 'judgment-day' rule applies the date of the US judgment. Recently, other approaches have been adopted or encouraged, such as the

‘payment-day’ rule (fixing at the date of the judgment is satisfied) and the Restatement (Third) Foreign Relations Laws’ less rigid standard that permits courts to award payment in whichever way will best make whole the prevailing party. See Restatement (Third) of Foreign Relations Law section 423 (1987).

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Yes. Judgment debtors have the right to appeal a US court decision regarding the recognition and enforcement of a foreign judgment. A trial court may require the judgment debtor to post an appeal bond before issuing a stay of execution of its ruling.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

The 2005 Model Act provides that recognised judgments are ‘enforceable in the same manner and to the same extent as a judgment rendered in this state’. While the 2005 Model Act does deal with some of the particulars of judgment enforcement, all states except for California, Vermont and Massachusetts have enacted the Uniform Enforcement of Foreign Judgments Act. The Enforcement Act applies to both judgments of US

sister states and to those of ‘any other court which is entitled to full faith and credit’ of the relevant state.

Where states have adopted the Enforcement Act in conjunction with one of the Model Recognition Acts, a path to enforcement of a foreign judgment is more clearly prescribed than where the enforcing state has not done so. It must be noted, however, that ‘a foreign-country money judgment cannot be enforced until it has been recognized and that the [Recognition Act] is not an enforcement act’ (*Electrolines, Inc v Prudential Assurance Co*, 677 NW 2d 874, 882 (Mich Ct App 2003), and that ‘the [Recognition Act] and the [Enforcement Act] operate in tandem, with recognition of a foreign money judgment under the [Recognition Act] the precursor to enforcement under the [Enforcement Act]’ (Id at 883).

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

Judgment creditors bringing suspect foreign judgments that lack indicia of fairness or due process should not presume that the foreign judgments will be rubber stamped by US courts. See, for example, *Osorio v Dole Food Co*, 665 F Supp 2d 1307 (SD Fla 2009).

Gibson Dunn represented Dole Food Company in two cases cited in this chapter: Osorio v Dole Food Co, 665 F Supp 2d 1307 (SD Fla 2009); and Osorio v Dow Chem Co, 635 F3d 1277 (11th Cir 2011). Gibson Dunn also represented Chevron Corporation in two cases cited in this chapter: Chevron Corp. v Donziger, 886 F Supp 2d 235 (SDNY 2012) and Chevron Corp. v Donziger, Case No 14-0826(L) (2d Cir 8 August 2016).

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Venezuela

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1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what if any amendments or reservations has your country made to such treaties?

The following treaties related to exequaturs are valid in Venezuela:

- the Bolivian Agreement for the Enforcement of Foreign Actions, ratified in 1914;
- the Inter-American Convention on Letters Rogatory, and additional protocol to the Inter-American Convention on Letters Rogatory;
- the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; and
- the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

Venezuela has usually entered into these treaties with no difficulties and, in practice, there have been few reservations.

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Yes. There is uniformity in Venezuela for the enforcement of foreign judgments, the same law applies to the entire country.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

The Code of Civil Procedure and the Private International Law Statute.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Venezuela is not a signatory of the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Instead, the courts in Venezuela require compliance with the formalities established in the Private International Law Statute.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

According to the Civil Code, the period to request the enforcement of a final and binding decision elapses in 20 years. The limitation period starts running on the date of the final judgment.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

Laws in Venezuela do not stipulate any limitation on remedies enforceable in our jurisdiction. Any decision may be enforced in Venezuela provided that it does not affect public policy.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Pursuant to the Code of Civil Procedure, appointing the court for the recognition of foreign civil and commercial judgments would depend on whether it is a judgment from a contentious matter or a voluntary jurisdiction matter. In the first case, the Supreme Court of Justice would be responsible for handling the recognition and in the second case, it will be the Superior Court of the jurisdiction where the judgment will be enforced.

Once recognised, the enforcement of such judgment will be carried out in accordance with the Code of Civil Procedure and will be handled by a court that has been selected based on the area of specialisation, the value of the claim and the territory where it will be enforced.

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

These are two separate procedures. The recognition procedure (exequatur) is stipulated in the Private International Law Statute and can be managed before the Superior Court where the foreign decision will be enforced or the Supreme Court of Justice. The enforcement of the judgment is carried out through the relevant court according to the above-mentioned statute.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

A merits-based defence is not a possibility for the defendant. However, the defendant could challenge whether the foreign judgment fulfils the legal requirements for recognition or not.

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

In an enforcement procedure, which is the procedure used to execute a foreign judgment in Venezuela, the party against whom the judgment is executed cannot obtain injunctive relief. If that party wants to prevent the enforcement, it should bring the corresponding opposition during the exequatur procedure.

On the other hand, the party that is requesting the enforcement could obtain injunctive relief in order to guarantee the future enforcement, due to the fact that the exequatur procedure could take several months.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

Foreign judgments are effective in Venezuela provided that they meet the following requirements:

- they should involve civil or commercial matters or matters related to private legal relationships;
- they should have res judicata effects under the law of the state where they were passed;
- they should not relate to in rem rights on real property located in Venezuela, or exclusive jurisdiction, to ensure the matter is not taken away from Venezuela;
- the sentencing state's courts should have jurisdiction to hear the case under the general principles on jurisdiction established by the Private International Law Statute (Chapter IX);
- the defendant should have been duly served with sufficient time to appear and, generally, procedural guarantees should have been afforded to ensure a reasonable possibility of defence;
- they should not be incompatible with a previous judgment with res judicata effects; and
- there should not be a trial pending before the Venezuelan courts with the same purpose and between the same parties which commenced before the foreign judgment was passed.

