

Enforcement of Foreign Judgments

Contributing editor
Patrick Doris



2019

GETTING THE
DEAL THROUGH 

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Patrick Doris

Gibson, Dunn & Crutcher UK LLP

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CONTENTS

Austria	5	Nigeria	56
Katharina Kitzberger and Stefan Weber Weber & Co Rechtsanwälte GmbH		Etigwe Uwa SAN, Adeyinka Aderemi and Chinasa Unaegbunam Streamsowers & Köhn	
Bermuda	11	Norway	61
Delroy B Duncan Trott & Duncan Limited		Snorre Nordhus and John Paulsen Kvale Advokatfirma DA	
Cayman Islands	15	Panama	65
Jalil Asif QC, Pamela Mitchell and Peter Tyers-Smith Kobre & Kim		Jose Carrizo Morgan & Morgan	
Chile	19	Philippines	68
Francisco Aninat and Jorge Bofill Bofill Escobar Abogados		Ricardo Ma PG Ongkiko, Anthony RV Jacoba and Trisha Beverly C Flores SyCip Salazar Hernandez & Gatmaitan	
France	24	Russia	73
Anke Sprengel EBA Endrös-Baum Associés		Konstantin Krasnokutskiy and Alexey Drobyshev Lex Navicus Concordia	
Ghana	31	Switzerland	77
Thaddeus Sory Sory @ Law		Dieter A Hofmann and Oliver M Kunz Walder Wyss Ltd	
India	35	Turkey	83
Namita Chadha and Sakshi Arora Chadha & Co		Pelin Baysal and Beril Yayla Sapan Gün + Partners	
Ireland	39	United Arab Emirates	88
Julie Murphy-O'Connor and Gearoid Carey Matheson		Hassan Arab and Sara Koleilat-Aranjo Al Tamimi & Company	
Japan	46	United Kingdom	93
Masanobu Hara and Misa Takahashi TMI Associates		Patrick Doris, Rebecca Sambrook and Helen Elmer Gibson, Dunn & Crutcher UK LLP	
Korea	51	United States	102
Woo Young Choi and Ji Yun Seok HMP LAW		Scott A Edelman, Perlette Michèle Jura, Miguel Loza Jr and Nathaniel L Bach Gibson, Dunn & Crutcher LLP	

Preface

Enforcement of Foreign Judgments 2019

Eighth edition

Getting the Deal Through is delighted to publish the eighth edition of *Enforcement of Foreign Judgments*, which is available in print, as an e-book 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 new chapters on Ghana and Russia.

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 UK LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
August 2018

Austria

Katharina Kitzberger and Stefan Weber

Weber & Co Rechtsanwälte GmbH

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 (EU) 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). The Brussels Ia Regulation replaces Regulation (EC) No. 44/2001 of 22 December 2000 (the Brussels I Regulation – together with the Brussels Ia Regulation – 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. In addition, the following treaties also contain regulations on the recognition and enforcement of foreign judgments between member states of the EU:

- Regulation (EC) No. 2201/2003 of the Council of 27 November 2003 (Brussels IIa) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (which replaces the former Council Regulation (EC) No. 1347/2000);
- 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;
- 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;
- Regulation (EC) No. 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations;
- 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;
- Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (which replaces the former Council Regulation (EC) No. 1346/2000 on insolvency proceedings); and

- Regulation (EU) No. 2016/1104 of the Council 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.

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;
- the Convention on the Registration of Inland Navigation Vessels of 25 January 1965, including Protocols Nos. 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, because of 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 and based thereupon the exchange of notes regarding articles 17 and 18 of the Convention;
- 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, the Austrian Jurisdiction Act and the Austrian Enforcement Act (AEA). Austrian case law is not binding, but is 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 the 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 to 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. Therefore, the limitations 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 limitations must be assessed under the law applicable to the claim awarded in the judgment. Therefore, 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 limitations 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, therefore, will 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 before 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 that for the motion for enforcement are different, 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 land property that is the object of enforcement is registered;
- the district court where immovable property that is not registered is located;
- the district court of the opposing party's domicile in the case of enforcement against 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). 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 enforcement of EU member state judgments is subject to a simplified procedure. 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. This notwithstanding, there are a number of limited grounds on which the recognition and enforcement of a foreign judgment can be denied under the Brussels Regime. In terms of enforcement, a judgment given 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 a defence;
- the recognition or enforcement is irreconcilable with a judgment given in a dispute between the same parties in Austria; or
- the recognition or enforcement 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 through which the declaration of enforceability was granted. However, such an appeal does not constitute 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 (because of a conjunct motion for a 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 in which 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, a 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
- there has been 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 accordance with due process. Austrian procedural public policy will be deemed as violated where the proceedings violated the basic principles of a 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

Update and trends

In November 2016, the Austrian Parliament passed a law that amends the AEA. The section concerning international enforcement law was restructured and accompanying laws to the Brussels Ia Regulation and to 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 were implemented. These laws allow claimants to seek an order to preserve funds in defendants' bank accounts across Europe. The restructuring amendments to the AEA did not change the international enforcement law in its substance, but formally re-arranged the respective provisions on recognition and enforcement of foreign judgment. The amendments to the international enforcement law entered into force on 2 January 2017.

that instituted the proceedings and, therefore, did not have sufficient time to arrange a 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 on 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 it to arrange a 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.

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 has suffered a violation by fraud, such violation may be deemed a violation of the 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 the 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?

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 the 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). Therefore, depending on the circumstances of the case, Austrian courts may come to the conclusion that, pursuant to the Austrian rules on jurisdiction, the foreign court did not have jurisdiction over the legal matter and will thus reject the application for a 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 on recognition and enforcement of the Brussels Regime, regardless of whether arbitration is a principal or incidental question. Therefore, 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 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (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, but 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 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 principal 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, as 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) of the decision being delivered to the parties to 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 of being served with 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 supporting

or confuting the facts that have already been brought forward during the first instance proceedings.

If the motion for enforcement has already been approved (because of a conjunct motion for a declaration of enforceability and enforcement) before the declaration of enforceability becomes 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 immovable 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, 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 carrying out the enforcement: seizing movable 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 immovable property that is the object of enforcement to be 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 for a decision on recognition and enforcement is rendered at first instance. This period may be extended 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 what extent, the debtor possesses executable assets in Austria. Further, the parties to enforcement proceedings may request a stay of enforcement proceedings. The AEA enumerates certain grounds for such a stay of

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the 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 provisions on

recognition and enforcement of foreign judgments determine 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 movable property. Law firms (which often cooperate with private investigators) can be of help when recovering assets in Austria.

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 are binding on the Courts of Bermuda.

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

'[T]he 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 the 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 the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

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 (*Laep*), 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 that 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 *Mubarack v Mubarack & Twenty-First Century Holdings Ltd* [2002] Bda LR 63 (*Mubarack*), 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 Rule 1(1)(m) of RSC Order 11, 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 both under the 1958 Act and at common law 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*, 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 in *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 will also apply to a foreign judgment registered under the 1958 Act. At common law the Supreme Court in *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; or
- 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:

- 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 can 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 (*Muhl*), 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] Ch 433 applied in the Supreme Court of Bermuda decision in *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 immovable 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 it did not receive notice of the foreign proceedings in sufficient time to enable it 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* and *Mubarack* 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?

In *Muhl*, 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 Vitiation 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 (*Consolidated*) 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* 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 will, in all likelihood, recognise the judgment that was 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 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 & 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 United Kingdom, including England and Wales, Scotland and Northern Ireland.

The 1958 Act does not apply to the United States or to any of the member states of the European Union other than the United Kingdom. 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 which 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 registrable from those parts of the judgment that would not meet the requirements of the 1958 Act (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 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*). 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 the 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 & 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 that 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 that 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 criticised, 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.'

* The information in this chapter is accurate as of August 2017

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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 entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments. Similarly, the United Kingdom, so far, has not extended its ratification of any relevant treaties to the Cayman Islands by Order in Council. The United Kingdom has power to do so because the Cayman Islands is a British Overseas Territory.

The Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (the 1996 Law) provides a statutory regime for recognition and enforcement of foreign judgments in circumstances where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands judgments (section 3(1) of the 1996 Law). So far, the 1996 Law has only been extended to judgments from Superior Courts of Australia and its External Territories.

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?

In light of the limited application of the 1996 Law, enforcing foreign judgments in the Cayman Islands is usually done through the common law route (ie, by commencing a new action based upon the foreign judgment as an unsatisfied debt or other obligation). Such an action will be conducted under the local procedural regime for litigation in the Cayman Islands – namely, the Grand Court Rules (GCR).

The exceptions are:

- the statutory regime for reciprocal recognition and enforcement of judgments contained in the 1996 Law, which currently applies only to judgments from the Superior Courts of Australia and its External Territories; and
- the statutory regime under the Maintenance Law (1996 Revision) for recognition and enforcement of foreign judgments and orders for maintenance in a private family law context, which currently applies only to the courts of England and Wales, Ireland, Jamaica, Belize and two Canadian provinces (Ontario and Yukon).

The procedure for reciprocal recognition under the 1996 Law is governed by Order 71 of the GCR, and section 16 of the Maintenance Law prescribes the procedure for recognition of relevant foreign maintenance orders.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on the 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 the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

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 on the date of the judgment or, when there have been appeals, the date of the last judgment. There is no limitation period contained in the Maintenance Law 1996 in respect of the recognition of maintenance orders made by a relevant foreign court, which is likely to be explicable on the basis that such an order imposes a continuing obligation to make maintenance payments. However, arrears of maintenance payments due under a foreign maintenance order are likely to be treated in the same way as money due under judgment and therefore limited to six years from the date on which the payment became due.

The Cayman Islands court will 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, including declaratory judgments, are 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, mutuality and public policy, but will not re-examine the merits of the underlying case.

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

- be final and conclusive;
- is a money judgment; and
- have been given after the 1996 Law was extended to the relevant foreign country.

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, proceedings to enforce a foreign judgment must be brought in the Financial Services Division of the Grand Court of the Cayman Islands. Enforcing a foreign maintenance order made by a relevant foreign court should be pursued in the court of corresponding jurisdiction (ie, the Grand Court for a superior court of record or the Summary Court for any other 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 fresh action must be commenced based on the obligation established by the foreign judgment, in order to obtain a domestic Cayman Islands judgment of equivalent effect. Once the local 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, including garnishee orders, attachment of earnings and the appointment of receivers (see Order 45 of the GCR).

Enforcement 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. Second, the judgment debtor then has a limited time within which to apply to set aside registration on specified grounds. Third, if registration is not challenged, or is confirmed by the court after a contested application made by the judgment debtor, the registered judgment is treated as if it were a judgment of the Grand Court. Domestic enforcement methods are then available.

Enforcement under the Maintenance Law is dealt with by sending a certified copy of the foreign maintenance order to the Governor for onward transmission to the appropriate court officer of the Grand or Summary Court for registration. The registered judgment is then enforceable as a Cayman judgment (maintenance orders are typically enforced through the attachment of earnings process under Order 50A of the GCR).

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 Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment or entertain reopening of the merits of the underlying dispute. Principally, this is because one of the basic requirements for recognition at common law and under the 1996 Law is that the foreign judgment be final and conclusive on the merits. A defendant may, nevertheless, resist the enforcement of a foreign judgment at common law on the grounds that the foreign court lacked jurisdiction to give the judgment, or that the judgment was obtained by fraud, that it is contrary to the public policy of the Cayman Islands, or offends the rules of natural justice.

A defendant may also raise as a defence to common law enforcement the existence of a different enforceable foreign judgment granted in its 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).

A foreign judgment that determines that a Cayman Islands trust or dispositions of trust property are void on the grounds that the foreign law on which the judgment is based does not recognise the concept of a trust, or otherwise seeks to impose matrimonial or forced heirship rights, will not be recognised.

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

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

The Maintenance Law permits a defendant to challenge the registration of a foreign maintenance order, but does not prescribe the specific grounds upon which a challenge may be made. It is likely that established principles will apply (ie, the foreign court had jurisdiction to make the order, and the judgment was not obtained by fraud, is not contrary to public policy, and does not offend the rules of natural justice).

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 is sought, provided that the judgment creditor is subject to the jurisdiction of the Cayman Islands court, the judgment debtor may be able to obtain an injunction restraining the enforcement of a foreign judgment. The judgment debtor must make out grounds to object to the enforcement or registration – for example, on the grounds the judgment was obtained by fraud or in breach of contract 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 its 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?

The specific mandatory requirements for the enforcement of a foreign judgment at common law are:

- the judgment is final and conclusive;
- the foreign court had jurisdiction over the judgment debtor to give the judgment;
- the foreign judgment was not obtained by fraud;
- the foreign judgment is not contrary to the public policy of the Cayman Islands; and
- the foreign judgment was not obtained in a manner that offends the rules of natural justice.

Statutory recognition under the 1996 Law requires that:

- the judgment have been from one of the jurisdictions to which the 1996 Law applies (currently limited to judgments from the Superior Courts of Australia and its external territories);
- the foreign judgment be final and conclusive;
- the foreign judgment have been given after the 1996 Law came into force;
- registration have been sought within the applicable limitation period of six years; and
- at the date of the application, the judgment not already have been wholly satisfied or enforced and still be capable of enforcement in the country of the foreign judgment.

Statutory recognition under the Maintenance Law requires that the judgment have been from one of the jurisdictions to which the Maintenance Law applies (currently limited to England and Wales, Ireland, Jamaica, Belize, and the Canadian provinces of Ontario and Yukon).

12 Other factors

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

When considering the enforcement of a non-money foreign judgment at common law, the Cayman Islands court will have regard to general

considerations of fairness and will not extend domestic law to suit foreign litigants.

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 or the Maintenance Law. The Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment, but failure to accord with local concepts of due process may be an aspect of the public policy considerations for the court in recognising and enforcing a 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?

There is no such formal requirement for enforcement at common law or under the Maintenance Law. The Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment. However, as described above (see question 11), the Cayman Islands court will not recognise or enforce a foreign judgment at common law where the foreign court lacked jurisdiction to give that 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, to 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 by 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 or under the Maintenance Law, the Cayman Islands court will not generally make enquiries into an apparently regular foreign judgment. However, it is open to a judgment debtor to challenge the recognition and enforcement of a foreign judgment or maintenance order on the basis that such an order or judgment was obtained in a manner contrary to the rules of natural justice. This may include the contention that the judgment debtor did not receive notice or alternatively did not receive adequate or sufficient notice to present its case substantively. Mere procedural irregularities in the foreign procedure will be insufficient and if the judgment debtor was served through a method to which it agreed (or is deemed to have agreed), then no complaint can be made if actual notice was not received.

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 statutory 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 the most convenient one for the judgment debtor.

The 1996 Law provides an exhaustive list of grounds on 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. It is highly likely that fraud could also be relied upon to resist registration under the Maintenance 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?

It is open to a judgment debtor to resist recognition and enforcement of a foreign judgment on the grounds that it would be contrary to the public policy of the Cayman Islands. However, the scope for such a challenge is narrow – for example, where a foreign judgment is obtained in breach of an injunction not to proceed in that foreign injunction. It is also suggested that a foreign judgment will not be enforced to the extent it includes any element of punitive damages such as the double or treble damages awarded in the United 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 existence of a conflicting foreign judgment involving the same parties or parties in privity with them will preclude a subsequent foreign judgment from being recognised or enforced at common law. Similar principles are likely to apply to a foreign maintenance under the Maintenance Law.

The statutory scheme for recognition in the 1996 Law 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?

The concept of 'alter ego' is not applicable in the Cayman Islands. However, the Cayman Islands court applies principles of agency, constructive trust and equitable execution in order to facilitate the enforcement of foreign judgment against assets held in the name of third parties.

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 enforcement at common law or under the Maintenance Law. Failure to use agreed alternative dispute resolution (ADR) mechanisms is not a ground to refuse recognition under the 1996 Law. However, if a foreign judgment is obtained in breach of an enforceable agreement to use ADR and in breach of an anti-suit injunction, it may be open to the judgment debtor to resist recognition and enforcement on the public policy ground.

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 or the Maintenance Law has been extended are given the benefit of a streamlined statutory scheme for recognition. Apart from this, no special deference is given to judgments from one foreign country over those of another foreign country. However, under section 10(1) of the 1996 Law, the Governor of the Cayman Islands may order that the judgments of any foreign country which treats Cayman Islands judgments substantially less favourably than the Grand Court treats that country's foreign judgments shall not be enforceable.

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; therefore, the enforcement of such awards is often not pursued.

The 1996 Law permits registration of part of a judgment only, and the removal from the foreign judgment of 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 amount claimed in the new action can be expressed in foreign currency. Conversion to local currency will

be effected either when the local judgment is entered or at the time of enforcement. The same approach is likely to be taken in relation to enforcement under the Maintenance Law.

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 a new main proceeding at 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 a new main proceeding, or registering under the 1996 Law or Maintenance Law, the usual local rights of appeal to the Cayman Islands Court of Appeal are available. The existence or prospect of an appeal does not, however, act as a stay of enforcement and the Grand Court and Cayman Islands Court of Appeal are empowered to grant injunctions restraining the judgment debtor from disposing or parting with the possession of the subject matter of the appeal pending the determination thereof.

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 proceeding at common law, or has been registered in the Cayman Islands under the 1996 Law or the Maintenance 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 (see question 8).

28 Pitfalls

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

Not applicable.

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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 (Montevideo Treaty);
- the Agreement on Cooperation and Jurisdictional Assistance in Civil, Commercial, Labour and Administrative Matters between the States Parties of Mercosur 1991 (Mercosur Agreement);
- the Inter-American Convention on Private International Law 1928 (Bustamante Code);
- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention);
- the Inter-American Convention on International Commercial Arbitration 1975 (Panama Convention); and
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention).

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.

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.

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 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 No. 19.971 on International Commercial Arbitration.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on the 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 the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971. Also, Chile has not ratified the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards 1979.

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 Carlos Anabalón, *Tratado Práctico de Derecho Procesal Civil Chileno*, 2nd edition, p311). However, a decision by the Third 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 Third 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. In this case, the Supreme Court held that, in cases of arbitration taking place abroad, interim measures requiring enforcement in Chile must be requested directly in national courts, according to Law No. 19.971 (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 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' (article 54 of the ICSID 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?

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, owing 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 therefore 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 can 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 can challenge the recognition based upon the grounds indicated in Chapter VIII of Law No. 19.971, which are those of the United Nations Commission on International Trade

Law 1985 Model Law. In a recent decision, the Supreme Court indicated that, in the context of an exequatur proceeding of an arbitral award, it 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 No. 19.971 to determine whether to recognise the award. This is because the purpose of recognition proceedings is limited to determining whether or not to authorise the enforcement of awards rendered in foreign countries (see 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 third criterion.

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, namely):

- it contains nothing contrary to Chilean laws (with the exception of the procedural laws under which the judgment would have been issued in Chile);
- it does not oppose Chilean national jurisdiction;
- the party against which 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
- 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, simultaneously, 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 aims 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 which 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 No. 19.971 provides limited grounds for refusing recognition or enforcement which are included in the 1985 Model Law.

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

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 procured by fraud (see Supreme Court, Case No. 24.097-2014).

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 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 No. 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 which the award is being enforced will 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 Supreme Court, Case Nos. 1419-2010 and 7480-2013).

According to Law No. 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 aims 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 it 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, this will 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 will 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 can 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. Therefore, a foreign judgment is only enforceable against the parties to which 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 which 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 will not recognise the judgment (perhaps unless there was a discussion on the matter in the proceeding that originated the foreign judgment). Under Chilean law, parties which have 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*,

p130.) It is also very likely that the Chilean Supreme Court will 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 No. 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 (article 22 of Law No. 18.010). 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 (article 21 of Law No. 18.010). According to article 22, prior appraisal by the court is not required. The same article provides some important rules (eg, 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 which 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 it had plausible grounds to litigate.

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.

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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 on 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 on 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' (article 54 of the ICSID Convention). It is worth mentioning that in the ICSID case between Chile and MTD (*MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, 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.

* *The information in this chapter is accurate as of August 2017*

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 member states as outlined in this chapter.

Enforcement of judgments between EU member states

EU regulations and treaties

The issues of enforcement of judgments between EU member states 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 European 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 (EC) No. 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 member states. Besides the Brussels I Regulation, the following EU regulations contain rules on the recognition and enforcement of judgments between EU member states:

- 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 (EU) No. 2015/848 of 20 May 2015, which came 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 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 (no longer in force and being replaced by the Protocol of 27 November 1992), the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, of 18 December 1971 (no longer in force and replaced by the Protocol of 27 November 1992) 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, Hong Kong, 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, 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 the 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 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?

As far as enforcement of a foreign decision is concerned, articles L111-3 and L111-4 of the French Code of Civil Enforcement Procedures 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, articles L111-3 and L111-4 of the French Code of Civil Enforcement Procedures 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 will 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 and Court of Cassation, First Civil Chamber, 24 May 2018, Appeal No 16-26.012). 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 of the Code of Judicial Organisation). The local jurisdiction will be determined by the domicile of the defendant (article 42 of the Code of Civil Procedure) or the registered office of the legal person (article 43 of the Code of Civil Procedure).

Enforcement of judgments between EU member states

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 Annex 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 that 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 articles 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. Because of 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) of the old Brussels

I Regulation, and article 36 of the new Brussels I Regulation) (for the possibilities available to challenge the recognition of a foreign judgment under the Brussels I Regulation, 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 of the old Brussels I Regulation and article 509-2(1) of the 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 Regulation). However, this requirement has been abolished by Regulation (EU) No. 1215/2012. Under the new Brussels I Regulation, 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.

Owing 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 and 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 litigation 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 litigation 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 for declaration of enforceability (ie, article 20(1) of the European Small Claims Procedure Regulation). The party seeking enforcement need only 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 EU member states

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 the new Brussels I Regulation and article 45(2) of the old Brussels I Regulation).

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 recognition or to raise an incidental question of recognition (article 36 of the new Brussels I Regulation), and within the appeal procedure lodged by the defendant after the decision on the application for a declaration of enforceability (article 49 of the Brussels I Regulation).

The burden of proof concerning the reasons provided for by articles 34 and 35 of the Brussels I Regulation 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 incorporated 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 that falls within 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 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) of old Brussels I and article 36(1) of new Brussels I). Nevertheless, the Regulation determines the basic requirements for recognition (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 insofar as the principles of fair process are concerned.

Enforcement of judgments between EU member states

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 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 case 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 itself 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 Court of Justice of the European Union (CJEU) in Case C-7/98, *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 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 enshrined 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 Court of Cassation continues to apply the principles developed in the *Cornelissen* case (see Court of Cassation, First Civil Chamber, 4 May 2017, Appeal No. 16-13,645; and more recently Court of Cassation, First Civil Chamber, 15 May 2018, Appeal No. 17-17,546).

Enforcement of judgments between EU member states

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 (article 35 of old Brussels I). This is especially the case in consumer law and 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 on 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.

Enforcement of judgments between EU member states

The old Brussels I Regulation

According to article 26, the foreign court is obliged to verify whether the defendant was able to receive the document instituting the proceedings, or an equivalent document, in sufficient time to enable it to arrange for a defence, or that all necessary steps were 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 its 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 set out 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 that instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable it to arrange for a defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for it 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 Vitiating 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 French court 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 fraudulently determined its residence in a foreign country in order to base the jurisdiction in that 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 would 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 its 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 to a defence.

If the foreign judgment contradicts 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).

Enforcement of judgments between EU member states

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 judgments in *Hoffmann/Krieg* (Case C-145/86, 4 February 1988) and *Krombach*, the CJEU 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. At the request of any interested party, the recognition of a decision shall be refused if the decision is irreconcilable with a decision rendered between the same parties in the requested member state or if the decision is irreconcilable with a decision given previously in another member state or in a third state between the same parties in a dispute having the same subject matter and the same cause, where the decision given previously satisfies the conditions necessary for its recognition in the requested member state (see article 34 of the old Brussels I Regulation and article 45 of the new 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 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 which have agreed on alternative dispute resolution (ADR) are prevented from bringing an action in a state court. When one party to the ADR 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 will 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 fails to invoke before the foreign state court that an enforceable ADR clause exists, it is unlikely to succeed in arguing that its rights under the clause have not been respected in order to prevent the enforcement of the foreign judgment. If the defendant raises 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 article 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.

