



ICLG

The International Comparative Legal Guide to:

Enforcement of Foreign Judgments 2019

4th edition

A practical cross-border insight into the enforcement of foreign judgments

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EDITORIAL

Welcome to the fourth edition of *The International Comparative Legal Guide to: Enforcement of Foreign Judgments*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations relating to the enforcement of foreign judgments.

It is divided into two main sections:

Three general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting the enforcement of foreign judgments, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in the enforcement of foreign judgments in 36 jurisdictions.

All chapters are written by leading lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Louise Freeman and Chiz Nwokonkor of Covington & Burling LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Country Finder

1.1 Please set out the various regimes applicable to recognising and enforcing judgments in your jurisdiction and the names of the countries to which such special regimes apply.

Applicable Law/ Statutory Regime	Relevant Jurisdiction(s)	Corresponding Section Below
Common Law.	All countries.	Sections 2, 4, and 5.
Uniform Foreign Money Judgments Recognition Act (1962).	All countries (adopted by a majority of U.S. states).	Sections 2, 4, and 5.
Uniform Foreign-Country Money Judgments Recognition Act (2005).	All countries (adopted by a minority of U.S. states).	Sections 2, 4, and 5.

2 General Regime

2.1 Absent any applicable special regime, what is the legal framework under which a foreign judgment would be recognised and enforced in your jurisdiction?

The United States does not have a uniform federal law governing the recognition and enforcement of foreign judgments, and it is not a party to any treaty that deals with this subject. Accordingly, the recognition and subsequent enforcement of foreign judgments in the United States is primarily a matter of state statutory and common law.

The statutory law of the states derives from two model recognition acts promulgated by the National Conference of Commissioners on Uniform State Laws: the 1962 Uniform Money-Judgments Recognition Act; and the 2005 Uniform Foreign-Country Money Judgments Recognition Act. The majority of states and the District of Columbia have adopted some version of these model laws. New York, for example, has enacted the New York Uniform Foreign Money-Judgments Recognition Act, codified in Article 53 of New York’s Civil Practice Law and Rules (“CPLR”). These statutes apply only to judgments that grant or deny recovery of a sum of money.

States without a recognition act rely on the common law, influenced by the Restatement (Third) of Foreign Relations Law of the United States. In some states, the recognition statute expressly provides that common law principles remain available to support recognition. *See, e.g.*, Del. Code Ann. tit. 10, § 4807 (“This chapter does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of [the statute]”).

The common law follows the guidelines established by the leading federal case on recognition and enforcement of foreign judgments, *Hilton v. Guyot*, 159 U.S. 113 (1895). In *Hilton*, the Supreme Court held that the recognition and enforcement of foreign judgments is primarily based on principles of international comity. Accordingly, “where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice”, the merits of the case “should not, in an action brought in this country upon the judgment, be tried afresh”. *Id.* at 202–03.

While state courts are courts of general jurisdiction, and are presumed to have subject matter jurisdiction over a case, the constitutional limitations on federal jurisdiction make federal courts “courts of limited jurisdiction”. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). Federal courts hear recognition and enforcement actions under either diversity of citizenship jurisdiction, or federal question jurisdiction, with diversity of citizenship jurisdiction being the most commonly invoked jurisdictional ground. The diversity statute, 28 U.S.C. § 1332, provides that district courts have jurisdiction over all civil actions where the matter in controversy exceeds \$75,000 and the parties are diverse.

In diversity cases, federal courts apply the recognition and enforcement rules of the state in which the federal court sits. *See Yahoo! Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme*, 433 F.3d 1199, 1212 (9th Cir. 2006) (*en banc*) (*per curiam*) (observing that, in international diversity cases, “enforceability of judgments of courts of other countries is generally governed by the law of the state in which enforcement is sought”). This means that removal of an enforcement action from state to federal court will ordinarily result in the federal court’s application of the same state statute that would have been applied in state court proceedings. Additionally, Rule 64 of the Federal Rules of Civil Procedure requires a federal court to apply state law for remedies involving the seizure of property, which may be essential in an action seeking to collect on a foreign money judgment in a U.S. court.

When a federal court’s subject matter jurisdiction is based on a question of federal law, rather than diversity grounds, the courts

apply the applicable federal statute (if there is one) or federal common law. For example, the U.S. has acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (“New York Convention”) and implemented its provisions in Chapter 2 of the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 201–208. Section 203 provides that an action or proceeding falling under the New York Convention “shall be deemed to arise under the laws and treaties of the United States”, and the district courts of the United States “shall have original jurisdiction over such an action”. 9 U.S.C. § 203.

