International
Comparative
Legal Guides

Enforcement of Foreign Judgments 2020

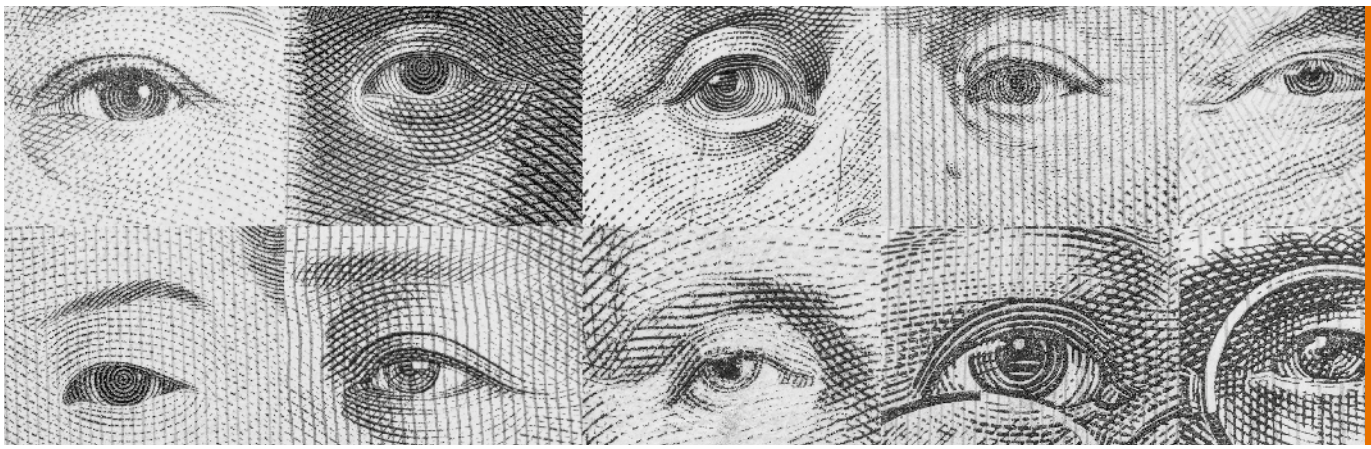
A practical cross-border insight into the enforcement of foreign judgments

Fifth Edition

Featuring contributions from:

Advokatfirman Hammarskiöld & Co
Allen & Gledhill (Myanmar) Co., Ltd.
Allen & Gledhill LLP
Archipel
Bae, Kim & Lee LLC
Bär & Karrer Ltd.
Blake, Cassels & Graydon LLP
Boss & Young, Attorneys-at-Law
Covington & Burling LLP
CRA – Coelho Ribeiro e Associados
CRB Africa Legal
Debarliev, Dameski and Kelesoska, Attorneys at Law
ESENYEL & PARTNERS LAWYERS AND CONSULTANTS
Gall
GASSER PARTNER Attorneys at Law
GVZH Advocates
Herbert Smith Freehills LLP
King & Wood Mallesons
Konrad Partners
Kubas Kos Gałkowski
Macesic and Partners LLC
Machado Meyer Sendacz e Opice Advogados
MinterEllison
Montanios & Montanios LLC
Mori Hamada & Matsumoto
Osborne Clarke LLP
Papadimitriou – Pimblis & Partners
PIERRE THIELEN AVOCATS S.à r.l
Portolano Cavallo
Quevedo & Ponce
Rahmat Lim & Partners
Roberts & Shoda
Sébastien Champagne & Vanessa Foncke
Simont Braun
Sorainen
Van Oosten Schulz De Korte
Williams & Connolly LLP
Wilmer Cutler Pickering Hale and Dorr LLP

CDR Commercial Dispute Resolution
ICLG.com



ISBN 978-1-83918-034-7
ISSN 2397-1924

Published by
global legal group
59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
info@glgroup.co.uk
www.iclg.com

Group Publisher
Rory Smith

Publisher
Jon Martin

Senior Editors
Suzie Levy
Rachel Williams

Editor
Oliver Chang

Creative Director
Fraser Allan

Printed by
Ashford Colour Press Ltd.

Cover image
www.istockphoto.com

Strategic Partners

International Comparative Legal Guides

Enforcement of Foreign Judgments 2020

Fifth Edition

Contributing Editors:
Louise Freeman & Shivani Sanghi
Covington & Burling LLP

Expert Chapters

Q&A Chapters

USA

John J. Buckley, Jr.

Ana C. Reyes

Williams & Connolly LLP

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. Moreover, 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 (West 2019) ("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. *Ohno v. Yasuma*, 723 F.3d 984, 990 (9th Cir. 2013). 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) (West 2019). The finality requirement means that intermediate and interlocutory rulings cannot be recognised.

Judgments for taxes, fines or other penalties are excluded from the recognition statutes. Additionally, under the 1962 Recognition Act, courts will 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)(3)(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). The 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 of 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 instead 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, cross-claim or affirmative defence in a pending proceeding. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 36A.006 (West 2019) (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) (West 2019) (same).