A judgment that considers whether or not an arbitration clause is null and void, inoperative or incapable of being performed does not fall within the scope of the 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, 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 will 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. Partial recognition or 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 begins to run from the day of the declaration of enforceability and must be paid according to French law.

Concerning the enforcement of judgments under the Brussels I Regulation, 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 and, according to article 43(2) and Annex III of old Brussels I, the Court of Appeal is competent for hearing 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 of the 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 Code of Civil Procedure).

During the timeframe 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 which 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 will make the enforcement conditional on the provision of 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 be appealed by the party concerned. This appeal is lodged in accordance with French law (articles 542 et seq of the Civil Procedure Code).

Between EU member states, the new Brussels I Regulation no longer obliges a party wishing to enforce a foreign judgment in France to obtain a judgment in France recognising or enforcing the foreign judgment. A judgment given in a member state that 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 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 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 European Payment Order Regulation, the defendant has to lodge its appeal before the court of origin by using the standard form F set out in Annex 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), a defendant which, 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 security.

In cases of an appeal against the judgment, the competent court can make the enforcement conditional on 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 its 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 Annex 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) of 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) on the party against which enforcement is sought, even though a contradictory proceeding is not intended (ie, article 42 of Brussels I, now abolished by Regulation (EU) No. 1215/2012).

The enforcement proceedings of all EU 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 that wishes to invoke in a member state a judgment given in another member state shall produce a copy of the judgment that 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 of 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 which 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) of Brussels I).

Where the person against which the enforcement is sought is domiciled in a member state other than the member state of origin, it 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 that it understands or the official language of the member state in which it 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 it is domiciled (article 43(2) of Brussels I).

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

Owing to the large number of different rules applying to the recognition and enforcement of foreign judgments (ie, French private international law, EU 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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Ghana

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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?

Ghana is not a signatory to any international treaty or convention governing the recognition and enforcement of foreign judgments at the moment. Foreign judgments are, however, recognised and enforced in Ghana based on the principle of reciprocity (*Republic v Mallet: Ex Parte Braun* (1975) 1 GLR 68).

The Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993 (LI 1575) made under section 81 of the Courts Act 1993 (Act 459), in the schedule thereto, lists the countries whose judgments will be enforced in Ghana on the basis of reciprocity. The president may from time to time revise the list.

2 Intra-state variations

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

There are no different jurisdictions within Ghana.

3 Sources of law

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

Enforcement of foreign judgments in Ghana is regulated by statute, subsidiary legislation and case law. Enforcement of foreign judgments is generally governed by:

- the Courts Act 1993 (Act 459), which regulates the registration and setting aside of foreign judgments;
- the Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993 (LI 1575), which lists the countries whose judgments are enforceable in Ghana on a reciprocal basis;
- the High Court (Civil Procedure) Rules, 2004 (CI 47), which set out in detail the procedure for the enforcement and registration of foreign judgments; and
- decided cases by the Superior Courts of Judicature and the courts of other common law countries on the subject.

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?

Ghana is not yet 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 right of action on a foreign judgment is barred after six years from the date of judgment, or where there has been an appeal, after the last judgment in those proceedings (section 82 (2) of the Courts Act 1993 (Act 459)). The courts will not consider the statute of limitations of the foreign jurisdiction in reckoning time.

6 Types of enforceable order

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

Although the Courts Act does not expressly forbid the enforcement of interim and permanent injunction orders or orders for specific performance, the language of section 81(2) of the Act suggests strongly that the courts are mainly interested in money judgments insofar as foreign judgments are concerned. The reason is that the section says that a judgment of a superior court of a foreign country to which the statutory provisions regulating foreign judgments apply is deemed to be a judgment of a foreign court for purposes of enforcement if the judgment of the foreign court:

- is final and conclusive; and
- orders payment of a sum of money, not being a sum payable in respect of taxes or other charges of a similar nature or in respect of a fine or other penalty.

Money judgments are therefore mainly the only types of awards enforceable in Ghana.

7 Competent courts

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

The Courts Act gives exclusive jurisdiction to the High Court as the court of first instance for purposes of enforcing foreign judgments (section 82 (1) of the Courts Act 1993 (Act 459)).

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 merely the process of making the foreign judgment assume the character of enforceability. Recognition is therefore the first necessary step, which is a condition sine qua non, to enforce the judgment. When the judgment is recognised, it assumes the character of a judgment of the High Court of the Republic of Ghana and it is enforceable as such.

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 defences available to the judgment debtor upon an application to register a foreign judgment are only jurisdictional and procedural. The High Court will not assume jurisdiction to hear the matter de novo on its merits.

10 Injunctive relief

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

The only procedure available to a judgment debtor, against which a foreign judgment is sought to be enforced, is to apply to have the registration of the foreign judgment set aside. However, on an appeal against a refusal by the High Court to set aside the registration, the judgment debtor may apply for an order of injunction to restrain the enforcement of the foreign judgment against it pending the final determination of the appeal.

11 Basic requirements for recognition

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

To be recognised, a foreign judgment should:

- have been obtained in accordance with the laws of the court of origin;
- be final and conclusive between the parties;
- not have been wholly satisfied;
- be capable of enforcement in the foreign country;
- have been delivered by a court that had jurisdiction over the parties and over the subject matter of the original action;
- not be contrary to Ghana's public policy;
- not have been obtained by fraud or in breach of the rules of natural justice; and
- be for a fixed amount of money.

12 Other factors

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

Reciprocity is certainly a basis for recognition of a foreign judgment. This is clearly stated in section 81(1) of the Courts Act 1993.

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 High Court in Ghana will set aside the registration of a foreign judgment on an application made by a judgment debtor, on the ground that it was unable to participate in the proceedings in the foreign court because it did not receive notice of the proceedings in sufficient time to mount a defence. The availability or otherwise of pre-trial discovery by itself may not be a valid ground to refuse enforcement of a foreign judgment unless it is proved that, under the law in accordance with which the judgment was entered, limited pre-trial discovery is fatal to the proceedings.

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 grounds upon which the High Court will enforce the judgment of a foreign court is that the foreign court had jurisdiction over the defendant. For the purposes of deciding whether the foreign court (original court) had jurisdiction, it is sufficient:

- if the judgment debtor submitted to the jurisdiction of that court by voluntarily appearing in the proceedings, otherwise than for the

purpose of protecting or obtaining the release of property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of that court;

- if the judgment debtor was plaintiff or counter-claimed in the proceedings in the original court;
- if the judgment debtor had, before the commencement of proceedings, agreed in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of that country;
- if the judgment debtor was, at the time when the proceedings were instituted, resident in or a body corporate with its principal place of business in the country of that court; or
- if the judgment debtor 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.

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?

Generally, the High Court will enforce a judgment of the original court where, if the subject matter is immovable property, the property in question was situated in the country of that court at the time of proceedings in the original court.

The High Court is, however, required to set aside the registration of a foreign judgment where:

- the subject matter of the proceedings was immovable property outside the country of the original court;
- the proceedings were initiated in the original court in breach of an agreement under which the dispute in question was to be settled otherwise than by proceedings in the original court; or
- the judgment debtor was entitled, under the rules of public international law, to immunity from the jurisdiction of the original 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?

As already noted, the High Court in Ghana will set aside the registration of a foreign judgment on an application by a judgment debtor where the judgment debtor demonstrates that, being the defendant in the proceedings in the foreign court, it was unable to participate in those proceedings because it did not receive notice of the proceedings in sufficient time to enable it to defend the proceedings.

For this purpose, it is sufficient if the judgment creditor demonstrates to the High Court that the judgment debtor was notified of the proceedings but deliberately refused to participate in the proceedings, unless the judgment debtor displaces the fact of notice to it by establishing that the laws of the original court mandatorily demanded actual notice, by personal service on it of the processes.

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?

To the extent that the foreign court had jurisdiction over the parties and the subject matter of the proceedings, the convenience of the judgment debtor will not be a deciding factor for purposes of registering and enforcing the judgment against the judgment debtor.

18 Vitiating by fraud

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

The High Court is required to set aside the registration of a foreign judgment and, for that matter, deny it enforceable status where the foreign judgment was 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?

The High Court is also required to set aside the registration of a foreign judgment where enforcement of the foreign judgment would be contrary to the public policy of Ghana.

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 no clear rules for determining which foreign judgment must be given priority over the other where there is a conflict. Where there is a conflict, the High Court will have to apply general principles for purposes of determining which judgment should be given priority. The first point to consider may be whether there is good reason to deny one foreign judgment's enforceability as against the other. If the High Court thinks the two foreign judgments are equally enforceable, it may give priority to the first in time on the basis of the doctrine of *res judicata* (*Vervaeke v Smith* [1983] 1 AC 145 HL).

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 High Court will only register and enforce judgments against parties to such judgments. The High Court will therefore not enforce a judgment against an agent unless the judgment sought to be enforced states that it may be enforced against an agent or some other persons.

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 High Court is required to set aside the registration of a foreign judgment upon the application of the judgment debtor where the proceedings were initiated in the original court in breach of an agreement under which the dispute in question was to be settled otherwise than by proceedings in the original court.

23 Favourably treated jurisdictions

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

The only basis for enforcing judgments of a foreign court is reciprocity. No priority is given to the judgments of any country over another.

24 Alteration of awards

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

Yes. Under section 82(9) of the Courts Act 1993 (Act 459) the registering court – to wit, the High Court – is empowered to separate the matters that may be registered under the foreign judgment from those that may not and then register the foreign judgment in respect of only the matters that may 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?

Yes. Under section 82(7) of the Courts Act 1993 (Act 459), the currency of the foreign judgment will, upon enforcement, be converted to Ghanaian cedis at the prevailing interbank rate as at the date on which the judgment was delivered in the court of origin.

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 Constitution (articles 137(1) and (2) and sections 11(1) and (2) of the Courts Act 1993), there is a right to appeal any decision of the High Court and this therefore includes any judgment or order made by the High Court in relation to an application to register a foreign judgment. An appeal may be lodged at the Court of Appeal and there is a further right to appeal the decision of the Court of Appeal to the Supreme Court. The procedure is by way of a notice of appeal filed in accordance with the rules (Common Law 19) of court. Once the appeal against the order of the High Court is affirmed by the Court of Appeal or upon a further appeal to the Supreme Court, the judgment may then be enforced by the High Court.



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27 Enforcement process

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

The processes for execution of a foreign judgment, which as already pointed out are usually money judgments, are mainly by:

- a writ of fieri facias;
- garnishee orders;
- charging orders; and
- a writ of sequestration (see Rule 1, Order 43 of Common Law 47).

28 Pitfalls

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

There are no known pitfalls in seeking recognition and enforcement of a foreign judgment in Ghana. It may only be stated that for purposes of enforcement, it is not the judgments of all courts in the countries listed in LI 1575 that are registrable in Ghana as foreign judgments.

The Foreign Judgments and Maintenance Orders (Reciprocal Enforcement) Instrument 1993 (LI 1575) specifies particular courts in the countries stated in the instrument as the only courts whose judgments are registrable in Ghana as foreign judgments. Where a judgment is delivered by a court which has not been specified as one of the courts in that country whose judgments is registrable in Ghana, the High Court in Ghana will deny it registration.

Before commencing proceedings to register a foreign judgment in Ghana, it is important to settle two questions:

- whether the country in which the judgment sought to be enforced was made has been recognised by LI 1575; and
- whether the court of that approved country whose judgment is sought to be enforced has also been recognised by LI 1575.

India

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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, Singapore, the United Arab Emirates, the Federation of Malaya, Trinidad and Tobago, New Zealand, the Cook Islands (including Niue) and the Trust Territories of Western Samoa, Hong Kong, Papua 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 the 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 a 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 concerning judgment;
- Bilateral treaties with the reciprocating countries with regard to recognition and enforcement of foreign judgments to which India is a party.
- 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 the 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 the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

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 with the provisions of the Code, foreign judgments from reciprocating territories are executable in India as decrees passed by the 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.

In accordance with the provisions of the statute of limitations, 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; or
- 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 is 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 that such decrees are money decrees (not including taxes or other charges of a similar nature fines or other penalties, or sums payable further to 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?

According to the provisions of the Code, a judgment from a reciprocating territory for which enforcement in India is sought 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?

According to 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 the merits and therefore not conclusive. In addition to merits-based defences, a defendant can challenge the foreign judgment as follows:

- competency of jurisdiction;
- incorrect view of international law or 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 an 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. According to 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; or
- where the defendant has contracted to submit itself 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 will 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 were expounded in the case of *Ramanathan Chettyar* (see question 11). Therefore, it is necessary to examine subject-matter jurisdiction only

to the extent of its applicability according to the law of the country in which the decree was passed. Furthermore, it may be necessary to determine subject-matter jurisdiction in terms of whether the decree was 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 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 that must 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 will only be considered if the defendant:

- has not submitted 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* 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 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 which 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 will 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.

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 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 such judgments exists in the same manner as the right to appeal 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 of the following ways:

- 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 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, will not be enforced in India.



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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?

Our analysis hereunder is confined to civil and commercial matters and does not extend to matters of personal status, such as matrimonial and family matters, wills and succession, insolvency, social security and arbitration.

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 that 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 that 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) No. 44/2001) and more recently the Brussels I Recast Regulation (Council Regulation (EC) No. 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 that 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 the 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 (EC) No. 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 (EC) No. 861/2007 created the European Small Claims Procedure, which allows cross-border claims to be brought under a simplified procedure for civil or commercial claims that do not exceed €2,000, excluding interest, expenses and disbursements.

Finally, the European order for payment procedure was established pursuant to Regulation (EC) No. 1896/2006 (as amended), providing for standardised forms and procedures for pursuing uncontested money debts without monetary limit. The European Small Claims Procedure and Regulation (EC) No. 1896/2006 (as amended) allow enforcement in EU 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 of 2007 is also applicable to the enforcement in Ireland of judgments involving the European Free Trade Association (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:

- European Union Treaty Law (and the Brussels I Regulation (EC) No. 44/2001 and Brussels I Recast Regulation (EC) No. 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 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 monetary sum, be final and conclusive, and be given by a court of competent jurisdiction (albeit noting that recognition and enforcement can nevertheless be challenged on certain grounds).

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on the 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 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?

Although the Brussels Regime and the Lugano Convention do not themselves provide for limitation periods, for judgments to be recognised and enforced thereunder, they must generally still be enforceable in the state in which given. There is authority from the Court of Justice of the European Union (*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. 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 and 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 the European Small Claims Procedure.

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, if declaratory relief is required or if it is required for *res judicata* purposes. 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 such 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;
- the defendant was not served with the proceedings so as to allow it properly to arrange a defence; or
- 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:

- there was fraud in procuring the foreign judgment (irrespective of whether fraud has been raised as a defence in the foreign proceedings or not);
- the court lacked jurisdiction (whether the foreign court or the Irish court);
- the judgment is contrary to Irish public policy;
- the judgment 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); or
- 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 been 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 (and it is expected that the Irish courts would exercise the discretion to impose a stay in the event of an 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 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.

In practical terms, the following is the position for each of the applicable regimes.

Under the Brussels I Recast Regulation, there is no special procedure required for the recognition of a judgment. Under article 36 of the Brussels I Recast Regulation, ‘a judgment given in a member state shall be recognised in the other member states without any special procedure being required’. In addition, if a judgment is given in a member state, and if it is enforceable in that member state, that judgment will be enforceable in other member states without a declaration of enforceability. If another member state wishes to recognise such a judgment, it should be enforced under the same conditions as provided for in the member state where the judgment was given. Since no declaration of enforceability is required, when enforcing a judgment, a creditor can go straight to the ‘competent enforcement authority’ in the member state for enforcement.

Under the Brussels I Recast Regulation, in order to enforce a judgment, the following is required:

- a copy of the judgment that satisfies conditions necessary to establish its authenticity;
- a standard form certificate issued by the court that granted the judgment; and
- if necessary, a translation of the judgment.

Recognition and enforcement under the Brussels I Regulation and the Lugano Convention is provided for under Order 42 A of the Rules of the Superior Courts. Under Order 42 A, an *ex parte* application grounded on an affidavit is made to the Master of the High Court, which is addressed further below. However, once the proofs required by the Brussels I Regulation or the Lugano Convention are met, the Master has no discretion but to grant the order sought.

An application for recognition and enforcement under the Brussels I Regulation or the Lugano Convention is made by the applicant on an *ex parte* (one side only) application grounded upon an affidavit. The affidavit should state:

- whether the judgment provides for the payment of a sum or sums of money;
- whether interest is recoverable on the judgment or part thereof in accordance with the law of the state in which the judgment was given and, if this is the case, the rate of interest, the date from which the interest is recoverable, and the date on which the interest ceases to accrue;
- the address for service of proceedings on the party making the application and the name and usual address for the person against which the judgment was given;
- the grounds on which the right to enforce the judgment is vested in the party making the application; and
- as the case may require confirmation that the judgment has not been satisfied in whole or in part and the amount that remains unsatisfied.

The affidavit should exhibit:

- the judgment sought to be enforced or a certified or authenticated copy;
- if given in default, a certified document establishing that the party in default was served with enough time to prepare a defence;
- documents that establish that the judgment is enforceable and has been served; and
- if necessary, translations.

Once the necessary proofs are in order, the Master of the High Court has no discretion but to make the order sought. Once made, notice of the making of the relevant order is to be served with the order against the party to which it is directed. The notice should contain:

- full particulars of the judgment or decision declared enforceable;
- the name and address of the party making the application and address for service;
- the protective measures (if any) granted in respect of the property;
- the right of the person against which the order is made to appeal to the High Court against the order; and
- the period within which any appeal may be brought.

Under common law, in order for a foreign judgment to be enforced in Ireland, the foreign judgment must comply with the following prerequisites:

- the judgment must be for a definite sum and therefore only money judgments may be enforced. Moreover, Irish courts will not enforce foreign revenue, penal or other public laws, whether directly or through the recognition of a foreign judgment;
- the judgment must 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; and
- the judgment against the defendant must be given by a court of competent jurisdiction. This means that the foreign court 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. Submission to the jurisdiction of the foreign court by the defendant will usually arise by virtue of a prior agreement to that effect or by participation in the foreign proceedings, or through presence in the jurisdiction at the time of the proceedings. 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 itself be sufficient basis for the Irish courts to accept that the foreign court had jurisdiction.

At common law, an application for leave to issue and serve the proceedings out of the jurisdiction is required to be made to the High Court, usually on an *ex parte* basis, grounded upon an affidavit. Once the (summary) summons has been issued and served, the next step for the plaintiff is to issue a motion seeking judgment. That motion is also grounded on affidavit; the plaintiff will need to put evidence of the originating summons and motion before the court by way of affidavit. In such cases, an application can subsequently be made by the defendant to set aside service on the grounds that Ireland is not the appropriate jurisdiction in which to seek enforcement from the perspective of comparative cost and convenience (pursuant to Order 11 of the Rules of the Superior Courts). 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.

The following documents are required in support of an application for recognition and enforcement under common law:

- a verified, certified and sealed copy of the judgment;
- the originating writ or summons;
- a grounding affidavit, which:
 - exhibits the judgment that is sought to be enforced and a translation of the judgment or any other documents produced that are not in a recognised language of the local court; and
 - where judgment has been obtained in default, the affidavit evidences that the party in default was served with the documents instituting proceedings and refers to the fact that the judgment is enforceable in its originating state;
- proof of service of the judgment if obtained in default; and
- translation of the judgment, if necessary.

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 (ie, non-EU and non-EFTA) judgments. 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 *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. It is also relevant that recognition or enforcement is being sought for a legitimate purpose (see *In re Mount Capital Fund Limited (In Liquidation) & Ors* [2012] IEHC 97 (unreported), High Court, Laffoy J, 5 March 2012).

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 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 involved a fair trial.

For enforcement at common law, there is no formal requirement to demonstrate that the proceedings before the original court corresponded to due process in Ireland. However, as identified in 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. 'Equivalence of approach' was a persuading factor in favour of the court's jurisdiction to recognise a foreign liquidation or bankruptcy (see *In re Mount Capital Fund Limited (In Liquidation) & Ors* [2012] IEHC 97 (unreported), High Court, Laffoy J, 5 March 2012; and *Drumm* [2010] IEHC 546).

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 that 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 that require submission to the jurisdiction of the foreign court by the defendant. Typically, under Irish law, this is usually understood as arising by virtue of:

- the defendant's prior agreement to that effect in a contract;
- its presence in the jurisdiction at the time of the proceedings; or
- its 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 basis 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 itself be sufficient 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 that 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 it to arrange a defence. However, irregularity of service is unlikely to provide a basis to resist recognition and enforcement if the defendant was made aware of the proceedings and failed to take steps in respect thereof when it was possible to do so.

As identified in 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 *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 assumption of jurisdiction by an Irish court and service or notice of the proceedings.

18 Vitiations by fraud**Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?**

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) to recognise or enforce a judgment that is tainted by allegations of fraud.

As identified in question 9, recognition and enforcement of a judgment procured by fraud may similarly be refused at common law. This is so irrespective of whether the fraud was by the original court or the plaintiff, and irrespective of whether fraud was raised as a defence in the foreign proceedings (see the persuasive English authority of *Owens Bank Ltd v Bracco* [1992] 2 AC 443).

In each case, 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 *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 confirmed that 'manifestly' is a threshold issue that 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 that 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, which addressed the public policy exception to the enforcement of arbitral awards under the New York Convention). Accordingly, in order to invoke the public policy exception to Irish common law enforcement successfully, a defendant has a high threshold to meet.

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 question 9).

At common law, there is no specific authority that 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 or 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 and expert determination) is something for the court where judgment was pronounced to consider upon the application of the defendant or 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.

23 Favourably treated jurisdictions

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

Where enforcement of a judgment under the Brussels Regime or Lugano Convention is sought, there is no distinction.

Enforcement at common law (which, under Irish law, would involve all jurisdictions save those subject to the Brussels Regime and Lugano Convention) is more straightforward where the country in which the relevant judgment was pronounced has the legal system and applicable legal principles that are similar to those in Ireland. 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. The 'equivalence of approach' has also been applied in the context of recognising a foreign liquidation (see *In re Mount Capital Fund Limited (In Liquidation) & Ors* [2012] IEHC 97 (unreported) High Court, Laffoy J, 5 March 2012).

However, by virtue of the procedural rules applicable, and the broader nature of what may be enforced, judgments subject to the Brussels Regime and Lugano Convention are more amenable to straightforward recognition and enforcement in Ireland than judgments from jurisdictions that 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, or may not be quantified or susceptible to easy quantification). 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 at the execution stage for that purpose. The court fees and costs of the Irish enforcement proceedings may also be awarded against the respondent.

Update and trends

Leave of the Irish court is required to issue and serve proceedings seeking recognition and enforcement of foreign (ie, non-EU or non-EFTA) judgments at common law, 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 is no, or no likely, possibility of there being assets in the jurisdiction against which to enforce. *Albanibeg Ambient ShpK v Enel SpA & Enelpower SpA* [2016] IEHC 139 and [2018] IECA 46 is the seminal judgment on this issue.

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 which 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 an 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 will 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 it will be unable to pay the respondent's costs if ordered to do so. Security for costs may also be ordered if the appellant is a company within the jurisdiction and there is reason to believe that entity 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 that 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 or she 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 its own but there is money due and owing to it from a third party based in Ireland (the 'garnishee'). In those circumstances, the judgment creditor may seek to have that debt paid to it 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 or she is appointed. If the receiver takes possession of the relevant assets, it 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 (eg, 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 may, if the liquidator believes it appropriate, be subject to proceedings themselves and may, 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 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.

28 Pitfalls

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

Depending on the nature of the judgment (civil, commercial, matrimonial or insolvency, etc), different regimes can apply, so care should be taken to identify the relevant regime in the first instance.