2.2 What constitutes a ‘judgment’ capable of recognition and enforcement in your jurisdiction?

State statutes based on the Model Acts require that a judgment: grant or deny recovery of a sum of money; be final and conclusive between the parties; and be enforceable in the country in which the judgment was entered. *See* 2005 Recognition Act § 3(a) (2); 1962 Recognition Act § 3; Cal. Civ. Proc. Code § 1715(a)–(b). *See also* *Iraq Middle Mkt. Dev. Found. v. Harmoosh*, 848 F.3d 235, 238 (4th Cir. 2017) (“a foreign judgment regarding a sum of money is generally conclusive between the parties so long as it is final, conclusive, and enforceable where rendered”) (internal quotation marks omitted). The finality requirement means that intermediate and interlocutory rulings cannot be recognised.

Although the Model Acts and the Restatement do not require reciprocity, i.e. a showing that courts of the originating state would recognise and enforce a judgment entered in the court of a U.S. state, some state statutes make this a requirement. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 6A.004(c)(9).

Judgments for taxes, fines or other penalties are excluded from the recognition statutes. *See* *Plata v. Darbun Enters. Inc.*, No. D062517, 2014 WL 341667, at *5 (Cal. Ct. App. Jan. 31, 2014) (“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”). Under the 1962 Recognition Act, courts will also not recognise and enforce judgments “[in] support [of] matrimonial or family matters”. 1962 Recognition Act § 1(2). The 2005 Recognition Act expanded this exclusion to cover judgments “for divorce, support, or maintenance, or other judgments rendered in connection with domestic relations”. 2005 Recognition Act § 3(b)(3). However, non-monetary judgments, including matrimonial matters, may be recognised under principles of comity, or pursuant to specific statute law. *See, e.g.*, Cal. Civ. Proc. Code § 1715(B) (providing that a judgment in connection with domestic relations may be recognised under a savings clause); *Downs v. Yuen*, 748 N.Y.S. 2d 131 (App. Div. 2002) (the New York recognition statute does not bar recognition of a foreign support judgment as a matter of comity). Restatement (Third) of Foreign Relations Law § 481(1) has a broader scope than the Model Acts, and would recognise foreign judgments “establishing or confirming the status of a person, or determining interests in property”.

Section 2, cmt. 3 of the 2005 Recognition Act provides that a foreign country judgment “need not take a particular form”, and that “any competent government tribunal that issues such a ‘judgment’ comes within the term ‘Court’ for purposes this Act”. However, the judgment must be from an adjudicative body of the foreign country “and not the result of an alternative dispute mechanism chosen by the parties”. Foreign arbitral awards, therefore, are not covered by the Act, but are governed by federal law. On the other hand, a judgment of a foreign court confirming or setting aside an arbitral award is covered by the Act.

2.3 What requirements (in form and substance) must a foreign judgment satisfy in order to be recognised and enforceable in your jurisdiction?

For the substantive requirements of a judgment, *see supra*, question 2.2.

To have a judgment recognised, Section 6 of the 2005 Recognition Act requires that the judgment holder file a court action against the debtor. This means that the holder may bring a plenary action or raise the matter as a counterclaim, crossclaim or affirmative defence in a pending proceeding. *See, e.g.*, Tex. Code Prac. & Rem. Ann. § 36A.006 (recognition can be sought as an original matter by filing an action seeking recognition, or may be raised in a pending action by counterclaim, cross-claim or affirmative defence); Cal. Civ. Proc. Code § 1718(b) (same); D.C. Code Ann. § 15-366(b) (same).

In New York, the holder of the judgment has *three* options: a plenary action (which is often an attachment action pursuant to CPLR § 6201(5)); an expedited summary judgment action pursuant to CPLR § 3213; or filing a counterclaim, cross-claim or asserting an affirmative defence in a current proceeding. The summary procedure is favoured; CPLR § 3213 provides that “[w]hen an action is based upon an instrument for the payment of money only or upon any judgment, the plaintiff may serve with the summons a notice of motion for summary judgment and the supporting papers *in lieu* of a complaint”. However, the predicate for a 3213 proceeding is “an instrument for the payment of money only” or a judgment. The motion papers, therefore, must contain sufficient evidentiary detail for the plaintiff to establish entitlement to summary judgment, although supplementing the moving papers may be allowed, in the court’s discretion. *See Sea Trade Mar. Corp. v. Coutsodontis*, 978 N.Y.S.2d 115, 117–18 (App. Div. 2013).