In New York, and several other jurisdictions, the holder of the judgment has several options: (1) a plenary action (which is often an attachment action pursuant to CPLR § 6201(5)); (2) an expedited summary judgment action pursuant to CPLR § 3213, which is *in lieu* of a complaint; or (3) filing a counterclaim or cross-claim or asserting an affirmative defence in a current proceeding. *See generally* CPLR § 5303. 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". *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 have the foreign judgment authenticated in accordance with an act of Congress or the statutes of New York, and filed within 90 days of the date of authentication. In addition: (1) when the judgment was rendered in a foreign language the holder must provide a certified English translation; (2) unless obvious from the face of the judgment, the holder must 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; (3) if the expert's affidavit is in a foreign language, there must be a certified English translation; and (4) if the expert cites a particular foreign law authority, the translator must provide the court with copies of those authorities and translated copies. *See Sea Trade*, *supra*; John R. Higgitt, Supplementary Practice Commentaries, CPLR § 3213, at 704–05 (Supp. 2019).

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 to satisfy due process. *See Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Int'l Shoe Co. v. Washington*, 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 Article 53, whether or not the defendant has 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". Accordingly, the court held that jurisdiction over the judgment debtor or its property was not a prerequisite to suit. Accord: *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contr. & Fin. Servs. Co.*, 1986 N.Y.S. 2d 454 (App. Div. 2014). 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 *Lenchyshyn* 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. Cty. 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). In *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58 (2d Cir. 2017), the Second Circuit clarified procedures for the recognition and enforcement of foreign arbitral awards. The court of appeals held 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, the sovereign has been served with process in accordance with its provisions, and there is proper venue. *See, e.g., Crystallex Int'l Corp. v. Bolivarian Rep. of Venezuela*, 932 F.3d 126 (3d Cir. 2019); *Shapiro v. Rep. 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) (applying Washington statute).

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 "there is no consensus" on this issue. *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. Delaware law is representative of the law of most states. It provides that "[if] 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; *PJSC Credit-Moscow Bank v. Khairoulline*, No. CV 15-6604, 2016 WL 4454208 (E.D. Pa. Aug. 24, 2016) (issuing stay pending resolution of appeals).

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

A judgment debtor cannot file a challenge unless the judgment creditor has brought a recognition/enforcement action. *Chevron Corp. v. Naranjo*, 667 F.3d 232, 240 (2d Cir. 2012) ("The Recognition Act nowhere authorizes a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor"). Accord: *Jill Stuart Asia LLC v. LG Fashion Corp.*, No. 18-CV-3786 (VSB), 2019 WL 4450631, at *3 (S.D.N.Y. Sept. 17, 2019).

All states recognise both mandatory and discretionary grounds for non-recognition. These grounds, usually based on state statutory law, 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.

New York law, for example, 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. (However, under CPLR § 5303, a defendant waives personal jurisdiction by voluntarily appearing in the foreign court proceeding for purposes other than contesting jurisdiction.)

New York law also provides eight discretionary grounds pursuant to which a New York court "need not" recognise a judgment. CPLR § 5304(b). These discretionary grounds 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.

While 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).

State recognition statutes 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 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 have been 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).

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. U.S. courts have held that, in arbitration cases, it may refuse to recognise a foreign court's decision if it "clearly misinterprets [a] Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness". *Cerner Middle East Limited v. iCapital, LLC*, 939 F.3d 1016 (9th Cir. 2019) (citation omitted).

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*, 714 F. App'x 18 (2d Cir. 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)(5); Tex. Civ. Prac. & Rem. Code Ann. § 36.005(b)(4); Cal. Civ. Proc. Code § 1715(2). *See generally Thai-Lao Lignite (Thai.) Co., 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 Syrketi*, 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 is 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 193 (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?

"Simple inconsistency between American state or federal law and foreign law does not render a foreign judgment unenforceable." *Ohno v. Yasuma*, 723 F.3d 984,1003 (9th Cir. 2013). However, when the foreign court's judgment conflicts with U.S. law, a court, in the proper circumstances, may refuse to recognise the foreign judgment on public policy grounds. *Id.* at 1003-04 (discussing cases). The SPEECH Act, 28 U.S.C. §§ 4101-4105, makes foreign defamation judgments unenforceable in U.S. courts, unless those judgments meet freedom of speech and freedom of the press constitutional standards. As noted, 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 a foreign court applied U.S. law 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). In Georgia and Massachusetts, lack of reciprocity is a mandatory ground for non-recognition. 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, 877 (Mich. Ct. App. 2003). New York courts are divided on the issue. *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. Attachment actions are often the vehicle of choice for enforcing foreign judgments. For example, in *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126 (3d Cir. 2019), the Third Circuit held that a state-owned oil company was Venezuela's alter ego, and therefore the district court had jurisdiction under the FSIA to attach the oil company's assets and satisfy a $1.2 billion judgment.