Assuming that one is dealing with a civil or commercial judgment, care should also 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 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 were 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 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 Lugano Convention is subject to a definition of 'judgment' that 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.



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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?

Japan is not a 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?

Yes. There is uniformity in the law on the enforcement of foreign judgments throughout Japan.

3 Sources of law

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

Legislation is the main source of law in Japan, and enforcement of foreign judgments is governed by article 118 of the Code of Civil Procedure (CCP) and article 24 of the Civil Execution Act (CEA).

Article 118 of the CCP sets out the requirements for final and binding foreign judgments to be effective in Japan, which are:

- the jurisdiction of the foreign court is recognised under laws, regulations, conventions or treaties;
- the defendant has received service (excluding service by publication or means similar thereto) of a summons or an order necessary for the commencement of the suit, or has appeared in the action 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 with Japanese courts (ie, reciprocity).

Article 24 of the CEA stipulates that execution of a judgment must be rendered without investigating whether or not the decision is appropriate, but that a foreign judgment should not be executed if:

- it is not proved that the judgment is final and binding; or
- it does not fulfil the requirements provided for in article 118 of the CCP.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on the 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 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?

In principle, the limitation period for enforcement of a foreign judgment is 10 years from the day after the foreign judgment became final and binding.

Neither the CCP nor the CEA has any rules regarding a limitation period for enforcement of a foreign judgment. However, article 174-2 of the Civil Code provides that any right determined by a final and binding judgment is subject to a limitation period of 10 years. Therefore, if 10 years have passed since the day after the foreign judgment became final and binding, a Japanese court might not render an execution judgment for the reason that it might be contrary to public policy in Japan.

In this regard, an amendment to the Civil Code was enacted in the Diet session in May 2017, and will take effect within three years of the enactment date. The amendment (to article 169 of the Civil Code) provides that any right determined by a final and binding judgment, or any similar order or decree having the same effect, shall be subject to a limitation period of 10 years, except for rights that are not yet due and payable at the time when the judgment becomes final.

6 Types of enforceable order

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

Foreign money judgments can be enforceable and be satisfied by the compulsory execution of a pecuniary claim as long as the judgment satisfies all the requirements set forth in section 3, article 24 of the CEA (see question 3). Provisional remedies such as provisional attachment and provisional disposition are not enforceable, because a foreign judgment must be 'final and binding' in order to be enforceable in Japan (article 118 of the CCP).

Permanent injunctions can be enforceable as long as they are final and binding. However, the more relevant issue often is whether the permanent injunction in question is not contrary to public policy in Japan as required by article 118 (iii) of the CCP. If the permanent injunction is deemed to be contrary to public policy in Japan, it will not be enforceable.

Assuming that a foreign judgment satisfies all the requirements set forth in section 3, article 24 of the CEA, specific performance can be enforceable where the nature of the obligation permits such enforcement (section 1, article 414 of the Civil Code). For example, the delivery of real property can be satisfied by the compulsory execution of a non-pecuniary claim.

With regard to specific performance, section 2, article 414 of the Civil Code provides that, in the event that the nature of the obligation does not permit the enforcement of specific performance, if it is an obligation for an act, the obligee may request the court to cause a third party to perform such act at the expense of the obligor; provided, however, that with respect to any obligation for any juristic act, the manifestation of intention of the obligor may be achieved by a judgment. Furthermore, section 3, article 414 of the Civil Code states that,

with respect to any obligation for an inaction, a request may be made to the court at the expense of the obligor seeking the removal of the outcome of the action performed by the obligor, or an appropriate ruling against any future action.

7 Competent courts

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

An action seeking an execution judgment for a judgment of a foreign court must be filed with the district court having jurisdiction over the location of the general venue of the obligor, and when there is no such general venue, with the district court having jurisdiction over the location of the subject matter of the claim or the seizable property of the obligor (section 1, article 24 of the CEA). If the obligor is a natural person, the general venue is his or her place of residence; and if the obligor is a corporation, the general venue is its principal place of business (article 4 of the CCP).

Then, once an execution judgment is obtained, a petition for compulsory execution must be filed with a competent district 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?

In Japan, a judgment rendered by a foreign court is recognised without any necessity of a separate procedure as long as it satisfies the requirements of article 118 of the CCP. Therefore, a foreign judgment will have legal effect, such as acting to restrict a claim in a later litigation that contradicts the foreign judgment, without any separate procedure being necessary.

On the other hand, in order to execute a foreign judgment by compulsion, it is necessary to obtain an execution judgment from a competent court and then file a petition for compulsory execution based on that execution 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?

As section 2, article 24 of the CEA stipulates that an execution judgment must be made without investigating whether or not the decision is appropriate, a substantive re-examination of the foreign judgment is prohibited in principle. The defendant may only be allowed to challenge a foreign judgment on the basis that it is not final and binding, or that it does not satisfy any of the requirements set out in article 118 of the CCP. In such a challenge, the defendant may argue that the content of the judgment is contrary to public policy in Japan.

10 Injunctive relief

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

No. In principle, injunctive relief to prevent foreign judgment enforcement proceedings is not possible under Japanese law.

11 Basic requirements for recognition

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

See question 3 for a discussion of the CCP's requirements for recognition of a foreign judgment.

With regard to the requirement sets forth in article 118 (iv) of the CCP, the Supreme Court of Japan has ruled that 'a mutual guarantee' is interpreted to mean there is a guarantee that, in the country where a foreign court rendering a judgment is located, judgments rendered by the courts of Japan that are of the same type as said judgment shall be effective on conditions that are not different in any material respect from those listed in article 118 of the CCP (Supreme Court judgment of 7 June 1983).

In this case, the Supreme Court concluded that the requirement of 'mutual guarantee' was met with respect to the original judgment in question rendered by the US District Court for the District of Columbia in the United States.

On the other hand, judgments rendered by courts in China have not been found to meet this requirement.

12 Other factors

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

Only those items listed in article 118 of the CCP are considered with regard to recognition of foreign judgments and whether or not to grant execution judgment in respect thereof (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?

Article 118 (i) of the CCP requires that the jurisdiction of the foreign court that gave the judgment been recognised under laws, regulations, conventions or treaties, and article 118 (ii) of the CCP requires that the defendant must have received service (excluding service by publication or means similar thereto) of a summons or an order necessary for the commencement of the suit, or have appeared in the action without receiving such service. In addition to these specific procedural requirements, article 118 (iii) of the CCP requires 'procedural public policy' for a foreign judgment to be acknowledged, by setting forth that the content of the judgment and the court proceedings pursuant to which the judgment was rendered must not be contrary to public policy in Japan. For example, if the judge who rendered the foreign judgment had been bribed, procedural public policy will be denied and such foreign judgment will not be recognised in Japan.

The Supreme Court of Japan has ruled that a 'judgment of a foreign court' as provided in article 24 of the CEA denotes a final judgment rendered by a foreign court on private law relations that has provided procedural guarantees to both parties, regardless of the name, procedure or form of judgment. The court also ruled that even if the judgment is called a decision or order, insofar as it possesses the characteristics described above of a final judgment, it should be regarded as a judgment of a foreign court (Supreme Court judgment of 28 April 1998).

With regard to the example mentioned in the question, whether there was no or limited pre-trial discovery available to the defendant is irrelevant. Rather, procedural guarantees to both parties or the opportunity for both parties to litigate the case is vital.

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 rendering the execution judgment will examine whether the jurisdiction of foreign court which rendered the judgment is recognised under laws or regulations or conventions or treaties.

In this regard, the court will examine whether or not the foreign court had jurisdiction over the case in question by applying *mutatis mutandis* the Japanese rules regarding jurisdiction. Then, the court will determine in light of the rule of reason, while basically complying with the provisions on international jurisdiction under the CCP of Japan and considering whether or not it is appropriate for Japan to recognise a judgment rendered by the foreign court, in the context of the specific circumstances of the case (Supreme Court judgment of 24 April 2014).

Article 3-2 of the CCP stipulates that a Japanese court will have personal jurisdiction over a defendant if the defendant had its address within Japan, or in the event that the address is unknown, if it has a domicile within Japan, or in the event the domicile is unknown, if it had its address within Japan before the filing of the case.

Update and trends

Courts in Japan have not recognised the judgments rendered by Chinese courts for the reason that there is no 'mutual guarantee', which is one of the requirements for foreign judgments to be recognised in Japan. However, taking into consideration the recent situation that in other jurisdictions such as Germany, Singapore and California, judgments rendered by Chinese courts have been recognised, and then in return Chinese courts have recognised judgments rendered by courts in those countries, one of the leading law magazines, *Kokusai Shoji Houmu (International Business Law)*, has carried an article suggesting that the Japanese courts should reconsider taking the initiative to recognise judgments rendered by Chinese courts, so that Chinese courts will then recognise judgments rendered by Japanese courts in return.

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 per the response to question 14, whether or not the foreign court had subject-matter jurisdiction over the case in question will be determined by applying *mutatis mutandis* the Japanese rules regarding jurisdiction. Then, the court will determine in light of the rule of reason, while basically complying with the provisions on international jurisdiction under the CCP of Japan and considering whether or not it is appropriate for Japan to recognise a judgment rendered by the foreign court, in the context of the specific circumstances of the case (Supreme Court judgment of 24 April 2014).

Article 3-3 of the CCP provides the rules regarding subject-matter jurisdiction. For example, if the place of performance of an agreement is in Japan, or if the place of any asset to be seized is located in Japan, or if a party has a place of business in Japan, then Japanese courts will have subject-matter jurisdiction.

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 118 (ii) of the CCP requires that, for a foreign judgment to be recognised, the defendant have received service (excluding service by publication or means similar thereto) of a summons or order necessary for the commencement of the suit, or have appeared in the action without receiving such service. In this regard, the Supreme Court judgment of 28 April 1998 sets out the following criteria as to whether this requirement has been met:

- the defendant must have been actually aware of the commencement of the suit;
- the defendant must not have been interfered with its right to defend the action; and
- if there is any treaty prescribing the method of service executed between the country of judgment and Japan, and if this treaty provides that the service of the document required for the commencement of litigation must be effected in a manner set out in this treaty, the service must have been made in accordance with that method.

In addition, whether service directly made by post satisfies the requirement contained in article 118 (ii) of the CCP is problematic. Regarding the third element described in the Supreme Court ruling referred to above, Japan is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, which 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. Nevertheless, there is a risk a Japanese court will conclude that service directly made by post does not meet the requirement set out in article 118 (ii) of the CCP.

Further, in order to satisfy the first requirement set out by the Supreme Court judgment referred to above (ie, the defendant must have been actually aware of the commencement of the suit), although there is no Supreme Court decision on this point, the Tokyo High Court judgment of 18 September 1997 determined that a Japanese translation of the summons is required regardless of the language skill of the defendant, if the defendant is a Japanese national and has his or her domicile in Japan.

However, it should be noted that a recent Tokyo High Court judgment of 24 September 2015 determined that the service of summons from a court in California on a Japanese national who was domiciled in California without a Japanese translation satisfied the requirement set out in article 118 (ii) in a case where the defendant apparently had a very high comprehension and understanding of English.

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. Relative inconvenience will be considered by the court in the course of considering whether the jurisdiction of the foreign court is recognised as set forth in article 118 (i) of the CCP.

In this regard, article 3-9 of the CCP provides that a Japanese court may reject all or part of an action, even if it has jurisdiction over the case, if the court finds that, based on the nature of the case, the burdens on the defendant to respond, the location of the evidence and other facts, allowing a Japanese court to handle the case would interfere with the fairness between the parties or the realisation of an appropriate and prompt trial.

18 Vitiating by fraud

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

Yes. The court will examine the foreign judgment for allegations of fraud upon the defendant or the court. Any foreign court judgment obtained by fraud will not satisfy the requirement set forth in article 118 (iii) of the CCP, which requires that the content of the judgment and the court proceedings not be contrary to public policy in Japan, and enforcement will not be permitted.

19 Public policy

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

Yes. Article 118 (iii) of the CCP requires that the content of the judgment and the court proceedings not be contrary to public policy in Japan. Recognition and enforcement of any foreign judgment may be denied because of not meeting this requirement if it conflicts with Japanese laws or Japanese public policy.

A typical example of such a conflict with Japanese public policy is an award of punitive damages (see question 24).

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?

First, with regard to the conflict between decisions of a Japanese court and a foreign court, while there is no Supreme Court decision directly on this point, there are two different schools of thought. One is that a foreign judgment is always contrary to Japanese public policy if there is a conflicting Japanese judgment, and the other is that a foreign judgment will be contrary to Japanese public policy only if the conflicting Japanese judgment was rendered and became final before the foreign judgment.

With regard to this issue, the Osaka District Court judgment of 22 December 1977 determined that a foreign judgment that is in conflict with another final judgment in Japan between the same parties shall not be recognised, because it is contrary to Japanese public policy regardless of the chronological order of the foreign and Japanese

judgments, in relation to the filing of an action, rewarding of a judgment and finalisation of the judgment.

Second, there are no court precedents in Japan with respect to a conflict between two different 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?

Simply, a judgment is enforceable only against the named judgment debtor, but in very limited cases, it may be enforced against a party other than the named judgment debtor through the application of the doctrine of piercing the corporate veil.

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 will recognise and enforce a foreign judgment if the defendant appeared before the foreign court without alleging that the case should be rejected because there was an alternative dispute resolution agreement. In this particular case, the application of Japanese law regarding jurisdiction will result in jurisdiction by appearance having been established (article 12 of the CCP). Further, if such a foreign judgment was obtained without appearance of the defendant but all the requirements provided for in article 118 of the CCP are met, then the foreign judgment also may be recognised and enforced.

23 Favourably treated jurisdictions

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

In principle, all foreign jurisdictions are supposed to be treated equally, as a Japanese court is only to examine whether the judgment of a foreign court satisfies the requirements set forth in article 118 of the CCP and whether such a judgment has become final and binding. An execution judgment is to be made without investigating whether or not the underlying judicial decision is appropriate.

24 Alteration of awards

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

Yes. A court may recognise only part of a judgment. In particular, for example, the court may reduce the amount of damages if the foreign judgment includes in the damage amount punitive damages, which are contrary to Japanese public policy. In this regard, the Supreme Court in a decision of 11 July 1997 held that, in a case where an execution judgment of a judgment rendered by a court in California was sought, the

portion corresponding to the punitive damage award that was imposed on the defendant for the purpose of publicly shaming and sanctioning the defendant's conduct should not be effective because it was contrary to Japanese public policy.

A fundamental principle of Japanese tort law is to restore the plaintiff to its status when the tort did not exist, and this principle conflicts with the idea of requiring a defendant to pay punitive damages (therefore putting the plaintiff in a better position, assuming the compensatory damages suffice to restore the plaintiff's status).

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 Japanese yen. With regard to interest, the court does take it into account, even if the foreign judgment does not clearly provide for interest, if it is apparent from the local law applicable to that foreign judgment that interest accrues at a specific rate (Supreme Court judgment of 11 July 1997).

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. There is a right to appeal the execution judgment. The procedure for appeal is the same as that for other judgments. The judgment rendered by the first instance court may be appealed twice under the Japanese legal system. The procedure at the second instance court is a fact-finding proceeding, but the third instance court (ie, the Supreme Court) only considers very limited legal issues, and appeals concerning issues related to facts are not allowed by the Supreme Court. The appeal must be made within 14 days of service of the relevant prior instance court judgment, and if this period passes without the judgment being appealed, the relevant judgment becomes final and binding and is therefore enforceable. However, if the first instance court approves provisional execution, such judgment may be enforced without waiting for the judgment to be final.

27 Enforcement process

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

Once an enforcement judgment is obtained, the foreign court judgment for which an execution judgment has become final and binding will serve as a title of obligation, and compulsory execution can be carried out based thereon. Article 22 (vi) of the CEA lists as one of the titles with which compulsory execution can be carried out, 'a judgment



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rendered by a foreign court for which an execution judgment has become final and binding’.

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

Every foreign judgment case in which the demand for an execution judgment has been dismissed has had different reasons for the dismissal, and it is difficult to identify common pitfalls to be avoided, but in several of these cases dismissal resulted because the requirements set in either article 118 (ii) or (iii) of the CCP had not been met (ie, service requirement or public policy requirement). It should be understood, as mentioned above, that a Japanese court will not consider service effected via mail or courier delivery, or similar means of publication, as satisfying the requirements set forth in article 118 (ii) of the CCP.

Korea

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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 a 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 is 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 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 has been declared in an execution judgment issued by the Korean court. Further, the CCE provides that an execution judgment for 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 new enacted article 217-2, enacted in 2014, provides an express basis for the Korean court to refuse to approve excessive compensation awards (including punitive damages) or excessive litigation costs as follows:

- where a final judgment on compensation for damages will cause an outcome that is markedly contrary to the basic order of the laws of Korea or an international treaty ratified by Korea, the court shall not approve, in whole or in part, the relevant final judgment; and
- when reviewing this requirement, the court must consider whether the compensation for damages as recognised by the foreign court includes litigation costs and expenses (attorneys' fees), as well as the scope thereof.

Korean law provides for compensation for actual damages in principle. However, foreign courts may order punitive damages in their judgment on compensation. This has provided the basis for a 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 a judgment must not be contrary to 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 enacted to allow the court to exercise discretion in applying it based on the totality of circumstances.

The Korean Supreme Court has 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 grounds 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 the 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 movable or immovable assets, is enforceable by the Korean courts. However, such a judgment must be final and conclusive after all available appeals have been exhausted. Interim relief, provisional attachment or disposition cannot be enforced by the Korean courts, since they are not regarded as final and conclusive judgments as set forth in the CCE.

In a case where a court of the United States entered a 'decree of specific performance' stating 'The plaintiffs shall have the right to get the specific performance order against the defendants under the Memorandum of Agreement and the exclusive licence agreement' – which is quite different from the form of disposition or mode of the statement in Korean judgments – the Korean Supreme Court refused to grant recognition on that decision, based on the rationale that a court of Korea shall grant compulsory execution as a matter of principle unless the terms of an agreement, as the object of a specific performance decree, are unlikely to become an act, making enforcement unlikely even in the country where the judgment was rendered (Supreme Court Judgment 2012da23832 rendered on 30 May 2017).

As for the court decision ordering payment of legal fees and expenses as associated with the order of specific performance, in the above case the Supreme Court ruled that the decision on legal fees is not subject to the order of specific performance and that the recognition of such decision should be separately reviewed.

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, a branch offices or a place of business has 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. Paragraph 1, article 27 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 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 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 owing to 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 that a request for, or an entrustment of, a compulsory execution has been withdrawn (sub-paragraph 6).

Paragraph 1, article 50 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 the foreign judgment be final and conclusive, with all appeals before the foreign courts exhausted. However, there is no requirement under the CCP that a foreign court 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 are the Statutory Rules 1992 No. 321 made under the Foreign Judgments Act 1991, were amended to the Statutory Rules No. 334 of 22 December 1999. These new Regulations included the courts of Korea within the category of superior courts for the purpose of reciprocal enforcement of judgments for the first time. Therefore, 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 in which a judgment was entered must not infringe 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 the Korean court.

However, minor discrepancies in court proceedings and omission of legal reasoning in the opinion or jury trial are not regarded as violations of the procedural public policy. Therefore, failure to open a 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?

The international jurisdiction of the foreign court should be recognised according to the principle of international jurisdiction under Korean law, 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 whether the foreign judgment has jurisdiction in spite of the defendant raising no defence. If a foreign judgment is found to be lacking international jurisdiction as pursuant to the above principle, the Korean court will dismiss the enforcement proceeding without further review of the 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 has been 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 has been made to a defendant in a foreign proceeding. The defendant must have been served with legitimate and adequate notice of legal proceedings in a foreign court in order to give it sufficient time to defend those

proceedings. 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 and 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.

Therefore, 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 has declared that the service of process will be regarded as 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 objected to the service of process by private mail at the time of signing the Hague Service Convention. The illegitimacy of 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 has 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 was not properly served pursuant to the method and procedure on service of process as provided 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 owing 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 was difficult to reasonably foresee that the defendant would be sued before such a foreign court, since the defendant did not have a 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 has 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 out a generous guideline on this issue (2002Da74213). The court opined that procurement of a foreign judgment by fraudulent methods, such as through the use of forged or discarded documents or perjury, cannot be a cause to refuse recognition and enforcement unless such fraudulent acts have been proven in a guilty judgment and an affirmative defence of fraud has been 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 not be contrary to 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 excessive monetary compensation awarded in 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 a previous final and conclusive judgment involving the same parties, the recognition of the second foreign judgment will be denied. One of the Korean court precedents deals with this issue.

After Korean judgment was issued 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 therefore violated Korean public policy. The court determined that the foreign judgment lacked the conditions for recognition of a foreign judgment set forth in the CCP and was 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 against third parties, other than those named in the judgment, in order not to impair the clarity and stability of civil proceedings and the 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 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 awarded in view of various factors such as substantial nexus between actual damages and compensation, equitable sharing of damages among the 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 to recognise a foreign judgment as legitimate and enforceable in Korea without converting the amount of the 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.



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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?

The right to appeal a judgment rendered by a lower court is guaranteed and a losing party can appeal the judgment within 14 of 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 an order for 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 issued after all the appeals have been exhausted, the winning party can enforce the Korean judgment against any assets of the defendant. The plaintiff should obtain the letter of execution of such a Korean judgment from the court and must then apply for the actual execution process of the Korean judgment to 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 whether a reciprocal guarantee is provided for between the foreign country and Korea. The Korean courts are 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. A recent Supreme Court judgment (2012Da23832) recognised the reciprocal guarantee on a US court judgment ordering the specific performance by generously interpreting the relevant provisions of the Uniform Foreign-Country Money Judgments Recognition Acts.

Another issue is whether 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.

Nigeria

Etigwe Uwa SAN, Adeyinka Aderemi and Chinasa Unaegbunam

Streamsaunders & Köhn

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, 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 from countries to which Part 1 of the 2004 Act has not been extended, provided that such applications for enforcement are made within 12 months of the foreign judgment or within such time frame 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 into 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 suggests 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, Laws of the Federation of Nigeria, 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 the 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 the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971. 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 of 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 of the date of the judgment or a longer period if allowed by the registering court. Therefore, where an application for registration of a foreign judgment is not brought within the statutory 12-month period, the application will be caught by limitation, except when time is extended for the judgment creditor by the court. This position was affirmed by the Supreme Court in *Marine & Gen Ass Co Plc v OU Ins Ltd* (2006) 4 NWLR (Part 971) 622.

There are no circumstances stipulated by the Act under which an enforcing court would 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?

The only order made by a foreign court that is enforceable in Nigeria pursuant to the 2004 Act is a final judgment that is 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 that 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 jurisdiction would be the Federal High Court. The Court therefore concluded that the application to register 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. In *Kabo Air Limited v the O' Corporation Limited* (2014) LPELR-23616 (CA), the Court of Appeal also alluded to the fact that the subject matter of the judgment sought to be registered was in relation to aviation, which is within the exclusive jurisdiction of the Federal High Court, in holding that the Federal High Court had jurisdiction to entertain the application for registration of a judgment that was obtained in the Gambia.

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 has been registered and is not 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, the 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. These include execution by issuance of a writ of attachment that empowers court bailiffs to seize property of the judgment debtor, and execution through garnishee proceedings, which 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 the leave of the court 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 the 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 relief, being in personam, is directed against the litigant and not the court or its proceedings. The available remedy for a defendant, akin to a 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 2004 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 that 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 it 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 without any form of fraud;
- the foreign judgment must conform to public policy in Nigeria;
- the judgment creditor must be the applicant for 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 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 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 proceedings, was a person that 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 appeared or otherwise agreed 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 movable property. The registering court will have to consider before registration of the judgment whether 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 was in the original country whether 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 subject-matter jurisdiction where there is controversy as to whether the proceedings of the original court ran contrary to an agreement by the 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 have received actual notice of the proceedings of the original action in the foreign court within sufficient time to enable it 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 (which was the defendant in the original proceedings), it did not receive notice of those proceedings in sufficient time to enable it 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 judgment 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's jurisdiction, the registering court will not consider the relative inconvenience to the judgment debtor in the registration or setting aside proceedings.