The holder of a foreign country judgment seeking summary relief under § 3213 must: (1) provide a certified copy of the actual judgment; (2) when the judgment was rendered in a foreign language provide a certified English translation of it; (3) unless obvious from the face of the judgment, submit the affidavit of an expert in the law of the jurisdiction that rendered the judgment establishing that the judgment is final, conclusive and enforceable in that jurisdiction; (4) if the expert’s affidavit is in a foreign language, provide a certified English translation of it; and (5) if the expert cites a particular foreign law authority to provide the court with copies of those authorities and translated copies. *See Sea Trade, supra*; John R. Higgitt, Supplementary Practice Commentaries, CPLR § 3213, at 704–5 (Supp. 2018).

2.4 What (if any) connection to the jurisdiction is required for your courts to accept jurisdiction for recognition and enforcement of a foreign judgment?

The court must have subject matter jurisdiction (of particular importance in federal court) and in most states there must also be personal jurisdiction, i.e., the non-resident judgment debtor must have “minimum contacts” with the state that satisfies due process. *See Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

State personal jurisdiction law varies, and courts disagree about the due process requirements in recognition actions. In New York, the situation is particularly muddled. New York state courts have, in the past, opined that a foreign money judgment is enforceable under CPLR Art. 53, whether or not the defendant had contacts with the state, or currently has assets within the state against which a judgment could be enforced. In *Lenchyshyn v. Pelko Electric, Inc.*,

723 N.Y.S. 2d 285, 291 (App. Div. 2001), the Fourth Department reasoned that, in an Article 53 proceeding, “the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognising the foreign country money judgment”. However, in *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 73 N.Y.S. 3d 1 (App. Div. 2018), the First Department issued a conflicting decision, restricting *Lenchyslyn* to cases where the judgment debtor “does not contend that substantive grounds exist to deny recognition to the foreign judgment”. *Id.* at 10. Therefore, “[o]nly when a judgment debtor opposing recognition of a foreign country judgment asserts substantive statutory grounds for denying recognition, must there be either *in personam* or *in rem* jurisdiction in New York”. *Diaz v. Galopy Corp. Int’l, N.V.*, 79 N.Y.S.3d 494, 498 (Sup. Ct. N.Y. City 2018).

Once converted into a state judgment, a foreign judgment is generally given full faith and credit under Article IV, Section 1 of the U.S. Constitution, and is therefore enforceable as a domestic judgment in any U.S. court. *See, e.g.*, CPLR § 5303; Fla. Stat. Ann. § 55.604(5); Cal. Civ. Proc. Code § 1719.

Parties seeking to enforce foreign *arbitral* awards in the U.S. will encounter differences in the procedural and jurisdictional rules, which are governed by treaty (the New York Convention) and statute (the FAA). The Second Circuit, in *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir.), *cert. denied*, 138 S. Ct. 557 (2017), clarified procedures for the recognition and enforcement of foreign arbitral awards, holding that under the New York Convention and the FAA, an action to convert a non-domestic arbitral award into a judgment is a “recognition and enforcement action” even though the FAA uses the term “confirmation”. The party wishing to enforce the award, therefore, can bring a single action. *See* John J. Buckley, Jr., *Procedural and Jurisdictional Aspects of Enforcing Foreign Arbitral Awards in the United States*, Legal Media Expert Guides (Sept. 20, 2018), <https://www.expertguides.com/articles/procedural-and-jurisdictional-aspects-of-enforcing-foreign-arbitral-awards-in-the-united-states/arqmupny>.

Finally, the jurisdiction of United States courts over actions against *foreign sovereigns* is governed by the Foreign Sovereign Immunities Act of 1976 (“FSIA”), 28 U.S.C. § 1608 (2012). That statute empowers federal courts to exercise personal jurisdiction over foreign sovereigns when one of its exceptions from jurisdictional immunity applies, and the sovereign has been served with process in accordance with its provisions. *See, e.g.*, *Mobil Cerro Negro, Ltd. v. Bolivarian Rep. of Venezuela*, 863 F.3d 96, 104 (2d Cir. 2017); *Shapiro v. Repub. of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991) (“Under the FSIA...personal jurisdiction [over a foreign sovereign] equals subject matter jurisdiction plus valid service of process”).

2.5 Is there a difference between recognition and enforcement of judgments? If so, what are the legal effects of recognition and enforcement respectively?

A plaintiff seeking to enforce a foreign judgment within the United States must, as a prerequisite to enforcement, first have the judgment recognised by a domestic court. Recognition of a foreign judgment means that “the forum court accepts the determination of legal rights and obligations made by the rendering court in the foreign country”. 2005 Recognition Act § 4 cmt. 2; *Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 613 & n.9 (9th Cir. 2017).