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

There are no other factors to take into consideration for the recognition or enforcement of a foreign judgment other than those established in the above-mentioned laws.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

There is no such requirement. As outlined above, the requirements are those established in the Private International Law Statute and there are no further provisions in this regard.

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

There are no particular norms expressly stipulating that the court where the judgment was issued must have personal jurisdiction over the defendant. However, article 53(iv) of the Private International Law Statute stipulates that courts of the state issuing judgment must have jurisdiction to hear the matter in accordance with the general jurisdiction principles established in Chapter 9 of the Statute.

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

As outlined above, article 53(iv) stipulates that courts must have jurisdiction over the matter.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

According to article 53(v) of the Act on Private International Law, the defendant must be served with sufficient time to appear and must also be granted the procedural guarantees that secure a reasonable possibility of defence. The defendant must be formally served notice and not just informally be made aware of the process.

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

No, the court will not consider this circumstance.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

No, the court will not consider this circumstance.

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Even if it is not expressly stipulated in the Private International Law Statute, the court will take into account public policy in Venezuela in order to enforce a foreign judgment.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

Pursuant to article 53(vi) of the Private International Law Statute, for a foreign judgment to be recognised in Venezuela it cannot be in conflict with a previous final judgment and there must be no pending processes in the Venezuelan courts involving the same matter and parties initiated before the rendering of the foreign judgment.

Please note that if there is a conflict between the judgments, the judgment that was issued first will prevail.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

No, this is not possible.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

This issue would be a matter of merit that should have been examined during the process when the foreign judgment was issued. Therefore, the court in Venezuela will not consider this argument.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

No, greater deference is not given to a foreign judgment depending on the jurisdiction of origin.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

Pursuant to article 54 of the Private International Law Statute, if a foreign judgment is not completely effective, the effective portion of the judgment could be admitted.

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

Pursuant to Venezuelan law, unless there is an express agreement between the parties to make the payment in foreign currency, debts can be paid in bolivars at the official exchange rate valid on the date of payment.

The court will not take into account court costs or foreign exchange controls. The court will only convert to local currency the amounts that the foreign judgment ordered to pay. In order to calculate interest the court will use the guidelines established in the foreign judgment. If no such formula or method to calculate interest is included, such calculation must be made in accordance with Venezuelan law (ie, the interest will depend on the amount owed, the subject of the case etc). In general, late payment interests are calculated on a 12 per cent annual rate basis.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Venezuelan law does not allow this kind of appeal. However, an extraordinary remedy called constitutional review could be filed. This is used to challenge any constitutional violation.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Once a judgment has been recognised and declared as final in the Venezuelan jurisdiction, the Supreme Court of Justice or the Superior Court (depending on the type of judgment, as explained above) will refer the case to the relevant court for its enforcement. Once the court receives the case it will order the enforcement as per the request of the interested party. If it is a voluntary jurisdiction judgment, the court will issue the notification to the corresponding persons or entities. In the case of contentious procedure judgments, the court will set a time frame of three to ten days for the debtor to pay voluntarily; compulsory enforcement will only be initiated after this period elapses.

If the decision involves liquid assets, the judge will order the seizure of assets belonging to the debtor. If the decision involves real or personal property, the granting of such property could involve the use of public force, if necessary. If the judgment involves an obligation 'to do' or 'not to do', the judge could, by request of the creditor, authorise the creditor to execute such an obligation or abolish the matter executed in contravention of the 'not to do' obligation. If the judgment involves the granting of one or several elements and the debtor fails to comply with the judgment, the creditor could then request the granting of any such elements in accordance with the creditor's choosing.

28 Pitfalls

What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?

There are not many procedures in Venezuela to file an exequatur petition; therefore it is not possible to outline common difficulties. The main issue is duration, as an exequatur procedure could take up to two years. Another issue is that in many cases, foreign judgments are not duly legalised or certified with an apostille. In this case, the exequatur procedure will not be admitted.



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Asset Recovery	Gas Regulation	Product Liability
Aviation Finance & Leasing	Government Investigations	Product Recall
Banking Regulation	Healthcare Enforcement & Litigation	Project Finance
Cartel Regulation	High-Yield Debt	Public-Private Partnerships
Class Actions	Initial Public Offerings	Public Procurement
Commercial Contracts	Insurance & Reinsurance	Real Estate
Construction	Insurance Litigation	Restructuring & Insolvency
Copyright	Intellectual Property & Antitrust	Right of Publicity
Corporate Governance	Investment Treaty Arbitration	Securities Finance
Corporate Immigration	Islamic Finance & Markets	Securities Litigation
Cybersecurity	Labour & Employment	Shareholder Activism & Engagement
Data Protection & Privacy	Legal Privilege & Professional Secrecy	Ship Finance
Debt Capital Markets	Licensing	Shipbuilding
Dispute Resolution	Life Sciences	Shipping
Distribution & Agency	Loans & Secured Financing	State Aid
Domains & Domain Names	Mediation	Structured Finance & Securitisation
Dominance	Merger Control	Tax Controversy
e-Commerce	Mergers & Acquisitions	Tax on Inbound Investment
Electricity Regulation	Mining	Telecoms & Media
Energy Disputes	Oil Regulation	Trade & Customs
Enforcement of Foreign Judgments	Outsourcing	Trademarks
Environment & Climate Regulation	Patents	Transfer Pricing
Equity Derivatives	Pensions & Retirement Plans	Vertical Agreements

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