18 Vitiation by fraud

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

One of the grounds for denying the registration of a foreign judgment under the 2004 Act is that the 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 denying the registration of a foreign judgment is that enforcement of the judgment would be contrary to public policy in Nigeria. There is no specific requirement that the foreign judgment 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, prior to the date of the judgment, been the subject of a final and conclusive judgment of another court having jurisdiction over 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 will 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 is the that which will 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 is binding only on the parties to the action and parties affected by the judgment. The court cannot apply principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor which 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 was 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?

Section 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 lacked 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, the Republic of 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 of the date of such judgment, to any country that accords reciprocal treatment to judgments of superior courts in Nigeria. The Minister of 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 relates 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 has 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 damages awards made in a foreign judgment. This would amount to exercising 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 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 pursuant to the 1958 Act, the foreign judgment may be registered and enforced in foreign currency.

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 recognising and enforcing 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 a judgment does not preclude a judgment creditor from seeking to use garnishee proceedings to enforce the 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 of execution. 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 and restrains it from moving its assets outside the jurisdiction or dissipating them below the adjudged sum within the jurisdiction.

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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 registration, all the processes by which a judgment of a superior court may be enforced in Nigeria are available to enforce the foreign judgment. They include, but are not limited to, writs of attachment of real and personal property (movable and immovable), garnishee proceedings and committal 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 that 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 section 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 an 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 eventually reach the Supreme Court of Nigeria, resulting in significant delays.

Norway

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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?

Foreign judgments are only recognised and enforceable in Norway to the extent this follows from treaty or statutory law.

Norway has entered into several international treaties for the reciprocal recognition and enforcement of foreign judgments. From a practical perspective, by the most important treaty with regard to the recognition and enforcement of foreign judgments is 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 Norway, Switzerland and Iceland.

Norway has also entered into a multilateral treaty with the other Nordic countries: the Convention between Norway, Denmark, Finland, Iceland and Sweden on the recognition and enforcement of judgments on civil matters of 11 October 1977. This treaty was further incorporated into national legislation by the respective member states. In Norway, it resulted in Act No. 71 of 10 June 1977 regarding the recognition and enforcement of Nordic judgments on civil matters. In addition, Norway has entered into bilateral treaties on recognition and enforcement of judgments on civil law matters with the United Kingdom (1961), West Germany (1977) and Austria (1984).

In addition, Norway has entered into several treaties on specific areas that include rules governing the recognition and enforcement of judgments. These treaties will in general take precedence over the Lugano Convention (article 67 of the Lugano Convention). Such treaties include (the list is non-exhaustive):

- the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road;
- 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; and
- the Convention concerning International Carriage by Rail of 9 May 1980.

These treaties have all been incorporated into national legislation.

The most important treaty in practice in Norway is the Lugano Convention, and as such, the answers to recognition and enforcement lie within the scope of that convention.

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 recognition and enforcement of foreign judgments in Norway. Different jurisdictions, as such, do not exist in Norway.

3 Sources of law

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

The primary sources of law are the aforementioned multilateral and bilateral treaties, if applicable, and Norwegian statutory law applicable to the recognition and enforcement of foreign judgments (the Norwegian Civil Procedure Act and the Norwegian Enforcement Act).

Norwegian case law will be relevant, and taken into consideration by the courts, when interpreting the treaties and legislation. In addition, case law from the European Court of Justice will be a relevant source of law when interpreting the Lugano Convention. Also, foreign judgments interpreting the Convention will be of interest.

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?

Norway is not a signatory to 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?

There is no specific limitation period for the enforcement of foreign judgments in the Lugano Convention. We are not aware of any case where this question has been assessed in Norway. Our view is that the foreign judgment can be enforced in Norway, as long as it is enforceable in the country where the judgment was rendered, even though the limitation period has expired according to Norwegian law.

6 Types of enforceable order

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

The Lugano Convention provides for enforcement of any decision rendered by a court in a signatory state, with the same effect in Norway as in the signatory state, regardless of what the decision is called in the signatory state. Article 32 of the Lugano Convention specifically lists decrees, orders, decisions and writs of execution, as well as the determination of costs or expenses by an officer of the court. A court in the context of the Convention shall be understood as any authority in the signatory state that has been appointed to have jurisdiction in matters that fall within the scope of the Convention. Also, provisional and protective measures are enforceable under the provisions of the Convention.

7 Competent courts

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

A plaintiff seeking enforcement of a foreign judgment must file a request for enforcement with the competent district court in Norway in order to receive a declaration of enforceability. The competent district court will be either the court of the opposing party's domicile, or the court where the enforcement will take place. These two alternatives apply equally.

Once the district court has ruled that the judgment is enforceable in Norway, the foreign judgment may be enforced in Norway in accordance with the provisions of the Norwegian Enforcement Act. The application for a declaration of recognition may be filed in conjunction with the petition for enforcement, and in the same document. After the judgment has been declared enforceable and the court has granted the petition for enforcement, the court will send its decision to the bailiff for execution.

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 of the foreign judgment is contingent upon receiving a declaration of enforceability from the competent district court. However, an application for a declaration of enforceability may be filed together with the petition for enforcement (see question 7).

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 foreign judgment may, under no circumstances, be reviewed with respect to the substance of the judgment. Hence, the Norwegian court will not undertake any review of the facts or the law in the foreign judgment.

In accordance with article 34 of the Lugano Convention, the judgment can, however, be challenged on the following grounds:

- recognition is manifestly contrary to Norwegian public policy;
- the judgment was given in default of appearance of the defendant and the defendant was not served with the document that instituted the proceedings in sufficient time and in such a way as to enable it to arrange for a defence;
- the judgment is irreconcilable with a judgment rendered in Norway in a dispute between the same parties; or
- the judgment is irreconcilable with an earlier judgment rendered in another signatory or third state in a dispute between the same parties concerning the same subject matter.

There are some grounds for challenging the judgment in article 35 of the Lugano Convention. The practical grounds are that a judgment shall not be recognised if it conflicts with the following sections in the Convention:

- section 3, Jurisdiction in matters relating to insurance;
- section 4, Jurisdiction over consumer contracts; and
- section 6, Exclusive jurisdiction.

10 Injunctive relief

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

We are not aware of any Norwegian case where this question has been addressed, and in our opinion injunctive relief to prevent enforcement proceedings is not a usable legal remedy. The petition for enforcement must be contested and tried in the Norwegian courts and a decision in favour of the plaintiff is subject to appeal by the defendant.

11 Basic requirements for recognition

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

Under the Lugano Convention, a judgment from another signatory state is recognised and declared enforceable if certain formal requirements are met. In accordance with articles 53 and 54 of the Lugano Convention, the party seeking a declaration of enforceability is required to provide the following documents:

- a judgment that falls within the scope of application of the Convention in an original or authentic copy; and
- a confirmation on a standard form annexed to the Convention as Annex V, or an equivalent document, proving the enforceability of the judgment in the state of origin.

In this first step of the enforcement process the foreign judgment will be declared enforceable if the above-mentioned formalities are in order, and without any review of, *inter alia*, whether enforcement is manifestly contrary to Norwegian public policy or the other grounds listed under question 9. At this stage, the defendant is not entitled to make any remarks or objections to the application.

The defendant may appeal the decision declaring the judgment enforceable. The appeal must be submitted to the Court of Appeals. In this further step of the enforcement process, the defendant may raise one or more of the limited grounds against enforcement of the foreign judgment (see question 9).

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 are exhaustively set out in the Lugano Convention.

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 general requirement that the judicial proceedings correspond to due process in Norway as such. However, when considering whether recognition of the judgment would be manifestly contrary to Norwegian public policy, a breach of fundamental rules of civil procedure in Norway can be relevant (see questions 9 and 19). If the judgment was given in default of appearance of the defendant, it is a requirement that the document instituting the proceedings was duly served on the defendant (see questions 9 and 16). This requirement is also in line with fundamental principles of Norwegian procedural law.

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 main rule is that Norwegian courts will not review whether the foreign court that delivered the judgment had jurisdiction over the defendant (article 35(3) of the Lugano Convention). There are some exceptions to this main rule, set forth in article 35(1) of the Lugano Convention. The most practical exceptions, which allow a legal examination (not factual) of the court's assessment, concern the following matters:

- jurisdiction in matters relating to insurance;
- jurisdiction over consumer contracts; and
- exclusive jurisdiction, regardless of domicile.

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 Lugano Convention prohibits the review of the jurisdiction of the foreign court; Norwegian courts will therefore not examine whether

the foreign court had subject-matter jurisdiction over the dispute in question.

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 accordance with article 34(1) of the Lugano Convention, the judgment will not be recognised if it was given in default of appearance, and:

- 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 it to arrange for its defence; and
- the defendant commenced proceedings to challenge the judgment when it was possible to do so.

First, the defendant must have been served in sufficient time to enable it to arrange a defence. The assessment shall, as a main rule, be based on the time the defendant was officially served, not when it obtained factual knowledge of the document. What constitutes sufficient time will be determined on a case-by-case basis, and the applicable rule in Norway and the country of origin can provide guidance, but will not be decisive. In Norway, the main rule is that the defendant must submit its defence pleading within three weeks of being served.

Second, the document must be served in such a way as to enable the defendant to arrange a defence. This implies a review of the content of the document and it is not in itself sufficient that the service of the document was done in compliance with the law of the state of origin.

Third, it is also a condition that the defendant commenced proceedings to challenge the judgment if it was possible 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?

In the main, no. However, the defendant may argue that the inconvenience is relevant under the public policy rule.

18 Vitiating by fraud

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

In the main, no. However, the defendant may argue that fraud is relevant under the public policy rule.

19 Public policy

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

If the foreign judgment is contrary to Norwegian public policy, this will be one of the grounds for contesting recognition of the judgment (article 34(1) of the Lugano Convention). The public policy rule can, in principle, be used as a merit-based defence, and a defence based on procedural grounds. The threshold for application is high and the rule will only be applicable in exceptional circumstances.

There is a debate in legal literature as to whether the courts shall examine the public policy rule on its their initiative or whether the party has to expressly invoke the said rule. The answer to this question is uncertain.

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?

That the foreign judgment conflicts with an existing judgment is one of the grounds for contesting recognition of the judgment. Articles 34(3) and (4) of the Lugano Convention provides that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the state in which recognition is sought if:

- the judgment is irreconcilable with an earlier judgment given in another state bound by the Convention; or
- the judgment was given 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 recognition in the state addressed.

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. According to Norwegian law, the enforcement must be directed against the party that is named as debtor in the conclusion of the judgment. However, the judgment is also binding on third parties which are bound by a corresponding agreement on the subject matter of the action owing to their relationship with the party.

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 have agreed to solve the dispute by arbitration, but one of them nevertheless, the plaintiff, files a law suit with the ordinary courts, the other party must raise an objection as soon as possible. If not, the said party is deemed to have accepted the ruling by the ordinary court. It raises the objection, but the court dismisses it and rules in favour of the plaintiff, the defendant must appeal. If not, the judgment becomes final. In both situations, the defendant cannot use the said agreement as an argument against the plaintiff's enforcement of the judgment.

23 Favourably treated jurisdictions

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

No. Foreign judgments are not enforceable in Norway, unless enforceability follows from bilateral or multilateral treaties or Norwegian statutory law.

24 Alteration of awards

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

It follows from article 48 of the Lugano Convention that if a foreign judgment decides more than one claim, a Norwegian court will subject each claim to an individual assessment and may decide that one or more of the claims is not enforceable (eg, because it is deemed to be in conflict with the public policy rule). A plaintiff may also limit an application of enforcement to specific parts of a foreign judgment.

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?

If the Norwegian court grants a petition for enforcement, the court will convert the monetary claim into Norwegian kroner and will include the foreign court costs and interest. The interest will be calculated in accordance with the interest that is set forth in the foreign judgment. However, interest on the enforcement costs in Norway will be calculated in accordance with Norwegian law.

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 a judgment that recognises a foreign judgment is set forth in article 43 of the Lugano Convention. The grounds for appeal are limited (articles 34 and 35 of the Lugano Convention).

According to the second paragraph of article 47 of the Lugano Convention, the plaintiff has a right to invoke protective measures as soon as the judgment has been declared enforceable.

27 Enforcement process

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

The most common and practical form of enforcement in Norway is enforcement with a petition for an execution lien.

After the judgment has been recognised, and the defendant has been given the possibility to raise objections against the petition for the execution lien, the court decides whether the petition shall be granted or denied. If the court grants the petition, the petition will be forwarded to the bailiff for execution. Only objections that are based on circumstances which arose so late that they could not have been raised against the recognition of the judgment can be raised as an objection in the enforcement proceedings.

28 Pitfalls

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

There are none.



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Panama

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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?

Yes. Panama is a signatory to various bilateral and multilateral treaties. From a legal standpoint, those treaties, once signed, need to be ratified by the National Assembly, pursuant to the Constitution.

2 Intra-state variations

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

Yes.

3 Sources of law

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

Primarily, legislation.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on the 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?

Yes.

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 enforcing court will not enter into considerations related to the statute of limitations.

6 Types of enforceable order

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

Final judgments are subject to exequatur proceedings. Interim measures, however, may be subject to personal services in Panama, provided that the requested party is physically located in Panama.

7 Competent courts

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

Exequatur proceedings on the enforcement of foreign judgments are handled by the Fourth Chamber of the Supreme Court of Justice.

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 separate proceedings. After the exequatur proceedings have concluded, the enforcement process starts.

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 defendant may oppose the exequatur proceedings if the following conditions are not met:

- the foreign judgment was rendered as a consequence of the exercise of an action in personam, with the exception of when the law especially regulates probate matters opened in other countries;
- the foreign judgment was rendered as part of proceedings in which the lawsuit was personally served on the defendant;
- the obligation that is sought to be enforced in Panama is legal in the territory of Panama; and
- the copy of the foreign judgment is authentic (that is, it must have been authenticated either by the Panamanian Consul of the place where it was issued or by Apostille prior to its submission in Panama as part of the request of enforcement).

10 Injunctive relief

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

Such a possibility does not exist in Panama.

11 Basic requirements for recognition

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

The basic requirements are as follows:

- the foreign judgment was rendered as a consequence of the exercise of an action in personam, with the exception of when the law especially regulates probate matters opened in other countries;
- the foreign judgment was rendered as part of proceedings in which the lawsuit was personally served on the defendant;
- the obligation that is sought to be enforced in Panama is legal in the territory of Panama; and
- the copy of the foreign judgment is authentic (that is, it must have been authenticated either by the Panamanian Consul of the place where it was issued or by Apostille prior to its submission in Panama as part of the request of enforcement).

12 Other factors

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

In the absence of a bilateral or multinational treaty, reciprocity should be always considered.

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?

It should meet the same requirements as set out in question 11.

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 main requirement is that the defendant has been personally served in the jurisdiction where the judgment was issued.

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 foreign judgment should be rendered as a consequence of the exercise of an action in personam.

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 personally 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?

No.

18 Vitiating by fraud

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

Such allegations could be opposed as being contrary to Panamanian public order.

19 Public policy

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

Yes.

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 the court determines that conflicting decisions could be deemed as being contrary to public order, yes.

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.

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 is a consideration that the local court will probably not enter into.

23 Favourably treated jurisdictions

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

No.

24 Alteration of awards

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

No.



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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 award can be converted into the local currency; however, as granted by the judgment issued, interest should be outside Panamanian jurisdiction.

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?

No.

27 Enforcement process

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

Enforcement proceedings should be commenced after the exequatur proceedings have concluded.

28 Pitfalls

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

Non-compliance with the basic requirements set out in question 11.

Philippines

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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 Philippines is not a party to any bilateral or multilateral treaties for the recognition and enforcement of foreign judgments. Philippine case law, however, recognises that recognition and enforcement of foreign judgments is a generally accepted principle of international law because of widespread practice and the embodiment of procedures for recognition and enforcement of foreign judgments in the rules of law, whether statutory or jurisprudential, adopted in foreign jurisdictions (*BPI Securities Corporation v Guevara*, 752 SCRA 342, 365 (2015), citing *Mijares v Ranada*, 455 SCRA 397, 421-422 (2005)), and considers as an established international legal principle 'that final judgments of foreign courts are reciprocally respected and rendered efficacious subject to certain conditions that vary in different countries' (*BPI Securities Corporation v Guevara*, 752 SCRA 342 (2015), citing *St Aviation Services Co Pte Ltd v Grand International Airways, Inc*, 505 SCRA 30, 34 (2006)).

2 Intra-state variations

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

Yes. The Philippines does not have a federal system and accordingly there is uniformity in the law and procedure within the jurisdiction in respect of the enforcement of foreign judgments. The Philippine Constitution requires the uniform application of the Rules of Court for all courts of the same grade (article VIII 5(5) of the Constitution), which is the primary source of law for the enforcement of foreign judgments (see question 3). The Rules of Court apply in all courts, except as otherwise provided by the Supreme Court (section 2, Rule 1 of the Rules of Court).

3 Sources of law

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

Foreign judgments may be enforced in the Philippines under procedural rules or jurisprudence (*Mijares v Ranada*, 455 SCRA 397 (2005)).

Section 48, Rule 39 of the Rules of Court primarily governs the enforcement of foreign judgments. Under this rule, the foreign judgment merely creates a right of action, and its non-satisfaction is the cause of action by which a suit can be brought for its enforcement (*BPI Securities Corporation v Guevara*, 752 SCRA 342 (2015)). The rule creates a distinction between a foreign judgment in an action in rem and one in personam. For the former, 'the foreign judgment is deemed conclusive upon the title to the thing', while for the latter, the foreign judgment is merely 'presumptive, and not conclusive, of a right as between the parties and their successors in interest by a subsequent title' (*BPI Securities Corporation v Guevara*, 752 SCRA at 367 (2015), citing *Mijares v Ranada*, 455 SCRA 397, 409 (2005)). In either case, the foreign judgment 'may be repelled by evidence of want of jurisdiction, want of notice to the party,

collusion, fraud, or clear mistake of law or fact' (last paragraph, section 48, Rule 39 of the Rules of Court).

Decisions of the Supreme Court applying or interpreting the rule on enforcement of foreign judgments form part of the legal system of the Philippines (article 8 of the Civil Code).

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on the 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 Philippines is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

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 foreign judgment merely gives rise to a right of action (see question 3). Under article 1144(3) of the Civil Code, an action upon a judgment must be brought within 10 years 'from the time the right of action accrues'. The provision applies to local and foreign judgments because it does not make any distinction between the two (*Mijares v Ranada*, 455 SCRA 397 (2005), in which the Supreme Court ruled that '[w]here the law does not distinguish, we shall not distinguish').

The right of action commences to run from the date of finality of the foreign judgment (*PNB v Bondoc*, 14 SCRA 770 (1965)).

The foreign law becomes relevant if it provides for a shorter period (ie, less than 10 years) of limitation (see Salonga, *Private International Law*, p554 (1995)). If the foreign law is not proven, Philippine courts will apply Philippine law, and assume that the foreign law is similar to Philippine law under the doctrine of processual presumption (*Industrial Personnel & Management Services, Inc v De Vera* 785 SCRA 563, 582 (2016)).

6 Types of enforceable order

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

Section 48, Rule 39 of the Rules of Court does not limit the foreign judgment, whether in an action in rem or in personam, to a particular type. Therefore, any remedy ordered by a foreign court may be enforceable in the Philippines. For example, the Philippine Supreme Court upheld a foreign money judgment in *Asiavest Merchant Bankers v Court of Appeals* (361 SCRA 489, (2001)). The Philippine Supreme Court also ruled that a foreign divorce decree may be recognised in *Corpuz v Sto Tomas* (628 SCRA 266 (2010)), and as a consequence of such ruling, it is reasonable to assume that the foreign divorce decree may be enforced as to the conjugal assets of the spouses, if there are any in the Philippines.

However, since there is a requirement that the judgment be final (Salonga, *Private International Law*, p553 (1995) citing *II Beagle*, 1390;

see also *PNB v Bondoc*, 14 SCRA 770 (1965)), interim injunctions will not be enforceable.

7 Competent courts

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

Yes. The regional trial court has jurisdiction over cases seeking enforcement of foreign judgments (section 19(6), Blg 129 of the Batas Pambansa or the Judiciary Reorganization Act of 1980, as amended).

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?

Unlike in other jurisdictions, there is no requirement for a special recognition or registration process before a foreign judgment can be enforced in the Philippines. As such, the procedures for recognition and enforcement are generally indistinguishable and accomplished in one proceeding. The Philippine Supreme Court has ruled that 'recognition and enforcement of a foreign judgment or final order requires only proof of fact of the said judgment or final order', and that once proven, the said foreign judgment enjoys a disputable presumption of validity (*BPI Securities Corporation v Guevara*, 752 SCRA at 371 (2015)).

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 defendant is limited to raising narrower grounds for challenging a foreign judgment. As discussed in question 8, the foreign judgment enjoys a presumption of validity. Therefore, the defendant is 'tasked with the burden of overcoming its presumptive validity' (*BPI Securities Corporation v Guevara*, 752 SCRA at 371 (2015)). Under section 48, Rule 39 of the Rules of Court, a defendant may raise the following to repel, by evidence, in the following foreign judgment:

- want of jurisdiction;
- want of notice to the party;
- collusion;
- fraud; or
- clear mistake of law or fact.

According to the Philippine Supreme Court, '[t]he rule on limited review embodies the policy of efficiency and the protection of party expectations, as well as respecting the jurisdiction of other states' (*Fujiki v Marinay*, 700 SCRA 69, 92 (2013), citing *Mijares v Ranada*, 455 SCRA at 411-412 (2005)).

Philippine case law has shown, though, that the ground 'clear mistake of law or fact' is used by defendants to raise merit-based defences. In *Nagarmull v Binalbagan-Isabela Sugar Company, Inc* (36 SCRA 46 (1970)), the Philippine Supreme Court resolved the merit-based defences to declare that the foreign judgment was repelled on the ground of 'clear mistake of law'. The merit-based defences were considered in determining whether the High Court of Malaya in Malaysia had committed a 'clear mistake of law or fact'; but these defences were determined to be 'mere conjectures and specious observations' and 'contradicted by the evidence on record' in *Asiavest Merchant Bankers v Court of Appeals* (361 SCRA 489, 504 (2001)). More recently, however, the Philippine Supreme Court recognised the defendant's attempt to raise merit-based defences and ruled that it is not necessary to look into the merits of the foreign judgment. The Supreme Court ruled that '[a] Philippine court will not substitute its own interpretation of any provision of the law or rules of procedure of another country, nor review and pronounce its own judgment on the sufficiency of evidence presented before a competent court of another jurisdiction'. The Supreme Court further clarified that '[i]f every judgment of a foreign court were reviewable on the merits, the plaintiff would be forced back on his or her original cause of action, rendering immaterial the previously concluded litigation' (*BPI Securities Corporation v Guevara*, 752 SCRA at 369 (2015), citing *Mijares v Ranada*, 455 SCRA at 411-412 (2005)).

Finally, a defendant may also raise the defence that the foreign judgment is contrary to public policy (see *Bayot v Court of Appeals*, 570 SCRA 472 (2008), citing *Llorente v Court of Appeals*, 345 SCRA 592 (2000) and *Mijares v Ranada*, 455 SCRA 397 (2005)).

10 Injunctive relief

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

We are not aware of any law, rule or jurisprudence that prohibits a party from trying to obtain injunctive relief to prevent foreign judgment enforcement proceedings. In this connection, we believe that it is possible for a party to obtain preliminary and permanent injunctive relief if there are compelling reasons to do so, and so long as the requisites for its issuance are present. The essential requisites for the issuance of injunctive relief are as follows:

- the applicant has a clear and unmistakable right;
- there has been material and substantial invasion of such right;
- there is an urgent need for the writ to prevent irreparable injury to the applicant; and
- no other ordinary, speedy and adequate remedy exists to prevent the infliction of irreparable injury (*Marquez v Sanchez*, 515 SCRA 577, 588 (2007)).