Enforcement means “application of the legal procedures of the state to ensure that the judgment debtor obeys the foreign country judgment”. *Millbrook Flowerbulbs*, 874 F. 3d at 613 n.9. A

recognised judgment is generally enforceable in any U.S. court under the Constitution’s full faith and credit clause. *See* Cal. Civ. Proc. Code § 1719(a) & (b). Once recognised, the judgment has *res judicata* effect. U.S. courts generally apply U.S. rules of issue preclusion. *See Hurst v. Socialist People’s Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 32–33 (D.D.C. 2007) (“Ordinarily, a federal court applies federal law on claim and issue preclusion in non-diversity cases.”). However, at least one appellate court has suggested that the *res judicata* effect of foreign judgments is controlled by foreign law. *See United States v. Buruji Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011) (surveying law).

2.6 Briefly explain the procedure for recognising and enforcing a foreign judgment in your jurisdiction.

As already noted, the procedures in each state vary. For the procedures in New York, *see supra* para. 2.3. Delaware law is representative of the law of most states. It provides that “[i]f recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment”. Del. Code Ann. Tit. 10, § 4809(a). “If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense”. *Id.* § 4809(b). Once recognised, the foreign-country judgment is: “(1) [c]onclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this State would be conclusive; and (2) [e]nforceable in the same manner and to the same extent as a judgment rendered in this State.” *Id.* § 4810.

In all jurisdictions, if a party establishes that an appeal from a foreign-country judgment is pending, or will be taken, the court “may stay any proceedings with regard to the foreign country judgment until: (1) the appeal is concluded; (2) the time for appeal expires; or (3) the appellant has had sufficient time to prosecute the appeal and has failed to do so”. *See* Tex. Civ. Prac. & Rem. Code Ann. § 36A.008; Cal. Civ. Proc. Code § 1720.

2.7 On what grounds can recognition/enforcement of a judgment be challenged? When can such a challenge be made?

All states recognise both mandatory and discretionary grounds for non-recognition. These grounds can be asserted as affirmative defences in an action on the judgment, or by counterclaim or cross-claim in a pending proceeding between the parties.

The majority of states have adopted versions of the Recognition Act. A few states have no governing statute and look to the Restatement (Third) of Foreign Relations Law, and principles of the common law set out in *Hilton v. Guyot*. *See Societe Damenagement et de Gestion de Labri Nautique v. Marine Travelift Inc.*, 324 F. Supp. 3d 1004 (E.D. Wis. 2018) (applying principles of the Restatement in the absence of a Wisconsin state statute). The Restatement, § 482, lists seven grounds upon which a court may refuse to recognise an otherwise valid foreign judgment, including jurisdictional defects, public policy concerns, fraud, an agreement to submit the dispute to another forum, and conflict with another final judgment entitled to recognition. States also look to the Restatement (Second) of Conflict of Laws § 98 cmt. g, (Am. Law Inst. 1971) which similarly enumerates a number of defences. *See Derr v. Swarek*, 766 F.3d 430 (5th Cir. 2014) (applying Mississippi law which follows the Restatement (Second) of Conflicts of Law).

While state recognition statutes are similar, they may differ on key issues. For example, the Model Recognition Acts and the Restatement do not require reciprocity. Nonetheless, Florida, Idaho, Maine,

North Carolina, Ohio and Texas make reciprocity a discretionary ground for recognition, while Georgia and Massachusetts make it a mandatory ground. There are disputes as well over the law applicable to questions concerning *the foreign court's* personal jurisdiction. Some courts look to the law of the rendering court, some look to the law of the enforcing court, and some look to both the foreign jurisdiction and the United States. See *Monks Own Ltd. v. Monastery of Christ in Desert*, 168 P.3d 121 (N.M. 2007) (examining the law of both jurisdictions). See generally, Tanya J. Monestier, *Whose Law of Personal Jurisdiction? The Choice of Law Problem in the Recognition of Foreign Judgments*, 96 B.U.L. Rev. 1788 (2016). Section 3(c) of the 2005 Recognition Act provides that “[a] party seeking recognition of a foreign-country judgment has the burden of establishing that this [Act] applies to the foreign-country judgment”. Once the threshold requirements are met, the burden shifts to the party opposing recognition to demonstrate a mandatory or discretionary ground for non-recognition. *Id.* § 4(d). In New York, however, “[a] plaintiff seeking enforcement of a foreign country judgment bears the burden of making a *prima facie* showing that the mandatory grounds for nonrecognition do not exist”. *Gemstar Canada, Inc. v. George A. Fuller Co.*, 6 N.Y.S.3d 552, 554 (App. Div. 2015) (internal quotation marks omitted).