New York and many other jurisdictions permit "turnover actions". *See* CPLR § 5225(b); Cal. Civ. Proc. Code § 708.205. 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. 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 New York Court of Appeals, in *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009), held that a turnover action contains "no express territorial limitation". *Id.* at 829. In *Peterson v. Islamic Republic of Iran*, 876 F.3d 63 (2d Cir. 2017), *petition for cert. filed* (U.S. May 7, 2018) (No. 17-1534), the court of appeals held that a court sitting in New York, with personal jurisdiction over a non-sovereign third party, could "recall to New York extraterritorial assets owned by a foreign sovereign". *Id.* at 92. In light of these decisions, judgment creditors find New York courts attractive because, once personal jurisdiction is established, courts can require assets located outside New York to be "turned over" to satisfy debts. *See Kassover v. Prism Ventures Partners LLC*, No. 602434/2005, 2017 WL 4011218 (N.Y. Sup.), *aff'd*, 92 N.Y.S.3d 634 (N.Y. Feb. 19, 2019) (Mem).

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.

The United States Supreme Court has agreed to review a decision of the Eleventh Circuit in *Outokumpu Stainless USA, LLC. v. Converteam SAS*, 902 F.3d 1316 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 2776 (2019). In that case, the Third Circuit, in conflict with two other federal courts of appeals, held that a non-signatory to a contract could not compel arbitration under the New York Convention through the doctrine of equitable estoppel. Although equitable estoppel is a classic mechanism for a nonparty to enforce a contract, including contracts with arbitration clauses, the Third Circuit held that "[p]rivate parties ... cannot contract around the Convention's requirement that the parties actually sign an agreement to arbitrate their disputes in order to compel arbitration". *Id.* at 1326 (emphasis omitted). The case presents an important issue for corporations engaging in cross-border commercial transactions, which often require performance by parties who are not actual signatories, including sureties and sub-contractors.

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?

On July 2, 2019, delegates from the Hague Conference on Private International Law adopted the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Article 4 provides: "a judgment given by a court of a Contracting State (State of origin) shall be recognized and enforced in another Contracting State (requested State) in accordance with [Chapter II of the Convention]." "Civil and commercial judgments" are final judgments, whether money or non-money judgments. In addition, Article 7(1) sets out the exclusive reasons recognition and enforcement may be denied: improper service; fraud; and manifest incompatibility with the public policy of the requested state. The United States, to date, has not signed the treaty. As noted, however, the several states have comprehensive laws governing recognition and enforcement. In New York, the financial centre of the U.S., the CPLR provides greater protections, and more expansive damages, than the new treaty. Further, enforcement remedies in New York include turnover orders that reach assets held by third persons, and have no express territorial limit.

John J. Buckley, Jr. is Senior Counsel with Williams & Connolly LLP. He founded and previously led the firm's international arbitration practice group. A Fellow of the American College of Trial Lawyers, his practice focuses on complex commercial litigation and international and domestic arbitration. A Fellow of the Chartered Institute of Arbitrators, he also serves as arbitrator.

Mr. Buckley has consistently been cited as among the top U.S. commercial arbitration practitioners in *Euromoney's Guide to the World's Leading Experts in Commercial Arbitration*.

He is listed on numerous arbitrator rosters, including the International Centre for Dispute Resolution ("ICDR"), and the International Institute for Conflict Prevention & Resolution ("CPR").

He earned his A.B., *magna cum laude*, Phi Beta Kappa, from Georgetown University and his J.D., with honours, from The University of Chicago, where he was Editor-in-Chief of *The University of Chicago Law Review*. Before joining Williams & Connolly, he was a law clerk to U.S. Supreme Court Justice Lewis F. Powell, Jr.

Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
USA

Tel: +1 202 434 5051
Email: JBuckley@wc.com
URL: www.wc.com

Ana C. Reyes is a partner and Co-Chair of the firm's International Litigation Practice Group. Her practice focuses on international litigation and arbitration. Along with her admissions in Bars of the United States, Ms. Reyes is dual-qualified and is listed on the Roll of Solicitors in England and Wales. Ms. Reyes is among those included on *The National Law Journal*'s Outstanding Women Lawyers list, which recognises "the 75 most accomplished female attorneys working in the legal profession today".

Ms. Reyes received her J.D., *magna cum laude*, from Harvard Law School in 2000, where she was an editor of the *Harvard Law Review*. In 2014, Ms. Reyes also received a Masters in International Public Policy, with distinction, from the Johns Hopkins University, School of Advanced International Studies.

Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
USA

Tel: +1 202 434 5276
Email: AReyes@wc.com
URL: www.wc.com

Williams & Connolly LLP, a law firm of approximately 300 lawyers located in Washington, D.C., focuses on high-stakes litigation and arbitration in the U.S. and internationally. Described by *Chambers USA* as "offering unmatched strength in depth and top-level trial capabilities", the firm is widely recognised as one of the nation's premier litigation firms. Clients of the firm include U.S. and foreign corporations, governments, as well as individuals involved in high-profile civil and criminal litigation. The firm's International Arbitration and International Litigation Practice Groups represent clients in major domestic and international commercial arbitrations and litigations, and in judgment and award enforcement proceedings.

www.wc.com

WILLIAMS & CONNOLLY LLP®

ICLG.com

Current titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Foreign Direct Investment Regimes
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

@ICLG_GLG

The International Comparative Legal Guides are published by:

global legal group