11 Basic requirements for recognition

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

The mandatory requirements for recognition of a foreign judgment are set forth in *Asiavest Merchant Bankers v Court of Appeals* (361 SCRA 489 (2001)), where the Supreme Court ruled that:

'[i]n this jurisdiction, a valid judgment rendered by a foreign tribunal may be recognised insofar as the immediate parties and the underlying cause of action are concerned so long as it is convincingly shown that there has been an opportunity for a full and fair hearing before a court of competent jurisdiction; that trial upon regular proceedings has been conducted, following due citation or voluntary appearance of the defendant and under a system of jurisprudence likely to secure an impartial administration of justice; and that there is nothing to indicate either a prejudice in court and in the system of laws under which it is sitting or fraud in procuring the judgment.' (*Asiavest Merchant Bankers v Court of Appeals*, 361 SCRA at 497 (2001).)

The foreign judgment must not have been obtained by fraud, collusion or clear mistake of fact or law (section 48, Rule 39 of the Rules of Court). The foreign judgment must not be contrary to the public policy or good morals of the Philippines (*Mijares v Ranada*, 455 SCRA 397 (2005)). The judgment must be final and executory (*Salonga, Private International Law*, p553 (1995) citing *II Beagle*, 1390; see also *PNB v Bondoc*, 14 SCRA 770 (1965)).

12 Other factors

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

Yes. Other factors exist that may be considered by the courts, such as the following:

- reciprocity (*Asiavest Merchant Bankers v Court of Appeals*, 361 SCRA at 497 (2001)); and
- whether the foreign court was a seriously inconvenient forum for the trial of the action (*Philsec Investment Corporation v Court of Appeals*, 274 SCRA 102, 113 (1997)).

There is still no Supreme Court decision on this point, but a view is taken that the following may be considered as discretionary factors for recognition of a foreign judgment:

- the foreign judgment conflicts with another final and conclusive judgment; and
- the proceeding in the foreign country was contrary to an agreement between the parties under which the dispute in question was to be settled other than through a proceeding in that court (eg,

the existence of an arbitration agreement) (Coquia and Aguilin-Pangalangan, *Conflict of Laws: Cases, Material and Comments*, p557 (2000)).

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. The recognition to be accorded a foreign judgment is not necessarily affected by the fact that the procedure in the courts of the country in which such a judgment was rendered differs from that of Philippine courts. The Philippine Supreme Court has held that 'matters of remedy and procedure are governed by the lex fori or the internal law of the forum' (*Oil and Natural Gas v Court of Appeals*, 293 SCRA 26, 45 (1998)). The Supreme Court further ruled that:

'the essence of due process is to be found in the reasonable opportunity to be heard and submit any evidence one may have in support of one's defence or stated otherwise, what is repugnant to due process is the denial of opportunity to be heard. Therefore, there is no violation of due process even if no hearing was conducted, where the party was given a chance to explain his side of the controversy and he waived his right to do so.' (*Oil and Natural Gas v Court of Appeals*, 293 SCRA 26, 46 (1998)).

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 raised as an issue, Philippine courts will examine whether the foreign court had personal jurisdiction over the defendant since the foreign judgment may be repelled by evidence of want of jurisdiction (section 48, Rule 39 of the Rules of Court). A foreign judgment enjoys the presumption of regularity (*BPI Securities Corporation v Guevara*, 752 SCRA at 371 (2015)) (see question 8); hence, the defendant must overcome the presumption by showing proof of the internal law of the foreign jurisdiction in respect of the service of summons, and that said rule was not followed (*Asiavest Limited v Court of Appeals*, 296 SCRA 539 (1998)).

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?

When raised as an issue, Philippine courts will examine whether the foreign court had subject-matter jurisdiction since the foreign judgment may be repelled by evidence of want of jurisdiction (section 48, Rule 39 of the Rules of Court). A foreign judgment enjoys the presumption of regularity (*BPI Securities Corporation v Guevara*, 752 SCRA at 371 (2015)) (see question 8); hence, the defendant must overcome the presumption by showing proof that the court had no subject-matter jurisdiction. If the defendant was unable to overcome the burden, the Philippine court will presume that the foreign court had subject-matter jurisdiction.

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?

Generally, matters of remedy and procedure such as those relating to the service of process upon a defendant are governed by the lex fori or the internal law of the forum or the country that promulgated the foreign judgment (*St Aviation Services Co v Grand International Airways Inc*, 505 SCRA 30, 35 (2006)). Therefore, the implication in *St Aviation Services* is that, so long as service is made in compliance with the rules of the foreign jurisdiction, it will be considered as sufficient. In the old case of *Boudard, et al, v Tait* (67 Phil 70(1939)), however, the Philippine Supreme Court, citing US jurisprudence, ruled that in actions in personam, '[t]here must be actual service within the state of notice upon him or upon someone authorised to accept service for him'.

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 discussed in question 12, the relative inconvenience of the foreign jurisdiction to the defendant may be one of the non-mandatory grounds for non-recognition of foreign judgments (*Philsec Investment Corporation v Court of Appeals*, 274 SCRA 102, 113 (1997)).

The Philippine Supreme Court has considered whether, under the principle of forum non conveniens, even if the exercise of jurisdiction is authorised by law, a foreign judgment may nonetheless be refused enforcement for any of the following practical reasons:

- the belief that the matter could be better tried and decided elsewhere, either because the main aspects of the case transpired in a foreign jurisdiction or the material witnesses have their residence there;
- the belief that the non-resident plaintiff sought the forum merely to secure procedural advantages or to convey or harass the defendant – a practice known as forum shopping;
- the unwillingness to extend local judicial facilities to non-residents or aliens when the docket may already be overcrowded;
- the inadequacy of the local judicial machinery for effectuating the right sought to be maintained; or
- the difficulty of ascertaining foreign law.

The Philippine Supreme Court explained that 'the issue of whether a suit should be entertained or dismissed on the basis of the principle of forum non conveniens depends largely upon the facts of each case and on the sound discretion of the court' (*Puyat v Zabarte*, 352 SCRA 738, 751-752 (2001)).

18 Vitiating by fraud

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

When raised as an issue, Philippine courts will examine the foreign judgment for allegations of fraud since the foreign judgment may be repelled by evidence of fraud (section 48, Rule 39 of the Rules of Court). Whether or not there was fraud will be decided by the court where enforcement of the foreign judgment is sought on the basis of its own internal law (Coquia and Aguilin-Pangalangan (2000), 'Cases, Material and Comments', *Conflict of Laws* p. 556)

To hinder the enforcement within this jurisdiction of a foreign judgment, fraud must be extrinsic – that is, fraud based on facts not controverted or resolved in the case where judgment is rendered, or which would go to the jurisdiction of the court or would deprive the party against which judgment is rendered a chance to defend the action to which it has a meritorious case or defence. In contrast, intrinsic fraud – that is, fraud that goes to the very existence of the cause of action, such as fraud in obtaining the consent to a contract – is deemed already adjudged, and it therefore cannot militate against recognition or enforcement of the foreign judgment (*PAWI v FASGI Enterprises, Inc*, 342 SCRA 722, 737 (2000)). Although there appears to be no specific ruling by the Supreme Court on the matter, Philippine courts may look into the defence of collusion, which is akin to fraud, under the express provisions of section 48, Rule 39 of the Rules of Court.

19 Public policy

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

The court cannot give effect to a foreign judgment that contravenes the Philippines' laws, customs and public morals (*Arca v Javier*, 95 Phil 579 (1954)). To extend the effect of a foreign judgment in the Philippines, Philippine courts must determine whether the foreign judgment is consistent with domestic public policy and other mandatory laws (*Fujiki v Marinay*, 700 SCRA 69, 91 (2013)). Prohibitive laws concerning persons, their acts or property, and those that have for their object public order, public policy and good customs, shall not be rendered ineffective by laws or judgments promulgated, or by determinations or conventions agreed upon, in a foreign country (article 17 of the Civil Code).

The viability of the public policy defence against the enforcement of a foreign judgment has been recognised in the Philippines. This defence allows for the application of local standards in reviewing the foreign judgment, especially when such judgment creates only a presumptive right, as it does in cases wherein the judgment is against a person. The defence is also recognised within the international sphere, as many civil law nations adhere to a broad public policy exception that may result in a denial of recognition when the foreign court, in light of the choice of law rules of the recognising court, applied the wrong law to the case. The public policy defence can safeguard against possible abuses of the easy resort to offshore litigation if it can be demonstrated that the original claim is noxious to constitutional values (*Mijares v Ranada*, 455 SCRA 397, 420-421 (2005)). A specific instance of public policy negating the enforcement of a foreign judgment is when an absolute divorce decree is secured by a Philippine national married to another Philippine national. According to the Philippine Supreme Court, this is contrary to the concept of public policy and morality and will not be recognised in the Philippines (*Bayot v Court of Appeals*, 570 SCRA 472 (2008), citing *Llorente v Court of Appeals*, 345 SCRA 592 (2000)).

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?

As discussed in question 12, while there is no Philippine Supreme Court decision on this point, a view is taken that a conflicting decision is one of the discretionary grounds for non-recognition of foreign judgments (Coquia and Aguilin-Pangalangan (2000), 'Cases, Material and Comments', *Conflict of Laws* p. 557).

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?

Yes. In case of a judgment or final order upon a specific thing, the foreign judgment is conclusive upon the title to the thing; hence, if the thing is held by a party other than the judgment debtor, the foreign judgment is still enforceable against the third party because it relates to the thing (section 48, Rule 39 of the Rules of Court). On the other hand, in a judgment or final order against a person, the foreign judgment is presumptive evidence of a right between the parties and their successors in interest by a subsequent title (section 48, Rule 39 of the Rules of Court), which is an express statement that the foreign judgment may be enforced against third parties provided that the third party is a successor in interest of the judgment debtor by a subsequent title. Although it appears that the Philippine Supreme Court has yet to resolve a foreign judgment case involving piercing of the corporate veil, we believe that the principles behind piercing may allow the enforcement of a foreign judgment against a party other than the judgment debtor. Examples might include where the veil of corporate fiction is being used as follows:

- to defeat public convenience, as when the corporate fiction is used as a vehicle for the evasion of an existing obligation;
- in fraud cases or when the corporate entity is used to justify a wrong, protect fraud or defend a crime; or
- in alter ego cases, where a corporation is merely a farce since it is a mere alter ego or business conduit of a person, or where the corporation is so organised and controlled and its affairs are so conducted as to make it merely an instrumentality, agency, conduit or adjunct of another corporation (*De Castro v Court of Appeals*, 805 SCRA 266, 290 (2016)).

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?

While there appears to be no Supreme Court case that directly resolves this point, the answer here may depend on whether or not the defence that the agreement to resort to alternative dispute resolution was not followed was raised in the foreign court proceedings.

Update and trends

Paragraph 2, article 26 of the Family Code states that where a marriage between a Filipino citizen and a foreigner is validly celebrated and a divorce is thereafter validly obtained abroad by the alien spouse giving him or her the capacity to remarry, the Filipino spouse shall have the capacity to remarry under Philippine law. The Supreme Court has previously ruled in *Republic v Orbecido III*, 509 Phil 108 (2005) that the elements for the application of this provision are:

- a valid marriage that has been celebrated between a Filipino citizen and a foreigner; and
- a valid divorce obtained abroad by the alien spouse giving him or her the capacity to remarry.

In *Republic v Manalo*, GR No. 221029, 14 April 2018, the Supreme Court clarified that the alien spouse need not initiate the divorce proceedings. The Filipino spouse has the capacity to remarry after initiating divorce proceeding abroad and obtaining a favorable judgment against the alien spouse who has the capacity to remarry.

In case the party raising the defence of non-compliance with the agreement to resort to alternative dispute resolution participated, but did not raise the issue, in the foreign court proceedings, we believe that the defence may be defeated under the doctrine of waiver of rights. Under Rule 4 of the Special Rules of Court on Alternative Dispute Resolution, a party to a pending action filed in violation of the arbitration agreement may request a court to refer the parties to arbitration in accordance with such agreement until the pre-trial conference. After the pre-trial conference, the court will only act upon the request for referral if it is made with the agreement of all the parties to the case. Applying this principle, if a party failed to invoke an agreement to resort to alternative dispute resolution in the foreign court proceedings, the Philippine courts will consider such a party to have waived the right to resort to alternative dispute resolution.

If the defence of non-compliance with the agreement to resort to alternative dispute resolution was raised in the foreign court proceedings but the foreign court ignored said defence and proceeded to hear the case and render a judgment, there may be a different approach by the Philippine courts depending on the mode of alternative dispute resolution chosen by the parties. If the mode is arbitration, we believe that the defence of non-compliance with the agreement to resort to alternative dispute resolution may be raised in light of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which was ratified by the Philippine Senate; Republic Act No. 9285, or the Alternative Dispute Resolution Act of 2004; and the declared public policy of actively encouraging and promoting the use of alternative dispute resolution (section 1 of Republic Act No. 9285). On the other hand, if the mode is mediation or other similar modes, which, unlike arbitration, do not result in a binding award or decision rendered by a third party, we believe that the defence of non-compliance with the agreement to resort to alternative dispute resolution will not succeed because the nature of the mode chosen by the parties may only cause the suspension of the court proceedings (to allow the parties to go through the alternative dispute resolution process agreed upon), but may not invalidate a court judgment rendered after due proceedings.

23 Favourably treated jurisdictions

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

No.

24 Alteration of awards

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

The Philippine Supreme Court has yet to rule on a matter involving the recognition of only part of a judgment, or an alteration or limitation of the damage award, but we believe it is possible for the Philippine courts to recognise only part of a judgment, or alter or limit the damage award on, among other things, public policy or clear mistake of law or fact grounds (section 48, Rule 39 of the Rules of 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?

We are not aware of any law, rule or jurisprudence that requires the conversion of the award to local currency. In fact, in several cases, the Philippine Supreme Court affirmed the foreign judgment in foreign currency without converting the amounts to the local currency (*Puyat v Zabarte*, 352 SCRA 738 (2001) and *Asiavest Merchant Bankers v Court of Appeals*, 361 SCRA 489, 505 (2001)). The payment of debts in money shall be made in the currency stipulated, or if it is not possible to deliver such currency, then in the currency that is legal tender in the Philippines (article 1249 of the Civil Code).

As to interest claims, the Philippine courts generally respect the interest rate stipulated in the foreign judgment because of the presumption of validity. In *Asiavest Merchant Bankers v Court of Appeals*, 361 SCRA 489, 505 (2001), the Supreme Court merely affirmed and did not even touch the award by the Malaysian Court of 12 per cent a year interest on the judgment award until payment. If the interest rates are unconscionable, however, the award may be vulnerable to a public policy defence. If the rates are struck down, the Philippine legal rate will apply, which is presently 6 per cent a year until fully paid (*Nacar v Gallery Frames*, 703 SCRA 439 (2013)).

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. A right to appeal a judgment recognising or enforcing a foreign judgment exists. If questions of fact will be raised, the decision of the regional trial court is appealable to the Court of Appeals under Rule 41 of the Rules of Court through the filing of a notice of appeal with the regional trial court. If only questions of law will be raised from the decision of the regional trial court, the case may be lodged directly with the Supreme Court through a petition filed under Rule 45 of the Rules of Court. A Rule 45 petition may also be filed in the Supreme Court to question the Court of Appeals' decision on the Rule 41 appeal.

If the judgment is affirmed, the judgment creditor may file a motion for execution with the regional trial court where the petition for recognition and enforcement of a foreign judgment was made under section 1, Rule 39 of the Rules of Court. The writ of execution shall issue as a matter of right at this stage, in which case the judgment is satisfied with the assistance of the court's sheriffs.

Further, the winning party has the option of filing a motion for execution of a foreign judgment during the pendency of appeal under section 2, Rule 39 of the Rules of Court. The grant of the motion here is discretionary and subject to the posting of a bond.

27 Enforcement process

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

As discussed in question 8, the procedures for recognition and enforcement are generally indistinguishable and accomplished in one proceeding. Therefore, the enforcement procedure follows the discussion above – that is, the petition is filed with the regional trial court. The decision of the regional trial court may be appealed all the way to the Supreme Court, and thereafter, a motion for execution under section 1, Rule 39 of the Rules of Court will be filed in the regional trial court upon finality of the local judgment recognising the foreign judgment. The Philippine Supreme Court has consistently held that the grant of a motion for execution upon finality of the judgment is mandatory and considered as ministerial on the part of the trial court (*Anama v Hon Court of Appeals*, 664 SCRA 293 (2012)). Once the motion has been granted, the Philippine court shall issue the writ of execution requiring the court's sheriff or other proper officer to enforce the writ according to its terms (section 8, Rule 39 of the Rules of Court). To illustrate, if the judgment is a money award, the sheriff shall demand, in writing, the payment from the judgment debtor of the judgment award by cash or certified bank cheque payable to the judgment creditor (upon proper receipt) (section 9, Rule 39 of the Rules of Court). If the judgment debtor cannot pay all or part of the obligation in cash, certified bank cheque or other acceptable modes of payment, the sheriff shall levy upon properties, whether real or personal, of the judgment debtor, which may be disposed of for value, sufficient to satisfy the judgment award (section 9(b), Rule 39 of the Rules of Court).

28 Pitfalls

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

The most common pitfall in seeking recognition or enforcement of a foreign judgment in the Philippines is the delay in the proceedings due to the heavy caseload of the courts. Despite reform efforts, there may also be the possibility of corruption to influence the resolution of the petition for recognition and enforcement in certain courts. The delay is prevalent even at the execution or implementation stage. The judiciary's efforts to promote efficiency in the resolution of cases have not gone unnoticed, however, including its programmes to ensure the integrity of the judges and court personnel under its supervision.

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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?

Russia is a party to a number of bilateral treaties on provision of legal assistance in civil and criminal matters. These treaties usually provide for recognition or enforcement of foreign judgments. Additionally, Russia is a party to the Commonwealth of Independent States Convention of 22 January 1993 on legal assistance and legal relations in civil, family and criminal matters, which involves all former Soviet Union countries, with the exception of the Baltic states.

Russia does not have a general approach to such treaties, although a significant number of them were entered into by the Soviet Union with its satellite and allied states.

Russia does not make any reservations and Russia does not currently enter into new treaties (the latest treaties providing for recognition and enforcement of judgments were entered into by Russia in 2000).

2 Intra-state variations

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

The law on the enforcement of foreign judgments is uniform throughout the entire country by virtue of being a matter of federal legislation, as set out by article 71(o) of the Russian Constitution.

There are, however, regional variations in the application of law where it is unclear (especially in general courts), which requires an analysis of the court practice in any given federal subject in such matters.

3 Sources of law

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

On a statutory level, the legal framework consists of:

- Chapter 45 of the Code of Civil Procedure (CCivP), used in general courts; and
- Chapter 31 of the Code of Commercial Procedure (CComP), used in commercial courts, which are state courts that resolve disputes arising from commercial or other economic activities.

The rules of the two procedural codes are similar for the most part with only some differences, usually relating to specific categories of foreign judgments.

The Decree of the Presidium of the Supreme Council of the Union of Soviet Socialist Republics (USSR) of 21 June 1988, No. 9131-XI 'On the recognition and enforcement of decisions by foreign courts and arbitrations in the USSR' remains in force with respect to the enforcement of foreign judgments. In practice, its provisions are entirely superseded by the rules of the two procedural codes.

Russian procedural rules must always be read in conjunction with the international treaty underlying the enforcement, since the general

enforcement regime is only implemented if there is an international treaty providing for such enforcement. Recognition and enforcement of a judgment without a treaty (based on reciprocity or comity) is a rare exception. Where treaty and statutory rules differ, the treaty trumps national law.

In addition to statute, interpretations of law and digests of court practice issued by the highest courts in Russia, the Supreme Court and the now-defunct Supreme Commercial Court are relevant. They provide guidelines for the lower courts on interpretation of statute (and sometimes effectively create new legal rules). These guidelines are technically not mandatory, but most of them are almost universally adhered to by lower instance courts, especially commercial 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?

Russia is not a party to the Hague Convention on Foreign Judgments in Civil and Commercial Matters 1971 and, as such, a Russian court will not take its provisions into consideration.

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 application for recognition and enforcement is to be filed within three years of the foreign judgment in question entering into force in its domestic jurisdiction. This timeframe can be restored by the enforcing court if it finds the reasons for the applicant missing the deadline legitimate.

The statute of limitations of the foreign jurisdiction will not be considered by the enforcing Russian court. A Russian court will treat this matter as one that must be raised by the defendant in its domestic proceedings, as opposed to at the recognition and enforcement stage.

6 Types of enforceable order

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

In Russia, only a final judgment on the merits is recognised as a 'judgment' (ie, orders for interim measures are not recognised or enforced).

As long as the foreign judgment is a final judgment on the merits, it can be recognised and enforced regardless of the type of remedy ordered by the foreign court.

Additionally, the issue of whether decisions approving settlement agreements are subject to recognition and enforcement is debatable and has no direct statutory answer, while the jurisprudence is somewhat inconsistent. Under article 409(1) of the CCivP, '[j]udgments of foreign courts, including judgments approving settlement agreements, are recognised and enforced[...]' Based on this provision, the general jurisdiction courts will refuse the enforcement of a court decision

approving a settlement agreement, unless the international treaty underlying recognition or enforcement provides for recognition and enforcement of such court decisions approving settlements.

Although the CComP has no analogous provision, the general approach is the same.

7 Competent courts

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

An application for recognition and enforcement of a foreign judgment must be brought before a particular court as determined by Russian procedural law.

Under article 409(1) of the CComP, an application for recognition and enforcement of a judgment that was rendered in a case that arose in the course of commercial or other economic activity must be brought before a commercial court. The application must be brought before a commercial court of the federal subject (ie, first level court) that has territorial jurisdiction over the place of residence of the debtor, or, if it is unknown or does not exist, the location of the debtor's assets (article 242(1) of the CComP).

Foreign judgments that are not rendered in economic disputes are subject to enforcement in general jurisdiction courts. Under article 410 of the CCivP, this application shall be considered by the court of the federal subject (ie, the second-level court) that has territorial jurisdiction over the place of residence of the debtor, or, if it is unknown or does not exist, the location of the debtor's assets.

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 Russian law, 'recognition' means that the state is giving legal force to a foreign judgment, therefore expanding its authority into the Russian jurisdiction. 'Enforcement' means that the court is using its adjudicatory powers to have the judgment executed. After a judgment has been recognised and enforced, the court can issue a writ of execution and subsequent recovery can begin with the assistance of the Federal Bailiff Service under the corresponding federal law.

In court, recognition and enforcement of a foreign judgment are, for the most part, fused into a single procedure, but there is an additional 'execution' procedure for actual recovery.

Two exceptions to this general rule are specific categories of judgments that are automatically recognised and do not require further enforcement because of their nature. Such judgments are recognised automatically, unless an interested party submits objections against such recognition within one month of learning of the existence of such judgment (article 412 of the CCivP and article 245(1) of the CComP).

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 only merits-based defence that a defendant can raise is public policy. The Russian court should not enquire into errors of law or fact committed by the foreign court. However, the notion of public policy is rather broad in Russian practice, and a Russian court might occasionally refuse recognition and enforcement of a judgment that is manifestly erroneous in fact or incompatible with Russian public law (ie, currency control, anti-money laundering, data protection legislation etc). Special care must be taken if the foreign judgment is rendered against a Russian party that has access to public funds.

10 Injunctive relief

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

Russian procedural law does not provide for such injunctive relief, and, as such, a party cannot prevent enforcement of a foreign judgment in this way.

However, if the foreign judgment is under appeal in the jurisdiction where it was rendered, a party can request the court to postpone the proceedings under the request for recognition and enforcement (article 411(6) of the CCivP and article 243(5) of the CComP). The court, in this situation, has the power to decide whether to grant the request. Should the request be granted, the recognition and enforcement proceedings are postponed until after the relevant appeal proceedings in the jurisdiction of the foreign judgment are concluded.