New York recognition law provides two mandatory grounds for non-recognition: (1) the judgment was “rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law”; or (2) “the foreign court did not have personal jurisdiction over the defendant”. CPLR § 5304. In Maryland, there are four mandatory statutory grounds for non-recognition: (1) the judgment was rendered “under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law”; (2) the foreign court lacked personal jurisdiction over the defendant; (3) the foreign court lacked subject matter jurisdiction; and (4) the judgment was obtained by fraud. Md. Code Ann., Cts. & Jud. Proc. § 10-704.

New York law provides eight discretionary grounds pursuant to which a New York court “need not” recognise a judgment. CPLR § 5304(b). These include: (1) lack of subject matter jurisdiction; (2) failure to receive notice of the proceedings in the foreign court in sufficient time to allow for defences; (3) the judgment was obtained by fraud; (4) the judgment (or the cause of action or claim for relief) is repugnant to the public policy of the state; (5) the judgment conflicts with another final and conclusive judgment; (6) the proceeding in the foreign country was in violation of an agreement between the parties establishing a process other than a proceeding in a foreign court; (7) in the case of jurisdiction based on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or (8) the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the U.S. court determines that the defamation law applied in the foreign court “provided at least as much protection for freedom of speech and press” as would be provided by the U.S. and New York constitutions. CPLR § 5304(B).

The mandatory “no impartial court” inquiry “focuses on the fairness of the foreign judicial system *as a whole*, rather than the specific judgment challenged”. *Carmona v. Carmona (In re Carmona)*, 580 B.R. 690, 708 (S.D. Tex. 2018) (quoting *DeJoria v. Maghreb Petroleum Exploration, S.A.*, 804 F.3d 373, 381 (5th Cir. 2015)). The defence is narrowly construed and has been applied only in situations where the foreign country’s court system was not capable of providing a fair trial. See, e.g., *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) (Iranian judicial system did not provide impartial tribunals); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (Ecuadorian judgment unenforceable when judgment creditor bribed and coerced judges and ghost wrote

decision), *aff’d*, 833 F.3d 74 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2268 (2017); *Bridgeway Corp. v. Citibank*, 45 F. Supp.2d 276 (S.D.N.Y. 1999), (refusing to enforce judgment issued by the Liberian Supreme Court when judiciary was dysfunctional due to civil war), *aff’d*, 201 F. 3d 134 (2d Cir. 2000).

The public policy defence “measures not simply whether the foreign judgment or cause of action is contrary to our public policy, but whether either is so offensive to our public policy as to be prejudicial to recognised standards of morality and to the general interests of the citizens”. *Naoko Ohno v. Yuko Yasuma*, 723 F. 3d 984, 1002 (9th Cir. 2013) (emphasis and internal quotation marks omitted). See also *S.A.R.L. Louis Feraud Int’l v. Viewfinder*, 489 F.3d 474, 479–80 (2d Cir. 2007) (“The public policy inquiry rarely results in refusal to enforce a judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense”). Nonetheless, courts have refused to recognise foreign judgments on public policy grounds. See *In re Carmona*, 580 B.R. at 712 (Mexican judgments repugnant to Texas public policy); *Derr v. Swarek*, 766 F. 3d at 437–38 (failure of German court to respect purchasers’ dismissal with prejudice of their breach of contract claims against seller violated Mississippi public policy).

The 2005 Recognition Act, and state statutes that follow it, deal with “due process” in two statutory sections. Section 4(b)(1) requires the forum court to deny recognition if the forum court “finds that the entire judicial system in the foreign country...does not provide procedures compatible with the requirements of fundamental fairness”. Section 4(c)(8) permits a denial of recognition if the court finds that the specific proceeding in the foreign court “was not compatible with the requirements of fundamental fairness”. Both sections have been construed to require only fundamental fairness, not to require the application of American constitutional standards. “If a defendant is afforded notice and an opportunity to be heard in the underlying [litigation] . . . the basic requisites of due process [are] met”. *Soc’y of Lloyd’s v. Grace*, 718 N.Y.S. 2d 327, 328 (App. Div. 2000).

2.8 What, if any, is the relevant legal framework applicable to recognising and enforcing foreign judgments relating to specific subject matters?

As noted, the Uniform Acts apply only to money judgments, and do not apply to judgments for taxes, fines or other penalties, or to judgments concerning domestic relations. However, even non-monetary final judgments may be enforced, in appropriate circumstances, under the common law. See CPLR § 5307 (expressly stating that Article 53 “does not prevent the recognition of a foreign country judgment in situations not covered by this article”).

Several categories of judgments are enforceable under particular federal statutes and treaties. For example, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Inter-American Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Panama Convention), as implemented by chapters 2 and 3 of the FAA, require that U.S. courts honour the agreement to arbitrate and the resulting award, with certain exceptions. Parties seeking enforcement of arbitration awards in U.S. courts must demonstrate both personal and subject matter jurisdiction. See *supra*, question 2.4. Article V of the New York Convention and Article 5 of the Panama Convention set forth the grounds on which a domestic court may refuse the recognition of an arbitral award. The grounds for non-recognition are substantially the same under both treaties.

The U.S. is a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States

(“ICSID”), which establishes the legal framework for the settlement of investment disputes between foreign investors and sovereign States that have consented to international arbitration pursuant to the Convention. Article 54 imposes on contracting states the obligation to enforce an award issued in an ICSID arbitration “as if it were a final judgment of a court in that State”. Courts have adopted varying approaches to the recognition and enforcement of ICSID awards. Some courts permit entry of a judgment on an ICSID award through *ex parte* proceedings. Other courts require award-creditors to pursue a plenary action in compliance with the FSIA’s personal jurisdiction, service and venue requirements. See *Micula v. Gov’t of Romania*, No. 15–3109-cv, 2017 WL 4772435 (2d Cir. Oct. 23, 2017); *Mobil Cerro Negro, Ltd. v. Bolivarian Rep. of Venez.*, 863 F.3d 96 (2d Cir. 2017).

The Securing of the Protection of our Enduring and Established Constitutional Heritage Act (“SPEECH”), 28 U.S.C. §§ 4101–4105, controls domestic actions that seek recognition of foreign defamation judgments.

Judgments concerning domestic relations, including child custody, can be recognised and enforced pursuant to several statutes and treaties, including the International Support Enforcement Act, 42 U.S.C. § 659a; the 1980 Hague Convention on the Civil Aspects of International Child Abduction; the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Inter Country Adoption; the Uniform Child Custody Jurisdiction and Enforcement Act; and the Uniform Interstate Family Support Act.

2.9 What is your court’s approach to recognition and enforcement of a foreign judgment when there is: (a) a conflicting local judgment between the parties relating to the same issue; or (b) local proceedings pending between the parties?

The Model Acts provide that “[a] foreign judgment need not be recognised if the judgment conflicts with another final and conclusive judgment”. See 1962 Model Act, § 4(b)(4); 2005 Model Act, § 4(c)(4). Many state statutes incorporate this language. See CPLR § 5304(b); Tex. Civ. Prac. & Rem. Code § 36.005(b)(4); Cal. Civ. Proc. Code § 1715(2)(d). See generally *Thai-Lao Lignite (Thai.) Co., Ltd. v. Gov’t of Lao People’s Democratic Rep.*, 864 F.3d 172, 179, 190–91 (2d Cir. 2017) (enforcing Malaysian arbitration award over English judgment); *Byblos Bank Eur., S.A. v. Sekerbank Turk Anonym Sirketi*, 885 N.E. 2d 191 (N.Y. 2008) (affirming non-recognition of a Belgium judgment which conflicted with an earlier judgment of a Turkish court); *Brosseau v. Ranzau*, 81 S.W.3d 381 (Tex. App. 2002) (The Mexican judgment is not entitled to recognition because it is inconsistent with the order of the U.S. bankruptcy court). There is no fixed rule concerning which judgment gets recognised. See Restatement (Third) of Foreign Relations Law, § 482(2)(e) & cmt. g (Am. Law Inst. 1987) (“Courts are likely to recognise the later of two inconsistent foreign judgments, but under Subsection 2(e) the court may recognise the earlier judgment or neither of them.”). In New York, if two foreign judgments are inconsistent, the later of the two will generally be recognised. See *Koehler v. Bank of Berm. Ltd.*, No. M18–302, 2004 WL 444101, at *17 (S.D.N.Y. Mar. 10, 2004) (endorsing the judgment that was the latest in time). But see *Byblos Bank Eur.*, 885 N.E.2d at 429 (last-in-time rule “need not be mechanically applied”).

The effect of local proceedings between the parties varies with the jurisdiction and the facts of the case. A U.S. court can stay the ongoing proceeding until the judgment creditors’ claim for recognition and enforcement of a foreign judgment has been adjudicated. Or the foreign country judgment can, in the appropriate ongoing case, be raised by counterclaim, cross-claim or affirmative defence.

2.10 What is your court’s approach to recognition and enforcement of a foreign judgment when there is a conflicting local law or prior judgment on the same or a similar issue, but between different parties?

When the foreign court’s judgment conflicts with U.S. law, a court may, in the proper circumstances, refuse to recognise the foreign judgment on public policy grounds. For example, in *Telnikoff v. Matusевич*, 702 A. 2d 230 (Md. 1997), the court refused to enforce an English libel judgment because English defamation law was “contrary...to the policy of freedom of the press underlying Maryland law”. *Id.* at 249. As noted above, a party can challenge recognition of a foreign judgment if there is a conflicting “final and conclusive judgment”, but it is unclear whether third parties can raise this defence.