11 Basic requirements for recognition

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

As a general rule, a foreign judgment must meet the following requirements:

- it is a judgment on the merits (see question 6);
- it has entered into force; and
- it was rendered by a court of a country that has an international treaty with Russia providing for recognition and enforcement of each other's judgments.

Failing the last point, a judgment can be enforced based on the principles of reciprocity and international comity, and there are examples of Dutch, English, South Korean, UK and US judgments being successfully enforced that way (see question 12).

The list of grounds to refuse recognition and enforcement includes the following:

- the judgment has not entered into force;
- the party against which the judgment was rendered was not properly, and in a timely manner, notified of the time and place of the hearing, or could not present its position to court for other reasons;
- the dispute was subject to the exclusive jurisdiction of a Russian court;
- a Russian judgment on a dispute between the same parties and on the same grounds has entered into force;
- there is a case under consideration by a Russian court that is between the same parties and on the same subject matter and the same grounds, and the Russian court was the first to initiate the proceedings, or to accept a statement of claim;
- the limitation period for recognition and enforcement has expired; and
- recognition and enforcement of the judgment would be contrary to Russian public policy.

Additionally, a Russian court will refuse recognition and enforcement if it would prejudice Russian state sovereignty or security (this is expressly listed as grounds for refusal in article 412(1) of the CCivP, and is seen as a part of public policy by the commercial courts).

These grounds for refusal are explained in more detail in questions 13, 16, 17, 19, and 20.

12 Other factors

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

The requirements of Russian procedural law with respect to recognition and enforcement of foreign judgments are prescriptive. Any specific circumstances that a Russian court will take into account in a given matter of recognition and enforcement will be considered by the court under the guise of public policy.

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?

In the course of recognition and enforcement proceedings, a Russian court will not consider procedural equivalence of due process.

Due process can become grounds to resist enforcement in two ways: proper service (see question 16) and public policy. While the available body of Russian court practice is limited, generally, a Russian court will consider whether international minimal standards of due process were met (without requesting full procedural equivalence to

the Russian law). If such standards were not met, a Russian court is likely to refuse recognition and enforcement as contrary to Russian 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?

A Russian court will not examine the jurisdiction of the court that rendered the judgment. The Russian courts only examine whether the case is subject to the exclusive jurisdiction of a Russian court, whether Russian proceedings commenced before the foreign court proceedings that resulted in the judgment (see grounds to refuse recognition and enforcement listed in question 11 above).

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 Russian court will not examine the jurisdiction of the court that rendered 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?

As a general rule, it is sufficient for a Russian court that the defendant was actually notified of the proceedings (ie, the defendant could present its position before the court that rendered the judgment). The approach of the Russian courts is that the rules of service are established in the jurisdiction where the judgment was rendered and should not be examined by the enforcing court.

If the defendant did not participate in the proceedings, the Russian court will require hard evidence of service. This is the main pitfall with respect to service. For example, notification through email will not be sufficient because of the low evidentiary value that Russian courts give emails. It is required that there is a paper trail for service of the defendant, ideally with notice of receipt or notice of the defendant refusing to receive the mail. Receipts from post or courier service will usually be sufficient evidence.

If the defendant is a shelf company registered in an offshore jurisdiction (eg, Liberia or Panama), if there is potential for future enforcement of the judgment in Russia, it is best to serve that party to all possible addresses that are in any way associated with the company (registered address, address of registered agent, actual address, addresses of legal representatives and attorney etc.)

If a party against which the judgment is rendered comes from a country that is party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents 1965, a Russian court will generally require that the defendant was served under the rules of that Convention. Special care must be taken if the foreign judgment is rendered against a Russian party.

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 will not be examined by the enforcing Russian court.

18 Vitiating by fraud

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

Fraud is generally not considered grounds to resist recognition and enforcement. However, in practice, a Russian court will examine such allegations and will take them into consideration as a part of Russian public policy. As such, if the Russian court finds allegations of fraud

(whether by the plaintiff or by the foreign court) meritorious, it might refuse recognition and enforcement on the grounds of public policy. While the available body of Russian court practice on the issue is limited, it is in line with the approach of the Russian courts to enforcement of arbitral awards, which Russian courts do refuse to enforce in cases of fraud; but instead of using fraud as outright grounds to refuse the application, it is treated as an element of Russian public policy (or, more rarely, arbitrability).

19 Public policy

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

A Russian court will always examine a foreign judgment for consistency with Russian public policy. The defendant need not put forward a public policy objection, as the Russian court is in any event mandated to examine whether the foreign judgment is consistent with Russian public policy.

Public policy was defined by the Supreme Commercial Court (citing an analogous provision of the Russian Civil Code on conflict of laws) in 2013 as the 'fundamental legal principles, which possess supreme prescriptive nature, universality, special social and public importance, and which are the basis for the economic, political, and legal system of the state'.

In practice, however, the courts will often extend the concept of Russian public policy beyond the fundamental principles of the legal system, and apply it to refuse recognition of fraudulent judgments, and to enquire into the consistency of the foreign judgment with rules of Russian public 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 only type of judgment that will affect the proceedings is a conflicting judgment rendered by a Russian court. In this case recognition and enforcement will be refused, as expressly set out by both procedural codes.

The Russian courts will not enquire into whether there are conflicting judgments in the country of the foreign judgment or third countries.

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 law does not expressly allow the Russian courts to enforce a foreign judgment against a third party, and we have not been able to find any court practice where foreign judgments would be enforced in such way.

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?

Russian courts see such agreements as matters of the jurisdiction of the court that rendered the judgment. As such, they are not subject to examination by an enforcing Russian court.

23 Favourably treated jurisdictions

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

Judgments made by the economic courts of Belarus are recognised automatically by virtue of a corresponding international treaty between Russia and Belarus. Russian courts have no power of judicial control over a Belarusian economic court judgment; such a judgment is to be enforced like a final Russian judgment.

24 Alteration of awards

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

The Russian court is not entitled to alter the award; its powers are limited to either granting recognition and enforcement or refusing it.

However, partial recognition and enforcement of a judgment is possible. The CComP expressly allows a commercial court to 'partially' refuse recognition, therefore necessarily implying that the foreign judgment can be partially recognised and enforced. While there is no equivalent provision in the CCivP, general jurisdiction courts will also sometimes recognise and enforce judgments in part (although such cases are extremely rare and the practice of application of law in this regard may vary depending on the region).

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 will not convert the damage award to local currency. The conversion will be undertaken by the bailiff at the stage of actual recovery ('execution' of the recognised foreign judgment).

An interest claim is theoretically allowed and general rules of jurisdiction will apply (ie, if the defendant is in Russia or has assets in Russia, the Russian court will have jurisdiction over such claim), but the governing law will be the substantive law applicable to the contract or other legal relation between the parties (ie, it will usually result in the Russian court being required to apply foreign law).

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?

An order recognising and enforcing a foreign judgment can be appealed.

In commercial courts, such order can be appealed to a cassation court (a third-level court) within one month of it being made. The rights of the plaintiff are ensured by the fact that a cassation appeal does not bar enforcement of the court decision, meaning that the appeal and the actual enforcement are concurrent.

In general courts, the order can be appealed to the appellate bench of the same court that rendered the order. This is a classic appeal that can be filed by the defendant within 15 days of the order being made. In this situation the plaintiff can request the appellate court to order interim measures against the defendant.

27 Enforcement process

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

After the judgment has been recognised and enforced, the party that enforced the judgment can obtain a writ of execution from the court that enforced the judgment. This writ of execution can be submitted to the Federal Bailiff Service, which can proceed to look for assets of the debtor to recover the assets. The procedure is conducted under a separate federal law on enforcement proceedings.

The bailiffs can order banks to freeze and later seize money on the debtor's accounts, can order that other properties of the debtor be judicially sold, and may prohibit the debtor (if he or she is a natural person) from leaving the Russian territory.

Close interaction with bailiffs during the enforcement (or, more accurately, 'execution') of the judgment through local lawyers is advisable, as the proceedings are likely to take an unduly long time, or fail altogether, otherwise.

28 Pitfalls

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

The first is proper service, or notification. A lack of proper notification, or a party being otherwise unable to present its case, is by far the most common grounds for refusal to recognise and enforce a foreign judgment. This is especially important in case of default judgments.

Additionally, a Russian court will sometimes make inquiries to the foreign court that rendered the judgment for evidence of notification, which may extend the proceedings for an unpredictable amount of time (in practice, the proceedings will usually take between three and four months).

Second, an occasional ground for refusal to recognise and enforce a judgment is public policy.

Russian courts tend to expand the notion of public policy way beyond international public policy or fundamental principles of the Russian legal system. Much as with arbitral awards, recognition of a foreign judgment will often be refused by a Russian court if there was a public element to the dispute, or if its enforcement would result in the violation of administrative rules set to protect the state budget (such as currency exchange rules).

Finally, defendants should be wary that Russian courts (especially commercial courts) will occasionally enforce foreign judgments based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. While such decisions by Russian courts are manifestly erroneous, some of them remain upheld by the higher courts.



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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, Iceland and Norway. 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 Regulation (EC) No. 44/2001 (Brussels I) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In this context, note 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 Austria, Belgium, (the former) Czechoslovakia, Germany, Italy, Liechtenstein, Spain 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), Iceland or Norway in Switzerland.

Where there are no applicable treaties, the recognition and enforcement of foreign judgments is governed by the Swiss Private International Law Act (the 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 therefore uniform, one should bear in mind that the CCP is relatively new, and it will take 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 the official language of the court's district (French, German 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 the 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 to 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 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 that 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 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. Swiss courts will take into account the respective case law of the Court of Justice of the European Union (CJEU), in particular, the CJEU's decisions in *Van Uden* (Case C-391/95, 17 November 1998) and *Mietz* (Case C-99/96, 27 April 1999). 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 under Swiss law (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, is 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 have 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 provides 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 effective for six months, but can be extended. However, the practical impact of a 'protective letter' is rather limited. Finally, the recognition of a foreign judgment under the PILA might be prevented by initiating Swiss proceedings on the merits (see question 20).

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 of the 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 of the 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 (article 47(1) of the 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 it was enabled to arrange a defence (article 34(2) of the 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, French, German 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) of the 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. At 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 of the 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, it may claim that recognition and enforcement would be manifestly contrary to Swiss public policy (see question 19), that it was unable to arrange for a 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 of the Lugano Convention).

Additional arguments may be raised by the defendant where enforcement is sought for a judgment that is not yet final (article 46 of the 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 such a 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 Ireland or the United Kingdom 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 Ireland or the United Kingdom 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 PILA rules (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 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 whose judgment 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 of the 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 need not be equivalent to Swiss standards.

Only severe violations of due process (amounting to a violation of fundamental principles of Swiss procedural law or violation of the right to be heard) will 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 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 habitual residence, insofar as the claims relate to an activity carried out in such a state (article 149 of the PILA), whereby 'domicile' refers to the state where the defendant resides with the intent of establishing permanent residence (article 20(1)(a) of the 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) of the PILA). For companies, the registered office is equivalent to domicile (article 21(1) of the 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) of the 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 a 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 the 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 rendered either at a business place of the enterprise or an employee's 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 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 1965). 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

Update and trends

The PILA has recently been amended in order to facilitate the recognition of foreign bankruptcy decrees; the new provisions will probably enter into force in 2019. In this context, a new provision was enacted that will allow the enforcement of foreign decisions in avoidance (claw-back) matters (article 174c of the PILA), provided that:

- the judgment was rendered in, or is enforceable in, the country where the bankruptcy proceedings were opened;
- the foreign bankruptcy has been recognised in Switzerland; and
- the defendant is not domiciled in Switzerland.

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) of the 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 it was not timely served even if it could have challenged the original judgment (article 34(2) of the 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 it could have appealed 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 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 into the official language of the place where service is to be performed (ie, French, German 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. Under both the Lugano Convention and national law, the foreign judgment will not be examined as to allegations of fraud as such. If, however, a fraud amounts to a manifest violation of Swiss public policy in a particular case, 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 article 34(1) of the Lugano Convention as well as under national law (in particular, article 27 of the 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, as in 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 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 can be recognised in Switzerland (article 34(4) of the 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 a 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 agreement to use alternative dispute resolution (ADR) does not constitute a reason for not enforcing a foreign judgment.

Under the PILA, it will 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 its request on the declaration of enforceability to only parts of the judgment (article 48 of the 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 it 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 of the Lugano Convention). 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 will 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 must 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). Second, 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 (although 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 from that for 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 income of the debtor.

For other claims, the court declaring the foreign judgment enforceable will usually also determine how these claims are to be enforced.

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Option to freeze assets

The request to declare the judgment enforceable can be combined with a request to freeze certain assets in Switzerland, be this during the proceedings in which the foreign judgment is being declared enforceable 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).

Turkey

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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?

Except for 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 1956 and the Convention concerning International Carriage by Rail 1985, which contain provisions for the recognition and enforcement of foreign judgments, but only for disputes in relation to the application of the aforementioned conventions.

Turkey has also entered into bilateral treaties with Albania, Algeria, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, China, Croatia, Georgia, Iran, Iraq, Italy, Kazakhstan, Kyrgyzstan, Lithuania, Macedonia, Moldova, Mongolia, Oman, Poland, Republic of Turkish Northern Cyprus, Romania, Slovakia, Syria, 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.

In addition, 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. 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 No. 5718 (PIL) dated 27 November 2007 is the main legislation that regulates the 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 Supreme Court are also important. However, in principle, the precedents of the Supreme Court are not binding in Turkish law apart from 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 the 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 the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

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 Supreme Court, in its various decisions, has stated that limitation periods are not related to public order and provisions of foreign law should be applicable to this issue (Fourth Chamber of the Supreme Court (Merit No. 2003/10163, Decision No. 2004/1408) and 11th Chamber of the Supreme Court (Merit No. 1998/383, Decision No. 1998/3945)). In addition, as to the precedents of the Supreme Court, in case a foreign judgment is recognised but not yet enforced, the statute of limitations specific to the merits (subject matter) of that judgment regulated by related Turkish provisions will be applied to that judgment as if it were a judgment rendered by a domestic court.

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 decisions rendered by 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, there is a view in Turkey that interim decisions will only be enforceable if the dispute has been finally resolved by the foreign court that issued these interim decisions. However, there is also the opinion that, in practice, 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 or monetary compensation are enforceable too.

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, because some civil courts of first instance reject the applications owing to lack of jurisdiction and send the file to the relevant commercial, intellectual property or labour courts.

Paragraph 2, article 51 of the PIL also regulates the jurisdiction of the courts. Pursuant to this provision, a case regarding enforcement of a foreign judgment must be filed before the court where the party against which the enforcement is sought, is domiciled. If there is no domicile address for this party, then the case can be filed before the court on this party's place of residence. If none of these exists, the case can be filed before one of the courts in Ankara, Istanbul or İzmir.

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 Turkish courts;
- the foreign judgment was rendered by a court unrelated to the matter in dispute and the parties;
- the judgment explicitly violates Turkish public order;
- the foreign court did not respect the right of defence of the party against which enforcement is sought, in Turkey;
- the foreign judgment is not final under the laws of the foreign country;
- a ground exists that would prevent enforcement of the foreign judgment (eg, a reason for restitution of the judgment (see 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 which the court can either accept or dismiss the enforcement 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 which enforcement is sought 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 are no non-mandatory factors. 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. Since provisions similar to the due process of law are explicitly stated by the Turkish Constitution – that as each person is equal before the law and shall be judged by impartial and independent courts – judgments that do not comply with these provisions may not be recognised owing to their explicit violation of public order.

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 will 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 itself competent although it had no actual relation with either the matter in dispute or the parties. Therefore, 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 or not the judgment was rendered on an issue that falls 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 of the foreign judgment. The court's examination will be limited to the enforcement requirements determined in articles 54 and 55 of the PIL (prohibition of *révision au fond*). However, intervention of the court will come into question if the judgment explicitly violates Turkish public order. As explained above, the foreign judgment must be in compliance with Turkish public order.

18 Vitiations by fraud

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

The vitiations of the foreign judgment by fraud is not regulated under the PIL.

However, pursuant to the judgment of the Second Chamber of the Supreme Court dated 15 November 1984 (Merit No. 1984/9293 and Decision No. 1984/9484), the reasons for '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 by the fraudulent acts of the winning party, this constitutes a reason for restitution of 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 that is subject to the exclusive jurisdiction of the Turkish courts, such as cases arising from rights in rem in immovable property and in cases arising from consumer or insurance agreements.

With regard to public policy, the Turkish court will ex officio examine whether or not enforcement of foreign judgment explicitly violates Turkish public order. The foreign judgment cannot be enforced if it explicitly violates 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 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 those in the final and conclusive judgment. The final and conclusive judgment can be either the Turkish court's judgment or another foreign judgment that has 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 on 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 the Kadikoy Fourth 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 PIL were met.'

Although the Supreme Court has not discussed this issue until now, provided that the *numerus clausus* conditions of the enforcement have been met, it is highly likely that the courts will accept an enforcement of judgment case disregarding the parties' objections as to an agreement on alternative dispute resolution, probably on the basis that an objection regarding the existence of alternative dispute resolution clauses between the parties is something that should have been evaluated by the court that rendered the actual decision on the merits of the dispute.

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 judgments from some foreign jurisdictions. However, it should be noted that determination of *de facto* reciprocity may take longer for certain foreign jurisdictions 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 will examine a foreign judgment in order to determine whether or not the requirements for enforcement are met. 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, since punitive damages are considered incompatible with the principles of Turkish liability law, they are considered, because of their nature, incompatible with Turkish public order. In other words, damages exceeding actual loss are considered incompatible with Turkish public order.

Note that, according to the general principle of 'civil courts' commitment to the request of the plaintiff', in Turkish law, 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. 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 the 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 and 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 of notification of the reasoned decision before the regional appellate court. The parties are also entitled to appeal the decision rendered by the regional appellate court before the Supreme Court within two weeks of notification of the regional appellate court's decision.

The appeal process prevents execution of the Turkish court's decision regarding enforcement of the foreign judgment. In other words, the foreign judgment cannot be executed until the Turkish court's decision regarding enforcement of a foreign judgment becomes final and cannot be appealed.

It should also be noted that if the debtor does not comply with the Turkish court's decision regarding 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 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, recognition and enforcement of a foreign judgment are regulated separately. In principle, enforceable judgments can be enforced whereas declaratory 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 petition must include:

- the names and addresses of the parties and their attorneys, if any;
- the country, court, date, number and 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 an approved copy of the judgment, the approved letter, and translations showing that the judgment is final must be attached to the plaintiff's petition.

The requirements for enforcement of a foreign judgment are as follows:

- there must be contractual or de facto reciprocity;
- the foreign court must have respected the right of defence of the party against which enforcement is sought in Turkey;
- the foreign judgment that is subject 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.

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 comply with the execution order, the claimant can apply for the attachment of 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 duration of the proceedings. In practice, recognition and enforcement of a foreign judgment takes about six to 18 months. If the decision is appealed before a regional court and finally before the Supreme Court, the process will take longer.

Public order is another common pitfall, since the laws do not regulate the definition of the public order. In principle, Turkish public order is interpreted narrowly by the courts and in this respect only judgments that contradict indispensable and essential Turkish legal principles are considered as violating Turkish public order.

There have been Supreme Court precedents stating that judgments, where there is no discussion of reasoning, cannot be enforced,

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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 Cassation, dated 10 February 2012, Merit No. 2010/1, Decision No. 2012/1, stated that the mere fact that a foreign decision lacks reasoning does not prevent that decision from being enforced. Decisions rendered by the Joint Chambers of the Supreme Court are binding on other chambers of the appeal court as well as the local (ie, first instance) courts. Therefore, the recognition and enforcement of a foreign judgment can no longer be denied owing to the violation of Turkish public order merely 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 treaties with 29 countries, there are still many countries whose decisions cannot be enforced in Turkey owing 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 because some civil courts of first instance reject applications owing to a lack of jurisdiction, sending the file to the relevant specialised court, such as a

commercial, intellectual property or labour court. Even though there are different Supreme Court precedents regarding this issue and this affects the duration of the proceedings, recent Supreme Court precedents point towards specialised courts. Confusion may still arise between specialised courts owing to complex and multi-faceted subject matter. For instance, for disputes arising from intellectual property law, according to some Supreme Court precedents, the intellectual property courts are the competent courts, whereas other precedents indicate the commercial courts as the competent courts. In those cases, there is a risk that the court may reject the case because of a lack of competence and the counterparty may appeal this decision to prolong the proceedings.

Finally, the issue of court fees is another important pitfall. According to the Turkish Act on Fees, if the subject matter of the judgment seeking to be enforced is monetary, a proportional fee (6.831 per cent of the total amount in dispute) shall be applicable to enforcement applications, and one-quarter of this amount is payable on filing the application. If the judgment's subject matter is not monetary, a fixed court fee, depending on the subject matter, will be applied. However, although the general approach regarding court fees has been explained, there is no firmly settled practice in this regard in Turkey, and some courts apply fixed fees for enforcement applications, whereas some chambers of the Supreme Court seldom apply fixed court fees.

United Arab Emirates

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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 United Arab Emirates (UAE) is party to a number of multilateral conventions on the recognition and enforcement of foreign judgments, including the Riyadh Convention on the Judicial Cooperation between the States of the Arab League 1983 (entered into without reservations) and the Gulf Cooperation Council (GCC) Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1996 (entered into without reservations).

Furthermore, the UAE has entered into several bilateral legal and judicial cooperation treaties dealing with the reciprocal recognition and enforcement of foreign judgments with the following states:

- Afghanistan (Federal Decree No. 23 of 2009);
- Algeria (Federal Decree No. 12 of 1984);
- Armenia (Federal Decree No. 26 of 2003);
- Azerbaijan (Federal Decree No. 37 of 2007);
- China (Federal Decree No. 55 of 2004);
- Egypt (Federal Decree No. 83 of 2000);
- France (Federal Decree No. 31 of 1992);
- India (Federal Decree No. 33 of 2000);
- Iran (Federal Decree No. 36 of 2012);
- Jordan (Federal Decree No. 106 of 1999);
- Kyrgyz Republic (Federal Decree No. 113 of 2015);
- Morocco (Federal Decree No. 57 of 2006);
- Nigeria (Federal Decree No. 40 of 2018);
- Pakistan (Federal Decree No. 12 of 2005);
- Somalia (Federal Decree No. 95 of 1982);
- Sudan (Federal Decree No. 8 of 2005);
- Syria (Federal Decree No. 60 of 2002);
- Tajikistan (Federal Decree No. 69 of 2007);
- Tunisia (Federal Decree No. 32 of 1975); and
- the United Kingdom (Federal Decree No. 38 of 2007).

If the UAE is party to a treaty in respect of the reciprocal enforcement of foreign judgments, whether multilateral or bilateral, the recognition and enforcement of foreign judgments in the UAE will follow the provisions of such treaty. In the absence of such a treaty, relevant provisions from select UAE statutes (*infra*) shall apply (see articles 235 to 238 of Federal Law No. 11 of 1992, also known as the UAE Civil Procedures Code).

The application of the above treaties entered into and ratified by the UAE extends to the Dubai International Financial Centre (DIFC) courts pursuant to article 24(2) of the DIFC Court Law. Furthermore, the DIFC courts have entered into several memoranda of guidance relating principally to reciprocal enforcement arrangements with several courts and authorities, such as the UAE Ministry of Justice, the Ras Al Khaimah Courts, the Federal Court of Australia, the Supreme Court of Singapore, the Supreme Court of New South Wales, and the Commercial Court of England and Wales.

2 Intra-state variations

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

The UAE is a federation of seven emirates. It is a civil law jurisdiction with Arabic language local courts with the exception of the DIFC and the Abu Dhabi Global Market (ADGM), two free zones in which English language common law courts sit. Following article 104 of the UAE Constitution, as amended, each emirate has its own independent judicial system except for matters that are exclusively assigned to the union. Except for the emirates of Dubai, Ras Al Khaimah and Abu Dhabi, all other emirates have delegated their prerogative to an independent judicial system to the union.