2.11 What is your court’s approach to recognition and enforcement of a foreign judgment that purports to apply the law of your country?

The mere fact that U.S. law was applied by the foreign court would have no effect on the recognition and enforcement of the foreign judgment. However, “[c]ourts have found a general policy interest in having New York law interpreted by a U.S. court where the parties agreed that New York law would govern their agreement”. *David Benrimon Fine Art LLC v. Durazzo*, No. 17 Civ. 6382 (JFK), 2017 WL 4857603 at *3, (S.D.N.Y. Oct. 26, 2017) (citing *Software AG, Inc. v. Consist Software Sols., Inc.*, No. 08 civ. 389 (CM) (FM), 2008 WL 563449, at *25 (S.D.N.Y. Feb. 21, 2008), *aff’d*, 323 F. App’x 11 (2d Cir. 2009)).

2.12 Are there any differences in the rules and procedure of recognition and enforcement between the various states/regions/provinces in your country? Please explain.

As discussed above, recognition and enforcement is largely a matter of state law, and state law differs on a number of issues. In Florida, Maine, Ohio and Texas, lack of reciprocity is a discretionary ground for non-recognition. See, e.g., *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1002–04 (5th Cir. 1990) (refusing to recognise an Abu Dhabi judgment because the Texas Recognition Act treats non-reciprocity as a discretionary ground for non-recognition); Fla. Stat. Ann. § 55.605(2)(g). Thus, a foreign litigant must determine if the state in which he wishes to enforce a judgment requires reciprocity, and whether the foreign court in which the litigant obtained the judgment does in fact reciprocate.

There is also a conflict concerning whether a party must meet the minimum contacts test to establish personal jurisdiction over a person or property. Most states require jurisdiction over the judgment debtor or his property. See *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874, 875 (Mich. Ct. App. 2003). New York courts are divided. See *supra* question 2.4.

2.13 What is the relevant limitation period to recognise and enforce a foreign judgment?

Neither the Restatement nor the 1962 Recognition Act addresses the statute of limitations question. The 2005 Recognition Act, however, includes a statute of limitations; it provides that “[a]n action to recognise a foreign-country judgment must be commenced within the earlier of (i) the time during which the foreign-country judgment is effective in the foreign country, or (ii) 15 years from the date that the foreign-country judgment became effective in the foreign

country”. Some courts have applied the state’s general statute of limitations, while some states have their own application limitations period. *See, e.g.*, Cal. Civ. Proc. Code § 1721 (“An action to recognise a foreign-country judgment shall be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 10 years from the date that the foreign-country judgment became effective in the foreign country”). The New York Convention does not contain a statute of limitations for enforcement of arbitral awards or restrictions with respect to foreign judgments. Parties are free to incorporate time limits into their agreements. In many states, the language of general limitations provisions have been read to include arbitrations.

3 Special Enforcement Regimes Applicable to Judgments from Certain Countries

3.1 With reference to each of the specific regimes set out in question 1.1, what requirements (in form and substance) must the judgment satisfy in order to be recognised and enforceable under the respective regime?

This is not applicable in the U.S. *See supra* section 2.

3.2 With reference to each of the specific regimes set out in question 1.1, does the regime specify a difference between recognition and enforcement? If so, what is the difference between the legal effect of recognition and enforcement?

This is not applicable in the U.S. *See supra* section 2.

3.3 With reference to each of the specific regimes set out in question 1.1, briefly explain the procedure for recognising and enforcing a foreign judgment.

This is not applicable in the U.S. *See supra* section 2.

3.4 With reference to each of the specific regimes set out in question 1.1, on what grounds can recognition/enforcement of a judgment be challenged under the special regime? When can such a challenge be made?

This is not applicable in the U.S. *See supra* section 2.

4 Enforcement

4.1 Once a foreign judgment is recognised and enforced, what are the general methods of enforcement available to a judgment creditor?

Under the Federal Rule of Civil Procedure 69(a)(1), “[a] money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies”.

State law remedies available to enforce foreign judgments generally include injunctions, notices of pendency, orders of attachment and receivership. In New York, CPLR § 6201(5), governing attachment procedures, is often the vehicle of choice for enforcing a foreign judgment. After the action is brought, the court will rule on whether the foreign judgment can be recognised in New York.

New York also permits “turnover actions” under CPLR § 5225(b). A turnover action is a special proceeding brought by creditors when the person with possession or control of the money or property is not the judgment debtor but a third person, for example, a financial institution with branches in New York. Upon a sufficient showing, courts “shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff”. CPLR § 5225(b). The “burden of proof in a turnover proceeding rests with the judgment creditor”, but the creditor “is entitled to broad discovery to assist in prosecuting the claims”. *Petrocelli v. Petrocelli Elec. Co.*, 995 N.Y.S. 2d 552, 553 (App. Div. 2014).

5 Other Matters

5.1 Have there been any noteworthy recent (in the last 12 months) legal developments in your jurisdiction relevant to the recognition and enforcement of foreign judgments? Please provide a brief description.

In 2009, the New York Court of Appeals held that a turnover proceeding under CPLR § 5225(b) could reach assets held abroad. The court noted that Art. 52 “contains no express territorial limitation”. As a result, a garnishee who is subject to personal jurisdiction in New York, and holds assets of a third party located outside of New York (and outside the country) can be ordered to bring those assets into New York to satisfy a judgment against the owners of the assets. *Koehler v. Bank of Berm.*, 12 N.Y.3d 533 (N.Y. 2009). Thereafter, in *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014), the U.S. Supreme Court held that the FSIA Act does not limit a court’s discretion to order extraterritorial, post-judgment discovery.

These two decisions, read broadly, were the foundation for the Second Circuit’s recent landmark ruling in *Peterson v. Islamic Republic of Iran*, 876 F.3d 63 (2d Cir. 2017), petition for cert. filed (U.S. May 8, 2018) (No. 17-1538). In that case, judgment creditors who were victims of Iran-sponsored terrorism, brought a turnover action in federal district court in New York seeking to enforce underlying judgments of \$1.68 billion in bond proceeds, allegedly owned by Iran’s central bank. The plaintiffs claimed that the funds had been processed through a “global chain of banks”. The district court dismissed the complaint, ruling that the assets at issue were not held in New York, but as a right to payment in Luxembourg, and the FSIA “does not allow for the attachment of property outside the United States”. *Id.* at 76. The Second Circuit reversed. The court held that state law governs the procedure for execution of judgments in federal court, and that “*NML Capital* and *Koehler*, when combined...authorise a court sitting in New York with personal jurisdiction over a non-sovereign third-party to recall to New York extraterritorial assets owned by a foreign sovereign”. *Id.* at 92.

On May 8, 2018, a petition for a writ of certiorari was filed in the U.S. Supreme Court by Iran’s central bank, seeking review of the Second Circuit decision. On October 1, 2018, the Court asked the Solicitor General of the United States to submit a brief expressing the views of the United States on the issue.

Practitioners should be aware of the *Peterson* ruling, but should note that the New York Court of Appeals has ruled, in *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 (2014), that the “separate entity doctrine” survives *Koehler*. The separate entity doctrine, a unique feature of New York jurisprudence, provides that even when a bank garnishee with a New York branch is subject to

personal jurisdiction, the bank's branches are treated as separate entities for purposes of garnishment and attachment proceedings. The separate entity doctrine, therefore, will temper the ruling in *Peterson* with respect to bank garnishees. Additionally, recalled assets will not be subject to turnover if, once they arrive in the United States, where the FSIA's various protections unquestionably apply, the FSIA would preclude their turnover or execution.

5.2 Are there any particular tips you would give, or critical issues that you would flag, to clients seeking to recognise and enforce a foreign judgment in your jurisdiction?

A corporation seeking to have a foreign judgment recognised and enforced in a New York court should consult New York Business Corporation Law § 1312(a). That statute provides that, without a certificate of authority from the New York Secretary of State, a

foreign corporation "shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized". N.Y. Bus. Corp. Law § 1312(a). There is a presumption that, in an action brought by a foreign corporation lacking a certificate of authority, the corporation is doing business in its state of incorporation, rather than in New York. The party invoking Section 1312, accordingly, has the burden of establishing that the corporation's business activities in New York were not just casual or occasional but systemic and regular. See *Gemstar Canada, Inc. v. George A. Fuller Co.*, 6 N.Y.S.3d 552, 554 (App. Div. 2015); *Acno-Tec Ltd. v. Wall St. Suites, L.L.C.*, 24 A.D.3d 392, 393 (App. Div. 2005). Importantly, even when a company is doing business in New York in violation of § 1312, it can register with the state and pay all fees, taxes, penalties and interest charges during the pendency of the action, thereby avoiding dismissal. See *Horizon Bancorp v. Pompee*, 82 A.D.3d 935 (2d Dep't 2011); *Showcase Limousine, Inc. v. Carey*, 703 N.Y.S. 3d 22, 23 (App. Div. 2000).



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