The DIFC and the recently established ADGM constitute common law legal enclaves within the prevalent civil law legal system of the UAE. The DIFC courts have jurisdiction to ratify foreign judgments of a foreign court pursuant to article 24(1)(a) of the DIFC Court Law (No. 10 of 2004) and article 7(6) of the Judicial Authority Law (No. 12 of 2004 as amended).

In order to resolve conflicts of jurisdiction and judgments between the DIFC courts and the onshore Dubai courts, Dubai Decree No. 19 of 2016 created a joint judicial committee (known as the Judicial Tribunal) to resolve such conflicts. The Judicial Tribunal is constituted of seven members: three judges each from the Dubai courts and the DIFC courts, with the Chief Justice of the Dubai Court of Cassation sitting as the Chairman.

3 Sources of law

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

Legal concepts in the UAE are codified in statutes and regulations as opposed to originating from judicial precedents. Enforcement of foreign judgments in the UAE is primarily governed by articles 235 to 238 of the Federal Law No. 11 of 1992, also known as the UAE Civil Procedures Code. Legal interpretation of the legislation lies with the judiciary.

In the DIFC, recognition and enforcement of foreign judgments are governed by article 7(6) of the Judicial Authority Law (as amended) and article 24(1) of the DIFC Court Law.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on the 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. The UAE is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971 (Hague 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?

There is no specific limitation period applicable to the commencement of legal proceedings relating to the recognition and enforcement of foreign judgments in the UAE. That said, the general limitation rule in the UAE (several exceptions apply) is that a claim, such as one relating to the recognition and enforcement of a judgment, is time-barred after 15 years as per Federal Law No. 5 of 1985, also known as the UAE Civil Transactions Code.

There is no express provision under DIFC law stipulating the limitation period applicable to the enforcement of foreign judgments by the DIFC courts.

6 Types of enforceable order

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

Pursuant to article 235(2)(d) of the UAE Civil Procedures Code, UAE courts will only enforce a final non-appealable order or judgment under the laws of the issuing home jurisdiction. The aforementioned article refers to the acquisition of *res judicata* force by the foreign judgment in accordance with the law of the court that issued it. As such, foreign interim orders and other appealable judgments and orders are generally not enforceable in UAE. By and large, foreign judgments and orders that satisfy the requirements of articles 235 to 238 of the UAE Civil Procedures Code are, in theory, enforceable in the UAE. More specifically, money judgments, final orders granting provisional and precautionary measures, final foreign enforcement orders, final injunctions (albeit not very common in practice in the UAE) and declaratory judgments (albeit not very common in practice in the UAE) are enforceable in the UAE so long as they satisfy the requirements of articles 235 to 238 of the UAE Civil Procedures Code.

On the other hand, foreign judgments and orders may be enforced by the DIFC courts even where such judgments and orders are subject to a pending appeal in the relevant foreign jurisdiction. Generally speaking, the DIFC courts will only enforce money judgments for specific sums of money.

7 Competent courts

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

For enforcement applications before the local UAE courts, the application for recognition and enforcement of the foreign judgment shall be submitted before the competent court of first instance in the jurisdiction which the party seeks to enforce the judgment under the usual procedures of bringing a claim pursuant to article 235(2) of the UAE Civil Procedures Code.

The language of the local UAE courts is Arabic and all documentation submitted to the court must be translated and certified by a legally sworn translator duly licensed by the UAE Ministry of Justice.

For enforcement applications before the DIFC courts, the application for recognition and enforcement of the foreign judgment shall be determined by the DIFC Court of First Instance, which generally does not require a connection to the DIFC.

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?

Before the local UAE courts and the DIFC courts, there is no procedural separation between recognition and enforcement. Before the local UAE courts, the purpose of the application filed before the relevant court of first instance is to request that the court of first instance recognise and declare the enforceability of the foreign judgment for which enforcement in the UAE is sought.

Before the DIFC courts, the procedure for seeking recognition and enforcement of foreign judgments is the same. Both recognition and

enforcement require the filing of a substantive claim with the DIFC Court of First Instance.

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?

Before the local UAE courts, a defendant's defences are usually limited to procedural issues. UAE courts will not entertain a merits-based defence and will limit their review to ensuring that certain procedural requirements are met under article 235 of the UAE Civil Procedures Code, such as the non-violation of UAE public policy and moral order as a result of the potential enforcement of the foreign judgment, the *res judicata* effect of the foreign judgment for which enforcement is sought and the lack of jurisdiction by the courts of the UAE.

In the DIFC courts, the approach to the recognition and enforcement of foreign judgments is based on the principles of English common law. As such, the defendant is limited to narrow grounds for challenging the recognition and enforcement of a foreign judgment. Broadly speaking, so long as the foreign court that issued the judgment had jurisdiction to hear the dispute in question, the defendant will be restricted to the following defences:

- the judgment was obtained by fraud;
- enforcement of the judgment is contrary to public policy;
- the foreign proceedings were conducted in a manner that the DIFC courts recognise as being contrary to the principles of natural justice; or
- the judgment ordered the payment of taxes, fines or penalties.

10 Injunctive relief

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

There are no express statutory provisions or rules that empower the UAE courts to grant anti-suit injunctions for preventing a party from pursuing the enforcement of foreign court proceedings in breach of a jurisdiction clause, even where the UAE has exclusive jurisdiction to hear the dispute between the parties. Furthermore, the UAE courts are unlikely to stay proceedings in favour of another foreign competent court. Under article 235(2)(a) of the UAE Civil Procedures Code, a UAE court will reject a claim for recognition and enforcement of a foreign judgment if the UAE courts have jurisdiction. However, the DIFC courts may issue anti-suit and anti-enforcement injunctions in appropriate cases.

11 Basic requirements for recognition

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

Except for instances where a bilateral or multilateral treaty on the recognition and enforcement of foreign judgments exists, the mandatory requirements for recognition and enforcement of a foreign judgment before the local UAE courts are mainly set out in article 235 of the UAE Civil Procedures Code, which lays down the following conditions:

- Requirement for reciprocity pursuant to article 235(1) of the UAE Civil Procedures Code: the judgment creditor has to prove that the foreign state issuing the judgment for which enforcement is sought would agree to enforce a UAE court judgment.
- Requirements for jurisdiction pursuant to article 235(2)(a) of the UAE Civil Procedures Code: the UAE court will not enforce a foreign judgment in the event it considers that it had original jurisdiction to hear the dispute. The UAE Civil Procedures Code codifies instances in which the UAE courts are likely to claim original jurisdiction over a dispute, such as articles 20, 21 and 33. The UAE courts provide a broad interpretation to the concept of original jurisdiction. For instance, the UAE courts will most likely claim jurisdiction in the event that a defendant has a place of residence or domicile in the UAE. The same approach applies in the event that the UAE is the situs of assets that constitute subject matter of the dispute. Furthermore, and pursuant to article 235(2)(b) of the UAE Civil Procedures Code, the UAE courts will assess whether the

foreign judgment or order was issued by a court having jurisdiction in accordance with the law of its home jurisdiction.

- Requirement for proper service of the proceedings pursuant to article 235(2)(c) of the UAE Civil Procedures Code: the UAE courts will look into the service of process, specifically in relation to verifying that the parties were properly summoned to attend and had proper legal representation at the proceedings. As such, the judgment creditor has to submit before the UAE courts an Arabic translation of all services to satisfy this requirement. It is noteworthy to highlight that since the UAE courts adopt a strict interpretation of the requirements laid down in article 235 of the UAE Civil Procedures Code, it is very unlikely that the UAE courts will grant enforcement of ex-parte foreign judgments or foreign default judgments.
- Requirement that the foreign judgment or order be a final non-appealable order or judgment under the laws of the issuing home jurisdiction and the acquisition of res judicata force by the foreign judgment in accordance with the law of the court that issued it pursuant to article 235(2)(d).
- Requirement for absence of a conflicting judgment pursuant to article 235(2)(e).
- Requirement for non-violation of public policy and morals pursuant to article 235(2)(e).

The DIFC courts require that the judgment be final and, for a specific sum of money, and that the foreign court that issued the judgment have had jurisdiction to hear the dispute in accordance with DIFC conflict of laws rules.

12 Other factors

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

Not applicable.

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?

Pursuant to article 235(2)(c) of the UAE Civil Procedures Code, the UAE courts will strictly assess whether the foreign judgment for which enforcement is sought was issued against parties that had been properly notified and represented in the legal proceedings. The UAE courts are very likely to reject the enforcement of a foreign judgment in the event that the procedural rules of the foreign state are unknown under the laws of the UAE.

In the DIFC courts, there is no requirement that the process resulting in the foreign judgment correspond to the process in the DIFC courts. However, there is a requirement that the foreign proceedings have been conducted in a manner that the DIFC courts recognise as not being contrary to the principles of natural justice. Generally speaking, this will mean that the judgment debtor was given due notice of the foreign proceedings and an opportunity to be heard.

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 article 235(2)(a) of the UAE Civil Procedures Code, the UAE courts will examine whether they have original jurisdiction over the dispute, including personal jurisdiction over the defendant. For example, articles 20 and 21 of the UAE Civil Procedures Code provide for personal jurisdiction over UAE nationals and foreigners who have a residence or domicile in the UAE.

The DIFC courts will need to be satisfied that the foreign court had jurisdiction over the dispute in accordance with DIFC conflict of laws rules. The DIFC courts will assume that the foreign court had such jurisdiction where:

- the defendant was present in the jurisdiction when proceedings commenced;
- the defendant was a counterclaimant in the proceedings;

- the defendant submitted to the jurisdiction of the relevant court – for example, by filing a substantive defence; or
- the parties agreed before commencement of the proceedings, with respect to the subject matter of the proceedings, to submit to the jurisdiction of the relevant 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?

Pursuant to article 235(2)(a) of the UAE Civil Procedures Code, the UAE courts will examine whether they have original jurisdiction over the dispute, including subject-matter jurisdiction over the controversy. The UAE courts will usually claim jurisdiction over disputes involving employment agreements performed in the UAE, real estate property located in the UAE and commercial agreements performed in the UAE.

As above, the DIFC courts will need to be satisfied that the foreign court had jurisdiction over the dispute in accordance with DIFC conflict of laws rules. The DIFC courts will assume that the foreign court had jurisdiction in the following cases:

- the defendant was present in the jurisdiction when proceedings commenced;
- the defendant was a counterclaimant in the proceedings;
- the defendant submitted to the jurisdiction of the relevant court (eg, by filing a substantive defence); or
- the parties agreed before commencement of the proceedings, with respect to the subject matter of the proceedings, to submit to the jurisdiction of the relevant 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 UAE courts will strictly apply article 235(2)(c) of the UAE Civil Procedures Code, which lays down the requirement for proper notice of the proceedings. As such, the UAE courts will examine whether the service of process was properly done and will verify that all parties to the dispute had proper notice of the proceedings and were afforded proper legal representation during the course of the proceedings. As such, actual notice is deemed not to be sufficient to pass the requirement set out under article 235(2)(c). The UAE courts may require that the notice be equivalent to that required under the laws of the UAE to be considered sufficient.

In relation to service, the relevant consideration for the DIFC courts is whether the foreign proceedings were conducted in a manner that the DIFC courts recognise as being contrary to the principles of natural justice. The DIFC courts are therefore unlikely to decline enforcement of a foreign judgment on the basis that a technical service requirement was not complied with, so long as the judgment debtor had actual notice of the proceedings and had an opportunity to be heard.

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 local UAE courts will consider the relevant inconvenience of the foreign jurisdiction to the defendant to decline enforcement of a foreign judgment.

Broadly speaking, the DIFC courts will not decline enforcement of a foreign judgment in cases where the foreign court had jurisdiction over the matter in accordance with DIFC conflict of laws rules, even if the foreign court was an inconvenient forum for the defendant.

18 Vitiation by fraud

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

Both the local UAE courts and the DIFC courts will examine the foreign judgment for allegations of fraud upon the defendant or the court.

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

Both the local UAE courts and the DIFC courts will examine the foreign judgment's consistency with UAE public policy before allowing its enforcement. While there is no a proper statutory definition of public policy under the laws of the UAE, the local courts of the UAE usually deem public policy, which shall be interpreted in light of Sharia (Islamic law) principles, to include both procedural and substantive matters. While the DIFC courts will also consider UAE public policy when examining the enforcement of a foreign judgment, generally speaking it is difficult to resist the enforcement of a foreign judgment on the basis of public policy arguments before the DIFC courts.

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 235(2)(e) of the UAE Civil Procedures Code, the UAE courts will not grant enforcement of a foreign judgment that is in conflict with another final and conclusive domestic UAE judgment concerning the same parties and controversy.

If the foreign judgment is in conflict with an existing final and conclusive judgment involving the same parties in relation to the same subject matter, then the DIFC courts are likely to decline enforcement of the foreign judgment on grounds of public policy or that the foreign proceedings were conducted in a manner that the DIFC courts recognise as being contrary to the principles of natural justice. This is regardless of whether the conflicting judgment is a judgment of a UAE court or a foreign 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?**

Principles of agency or alter ego will not be applied by the local UAE courts and the DIFC courts when examining an enforcement application of a foreign 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?**

Pursuant to article 235(2)(b) of the UAE Civil Procedures Code, the UAE courts will assess whether the foreign judgment or order was issued by a court having jurisdiction in accordance with the law of its home jurisdiction. Although this particular legal question has never been tested before the UAE courts, it is unlikely that the UAE courts will enforce a foreign judgment if the judgment debtor contends and proves that the issuing court did not have jurisdiction owing to the presence of a valid and enforceable alternative dispute resolution clause, such as a binding arbitration agreement that was not followed by the enforcing party.

It would be difficult to resist enforcement of a foreign judgment in the DIFC courts on the basis of a jurisdiction clause in circumstances where the foreign court had jurisdiction in accordance with DIFC conflict of laws rules and the foreign court considered and dismissed jurisdictional arguments raised by the judgment debtor. The fact that a foreign judgment was obtained in breach of a tiered dispute resolution clause, requiring the parties to engage in informal methods of dispute resolution before commencing formal proceedings, is unlikely to be considered a valid ground for resisting enforcement of a foreign judgment by the DIFC courts.

Update and trends

The DIFC courts continue to provide an enforcement-friendly framework. The *Barclays Bank PLC et al v Essar Global Fund Limited* [2016] DIFC CFI 036 judgment in which the DIFC courts enforced, for the first time, a US judgment, is another example of this trend. In its decision to enforce the New York judgment, the DIFC courts affirmed, through clear and balanced reasoning, their constitutionally granted jurisdiction to enforce foreign judgments (such an action not constituting a matter of foreign affairs falling within the jurisdiction of the UAE's Federal Supreme Court).

The initial decisions of the Judicial Tribunal show a clear preference for the jurisdiction of the Dubai courts when resolving situations of conflicts of jurisdiction, although the grounds for doing so depend heavily on the facts of each case. The impact of the Judicial Tribunal's decisions has so far been limited to curtailing the use of the DIFC courts as a 'conduit' jurisdiction for the onward enforcement outside the DIFC of arbitral awards seated outside the DIFC. However, in most cases, the Judicial Tribunal has found no real conflict of jurisdiction between the courts.

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

Foreign judgments issued by states with which the UAE has a bilateral or multilateral agreement are more easily enforceable in the UAE. Specifically, foreign judgments issued by a fellow GCC member receive greater deference when it comes to execution in light of the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1996.

Since the DIFC courts apply the English common law approach to the enforcement of foreign judgments, the DIFC courts should not treat judgments emanating from certain jurisdictions with greater deference than judgments emanating from other jurisdictions.

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

The local UAE and DIFC courts will not partially enforce a foreign judgment and will not make an alteration to the foreign judgment. As stated above, the UAE courts adopt a strict approach for enforcement. As such, if sections of the foreign judgment for which enforcement is sought contravene the applicable rules in the UAE, the UAE courts are unlikely to grant enforcement.

In certain cases, the DIFC courts may be willing to recognise and enforce only parts of a foreign judgment. For example, where a foreign judgment provides for the payment of damages and a penalty, the DIFC courts may only recognise and enforce the order for damages and decline to recognise and enforce the penalty for the reasons stated above.

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, the local UAE courts will convert the damages award into the local currency (Emirati dirhams), and if the foreign judgment includes costs and interests, the same shall also be converted. The courts may award court fees as well as legal fees for the recognition process which are usually minimal (usually not more than 2,000 Emirati dirhams). The UAE local courts will not award interest on costs. Furthermore, the UAE local courts will not award interest on the damages award, but will apply any interest awarded by the foreign courts. The interest rate, if applicable, is usually governed by the laws of the issuing home jurisdiction; but if the interest rates are exorbitant, the UAE courts may disregard such interest.

The DIFC Court of First Instance will normally issue its judgment in the same currency specified in the relevant foreign judgment. The

DIFC courts may also be willing to recognise and enforce interest and court costs awarded under the foreign judgment. However, once the DIFC court enters judgment recognising and enforcing the foreign judgment, this post-judgment interest is determined by DIFC law.

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?

Before the local UAE courts, the losing party may appeal a judgment enforcing a foreign judgment by way of appeal and cassation.

Before the DIFC courts, the losing party may seek permission to file an appeal against the judgment enforcing a foreign judgment before the DIFC Court of Appeal.

27 Enforcement process

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

There is not a separate process for enforcing a foreign judgment before the local UAE courts. The local UAE courts will issue a domestic judgment for the purpose of enforcement once the foreign judgment has been recognised. An enforcement file will be opened for the purpose of the enforcement proceedings.

In the DIFC courts, once a foreign judgment has been recognised and enforced, a separate enforcement application should be made to the DIFC courts' Enforcement Division. The procedure for enforcement varies depending on whether enforcement is sought against

assets within the DIFC or against assets onshore in the wider UAE. Should enforcement be sought against assets within the DIFC, then the enforcement methods are those available under the rules of the DIFC courts and are similar to those available in the English courts.

If enforcement is sought against assets onshore in the wider UAE, then usually an execution letter will be issued by the DIFC courts to the Chief Justice of the Court of First Instance of the Dubai Courts. The Dubai courts will then enforce against assets within Dubai or deputise the courts of an alternative Emirate to enforce the judgment against assets within that Emirate.

28 Pitfalls

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

Recognition and enforcement of foreign judgments in the UAE remains a challenging process, particularly in the absence of a bilateral or multilateral treaty entered into between the UAE and the issuing foreign state. This is in part due to the fact that the UAE is not a signatory to the Hague Convention, rendering the recognition and enforcement of foreign judgments in the UAE a complicated and lengthy procedure. To date, the number of bilateral and multilateral treaties on the recognition and enforcement of foreign judgments entered into by the UAE remains limited.

Furthermore, since most judgment debtors are domiciled or resident in the UAE, UAE courts will claim original jurisdiction over the dispute and reject the enforcement of the foreign judgment.

While the DIFC courts adopt a pro-enforcement attitude to foreign judgments, the costs of the proceedings remain relatively high (usually a percentage of the claimed judgment amount).

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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 United Kingdom 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 United Kingdom 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 United Kingdom is party to treaty-based schemes for the enforcement of judgments as a member of the European Union (EU) and the European Economic Area (EEA).

The Recast Brussels Regulation (EU) No. 1215/2012 (Recast Regulation), which reformed Regulation (EC) No. 44/2001 (Brussels I Regulation), provides for the speedy and simplified enforcement of judgments obtained in the courts of one EU/EEA 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 that 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; although in a recent judgment in *Pula Parking d.o.o. v Tederahn* (Case C-551/15), the Court of Justice of the European Union (CJEU) held that where a company owned by a public authority is exercising its functions independently of the public authority that owns it, the relationship between the parties to a dispute may be one in private law. Proceedings between these parties will come within the definition of civil and commercial matters. The Recast Regulation 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 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 United Kingdom, it must be sued in the United Kingdom 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 United Kingdom (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 the following grounds:

- the original court lacked jurisdiction to hear the matter (the Brussels I Regulation contains detailed provisions in that regard);
- recognition and enforcement would be manifestly contrary to UK public policy;
- the defendant was not served with proceedings in time to enable it to prepare a proper defence; or
- conflicting judgments exist in the United Kingdom or other member states.

However, the Recast Regulation has abolished this procedure; and article 39 of the Recast Regulation provides that a judgment that has been given in a member state and is enforceable in that member state shall be enforceable in other member states without the need for a declaration of enforceability. As described more fully in questions 9, 19 and 20, an application can be made for the courts of the relevant member state to refuse enforcement by the party against which enforcement is sought as follows:

- if the enforcement would be manifestly contrary to UK public policy;
- if the defendant was not served with proceedings in time to enable it to prepare a proper defence; or
- conflicting judgments exist in the United Kingdom 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 that the United Kingdom had previously entered into with other member states. The Brussels Convention 1968 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 2007 (in force since 2010 and replacing the previous Lugano Convention of 1988) 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 that the debtor has admitted to liability, failed to object or failed to appear – the judgment can be certified by the issuing court under Regulation (EC) No. 805/2004 (European Enforcement Order (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)).

As an alternative, where a civil or commercial claim does not exceed €5,000, excluding interest, expenses and disbursements, cross-border claims may be brought under the simplified procedure laid down in Regulation (EC) No. 861/2007 (European Small Claims Procedure, as amended by Regulation (EU) No. 2015/2421). Court fees for the European Small Claims Procedure 'shall not be disproportionate and shall not be higher than the court fees charged for national simplified court procedures in that member state' (article 15a of Regulation (EC) No. 861/2007, as amended).

A third avenue exists in the European Order for Payment Procedure (EOP Procedure) under Regulation (EC) No. 1896/2006 (as amended by Regulation (EU) No. 936/2012 and Regulation (EU) No. 2015/2421). The EOP Procedure provides standardised forms and procedures for pursuing uncontested money debts, without imposing any maximum value. Judgments given under the European 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], 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. However, following the amendments made to the EOP Procedure by Regulation (EU) No. 2015/2421, court fees for the EOP Procedure must not be greater than those for proceedings where there is no preceding European Order for Payment (ie, the fee that would be applicable for enforcement of a non-contested monetary judgment). The CJEU also found that a claimant can claim all interest accrued up to the date of payment of the claim. The EEO Regulation and the European Small Claims and EOP Procedures lay down subject-matter and tribunal exceptions, which are similar but with slight differences from those found in the Regulation. The three procedures apply among all member states with the exception of Denmark.

The European Union has signed and ratified the Hague Convention on Choice of Court Agreements 2005 (Hague Convention 2005) on behalf of all EU member states (including Denmark, from 1 September 2018). The Hague Convention 2005 came into force between the European Union and Mexico on 1 October 2015 and between the European Union and Singapore on 1 October 2016. The Hague Convention 2005 has also been signed but not yet ratified by China, Montenegro, Ukraine and the United States. It has been implemented into UK law by an amendment to the Civil Jurisdiction and Judgments Act 1982 (CJJA 1982).

The Hague Convention 2005 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 Hague Convention 2005 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 and 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; and the validity of entries in public registers. The European Union has also made a declaration under the Hague Convention 2005 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, where 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 1982 there is a simple procedure for the recognition of judgments arising from Hague Convention 2005 states. Judgments will be registered for enforcement if they are enforceable or effective in their country of origin. The party against which judgment is sought is not entitled to make submissions on an application for registration of a Hague Convention 2005 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 following grounds:

- 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 it to organise its defence (unless the defendant appeared and put its case in the original court and did not raise this);
- the proceedings were notified to the defendant in the United Kingdom in breach of fundamental principles of service in the United Kingdom;
- the judgment was obtained by procedural fraud;
- enforcement would be manifestly incompatible with public policy in the United Kingdom (including if it is incompatible with basic principles of procedural fairness); or
- the judgment is incompatible either with an earlier judgment given in the United Kingdom 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 United Kingdom 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 United Kingdom by legislation, and the provisions relating to recognition are generally modelled on the Foreign Judgments (Reciprocal Enforcement) Act 1933 (FJA 1933) (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; all three jurisdictions have separate court systems with their own procedural rules (see question 1).

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 United Kingdom derives from three key sources. Throughout this chapter we refer to each in turn, as there are some noteworthy differences in the substantive and procedural requirements for enforcement under each, as follows:

- European treaty law (see question 1): this pertains to the judgments of other EU member states and Iceland, Norway and Switzerland.
- United Kingdom statutes: these apply to judgments from specified jurisdictions that have historical or constitutional relationships with the United Kingdom or implementing conventions to which the United Kingdom is party as a result of its membership of the European Union into UK law.
- The Administration of Justice Act 1920 (AJA 1920) 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, the AJA 1920 currently applies to Anguilla, Antigua and Barbuda, the Bahamas, Barbados, Belize, Bermuda, Botswana, British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, Christmas Island, the Cocos (Keeling) Islands, Cyprus, Dominica, the Falkland Islands, Fiji, the Gambia, Ghana, Grenada, Guyana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Malta, Mauritius, Montserrat, New Zealand, Nigeria, Norfolk Island, Papua New Guinea, St Christopher and Nevis, St Helena, St Lucia, St Vincent and the Grenadines, the Seychelles, Sierra Leone, Singapore, the Solomon Islands, the Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus, Sri Lanka, Swaziland, Tanzania, Trinidad and Tobago, the Turks and Caicos Islands, Tuvalu, Uganda, Zambia and Zimbabwe.

- The FJA 1933 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. It also extends to some interim and arbitration awards. The FJA 1933 currently applies to judgments from Australia, Canada (except Quebec), India, Guernsey, Jersey, the Isle of Man, Israel, Pakistan, Suriname and Tonga.
- The CJA 1982 incorporated the Brussels and Lugano Conventions and the Hague Convention 2005 (see question 1) into UK law.
- The common law relating to recognition and enforcement of judgments applies where the originating jurisdictions do not have applicable treaties in place with the United Kingdom, or in the absence of any applicable UK statute. Key examples include judgments of the courts of Brazil, China, Quebec, Russia and the United States. At common law, a foreign judgment is not directly enforceable in the United Kingdom, 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 United Kingdom. Courts in the United Kingdom 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 the 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 United Kingdom is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971; however, the United Kingdom has opted in to the decision of the EU Council to authorise the opening of negotiations in relation to it.

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, the Brussels I Regulation, and the Brussels and Lugano Convention 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 United Kingdom (eg, see article 6(1)(a) of the EEO Regulation (EC) 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 and Wales 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 1920 provides that an application should be made to register the judgment debt within 12 months of the judgment date, although the court has the discretion to allow applications after that time. The FJA 1933 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 CJA 1982 provides that a judgment under the Hague Convention 2005 must be registered without delay. Under the Hague Convention 2005 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, the 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 1920 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 1933 is broader than the AJA 1920, 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 (although 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 1933 also makes specific provision for the enforcement of arbitration awards on similar terms.

The Hague Convention 2005 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 that can be recognised or enforced under that Convention. The Hague Convention 2005 also applies to judicial settlements, provided 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 that 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, although 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 has 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 United Kingdom. Lower civil courts also have the ability to hear EEO Regulation or European 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 Hague Convention 2005, and under the AJA 1920 and the FJA 1933, judgments must be registered in the United Kingdom 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 United Kingdom, as would a UK judgment obtained through enforcement through the common law route.

The European Small Claims and EOP Procedures, and the Recast Regulation, do not require registration prior to enforcement (as mentioned above), therefore 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 (eg, 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 United Kingdom 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) as follows:

- 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 United Kingdom 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 European 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 Hague Convention 2005 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 which enforcement is sought may not make submissions on an application for registration of a Hague Convention 2005 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 as follows:

- 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 it to organise a defence (unless the defendant appeared and put its 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 United Kingdom;
- the judgment was obtained by procedural fraud;
- enforcement would be manifestly incompatible with public policy in the United Kingdom (including if it is incompatible with basic principles of procedural fairness); or
- the judgment is incompatible either with an earlier judgment given in the United Kingdom 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 Hague Convention 2005 is narrower than the common law regime.

Under the AJA 1920, 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 United Kingdom. This provides some scope for a merits-based review. The FJA 1933 directs the court to register judgments that fulfil its requirements rather than creating a discretionary power. The AJA 1920 prohibits registration and the FJA 1933 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 1933 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 United Kingdom will not give judgment in debt claims based on a judgment of a foreign court that lacked jurisdiction according to relevant UK conflict of laws rules, was obtained by fraud, or is contrary to public policy in the United Kingdom or to the requirements of natural justice. Under section 32(1) of the CJJA 1982, 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 Regulations, the Brussels and Lugano Conventions, the FJA 1933 or common law, courts in the United Kingdom have the discretion to grant a stay pending resolution of the appeal. Under the AJA 1920, a judgment may not be registered where an appeal is pending in the original jurisdiction or where the defendant can show that it 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 United Kingdom 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 United Kingdom where the common law, statutory or treaty requirements are met. However, the United Kingdom courts do have the power to restrain persons subject to their jurisdiction from enforcing in the United Kingdom 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 and 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 United Kingdom is not enforceable in the United Kingdom 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 United Kingdom 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) is cast as a precondition 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 1920, the FJA 1933 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 1933 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 United Kingdom entered into the relevant treaty-based enforcement arrangements. The FJA 1933 is only extended on a country-by-country basis to selected jurisdictions and the AJA 1920's coverage is chiefly to former dominions and territories of the United Kingdom that have similar legal systems and processes.

Similarly, the Recast Regulation and Brussels I Regulation 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 1968 would be frustrated if the courts of an enforcing state could be required to carry out a detailed review of whether the

procedures that resulted in the judgment 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 of the 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 owing 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 of the ECHR, 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 article 6 of the ECHR to require ECHR issues arising from a considerable delay in prosecuting proceedings in Malta to be litigated before the Maltese court, because this would lead to considerable further delay. The applicability of article 6 of the ECHR to common law enforcement actions has also 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 1920 and the FJA 1933.

Under the CJA 1982, a registration decision can be appealed if one of the grounds for refusal or recognition or enforcement in the Hague Convention 2005 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 United Kingdom. It is possible that this could provide an opening for UK judges to consider article 6 of the ECHR issues on such appeals. Further, given that the Hague Convention 2005 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 that 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 the 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 could 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 would have mandatory jurisdiction over any dispute, without the 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 Hague Convention 2005 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 Hague Convention 2005 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 United Kingdom will consider whether the original court had personal jurisdiction in accordance with conflicts of law rules in the United Kingdom. These choice of law rules provide for narrower bases for jurisdiction over foreign defendants than some similar legal systems, such as that of the United States, 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 was 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 United Kingdom 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 *Vizcaya 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 as either 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 1920 and the FJA 1933 requirements are similar to those at common law, with some minor differences: under the AJA 1920, business presence is established if the defendant was 'carrying on business' in that state, while the FJA 1933 requires that the 'principal place of business' of the defendant be in the original jurisdiction or that a transaction relevant to the proceedings have been 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 Recast Regulation defines personal jurisdiction in some cases by reference to the subject matter of the dispute (eg, 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 *Shannon v Global Tunnelling Experts UK Ltd* [2015] EWHC 1267 (QB)). The Recast Regulation and the Brussels and Lugano Conventions also expressly exclude certain subject matter from their application. Consequently, a court in the United Kingdom 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 Hague Convention 2005 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 it to arrange for a defence. However, the CJEU has suggested that a defendant may not rely on an irregularity of service alone if it was 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 Hague Convention 2005, 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 it to prepare a 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 United Kingdom in a manner that is incompatible with the principles of notice in the United Kingdom. It is likely that to make out the latter defence, as with the common law position set out below, a mere defect in service will 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 United Kingdom statutes, a mere procedural irregularity in service will not be sufficient, so long as the defendant knew or ought to have known that it was required to arrange for a defence and 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). *Sloutsker 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, owing 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 is of no relevance to the analysis concerning recognition and enforcement.

18 Vitiation 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 United Kingdom take the view that the courts of the original jurisdiction are generally better placed to consider and deal with such issues (*Interdesco SA v Nullifire Ltd* [1992] 1 Lloyd's Rep 180).

The CJJA 1982 provides that one of the grounds of appeal against a decision to register a Hague Convention 2005 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 United Kingdom under the common law, the AJA 1920 or the FJA 1933. Courts in the United Kingdom 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 if the fraud was raised and considered by the original court, unless this was done in the context of a second and separate action not also tainted by fraud, in which case the Court of Appeal has held that 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). In *Midtown Acquisitions LP v Essar Global Fund Ltd* [2017] EWHC 519 (Comm), the High Court confirmed that a high standard must be reached to resist the enforcement of a foreign judgment in the English courts on the grounds of fraud, the court, approving the view of Lord Wilberforce in *The Amphill Peerage* [1977] AC 547 at p571: ‘only fraud in a strict legal sense will do. There must be conscious and deliberate dishonesty, and the declaration must be obtained by it.’

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 1933, the Hague Convention 2005 and common law, UK courts will not enforce a foreign judgment where it is contrary to UK public policy. In the case of the AJA 1920, 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 United Kingdom 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), although 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 United Kingdom.

By contrast, under the EEO Regulation, the EOP and European 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 United Kingdom 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 United Kingdom or another jurisdiction. The EEO Regulation, and the European Small Claims and EOP Procedures additionally require that the irreconcilability was not and could not have been 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, 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: ‘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 of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.’ Article 28(1) of the Brussels I Regulation provides that where the actions are related and pending in separate member states, any court other than the court first seized may stay its proceedings. The UK Supreme Court 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) of the Brussels I Regulation – 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.’

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 which it is addressed. In the case of corporate defendants, there are limited circumstances in which 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 its separate legal personality is rendered a sham or facade. In the case of a group of companies, it is 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 which 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 Regulation, the Brussels I Regulation, and 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 1920 or the FJA 1933. 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 United Kingdom will not enforce awards obtained in breach of a contractual obligation to resort to a different forum for the resolution of disputes. Under section 32(1) of the CJA 1982, 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 United Kingdom 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 United Kingdom to have jurisdiction, and foreign judgments obtained in contempt of such an order will not be enforceable in the United Kingdom on the grounds of public policy. However, the CJEU has ruled that an English or Welsh court cannot issue an anti-suit injunction against a party that has 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 generated significant controversy. The recent case of *Nori Holdings Ltd v Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm), however, upheld the rule as confirmed in *West Tankers*, and removed any doubt as to whether Recital 12 of the Recast Regulation has any impact on whether an English or Welsh court can issue an anti-suit injunction against a party who had issued proceedings in the courts of another EU member state.

Update and trends

The impact of Brexit

The United Kingdom will formally leave the European Union on 29 March 2019.

On 19 June 2018, EU and UK negotiators published a joint statement on the progress of negotiations on the draft withdrawal agreement. The joint statement confirms that the current provisions on recognition and enforcement of EU judgments in the United Kingdom (and vice versa) will govern judgments before the end of the transition period (31 December 2020). It is silent as to what the position will be for judgments rendered after this date or for cases where a jurisdiction agreement was entered into before the end of the transition period, but proceedings were commenced after this date. Currently, at that stage, retained EU law will theoretically include the Recast Regulation, the EEO Regulation, the Small Claims Procedure and the EOP Procedure. However, in the absence of any specific agreement between the United Kingdom and the other EU member states prior to Brexit, the reciprocity of these regimes would be lost because EU member states would no longer be required to treat judgments of the UK courts as those of a member state.

Subject to the transition arrangement, the Lugano Convention and the Hague Convention 2005 will not continue to bind the United Kingdom post Brexit, as it entered into these conventions as a consequence of EU membership and is not an individual party. The UK government has indicated that it does intend to reach a bespoke agreement with the European Union and is looking for an agreement with the European Union that is broader than the Lugano Convention.

The United Kingdom will also have the option to ratify the Hague Convention 2005 (of which the European Union is a member on behalf

of all member states) on its own behalf, which would mean that EU judgments would remain readily enforceable in the United Kingdom where there was an exclusive jurisdiction clause. This is not dependent on agreement from the European Union because the Hague Convention 2005 is open for signature by all states.

The United Kingdom is an individual signatory to the Brussels Convention 1968 and acceded to this convention when it joined the European Union. 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 1968 (Austria, Belgium, Denmark, France, Finland, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden) would default back to the Brussels Convention 1968, although it may be expected that this issue will attract further litigation in the UK courts.

The United Kingdom also maintains a number of pre-Brussels Convention 1968 treaties with certain EU and European Free Trade Association member states, which were incorporated into English law under the FJA 1933. While it is arguable that judgments from these states should be enforceable under the FJA 1933, this is likely to be the subject of litigation. The relevant states are Austria, Belgium, France, Germany, Italy, the Netherlands and Norway. Therefore, the safest assumption to make is that the common law rules, being the least advantageous, will apply.

For the avoidance of doubt, in the absence of specific agreement or transitional measures, judgments from Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia would be enforced under the common law rules (see question 3).

Arbitration awards are enforceable under the AJA 1920, the FJA 1933 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 1958 (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 2014 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).

Directive 2008/52/EC on mediation in civil and commercial matters 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 United Kingdom formalises any favourable treatment afforded to judgments from particular states. The EU and EEA scheme, the Hague Convention 2005, the AJA 1920 and the FJA 1933 each apply only to specified nations (see questions 1 and 3), whose judgments are thereby more readily enforceable, through the procedures set out in the relevant instruments, than those of other jurisdictions. European Union measures are predicated on the assumption of common minimum procedural safeguards and progressive harmonisation of laws. The extension of application of the FJA 1933 to new jurisdictions depends on the Crown satisfying itself that reciprocal treatment will be afforded in such jurisdictions to judgments of courts in the United Kingdom, and the FJA 1933 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 United Kingdom can 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. Where an award is for multiple damages, the sum in excess of the compensatory amount will be unenforceable. Article 48 of the Brussels I 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 Hague Convention 2005 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 United Kingdom 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 United Kingdom. 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 United Kingdom. In question 6 we note that the Recast Regulation, the Brussels I Regulation, the Brussels and Lugano Conventions and the Hague Convention 2005 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 United Kingdom 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 (although as set out in response to question 1, such fees must not be greater than those for enforcement of a non-contested monetary judgment), and that the claimant can 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, which 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 1920 and the FJA 1933 also provide for registration without notice to the defendant, which then has an opportunity to apply to set aside the declaration. The CJJA 1982 provides for applications without notice for registration of Hague Convention 2005 judgments. Appeals against a decision to register can be made to the High Court in England and Wales or Northern Ireland (or the 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 the European 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 United Kingdom have the power to make an order requiring security for costs from any appellant if:

- it is resident outside the jurisdiction (but not in a Brussels or Lugano Convention or Hague Convention 2005 contracting state);
- there is reason to believe that it 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 United Kingdom 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 United Kingdom (whether by registration under the European system, the AJA 1920 or the FJA 1933, or a fresh judgment under common law, or requires no registration or recognition by virtue of the Recast Regulation, the EEO Regulation, or the EOP or European Small Claims Procedures, 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 United Kingdom 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 United Kingdom, based on the jurisdiction of the original judgment, and the timing and nature of the award, to ensure that the most up-to-date requirements are met by any application. The EU/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 the original court's 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 its 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.

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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 United States 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 1958 (New York Convention) and the Inter-American Convention on International Commercial Arbitration 1979 (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, 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 1965 (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 United States is typically addressed on a state-by-state basis, although 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 the recognition and enforcement of foreign judgments display some significant differences, including the way they address reciprocity with the foreign jurisdiction as a prerequisite to recognition and enforcement, and the way they analyse the 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 and enforcement of foreign judgments is governed by individual state statutes or by common law. There is no federal statutory provision governing the recognition or enforcement of foreign judgments on a nationwide level; nor will foreign judgments be recognised in US courts through the 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 owing 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 23 states and the District of Columbia. Legislators in North Dakota and Texas adopted and enacted the 2005 Model Act in 2017. Legislators in Massachusetts introduced legislation in 2018 to adopt the 2005 Model Act, but that legislation is still pending and awaiting further action. Therefore, presently, some US states follow a version of the 1962 Model Act, some follow a version of the 2005 Model Act, and some continue to address recognition and enforcement issues 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 the 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 United States is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971.

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 expressly 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'. However, 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 United States 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. See *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.'

See also *De Fontbrune v Wofsy*, 838 F3d 992, 1005 (Ninth Circuit, 2016), finding that a French judgment awarding damages under the French concept of *astreinte* could be recognised under Californian law because it could 'be seen as fulfilling a function akin to statutory damages in American copyright law', and because 'the purpose of the award was not to punish a harm against the public, but to vindicate [the judgment creditor's] personal interest in having his copyright respected and to deter further future infringements by [the judgment debtor]'.

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 United States 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 the US state in which the recognition proceeding is filed, 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 *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 (Eleventh Circuit, 2011), in which 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 (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. See *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 Circuit, 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 2016 federal appellate decision affirmed an order granting injunctive relief in the foreign judgment context using the US's Racketeer Influenced and Corrupt Organizations Act (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 US\$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 Donziger and his Ecuadorian clients from attempting to recognise and enforce the judgment in any court in the United States, and placing a constructive trust over any proceeds they managed 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*, 833 F3d 74 (Second Circuit, 2016), which is now final after the US Supreme Court declined to review the matter in June 2017, 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 (eg, section 3(a)(2) of the 2005 Model Act and section 3 of the 1962 Model Act). Unlike in 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. See *PJSC Credit-Moscow Bank v Khairouline*, No. CV 15-6604, 2016 WL 4454208 (ED Pa 24 August 2016), finding that, under Pennsylvania's recognition

statute, the court had jurisdiction over five Russian judgments, even though all five judgments had been appealed in Russia, but ultimately issuing a discretionary stay, as permitted under Pennsylvania's recognition statute, pending the outcome of the Russian appellate proceedings).

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 section 4(a) of the 1962 Model Act and section 4(b) of the 2005 Model Act.

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 section 4(c) of the 2005 Model Act.

The 1962 Model Act includes the first six of the above discretionary grounds for non-recognition. States following the 2005 Model Act recognise two more discretionary defences not available in states following the 1962 Model Act. First, a court in a state following the 2005 Model Act may refuse recognition if the defendant establishes that 'the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment' (section 4(c)(7) of the 2005 Model Act). Second, a court following the 2005 Model Act may refuse recognition if the defendant establishes that 'the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law' (section 4(c)(8) of the 2005 Model Act).

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 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'. See *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 US and state 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' (*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. See *EOS Trans, Inc v Agri-Source Fuels LLC*, 37 So 3d 349, 352-53 (Fla Ct App 2010), holding that 'in assessing whether the exercise of personal jurisdiction is proper under the [1962 Model] Act, the trial court must determine whether the exercise is proper under both the law of the foreign jurisdiction and under US Constitutional Due Process requirements'; and *Nippon Emo-Trans Co v Emo-Trans, Inc*, 744 F Supp 1215 (EDNY 1990), finding that New York law does not require that a foreign court's determination of a jurisdictional challenge be given preclusive effect. If the foreign or US standards for personal 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 2005 Model Act, 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 it believes the odds are stacked against it, 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 defendants outside of the foreign jurisdiction where the lawsuit was filed 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 *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 and section 482, comment c of the Restatement (Third) of Foreign Relations (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 (Third Circuit, 1971) and *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.'

See also section 4(b) of the 1962 Model Act – 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 section 4(c) of the 2005 Model Act (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, given the deference traditionally afforded to foreign courts, litigants in US courts have not frequently objected to recognition of foreign judgments on the basis that the foreign forum was inconvenient. Nevertheless, the opportunity for such a defence does exist. For example, 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 section 4(b)(6) of the 2005 Model Act: '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 a Mexican judgment where the plaintiff colluded with a judicial officer, reversed on other grounds, 533 F 3d 578, 593-94 (Seventh Circuit, 2008); *In re Topcuoglu's Will*, 174 NYS 2d 260 (NY Surr Ct 1958), refusing to recognise a Turkish judgment procured through fraud; *Matter of Estate of Weil*, 609 NYS 2d 375 (1994), refusing to recognise an Israeli probate judgment procured through fraud; section 4(b)(2) of the 1962 Model Act; and section 4(c)(2) of the 2005 Model Act.

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 defen[ce] 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.'

See *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 foreign judgments that contravene federal or state public policy (see section 4(b)(3) of the 1962 Model Act and section 4(c)(3) of the 2005 Model Act). 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' (see *Ackermann v Levine*, 788 F 2d 830, 841 (Second Circuit, 1986)).

The 2005 Model Act provides an expanded basis for challenging recognition of a foreign-country judgment on public policy grounds. Rather than being restricted to challenging only the underlying cause of action upon which the judgment is based, a judgment debtor can also assert that the judgment itself would be contrary to public policy. See section 4, comment 8 of the 2005 Model Act, explaining that the 2005 Model Act rejected the narrow focus on the cause of action alone and 'provid[es] that the forum court may deny recognition if either the cause of action or the judgment itself violates 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?

Under the law of US states adopting one of the Model Acts, '[a] foreign judgment need not be recognized if ... the judgment conflicts with another final and conclusive judgment' (see section 4(b)(4) of the 1962 Model Act, section 4(c)(4) of the 2005 Model Act and section 482(2)(e) of the Restatement (Third) of Foreign Relations Law (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 had not abused its discretion under New York's Recognition Act in denying recognition of a Belgian judgment that 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 and which requires state-specific and case-specific analysis.

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 Act 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 section 4(b)(5) of the 1962 Model Act and section 4(c)(5) of the 2005 Model Act: 'A court of this state need not recognize 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'. See also section 482(2)(f) of the Restatement (Third) of Foreign Relations Law.

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 a 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 a Japanese judgment because the parties had agreed to arbitrate; and
- *Montebueno Marketing, Inc v Del Monte Corporation-USA*, 2014 WL 1509250 (Ninth Circuit, 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.’

Some courts, however, have pushed back on the idea that US courts can determine, in an after-the-fact recognition proceeding, whether the foreign proceeding violated an agreement to arbitrate, when the parties in the foreign proceeding had voluntarily moved forward with the litigation. ‘Judicial proceedings in a foreign court are not “contrary to” an arbitration clause for the purposes of the Maryland Recognition Act if the parties choose to forgo their rights to arbitrate by participating in those proceedings’ (see *Iraq Middle Mkt Dev Found v Harmoosh*, 848 F3d 235, 240 (Fourth Circuit, 2017)). According to the US Fourth Circuit Court of Appeals, the other interpretation ‘would inject a level of uncertainty into the process of recognizing foreign judgments ... [because] a court in Maryland would have almost complete discretion to decide whether to recognize a foreign judgment that both parties had voluntarily sought’ (idem).

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 (Seventh Circuit, 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 (Tenth Circuit, 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 (Second Circuit, 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 serious 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 because these types of legal infirmities taint the entire judgment.

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 the judgment is satisfied) and the Restatement (Third) Foreign Relations Law’s less rigid standard that permits courts to award payment in whichever way will best make whole the prevailing party (see section 423 of the Restatement (Third) of Foreign Relations Law (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.

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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, Massachusetts and Vermont 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' (see *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]' (idem at 883).

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

There has been a tendency in the past for judgment creditors to feel confident that the US recognition process would involve only a very limited review of the foreign judgment, but as explained in this chapter, that is not necessarily the case. While US courts will avoid an examination of the underlying merits of the foreign judgment at issue, they will definitely engage in a comprehensive analysis of the mandatory and discretionary non-recognition factors. Therefore, for example, judgment creditors bringing suspect foreign judgments that lack indicia of fairness or due process should not presume that those judgments will be rubber stamped by US courts (see *Osorio v Dole Food Co*, 665 F Supp 2d 1307 (SD Fla 2009)).

Gibson, Dunn & Crutcher LLP represented the 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 (Eleventh Circuit, 2011). Gibson, Dunn & Crutcher LLP also represented the 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, 833 F3d 74 (Second Circuit, 2016), cert denied, No. 16-1178, 2017 WL 1198372 (US 19 June 2017).

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